SELECTED CHILD WELFARE DECISIONS

JANUARY 2024 – JUNE 2024

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Introduction

These cases represent the child welfare related cases that I found between January 1, 2024 and June 30, 2024 from my review of the Slip Opinions for the Court of Appeals and Appellate Division posted on the OCA website. There are some trial court level cases included at the end of the compilation.

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

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

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

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

Venue

Matter of Norea CC., AD3d 2024 NY Slip Op 03211 (3rd Dept., 2024)

Appeal from an order of the Family Court of Rensselaer County (Jill A. Kehn, J. and Elizabeth M. Walsh, J.), entered December 23, 2022, which, in two proceedings pursuant to Family Ct Act article 10, rejected a transfer from the Family Court of Schenectady County.

Respondent Anna BB. (hereinafter the mother) and respondent Francis CC. (hereinafter the father) are the parents of the subject child (born in 2022). Three days after the child's birth, petitioner filed a prepetition application for temporary removal of the child in Schenectady County Family Court because it believed that the child's placement in respondents' home would be contrary to her best interests and would put her in imminent risk of harm. Given the child's age, many of the allegations in the prepetition application were derivative of allegations against respondents in a pending proceeding, in which respondents were alleged to have neglected their two older children.[FN1] A hearing was scheduled for the same day, during which respondents both argued that Schenectady County was not the proper venue for the proceedings because they resided in Rensselaer County and the child was born in Albany County. Schenectady County Family Court (Blanchfield, J.), noting the "imminent risk" that existed, exercised its emergency jurisdiction and granted petitioner's prepetition application for temporary removal of the child but indicated that "were a formal petition to be filed, [venue] would not be [proper in] Schenectady County" because neither respondents nor the child, who as a newborn shares the residence of her parent, resided in the county. Accordingly, the court ordered that the prepetition application be transferred to Rensselaer County Family Court.

Petitioner then attempted to formally commence these proceedings by filing petitions against the mother and the father in Rensselaer County Family Court, alleging child neglect. Soon after, Schenectady County Family Court entered an order removing the child and placing her in the custody of petitioner. Following Rensselaer County Family Court's apparent rejection of the transfer to Rensselaer County,[FN2] petitioner re-filed the neglect petitions against respondents in Schenectady County Family Court on December 13, 2022.[FN3] Respondents then each separately moved by order to show cause to again transfer the proceedings to Rensselaer County Family Court.[FN4] Schenectady County Family Court determined that because the child was a newborn, her legal residence and domicile was that of her parents, which was in Rensselaer County. Accordingly, it held that venue was not proper in Schenectady County and ordered that the proceedings — now formally commenced — again be

transferred to Rensselaer County Family Court. Rensselaer County Family Court (Kehn, J. and Walsh, J.), with two judges from that court signing the order, rejected the transfer, finding that the matter should remain in Schenectady County. Respondents appeal.

Initially, it is noted that an order of [*2]transfer, and by affiliation, an order rejecting transfer, "is not appealable to this Court as of right since it is not an order of disposition which is final in nature, [and] the matter is not properly before [this Court] because [respondents] did not seek permission to appeal" (*Matter of McDermott v McDermott*, 69 AD3d 1008, 1008 [3d Dept 2010] [internal quotation marks, brackets and citations omitted]). Nevertheless, as this appeal involves a novel issue, this Court will treat the notices of appeal as seeking permission to appeal and grant such permission (*see* Family Ct Act § 1112 [a]; *Matter of James R. v Jennifer S.*, 188 AD3d 1509, 1510 n 1 [3d Dept 2020]).

"As may be provided by law, the county court, the surrogate's court, [and] the family court . . . may transfer any action or proceeding, other than one which has previously been transferred to it, to any other court, except the supreme court, having jurisdiction of the subject matter in any other judicial district or county provided that such other court has jurisdiction over the classes of persons named as parties" (NY Const, art VI, § 19 [h]).[FN5] "Each court shall exercise jurisdiction over any action or proceeding transferred to it pursuant to this section" (NY Const, art VI, § 19 [j]; *but see Matter of Julie G. v Yu-Jen G.*, 81 AD3d 1079, 1080 [3d Dept 2011]).[FN6]

In child protective proceedings, venue is proper in the county where "the child resides or is domiciled at the time of the filing of the petition or in the county in which the person having custody of the child resides or is domiciled" (Family Ct Act § 1015 [a]; *see Matter of Tamara XX. v William YY.*, 199 AD3d 1244, 1249 [3d Dept 2021]; *Matter of Gabriella UU. [Kelly VV.]*, 83 AD3d 1306, 1307-1308 [3d Dept 2011]). The newborn "child must be considered to be a domiciliary of [Rensselaer County], since [Rensselaer County] is the domicile of [her] parents, who have sole legal, if not actual physical custody" (*Matter of Stanley R.*, 147 AD2d 284, 291 [2d Dept 1989]; *see Matter of Kali-Ann E.*, 27 AD3d 796, 798 [3d Dept 2006], *lv denied* 7 NY3d 704 [2006]). "The family court in a county may for good cause transfer a proceeding to a family court in any other county where the proceeding might have been originated and *shall* transfer a proceeding laying venue in the wrong county to a family court in any county where the proceeding might have been originated" (Family Ct Act § 174 [emphasis added]; *see Matter of Carter v Van Zile*, 162 AD3d 1127, 1128 [3d Dept 2018]; *compare Matter of Aponte v Jagnarain*, 205 AD3d 800, 802-803 [2d Dept 2022]; *Matter of Emma D. [Kelly V.(D.)]*, 180 AD3d 1331, 1332 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020]).

Rensselaer County Family Court did not have the authority to reject the transfer from Schenectady County Family Court (*see* NY Const, art VI, § 19 [h], [j]).[FN7] The statute governing venue in a child protective proceeding is based on the domicile or residence of the custodians of the child and the child (*see* Family [*3]Ct Act § 1015). There is simply no basis for maintaining a proceeding in a county where neither of the parents nor the subject child reside. Accordingly, the order is reversed, and the matter is transferred to the Family Court of Rensselaer County for further proceedings not inconsistent with this Court's decision.

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

ORDERED that the order is reversed, on the law, without costs, matter transferred to the Family Court of Rensselaer County for further proceedings not inconsistent with this Court's decision and, pending further proceedings, temporary placement of the child in foster care shall continue.

Footnote 1: The allegations against the mother regarding the older children were settled one month prior to the filing of this prepetition application for temporary removal when the mother admitted to findings of neglect regarding the older children. The allegations against the father were still pending at that time.

Footnote 2: According to Schenectady County Family Court, Rensselaer County Family Court (Walsh, J.) never issued an order rejecting the transfer. Instead, it directed the Chief Clerk of Rensselaer County Family Court to notify the Chief Clerk of Schenectady County Family Court of the rejection, which the Rensselaer County Chief Clerk did.

Footnote 3: In these petitions, petitioner lists the subject child's address of residence as respondents' home in Rensselaer County, despite the child having been removed to the custody of petitioner.

Footnote 4: Following Rensselaer County Family Court's rejection of the initial transfer, Schenectady County Family Court requested that petitioner show cause as to why the court should not vacate the temporary order for petitioner's failure to file a petition in the appropriate county in a timely manner. Petitioner responded in opposition, detailing the confusion from Rensselaer County Family Court and the lack of clarity regarding that court's rejection of the transfer. At a hearing held on December 13, 2022, petitioner noted its intention to re-file the neglect petitions in Schenectady County Family Court. Petitioner's Rensselaer County counterparts had no intention of filing neglect petitions in Rensselaer County, and, accordingly, Schenectady County Family Court, after acknowledging that petitioner should be permitted to file its neglect petitions

somewhere, advised that if petitioner was going to file in Schenectady County that it do so and serve respondents right away so that they may move to transfer. The court made clear that it would entertain venue transfer arguments, and, to the extent that it did, it would analyze such separately and distinctly from its previous analysis regarding the proper venue for the prepetition application for temporary removal, because petitions would now be filed constituting the commencement of formal proceedings and Family Ct Act § 1015 would now govern.

Footnote 5: Transfer to "any other court" includes transfer from one family court to a family court in another county (see Matter of Dana Marie E., 123 Misc 2d 112, 124 [Fam Ct, Queens County 1983]).

Footnote 6: Although this Court has previously allowed a family court to transfer a case back (see Matter of Julie G. v Yu-Jen G., 81 AD3d at 1080; but see NY Const, art VI, § 19 [h], [j]), in that case the rejecting court still acted in accordance with the appropriate venue statutes when rejecting. For example, in Julie G., Rensselaer County Family Court initially transferred the case to Saratoga County Family Court (81 AD3d at 1080). Importantly, venue was proper in both counties (i.e., one of the parties lived in Rensselaer County and the other lived in Saratoga County at the time of commencement). However, Rensselaer County transferred it upon request due to the parties having previously litigated in Saratoga County (id.). Saratoga County Family Court subsequently "sen[t] the matter back" — this Court did not use the language "reject" but instead classified the move as transferring the case back — because the party living in Saratoga County at the time of commencement had since moved out of the county and no party to the proceeding currently lived in the county (id.). Accordingly, Saratoga County Family Court essentially transferred the case to a county with proper venue and for good cause shown (*see* Family Ct Act § 174).

Footnote 7: We note that Rensselaer County Family Court essentially and improperly acted as an appellate court when rejecting Schenectady County Family Court's transfer, as the court stated in its decision that it was "not persuaded" by the argument that Rensselaer County would be a more convenient venue for respondents. Family Courts generally have no such appellate power as those courts are "of limited jurisdiction and cannot exercise powers beyond those granted to it by statute" (*Matter of Catholic Charities of R.C. Diocese of Syracuse v Barber*, 109 Misc 2d 25, 26 [Fam Ct, Onondaga County 1981] [internal quotation marks and citation omitted], *affd* 84 AD2d 966 [4th Dept 1981]; *accord Matter of Silverman v Leibowitz*, 208 AD3d 1332, 1333 [2d Dept 2022]; *see* NY Const, art VI, § 13 [b], [c]; Family Ct Act § 115; *Matter of Alison RR.*, 190 AD3d 12, 13 [3d Dept 2020]). Moreover, the uniform rules applicable to Family Court establish an individual assignment system requiring that each proceeding be supervised

by a single judge (22 NYCRR 205.3[a]). We perceive no authority for the subject order to have been signed by two judges.

Article 10 Temporary Orders

Matter of E.E., 225 AD3d 457 (1st Dept., 2024)

Order, Family Court, New York County (Anna R. Lewis, J.), entered on or about May 26, 2023, which, after a hearing, granted respondent mother's application under Family Court Act § 1028, unanimously reversed, on the law and the facts, without costs, the application denied, and the matter remanded to the Family Court for further proceedings consistent with this opinion.

Family Court's finding that the child should be returned to the mother lacked a sound and substantial basis in the record (Family Court Act § 1028[a][iii]; *see Matter of Zaniyah R.-T. [Wanda R.]*, 196 AD3d 584, 585 [2d Dept 2021]). In a prior order dated January 6, 2023, the court properly determined, based on evidence of the child's physical injuries and the child's statements that the mother was the person who inflicted those injuries, that returning the child to the mother would present an imminent risk of harm. However, it was an improvident exercise of the Family Court's discretion to determine that the risk could be mitigated by the conditions it imposed on the mother in the order under review (Family Ct Act § 1028; *Matter of Denim A. [Rayshaun W.]*, 217 AD3d 489, 489-490 [1st Dept 2023]). Given the extensive injuries found on the child — including bruises, scratches, and bite marks over his body and face — and given the child's statements that the mother had injured him, the court's determination was not in the child's best interests (*see* Family Ct Act§ 1028; *see also Nicholson v Scoppetta*, 3 NY3d 357, 376 n 8 [2004]; Prof. Merrill Sobie, Prac Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 1028).

In deciding that the conditions it had imposed on the mother — such as requiring her to ensure that the child regularly attended school and was enrolled in therapy, and requiring her to refrain from using corporal punishment on the child — would suffice to prevent or mitigate imminent risk of harm to the child, Family Court downplayed the risk that the child faced by focusing primarily, if not entirely, on the video of his interview with the Child Advocacy Center (CAC). Instead, the court should have construed that video in tandem with the other evidence before it, including photographs of the child's injuries and corroboration of the photographs by the child protective specialist assigned to the matter. The child protective specialist also provided testimony, which the court found credible, about her interview with the child, in which he not only recounted incidents of the mother's violence towards him consistent with those he described in the CAC video,

but in which he stated that the violent incidents occurred with regularity on Fridays, after the mother had been drinking, and that he was afraid to go home on Fridays for that reason. The court focused on the fact that the child had not repeated certain of these details in his CAC video interview, but did not explain why that video — which, even if not as detailed as the other evidence, in no way contradicted that other [*2]evidence — was determinative, as opposed to constituting merely one illustrative component of the overall situation.

The record also does not support the court's determination that the mother would comply with the conditions imposed upon her in the order under review (*see e.g. Matter of Sara A. [Ashik A.]*, 141 AD3d 646, 648 [2d Dept 2016]; *Matter of Julissia B. [Navasia J.]*, 128 AD3d 690, 691-692 [2d Dept 2015]). Instead, the record shows the mother's unwillingness or inability to acknowledge her own role in the circumstances that led to the child's removal from her care. She not only attributed all of the child's injuries to a single physical altercation involving the father, but, notably, was silent about any efforts on her part to attend to those injuries — for example, getting him medical help or reporting his injuries to authorities. Indeed, while the mother made sure to take photographs of the injuries she had allegedly sustained in the physical altercation, she made no effort to document the child's injuries.

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

Matter of O.B.A., 227 AD3d 402 (1st Dept., 2024)

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about August 17, 2022, which, after a hearing, granted petitioner's application for removal of the subject child pursuant to Family Court Act § 1027 pending the fact-finding hearing on the issue of neglect, unanimously affirmed, without costs.
On review of the evidence and testimony submitted at the hearing held pursuant to Family Court Act § 1027, we find that the record supports a determination that the child's life or health was at imminent risk of harm (Family Court Act § 1027[b][i]). The record includes evidence that the mother engaged in several incidents of volatile and erratic behavior while in the hospital in the days following the child's birth and in the presence of the newborn child (*see Matter of Julissia B. [Navasia J.]*, 128 AD3d 690, 691-692 [2d Dept 2015]). Although the imminent risk assessment was favorable to the mother, the decision whether to credit an expert opinion is a credibility determination for the court (*see Matter of Adina B. [Alexander B.]*, 210 AD3d 981, 983 [2d Dept 2022]). Given the imminent risk of harm that the mother's conduct posed to the child, and serious concerns raised by this conduct, it was a provident exercise of the court's discretion to remove the child pending the fact-finding determination on the issue of

neglect. Nor were there conditions that could be imposed sufficient to mitigate the risk (*id.*).

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

Matter of Dazinee F., 223 AD3d 664 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from an order of the Family Court, Queens County (Monica D. Shulman, J.), dated April 5, 2022. The order denied the mother's application for a hearing pursuant to Family Court Act § 1028 for the return of the child Samynee L.

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

The petitioner, inter alia, commenced this neglect proceeding pursuant to Family Court Act article 10 against the mother of the subject child Samynee L., seeking to remove the child from the mother's home pursuant to Family Court Act § 1027. In an order dated September 28, 2021, made after a hearing wherein the mother was represented by counsel, the Family Court determined that the child was at imminent risk of harm if left in the mother's care, but that an order could be put in place to mitigate the risk of harm to the child. The court directed, among other things, that the mother cooperate with agency supervision by allowing for announced and unannounced visits to her home, submit to random drug and alcohol testing and test negative, and submit to a mental health evaluation and comply with any recommended services.

The petitioner thereafter made an application to remove the child from the mother's home based upon, inter alia, the mother's failure to comply with the September 28, 2021 order. In [*2]an order dated November 30, 2021, made after a hearing, the Family Court granted the petitioner's application and the child was removed from the mother's home. The court determined, among other things, that the mother had "fail[ed] to participate in the services necessary to mitigate the child['s] . . . risk of harm."

On March 25, 2022, the mother filed an application pursuant to Family Court Act § 1028 for the return of the child to her care. In support of the application, the mother's attorney represented that despite the Family Court's order removing the child from the mother's home, the child had returned to the mother's home and continued living with the mother "since early November," had "physically resisted efforts to enforce the removal order," and did not leave the mother's home until March 12, 2022. Accordingly, the mother argued that "good cause" existed for the court to hold a hearing pursuant to Family Court Act § 1028(a) since the child "evince[d] a clear desire to remain in her home with

her mother," and the petitioner was likely "in regular contact with [the child] and would have filed an appropriate pleading for relief from the court if she were at risk of harm in the care of her mother."

On April 5, 2022, the parties appeared before the Family Court on the mother's application. The petitioner introduced a copy of a complaint sworn to by the mother in December 2021 and directed to the Federal Bureau of Investigation (hereinafter the FBI complaint). In the FBI complaint, the mother, inter alia, disputed that the court could exercise jurisdiction over her. The mother, who refused to testify, introduced copies of text messages between her and the child's teacher, as well as a progress report sent to the mother from the child's school.

In an order dated April 5, 2022, the Family Court denied the mother's application, determining that "[t]he mother's filing with the FBI, raises more concerns about her mental well being and clearly articulates the mother's refusal to cooperate with any orders that could be fashioned by the court to keep the child safe in [her] care." The mother appeals.

"[A] section 1028 hearing is intended to give a parent an opportunity for a prompt reunion with the child, pending trial, and . . . a court has no discretion to deny a parent's application pursuant to section 1028 without a hearing if the statute's conditions are satisfied" (*Matter of Kristina R.*, 21 AD3d 560, 562- 563 [citation and internal quotation marks omitted]). Under Family Court Act § 1028(a), "[u]pon the application of the parent . . . of a child temporarily removed . . . , the court shall hold a hearing to determine whether the child should be returned (i) unless there has been a hearing pursuant to section one thousand twenty-seven of this article on the removal of the child at which the parent or other person legally responsible for the child's care was present and had the opportunity to be represented by counsel, or (ii) upon good cause shown."

Here, contrary to the mother's contention, the Family Court did not err in denying her application for a hearing pursuant to Family Court Act § 1028. The mother was present and represented by counsel during the hearing held pursuant to Family Court Act § 1027. Additionally, although the court acknowledged that the mother presented some evidence that she had tried to ensure that the child was up to date on her schoolwork, the mother failed to present any evidence that she had complied, or was willing to comply, with the September 28, 2021 order. Therefore, under the circumstances of this case, the mother failed to show good cause why a hearing pursuant to Family Court Act § 1028 was warranted (*see id.* § 1028[a]; *Matter of Branson M. [Justin M.]*, 209 AD3d 435, 436).

Accordingly, the Family Court properly denied the mother's application for a hearing pursuant to Family Court Act § 1028.

Matter of Nyomi P., 224 AD3d 906 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from an order of the Family Court, Kings County (Jacqueline D. Williams, J.), dated February 7, 2023. The order, after a hearing, denied the mother's application pursuant to Family Court Act § 1028 for the return of the child Na'Toria P. to her custody during the pendency of the proceedings.

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

In October 2022, the petitioner commenced these proceedings pursuant to Family Court Act article 10, alleging, inter alia, that the mother neglected the child Na'Toria P. by failing to provide the child with proper supervision and guardianship, in that she left the child and the child's siblings alone at home, and that the mother was arrested on an outstanding warrant of which she had knowledge, but she failed to arrange for childcare in anticipation of her arrest. The petitioner temporarily removed the child from the mother's custody. The mother made an application pursuant to Family Court Act § 1028 for the return of the child to her custody. After a hearing on the application, the Family Court denied the mother's application. The mother appeals.

A parent's application pursuant to Family Court Act § 1028(a) for the return of a child who has been temporarily removed "shall" be granted unless the Family Court finds that "the return presents an imminent risk to the child's life or health" (*see Matter of Skkyy M.R. [Justin R.—Desanta C.]*, 206 AD3d 660; *Matter of Cheryl P. [Ayanna M.]*, 168 AD3d 1062, 1063). The court's determination will not be disturbed if it is supported by a sound and substantial basis in the record (*see Matter of Chase P. [Maureen Q.]*, 199 AD3d 807; *Matter of Carter R. [Camesha B.]*, 184 [*2]AD3d 575). In making its determination, the court "must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal" and "must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests" (*Nicholson v Scoppetta*, 3 NY3d 357, 378; *see Matter of Romeo O. [Sita P.-M.]*, 163 AD3d 574, 575). The child services agency bears the burden of establishing that the child would be at imminent risk and therefore should remain in its custody (*see Matter of Chase P. [Maureen Q.]*, 199 AD3d at 809; *Matter of Carter R. [Camesha B.]*, 184 AD3d at 576).

Here, the Family Court's determination as to the mother's lack of credibility should not be disturbed, as it is supported by the record (*see Matter of Junny B. [Homere B.]*, 200 AD3d 687, 688; *Matter of Zephyr D. [Luke K.]*, 148 AD3d 1013). There is a sound and substantial basis in the record for the court's determination that the return of the child to

the mother would present an imminent risk to the child, and that the risk could not be mitigated by reasonable efforts to avoid removal (*see Matter of Tatih E. [Keisha T.]*, 168 AD3d 935, 936; *Matter of Gavin G. [Carla G.]*, 165 AD3d 1258, 1259).

Matter of Prince M., 225 AD3d 703 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from an order of the Family Court, Richmond County (Peter F. DeLizzo, J.), dated June 5, 2023. The order, after a hearing, denied the mother's application pursuant to Family Court Act § 1028 for the return of the subject children to her custody during the pendency of the proceedings.
ORDERED that the order is affirmed, without costs or disbursements.

In April 2023, the subject children were placed in the custody and care of the petitioner on an emergency basis, following the commencement of neglect proceedings against the father. In May 2023, the petitions were amended to include allegations of neglect against the mother. Thereafter, the mother made an application pursuant to Family Court Act § 1028 for the return of the children to her custody during the pendency of the proceedings. Following a hearing, the Family Court denied the application. The mother appeals.

An application pursuant to Family Court Act § 1028(a) for the return of a child who has been temporarily removed "shall" be granted unless the Family Court finds that "the return presents an imminent risk to the child's life or health." In determining the application, the court "must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal" (*Nicholson v Scoppetta*, 3 NY3d 357, 378; *see Matter of [*2]Tymik R. [Tamika J.]*, 214 AD3d 737, 738). The court "must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests" (*Nicholson v Scoppetta*, 3 NY3d at 378; *see Matter of Tymik R. [Tamika J.]*, 214 AD3d at 738). Here, the record provides a sound and substantial basis for the Family Court's denial of the mother's application for the return of the children to her custody during the pendency of the neglect proceedings (*see Matter of Tymik R. [Tamika J.]*, 214 AD3d at 738; *Matter of Alex A.E. [Adel E.]*, 103 AD3d 721, 722).

The mother's remaining contentions are without merit.

Matter of Samson R., 227 AD3d 911 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, nonparties Laurie H. and Steven J. appeal from an order of the Family Court, Suffolk County (Victoria Gumbs-Moore, J.), dated February 17, 2023. The order granted the petitioner's motion to dismiss the application of nonparties Laurie H. and Steven J., inter alia, for a hearing pursuant to Family Court Act § 1028 to determine whether the subject child should be returned to their care.
ORDERED that the order is reversed, on the law, without costs or disbursements, the petitioner's motion to dismiss the application of nonparties Laurie H. and Steven J., inter alia, for a hearing pursuant to Family Court Act § 1028 to determine whether the subject child should be returned to their care is denied, and the matter is remitted to the Family Court, Suffolk County, for further proceedings consistent herewith.

In November 2015, the subject child was found to be neglected by his parents and placed in the custody of his maternal aunt, nonparty Laurie H. In November 2017, the child was returned to the father's custody under the supervision of the Suffolk County Department of Social Services (hereinafter DSS). In July 2018, the child was again placed in the custody of Laurie H. Thereafter, in May 2021, the child was placed in DSS's legal custody while he remained placed in the care of his foster care parents, Laurie H. and her paramour, nonparty Steven J. (hereinafter together the foster parents). In February 2023, DSS removed the child from the care of the foster parents and sought to place him in a qualified residential treatment program.

On February 7, 2023, the foster parents filed an application, inter alia, for a hearing pursuant to Family Court Act § 1028 to determine whether the child should be returned to their care. [*2]DSS moved to dismiss the foster parents' application. In an order dated February 17, 2023, the Family Court granted DSS's motion to dismiss the application on the ground that the foster parents lacked standing to seek a hearing pursuant to Family Court Act § 1028. The foster parents appeal.

Family Court Act § 1028(a) provides that "[u]pon the application of the parent or other person legally responsible for the care of a child temporarily removed under this part . . . , the court shall hold a hearing to determine whether the child should be returned," with two exceptions not relevant here (*see Matter of Elizabeth C. [Omar C.]*, 156 AD3d 193, 202). Family Court Act § 1028(a) further provides that "[e]xcept for good cause shown, such hearing shall be held within three court days of the application and shall not be adjourned" (*see Matter of Elizabeth C. [Omar C.]*, 156 AD3d at 202).

The phrase "person legally responsible" "includes the child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time" (Family Ct Act § 1012[g]). "The Court of Appeals, in interpreting Family Court Act § 1012(g), has held

that 'the common thread running through the various categories of persons legally responsible for a child's care is that these persons serve as the functional equivalent of parents'" (*Matter of Kavon A., Jr. [Kavon A.]*, 192 AD3d 1096, 1098, quoting *Matter of Yolanda D.*, 88 NY2d 790, 795). Further, "a person may act as the functional equivalent of a parent even though that person assumes temporary care or custody of a child," as long as "the care given the child [is] analogous to parenting and occur[s] in a household or 'family' setting" (*Matter of Yolanda D.*, 88 NY2d at 796). "Factors to be considered in determining whether an applicant is a person legally responsible for the care of a child include '(1) the frequency and nature of the contact, (2) the nature and extent of the control exercised by the [applicant] over the child's environment, (3) the duration of the [applicant's] contact with the child, and (4) the [applicant's] relationship to the child's parent(s)'" (*Matter of Kavon A., Jr. [Kavon A.]*, 192 AD3d at 1098, quoting *Matter of Trenasia J. [Frank J.]*, 25 NY3d 1001, 1004).

Here, the evidence in the record was sufficient to support a determination that the foster parents were persons legally responsible for the care of the child. The evidence demonstrated that the child, eight years old at the time of the foster parents' application, had been under the foster parents' care for most of his life. As the foster parents acted as the functional equivalent of the child's parents for an extended period of time, they qualified as persons legally responsible for the care of the child (*see Matter of Kavon A., Jr. [Kavon A.]*, 192 AD3d at 1098-1099). Thus, the foster parents were entitled to a hearing pursuant to Family Court Act § 1028.

The parties' remaining contentions are either without merit or not properly before this Court as they are based on matter dehors the record.

Matter of Dylan T., 227 AD3d 1088 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from (1) a decision of the Family Court, Kings County (Alicea Elloras-Ally, J.), dated October 27, 2023, and (2) an order of the same court, also dated October 27, 2023. The order, insofar as appealed from, upon the decision, made after a hearing, granted that branch of the petitioner's application pursuant to Family Court Act § 1027 which was to remove the subject child from the custody of the mother and place the child in the custody of the petitioner pending the determination of the proceeding.
ORDERED that the appeal from the decision is dismissed, without costs or disbursements, as no appeal lies from a decision (*see Schicchi v J.A. Green Constr. Corp.*, 100 AD2d 509); and it is further,

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

The Administration for Children's Services (hereinafter ACS) commenced this proceeding pursuant to Family Court Act article 10, alleging, inter alia, that the mother neglected the subject child, who was approximately two years and nine months old at the time, by, among other things, riding with the child on what was variously described as a moped, motor scooter, or E-bike, from Brooklyn into Queens without providing the child with a helmet. During the trip, the vehicle, which was driven by the father, was involved in an accident, resulting in certain injuries to the child, which were treated at a local hospital.

After a hearing, the Family Court granted ACS's application pursuant to Family Court Act § 1027 to remove the child and place the child in the custody of the ACS pending the determination of the proceeding. The mother appeals.

"'Following a hearing pursuant to Family Court Act §§ 1027 or 1028, if the court finds that removal is necessary to avoid imminent risk to the child's life or health, it shall remove or continue the removal of the child'" (*Matter of Daniella G. [Margarita K.]*, 206 AD3d 730, 731, quoting *Matter of Sara A. [Ashik A.]*, 141 AD3d 646, 647 [internal quotation marks omitted]; *see* Family Ct Act § 1027[b][i]; *Nicholson v Scoppetta*, 3 NY3d 357, 380; *see also* Family Ct Act §§ 1022[a][iii]; 1027[b][ii]; 1028[b]). In determining whether removal or continuing removal is necessary, the Family Court "must weigh . . . whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal" (*Nicholson v Scoppetta*, 3 NY3d at 378; *see Matter of Riley P. [Raymond S.]*, 171 AD3d 757, 759; *Matter of Baby Boy D. [Adanna C.]*, 127 AD3d 1079, 1080). The Family Court must also balance a finding of imminent risk "against the harm removal might bring, and it must determine factually which course is in the child's best interests" (*Nicholson v Scoppetta*, 3 NY3d at 378; *see Matter of Daniella G. [Margarita K.]*, 206 AD3d at 731-732; *Matter of Riley P. [Raymond S.]*, 171 AD3d at 759).

The Family Court's determination that the child's life or health would be at imminent risk if the child were returned to the mother's care during the pendency of this proceeding, and that the risk could not be mitigated by reasonable efforts short of removal, is supported by a sound and substantial basis in the record (*see* Family Ct Act §§ 1027, 1028; *Matter of Solai J. [Kadesha J.]*, 190 AD3d 973, 974). Significantly, the mother testified at the removal hearing that she had arranged for the father to transport her and the child to Queens without first providing the child with a helmet or other safety devices despite the availability of public transportation because "it was quicker."

Accordingly, the Family Court did not err in granting that branch of the petitioner's application which was to remove the child from the mother's custody and place the child in the custody of the ACS pending the determination of the proceeding.

Matter of Lily A., 227 AD3d 1205 (3rd Dept., 2024)

Appeal from an order of the Family Court of Otsego County (Michael F. Getman, J.), entered February 22, 2023, which, in a proceeding pursuant to Family Ct Act article 10, temporarily removed the subject children from respondents' custody.

Respondent Tenise ZZ. (hereinafter the mother) and respondent Brandon A. (hereinafter the father) are the parents of the subject children (born in 2015, 2017 and 2021). Petitioner commenced this neglect proceeding on September 14, 2022, seeking to remove the children from respondents' care as the result of, among other things, allegations that the children were living in a home without running water in June 2022, that the father had overdosed while caring for the children in July 2022, and that the mother had punched and seriously injured the maternal grandmother in the children's presence earlier in September 2022. Family Court executed an order to show cause on the same day which temporarily removed the subject children from respondents' care and placed them with the grandmother. Following a hearing conducted pursuant to Family Ct Act § 1027, Family Court continued the temporary removal and placement. The mother appeals.

We affirm. "It is well settled that, in determining a removal application pursuant to Family Ct Act § 1027, 'a court must engage in a balancing test of the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal' " (*Matter of Isayah R. [Shaye R.]*, 149 AD3d 1223, 1224 [3d Dept 2017], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 380 [2004]; *see* Family Ct Act § 1027 [b]; *Matter of Riley P. [Raymond S.]*, 171 AD3d 757, 759 [2d Dept 2019]). The hearing here included the testimony of one of petitioner's caseworkers, who had investigated the June, July and September 2022 incidents. The caseworker testified as to how she conducted a home visit in June 2022 and found a lack of running water at respondents' residence that forced the children to go to a neighbor's house to bathe, as well as how she offered SNAP benefits and housing services to address the situation. The caseworker further described how she confirmed that the father had overdosed in July 2022 and how the mother was again offered services and agreed to a safety plan prohibiting the father from having unsupervised contact with the children. The caseworker then set forth how she spoke to both the mother and the grandmother in the wake of the September 2022 incident and learned

that the two women had become embroiled in an argument at the grandmother's residence — where the mother and the children were, by then, living — during which the mother had punched the grandmother. The caseworker made clear that the children were in the room and saw this occur, with one telling the caseworker that "mom pushed grandma and punched her and there was blood everywhere." Notwithstanding the fact that the mother punched the grandmother hard enough to put her in the hospital with [*2]a brain bleed and mouth lacerations, the caseworker added that the mother saw nothing wrong with her actions because, in her view, she was acting in self-defense after the grandmother had shoved her. The grandmother, as well as an eyewitness to the September 2022 incident, confirmed in their testimony that the mother had punched the grandmother and knocked her out in front of the children.

Although the hearing evidence called the foregoing accounts into question in very limited respects, Family Court credited the proof that the children had been living in a home without running water under respondents' care, that the father had engaged in illegal drug activity shortly thereafter and that, despite petitioner's efforts to engage respondents to address the serious concerns raised by those events, the mother then "engaged in acts of domestic violence" against the grandmother in front of the children.[FN1] According deference to the credibility determinations of Family Court, that proof provided a sound and substantial basis in the record for its determination that the children "would be subject to imminent risk if [they] were to remain in [the mother's] care, and that the risk could not be mitigated by actions other than removal" (*Matter of Riley P. [Raymond S.]*, 171 AD3d at 759; *see Matter of Junny B. [Homere B.]*, 200 AD3d 687, 688-689 [2d Dept 2021]; *Matter of Isayah R.*, 149 AD3d at 1224). Thus, Family Court properly directed that the children be temporarily removed from the mother's care and placed with the grandmother, whom the proof reflected had been relied upon as a placement before without incident (*see* Family Ct Act § 1027 [b] [i] [C]).

The mother's remaining arguments have been examined and found to be lacking in merit.

ORDERED that the order is affirmed, without costs.

Footnote 1: The mother suggests that, because the grandmother purportedly instigated the September 2022 argument and pushed the mother at some point during it, the mother's response of punching the grandmother out in front of the children somehow failed to constitute domestic violence. Without belaboring the point, we do not agree (*see e.g. Matter of Esther N.[Onyebuchi N.]*, 206 AD3d 564, 564-565 [1st Dept 2022]).

Evidentiary Rulings in Article 10 Proceedings

Matter of Kiarah. R., 225 AD3d 774 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from an order of the Family Court, Kings County (Jacqueline D. Williams, J.), dated December 15, 2022, and two amended orders of fact-finding of the same court (one as to each child), both dated December 16, 2022. The order dated December 15, 2022, granted the petitioner's motion for summary judgment on so much of the petitions as alleged that the mother derivatively neglected the subject children. The amended orders of fact-finding found that the mother derivatively neglected the subject children. ORDERED that the appeal from the order dated December 15, 2022, is dismissed, without costs or disbursements, as it was superseded by the amended orders of fact-finding; and it is further,

ORDERED that the amended orders of fact-finding dated December 16, 2022, are reversed, on the law, without costs or disbursements, the petitioner's motion for summary judgment on so much of the petitions as alleged that the mother derivatively neglected the subject children is denied, the order dated December 15, 2022, is modified accordingly, and the matter is remitted to the Family Court, Kings County, for a fact-finding hearing and new determinations on so much of [*2]the petition concerning the child Kiarah V. R. as alleged that the mother derivatively neglected the child Kiarah V. R. and on the petition alleging that the mother derivatively neglected the child Bakari K.

The subject children were born in 2020 and 2021. The Administration for Children's Services (hereinafter ACS) commenced these related proceedings pursuant to Family Court Act article 10, alleging, among other things, that the mother derivatively neglected the children based on findings of neglect against the mother in 2007 and 2009 as to the children's older siblings. ACS moved for summary judgment on so much of the petitions as alleged that the mother derivatively neglected the children. The Family Court granted the motion, and the mother appeals.

Although there is no express provision for a summary judgment procedure in Family Court Act article 10 proceedings, summary judgment pursuant to CPLR 3212 may be granted in such a proceeding when it clearly has been ascertained that there is no triable issue of fact (*see* Family Ct Act § 165[a]; *Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182; *Matter of Jaylhon C. [Candace C.]*, 170 AD3d 999, 1001).

While proof of the abuse or neglect of one child is admissible evidence on the issue of the abuse or neglect of any other child of the parent (*see* Family Ct Act § 1046[b]), "there is no per se rule that a finding of neglect of one sibling requires a finding of derivative neglect with respect to the other siblings. The focus of the inquiry . . . is whether the evidence of abuse or neglect of one child indicates a fundamental defect in the parent's understanding of the duties of parenthood" (*Matter of Andrew B.-L.*, 43 AD3d 1046, 1047 [internal quotation marks omitted]; *see Matter of Katherine L. [Adrian L.]*, 209 AD3d 737, 739). In determining whether a child born after the underlying acts of abuse or neglect should be adjudicated derivatively neglected, the "determinative factor is whether, taking into account the nature of the conduct and any other pertinent considerations, the conduct which formed the basis for a finding of abuse or neglect as to one child is so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still exists" (*Matter of Serenity R. [Truman C.]*, 215 AD3d 854, 857 [internal quotation marks omitted]; *see Matter of Elijah O. [Marilyn O.]*, 83 AD3d 1076, 1077; *Matter of Kadiatou B.*, 52 AD3d 388, 389).

Here, ACS failed to establish, prima facie, that the mother derivatively neglected the children based upon her alleged failure to address certain mental health issues underlying the 2007 and 2009 findings of neglect (*see Matter of Azayla K.L. [Aleisha L.]*, 187 AD3d 1018, 1020). In support of its motion, ACS relied solely on the prior neglect findings and failed to include an affidavit from anyone with personal knowledge of the events alleged in the neglect petitions or any other evidentiary material (*see* CPLR 3212[b]). The prior neglect findings were not so proximate in time to establish, as a matter of law, that the conditions that formed the basis therefor continued to exist (*see Matter of Jamakie B. [Gwendolyn J.]*, 119 AD3d 939, 940; *Matter of Elijah O. [Marilyn O.]*, 83 AD3d at 1077).

Matter of Adrian L., 225 AD3d 1166 (4th Dept., 2024)

Appeals from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered June 29, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had neglected the subject children.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondents each appeal from an order that, inter alia, determined that they neglected the subject children**.** As a preliminary matter, we exercise our discretion to treat respondents' notices of appeal from the order as valid notices of appeal from the subsequently entered order of disposition (*see* CPLR 5520 [c]; *Matter of Gina R. [Christina R.]*, 211

AD3d 1483, 1483 [4th Dept 2022]; *Matter of Ariana F.F. [Robert E.F.]*, 202 AD3d 1440, 1441 [4th Dept 2022]).

We reject respondents' contention that Family Court erred in finding that they neglected the children. We conclude that petitioner established by a preponderance of the evidence that the children were in imminent danger of emotional impairment based upon the alleged repeated incidents of domestic violence between respondents (*see* Family Ct Act § 1012 [f] [i] [B]; *Matter of Afton C. [James C.]*, 17 NY3d 1, 8-9 [2011]).

We further reject respondent Jason L.'s contentions that the court erred in various evidentiary rulings. Jason L.'s contention that the Utica Police Department records were not properly certified is unpreserved for our review. Jason L. additionally contends that the court erred in considering those records because they contained inadmissible hearsay. We reject that contention, inasmuch as, with respect to the police records, "[t]here is no indication that the court considered, credited, or relied upon inadmissible hearsay in reaching its determination" (*Matter of Milo C. [Daniella C.]*, 214 AD3d 1350, 1351 [4th Dept 2023], *lv denied* 40 NY3d 901 [2023] [internal quotation marks omitted]).

Jason L. further contends that the court erred in considering the maternal grandmother's testimony regarding statements made by the older subject child and the mother, because those statements constituted inadmissible hearsay. We reject that contention. The older child's out-of-court statements relating to allegations of neglect were sufficiently corroborated by other evidence tending to support their reliability (*see* Family Ct Act § 1046 [a] [vi]; *Matter of Crystal S. [Patrick P.]*, 193 AD3d 1353, 1354 [4th Dept 2021]). With respect to the mother's out-of-court statements, we conclude that any error "is harmless because the result reached herein would [*2]have been the same even had such [statements] been excluded" (*Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]). We also reject Jason L.'s contention with respect to hearsay testimony of a supervisor employed by petitioner, because that testimony was admitted conditionally, the court later noted explicitly that it "may not consider [the supervisor's] testimony" in reaching its decision, and there is no indication that the court relied upon that hearsay (*see Milo C.*, 214 AD3d at 1351).

We have reviewed respondents' remaining contentions in both appeals and conclude that they lack merit.

NEGLECT

General and Mixed Neglect

Matter of K.A.M., 223 AD3d 567 (1st Dept., 2023)

Order, Family Court, Bronx County (Ashley B. Black, J.), entered on or about April 3, 2023, which denied respondent Rayshawn's motion to vacate an order of fact-finding, same court and Judge, entered on or about March 1, 2023, finding, upon his default, that he neglected the subject children, unanimously affirmed, without costs. Appeal from order of disposition, same court and Judge, entered on or about May 5, 2023, which, to the extent appealed from as limited by the briefs, brings up for review the March 1, 2023 fact-finding order, unanimously dismissed, without costs, as taken from a nonappealable paper. Appeal from March 1, 2023 fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Family Court providently exercised its discretion in denying respondent's motion to vacate his default (*see Matter of Serenity Victoria M. [Allison B.]*, 150 AD3d 486 [1st Dept 2017]) because he failed to demonstrate a reasonable excuse for his failure to appear at the continued hearing on the family offense petition (*see* CPLR 5015[a][1]; *Matter of Yadori Marie F. [Osvaldo F.]*, 111 AD3d 418, 419 [1st Dept 2013]). Respondent's contention that he was in the court's virtual lobby waiting to be let into the virtual hearing for about 50 minutes conflicted with his counsel's statement to Family Court that he was requesting an adjournment on respondent's behalf because he had just received a text from respondent stating that he "was on his way to work." The other evidence submitted by respondent, a screen shot purportedly showing that he was in the court's virtual lobby at 4:51 p.m., is undated and did not establish whether he was present 50 minutes earlier, when the hearing was scheduled to begin, or how long he had been waiting (*see Matter of Danielle R.*, 239 AD2d 305, 305 [1st Dept 1997]). Family Court properly denied the request of respondent's counsel for an adjournment because he could not provide any explanation for respondent's failure to appear (*see Matter of Keith H. [Logann M.K.]*, 113 AD3d 555, 556 [1st Dept 2014], *lv denied* 23 NY3d 902 [2014]).

Since respondent failed to proffer a reasonable excuse for his default, this Court need not determine whether he proffered a meritorious defense (*see Matter of Darryl H.W. [Angelina P.]*, 194 AD3d 439, 440 [1st Dept 2021]). In any event, his affidavit did not

address the charges that he neglected the children by committing acts of domestic violence against the mother in their presence.

Matter of D.B., 226 AD2d 403 (1st Dept., 2024)

Order of disposition, Family Court, Bronx County (E. Grace Park, J.), entered on or about January 4, 2021, to the extent it brings up for review a fact-finding order, same court (Elenor Cherry, J.), entered on or about March 31, 2020, which found that respondent father neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.
A preponderance of the evidence supports Family Court's finding of neglect. Family Court found that the father verbally abused the child and continued his harsh and threatening behavior towards her, even after she had been psychiatrically hospitalized and repeatedly expressed suicidal thoughts (see *Matter of Robann H. [Autumn P.]*, 221 AD3d 502, 503 [1st Dept 2023]; *Matter of Kevin M.H. [Kenneth H.]*, 76 AD3d 1015, 1016 [2d Dept 2010], *lv denied* 15 NY3d 715 [2010]). Family Court further found that the father failed to address the child's emotional and psychological needs by, among other things, minimizing her suicidal ideation and repeated suicide attempts and actively impeding her efforts to seek medical and mental health treatment (*see Matter of S.H. [Patricia W.]*, 176 AD3d 515, 516 [1st Dept 2019], *lv denied* 34 NY3d 909 [2020]; *Matter of Ariel P. [Lisa W.]*, 102 AD3d 795, 795 [2d Dept 2013]). The court's factual findings have a sound and substantial basis in the record. The court appropriately found neglect based on the father's failure to appreciate the seriousness of his child's mental health condition and his failure to exercise a minimum degree of care in ensuring that she received appropriate treatment, which both exacerbated the child's emotional trauma and placed the child in imminent danger of further impairment (Family Court Act § 1012[f][i][A]; *Matter of Ariel P. [Lisa W.]*, 102 AD3d at 795).

Contrary to the father's argument, the child's out-of-court statements were sufficiently corroborated by his own testimony (*see Matter of Michelle S. [Yi S.]*, 157 AD3d 551, 552 [1st Dept 2018], *lv denied* 31 NY3d 904 [2018]). For example, the father admitted to fighting with the child and cursing at her in the presence of an agency liaison, admitted he prevented her from seeing family members**,** and testified to his "hardcore" parenting style. The father was dismissive of the child's suicidal ideation and mental condition, and admitted to failing to accompany her to the hospital to seek mental health treatment. The testimony of the agency Child Protective Specialist that the child told her in the presence of the school counselor and social worker that her father cursed at her, challenged her to fight, and otherwise spoke to her in inappropriate ways further corroborated the child's statements (*see Matter of Robann H.*, 221 AD3d at 503).

Although repetition of the same allegations may not provide sufficient corroboration of out-of-court statements, the consistency of the child's many reported statements [*2]enhanced their credibility (*see Matter of Emily S. [Jorge S.]*, 146 AD3d 599, 600 [1st Dept 2017]). In addition, the father's angry and disruptive behavior displayed throughout the proceedings further supported the court's credibility findings (*see Matter of Kira J. v Lakisha J.*, 85 AD3d 1030, 1031 [2d Dept 2011]).

There is no reason to disturb the court's credibility findings, which are entitled to deference (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of Moises G. [Luis G.]*, 135 AD3d 527, 527-528 [1st Dept 2016]).

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

Matter of L.B., 226 AD3d 554 (1st Dept., 2024)

Order of fact-finding, Family Court, New York County (Maria Arias, J.), entered on or about March 28, 2023, which, after a hearing, found that respondent father neglected the subject child, unanimously affirmed, without costs. Appeal from order of disposition, same court and Judge, entered on or about May 15, 2023, which placed the child in the custody of the Commissioner of Social Services until the next permanency hearing, directed the father to complete a substance abuse treatment program, and imposed other conditions, unanimously dismissed, without costs, as taken by a nonaggrieved party.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Court Act § 1046[b][i]). The caseworker testified that she spoke with the father at the hospital after the child's birth and that the father admitted he was aware that the mother was "actively using" heroin before she got pregnant and continuing until she went into a treatment facility about six or seven months into her pregnancy. After that, he would also see her when she left the facility and give her money, and, there was testimony from the father that at some point prior to giving birth, the mother lived with the father and his mother. This supports a finding that the father "neglected the child because he knew or should have known that respondent mother was abusing narcotics while she was pregnant with the child, but failed to take any steps to stop her drug use" (*Matter of Ja'Vaughn Kiaymonie S. [Nathanial S.]*, 146 AD3d 422, 423 [1st Dept 2017]). The child was born at 36 weeks, with serious health issues requiring an extended stay in the NICU, further supporting a finding of neglect against the father (*see Matter of Thamel J. [Deryck T.J.]*, 162 AD3d 507, 507 [1st Dept 2018]). Lastly, the court was entitled to find that the father's vague and inconsistent testimony that he assisted the mother in going to treatment facilities by carrying her bags was incredible and/or insufficient and "[t]here is no reason to disturb the court's credibility findings, which are entitled to deference"

(*Matter of D.B.,* -AD3d-*,* 2024 NY Slip Op 01775, *2 [1st Dept 2024], citing *Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

No appeal lies from the dispositional order, as the transcript from the dispositional hearing establishes that it was entered on the father's consent and he is therefore not an aggrieved party within the meaning of CPLR 5511 (*see Matter of P.A. [Kathleen A.]*, 217 AD3d 596, 597 [1st Dept 2023]). The father's appeal from that order is also moot because it has been superseded by later orders (*id.*).

Matter of D.P., 227 AD3d 549 (1st Dept., 2024)

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about October 31, 2022, which, to the extent appealed from as limited by the briefs, determined, after a hearing, that appellant neglected the subject child, unanimously affirmed, without costs.
Initially, petitioner agency's witness properly laid a foundation for the admission of records under the business records exception to the rule against hearsay. The witness established that she was familiar with Administration for Children's Services (ACS) record-keeping practices; that the records were kept in the course of ACS's regular record-keeping practices; and that they were recorded on or reasonably near the time of the recorded events generally within five business days, by persons who were under a business obligation to do so accurately (*see Matter of Adonis H. [Enerfry H.]*, 198 AD3d 478, 479-480 [1st Dept 2021]).

Appellant failed to preserve his argument that he was not a person legally responsible for the child within the meaning of Family Court Act § 1012(g), and we decline to review it in the interest of justice (*see Matter of Jadiel M. [Naqwuan B.]*, 187 AD3d 677, 678 [1st Dept 2020]).

As to the merits, the finding of neglect based on domestic violence was supported by a preponderance of the evidence, and there is no basis to disturb the court's credibility determinations (Family Court Act § 1046[b][i]; *see Matter of Tammie Z.*, 66 NY2d 1, 3-5 [1985]). The caseworker testified to the child's statement that appellant and the mother fought all the time, and that appellant was not nice to her. The child's maternal aunt further testified that the child disclosed seeing appellant drag the mother across the floor and hit her. The child also used a toy gun to demonstrate to the aunt another incident in which appellant took a gun out of the closet and put it to the mother's head. These out-of-court statements by the child were further corroborated by an order of protection issued in favor of the mother and child against appellant after an incident of domestic violence that took place in April 2022, approximately a month before the

caseworker interviewed the child (*see Matter of Emily S. [Jorge S.]*, 146 AD3d 599, 600 [1st Dept 2017]).

The evidence also showed that the child's emotional and mental condition was impaired or in imminent danger of being impaired by exposure to acts of domestic violence committed by appellant against the mother. The child's aunt testified that he was visibly distraught when recounting the incidents he had witnessed, and that his behavior had changed since living with the mother and appellant in that he began to curse, threw temper tantrums, and hit his grandmother.

The record further supports the finding that appellant inflicted excessive corporal punishment on the child. The child stated to his maternal aunt that appellant hit him on the back with a belt, and the aunt testified that she saw a bruise [*2]on the child's back and that he cried out in pain when she put lotion on that spot (*see Matter of Paige T. [Kodjo T.]*, 189 AD3d 563, 564 [1st Dept 2020]). Although the child's injuries were the result of a single incident, that fact does not preclude a finding of excessive corporal punishment or neglect (*see Matter of Liza F. [Bon F.]*, 177 AD3d 570, 571 [1st Dept 2019]).

Furthermore, a preponderance of the evidence supports the court's finding that the child's physical, mental, or emotional condition was in imminent danger of becoming impaired as a result of appellant engaging in sexual activity in his presence (*see Matter of Ja'Dore G. [Cannily G.]*, 169 AD3d 544, 545 [1st Dept 2019]).

Family Court providently exercised its discretion in granting the agency's request to conform the pleadings to the evidence, as appellant had ample notice of the allegations and a reasonable time to respond (Family Court Act § 1051[b]; *see Matter of Enrique S. [Kelba C.S.]*, 134 AD3d 576, 577 [1st Dept 2015], *lv denied* 27 NY3d 948 [2016]; *Matter of Autumn M. [Sita P.M.]*, 213 AD3d 852, 853 [2d Dept 2023]).

Matter of Donald M. P. 223 AD3d 671 (2nd Dept., 2024)

In a proceeding pursuant Family Court Act article 10, the mother appeals from an order of fact-finding of the Family Court, Kings County (Jacqueline B. Deane, J.), dated September 26, 2022, as amended June 22, 2023. The order of fact-finding, as amended, upon the mother's failure to appear at a fact-finding hearing, and after an inquest, found that she derivatively neglected the subject child.

ORDERED that the appeal is dismissed, without costs or disbursements, except insofar as it brings up for review the denial of the mother's attorney's application for an

adjournment (*see* CPLR 5511; *Matter of Vallencia P. [Valdissa R.]*, 215 AD3d 850, 851); and it is further,

ORDERED that the order of fact-finding, as amended, is affirmed insofar as reviewed, without costs or disbursements.

The order of fact-finding, as amended, was entered upon the mother's failure to appear at a fact-finding hearing (*see e.g. Matter of Harlem H.H. [Coty H.]*, 218 AD3d 579, 581; *Matter of Bartosz B. [Andrezej B.]*, 187 AD3d 894, 896). Among other reasons, although the mother's attorney appeared at the fact-finding hearing, she elected not to participate and she did not actively represent the mother by presenting evidence or making objections (*see Matter of Devon W. [Lavern D.]*, 127 AD3d 1098, 1099), except to the extent that she objected to the Family Court's decision to proceed in the mother's absence. Since the finding of derivative neglect was made upon the mother's default, review is limited to matters that were the subject of contest in the Family Court (*see* CPLR 5511; *Matter of Vallencia P. [Valdissa R.]*, 215 AD3d at 851).

Under the circumstances present here, the mother's contention that the Family Court improvidently exercised its discretion in denying her attorney's application for an adjournment is without merit (*Matter of Vallencia P. [Valdissa R.]*, 215 AD3d at 851-852; *Matter of Zowa D.P. [Jenia W.]*, 190 AD3d 744, 745).

Matter of Alisha S., 223 AD3d 827 (2nd Dept., 2024)

Robert M. Rametta, Goshen, NY, attorney for the child Stephen S. In related proceedings pursuant to Family Court Act article 10, the mother appeals from (1) an order of disposition of the Family Court, Orange County (Victoria B. Campbell, J.), dated September 12, 2022, and (2) a corrected order of disposition of the same court dated November 28, 2022. The corrected order of disposition, upon an order of fact-finding of the same court dated May 26, 2022, made after a fact-finding hearing, finding that the mother neglected the subject children, and after a dispositional hearing, inter alia, placed the mother and the child Alisha S. under the supervision of the Orange County Department of Social Services for a period of 12 months and continued the placement of the child Alisha S. in the custody of the Commissioner of Social Services of Orange County until the completion of the next permanency hearing.

ORDERED that the appeal from the order of disposition is dismissed, without costs or disbursements, as that order was superseded by the corrected order of disposition; and it is further,

ORDERED that the appeal from so much of the corrected order of disposition as placed the mother and the child Alisha S. under the supervision of the Orange County Department [*2]of Social Services for a period of 12 months and continued the placement of the child Alisha S. in the custody of the Commissioner of Social Services of Orange County until the completion of the next permanency hearing is dismissed as academic, without costs or disbursements; and it is further,

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

In January 2021, the petitioner removed the subject children from the father's care and, inter alia, commenced these proceedings pursuant to Family Court Act article 10 against the mother, alleging that she neglected the children by failing to provide them with proper supervision and guardianship. According to the petition, the mother knew or should have known that the children were living in unsanitary conditions, were not having their medical or mental health needs met, were not attending school regularly, and were exposed to violence. The father consented to the entry of a finding of neglect against him.

After a fact-finding hearing, the Family Court found that the mother neglected the children. Following a dispositional hearing, the court issued a corrected order of disposition dated November 28, 2022, which, among other things, placed the mother and the child Alisha S. under the supervision of the Orange County Department of Social Services for a period of 12 months and continued the placement of the child Alisha S. in the custody of the Commissioner of Social Services of Orange County until the completion of the next permanency hearing.

The appeal from so much of the corrected order of disposition as placed the mother and child Alisha S. under the supervision of the Orange County Department of Social Services for a period of 12 months must be dismissed, as that portion of the corrected order of disposition has expired by its own terms (*see Matter of Anilya S. [Mohamed S.]*, 218 AD3d 473, 474). The appeal from so much of the corrected order of disposition as continued the placement of the child Alisha S. in the custody of the Commissioner of Social Services of Orange County until the completion of the next permanency hearing is dismissed as academic because the Family Court thereafter held additional permanency hearings (*see Matter of Hanah A. [Kristy M.]*, 194 AD3d 922, 923; *Matter of Peter T. [Shay S.P.]*, 173 AD3d 1043, 1045). "However, the appeal from so much of the [corrected] order of disposition as brings up for review the finding that the mother neglected the children is not academic [because] the adjudication of neglect constitutes a permanent and significant stigma which might indirectly affect the mother's status in future proceedings" (*Matter of Hanah A. [Kristy M.]*, 194 AD3d at 923; *see Matter of Ivy R.Q.M. [Afroz Q.M.]*, 184 AD3d 833, 834).

"In a neglect proceeding pursuant to Family Court Act article 10, the petitioner has the burden of proving by a preponderance of the evidence that the subject child was neglected" (*Matter of Hanah A. [Kristy M.]*, 194 AD3d at 923 [internal quotation marks omitted]). "A parent neglects a child where he or she fails to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship that results in impairment or imminent danger of impairment to the child's physical, mental[,] or emotional condition" (*id.* [internal quotation marks omitted]).

Here, contrary to the mother's contention, the Family Court's finding of neglect was supported by a preponderance of the evidence, which demonstrated, inter alia, that the mother failed to act to protect the children from unsanitary living conditions, inconsistent school attendance by the children, gang and gun violence, a lack of medical and mental health treatment, as well as having failed to act upon the older children's inappropriate behavior (*see Matter of Brian F., Jr. [Brian F., Sr.]*, 143 AD3d 983, 983; *Matter of Jonathan W.*, 17 AD3d 374, 375).

Matter of Nicholas M., 224 AD3d 684 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the father appeals from (1) a temporary order of protection of the Family Court, Suffolk County (Caren Loguercio, J.), dated October 22, 2021, (2) an order of the same court, also dated October 22, 2021, (3) a decision of the same court dated June 27, 2022, and (4) an order of fact-finding and disposition of the same court dated August 8, 2022. The temporary order of protection, inter alia, directed that the father have no contact with the subject child except for supervised parental access. The order dated October 22, 2021, among other things, directed the temporary removal of the subject child pursuant to Family Court Act § 1022. The order of fact-finding and disposition, insofar as appealed from, upon the decision, found that the father neglected the subject child.
ORDERED that the appeals from the temporary order of protection and the order dated October 22, 2021, are dismissed as academic, without costs or disbursements; and it is further,

ORDERED that the appeal from the decision is dismissed, without costs or disbursements, as no appeal lies from a decision (*see Schicchi v J.A. Green Constr. Corp.*, 100 AD2d 509, 509-510); and it is further,

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

The petitioner commenced this proceeding against the father and a related proceeding against the mother alleging that they neglected the subject child, in that, among other

things, they failed to provide the child with proper care, supervision, and guardianship. On October 22, 2021, prior to the filing of the petitions, the Family Court issued an order, inter alia, directing the temporary removal of the child pursuant to Family Court Act § 1022 and a temporary order of protection, among other things, directing that the father have no contact with the child except for supervised parental access. After a fact-finding hearing, in an order of fact-finding and disposition [*2]dated August 8, 2022, the court, inter alia, found that the father neglected the child. The father appeals from the temporary order of protection, the order dated October 22, 2021, and so much of the order of fact-finding and disposition as found that he neglected the child.

The appeal from the temporary order of protection must be dismissed as academic because that order expired by its own terms and imposes no enduring consequences on the father (*see Matter of Nicholas M. [Lisa B.]*, 211 AD3d 950, 951).

The appeal from the order dated October 22, 2021, directing the temporary removal of the child pursuant to Family Court Act § 1022 must be dismissed as academic because that order was superseded by the order of fact-finding and disposition (*see Matter of Stephen L. [Patrick S.L.]*, 161 AD3d 1155, 1156).

A party seeking to establish neglect must show, by a preponderance of the evidence, that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired and that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with adequate care or proper supervision or guardianship (*see* Family Ct Act §§ 1012[f][i]; 1046[b][i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368; *Matter of Anilya S. [Mohamed S.]*, 218 AD3d 473, 474-475). "Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor" (*Matter of Zaniah T. [Deshaun T.]*, 216 AD3d 1173, 1174 [internal quotation marks omitted]; *see Matter of Raveena B. [Khrisend R.]*, 209 AD3d 640, 641). Here, a preponderance of the evidence supports the Family Court's finding that the father neglected the child, inter alia, by his failure to provide proper supervision and guardianship, by not maintaining a safe, clean environment for the child, and by not providing the child with appropriate hygiene and dental care (*see Matter of Nicholas M. [Lisa B.]*, 211 AD3d at 952; *Matter of Antonio T. [Franklin T.]*, 169 AD3d 699, 701; *Matter of Olivia R. [Kaila G.]*, 138 AD3d 1122, 1123).

Matter of Yeimi M., 224 AD3d 837 (2nd Dept., 2024) (Mother’s case)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an order of disposition of the Family Court, Kings County (Ilana Gruebel, J.), dated August

10, 2022. The order of disposition, insofar as appealed from, was entered upon an order of fact-finding of the same court dated March 1, 2022, made after a fact-finding hearing, finding that the mother neglected the subject child.
ORDERED that the order of disposition is affirmed insofar as appealed from, without costs or disbursements.

In December 2018, the Administration for Children's Services commenced this proceeding pursuant to Family Court Act article 10, alleging, inter alia, that the mother neglected the subject child because the mother had permitted her boyfriend to have continued access to, and contact with, the child after she had reported to the mother that the mother's boyfriend had sexually abused her on multiple occasions. After a fact-finding hearing, the Family Court found that the mother neglected the child. The mother appeals.

In a neglect proceeding, the petitioner has the burden of proving by a preponderance of the evidence that the subject child was neglected (*see id.* § 1046[b][i]; *Matter of Maurice M. [Suzanne H.]*, 158 AD3d 689, 690; *Matter of Jemima M. [Aura M.]*, 151 AD3d 862, 863). Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses, having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor (*see Matter of Skye H. [Tianna S.]*, 195 AD3d 711, 713).

Here, the Family Court's finding that the mother neglected the child by permitting her boyfriend to have continued access to, and contact with, the child after she had reported to the mother that the mother's boyfriend had sexually abused her on multiple occasions was supported by a preponderance of the credible evidence (*see Matter of Jose E. [Jose M.]*, 176 AD3d 1201, 1202; *Matter of Selena J.*, 35 AD3d 610, 611). Contrary to the mother's contention, the court was entitled to draw the strongest negative inference against her for her failure to testify (*see Matter of Adina B. [Alexander B.]*, 210 AD3d 981, 983; *Matter of Kristina I. [Al Quran F.]*, 163 AD3d 565, 567; *Matter of Alanah M. [Donnie M.]*, 96 AD3d 757, 758).

The mother's remaining contentions are without merit.

Matter of Kaira K., 226 AD3d 900 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from an order of disposition of the Family Court, Queens County (Emily Ruben, J.), dated August 22, 2022. The order of disposition, insofar as appealed from, was entered upon

an order of fact-finding of the same court dated July 19, 2022, made after a fact-finding hearing, finding that the mother neglected the subject children.
ORDERED that the order of disposition is modified, on the law and the facts, by deleting the provision thereof, upon the order of fact-finding, determining that the mother neglected the child Kiana B. by failing to provide that child with an adequate education; as so modified, the order of disposition is affirmed insofar as appealed from, without costs or disbursements, and the order of fact-finding is modified accordingly (*see Matter of Divine K. M. [Andre G.]*, 211 AD3d 733, 734; *Matter of Majesty M. [Brandy P.]*, 166 AD3d 775, 775-776).

The mother has two children, one born in 2012 and the other born in 2020. In January 2020, before the younger child, Kaira K., was born, the mother and the older child, Kiana B., began residing in a unit within a residential facility for families with housing difficulties (hereinafter the facility). The mother and Kiana B. continued living within the facility after Kaira K. was born. In January 2021, following a referral from the mother's case manager at the facility, the Administration for Children's Services (hereinafter ACS) commenced these related proceedings pursuant to Family Court Act article 10, alleging, inter alia, that the mother neglected the children. In its petitions, ACS asserted, among other things, that the mother neglected both children by failing to provide them with adequate shelter and neglected Kiana B. in particular by failing to provide her with an adequate education. In October 2021, after the mother tested positive for cocaine on multiple occasions, upon [*2]receiving leave of the court, ACS amended its petitions to allege, inter alia, that the mother neglected both children due to her repeated misuse of a drug.

The Family Court thereafter conducted a fact-finding hearing over the course of six days, beginning in October 2021 and ending in May 2022. In an order of fact-finding dated July 19, 2022, the court found, among other things, that the mother neglected both children by failing to provide adequate shelter and repeatedly misusing cocaine and that she neglected Kiana B. by failing to provide her with an adequate education. The court then entered an order of disposition dated August 22, 2022, upon the order of fact-finding. The mother's appeal from the order of disposition brings up for review the findings of neglect in the order of fact-finding (*see* CPLR 5501[a][1]; *Matter of Timothy L. [Timothy L.]*, 221 AD3d 1006, 1007).

"At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing that the subject child has been abused or neglected by a preponderance of the evidence" (*Matter of Kamaya S. [Zephaniah S.]*, 218 AD3d 590, 592 [internal quotation marks omitted]). "To establish neglect of a child, the petitioner must demonstrate, by a preponderance of the evidence, (1) that the child's physical, mental, or emotional condition has been impaired or is in

imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Chloe P.-M. [Martinique P.]*, 220 AD3d 783, 784 [internal quotation marks omitted]). "Courts must evaluate parental behavior objectively by considering whether a reasonable and prudent parent would have so acted, or failed to act, under the circumstances then and there existing" (*Matter of Abigail M.A. [James A.]*, 222 AD3d 973, 975 [alterations and internal quotation marks omitted]).

A parent or caretaker may be found to have "neglected [a] child by failing to supply the child with adequate shelter based on the unsanitary," deplorable, or otherwise unsafe "conditions of the home" (*Matter of Majesty M. [Brandy P.]*, 166 AD3d at 776; *see Matter of Chloe P.-M. [Martinique P.]*, 220 AD3d at 784; *Matter of Justyn H. [Laverne H.]*, 191 AD3d 876, 877), since "such conditions necessarily imply an imminent danger of impairment [to] the [child's] health" (*Matter of Busch v Margaret B.*, 109 AD2d 837, 837-838; *see Matter of Todd D.*, 9 AD3d 462, 463). However, evidence showing that a child's home was "in a state of disarray and was generally messy" is generally insufficient to "warrant[ ] a finding of neglect," absent "evidence of unsanitary or unsafe conditions" (*Matter of Erik M.*, 23 AD3d 1056, 1057; *see Matter of Majesty M. [Brandy P.]*, 166 AD3d at 776; *Matter of Clydeane C. [Annetta C.]*, 74 AD3d 486, 487-488). Moreover, evidence of unsanitary or unsafe conditions may not be sufficient to warrant a finding of neglect where, for example, the record demonstrates that the conditions were temporary in nature and improved over time (*see Matter of Jordin B. [Tiaya B.]*, 170 AD3d 996, 998; *Matter of Iyanah D.*, 65 AD3d 927, 927-928; *Matter of Devin N.*, 62 AD3d 631, 632).

Here, contrary to the mother's contention, "[t]he evidence adduced at the fact-finding hearing established that the mother maintained the [childrens'] home in a deplorable and unsanitary condition" (*Matter of Justyn H. [Laverne H.]*, 191 AD3d at 877 [internal quotation marks omitted]; *see Matter of Antonio T. [Franklin T.]*, 169 AD3d 699, 701; *Matter of Jessica DiB.*, 6 AD3d 533, 534). The evidence demonstrated, among other things, that the conditions of the children's home over an extended period of time included garbage and soiled diapers strewn about, old food and fast-food containers left in the kitchenette area, spilled liquids in the refrigerator that went unremedied, and soiled bed sheets (*see Matter of China C. [Alexis C.]*, 116 AD3d 953, 954). Further, the evidence established that, at times, the children appeared malodorous and unbathed, and that the mother declined a suggestion to obtain a storage unit at no cost to her (*see Matter of Chloe P.-M. [Martinique P.]*, 220 AD3d at 784; *Matter of Jessica DiB.*, 6 AD3d at 534). As a result, the Family Court properly concluded that the mother neglected the children by failing to provide them with adequate shelter.

Moreover, "[p]ursuant to Family Court Act § 1046(a)(iii), proof that a person repeatedly misuses a drug, under certain circumstances, constitutes prima facie evidence that a child of . . . such person is a neglected child" (*Matter of Mia S. [Michelle C.]*, 212 AD3d 17, 19 [internal [*3]quotation marks omitted]). Specifically, "proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence," among other things, "shall be prima facie evidence that a child of . . . such person is a neglected child" (*Matter of Jesse W. [Jesse W.]*, 189 AD3d 848, 849 [internal quotation marks omitted]). "In cases where this presumption of neglect is triggered, the petitioner is not required to establish that the child suffered actual harm or was at imminent risk of harm" (*Matter of Mia S. [Michelle C.]*, 212 AD3d at 19 [internal quotation marks omitted]). However, proof of a parent's repeated misuse of a drug will not constitute prima facie evidence of neglect in circumstances where he or she "was voluntarily and regularly participating in a drug rehabilitative program before the neglect petition was filed" (*id.* at 25; *see Matter of Kailey Z. [Nancy Z.]*, 185 AD3d 832, 833; *Matter of Mia G. [William B.]*, 146 AD3d 882, 884). "In those circumstances, . . . evidence establishing that the child's physical, mental[,] or emotional condition has been impaired or is in imminent danger of becoming impaired" is required to establish neglect, even where the parent "has repeatedly misused a drug" (*Matter of Keira O.*, 44 AD3d 668, 670 [internal quotation marks omitted]). In any event, when the presumption is triggered, it "is not rebutted by a showing that the children were never in danger and were always well kept, clean, well fed[,] and not at risk" (*Matter of Arthur S. [Rose S.]*, 68 AD3d 1123, 1124 [internal quotation marks omitted]). Moreover, "the sole fact that an individual consumes cannabis, without a separate finding that the child's physical mental or emotional condition was impaired or is in imminent danger of becoming impaired established by a fair preponderance of the evidence[,] shall not be sufficient to establish prima facie evidence of neglect" (Family Court Act § 1046[a][iii]).

Here, ACS presented a prima facie case of neglect based on evidence that the mother repeatedly tested positive for cocaine (*see Matter of Kailey Z. [Nancy Z.]*, 185 AD3d at 833; *Matter of Kenneth C. [Gertrude B.]*, 148 AD3d 799, 800). Since the evidence at the fact-finding hearing did not show that the mother was voluntarily and regularly participating in a drug rehabilitation program before the petitions were filed, and instead indicated that she had declined ACS's referral to a substance abuse counselor shortly after the petitions were filed, the mother failed to rebut ACS's prima facie showing of neglect (*see Matter of Mia S. [Michelle C.]*, 212 AD3d at 25; *Matter of Christian G. [Alexis G.]*, 192 AD3d 1027, 1029). Therefore, the Family Court correctly determined that the mother neglected the children by repeatedly misusing a drug.

However, the Family Court's determination that the mother neglected Kiana B. by failing to provide her with an adequate education is not supported by the record (*see Matter of Natiello v Carrion*, 73 AD3d 1070, 1072; *cf. Matter of Tim C. [Rizalina C.]*, 185 AD3d 1021, 1022). The evidence demonstrated that that child had excessive absences throughout the 2020-2021 school year. However, the overwhelming majority of those absences occurred during the first half of the school year as a result of bussing issues, which the mother attempted to and ultimately did remedy, as well as technological issues the mother experienced when the child was attempting to attend school remotely during the COVID-19 pandemic. The record also showed that Kiana B.'s absences during the second half of the school year were far more sporadic, that some of the absences during that period occurred when the mother did not have residential custody of Kiana B., that Kiana B.'s attendance improved as time went on, and that Kiana B. successfully completed the third grade. Under the circumstances presented, the court should not have determined that the mother committed educational neglect (*see Matter of Natiello v Carrion*, 73 AD3d at 1072; *Matter of Alexander D.*, 45 AD3d 264, 264; *Matter of Jennifer N.*, 173 AD2d 971, 972).

The mother's remaining contentions either are without merit, are improperly raised for the first time on appeal, or need not be reached in light of our determination.

Matter of Janiyah S., 226 AD3d 909 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, Pedro H. appeals from (1) an order of fact-finding of the Family Court, Kings County (Jacqueline B. Deane, J.), dated February 9, 2023, (2) an order of disposition of the same court dated May 19, 2023, and (3) an order of protection of the same court, also dated May 19, 2023. The order of fact-finding, insofar as appealed from, after a fact-finding hearing, found that Pedro H. neglected the child Janiyah S. and derivatively neglected the child DaNyla S. The order of disposition, insofar as appealed from, upon the order of fact-finding and after a dispositional hearing, placed Pedro H. under the supervision of the petitioner until February 19, 2024, and directed Pedro H. to submit to a mental health evaluation, participate in individual counseling, and sign HIPAA releases. The order of protection, inter alia, directed that Pedro H. have no contact with the subject children until and including February 19, 2024.

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

ORDERED that the appeal from so much of the order of disposition as placed Pedro H. under the supervision of the petitioner until February 19, 2024, is dismissed as academic, without costs or disbursements; and it is further,

ORDERED that the appeal from the order of protection is dismissed as academic, without costs or disbursements; and it is further,

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

The Administration for Children's Services (hereinafter ACS) commenced these related proceedings pursuant to Family Court Act article 10, alleging, inter alia, that Pedro H. (hereinafter Pedro), the live-in boyfriend of the nonrespondent mother, neglected the child Janiyah S. and derivatively neglected the child DaNyla S. After a fact-finding hearing, the Family Court found that ACS established, by a preponderance of the evidence, that Pedro neglected Janiyah S. and derivatively neglected DaNyla S. In an order of disposition dated May 19, 2023, the court, among other things, placed Pedro under the supervision of ACS until February 19, 2024, and directed Pedro to submit to a mental health evaluation, participate in individual counseling, and sign HIPAA releases. The court also issued an order of protection, inter alia, directing that Pedro have no contact with the subject children until and including February 19, 2024. Pedro appeals.

The appeal from the order of protection must be dismissed as academic because that order expired by its own terms and imposes no enduring consequences on Pedro (*see Matter of Nicholas M. [Robert M.]*, 224 AD3d 689; *Matter of Nicholas M. [Lisa B.]*, 211 AD3d 950, 951). The appeal from so much of the order of disposition as placed Pedro under the supervision of ACS until February 19, 2024, has been rendered academic, since the period of supervision has expired by its own terms (*see Matter of Serenity R. [Truman C.]*, 215 AD3d 854, 856-857; *Matter of Aliyah T. [Jaivon T.]*, 174 AD3d 722, 723). However, since the adjudication of neglect constitutes a permanent and significant stigma that might indirectly affect Pedro's status in future proceedings, the appeal from so much of the order of disposition as brings up for review the findings of neglect is not academic (*see Matter of Serenity R. [Truman C.]*, 215 AD3d at 857; *Matter of Aliyah T. [Jaivon T.]*, 174 AD3d at 723).

In a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of proving neglect by a preponderance of the evidence (*see id.* § 1046[b][i]; *Matter of Jada W. [Fanatay W.]*, 219 AD3d 732, 737). To satisfy this burden, ACS may rely upon prior out-of-court statements of the subject children, provided that they are sufficiently corroborated (*see* Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 118-119; *Matter of Ashley G. [Eggar T.]*, 163 AD3d 963, 964). Corroboration is not required because statements of children are generally unreliable

but because the out-of-court statements are hearsay and Family Court Act § 1046(a)(vi) requires some further evidence to establish their reliability (*see Matter of Nicole V.*, 71 NY2d at 118). "'Any other evidence tending to support the reliability of the previous statements . . . shall be sufficient corroboration'" (*Matter of Zeeva M. [Abraham M.]*, 126 AD3d 799, 800, quoting Family Ct Act § 1046[a][vi]; *see Matter of Alven V. [Ketly M.]*, 194 AD3d 725, 726). "In article 10 proceedings, the Family Court has 'considerable discretion to decide whether the child's out-of-court statements describing incidents of abuse or neglect have, in fact, been reliably corroborated and whether the record as a whole supports a finding of abuse'" (*Matter of Nyla S. [Jason B.]*, 224 AD3d 691, 692, quoting *Matter of Christina F.*, 74 NY2d 532, 536 [internal quotation marks omitted]).

Contrary to Pedro's contention, ACS established, by a preponderance of the evidence, that Janiyah S. was neglected as a result of his failure to provide her with proper supervision and guardianship by inappropriately touching her buttocks while she was sleeping in her bed (*see* Family Ct Act § 1012[f][i][B]). Where the Family Court is primarily confronted with issues of credibility, its factual findings must be accorded considerable deference on appeal (*see Matter of Cheryale B. [Michelle B.]*, 121 AD3d 976, 977; *Matter of Alexis S. [Edward S.]*, 115 AD3d 866, 867). In this case, the Family Court's determination that ACS established that Pedro neglected Janiyah S. is [*2]supported by the record. We conclude that the court providently exercised its discretion in determining that Janiyah S.'s out-of-court statements were reliably corroborated by a video depicting her interview at a child advocacy center, which the court viewed during the fact-finding hearing, and that the record as a whole supported a finding of neglect (*see Matter of Christina F.*, 74 NY2d at 537; *Matter of Steven Glenn R.*, 51 AD3d 802, 803; *Matter of Kristina R.*, 21 AD3d 560, 562; *Matter of Besthani M.*, 13 AD3d 452, 453; *see also* Family Ct Act § 1046[a][vi]).

Furthermore, while Pedro correctly contends that a violation of an order of protection, standing alone, is insufficient to establish neglect (*see Matter of Abbygail H.M.G. [Christine Y.]*, 129 AD3d 722, 723; *Matter of Jada K.E. [Richard D.E.]*, 96 AD3d 744, 745), where, as here, such a violation is combined with other evidence demonstrating a marked lack of parental judgment, it is a relevant and appropriate factor to consider in conjunction with the overall finding of neglect (*see Matter of Kieran XX. [Kayla ZZ.]*, 154 AD3d 1094, 1096; *Matter of Paige AA. [Anthony AA.]*, 85 AD3d 1213, 1217).

Contrary to Pedro's contention, the Family Court's finding that he derivatively neglected DaNyla S. was supported by a preponderance of the evidence. "[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent" (Family Ct Act § 1046[a][i]). There is no per se rule that a finding of abuse or neglect of one sibling requires a finding of derivative abuse or neglect with respect to other siblings (*see*

Matter of Nash D. [Daniel D.], 224 AD3d 749). The focus of the inquiry with respect to derivative findings is whether the evidence of abuse or neglect of another child or children demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for the other child or children in the parent's care (*see Matter of Marino S.*, 100 NY2d 361, 374; *Matter of Nash D. [Daniel D.]*, 224 AD3d 749). Here, the evidence adduced at the fact-finding hearing demonstrated, by a preponderance of the evidence, a fundamental defect in Pedro'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 his care (*see Matter of Nyla S. [Jason B.]*, 224 AD3d 691; *Matter of Taurice M. [Gregory A.]*, 147 AD3d 844, 845).

Accordingly, the Family Court properly found that Pedro neglected Janiyah S. and derivatively neglected DaNyla S. (*see generally Matter of Naphtali A. [Winifred A.]*, 165 AD3d 781, 784).

The order of disposition, which directed Pedro, inter alia, to submit to a mental health evaluation and participate in individual counseling, was in the best interests of the subject children (*see Matter of Jaheem M. [Cymon M.]*, 174 AD3d 610, 611; *Matter of Salvatore M. [Nicole M.]*, 104 AD3d 769, 770).

Matter of James L., 226 AD3d 1022 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the father appeals from an order of fact-finding and disposition of the Family Court, Nassau County (Ellen R. Greenberg, J.), dated May 18, 2022. The order of fact-finding and disposition, insofar as appealed from, after a fact-finding hearing, found that the father neglected the subject children and, in effect, found that the father derivatively neglected the child James L. ORDERED that the order of fact-finding and disposition is modified, on the law and the facts, by deleting the provisions thereof finding that the father neglected the child James L. and, in effect, finding that the father derivatively neglected the child James L., and substituting therefor a provision denying so much of the petition relating to the child James L. as alleged that the father neglected the child James L. and, in effect, alleged that the father derivatively neglected the child James L., and dismissing that proceeding insofar as asserted against the father; as so modified, the order of fact-finding and disposition is affirmed insofar as appealed from, without costs or disbursements.

On August 24, 2020, the Nassau County Department of Social Services (hereinafter [*2]DSS) commenced related proceedings pursuant to Family Court Act article 10, alleging, among other things, that the father neglected then 14-year-old Kai L., also known as Kevin L. (hereinafter Kevin), and Kevin's then 5-year-old brother, James L. (hereinafter James and, together with Kevin, the children). Evidence was

presented at a fact-finding hearing that while the children were present in the father's apartment, Kevin observed the father punching another person in the face, purportedly over rent money. DSS also presented evidence that Kevin wore inadequate clothing for the cold weather and had gone several days in January 2020 without heat or hot water in his home. Following the fact-finding hearing, in an order of fact-finding and disposition, the Family Court, among other things, found that the father neglected the children and, in effect, found that the father derivatively neglected James. The father appeals.

"[A] party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [citation omitted]; *see Matter of Je'laya J. [Nathaniel J.]*, 192 AD3d 1030, 1031). "Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor" (*Matter of Je'laya J. [Nathaniel J.]*, 192 AD3d at 1031 [internal quotation marks omitted]; *see Matter of Sydelle P. [Alvin P.]*, 210 AD3d 1098, 1100).

Here, the Family Court properly determined that DSS established by a preponderance of the evidence that the father neglected Kevin by failing to provide him with proper supervision or guardianship and that, as a result, Kevin's physical, mental, or emotional condition was impaired or was in danger of becoming impaired (*see Matter of Je'laya J. [Nathaniel J.]*, 192 AD3d at 1031; *Matter of Kurt K. [Karen K.]*, 133 AD3d 755, 756; *Matter of Nia J. [Janet Jordan P.]*, 107 AD3d 566, 567).

"A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence" (*Matter of Bronx S. [Denzel J.]*, 217 AD3d 956, 957 [internal quotation marks omitted]). However, "not every child exposed to domestic violence is at risk of impairment" (*Matter of Kiara C. [David C.]*, 85 AD3d 1025, 1026 [alterations and internal quotation marks omitted]), and "exposing a child to domestic violence is not presumptively neglectful" (*Nicholson v Scoppetta*, 3 NY3d at 375 [emphasis omitted]).

Here, the preponderance of the evidence did not establish that the father neglected James by engaging in acts of domestic violence. In this regard, DSS failed to establish at the fact-finding hearing that the altercation that occurred in the father's apartment constituted domestic violence (*cf.* Family Ct Act § 812[1]). Furthermore, DSS did not present evidence that James had observed the incident or that it caused impairment, or

an imminent danger of impairment, to his physical, mental, or emotional well-being (*see Matter of Simone C.P. [Jeffry F.P.]*, 182 AD3d 554, 555; *Matter of Harper F.-L. [Gary L.]*, 125 AD3d 652, 654).

"[W]hile proof of the abuse or neglect of one child is admissible evidence on the issue of the abuse or neglect of any other child of the parent, a finding of abuse or neglect as to one child does not mandate a finding of derivative abuse or neglect as to the other children" (*Matter of Katherine L. [Adrian L.]*, 209 AD3d 737, 739, citing Family Ct Act § 1046[a][i] [citations omitted]). "The focus of the inquiry with respect to derivative findings is whether the evidence of abuse or neglect of another child or children demonstrates such an impaired level of parental judgment so as to create a substantial risk of harm for the other child or children in the parent's care" (*Matter of Katherine L. [Adrian L.]*, 209 AD3d at 739-740 [internal quotation marks omitted]; *see Matter of Monica C.M. [Arnold A.]*, 107 AD3d 996).

Here, DSS failed to demonstrate that the father had such an impaired level of parental [*3]judgment so as to create a substantial risk of harm to James. Notably, there was an approximately nine-year age difference between the children, and they had different living situations and different relationships with the father (*see Matter of Katherine L. [Adrian L.]*, 209 AD3d at 740; *Matter of Christina P.*, 275 AD2d 783, 784). Thus, under all of the circumstances of this case, a preponderance of the evidence did not support a finding that the father derivatively neglected James.

Accordingly, we modify the order of fact-finding and disposition as indicated herein.

Matter of Jefferson C.-A., 227 AD3d 894 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the father appeals from an order of fact-finding of the Family Court, Suffolk County (Caren Loguercio, J.), dated September 14, 2022. The order of fact-finding, after a fact-finding hearing, found that the father neglected the subject children.
ORDERED that the order of fact-finding is reversed, on the facts, without costs or disbursements, the petition is denied, and the proceedings are dismissed.

On May 7, 2021, while executing a search warrant, police officers from the Suffolk County Police Department discovered cocaine within a bedroom of an apartment in a house in Huntington Station. The father resided in the apartment with the mother and the subject children, who were born in 2016 and 2019. Days later, the Suffolk County Department of Social Services (hereinafter DSS) commenced these proceedings pursuant to Family Court Act article 10, alleging that the father neglected the children by possessing the cocaine and storing it in a location where "the children had easy access

to it." In an order of fact-finding dated September 14, 2022, made after a fact-finding hearing, the Family Court found that the father neglected the children. The father appeals.

"At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing that the subject child has been abused or neglected by a preponderance of the evidence" (*Matter of Kamaya S. [Zephaniah S.]*, 218 AD3d 590, 592 [internal quotation marks omitted]). "To establish neglect of a child, the petitioner must demonstrate, by a preponderance of the evidence, (1) that the child's physical, mental, or emotional [*2]condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Chloe. P.-M. [Martinique P.]*, 220 AD3d 783, 784 [internal quotation marks omitted]). "Article 10 erects a careful bulwark against unwarranted state intervention into private family life, for which its drafters had a deep concern" (*Matter of Jamie J. [Michelle E.C.]*, 30 NY3d 275, 284 [internal quotation marks omitted]). "[T]he court is not required to wait until a child has already been harmed before it enters a finding of neglect" (*Matter of Kiemiyah M. [Cassiah M.]*, 137 AD3d 1279, 1279). However, "[n]eglect findings cannot be casually issued" and, instead "require proof of actual or imminent harm to the child as a result of a parent's failure to exercise a minimum degree of care" (*Matter of Jamie J. [Michelle E.C.]*, 30 NY3d at 284). The requirement of "[a]ctual or imminent danger of impairment [a]s a prerequisite to a finding of neglect . . . ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior" (*Matter of Zahir W. [Ebony W.]*, 169 AD3d 909, 909-910 [internal quotation marks omitted]). "'In order for danger to be 'imminent,' it must be 'near or impending, not merely possible'" (*Matter of Serina M. [Edward M.]*, 179 AD3d 925, 927, quoting *Nicholson v Scoppetta*, 3 NY3d 357, 369).

Based upon these standards, a court may issue a finding of neglect in various circumstances involving the possession, use, or sale of illegal narcotics. For example, such a finding may be warranted where there is "proof of a parent's repeated drug use" in a manner sufficient to constitute "prima facie evidence of neglect" pursuant to Family Court Act § 1046(a)(iii) (*Matter of Camila G.C. [Matthew C.]*, 211 AD3d 934, 935; *see Matter of Jesse W. [Jesse W.]*, 189 AD3d 848, 849-850). Further, evidence demonstrating that a parent stored drugs within the home in a location that was "readily accessible" to a child may be sufficient to support a finding of neglect (*Matter of Jaielly R.H. [Kimberly V.]*, 132 AD3d 993, 993; *see Matter of Majesty M. [Brandy P.]*, 166 AD3d 775, 776; *Matter of Sarah A. [Daniel A.]*, 109 AD3d 467, 467). Similarly, a neglect finding may be based upon evidence establishing that a parent exposed a child "to the

very dangerous activity of narcotics trafficking" (*Matter of Majesty M. [Brandy P.]*, 166 AD3d at 776; *see Matter of Paul J.*, 6 AD3d 709, 710; *Matter of Michael R.*, 309 AD2d 590, 590-591), including, inter alia, evidence that the parent "packaged and sold narcotics in the presence of the child[ ]" (*Matter of Paul J.*, 6 AD3d at 710; *see Matter of Michael R.*, 309 AD2d at 590-591), "resided with the child in a home in which narcotics transactions were taking place" (*Matter of Diamonte O. [Tiffany R.]*, 116 AD3d 866, 867; *see Matter of Essleiny A. [Rafael A.]*, 142 AD3d 862, 862; *Matter of Sarah A. [Daniel A.]*, 109 AD3d at 467), or "travel[ed] with the child[ ] to an arranged drug transaction" (*Matter of Evan E. [Lasheen E.]*, 95 AD3d 1114, 1114; *see Matter of Eliani M.-R. [Sonia M.]*, 172 AD3d 636, 636). By contrast, a parent's "mere use of illicit drugs," without more, "is insufficient to support a finding of neglect" (*Matter of Delanie S. [Jeremy S.]*, 165 AD3d 1639, 1639; *see Matter Anastasia L.-D. [Ronald D.]*, 113 AD3d 685, 688; *Matter of Anastasia G.*, 52 AD3d 830, 831). Nor will the presence of illicit drugs in the home where the child resides be sufficient, standing alone, to support a finding of neglect (*see Matter of Charisma D. [Sandra R.]*, 67 AD3d 404, 405; *cf. Matter of Brad I. [Brad J.]*, 117 AD3d 1242, 1244-1245). In either scenario, a neglect finding will not be warranted absent evidence that the child suffered the requisite impairment, or that he or she was in imminent danger of suffering such impairment, as a result of the parent's conduct (*see Nicholson v Scoppetta*, 3 NY3d at 369; *Matter of Zahir W. [Ebony W.]*, 169 AD3d at 909-910).

Here, the Family Court's finding that the father neglected the children was not supported by a preponderance of the evidence (*see Matter of Charisma D. [Sandra R.]*, 67 AD3d at 405; *see generally Matter of Kingston T. [Diamond T.]*, 209 AD3d 743, 745; *Matter of Nabil H.A. [Vinda F.]*, 195 AD3d 1012, 1012). Initially, contrary to the father's contention, the record contained sufficient evidence for the court to infer that he intended to sell the cocaine that the officers found in his apartment, which weighed approximately four ounces. Nonetheless, his intent to sell these illicit drugs was insufficient, without more, to warrant a finding of neglect. The record, for example, contained no evidence establishing that the father engaged in drug transactions within the house or that he otherwise exposed the children to drug-trafficking activities (*cf. Matter of Diamonte O. [Tiffany R.]*, 116 AD3d at 867; *Matter of Evan E. [Lasheen E.]*, 95 AD3d at 1114; *Matter of Paul J.*, 6 AD3d at 710). Nor was there evidence adduced at the hearing as to whether the father regularly engaged in the sale of drugs, or the manner in which he intended to sell the cocaine. [*3]Moreover, although the officers discovered the cocaine within the father's bedroom closet, it was located on a five- or six-foot-high shelf and was otherwise stored in a manner that was not readily accessible to the children (*see Matter of Majesty M. [Brandy P.]*, 166 AD3d at 776; *cf. Matter of Jaielly R.H. [Kimberly V.]*, 132 AD3d at 993). Finally, there was no indication in the record that the father ever used cocaine or any other illicit drugs. Absent evidence that the father's conduct caused

the requisite harm to the children or otherwise placed them in imminent danger of such harm, the court should not have found that he neglected them (*see Matter of Jamie J. [Michelle E.C.]*, 30 NY3d at 284; *Nicholson v Scoppetta*, 3 NY3d at 369; *Matter of Chaim R. [Keturah Ponce R.]*, 94 AD3d 1127, 1130).

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

Matter of Richard TT., 223 AD3d 1070 (3rd Dept., 2024)

Appeal from an order of the Family Court of Schenectady County (Jill S. Polk, J.), entered June 10, 2022, which granted petitioner's applications, in two proceedings pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected. Respondent Kara VV. (hereinafter the mother) and respondent Richard UU. (hereinafter the father) are the unmarried parents of four children (born in 2003, 2007, 2009 and 2013). Following a report to petitioner in July 2020, the children were removed from respondents' care and placed in the custody of petitioner, which filed separate petitions against the mother and the father seeking to find the children to have been neglected by the parents.**[FN1]** Despite attending the initial appearance, the mother inconsistently appeared at subsequent proceedings. However, the mother appeared at the initial permanency hearing in March 2021 and, although her phone number had been subsequently disconnected, she attended the next permanency hearing in September 2021. Given the disconnected phone number, the mother's assigned counsel requested an adjournment because she had been unable to adequately prepare for the hearing, but represented that the mother had previously been "doing an excellent job keeping in touch" and the attorney did not want Family Court to think that the mother had just "disappeared" and suddenly appeared in court; Family Court denied the request and proceeded with the hearing. Thereafter, the mother did not appear at the continuation of the same permanency hearing scheduled in November 2021 or the adjourned date a week later in December 2021, whereat the mother's assigned counsel orally moved to be relieved as counsel. Family Court granted such application and proceeded with the permanency hearing, held a fact-finding hearing on the neglect petition the next day without the mother or any counsel for her present, and ultimately found the children to be neglected by respondents. The mother appeals.**[FN2]**

We reverse the finding as to the mother and remit. It is well established that the mother, as a respondent in a proceeding pursuant to article 10 of the Family Ct Act, had both a constitutional and a statutory right to the assistance of counsel (*see* US Const, 6th Amend; NY Const, art I, § 6; Family Ct Act §§ 261, 262 [a] [i]; *Matter of Jung [State Commn. on Jud. Conduct]*, 11 NY3d 365, 373 [2008]; *Matter of Pfrang v Charland*, 42

AD3d 611, 611 [3d Dept 2007]). Once counsel has been assigned, an attorney of record may withdraw from representation only upon reasonable notice to his or her client (*see* CPLR 321 [b] [2]; *Matter of Hohenforst v DeMagistris*, 44 AD3d 1114, 1116 [3d Dept 2007]). Such requirement remains true even where a party fails to appear at proceedings or there are allegations of a breakdown in communication between the client and the attorney (*see Matter of Joslyn U. [Heather L.]*, 121 AD3d 1521, 1521 [4th Dept 2014], *lv dismissed* 24 NY3d 1098 [2015]; *Matter of Meko M.*, 272 AD2d 953, 954 [4th [*2]Dept 2000]; *compare Matter of Dakota W. [Kimberly X.]*, 189 AD3d 2004, 2005 [3d Dept 2020], *lv denied* 36 NY3d 911 [2021]).

Here, there is no indication in the record that the mother's assigned counsel had informed her that she was seeking to withdraw as counsel (*see Matter of Joslyn U. [Heather L.]*, 121 AD3d at 1521; *Matter of Hohenforst v DeMagistris*, 44 AD3d at 1116; *Matter of Meko M.*, 272 AD2d at 954). Nor does the record reveal that Family Court made any inquiry into such notice or whether there was good and sufficient cause for such withdrawal (*see Matter of Meko M.*, 272 AD2d at 954; *see generally Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 386 [2011]). The record further fails to demonstrate that the mother had "voluntarily absented herself from the proceedings," as her assigned counsel — less than two months before immediately withdrawing at the start of the hearing — had commended the mother's "excellent job keeping in touch" (*Matter of Dakota W. [Kimberly X.]*, 189 AD3d at 2005). Further, the record from the November 2021 continuation of the permanency hearing revealed testimony from the caseworker that the mother had moved from the Rochester area to the Schenectady-Albany area, and had contacted the caseworker four days before the hearing date to schedule a conference call with her. For these reasons, we also reject the contentions of the appellate attorney for the children that the mother was in default (*see generally Matter of Elaysia GG. [Amber HH.]*, 221 AD3d 1338, 1339 [3d Dept 2023]; *Matter of Amanda I. v Michael I.*, 185 AD3d 1252, 1253-1254 [3d Dept 2020]).[FN3] As it relates to petitioner's contention that there was sufficient evidence of neglect in the petition, we note that "[t]he deprivation of a party's fundamental right to counsel is a denial of due process and requires reversal, without regard to the merits of the unrepresented party's position" (*Matter of Dolson v Mitts*, 99 AD3d 1079, 1080 [3d Dept 2012] [internal quotation marks and citations omitted]; *see Matter of Joslyn U. [Heather L.]*, 121 AD3d at 1521; *Matter of Hannah YY.*, 50 AD3d 1201, 1203 [3d Dept 2008]; *Matter of Wilson v Bennett*, 282 AD2d 933, 935 [3d Dept 2001]; *Matter of Meko M.*, 272 AD2d at 954). To that end, because the directives of Family Ct Act § 262 were not followed, the mother does not need to demonstrate actual prejudice (*see Matter of Pfrang v Charland*, 42 AD3d at 612; *Matter of Wilson v Bennett*, 282 AD2d at 935). Accordingly, Family Court's finding of neglect against the mother must be reversed and the case remitted for a new fact-finding hearing upon compliance with Family Ct Act §§ 261 and 262 (*see Matter of*

Hannah YY., 50 AD3d at 1203; *Matter of Pfrang v Charland*, 42 AD3d at 612; *see also Matter of Dolson v Mitts*, 99 AD3d at 1080).

Egan Jr., J.P., and McShan, J., concur.

Pritzker, J. (dissenting).

Although we share in the majority's concern regarding respondent Kara VV. (hereinafter the mother) being denied due process, we respectfully dissent [*3]because it is our opinion that this issue is not properly before this Court given that the neglect finding was issued on default (*see* CPLR 5511). Specifically, the mother defaulted when she failed to appear at the fact-finding hearing on the neglect petition and, because her attorney had been relieved, no attorney participated at the hearing on her behalf (*see Matter of Destiny F.S.J. [Elio F.S.]*, 221 AD3d 602, 603 [2d Dept 2023]; *Matter of Irelynn S.[Maurice S.]*, 188 AD3d 1744, 1744 [4th Dept 2020], *affd* 38 NY3d 933 [2022]; *Matter of Adele T. [Kassandra T.]*, 143 AD3d 1202, 1204 [3d Dept 2016]; *compare Matter of Elaysia GG. [Amber HH.]*, 221 AD3d 1338, 1339 [3d Dept 2023]; *Matter of Jerry VV. v Jessica WW.*, 186 AD3d 1799, 1800 [3d Dept 2020]; *Matter of Amanda I. v Michael I.*, 185 AD3d 1252, 1253-1254 [3d Dept 2020]), thus there were no contested issues presented at the fact-finding for this Court to review (*see e.g. Matter of Destiny F.S.J. [Elio F.S.]*,221 AD3d at 603; *Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 960 [2d Dept 2022]). As such, the mother's sole recourse was to move to vacate the default pursuant to CPLR 5015 (a), essentially making the same arguments she has raised on direct appeal, and, if same is denied, appeal from that denial (*see Matter of Corey MM. [Cassandra LL.]*, 177 AD3d 1119, 1120 [3d Dept 2019]; *Matter of Nicole TT. v Rickie UU.*, 174 AD3d 1070, 1070-1071 [3d Dept 2019]). Accordingly, it is our view that this appeal must be dismissed.

Powers, J., concurs.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as granted petitioner's application against respondent Kara VV.; matter remitted to the Family Court of Schenectady County for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

Footnote 1: The mother initially consented to the removal and, following a hearing at the initial appearance, Family Court continued such removal order and issued several related orders that are not relevant to this appeal.

Footnote 2: Following oral argument, the parties were permitted to address whether this appeal became moot due to subsequent proceedings that occurred in Family Court. Although an appeal from certain Family Court determinations may become moot by certain subsequent proceedings, "the finding of neglect creates a permanent and

significant stigma that may adversely affect [a parent] . . . in further proceedings" (*Matter of Neveah AA. [Alia CC.]*, 124 AD3d 938, 939 [3d Dept 2015] [internal quotation marks and citations omitted]; *see Matter of Derick L. [Michael L.]*, 166 AD3d 1325, 1326 [3d Dept 2018], *lv denied* 32 NY3d 915 [2019]). As a result, an appeal from a finding of neglect is not moot — even in instances where parental rights were later terminated by judicial surrender or a finding of permanent neglect, and after the children were adopted (*see Matter of Neveah AA. [Alia CC.]*, 124 AD3d at 939; *Matter of Karm'Ny QQ. [Steven QQ.]*, 114 AD3d 1101, 1101-1102 [3d Dept 2014]; *Matter of Bayley W. [Jaden W.]*, 100 AD3d 1203, 1203-1204 [3d Dept 2012]).

Footnote 3: Indeed, "[i]t is beyond cavil that a party's failure to appear does not automatically result in a default, especially where counsel appears on the party's behalf" (*Matter of Madelyn V. [Lucas W.-Jared V.]*, 199 AD3d 1249, 1252 [3d Dept 2021]; *lv denied* 38 NY3d 901 [2022]). The critical distinction between the cases cited by the dissent and this case is that, in those cases, the parent had *still* been represented by counsel during the proceeding, who choose to participate on behalf of their client or chose to remain present but not participate — like the father's attorney had done as an exemplar for over a year and a half (*see Matter of Elaysia GG. [Amber HH.]*, 221 AD3d at 1339; *compare Matter of Myasia QQ. [Mahlia QQ.]*, 133 AD3d 1055, 1056 [3d Dept 2015]). Whereas here, however, the mother's counsel immediately withdrew *before* there was an opportunity to participate or remain present in the hearing, and Family Court neither made any inquiry nor developed the record to determine whether counsel knew or understood that the mother had expected her attorney to continue to participate, in her absence, in that hearing or the fact-finding hearing on the neglect petition, which took place the next day (*see Matter of Elaysia GG. [Amber HH.]*, 221 AD3d at 1339; *Matter of Jerry W. v Jessica WW.*, 186 AD3d 1799, 1800 [3d Dept 2020]; *Matter of Amanda I. v Michael I.*, 185 AD3d at 1253-1254). It is this important distinction combined with counsel's representations in September 2021 that the mother was doing an "excellent job" communicating with counsel, on November 22, 2021 when the caseworker admitted the mother contacted her for a meeting just four days before the appearance after relocating to be closer to the children, and the oral application to be relieved as counsel the following week on December 1, 2021 — when the mother's counsel again stated on the record that the mother had been "generally very [responsive]" but not as of late — which serves as the basis for rejecting the notion that the mother had defaulted. We additionally note that no party had moved to find the mother in default nor did Family Court hold the mother in default during this appearance (*see generally Matter of Daniel RR. v Heather RR.*, 221 AD3d 1301, 1302 n 2 [3d Dept 2023]).

Matter of Joseph GG., 227 AD3d 1238 (3rd Dept., 2024)

Appeal from an order of the Family Court of Ulster County (Anthony McGinty, J.), entered December 1, 2022, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject child to be neglected. Respondent (hereinafter the mother) and Wayne GG. (hereinafter the father)[FN1] are the parents of the subject child (born in 2008). As background, in August 2018 the child was adjudicated to be a person in need of supervision and placed on probation for failing to attend school regularly. In June 2019, it was alleged that he had violated probation, and Family Court adjourned the violation petition in contemplation of dismissal on the condition that the child attend school regularly. When the child continued not to attend school, the petition was later restored to the calendar, and the child was again placed on probation in July 2020.

Petitioner commenced this Family Ct Act article 10 proceeding alleging that the mother had neglected the child by failing to ensure the child's attendance in school and that he receive mental health counseling. Family Court issued a temporary order requiring, among other things, that the mother ensure that the child attend school or receive approved home instruction. Following a fact-finding hearing, the subject child was adjudicated as neglected. The child was later removed and placed in petitioner's care following a dispositional hearing. The mother appeals.

"To establish educational neglect, petitioner was required to prove by a preponderance of the evidence that the child['s] 'physical, mental or emotional condition has been impaired or [was] in imminent danger of becoming impaired' due to respondent['s] failure to provide [him] with an adequate education" (*Matter of Santino B. [Lisette C.]*, 93 AD3d 1086, 1087 [3d Dept 2012] [citation omitted], quoting Family Ct Act § 1012 [f] [i] [A]; *see Matter of Abel XX. [Jennifer XX.]*, 182 AD3d 632, 633-634 [3d Dept 2020]). "In determining whether respondent[ ] failed to exercise a minimum degree of care, the critical inquiry is whether a reasonable and prudent parent would have so acted, or failed to act, under the circumstances" (*Matter of Bonnie FF. [Marie VV.]*, 220 AD3d 1078, 1079-1080 [3d Dept 2023] [internal quotation marks, ellipsis and citations omitted]; *see Matter of Nina VV. [Wendy VV.]*, 216 AD3d 1215, 1216 [3d Dept 2023]). "We accord great deference to Family Court's findings and credibility determinations and we will not disturb them, unless they are unsupported by a sound and substantial basis in the record" (*Matter of Raquel ZZ. [Angel ZZ.]*, 216 AD3d 1242, 1244 [3d Dept 2023] [internal quotation marks and citations omitted]; *see Matter of Joshua R. [Kimberly R.]*, 216 AD3d 1219, 1220 [3d Dept 2023], *lv denied* 40 NY3d 905 [2023]).

School records demonstrate that the child had 61 unexcused absences during the 2018-2019 school year; 93 unexcused absences during the 2019-2020 school year; 50 unexcused absences during the [*2]2020-2021 school year; and as of March 2022, at

the time the record was created, had accumulated 60 unexcused absences during the 2021-2022 school year. The mother largely attributed the child's absences to his separation anxiety, which he had been diagnosed with at approximately five years old. Starting in September 2020, the mother underwent a six-month chemotherapy treatment and, in March 2021, a surgery to further treat her cancer diagnosis. According to the mother, this medical treatment left her unable to fight with the child to attend school. The mother testified that when she attempted to get the child to attend school, he would throw himself on the ground, lock himself in his bedroom and become aggressive. In the mother's view, neither taking away the child's access to video games or other privileges, nor providing the child with incentives to attend school was successful. Yet, the father testified that they only took away the child's privileges for short periods, and when these efforts were deemed unsuccessful, his privileges would be restored. The child was engaged in mental health counseling for short stints, however, the mother explained that this was unsuccessful because he did not like his counselor and refused to attend, and he was therefore dismissed from treatment.

A probation officer, who was assigned to the child's case in April 2021, testified that during his time working with the child the mother would provide "vague" medical reasons as to why the child could not attend school, though she failed to provide documentation to substantiate these reasons. The probation officer explained that the mother appeared to be cooperative at first by agreeing to take certain recommended actions but then failed to follow through. This included an occurrence when the mother had agreed to remove the child's video gaming system from his bedroom if he failed to attend school, yet, when the child subsequently did not attend, the mother rescinded this agreement. Notably, the probation officer detailed that the only time the child has consistently attended school was a period during which he was enrolled in a residential school as a condition of his probation. The social worker for the child's school testified that she worked with the family, conducted home visits and communicated with petitioner in an effort to get the child to attend school, all to no avail. This included offering the child an alternative school schedule from 3:30 p.m. to 5:00 p.m., as a reduced class size was thought to be better for the child's anxiety; however, he still failed to attend. The mother reported to the social worker that she had tried to get the child to attend school on this alternative schedule but he refused to get into the vehicle. The social worker explained that these truancy issues were also prevalent while classes were fully remote during the COVID-19 pandemic, indicating that the child would log into class and then log off. The social worker echoed the mother's [*3]testimony that the child was referred to counseling services, although he was dismissed for failing to attend.

The record demonstrates that in each of the preceding four school years the child has had more than 50 unexcused absences, with as many as 93 during the 2019-2020

school year; this "unrebutted evidence of excessive school absences is sufficient to establish educational neglect" (*Matter of Raquel ZZ. [Angel ZZ.]*, 216 AD3d at 1244 [internal quotation marks, brackets and citations omitted]). While not minimizing the mother's health issues resulting from her cancer diagnosis, we note that the child's school records and the testimony adduced at the fact-finding hearing demonstrate that the child's truancy was a longstanding issue that predated her cancer diagnosis and was not a result of her illness. Despite the mother's testimony that she took steps to address the child's truancy, the record demonstrates that, when presented with pushback from the child, she regularly failed to institute recommendations that she had initially agreed to. Moreover, the mother failed to secure mental health counseling for the child until ordered to do so by Family Court, despite being aware of his anxiety and the impact on his school attendance. Contrary to the mother's assertion, this has impacted the child's education detrimentally, as demonstrated by her testimony that he had failed to successfully complete the eighth grade. According deference to Family Court's factual findings and credibility determinations, we find that a sound and substantial basis exists for its determination that the mother neglected the child (*see Matter of Jaylin XX. [Jamie YY.]*, 216 AD3d 1224, 1228 [3d Dept 2023]; *Matter of Anthony FF. [Lisa GG.]*, 105 AD3d 1273, 1274 [3d Dept 2013]; *Matter of Santino B. [Lisette C.]*, 93 AD3d at 1088-1089; *Matter of Shannen AA. [Melissa BB.]*, 80 AD3d 906, 908 [3d Dept 2011], *lv denied* 16 NY3d 709 [2011]).

As to the mother's challenge to the dispositional order removing the child from her care, "[a] dispositional order in a neglect proceeding must reflect a resolution consistent with the best interests of the child after consideration of all relevant facts and circumstances, and must be supported by a sound and substantial basis in the record" (*Matter of Jaylin XX. [Jamie YY.]*, 216 AD3d at 1228 [internal quotation marks, brackets and citations omitted]; *accord Matter of Kaitlyn SS. [Antonio UU.]*, 184 AD3d 961, 966 [3d Dept 2020]). "The factors to be considered in making the determination include the parent['s] capacity to properly supervise the child[ ], based on current information and the potential threat of future neglect" (*Matter of Joshua R. [Kimberly R.]*, 216 AD3d at 1223-1224 [internal quotation marks, ellipses and citations omitted]). At the dispositional hearing, a caseworker for petitioner testified that he investigated a range of placement options but had eliminated family placement as an option because those family members proposed did not [*4]believe they could get the child to attend school. The caseworker explained that although therapeutic foster placement was an option for the child, he believed this would be unsuccessful in motivating the child to attend school. The mother conceded that since the finding of neglect the child had not attended school, and she had not completed the necessary paperwork to enroll the child in homeschooling. The mother and the father explained that they were considering private school for the child and believed this would be beneficial for him because of the small

class size. Based upon the foregoing, and deferring to Family Court's credibility determinations, we are satisfied that Family Court's finding that removal was in the child's best interests has a sound and substantial basis in the record (*see id*. at 1224; *Matter of Jamel HH. [Linda HH.]*, 155 AD3d 1379, 1380 [3d Dept 2017]; *cf. Matter of Obed O. [Veronica G.]*, 102 AD3d 575, 575 [1st Dept 2013]).**[FN2]**

ORDERED that the order is affirmed, without costs.

Footnote 1: Although named as a respondent in the initial petition and found to have neglected the child, the father passed away during the pendency of this appeal and has been removed as a party.

Footnote 2: We have been advised by the attorney for the child that the child has been successfully attending school and engaging in counseling while in his placement.

Matter of Angelina M., 224 AD3d 1223 (4th Dept., 2024)

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered September 29, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Marilyn O. neglected one of the subject children and derivatively neglected the other two subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order entered after a fact-finding hearing finding, inter alia, that she neglected her daughter and derivatively neglected her two sons. Contrary to the mother's contention, there is a sound and substantial basis in the record for Family Court's determination that the mother neglected her daughter. Pursuant to Family Court Act § 1012 (f) (i) (B), a neglected child is, as relevant here, one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the] parent . . . to exercise a minimum degree of care . . . by unreasonably inflicting or allowing to be inflicted harm." In determining whether a parent exercised a minimum degree of care, the court must consider what "a reasonable and prudent parent [would have done] . . . under the circumstances then and there existing" (*Nicholson v Scoppetta*, 3 NY3d 357, 370 [2004]; *see Matter of Cameron J.S. [Elizabeth F.]*, 214 AD3d 1355, 1356-1357 [4th Dept 2023], *lv denied* 39 NY3d 915 [2023]). The evidence at the fact-finding hearing established that the daughter told the mother about incidents of sexual abuse by the daughter's uncle and grandfather and the mother neglected to exercise the minimum degree of care by failing

to take sufficient action in order to avoid actual physical, mental and emotional impairment to her daughter (*see Matter of Telsa Z. [Denise Z.]*, 81 AD3d 1130, 1133 [3d Dept 2011]; *see also Matter of Crystiana M. [Crystal M.-Pamela J.]*, 129 AD3d 1536, 1537 [4th Dept 2015]; *see generally Nicholson*, 3 NY3d at 370).

Contrary to the mother's further contention, the court properly drew a negative inference against her based on her failure to testify at the fact-finding hearing (*see Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1678 [4th Dept 2021]; *Matter of Rashawn J. [Veronica H.-B.]*, 159 AD3d 1436, 1437 [4th Dept 2018]).

We also conclude that the finding of derivative neglect with respect to the mother's two sons has a sound and substantial basis in the record inasmuch as "the evidence with respect to the child found to be . . . neglected demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [the mother's] care" (*Matter of Sean P. [Sean P.]*, 162 AD3d 1520, 1520 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018] [internal quotation marks omitted]; *see also Matter of Balle S. [Tristian S.]*, 194 AD3d 1394, 1396 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021]).

The mother contends that the Attorney for the Child (AFC) for the daughter and the AFC for her sons improperly advocated a position that was contrary to the children's express wishes. The mother's contention is not preserved for our review because she made no motion to remove the AFCs (*see Matter of Muriel v Muriel*, 179 AD3d 1529, 1530 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]; *Matter of Edmonds v Lewis*, 175 AD3d 1040, 1041 [4th Dept 2019], *lv denied* 34 NY3d 909 [2020]; *Matter of Daniel K. [Roger K.]*, 166 AD3d 1560, 1561 [4th Dept 2018], *lv denied* 32 NY3d 919 [2019]).

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

Matter of Adam B.-L., 224 AD3d 1272 (4th Dept., 2024)

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 28, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, found that respondent had abused the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent appeals from an order of fact-finding and disposition that, among other things, determined that he abused the subject child. We affirm.

Respondent, who was the boyfriend of the child's mother, contends that petitioner failed to establish that he was a person legally responsible for the child within the meaning of the Family Court Act. We reject that contention. Pursuant to Family Court Act § 1012 (g), a " '[p]erson legally responsible' includes the child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time." "The term includes the partner of a parent where that partner participates in the family setting on a regular basis and therefore shares responsibility for supervising the child[ ]" (*Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]). Here, we conclude that Family Court properly determined that respondent acted as "the functional equivalent of a parent in a familial or household setting" for the child (*id.* at 1623 [internal quotation marks omitted]; *see Matter of Kevin N. [Richard D.]*, 113 AD3d 524, 524 [1st Dept 2014]). Contrary to respondent's contention, the court, in reaching its determination, was entitled to draw the strongest possible inference against respondent in light of his failure to testify (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]).

We reject respondent's further contention that petitioner failed to establish that he abused the subject child. Petitioner established a prima facie case against respondent by demonstrating that respondent, the child's mother, and the child's grandmother all "shared responsibility for [the child's] care" during the time period in which the child's injuries were sustained and, thus, the "presumption of culpability extends" to him (*Matter of Grayson R.V. [Jessica D.]* [appeal No. 2], 200 AD3d 1646, 1649 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022] [internal quotation marks omitted]). In response, respondent failed to offer any explanation for the child's injuries or to otherwise rebut the presumption of culpability (*see id.*).

Matter of Justice H.M., 225 AD3d 1298 (4th Dept., 2024)

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered February 16, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, placed respondent and the subject children under the supervision of petitioner.
It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of disposition that, although now expired, brings up for review the underlying fact-finding order wherein Family Court found that the mother neglected the subject children (*see Matter of Bentley C. [Zachary D.]*, 165 AD3d 1629, 1629 [4th Dept 2018]; *Matter of Syira W. [Latasha B.]*, 78 AD3d 1552, 1552 [4th Dept

2010]; *Matter of Jimmy D.*, 302 AD2d 892, 892 [4th Dept 2003], *lv denied* 100 NY2d 503 [2003]). We agree with the mother that the court's finding of neglect is not supported by the requisite preponderance of the evidence (*see generally* Family Ct Act § 1046 [b] [i]).

As relevant here, the Family Court Act defines a neglected child as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent . . . to exercise a minimum degree of care . . . in supplying the child with adequate food, clothing, [or] shelter . . . though financially able to do so or offered financial or other reasonable means to do so" (Family Ct Act § 1012 [f] [i] [A]). The statute also provides that a parent is responsible for educational neglect when, under the same requisite conditions, the parent fails to supply the child with "adequate . . . education in accordance with the provisions of [the compulsory education part of Education Law article 65] . . . notwithstanding the efforts of the school district or local educational agency and child protective agency to ameliorate such alleged failure prior to the filing of the petition" (*id.*; *see Matter of Matthew B.*, 24 AD3d 1183, 1183 [4th Dept 2005]).

"The statute thus imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence" (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011]; *see* Family Ct Act § 1046 [b] [i]). "First, there must be 'proof of actual (or imminent danger of) physical, emotional or mental impairment to the child' " (*Afton C.*, 17 NY3d at 9, quoting *Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]). "In order for danger to be 'imminent,' it must be 'near or impending, not merely possible' " (*id.*, quoting *Nicholson*, 3 NY3d at 369). "This prerequisite to a finding of neglect ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior" (*Nicholson*, 3 NY3d at 369). "Second, any [*2]impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care . . . This is an objective test that asks whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances . . . Critically, however, the statutory test is *minimum* degree of care—not maximum, not best, not ideal—and the failure must be actual, not threatened" (*Afton C.*, 17 NY3d at 9 [internal quotation marks omitted]).

As a preliminary matter, the Attorney for the Children (AFC) asserts on appeal that we may consider allegations drawn from the petition and evidence adduced at the dispositional hearing in determining whether petitioner established by a preponderance of the evidence that the mother neglected the children**.** That assertion is devoid of merit. "[O]nly competent, material and relevant evidence may be admitted" at a fact-finding hearing to determine whether a child is an abused or neglected child as defined by Family Court Act article 10 (§ 1046 [b] [iii]; *see* § 1044; *Matter of Nicholas J.R. [Jamie*

L.R.], 83 AD3d 1490, 1491 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]), and "only the evidence presented at the fact-finding hearing" may be considered by the courts in determining whether the petitioner established by a preponderance of the evidence that the child is an abused or neglected child (*Matter of Sheila G.*, 61 NY2d 368, 386-387 [1984]; *see* §§ 1046 [b] [i]; 1047 [a]).

Upon consideration of the evidence presented at the fact-finding hearing, we agree with the mother that petitioner failed to establish that the mother neglected the children. Although there was evidence of some unsanitary conditions in the mother's apartment, petitioner's caseworker testified that the apartment "met minimal standards" when she personally observed it and when the petition was filed, and we therefore conclude that the evidence was not sufficient to establish that the mother neglected the children by failing to supply adequate shelter (*see* Family Ct Act § 1012 [f] [i] [A]; *Matter of Silas W. [Natasha W.]*, 207 AD3d 1234, 1235 [4th Dept 2022]; *cf. Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1280 [4th Dept 2014]).

Next, to the extent that petitioner alleged and the court found that the mother committed educational neglect with respect to the older child, we agree with the mother that, contrary to the assertions of petitioner and the AFC, the court's determination lacks a sound and substantial basis in the record. It is undisputed that the older child had not attained the age of six by December 1 of the year in which the educational neglect was alleged to have taken place, and thus his attendance at school was not mandated by article 65 of the Education Law (*see* §§ 3205 [1] [a], [c]; 3212 [2] [b]; *Matthew B.*, 24 AD3d at 1183). Inasmuch as "article 65 did not require [the older child's] attendance at school, [the mother] had no duty to supply [the older child] with adequate education within the meaning of Family Court Act § 1012 (f) (i) (A)" (*Matthew B.*, 24 AD3d at 1183-1184).

We further agree with the mother that petitioner failed to meet its burden of establishing by a preponderance of the evidence that the mother neglected the children with respect to their hygiene and clothing. The testimony of petitioner's witnesses demonstrated, at most, that "the manner in which [the children] dressed and attended to hygiene [was] less than optimal, but it did not appear that those conditions resulted in any actual [or imminent] physical, emotional, or mental impairment to the children" (*Matter of Christian J.S. [Jodi A.F.]*, 132 AD3d 1355, 1357 [4th Dept 2015]; *see Matter of Jalesa P. [Georgia P.]*, 75 AD3d 730, 733 [3d Dept 2010]).

With respect to the mother's purported mental health condition, although "a finding of neglect based on mental illness need not be supported by a particular diagnosis or by medical evidence" (*Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1404 [4th Dept 2016]), " '[p]roof of mental illness alone will not support a finding of neglect . . . The evidence must establish a causal connection between the parent's condition, and actual

or potential harm to the child[ren]' " (*Matter of Jesus M. [Jamie M.]*, 118 AD3d 1436, 1437 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]). Here, petitioner did not present any diagnostic or medical evidence at the fact-finding hearing and instead relied entirely on the mother's purported paranoid and disoriented behavior and rambling conversational style to establish that the mother suffered from mental illness. Even assuming, arguendo, that petitioner established that the mother suffered from an untreated mental health condition on those bases (*see e.g. Thomas B.*, 139 AD3d at 1403-1404), we conclude that petitioner failed to establish by the requisite preponderance of the evidence a causal connection between the mother's mental health condition and any actual or imminent harm to the children (*see Jesus M.*, 118 AD3d at 1437; *see also Matter of Lacey-Sophia T.-R. [Ariela (T.)W.]*, 125 AD3d 1442, 1445 [4th Dept 2015]).

Matter of Landen S. (April S.), 227 AD3d 1465 (4th Dept., 2024)

Appeal from an order of the Family Court, Yates County (Stacey Romeo, A.J.), entered March 2, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, placed respondent Timothy S. under the supervision of petitioner.
It is hereby ORDERED that said appeal from the order insofar as it concerns the disposition is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this proceeding brought pursuant to Family Court Act article 10, respondent father appeals from an order of disposition that, inter alia, placed him under the supervision of petitioner for a period of 12 months following an adjudication that he neglected the subject children. As an initial matter, we dismiss the appeal insofar as it concerns the disposition inasmuch as the father consented thereto (*see* CPLR 5511; *Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1676 [4th Dept 2021]; *Matter of Kendall N. [Angela M.]*, 188 AD3d 1688, 1688 [4th Dept 2020], *lv denied* 36 NY3d 908 [2021]). The appeal, however, brings up for review the order of fact-finding determining that he neglected the children (*see Noah C.*, 192 AD3d at 1676; *Matter of Anthony L. [Lisa P.]*, 144 AD3d 1690, 1691 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]; *Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]).

Contrary to the father's contention, Family Court did not err in determining that petitioner established that the father neglected the children. To establish neglect, petitioner was required to show, by a preponderance of the evidence, " 'first, that [the] child[ren]'s physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child[ren] is a consequence of the failure of the parent or caretaker to exercise a minimum degree of

care in providing the child[ren] with proper supervision or guardianship' " (*Matter of Jayla A. [Chelsea K.-Isaac C.]*, 151 AD3d 1791, 1792 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act § 1012 [f] [i]). The court's "findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter of Jeromy J. [Latanya J.]*, 122 AD3d 1398, 1398-1399 [4th Dept 2014], *lv denied* 25 NY3d 901 [2015] [internal quotation marks omitted]).

Here, the record establishes that the father left the subject children at the mother's home and in her long-term care, despite the fact that it was in violation of the order of protection that the father had previously sought and obtained. The record further established that the father failed to assist the mother with the children's mental health issues and multiple absences from school. We therefore conclude that " 'there is a sound and substantial basis to support [the [*2]court's] finding that the child[ren were] in imminent danger of impairment as a result of [the father's] failure to exercise a minimum degree of care' " (*Matter of Claudina E.P. [Stephanie M.]*, 91 AD3d 1324, 1324 [4th Dept 2012]; *see generally Nicholson*, 3 NY3d at 368-370).

Parental Mental Health

Matter of C.B., III, 225 AD3d 415 (1st Dept., 2024)

Order of disposition, Family Court, Bronx County (Ashley B. Black, J.), entered on or about April 20, 2023, to the extent it brings up for a review a fact-finding order, same court and Judge, entered on or about January 5, 2023, which, after a hearing, found that respondent mother neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]), which shows that the mother's untreated mental illness placed the child's physical, mental, and emotional condition at imminent risk of becoming impaired (*see Matter of Michael P. [Orthensia H.]*, 137 AD3d 499, 500 [1st Dept 2016]; *Matter of Immanuel C.-S. [Debra C.]*, 104 AD3d 615 [1st Dept 2013]). Petitioner agency's caseworker testified that the mother appeared to be erratic and having auditory hallucinations when he spoke to her, as she kept stating "that the police radio was saying that the child was being sexually abused," which never happened. Furthermore, the agency's case notes in evidence reflected that the mother told a caseworker that she had spoken to doctors regarding her thoughts but was no longer speaking to

doctors and that the mother's unfounded fears that the child was being sexually abused by his father caused her to take the child to the hospital where he received an unnecessary examination and the child later was subjected to a forensic interview with a detective and caseworkers regarding her allegations (*see Matter of Leilani D. [Linsford D.]*, 190 AD3d 478 [1st Dept 2021]). The mother's out-of-court statements as testified to by the caseworker and in the case notes in evidence were admissible as a party admission (*see Matter of Maxwell P. [Katherine S.]*, 196 AD3d 416, 417 [1st Dept 2021]).

Although the mother testified at the fact-finding hearing, she did not deny that she told caseworkers, as reflected in the case notes, that she took the child to the hospital where he was medically examined because she believed the father sexually abused him. She also did not refute the caseworker's testimony concerning her apparent auditory hallucinations or that she told him and others that the child was being sexually abused by the father, which caused petitioner to have the child interviewed about those allegations the next day.

Contrary to the mother's contention, her making repeated unfounded allegations that the father was sexually abusing the child presented an imminent danger of emotional or mental impairment to the child and did not meet the minimum degree of care required of a reasonable and prudent parent (*see Matter of Ava M. [Michelle E.-M.]*, 127 AD3d 975, 975 [2d Dept 2015]; *Matter of Salvatore M. [Nicole M.]*, 104 AD3d 769, 769 [2d Dept 2013], *lv denied* 21 NY3d 858 [2013]). Petitioner was not obligated to prove that the child suffered past or present [*2]harm, because the evidence demonstrated that he was at risk of harm based on demonstrable conduct by the mother (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79-80 [1995]). The absence of evidence that the mother had a diagnosed condition does not preclude a finding of neglect (*see Matter of Zariyasta S.*, 158 AD2d 45, 48 [1st Dept 1990]). Family Court was in the best position to observe the witnesses and assess their demeanor. Thus, there is no basis to disturb its credibility determinations (*see Matter of Mariah B. [Nigel M.]*, 178 AD3d 622, 623 [1st Dept 2019]).

Matter of N.R., 227 AD3d 596 AD3d 2024 NY Slip Op 02896 (1st Dept., 2024)

Order of fact-finding and disposition (one paper), Family Court, Bronx County (E. Grace Park, J.), entered on or about June 26, 2023, which, to the extent appealed from as limited by the briefs, after fact-finding and dispositional hearings, found that respondent mother had neglected the subject children, unanimously affirmed, without costs.

The credible evidence supports the determination that the mother placed the children at imminent risk of impairment of their physical, mental, or emotional health (*see Nicholson v Scoppetta*, 3 NY3d 357, 368-369 [2004]; Family Ct Act §§ 1012, 1046). The mother's unspecified, untreated mental illness manifested in her belief that the very young children were being inappropriately touched/sexually abused by strangers, subjecting them to evaluations and examinations by medical professionals, child protective services, and police officers (*see Matter of N.A.S. [V.H.]*, 217 AD3d 485, 486 [1st Dept 2023]; *Matter of Lanelis V. [Daisy C.]*, 102 AD3d 441, 441-442 [1st Dept 2013]). There is no reason to disturb the court's credibility findings, which are entitled to deference (*see Matter of Irene O.*, 38 NY2d 776, 778 [1975]; *Matter of Moises G. [Luis G.]*, 135 AD3d 527, 527-528 [1st Dept 2016]).

The mother's contention that the court abused its discretion in conforming the pleading to the proofs is improperly raised for the first time in her reply brief (*see Erdey v City of New York*, 129 AD3d 546, 546-47 [1st Dept 2015]). In any event, the mother had a full and fair opportunity to address allegations concerning unsubstantiated accusations of sexual abuse of one or both of the children in 2020 that she, herself, testified to at both the Family Court Act § 1028 and fact-finding hearings (*see Matter of Oksoon K. v Young K.*, 115 AD3d 486, 487 [1st Dept 2014*], lv denied* 24 NY3d 902 [2014]).

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

Parental Substance Abuse

Matter of Ethan M., 223 AD3d 471 (1st Dept., 2024)

Order of disposition, Family Court, Bronx County (E. Grace Park, J.), entered on or about October 21, 2022, to the extent it brings up for review an amended fact-finding order, same court and Judge, entered on or about December 5, 2022, which found that respondent father neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

A preponderance of the evidence supports Family Court's finding of neglect based on the father's misuse of drugs (Family Ct Act § 1012[f][i][B]). The caseworker's uncontroverted and credible testimony established that the father admitted that he had "relapsed," and the child reported that the father used drugs, left "dirty needles" in various rooms around the house, and had asked the child for "clean" urine. The child further stated that the father's "strange" behavior was occurring more frequently (*see Matter of Maranda LaP. v Francesca LaP.*, 23 AD3d 221, 222 [1st Dept 2005]). When

the caseworker sought more information from the child during her investigation, the father became volatile and asked the caseworker to leave the house.
Contrary to the father's argument, the child's statements were sufficiently corroborated by his own admission that he had relapsed (*see Matter of C.L. [Edward L.]*, 214 AD3d 481, 482 [1st Dept 2023]), as well as by the caseworker's observations (*see Matter of Cerenity F. [Jennifer W.]*, 160 AD3d 540, 541 [1st Dept 2018]). The child's statements were sufficiently detailed and there is no reason to disturb the court's credibility findings which are entitled to deference (*see Matter of Harrhae Y. [Shy-Macca Ernestine B.]*, 112 AD3d 512, 513 [1st Dept 2013]). The court properly drew a negative inference from the father's failure to testify (*see Matter of Adonis H. [Enerfry H.]*, 198 AD3d 478, 479 [1st Dept 2021]). Under these circumstances, there is a statutory presumption of neglect, which the father failed to refute, as he presented no evidence that he was participating in a rehabilitative program (*see Matter of Sahairah J. [Rosemarie R.]* 135 AD3d 452 [1st Dept 2016]).

The father's contention that he is entitled to a missing witness inference is unpreserved and unavailing (*see Matter of Kayvon B.*, 85 AD3d 452 [1st Dept 2011]). The father's argument that he was denied effective assistance of counsel is likewise unpreserved (*see Matter of Iyana W. [Shamark W.]*, 124 AD3d 418 [1st Dept 2015]) and unavailing (*see Matter of Frederick T. [Maria T.]*, 191 AD3d 489, 490 [1st Dept 2021]).

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

Matter of Timothy K., 225 AD3d 700 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the father appeals from (1) a decision of the Family Court, Suffolk County (Frank A. Tantone, J.), dated July 22, 2021, and (2) an order of fact-finding and disposition of the same court dated September 6, 2022. The order of fact-finding and disposition, after fact-finding and dispositional hearings, and upon the decision, found that the father neglected the subject children, placed the father under the supervision of the Suffolk County Department of Social Services for a period of one year, and released the children to the nonrespondent mother subject to the supervision of the Suffolk County Department of Social Services for a period of one year.
ORDERED that the appeal from the decision is dismissed, without costs or disbursements; and it is further,

ORDERED that the appeal from so much of the order of fact-finding and disposition as placed the father under the supervision of the Suffolk County Department of Social Services for a period of one year and released the children to the nonrespondent mother subject to the supervision of the Suffolk County Department of Social Services

for a period of one year, is dismissed as academic, without costs or disbursements; and it is further,

ORDERED that the order of fact-finding and disposition is affirmed insofar as [*2]reviewed, without costs or disbursements.

The petitioner, Suffolk County Department of Social Services, Child Protective Services, commenced these related proceedings pursuant to Family Court Act article 10, alleging that the father neglected the subject children by misusing drugs. Following a fact-finding hearing, the Family Court found that the father neglected the children by repeatedly misusing heroin. After a dispositional hearing, the court issued an order of fact-finding and disposition dated September 6, 2022, which, inter alia, released the children to the custody of the nonrespondent mother subject to the petitioner's supervision for a period of one year and placed the father under the petitioner's supervision for a period of one year. The father appeals.

The appeal from the decision is dismissed, as no appeal lies from a decision (*see Schicchi v J.A. Green Constr. Corp.*, 100 AD2d 509). Furthermore, the father's appeal from so much of the order of fact-finding and disposition as placed the father under the petitioner's supervision and released the children to the nonrespondent mother under the petitioner's supervision for a period of one year is dismissed as academic, as those provisions of the order have expired by their own terms (*see Matter of Kailey Z. [Nancy Z.]*, 185 AD3d 832, 833).

However, since the adjudication of neglect constitutes a permanent and significant stigma that might indirectly affect the father's status in future proceedings, the appeal from so much of the order of fact-finding and disposition as brings up for review the finding of neglect is not academic (*see Matter of Ava A. [Steven A.]*, 179 AD3d 666, 667).

"Family Ct Act § 1033-b(1)(b) requires the court, at an initial appearance based on a petition filed pursuant to Family Ct Act article 10, to, among other things, advise respondent of the allegations in the petition" (*Matter of Shawndalaya II.*, 31 AD3d 823, 825). Contrary to the father's contentions, although the Family Court failed to strictly follow the procedural requirements set forth in Family Court Act § 1033-b, reversal is not warranted under the particular circumstances of this case. There is no indication that the father, who was aided by counsel, was not fully aware of the contents of the petition at the time of his first appearance, as evinced by the father's representation that he had contacted a number of programs recommended by the petitioner and the representation by the father's attorney that he and the father would continue to discuss a resolution of the petition (*see id.* at 825).

"At a fact-finding hearing in a neglect proceeding pursuant to Family Court [Act] article 10, the petitioner has the burden of proving by a preponderance of the evidence that the subject child was neglected" (*Matter of Kailey Z. [Nancy Z.]*, 185 AD3d 832, 833-834). "Family Court Act § 1012(f)(i)(B) defines a neglected child, inter alia, as one whose 'physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired' because a parent fails 'to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, . . . [or] by misusing a drug or drugs'" (*Matter of Camila G.C. [Matthew C.]*, 211 AD3d 934, 935). "Additionally, pursuant to Family Court Act § 1046(a)(iii), 'proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of . . . such person is a neglected child except that such drug or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program'" (*Matter of Jesse W. [Jesse W.]*, 189 AD3d 848, 849).

Here, contrary to the father's contention, the Family Court's finding of neglect was supported by a preponderance of the evidence. The evidence of the father's repeated misuse of heroin, as adduced at the fact-finding hearing, established a prima facie case of neglect pursuant to Family Court Act § 1046(a)(iii). Therefore, neither actual impairment of the children's physical, mental, or emotional condition, nor a specific risk of impairment, needed to be established (*see* [*3](*Matter of Mia S. [Michelle C.]*, 212 AD3d 17, 19). The father failed to rebut this showing.

Accordingly, the Family Court properly found that the father neglected the children.

Matter of Andrew M., 225 AD3d 764 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the petitioner appeals from an order of fact-finding of the Family Court, Kings County (Melody Glover, J.), dated April 25, 2023. The order of fact-finding, upon the mother's failure to appear at a fact-finding hearing and after an inquest, and upon a finding that the petitioner failed to establish that the mother neglected the subject child, in effect, dismissed the amended petition. ORDERED that the order of fact-finding is reversed, on the law and the facts, without costs or disbursements, the amended petition is reinstated, a finding is made that the mother neglected the subject child, and the matter is remitted to the Family Court, Kings County, for a dispositional hearing and a determination thereafter.

In November 2021, the petitioner commenced this proceeding pursuant to Family Court Act article 10, alleging, inter alia, that the mother neglected the subject child, who was born in 2017. In an order dated November 16, 2021, entered upon consent, the Family Court released the child to the mother's custody upon certain conditions (hereinafter the conditional order). In June 2022, the petitioner made an application to remove the child from the mother's custody, alleging, among other things, that she was not in compliance with the conditional order. In an order dated June 6, 2022, after a hearing, the court granted the petitioner's application, and the child was removed from the mother's custody. Thereafter, the petitioner filed an amended petition alleging, inter alia, that the mother had failed to comply with the terms of the conditional order. In an order dated April 25, 2023, upon the mother's failure to appear at a fact-finding hearing, the court found that the petitioner failed to establish that the mother neglected the child and, in effect, dismissed the amended petition. The petitioner appeals. We reverse.

In a child neglect proceeding pursuant to Family Court Act article 10, the petitioner must establish by a preponderance of the evidence that the subject child is neglected (*see id.* § 1046[b][i]; *Matter of Kailey Z. [Nancy Z.]*, 185 AD3d 832, 833-834). A neglected child is one, inter alia, "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree [*2]of care . . . in providing the child with proper supervision or guardianship . . . by misusing a drug or drugs" (Family Ct Act § 1012[f][i][B]). Additionally, pursuant to Family Court Act § 1046(a)(iii), "proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of . . . such person is a neglected child." "In cases where this presumption of neglect is triggered, the petitioner is not required to establish that the child suffered actual harm or was at imminent risk of harm" (*Matter of Kailey Z. [Nancy Z.]*, 185 AD3d at 834).

Here, contrary to the Family Court's determination, the petitioner established by a preponderance of the evidence that the mother neglected the child. The evidence demonstrated that the mother, who previously had been found to have neglected two of her older children, violated the conditional order that required her, inter alia, to submit to random drug screenings and comply with drug treatment services if she tested positive for drug use, not leave the child home alone, and not leave the child with anyone who previously was not cleared by the petitioner. After the issuance of the conditional order, the mother tested positive for cocaine twice between January and April 2022 and admitted that she would have tested positive a third time if she had submitted to a test, she did not provide the caseworkers with evidence that she engaged in a drug

treatment program, and she failed to submit to multiple scheduled random drug screenings. In June 2022, the child was removed from the mother's care after, among other things, the child was left with a neighbor for an extended period of time with no information as to when the mother would return. This evidence, together with a negative inference drawn from the mother's failure to testify, established a prima facie case of neglect pursuant to Family Court Act § 1046(a)(iii), which the mother failed to rebut (*see Matter of Jesse W. [Jesse W.]*, 189 AD3d 848, 850; *Matter of Rylee K. [Robert K.]*, 186 AD3d 1689, 1690).

In light of our determination, we need not address the parties' remaining contentions.

Matter of Winter II., 227 AD3d 1142 (3rd Dept., 2024)

Appeals (1) from two orders of the Family Court of Schenectady County (Kevin A. Burke, J.), entered August 1, 2022 and October 11, 2022, which granted petitioner's application, in proceeding No. 1 pursuant to Family Ct Act article 10, to adjudicate the subject child to be neglected, and (2) from an order of said court, entered October 11, 2022, which, in proceeding No. 2 pursuant to Family Ct Act articles 10 and 10-A, modified the permanency plan of the subject child.
Respondent (hereinafter the mother) is the mother of the subject child (born in 2021), who tested positive for opioids upon her birth while the mother tested positive for opioids, cocaine and marihuana. On August 11, 2021, Family Court granted petitioner's prepetition application for removal of the child (*see* Family Ct Act § 1027) and, upon the mother's consent, placed the child in the temporary care of the paternal grandparents, who were also caring for the mother's four older children. Two days later, petitioner filed a neglect petition alleging that the child's "physical, mental or emotional condition ha[d] been impaired or [wa]s in imminent danger" of so becoming due to the mother's history of drug abuse. The petition revealed that the mother had acknowledged using cocaine and marihuana on a weekly basis during her pregnancy with the subject child and that her four other children had also been removed from her care due to indicated reports. Although the mother was present in court for appearances on August 10 and August 25, 2021, she subsequently stopped attending any of the scheduled appearances. Her assigned counsel, however, appeared on her behalf. Following a virtual fact-finding hearing on March 30 and April 11, 2022, Family Court issued an order on August 1, 2022, granting the neglect petition. Following a permanency hearing, Family Court issued an order in October 2022 changing the permanency goal from return to parent to permanent placement with the paternal grandparents. The mother appeals from these orders.

Petitioner contends that the mother was in default on the neglect petition for having failed to attend three consecutive pretrial appearances and the entire fact-finding

hearing. As such, petitioner maintains that the mother's appeal from the August 2022 order should be dismissed because no appeal lies from an order entered on default (*see* CPLR 5511; *Matter of Corey MM. [Cassandra LL.]*, 177 AD3d 1119, 1120 [3d Dept 2019]). Petitioner's argument is understandable, particularly considering that the mother's own counsel was unsuccessful in her efforts to communicate with the mother after August 2021. Nonetheless, the mother did attend the first two appearances in August 2021. While consenting to the temporary removal of the child, the mother communicated to her attorney that she opposed the petition. The record shows that the mother's counsel diligently participated on her behalf during the fact-finding hearing. Counsel requested an adjournment at the commencement of the [*2]hearing, but Family Court determined — reasonably, in our view — "to proceed with trial." The mother's attorney cross-examined petitioner's witness, engaged in voir dire of the evidence, lodged objections and made a closing argument. Family Court did not declare the mother to be in default but issued its neglect finding on the evidence presented (*see Matter of Dakota W. [Kimberly X.]*, 189 AD3d 2004, 2004 n 2 [3d Dept 2020], *lv denied* 36 NY3d 911 [2021]; *compare Matter of Corey MM. [Cassandra LL.]*, 177 AD3d at 1120; *Matter of Adele T. [Kassandra T.]*, 143 AD3d 1202, 1204 [3d Dept 2016]). Given these circumstances, we conclude that the order was not entered on default and that the mother's appeal is properly before us (*see Matter of Richard TT. [Kara VV.]*, 223 AD3d 1070, 1072 n 3 [3d Dept 2024]; *Matter of Elaysia GG. [Amber HH.]*, 221 AD3d 1338, 1338-1339 [3d Dept 2023]; *Matter of Amanda I. v Michael I.*, 185 AD3d 1252, 1253-1254 [3d Dept 2020]).

Turning to the merits, we discern no basis upon which to disturb the neglect finding against the mother. Petitioner bore the burden on its neglect petition to establish, by a preponderance of the evidence, that the child's " 'physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care' due to, among other things, 'misusing a drug or drugs' " (*Matter of Rosaliee HH. [Samantha HH.]*, 221 AD3d 1299, 1300 [3d Dept 2023] [internal quotation marks omitted], quoting Family Ct Act § 1012 [f] [i] [B]). Pertinent here, "a newborn's positive toxicology, in conjunction with evidence that links such toxicology to the newborn's impairment or imminent risk of impairment, suffices to establish a finding of neglect against the mother" (*Matter of Leo RR. [Joshua RR.]*, 213 AD3d 1190, 1191 [3d Dept 2023]; *see Matter of John QQ.*, 19 AD3d 754, 756 [3d Dept 2005]). "We accord great deference to Family Court's findings and credibility determinations and we will not disturb them, unless they are unsupported by a sound and substantial basis in the record" (*Matter of Kaleb LL. [Bradley MM.]*, 218 AD3d 846, 848 [3d Dept 2023] [internal quotation marks and citations omitted]).

During the hearing, Jessica Santiago, a caseworker with Schenectady County Child Protective Services, testified that she received a hotline report on August 8, 2021 alleging that the subject child had tested positive for opioids upon her birth, with the mother testing positive for opioids, cocaine and marihuana following the delivery. The child was transferred to the neonatal intensive care unit of a local hospital due to respiratory distress but was not exhibiting any withdrawal symptoms. During an interview with Santiago the next day, the mother acknowledged that she had used cocaine four days before the subject child's birth, revealing that she had used both cocaine and marihuana on a weekly basis throughout her pregnancy. She denied [*3]using opioids. Santiago testified that the mother had been the subject of six prior indicated reports pertaining to her other four children, one of whom had also been removed from her care due to drug use during pregnancy. Although the mother had agreed to participate in inpatient substance abuse treatment after the removal of that child, according to Santiago, she only attended a program for a few days before leaving against medical advice. As for whether the mother had engaged in substance abuse treatment during her pregnancy with the subject child, the mother had "not made [Santiago] aware of" that fact, but she did sign a release for outpatient substance abuse treatment as of their initial meeting on the underlying neglect petition.

On this record, there is a sound and substantial basis to support the neglect finding. While proof of a positive toxicology report for a controlled substance does not, by itself, establish that a child has been "physically, mentally, or emotionally impaired, or is in imminent danger of being impaired," the surrounding circumstances establish that the child was at imminent risk of harm (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]). The mother's use of drugs during her pregnancy, despite the prior removal of another child under similar circumstances, evinced a lack of understanding about the significance of her conduct. Her failure to take this issue seriously is further demonstrated by her refusal to acknowledge using opioids during the subject pregnancy despite medical evidence to the contrary. This proof, coupled with the mother's failure to meaningfully engage in substance abuse treatment, provides a sufficient basis to conclude that the subject child was at imminent risk of harm due to the mother's failure to exercise a minimum degree of care (*see id.*; *Matter of John QQ.*, 19 AD3d at 756). Having failed to object at the hearing, the mother's present argument that Family Court improperly considered postpetition evidence at the hearing has not been preserved for our consideration (*see Matter of Darren HH. [Amber HH.]*, 68 AD3d 1197, 1198 [3d Dept 2009], *lv denied* 14 NY3d 703 [2010]).

The mother's challenge to the October 2022 permanency order is also unavailing. As a threshold matter, we reject petitioner's argument that the mother's appeal from this order has been rendered moot by subsequent permanency planning orders. Since the October 2022 order modified the permanency goal from reunification with parent to

permanent placement with the paternal grandparents, and the subsequent permanency orders merely continued this goal, the mother's appeal is not moot (*see Matter of Tyler I. [Shawn I.]*, 219 AD3d 1097, 1098 [3d Dept 2023]; *Matter of Jaylynn WW. [Justin WW.-Roxanne WW.]*, 202 AD3d 1394, 1396 [3d Dept 2022], *lv denied* 38 NY3d 907 [2022]).[FN1] Turning to the merits, " '[a]t the conclusion of a permanency hearing, Family Court has the authority to modify an existing permanency goal [*4]and must enter a disposition based upon the proof adduced and in accordance with the best interests of the children' " (*Matter of Jaylynn WW. [Justin WW.-Roxanne WW.]*, 202 AD3d at 1396, quoting *Matter of Dakota F. [Angela H.]*, 180 AD3d 1149, 1151 [3d Dept 2020]; *see* Family Ct Act § 1089 [d]). By the time of the August 15, 2022 permanency hearing, the subject child had been in the care of the paternal grandparents since her birth approximately 14 months prior. Her older siblings were also residing in this household and, according to the permanency planning report, the subject child was "thriving in her placement." The evidence further revealed that petitioner had lost contact with the mother, who had also failed to attend any of the scheduled visits with the subject child. In these circumstances, Family Court's determination that a modification of the permanency goal from reunification with parent to permanent placement with the paternal grandparents was in the child's best interests is supported by a sound and substantial basis in the record.

Egan Jr., J.P., Aarons, Pritzker and Fisher, JJ., concur.

ORDERED that the orders are affirmed, without costs.

Footnote 1: Petitioner's contention that the mother did not appeal from the October 2022 order is incorrect.

Domestic Violence

Matter of Amelia A., 223 AD3d 401 (1st Dept, 2024)

Order of disposition, Family Court, New York County (Maria Arias, J.), entered on or about January 25, 2023, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about February 17, 2023, which, after a hearing, determined that respondent father neglected the subject child, unanimously affirmed, without costs.

The finding that the father neglected the child by assaulting the mother while the child was in the home was supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). The father assaulted the mother while she was sleeping on

the couch in their living room, causing serious injuries that required the mother to seek emergency treatment at a hospital, which led to the father's arrest. The infant child was sleeping in the bedroom and, according to the parents' testimony, did not wake up until police arrived. Although the finding of neglect was based on a single incident, "a single instance of domestic violence may be a proper basis for a finding of neglect" (*Matter of Esther N.*, *[Onyebuchi N.]* 206 AD3d 564, 564 [1st Dept 2022]). Here, it is undisputed that the physical altercation lasted approximately 7-12 minutes. The severity of the mother's injuries, including a broken nose, caused her to fear for her life and flee the home to seek help. This prolonged violence demonstrated that the father's judgment was strongly impaired, and the child was exposed to a risk of substantial harm (*see Matter of Allyerra E. [Alando E.]*, 132 AD3d 472, 473 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]). Further, imminent danger of physical harm to a child who is in proximity to violence directed at a parent can be inferred even in the absence of evidence that the child was "aware of the incident or emotionally affected by it" (*Matter of Esther N.*, 206 AD3d at 565; *Matter of Athena M.[Manuel M.T.]*, 190 AD3d 644, 644 [1st Dept 2021]; *Matter of O'Ryan Elizah H. [Kairo E.]*, 171 AD3d 429, 429 [1st Dept 2019]). Accordingly, Family Court correctly found that the father neglected the infant.

Matter of E.F., 225 AD3d 540 (1st Dept., 2024)

Order of disposition, Family Court, Bronx County (Karen M.C. Cortes, J.), entered on or about May 5, 2023, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about April 18, 2023, which found that respondent father neglected the subject children, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The neglect finding is supported by a preponderance of evidence that the father's actions posed an imminent danger to the children's emotional and physical well-being (*see* Family Ct Act §§ 1012[f][i][B], 1046[b][i]). The record shows that on three occasions in 2020, the father committed acts of domestic violence in the presence of the older child, including an incident in which he punched the mother in the stomach when she was pregnant with the younger child (*see Matter of Carmine G. [Franklin G.]*, 115 AD3d 594, 594 [1st Dept 2014]). Moreover, the mother and the father both testified that the older child tried to get in between them during the incident and kicked the father (*see Matter of Kenny J.M. [John M.]*, 157 AD3d 593, 593 [1st Dept 2018]). We reject the father's assertion that there was no evidence of harm to the child during the incident, as it ignores that the child's physical proximity to the domestic violence created the imminent danger of harm underlying the neglect finding (*see Matter of Amir R. [David M.]*, 188 AD3d 533, 533-534 [1st Dept 2020], *lv denied* 36 NY3d 911 [2021]).

Furthermore, the evidence that the father pleaded guilty to a criminal charge arising from one of those incidents, admitting that he attempted to violate a valid order of protection, provides additional support for the finding that he neglected the older child (*see Matter of Angie G. [Jose D.G.]*, 111 AD3d 404, 404 [1st Dept 2013]). The court properly credited the mother's testimony in making its findings, and there is no basis to disturb those credibility determinations (*see Matter of Heily A. [Flor F.—Gustavo A.]*, 165 AD3d 457, 457 [1st Dept 2018]).

As to the finding that the father neglected the younger child, the father did not object to the sufficiency of the petition, and therefore has failed to preserve his argument that he was deprived of notice or opportunity to defend against the derivative neglect charge because the petition did not allege it (*see Matter of M.G. [Cornelius G.]*, 212 AD3d 437, 438 [1st Dept 2023]; *Matter of Michelle S.*, 195 AD2d 721, 722 [3d Dept 1993]). In any event, the petition provided adequate notice that the allegations of neglect regarding the younger child were derivative in nature, based on the incidents of domestic violence committed in the presence of the older child near the time of the younger child's birth so that it was reasonable to conclude that the neglect still existed (Family Court Act § 1046[a][1]; *see Matter of Tyjaa E. [Kareem McC.]*, 157 AD3d 420, 420 [1st Dept 2018[*2]]). The evidence of multiple acts of domestic violence in the presence of the older child also showed that the father's parental judgment and impulse control were so defective at the time of the fact-finding hearing as to create a substantial risk of harm to any child in his care, thus warranting the finding of neglect as to the younger child (*see Matter of Joseph P. [Cindy H.]*, 112 AD3d 553, 554-555 [1st Dept 2013]).

Matter of N.K., 226 AD3d 512 (1st Dept., 2024)

Order, Family Court, Bronx County (Lauren T. Broderick, J.), entered on or about September 22, 2023, which, upon respondent father's admission that he willfully violated an order of protection, sentenced him to a nine-month jail term, unanimously affirmed, without costs.

Family Court did not abuse its discretion in imposing a nine-month jail commitment on the father. Under Family Court Act § 846-a, upon finding that the father had violated an order of protection multiple times, the court was authorized to impose a maximum term of 18 months, or consecutive six-month terms for each of the three violations. The court properly considered that the father made telephone calls to the nonrespondent mother in violation of an outstanding order of protection while he was still serving a previously imposed six-month term for violating a temporary order of protection.

The term of commitment is not excessive and we decline to reduce it in the interest of justice. Issuing an order of protection furthers the purpose of attempting to stop the

violence, ending the family disruption and providing protection for victims of domestic violence (*see* Family Ct Act § 812[2][b]; *Matter of Katharine B. v Thomas L.*, 189 AD3d 474, 474 [1st Dept 2020], *lv dismissed* 36 NY3d 1107 [2021]). Given the father's history of committing acts of domestic violence against the mother while the children were present and his repeated violation of orders of protection designed to protect them, his claim that his incarceration has left him unable to provide them with financial support, caused him to lose his apartment, and that his vehicle might be repossessed does not establish extraordinary circumstances warranting a reduction of his term in the interest of justice (*see People v Conklin*, 158 AD3d 973, 976 [3d Dept 2018], *lv denied* 31 NY3d 1080 [2018]).

Matter of G.B., 227 AD3d 581 2024 NY Slip Op 02884 AD3d (1st Dept., 2024)

Order of fact-finding and disposition (one paper), Family Court, Bronx County (E. Grace Park, J.), entered on or about May 3, 2023, which, to the extent appealed from as limited by the briefs, found, after a hearing, that respondent father neglected the two subject children, unanimously modified, on the law and facts, to vacate so much of the neglect finding as is based on respondent's abuse of alcohol, and otherwise affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence insofar as it established that the father's acts of domestic violence against nonrespondent mother during the July 16, 2022 incident posed an imminent danger to the children's physical, mental, or emotional well-being (*see* Family Ct Act §§ 1012[e][iii]; 1046[b]; *Matter of J.A.W. [Lance W.]*, 216 AD3d 480, 481 [1st Dept 2023]). The court properly credited the testimony of the agency's caseworker over the father's, as the father denied that any physical altercation occurred yet acknowledged that he "scuffl[ed]" with the mother for approximately three minutes after he grabbed her cell phone while the children were in the home. We find no basis to disturb the court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777-778 [1975]; *Matter of Madison H. [Demezz H.-Tabitha A.]*, 99 AD3d 475, 476 [1st Dept 2012]). The evidence also shows that the children's emotional and mental conditions were impaired or in imminent danger of being impaired by the domestic violence that the father inflicted on the mother while the children were nearby (*see Matter of Esther N. [Onyebuchi N.]*, 206 AD3d 564, 565 [1st Dept 2022]; *Matter of Athena M. [Manuel M.T.]*, 190 AD3d 644, 644-645 [1st Dept 2021]).

Family Court properly found the children's out-of-court statements regarding the domestic abuse reliable and corroborated. The children's statements, testified to by the caseworker, about the July 16, 2022 incident showed that they were in their bedroom when they became frightened because they heard their parents fighting and called their maternal grandmother for help. These statements by the two children cross-corroborate

each other and were properly admitted into evidence (*see Matter of H. [Ronald H.]*, 193 AD3d 419, 419-420 [1st Dept 2021]).

Furthermore, the one child's out-of-court statement to the caseworker that she asked her grandmother to summon the police during the July 16, 2022 incident was corroborated by an oral report transmittal (ORT). The ORT stated that an EMS worker from the New York City Fire Department reported that the police went to the family home that day after the grandmother had reported that the children "felt unsafe" because their parents were having a "heated verbal altercation which became physical." The children also described themselves to the caseworker as "scared" when they heard the altercation between their parents, demonstrating that their emotional states were impaired by the violence they had witnessed (*see Matter [*2]of Heily A. [Flor F.—Gustavo A.]*, 165 AD3d 457, 457-458 [1st Dept 2018]).

We find, however, that petitioner did not satisfy its burden of proving by a preponderance of the evidence that the father neglected the children by abusing alcohol. There is no evidence that the father "lost self-control during repeated bouts of excessive drinking, and such evidence is necessary to trigger the presumption of neglect under Family Court Act § 1046(a)(iii)" (*Matter of Caleah C.M.S. [Calvin S.]*, 174 AD3d 457, 457-458 [1st Dept 2019]). We reject the Family Court's finding that the children's out-of-court statements, testified to by the caseworker, cross-corroborate each other to show that the father regularly drank alcohol in excess. That finding lacks a sound and substantial basis in the record, as the caseworker never testified that the children told her they saw the father impaired (*see id.*).

Matter of George A. C., 223 AD3d 798 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the father appeals from (1) an order of fact-finding of the Family Court, Queens County (Joan L. Piccirillo, J.), dated March 11, 2022, and (2) an order of disposition of the same court, also dated March 11, 2022. The order of fact-finding, after a fact-finding hearing, found that the father neglected the child George A. C. and derivatively neglected the child Nikolaos S. C. The order of disposition, upon the order of fact-finding and after a dispositional hearing, inter alia, placed the father under the supervision of the Administration for Children's Services and directed him to comply with certain conditions for a period of six months.

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

ORDERED that the appeal from the order of disposition is dismissed, without costs or disbursements, except insofar as it brings up for review so much of the order of fact-finding as found that the father neglected the child George A. C. and derivatively neglected the child Nikolaos S. C.; and it is further,

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

The Administration for Children's Services (hereinafter ACS) commenced these related proceedings pursuant to Family Court Act article 10 alleging, inter alia, that the father neglected the child George A. C. and derivatively neglected the child Nikolaos S. C. by perpetrating an act of domestic violence against the mother in the presence of George A. C. Evidence was presented at the fact-finding hearing demonstrating that, on September 27, 2018, the father broke through a locked door into the family's apartment and lunged at and grabbed the mother, causing her to fall and George A. C. to fall out of her arms. Additionally, evidence showed that, during this incident, the father flipped over furniture, screamed at the mother, and threw items in her direction, causing dents in the wall. In an order of fact-finding, the Family Court found that the father neglected George A. C. and derivatively neglected Nikolaos S. C. In an order of disposition, made after a dispositional hearing, the court, among other things, placed the father under the supervision of ACS and directed him to comply with certain conditions for a period of six months. The father appeals from the order of fact-finding and the order of disposition.

The appeal from so much of the order of disposition as placed the father under the supervision of ACS and directed him to comply with certain conditions for a period of six months has been rendered academic, as that portion of the order of disposition has expired by its own terms (*see Matter of Shalom A. [Codjo A.]*, 215 AD3d 825, 826; *Matter of Skye H. [Tianna S.]*, 195 AD3d 711, 713). However, the appeal from so much of the order of disposition as brings up for review the findings that the father neglected George A. C. and derivatively neglected Nikolaos S. C. is not academic, since an adjudication of neglect constitutes a permanent and significant stigma which might indirectly affect the father's status in future proceedings (*see Matter of Shalom A. [Codjo A.]*, 215 AD3d at 826).

"A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence" (*Matter of Divine K.M. [Andre G.]*, 211 AD3d 733, 734 [internal quotation marks omitted]; *see Matter of Sydelle P. [Alvin P.]*, 210 AD3d 1098, 1100). "Even a single act of domestic violence, either in the presence of a child or within the hearing of a child, may be sufficient for a neglect finding" (*Matter of Divine K.M. [Andre G.]*, 211 AD3d at 735; *see Matter of Nina P. [Giga P.]*, 180 AD3d 1047). "Where the

hearing court is presented with sharply conflicting accounts regarding the subject events, and chooses to credit the testimony of certain witnesses over that of others, its determination will not be disturbed unless clearly unsupported by the record" (*Matter of Sydelle P. [Alvin P.]*, 210 AD3d at 1100 [internal quotation marks omitted]; *see Matter of Shalom A. [Codjo A.]*, 215 AD3d at 827).

Here, a preponderance of the credible evidence supported a finding that George A. C.'s physical, mental, or emotional condition was impaired or in imminent danger of impairment by the father's commission of an act of domestic violence against the mother in the child's presence (*see Matter of Saphire R. [Christopher R.]*, 219 AD3d 730, 731-732; *Matter of Shalom A. [Codjo A.]*, 215 AD3d at 827). Moreover, the father's commission of an act of domestic violence against the mother in the presence of George A. C. evinced a fundamental defect in his understanding of the duties of parenthood, such that it supports a finding of derivative neglect with respect to Nikolaos S. C. (*see Matter of Saphire R. [Christopher R.*], 219 AD3d at 732; *Matter of Madeleine B. [Peter B.]*, 198 AD3d 641, 643).

The father's contention that the Family Court was biased against him is unpreserved for appellate review. "A party claiming court bias must preserve an objection and move for the court to recuse itself" (*Matter of Baby Girl Z. [Yaroslava Z.]*, 140 AD3d 893, 894; *see Matter of Goundan v Goundan*, 210 AD3d 1087, 1089). In any event, when a claim of bias is raised, the inquiry on appeal is limited to whether the court's "bias, if any, unjustly affected the result to the detriment of the complaining party" (*Matter of Bowe v Bowe*, 124 AD3d 645, 646 [internal quotation marks omitted]; *see Matter of Baby Girl Z. [Yaroslava Z.]*, 140 AD3d at 894). Here, the record contains no evidence of bias by the court (*see Matter of Bibi H. v Administration for Children's Servs.-Queens*, 210 AD3d 771, 772; *Matter of Davis v Pignataro*, 97 AD3d 677, 678).

The father's remaining contentions are either not properly before this Court or without merit.

Matter of Roland M., 224 AD3d 903 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the petitioner appeals from an order of fact-finding of the Family Court, Kings County (Michael R. Milsap, J.), dated March 29, 2023. The order of fact-finding, after a hearing, inter alia, dismissed the petitions.

ORDERED that the order of fact-finding is reversed, on the facts, without costs or disbursements, the petitions are reinstated, a finding is made that the father neglected

the subject children, and the matter is remitted to the Family Court, Kings County, for a dispositional hearing and dispositions thereafter.

In December 2021, the petitioner commenced these proceedings against the father, alleging, inter alia, that he neglected the subject children by committing acts of domestic violence against the mother in their presence. At a fact-finding hearing, the petitioner relied on the hearsay statements of the child Roland M., the hearsay statements of the child Rosalee M., and an oral report transmission document (hereinafter the ORT), which was admitted into evidence without objection. The father testified on his own behalf. The Family Court dismissed the petitions, concluding, among other things, that Roland M.'s out-of-court statement that the argument between the father and the [*2]mother ended with the father choking the mother and dragging her out of the apartment was not sufficiently corroborated pursuant to Family Court Act § 1046(a)(vi) and that, "[w]ithout evidence of the serious nature of the violence, such as injury to the victim and harm to the children, a finding of neglect could not be had." The petitioner appeals.

At a fact-finding hearing in a neglect proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing that the subject child has been neglected by a preponderance of evidence (see *id.* § 1046[b][i]). As relevant here, Family Court Act § 1012(f)(i)(B) defines a neglected child as one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship" (*see Nicholson v Scoppetta*, 3 NY3d 357, 368).

"'A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence"' (*Matter of Kashai E.[Kashif R.E.]*, 218 AD3d 574, 575, quoting *Matter of Divine K.M. [Andre G.]*, 211 AD3d 733, 734 [internal quotation marks omitted]). "Even a single act of domestic violence, either in the presence of a child or within the hearing of a child, may be sufficient for a neglect finding" (*Matter of Divine K.M. [Andre G.]*, 211 AD3d at 735; *see Matter of Nina P. [Giga P.]*, 180 AD3d 1047, 1047). "'While the credibility findings of a hearing court are accorded deference, we are free to make our own credibility assessments and, where proper, make a finding of neglect based upon the record before us"' (*Matter of Jubilee S. [James S.]*, 149 AD3d 965, 967, quoting *Matter of Chanyae S. [Rena W.]*, 82 AD3d 1247, 1247 [citations omitted]).

Here, contrary to the determination of the Family Court, a preponderance of the evidence established that the father neglected the children by perpetrating acts of

domestic violence against the mother in their presence (*see Matter of Jubilee S. [James S.]*, 149 AD3d at 967; *Matter of Nah-Ki B. [Nakia B.]*, 143 AD3d 703, 707). The out-of-court statement of the oldest child, Roland M., was sufficiently corroborated. "The out-of-court statements of siblings may properly be used to cross-corroborate one another" (*Matter of Kashai E.[Kashif R.E.]*, 218 AD3d at 575 [internal quotation marks omitted]; *see Matter of Ashley G. [Eggar T.]*, 163 AD3d 963, 964). "However, such out-of-court statements must describe similar incidents in order to sufficiently corroborate the sibling's out-of-court allegations" (*Matter of Kashai E.[Kashif R.E.]*, 218 AD3d at 575 [internal quotation marks omitted]; *Matter of Divine K.M. [Andre G.]*, 211 AD3d 733, 735) "and be independent from and consistent with the other sibling's out-of-court statement" (*Matter of Ashley G. [Eggar T.]*, 163 AD3d at 965). Roland M.'s statement was corroborated by the out-of-court statement of his sister, Rosalee M., that she witnessed the father drag the mother out the door and choke her. Roland M.'s statement was also corroborated by the ORT received by the petitioner, which reported that Roland M. called the authorities during the domestic violence incident, that during the incident the father strangled the mother with his hands, that Roland M. had to intervene, and that the father was being charged with strangulation in the second degree (*see* Family Ct Act § 1046[a][v], [vi]).

Moreover, contrary to the Family Court's determination, the evidence was sufficient to establish that the father's acts of domestic violence against the mother in the children's presence impaired, or created an imminent danger of impairing, the children's physical, mental, or emotional condition (*see Matter of Nina P. [Giga P.]*, 180 AD3d at 1048; *Matter of Najaie C. [Niger C.]*, 173 AD3d 1011, 1011-1012; *Matter of Jihad H. [Fawaz H.]*, 151 AD3d 1063, 1063-1064).

Accordingly, the Family Court should not have dismissed the petitions, and the order appealed from must be reversed, the petitions reinstated, a finding of neglect entered, and the matter remitted to the Family Court, Kings County, for a dispositional hearing and dispositions thereafter.

Matter of Skyli, 224 AD3d 913 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the father appeals from an order of disposition of the Family Court, Kings County (Melody Glover, J.), dated May 18, 2023. The order of disposition, upon an order of fact-finding of the same court dated April 17, 2023, made after a fact-finding hearing, finding that the father neglected the subject child, released the subject child to the custody of the mother, and placed the

father under the supervision of the Administration for Children's Services and imposed certain conditions until November 17, 2023.
ORDERED that the appeal from so much of the order of disposition as placed the father under the supervision of the Administration for Children's Services and imposed certain conditions until November 17, 2023, is dismissed as academic, without costs or disbursements; and it is further,

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

The Administration for Children's Services (hereinafter ACS) commenced this proceeding, alleging, inter alia, that the father neglected the subject child. After a fact-finding hearing, the Family Court found that the father neglected the child by perpetrating acts of domestic violence against the mother in close proximity to the child. In an order of disposition dated May 18, 2023, the court, among other things, released the child to the custody of the mother, placed the father under the supervision of ACS until November 17, 2023, and directed the father to complete a batterer's accountability course and comply with the terms of a temporary order of protection that [*2]expired on November 17, 2023. The father appeals.

The appeal from so much of the order of disposition as placed the father under the supervision of ACS and imposed certain conditions until November 17, 2023, must be dismissed as academic, as those portions of the order of disposition expired by their own terms (*see Matter of Serenity R. [Truman C.]*, 215 AD3d 854, 855; *Matter of Katherine L. [Adrian L.]*, 209 AD3d 737, 738). However, because the finding of neglect constitutes a permanent and significant stigma that might indirectly affect the father's status in future proceedings, the appeal from so much of the order of disposition as brings up for review the finding in the order of fact-finding that the father neglected the child is not academic (*see Matter of Serenity R. [Truman C.]*, 215 AD3d at 855; *Matter of Katherine L. [Adrian L.]*, 209 AD3d at 738-739).

"At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing that the subject child has been abused or neglected by a preponderance of the evidence" (*Matter of Abigail M.A. [James A.]*, 222 AD3d 973, 974 [internal quotation marks omitted]; *see* Family Ct Act § 1046[b][i]). "Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor" (*Matter of Katherine L. [Adrian L.]*, 209 AD3d at 739 [internal quotation marks omitted]; *see Matter of Melanie T. [Eric F.]*, 217 AD3d 872, 873).

"To establish neglect of a child, the petitioner must demonstrate, by a preponderance of the evidence, (1) that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Abigail M. A. [James A.]*, 222 AD3d at 974-975 [internal quotation marks omitted]; *see* Family Ct Act § 1012[f][i]; *Matter of Melanie T. [Eric F.]*, 217 AD3d at 873). "[A] child's experience of domestic violence can cause these harms or put a child in imminent danger of them" (*Matter of Melanie T. [Eric F.]*, 217 AD3d at 873 [internal quotation marks omitted]; *see Matter of Jaylen S. [Richard S.]*, 214 AD3d 885, 885). "Even a single act of domestic violence, either in the presence of a child or within the hearing of a child, may be sufficient for a neglect finding" (*Matter of Melanie T. [Eric F.]*, 217 AD3d at 873 [internal quotation marks omitted]; *see Matter of Shalom A. [Codjo A.]*, 215 AD3d 825, 827).

Where, as here, "the hearing court is presented with sharply conflicting accounts regarding the subject events, and chooses to credit the testimony of certain witnesses over that of others, its determination will not be disturbed unless clearly unsupported by the record" (*Matter of Shalom A. [Codjo A.]*, 215 AD3d at 827 [internal quotation marks omitted]; *see Matter of Sydelle P. [Alvin P.]*, 210 AD3d 1098, 1100). Here, a preponderance of the credible evidence supported a finding that the father's acts of domestic violence against the mother in close proximity to the child impaired the child's emotional condition and placed the child in imminent danger of physical impairment (*see Matter of Cruz W. [Jacki W.]*, 218 AD3d 782, 783; *Matter of Melanie T. [Eric F.]*, 217 AD3d at 873). Contrary to the father's contention that his actions did not harm the child, actual emotional harm to the child was established by the mother's testimony that when the father was violent towards her, the child reacted by screaming and crying (*see Matter of Cruz W. [Jacki W.]*, 218 AD3d at 783). Moreover, the evidence demonstrated that the father's acts of domestic violence against the mother placed the child at imminent risk of physical harm because the child was either in the same room, next to the mother, or in the mother's arms when the father slapped, pushed, or choked the mother, and in one instance, the child fell from the mother's arms when the father struck the mother (*see Matter of Shalom A. [Codjo A.]*, 215 AD3d at 827; *Matter of Skye H. [Tianna S.]*, 195 AD3d 711, 714).

The father's remaining contentions are either unpreserved for appellate review or without merit.

Matter of Jayce W., 224 AD3d 916 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an order of fact-finding of the Family Court, Richmond County (Karen B. Wolff, J.), dated July 5, 2022. The order of fact-finding, after a hearing, found that the mother neglected the subject child.
ORDERED that the order of fact-finding is affirmed, without costs or disbursements.

The Administration for Children's Services commenced this proceeding pursuant to Family Court Act article 10, alleging, inter alia, that the mother neglected the subject child by engaging in acts of domestic violence against the father in close proximity to the child. After a fact-finding hearing, the Family Court found that the mother neglected the child. The mother appeals.

"'[A] party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship'" (*Matter of Jaylen S. [Richard S.]*, 214 AD3d 885, 885, quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368 [citation omitted]; *see* Family Ct Act §§ 1012[f][i], 1046[b][i]; *Matter of Na'ima W. [Kenyatta W.]*, 192 AD3d 1127, 1128). "'Even a single act of domestic violence, either in the presence of a child or within the hearing of a child, may be sufficient for a neglect finding'" (*Matter of Jaylen S. [Richard S.]*, 214 AD3d at 885-886, quoting *Matter of Jermaine T. [Jairam T.]*, 193 AD3d 943, 945). "'The credibility findings of the Family Court should be accorded great deference, as it had direct access to the parties and was in the best position to evaluate their testimony, character, and sincerity'" (*Matter of Destiny B. [Anthony R.]*, 203 AD3d 1042, 1042, quoting *Matter of Isabela P. [Jacob P.]*, 195 AD3d 722, 723 [internal quotation marks omitted]).

Here, the evidence presented during the fact-finding hearing demonstrated that the mother smashed the back window of the father's vehicle with an aluminum bat while the child was on the sidewalk only 10 feet away, causing the glass to shatter, and that in the days leading up to this incident, the mother had threatened the father over the phone and in text messages, including stating, "wait till I catch you." Thus, a fair preponderance of the evidence supports the Family Court's finding that the child's physical, mental, or emotional condition was impaired or in imminent danger of impairment by the mother's commission of an act of domestic violence against the father in close proximity to the child (*see Matter of Mirza S.A. [Mirza A.A.]*, 160 AD3d 715, 716; *Matter of Cody W. [Ronald L.]*, 148 AD3d 914, 916). Furthermore, contrary to the mother's contention, the record supports the court's credibility assessments (*see*

Matter of Melanie T. [Eric F.], 217 AD3d 872, 874; *Matter of Mariliz G. [Jamie G.]*, 207 AD3d 627, 629).

The mother's remaining contention is without merit.

Matter of Abdul R., 225 AD3d 881 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the father appeals from an order of fact-finding and disposition of the Family Court, Suffolk County (Frank A. Tantone, J.), dated February 16, 2023. The order of fact-finding and disposition, insofar as appealed from, after a fact-finding hearing, found that the father neglected the subject children.
ORDERED that the order of fact-finding and disposition is affirmed insofar as appealed from, without costs or disbursements.

The Suffolk County Department of Social Services (hereinafter DSS) commenced these related proceedings pursuant to Family Court Act article 10, alleging that the father neglected the subject children. At a fact-finding hearing, DSS presented evidence that, during an altercation with his family involving the children, the father struck the nonrespondent mother while she was holding their youngest child in her arms, causing the mother to fall to the ground while holding that child. Following the hearing, the Family Court found that the father neglected the children by engaging in an act of domestic violence against the mother in the children's presence. The father appeals.

"'A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming [*2]impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence'" (*Matter of Ariella S. [Krystal C.]*, 89 AD3d 1092, 1093, quoting *Matter of Kiara C. [David C.]*, 85 AD3d 1025, 1026). Even a single act of domestic violence, either in the presence of a child or within the hearing of a child, may be sufficient for a neglect finding (*see Matter of Jihad H. [Fawaz H.]*, 151 AD3d 1063, 1064; *Matter of Sapphire G. [Samarj L.G.]*, 136 AD3d 687, 687).

Here, the Family Court's finding that the father neglected the children is supported by the record. A preponderance of admissible evidence supported a finding that the children's physical, mental, or emotional conditions were impaired or in imminent danger of impairment by the father's commission of an act of domestic violence against the mother while the children were present in the household, and while the mother was holding the youngest child (*see Matter of Nina P. [Giga P.]*, 180 AD3d 1047, 1048; *Matter of Jihad H. [Fawaz H.]*, 151 AD3d 1063; *Matter of Ndeye D. [Benjamin D.]*, 85 AD3d 1026, 1026-1027; *Matter of Kiara C. [David C.]*, 85 AD3d at 1026). Although

the father disputed the allegations, there is no basis for disturbing the court's credibility determinations, which are entitled to deference and are supported by the record (*see Matter of Tatianna C. [James C.]*, 195 AD3d 1014, 1015; *Matter of Alivia F. [John F.]*, 194 AD3d 709, 712).

The parties' remaining contentions are either improperly raised for the first time on appeal or without merit.

Matter of Easton J., 226 AD3d 684 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the father appeals from an order of disposition of the Family Court, Richmond County (Peter F. DeLizzo, J.), dated April 20, 2023. The order of disposition, insofar as appealed from, was entered upon an order of fact-finding of the same court dated February 28, 2023, made after a fact-finding hearing, finding that the father neglected the subject children.

ORDERED that the order of disposition is reversed insofar as appealed from, on the law, without costs or disbursements, the order of fact-finding is vacated, the petitions are denied, and the proceedings are dismissed.

In September 2021, the Administration for Children's Services (hereinafter ACS) commenced these proceedings against the father, alleging that he neglected the subject children by committing an act of domestic violence against the nonrespondent mother while the children were [*2]present in the home and within the hearing of the children. Following a fact-finding hearing, the Family Court found that the father neglected the children. The father appeals.

The Family Court failed to state on the record the facts which it deemed essential to its finding of neglect (*see* Family Court Act § 1051[a]; *Matter of Destiny H. [Valerie B.]*, 83 AD3d 939, 939). However, remittal is unnecessary because the record is sufficient for this Court to conduct an independent review of the evidence (*see Matter of Destiny H. [Valerie B.]*, 83 AD3d at 939).

"A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence" (*Matter of Divine K.M. [Andre G.]*, 211 AD3d 733, 734 [internal quotation marks omitted]; *see Nicholson v Scopetta,* 3 NY3d 357, 368-372). "Even a single act of domestic violence, either in the presence of a child or within the hearing of a child, may be sufficient for a neglect finding" (*Matter of Divine K.M. [Andre G.]*, 211 AD3d at 735).

Upon our independent review of the record, we find that the evidence does not support the Family Court's finding that the allegations of neglect were proven by a preponderance of evidence (*see* Family Court Act § 1046[b][i]; *Matter of Kingston T. [Diamond T.]*, 209 AD3d 743, 745; *Matter of Destiny H. [Valerie B.]*, 83 AD3d at 939-940).

A recording of a 911 call made by the mother, which was admitted into evidence without objection, was the only admissible evidence offered in support of the petition. During this call, the mother told the 911 operator that the father was harassing her and threatening her, that there were weapons in the house, including knives and guns, and that she was in fear for her life. However, no evidence was admitted in support of ACS's position that the children observed, were aware of, or were in close proximity to the domestic violence, and that their physical, mental, or emotional condition was impaired or was in danger of becoming impaired (*see Matter of Kingston T. [Diamond T.]*, 209 AD3d at 745). While ACS contends that the redacted ACS progress notes were admitted into evidence, and contain the children's out-of court-statements demonstrating the children were aware of and heard the domestic violence, the progress notes, although marked for identification at the virtual hybrid hearing, were never entered into evidence, and therefore, cannot be considered. Thus, ACS failed to establish that the children's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the father's acts of violence toward the mother (*see Matter of Divine K.M. [Andre G.]*, 211 AD3d at 736; *Matter of Anthony S.*, 128 AD3d 969, 970).

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

Matter of Xierra N., 226 AD3d 790 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the father appeals from an order of fact-finding of the Family Court, Kings County (Jacqueline B. Deane, J.), dated June 14, 2022. The order of fact-finding, after a hearing, found that the father neglected the subject child.
ORDERED that the order of fact-finding is affirmed, without costs or disbursements.

The Administration for Children's Services commenced this proceeding, alleging, inter alia, that the father neglected the subject child. After a fact-finding hearing, the Family Court found that the father neglected the child by perpetrating acts of domestic violence in close proximity to the child. The father appeals.

"[A] party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [citation omitted]; *see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]; *Matter of Roland M. [Manuel M.]*, ___ AD3d ___, ___, 2024 NY Slip Op 01011, *1 [2d Dept]). "A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence" (*Matter of Kiara C. [David C.]*, 85 AD3d 1025, 1026; *see Matter of Bronx S. [Denzel J.]*, 217 AD3d 956, 957). "Even a single act of domestic violence, either in the presence of a child or within the hearing of a child, may be sufficient for a neglect finding" (*Matter of Jermaine T. [Jairam T.]*, 193 AD3d 943, 945; *see Matter of Sydelle P. [Alvin P.]*, 210 AD3d 1098, 1099-1100). "Furthermore, impairment or imminent danger of physical impairment should also be inferred from the subject children's proximity to violence directed against a family member, 'even absent evidence that they were aware of or emotionally impacted by the [*2]violence'" (*Matter of Najaie C. [Niger C.]*, 173 AD3d 1011, 1012, quoting *Matter of Andru G. [Jasmine C.]*, 156 AD3d 456, 457).

Here, the evidence presented during the fact-finding hearing demonstrated that the father engaged in a physical altercation involving the mother and two other individuals and shot a firearm while the child was left unattended in her stroller on the sidewalk two to three houses away. Thus, a fair preponderance of the evidence supports the Family Court's finding that the child's physical, mental, or emotional condition was impaired or in imminent danger of impairment by the father's commission of an act of domestic violence in close proximity to the child (*see Matter of Jayce W. [Lucinda J.]*, ___ AD3d ___, ___, 2024 NY Slip Op 01016, *1 [2d Dept]; *Matter of Najaie C. [Niger C.]*, 173 AD3d at 1012; *Matter of Ariella S. [Krystal C.]*, 89 AD3d 1092, 1094).

The father's remaining contention is without merit.

Matter of Joseph M. H., 227 AD3d 996 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the father appeals from an order of disposition of the Family Court, Queens County (Emily Ruben, J.), dated April 11, 2023. The order of disposition, insofar as appealed from, was entered upon an order of fact-finding of the same court dated November 30, 2023, made after a fact-finding hearing, finding that the father neglected the subject children.

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

In May 2021, the Administration for Children's Services commenced these proceedings against the father, alleging that he neglected the subject children by committing an act of domestic violence against the nonrespondent mother while the children were present in the home and within the hearing of the children. Following a fact-finding hearing, the Family Court found that the father neglected the children. The father appeals.

"'A finding of neglect is proper where a preponderance of the evidence establishe[d] that the child's physical, mental, or emotional condition was impaired or . . . in danger of [being] impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence'" (*Matter of Easton J. [Courtney J.]*, ___ AD3d ___, ___, 2024 NY Slip Op 01810, *2 [2d Dept], quoting *Matter of Divine K.M. [Andre G.]*, 211 AD3d 733, 734; *see Nicholson v Scoppetta*, 3 NY3d 357, 368-372). "'Even a single act of domestic violence, either in the presence of a child or within [*2]the hearing of a child, may be sufficient for a neglect finding'" (*Matter of Easton J. [Courtney J.]*, ___ AD3d at ___, 2024 NY Slip Op 01810, *2, quoting *Matter of Divine K.M. [Andre G.]*, 211 AD3d at 735). "'The credibility findings of the Family Court should be accorded great deference, as it had direct access to the parties and was in the best position to evaluate their testimony, character, and sincerity'" (*Matter of Jayce W. [Lucinda J.]*, 224 AD3d 916, 917, quoting *Matter of Destiny B. [Anthony R.]*, 203 AD3d 1042, 1042 [internal quotation marks omitted]).

A preponderance of the credible evidence supported a finding that the children's physical, mental, or emotional conditions were impaired or in imminent danger of impairment by the father's commission of an act of domestic violence against the mother in the presence of, or within the hearing of, the children (*see Matter of Davasha T. [David T.]*, 218 AD3d 475, 477; *Matter of Nina P. [Giga P.]*, 180 AD3d 1047, 1047-1048). Among other things, the evidence established that the father struck the mother in the face with a pepper bottle, causing swelling and redness, that the child Joseph M. H. was present in the room during the incident and appeared upset and afraid during the incident and was crying shortly after the incident, that the child Janelle S. H. went to her room when her parents began arguing and only exited when the police arrived at the family home, and that Janelle S. H. appeared sad while the father was arrested. Furthermore, contrary to the father's contentions, the record supports the Family Court's credibility assessments (*see Matter of Abdul R. [Abdul G.]*, 225 AD3d 881, 882; *Matter of Melanie T. [Eric F.]*, 217 AD3d 872, 874).

The father's remaining contentions are without merit.

Matter of Logan P., AD3d 2024 NY Slip Op 03429 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the father appeals from an order of fact-finding and disposition of the Family Court, Kings County (Ben Darvil, Jr., J.), dated February 28, 2023. The order of fact-finding and disposition, insofar as appealed from, after a fact-finding hearing, found that the father neglected the subject children.
ORDERED that the order of fact-finding and disposition is affirmed insofar as appealed from, without costs or disbursements.

In December 2021, the Administration for Children's Services (hereinafter ACS) commenced these related proceedings pursuant to Family Court Act article 10 against the father, alleging that he neglected the subject children by committing an act of domestic violence against the nonrespondent mother while in an elevator with the children present. Following a fact-finding hearing, at which ACS relied on the children's out-of-court statements to an ACS caseworker, the Family Court found that the father neglected the children. The father appeals.

"'A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence'" (*Matter of Bronx S. [Denzel J.]*, 217 AD3d 956, 957, quoting *Matter of Kiara C. [David C.]*, 85 AD3d 1025, 1026). "Even a single act of domestic violence, either in the presence of a child or [*2]within the hearing of a child, may be sufficient for a neglect finding" (*Matter of Abdul R. [Abdul G.]*, 225 AD3d 881, 882; *see Matter of Roland M. [Manuel M.]*, 224 AD3d 903, 904-905).

"In neglect proceedings, '[u]nsworn out-of-court statements of the [children] may be received and, if properly corroborated, will support a finding of abuse or neglect'" (*Matter of Silveris P. [Meuris P.]*, 198 AD3d 787, 789, quoting *Matter of Nicole V.*, 71 NY2d 112, 117-118). "'The Family Court, as the trier of fact, has considerable discretion in determining whether the child[ren]'s statements are sufficiently corroborated and whether the record as a whole supports a finding of [neglect]'" (*Matter of Silveris P. [Meuris P.]*, 198 AD3d at 789, quoting *Matter of Neleh B. [Quincy J.]*, 162 AD3d 1007, 1009).

Here, a preponderance of admissible evidence supported a finding that the children's physical, mental, or emotional conditions were impaired or in imminent danger of impairment by the father's commission of an act of domestic violence against the mother in the presence of the children (*see Matter of Abdul R. [Abdul G.]*, 225 AD3d at 882; *Matter of Bronx S. [Denzel J.]*, 217 AD3d at 957). Contrary to the father's contention, the Family Court providently exercised its discretion in determining that the

children's out-of-court statements to an ACS caseworker that the father hit or punched the mother in the elevator and that the children felt scared and were crying reliably cross-corroborated one another (*see Matter of Divine K.M. [Andre G.]*, 211 AD3d 733, 735; *Matter of Silveris P. [Meuris P.]*, 198 AD3d at 789).

The father's remaining contention is improperly raised for the first time on appeal and, in any event, without merit.

Matter of Antonio S., 227 AD3d 1532 (4th Dept., 2024)

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered October 13, 2022, in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, determined that respondent Rene G. had neglected the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In these proceedings pursuant to Family Court Act article 10, Rene G. (respondent) appeals in appeal Nos. 1 through 5 from orders of disposition that, inter alia, adjudged that he neglected the subject children.

Respondent contends in all five appeals that Family Court erred in finding that he neglected the children because there was no evidence that the children's physical, mental, or emotional well-being was impaired or in danger of becoming impaired as a result of his conduct. We reject that contention. "[A] party seeking to establish neglect must show, by a preponderance of the evidence . . . , first, that [the] child[ren's] physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child[ren] is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child[ren] with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]). In certain situations, "[t]he exposure of the child[ren] to domestic violence between the [parties] may form the basis for a finding of neglect" (*Matter of Michael G.*, 300 AD2d 1144, 1144 [4th Dept 2002]; *see Matter of Trinity E. [Robert E.]*, 137 AD3d 1590, 1591 [4th Dept 2016]).

Here, the evidence established that the children's mother was stabbed in the leg during an altercation with respondent. The children were present at the scene when police arrived; the children appeared scared and saw their mother bleeding and taken away in an ambulance. Although it was unclear whether the children were awake at the time of the altercation itself or whether they witnessed it, two of the children at some point went

down the street to get help from their aunt. One child later told the caseworker that he knew that the mother was hurt and that she needed help that night; a second child knew that the dining room table had been broken during the incident. According to respondent's own testimony, the two youngest children were also home at the time of the incident. The children were also present during a subsequent incident in which respondent climbed into the mother's house through a window, in violation of a no-contact order of protection, and had an altercation with the mother. One of the children was [*2]injured during that altercation, and respondent was thereafter charged with criminal contempt and endangering the welfare of a child. Respondent was arrested at the house again several months later, an event witnessed by at least some of the children.

Thus, we conclude that the evidence established that the children's emotional or mental condition had been impaired, or was in imminent danger of becoming impaired, as a result of respondent's failure to exercise a minimum degree of care by providing the children with proper supervision or guardianship, "i.e., by engaging in . . . act[s] in which a reasonable and prudent parent [or caretaker] would not have engaged" (*Matter of Shania R. [Shana R.]*, 222 AD3d 1385, 1386 [4th Dept 2023]; *see Matter of Kadyn J. [Kelly M.H.]*, 109 AD3d 1158, 1159-1160 [4th Dept 2013]).

We have considered respondent's remaining contention and conclude that it is without merit.

Matter of Jasmine L., AD3d 2024 NY Slip Op 03268 (4th Dept., 2024)

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), entered October 13, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent had neglected one of the subject children and derivatively neglected the other subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent appeals in appeal No. 1 from an order of disposition that, inter alia, determined that he neglected one of his children and derivatively neglected another one of his children. In appeal No. 2, respondent appeals from an order of disposition that, inter alia, determined that he neglected three more of his children. In appeal No. 3, respondent appeals from an order of disposition that, inter alia, determined that he neglected another child. We affirm in all three appeals.

We conclude that there is a sound and substantial basis in the record to support Family Court's determination that respondent neglected five of the six children. A neglected child is defined, in relevant part, as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent or other person legally responsible for [the child's] care to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof . . . or by any other acts of a similarly serious nature requiring the aid of the court" (Family Ct Act § 1012 [f] [i] [B]). Here, petitioner established by a preponderance of the evidence that respondent engaged in acts of domestic violence against the children's mother while the children were present, including an incident in which he destroyed the mother's cell phone, choked her unconscious, threatened one of his children with an axe, and then prevented the mother and five of the children from leaving their home until the police arrived (*see Matter of Ricky A. [Barry A.]*, 162 AD3d 1747, 1748 [4th Dept 2018]; *Matter of Kadyn J. [Kelly M.H.]*, 109 AD3d 1158, 1159-1160 [4th Dept 2013]). Petitioner further established by a preponderance of the evidence that those five children were in imminent danger of physical, mental, or emotional impairment based on respondent's history of mental illness, alcoholism, and substance abuse issues for which he refused to seek treatment (*see Matter of Trinity E. [Robert E.]*, 137 AD3d 1590, 1590-1591 [4th Dept 2016]), and that respondent made inappropriate sexual comments to at least two of the children and inappropriately touched one of them by repeatedly rubbing up against her breasts and buttocks (*see Matter of Thomas XX. [Thomas YY.]*, 180 AD3d 1175, 1176-1177 [3d Dept 2020]). Contrary to respondent's contention, the statements made by certain of the children to the investigating caseworker "provided sufficient cross-corroboration inasmuch as they tend to support the statements of [each other] and, viewed together, give [*2]sufficient indicia of reliability to each [child's] out-of-court statements" (*Matter of Cameron M. [Keira P.]*, 187 AD3d 1582, 1582 [4th Dept 2020] [internal quotation marks omitted]).

We also conclude in appeal No. 1 that there is a sound and substantial basis in the record to support Family Court's determination that respondent derivatively neglected the sixth child, inasmuch as "the nature, duration and circumstances surrounding the neglect of the . . . other children can be said to evidence fundamental flaws in [respondent's] understanding of the duties of parenthood" (*Matter of Angel L.H. [Melissa H.]*, 85 AD3d 1637, 1637-1638 [4th Dept 2011], *lv denied* 17 NY3d 711 [2011] [internal quotation marks omitted]).

We have reviewed petitioner's remaining contention and respondent's remaining contention and conclude that they lack merit.

Excessive Corporal Punishment

Matter of Camrem C., 224 AD3d 495 (1st Dept., 2024)

Order of fact-finding and disposition (one paper), Family Court, New York County (Clark V. Richardson, J.), entered on or about October 27, 2022, which, to the extent appealed from as limited by the briefs, after a fact-finding hearing, found that respondent neglected the subject child by inflicting, or allowing to be inflicted, physical harm upon the child, unanimously affirmed, without costs.

Although the Family Court made no explicit findings regarding the credibility of the witnesses after the fact-finding hearing, this Court can make its own findings when the record is sufficiently complete to permit an independent factual review and the drawing of our own conclusions (*see* CPLR 5501; *Matter of Keith H. [Logann M.K.]*, 113 AD3d 555, 555 [1st Dept 2014], *lv denied* 23 NY3d 902 [2014]; *Matter of Allen v Black,* 275 AD2d 207, 209 [1st Dept 2000]). Here, given the breadth of evidence presented by ACS during the hearing, the Family Court's finding did not turn on the credibility of appellant's self-serving testimony to warrant remand and a new hearing. In its fact-finding order, the Family Court relied on medical evidence that the child suffered from "welts, lacerations and bruises, both fresh and in various stages of healing," which provided objective evidence of a pattern of corporal punishment. Moreover, the medical evidence corroborated the child's out-of-court statements made to his paraprofessional, the Child Advocacy Center, and his ACS caseworker (*see Matter of Jermaine J. [Howard J.],* 121 AD3d 437, 438 [1st Dept 2014] [affirming finding of neglect where child's out-of-court statements corroborated by the case worker, the child's teacher, the school guidance counselor, the child protective specialist, and by photographs of bruises on the child]). In contrast, appellant's testimony that the mother harmed the child on the way to school, on the day the abuse was reported to ACS, does not account for the child's multiple injuries in various stages of healing. At the very least, appellant should have been aware of these injuries and acted as a reasonably prudent guardian to protect the child (*see Matter of Mia B. [Brandy R.],* 100 AD3d 569, 570 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013] [various stages of healing of child's injuries indicated prolonged period of neglect during which the mother knew or should have known about excessive corporal punishment]).

Accordingly, the finding of neglect should be affirmed.

Matter of K.M., AD3d 2024 NY Slip Op 03011 (1st Dept., 2024)

Amended order of fact-finding and disposition (one paper), Family Court, Bronx County (Cynthia Lopez, J.), entered on or about May 24, 2023, which, to the extent appealed from, found that appellant father neglected the subject children, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that, after picking up the children in his vehicle, the father neglected the children by inflicting excessive corporal punishment upon two of them, in the presence of a third child who was caused to cry (*see* Family Ct Act §§ 1012[f][i][B]; 1046[a][i]). The children's out-of-court statements to an ACS caseworker as reflected in progress notes admitted into evidence was supported by the mother's testimony as to her own observation of one child's injury to her upper lip (*see Matter of Antonio S. [Antonio S., Sr.]*, 154 AD3d 420, 420 [1st Dept 2017]; *Matter of Jazmyn R. [Luceita F.]*, 67 AD3d 495 [1st Dept 2009]).

Contrary to the father's contention, the ACS progress notes were properly admitted under the business records exception to the hearsay rule (*see* CPLR 4518[a]). The testimony of ACS's caseworker established that the progress notes were made in the ordinary course of ACS's business and that ACS has a statutory duty to maintain a comprehensive case record for the children, containing reports of any transactions or occurrences relevant to their welfare (*see Matter of Adonis H. [Enerfry H.]*, 198 AD3d 478, 479 [1st Dept 2021]). The caseworker's testimony also established that she was an ACS employee and was familiar with the agency's record-keeping practices (*see Matter of Brian T. [Jeannette F.]*, 121 AD3d 500, 500 [1st Dept 2014]).

Regardless of whether the father had a valid reason for disciplining his daughter for refusing to answer his question as to how she got a mark on her face, the descriptions of his violence toward her and towards her sister, who tried to intervene, reflect that the discipline was not appropriate and went well beyond any common-law right to use reasonable force to control his children (*see Matter of Jermaine J. [Howard J.]*, 121 AD3d 437, 438 [1st Dept 2014]; *Matter of Joseph C. [Anthony C.]*, 88 AD3d 478, 479 [1st Dept 2011]). The fact that the upper lip injury did not require medical treatment and was the result of single incident does not preclude a finding of excessive corporal punishment (*see Matter of L.H.R. [Y.L.—Q.L.R.]*, 222 AD3d 414, 415 [1st Dept 2023]; *Matter of Cevon W. [Talisha W.]*, 110 AD3d 542, 542 [1st Dept 2013]). The court, in its discretion and in light of the credible evidence, properly rejected the father's denials of excessive corporal punishment as to the February 17, 2022 incident, and there is no basis to disturb that credibility determination on appeal (*see Matter of Ivahly M. [Jennifer L.]*, 159 AD3d 423, 424 [1st Dept 2018]). Furthermore, there are "adequately individualized" aspects to each child's account to support Family Court's

determination that their statements were [*2]not scripted or coached (*see Matter of L.V.M. [Simon S.]*, 222 AD3d 560, 561 [1st Dept 2023]).

The evidence that the father used excessive corporal punishment against two of his daughters in the February 2022 incident is admissible on the issue of neglect of his third child (*see* Family Ct Act § 1046[a][i]). That evidence supports a finding that the father derivatively neglected the third child, who was in the vehicle, witnessed the father smack and punch his sisters, and was caused to cry (*see Matter of Rahmel G. [Carlene G.]*, 201 AD3d 567, 568 [1st Dept 2022]; *Matter of Empress B. [Henrietta L.]*, 204 AD3d 562, 563 [1st Dept 2022]).

In addition, the ACS progress notes contained the children's statements reporting that the father inflicted excessive corporal punishment on each of them while they were staying in his home during the summer of 2021, including locking one child in a room without food and hitting another with a belt. These statements, although involving separate incidents, provide cross-corroboration to the extent that each child stated that the father used excessive and inappropriate corporal punishment (*see Matter of Serenity G. v Modi K.*, 171 AD3d 588, 588 [1st Dept 2019]). The children's statements concerning these incidents undermine any argument by the father that the February 2022 incident was a single or isolated incident of reasonable discipline (*see Matter of Jayden R. [Jacqueline C.]*, 134 AD3d 638, 638 [1st Dept 2015]).

Finally, the father's claim that the mother's fact-finding testimony should not have been admitted because it constituted improper bolstering is not preserved for appellate review, and we decline to review it (*see Matter of Ashley B. [Laney K.]*, 2 AD3d 1402, 1403 [4th Dept 2003], *lv denied* 2 NY3d 702 [2004]).

Matter of D.F., AD3d 2024 NY Slip Op 03326 (1st Dept., 2024)

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Ronna H. Gordon-Galchus, J.), entered on or about June 14, 2023, which, to the extent appealed from as limited by the briefs, determined, after a hearing, that respondent mother neglected the subject child, unanimously affirmed, without costs.
A preponderance of the evidence supports the finding that the mother neglected the child by inflicting excessive corporal punishment (*see* Family Ct Act §§ 1012[f][i][B], 1046[b][i]). The child's in-court testimony established that the mother routinely struck the child with a belt, a broom, and her hands, causing the child to become sad and afraid (*see Matter of Ibraheem K. [Jacqueline N.]*, 190 AD3d 643, 644 [1st Dept 2021]). The child testified to specific incidents of physical abuse, including a detailed description of an incident, when because the child was unable to stop crying the mother struck the

child to the top of the child's head with a handful of keys, causing the child pain and distress. This account was corroborated by the child's statements to Emergency Children's Services workers who responded on the day of the incident and statements made by the child to an ACS caseworker during an interview the following day (*see Matter of Fendi B. [Jason B.]*, 142 AD3d 878 [1st Dept 2016]).

The child's "sworn testimony at the fact-finding hearing is competent evidence of abuse, and the absence of physical injury or other corroboration does not require a different result" (*see Matter of Christina G. [Vladimir G.]*, 100 AD3d 454, 454 [1st Dept 2012] [internal citation omitted]). The record contains no evidence that these physical punishments were in any way a justified or a reasonable form of discipline (*see Matter of Peter G.*, 6 AD3d 201, 206 [1st Dept 2004], *appeal dismissed* 3 NY3d 655 [2004], citing Family Ct Act § 1012[f][i][B]; *Matter of Desiree D. [Iris D.]*, 209 AD3d 547, 548 [1st Dept 2022]). The court providently credited the child's testimony and found the mother's testimony incredible and self-serving. There is no basis for disturbing the court's credibility determinations, which are entitled to great deference on appeal (*see Matter of Any G. v Ayman H.*, 208 AD3d 1097, 1098 [1st Dept 2022]).

The mother did not preserve any argument that ACS failed to conform the pleadings to the proof, and we decline to review this claim in the interest of justice (*see Matter of C.F. [Carlos F.]*, 220 AD3d 506, 507 [1st Dept 2023], *lv denied* 41 NY3d 901 [2024]). Similarly, the mother did not preserve any claim that the court improperly considered inadmissible hearsay statements from a caseworker's testimony. The parties agreed to redact portions of testimony containing either hearsay or information irrelevant to the fact-finding, and the court expressly stated that those excerpts were not considered, and the caseworker's testimony was given limited weight overall (*see Benavides v City of New York*, 115 AD3d 518, 519 [1st Dept 2014]).

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

Matter of Nathaniel I. G., 227 AD3d 806 (2nd Dept. 2024)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from (1) an order of fact-finding of the Family Court, Kings County (Jacqueline D. Williams, J.), dated January 30, 2023, and (2) an order of disposition of the same court dated July 21, 2023. The order of fact-finding, after a fact-finding hearing, found that the mother neglected the subject child. The order of disposition, upon the order of fact-finding and after a dispositional hearing, inter alia, placed the subject child in the custody of the nonrespondent father.

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

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

The Administration for Children's Services (hereinafter ACS) commenced this proceeding pursuant to Family Court Act article 10, alleging, inter alia, that the mother failed to provide the subject child with proper supervision or guardianship by inflicting excessive corporal punishment on him during an incident in August 2019. After a fact-finding hearing, the Family Court determined that the mother neglected the child by inflicting excessive corporal punishment on him. After a dispositional hearing, the court released the child to the custody of the nonrespondent father without ACS supervision. The mother appeals.

A neglected child includes one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment" (*id*. § 1012[f][i][B]; *see Nicholson v Scoppetta*, 3 NY3d 357, 368; *Matter of Sama A. [Safaa S.]*, 224 AD3d 677, 678). "The petitioner has the burden of proving neglect by a preponderance of the evidence" (*Matter of Myiasha K.D. [Marcus R.]*, 193 AD3d 850, 851; *see Matter of Nyla S. [Jason B.]*, 224 AD3d 691, 691). "Although parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the [*2]use of excessive corporal punishment constitutes neglect" (*Matter of Alexander S. [Gabriel H.]*, 224 AD3d 907, 910 [internal quotation marks omitted]; *see Matter of Tarahji N. [Bryan N.—Divequa C.]*, 197 AD3d 1317, 1320). "A single incident of excessive corporal punishment may suffice to sustain a finding of neglect" (*Matter of Thaddeus R. [Gabrielle V.]*, 198 AD3d 901, 902 [internal quotation marks omitted]; *see Matter of Alexander S. [Gabriel H.]*, 224 AD3d at 910).

"In neglect proceedings, [u]nsworn out-of-court statements of the [children] may be received and, if properly corroborated, will support a finding of abuse or neglect" (*Matter of Mariliz G. [Jamie G.]*, 207 AD3d 627, 629 [internal quotation marks omitted]). "Corroboration means any other evidence tending to support the reliability of the previous statements" (*Matter of Alexander S. [Gabriel H.]*, 224 AD3d at 909 [internal quotation marks omitted]). "Family Court Judges presented with the issue have considerable discretion to decide whether [a] child's out-of-court statements describing incidents of abuse or neglect have, in fact[ ] been reliably corroborated" (*Matter of Mariliz G. [Jamie G.]*, 207 AD3d at 629 [internal quotation marks omitted]).

Here, the Family Court properly determined that ACS established by a preponderance of the evidence that the mother neglected the child by inflicting excessive corporal punishment on him (*see Matter of Sama A. [Safaa S.]*, 224 AD3d at 678; *Matter of Mariliz G. [Jamie G.]*, 207 AD3d at 629). Deferring to the hearing court's credibility findings, the evidence at the fact-finding hearing established that the mother pushed the child and restricted his breathing, leaving scratches on the child's eyelid and shoulder, which were visible to the ACS caseworker (*see Matter of Mariliz G. [Jamie G.]*, 207 AD3d at 629; *Matter of Lea E.P. [Jason J.P.]*, 176 AD3d 715, 716). Contrary to the mother's contention, the out-of-court statements of the child were sufficiently corroborated by the observations of the ACS caseworker (*see Matter of Mariliz G. [Jamie G.]*, 207 AD3d at 629).

The mother's remaining contentions are either without merit or not properly before this Court.

Matter of Leah S., AD3d 2024 NY Slip Op 03050 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the father and the mother separately appeal from (1) an order of fact-finding of the Family Court, Kings County (Melody Glover, J.), dated May 25, 2021, (2) an order of disposition of the same court dated August 11, 2021, and (3) an order of disposition of the same court also dated August 11, 2021. The order of fact-finding, insofar as appealed from, after a fact-finding hearing, found that the father and the mother neglected the child Leah S. and derivatively neglected the child Liana S. The first order of disposition, upon the order of fact-finding and after a dispositional hearing, inter alia, placed the child Leah S. in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing. The second order of disposition, upon the order of fact-finding and after a dispositional hearing, inter alia, placed the mother and the father under the supervision of the petitioner for a period of three months.
ORDERED that the appeals from the order of fact-finding are dismissed, without costs or disbursements, as the order of fact-finding was superseded by the orders of disposition and is brought up for review on the appeals from the orders of disposition; and it is further,

ORDERED that the appeals from so much of the first order of disposition as placed the child Leah S. in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing are dismissed as academic, without costs or disbursements; and it is further,

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

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

The appeals from so much of the first order of disposition dated August 11, 2021, as placed the child Leah S. (hereinafter the older child) in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing must be dismissed as academic, as the older child is now over the age of 18 and is no longer subject to the custody provisions of the first order of disposition (*see* Family Ct Act § 119[c]; *Matter of Jermaine T. [Jairam T.]*, 193 AD3d 943, 945). The appeals from so much of the second order of disposition dated August 11, 2021, as placed the father and the mother under the supervision of the petitioner for a period of three months must be dismissed as academic, as the period of supervision has expired by its own terms (*see Matter of Janiyah S. [Pedro H.]*, ___ AD3d ___, ___, 2024 NY Slip Op 02057, *1 [2d Dept]; *Matter of Serenity R. [Truman C.]*, 215 AD3d 854, 855).

The appeals from the orders of disposition bring up for review the findings that the father and the mother neglected the older child and derivatively neglected the child Liana S. (hereinafter the younger child) and are not academic, since the adjudication of neglect constitutes a permanent and significant stigma that might indirectly affect each parent's status in future proceedings (*see Matter of Janiyah S. [Pedro H.]*, ___ AD3d at ___, 2024 NY Slip Op 02057, *1; *Matter of Eliora B. [Kennedy B.]*, 146 AD3d 772, 773).

"In a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of proving neglect by a preponderance of the evidence" (*Matter of Janiyah S. [Pedro H.]*, ___ AD3d at ___, 2024 NY Slip Op 02057, *1; *see* Family Ct Act § 1046[b][i]; *Matter of Jada W. [Fanatay W.]*, 219 AD3d 732, 737). "[A] party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [citation omitted]; *see* Family Ct Act § 1046[b][i]; *Matter of Xierra N. [Lewis N.]*, ___ AD3d ___, ___, 2024 NY Slip Op 01927, *1 [2d Dept]). "Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor" (*Matter of Kishanda S. [Stephan S.]*, 190 AD3d 747, 748 [internal quotation marks omitted]; *see Matter of Alexander S. [Gabriel H.]*, 224 AD3d 907, 909).

"Although parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the use of excessive corporal punishment constitutes neglect" (*Matter of Kishanda S. [Stephan S.]*, 190 AD3d at 748 [internal quotation marks omitted]; *see Matter of Elisa V. [Hung V.]*, 159 AD3d 827, 828). "A single incident of excessive corporal punishment may suffice to sustain a finding of neglect" (*Matter of Kishanda S. [Stephan S.]*, 190 AD3d at 748 [internal quotation marks omitted]; *see Matter of Elisa V. [Hung V.]*, 159 AD3d at 828).

"Where a person's conduct toward one child demonstrates a fundamental defect in the parent's understanding of the duties of parenthood, or demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in his or her care, an adjudication of derivative neglect with respect to the other children is warranted" (*Matter of [*2]Zephaniah Z. [Charlene F.]*, 220 AD3d 800, 801 [internal quotation marks omitted]; *see Matter of Faith A.M. [Faith M.]*, 191 AD3d 884, 884-885). "[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent" (Family Ct Act § 1046[a][i]; *see Matter of Faith A.M. [Faith M.]*, 191 AD3d at 885).

Here, a preponderance of the evidence supported the Family Court's findings that the father and the mother neglected the older child by inflicting excessive corporal punishment on her and failing to seek medical attention despite being aware that she engaged in multiple instances of self-harm (*see* Family Ct Act § 1046[b][i]; *see also Matter of Zaniah T. [Deshaun T.]*, 216 AD3d 1173, 1175; *Matter of Samantha B.*, 5 AD3d 590, 591). There is no basis for disturbing the court's credibility determinations, which are entitled to great deference (*see Matter of Zaniah T. [Deshaun T.]*, 216 AD3d at 1175). Moreover, the infliction of excessive corporal punishment on the older child and the failure to seek medical attention for her evinced a fundamental defect in the understanding of the duties of parenthood and were sufficient to support the court's finding that the younger child was derivatively neglected (*see Matter of Delehia J. [Tameka J.]*, 93 AD3d 668, 669; *Matter of Samantha B.*, 5 AD3d at 591).

Accordingly, the Family Court properly found that the father and the mother neglected the older child and derivatively neglected the younger child.

The father's remaining contention is without merit.

ABUSE

Matter of Sama A., 224 AD3d 677 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from (1) an order of fact-finding of the Family Court, Kings County (Ilana Gruebel, J.), dated November 23, 2022, and (2) an order of disposition of the same court dated March 9, 2023. The order of fact-finding, insofar as appealed from, upon a decision of the same court dated November 23, 2022, made after a fact-finding hearing, found that the mother abused and neglected the subject child. The order of disposition, upon the order of fact-finding and after a dispositional hearing, inter alia, placed the subject child in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing.
ORDERED that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as the portion of the order of fact-finding appealed from was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

ORDERED that the appeal from so much of the order of disposition as placed the child in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing is dismissed as academic, without costs or disbursements; and it is further,

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

The Administration for Children's Services (hereinafter ACS) commenced this proceeding pursuant to Family Court Act article 10, alleging, inter alia, that the mother abused the [*2]subject child by allowing the father to commit certain offenses against the child and neglected the child by inflicting excessive corporal punishment and by failing to provide the child with proper supervision and guardianship. After a fact-finding hearing, the Family Court found, among other things, that the mother abused and neglected the child. After a dispositional hearing, the court, among other things, placed the child in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing. The mother appeals.

The Family Court correctly found that the mother's actions constituted abuse. At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act § 1046(b)(i), the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected (*Matter of Ciniya P. [Omar S.W.]*, 217 AD3d 954, 955). An abused child is defined as a child "whose parent or other person legally responsible for his [or her] care . . . commits, or allows to be

committed an offense against such child defined in article one hundred thirty of the penal law" (Family Ct Act § 1012[e][iii][A]). Here, ACS established by a preponderance of the evidence that the mother knew that the child was being abused and failed to take steps to protect the child from further harm (*see Matter of Maridas A. [Paula A.]*, 204 AD3d 511, 512; *Matter of Michael B. [Samantha B.]*, 130 AD3d 619, 621). Although the mother claimed that she did not know of the abuse before the child disclosed it to her in 2020, the court found that her testimony was not credible, and we find no basis to depart from the credibility determinations, which are entitled to great deference (*see Matter of Zaniah T. [Deshaun T.]*, 216 AD3d 1173, 1174).

The Family Court also correctly found that the mother neglected the child by inflicting excessive corporal punishment and by failing to provide the child with proper supervision and guardianship. A neglected child includes one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent or other person legally responsible for his [or her] care to exercise a minimum degree of care (A) in supplying the child with adequate food, clothing, shelter or education . . . though financially able to do so . . .; or (B) in providing the child with proper supervision and guidance, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment" (Family Ct Act § 1012[f][i]). While parents may have a limited right to use reasonable physical force against a child under certain narrow circumstances, "'the use of excessive corporal punishment constitutes neglect'" (*Matter of Raveena B. [Khrisend R.]*, 209 AD3d 640, 641, quoting *Matter of Kaylarose J.H. [Rena R.D.]*, 160 AD3d 953, 955). "A single incident of excessive corporal punishment may be sufficient to support a finding of neglect" (*Matter of Kaylarose J.H. [Rena R.D.]*, 160 AD3d at 955; *see Matter of Berllin B.O. [Shakira O.]*, 215 AD3d 581, 582). Here, the child's testimony was sufficient to support a finding that the mother, on February 6, 2021, hit and slapped the child's face and head, yanked the child's hair, and removed the child from the home (*see Matter of Je'laya J. [Tracey S.]*, 192 AD3d 1032, 1033-1034; *Matter of Sophia P.*, 66 AD3d 908, 909).

The mother's remaining contentions are without merit.

Sexual Abuse

Matter of S.T.B., 225 AD3d 414 (1st Dept., 2024)

Order of fact-finding, Family Court, Bronx County (Karen M.C. Cortes, J.), entered on or about December 20, 2022, which, after a hearing, determined that respondent sexually

abused the subject child S.T.B. and derivatively neglected the subject child T.D.B., unanimously affirmed, without costs.
Family Court properly concluded that S.T.B's out-of-court statements that respondent forcibly touched her were corroborated by the testimony of the ACS child protective specialist. S.T.B's statements are also corroborated by respondent's criminal charges, his guilty plea, the criminal court's order for respondent to engage in 36 therapy sessions at a sexual offender treatment program**,** and a full stay-away order of protection, in the related criminal proceedings based on the same incident (*see Matter of Jaylina B. [Clayton N.]*, 193 AD3d 609, 610 [1st Dept 2021]**,** *lv denied* 37 NY3d 904 [2021]; *Matter of Gabriel R. [Jose R.]*, 188 AD3d 501, 502 [1st Dept 2020]). S.T.B.'s consistent statements to the Police Department, District Attorney, and child protective specialist further enhanced their credibility (*Gabriel R.*, 188 AD3d at 502).

Respondent's own statements provided corroboration as he confirmed that he was in the apartment during the relevant time period and S.T.B's mother was not at home. Respondent also admitted to using a credit card to unscrew a lock on a door in the apartment (*see Matter of Jada J. [Reginald J.],* 210 AD3d 499, 501 [1st Dept 2022]). Respondent's testimony insinuating that S.T.B. fabricated the allegations against him in retaliation was unsupported by the record, and his broad, conclusory denials of sexual abuse were unavailing, and do not provide a basis to challenge Family Court's credibility findings (*see Matter of Adonis M.C. [Breanna V.M.]*, 212 AD3d 452, 454 [1st Dept 2023]).

The finding of derivative neglect against respondent as to T.D.B. was appropriate. Respondent's behavior evinced such an impaired level of judgment as to create a substantial risk of harm to the child (*Matter of Krystal N. [Juan R.]*, 193 AD3d 602, 602 [1st Dept 2021], *lv denied* 37 NY3d 906 [2021]).

Furthermore, respondent waived his objection to Family's Court's consideration of his mental health treatment records when his counsel consented to their admission at the hearing (*see Matter of Viktor T. [Gustavo T.]*, 221 AD3d 1015, 1016 [2d Dept 2023]). We have considered respondent's remaining arguments and find them unavailing.

Matter of J.L., AD3d 2024 NY Slip Op 03151 (1st Dept., 2024)

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about June 9, 2022, which, to the extent appealed from,

found that appellant sexually abused the two older subject children and derivatively abused the youngest subject child, unanimously affirmed, without costs.
A preponderance of the evidence supports Family Court's determination that appellant, a person legally responsible for the two older children, sexually abused those children (*see* Family Ct Act §§ 1012[e][iii]; 1046[b][i]), and that he derivatively abused the youngest child, his daughter (*see* Family Ct Act § 1046[a][i]). The court properly found that the eldest child's out-of-court statements were sufficiently corroborated by the middle child's out-of-court statements to the detective and by the mother's testimony (*see Matter of Nicole V.*, 71 NY2d 112, 124 [1987]; *Matter of Sade B. [Scott M.]*, 103 AD3d 519, 520 [1st Dept 2013]). Family Court also properly determined that the mother's testimony corroborated the older children's out-of-court statements that appellant was alone with them when she was not home (*see Matter of A.P. [M.P.]*, 183 AD3d 535, 536 [1st Dept 2020]). Appellant's intent to gain sexual gratification from raping the two older children was properly inferred from the acts themselves (*see Matter of Ada G.-L. [Christopher G.-L.]*, 188 AD3d 488, 489 [1st Dept 2020]). There is no reason to disturb the court's evaluation of the evidence, including its credibility determinations, as the findings were clearly supported by the record (*see Matter of Ilene M.*, 19 AD3d 106, 106 [1st Dept 2005]). Furthermore, the court properly drew a negative inference from appellant's failure to testify (*see Matter of Itzel A. [Jose V.]*, 188 AD3d 478, 479 [1st Dept 2020]).

Contrary to appellant's contention, the finding of derivative abuse is not undermined by the fact that the abuse of the two older children occurred about a year before the youngest child was born (*see Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556, 557 [1st Dept 2012]). The evidence of the abuse demonstrates that appellant's parental judgment and impulse control are so defective as to create a substantial risk of harm to any child in his care (*see Matter of Karime R. [Robin P.]*, 147 AD3d 439, 441 [1st Dept 2017]).

Appellant's claim that he was denied a fair trial because his trial counsel failed to submit expert testimony demonstrating the two older children's out-of-court statements were not sufficiently reliable for cross-corroboration is raised for the first time on appeal and unpreserved for appellate review (*see Matter of Judith L.C. v Lawrence Y.*, 179 AD3d 616, 617 [1st Dept 2020], *lv denied* 35 NY3d 911 [2020]), and we decline to review it. In any event, appellant's mere speculation that having an expert testify about how the detective might have influenced the two older children during their forensic interviews is not sufficient to demonstrate prejudice constituting [*2]ineffective assistance of counsel given that he never showed that there were relevant experts who would have been willing to testify in a manner helpful and favorable to his case (*see Matter of Julian P. [Colleen Q.]*, 129 AD3d 1222, 1224-1225 [3d Dept 2015]).

Matter of Nyla S., 224 AD3d 691 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, Jason B. appeals from an order of disposition of the Family Court, Queens County (Emily Ruben, J.), dated May 18, 2022. The order of disposition, upon an order of fact-finding of the same court dated April 22, 2022, made after a fact-finding hearing, inter alia, finding that Jason B. abused and neglected the subject children [*2]Nyla S. and Alyssa S., and derivatively abused and neglected the subject children Jayla B. and Joy B., and after a dispositional hearing, inter alia, released the subject children to the custody of the respondent mother.
ORDERED that the order of disposition is affirmed, without costs or disbursements.

The Administration for Children's Services (hereinafter ACS) commenced these proceedings pursuant to Family Court Act article 10, alleging, inter alia, that Jason B. (hereinafter the appellant) sexually abused and neglected the children Nyla S. and Alyssa S. Following a fact-finding hearing, in an order of fact-finding dated April 22, 2022, the Family Court found that the appellant was a person legally responsible for the care of Nyla S. and Alyssa S., that he sexually abused and neglected Nyla S. and Alyssa S., and that he derivatively abused and neglected the children Jair B., Jaden B., Jayla B., and Joy B., his biological children. After a dispositional hearing, the court issued an order of disposition dated April 26, 2022, upon the appellant's consent, releasing Jair B. and Jaden B. to the custody of their nonrespondent mother. After a separate dispositional hearing, the court issued an order of disposition dated May 18, 2022, inter alia, releasing Nyla S., Alyssa S., Jayla B., and Joy B. to the custody of the respondent mother. This appeal from the order of disposition dated May 18, 2022, ensued. The appeal from the order of disposition dated May 18, 2022, brings up for review so much of the order of fact-finding as found that the appellant sexually abused and neglected Nyla S. and Alyssa S., and derivatively abused and neglected Jayla B. and Joy B. (*see Matter of Timothy L. [Timothy L.]*, 221 AD3d 1006).

At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected (*see id.* § 1046[b][i]; *Matter of Brianna M. [Corbert G.]*, 152 AD3d 600, 601). The Family Court's credibility findings are entitled to great weight (*see Matter of Brianna M. [Corbert G.]*, 152 AD3d at 601; *Matter of Desiree P. [Michael H.]*, 149 AD3d 841, 841). In article 10 proceedings, the Family Court has "considerable discretion to decide whether the child's out-of-court statements describing incidents of abuse or neglect have, in fact, been

reliably corroborated and whether the record as a whole supports a finding of abuse" (*Matter of Christina F.*, 74 NY2d 532, 536 [internal quotation marks omitted]).

Here, ACS demonstrated, by a preponderance of the evidence, that the appellant sexually abused Nyla S. and Alyssa S. (*see* Family Ct Act §§ 1012[e][iii]; 1046[b][i]; Penal Law §§ 130.35[1]; 130.50[1], [3]; 130.75[1][a], [b]; 130.45[1]) and neglected those children by inflicting excessive corporal punishment on them (*see* Family Ct Act § 1012[f][i][B]). Contrary to the appellant's contention, the Family Court properly found him to be a person legally responsible for the care of Nyla S. and Alyssa S. within the meaning of the Family Court Act (*see id.* § 1012[g]; *Matter of Trenasia J. [Frank J.]*, 25 NY3d 1001, 1004-1006). Additionally, the court providently exercised its discretion in drawing a negative inference against the appellant for his failure to testify (*see Matter of Joshua T. [Kenisha T.]*, 196 AD3d 491, 492).

Contrary to the appellant's contention, the Family Court's finding that he derivatively abused and neglected Jayla B. and Joy B. was supported by a preponderance of the evidence. "[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent" (Family Ct Act § 1046[a][i]). The focus of the inquiry with respect to derivative findings is whether the evidence of abuse or neglect of another child or children demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for the other child or children in the parent's care (*see Matter of Marino S.*, 100 NY2d 361, 374; *Matter of Kristina I. [Al Quran F.]*, 163 AD3d 565, 567). Here, the evidence adduced at the fact-finding hearing demonstrated, by a preponderance of the evidence, a fundamental defect in the appellant'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 his care (*see Matter of Taurice M. [Gregory A.]*, 147 AD3d 844, 845). Accordingly, the court properly found that the appellant derivatively abused and neglected Jayla B. and Joy B. (*see generally Matter of Naphtali A. [Winifred A.]*, 165 AD3d 781, 784).

Matter of Yeimi M., 224 AD3d 836 (2nd Dept., 2024) (Boyfriend’s case)

In a proceeding pursuant to Family Court Act article 10, Atilio C. appeals from an order of disposition of the Family Court, Kings County (Ilana Gruebel, J.), dated August 10, 2022. The order of disposition, insofar as appealed from, was entered upon an order of fact-finding of the same court dated March 1, 2022, made after a fact-finding hearing, finding that Atilio C. abused and neglected the subject child.

ORDERED that on the Court's own motion, the notice of appeal from a decision dated March 1, 2022, is deemed to be a premature notice of appeal from the order of disposition (*see* CPLR 5520[c]); and it is further,

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

In December 2018, the Administration for Children's Services (hereinafter ACS) commenced this proceeding pursuant to Family Court Act article 10, alleging, inter alia, that the appellant, a person legally responsible for the subject child, sexually abused and neglected her. After a fact-finding hearing, the Family Court found that the appellant abused and neglected the child. This appeal ensued.

"'At a fact-finding hearing, any determination that a child is an abused or neglected child must be based on a preponderance of the evidence'" (*Matter of Jose E. [Jose M.]*, 176 AD3d 1201, 1202, quoting *Matter of D.S. [Shaqueina W.]*, 147 AD3d 856, 857). "'Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and [*2]observe their demeanor'" (*Matter of Jose E. [Jose M.]*, 176 AD3d at 1202, quoting *Matter of Oliver A. [Oguis A.-D.]*, 167 AD3d 867, 868).

Here, ACS demonstrated, by a preponderance of the evidence, that the appellant sexually abused and neglected the child (*see* Family Ct Act §§ 1012[e][iii]; 1046[b][i]; Penal Law §§ 130.52, 130.55, 130.60, 130.65). The child's testimony as to multiple instances of sexual abuse by the appellant was sufficient to support a finding of abuse and neglect (*see Matter of Ashley A.F. [Juan T.]*, 181 AD3d 882, 883; *Matter of Jose E. [Jose M.]*, 176 AD3d at 1202; *Matter of M.W. [Mohammad W.]*, 172 AD3d 879, 881). Any inconsistencies between the child's testimony and her out-of-court statements did not render such testimony unworthy of belief (*see Matter of Ashley A.F. [Juan T.]*, 181 AD3d at 883; *Matter of D.S. [Shaqueina W.]*, 147 AD3d at 857; *Matter of Karime R. [Robin P.]*, 147 AD3d 439, 440; *Matter of Andrea V. [James F.]*, 128 AD3d 1077, 1078).

Matter of Emily R., 226 AD3d 794 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, Magali M. C. appeals from (1) an order of fact-finding of the Family Court, Kings County (Elizabeth Barnett, J.), dated October 20, 2021, and (2) an order of disposition of the same court (Michael R. Milsap, J.) dated April 27, 2022. The order of fact-finding, insofar as appealed from, after a fact-finding hearing, found that Magali M. C. abused the subject children. The order of disposition, insofar as appealed from, after a dispositional hearing, placed the

children Emily R. and Estephania G.-M. in the custody of the Commissioner of Social Services of the City of New York and directed Magali M. C. to comply with certain conditions.
ORDERED that the appeal from so much of the order of fact-finding as found that Magali M. C. abused the children Emily R. and Estephania G.-M. is dismissed, without costs or disbursements, as that portion of the order of fact-finding was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

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

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

The petitioner commenced these related proceedings pursuant to Family Court Act article 10, alleging, inter alia, that Eduardo R. sexually abused the children Emily R., Estephania G.-M., and Miranda G.-C. After a fact-finding hearing, the Family Court found, among other things, that the petitioner established that Eduardo R. committed, inter alia, sexual abuse in the third degree against the children, that Magali M. C. (hereinafter the appellant), who is the mother of Estephania G.-M. and Miranda G.-C. and a person legally responsible for Emily R., was actually aware of the abuse, and that the appellant abused all three children by allowing Eduardo R. to commit such offenses. After a dispositional hearing, the court, among other things, placed Emily R. and Estephania G.-M. in the custody of the Commissioner of Social Services of the City of New York and directed the appellant to comply with certain conditions.

At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected (*see id.* § 1046[b][i]; *Matter of Brianna M. [Corbert G.]*, 152 AD3d 600, 601). "The Family Court Act defines an abused child as, inter alia, a child whose parent commits against him or her a sex offense as defined in article 130 of the Penal Law, or allows such an offense to be committed against the child" (*Matter of Vered L. [Yoshi S.]*, 205 AD3d 1028, 1029; *see* Family Ct Act § 1012[e][iii][A]).

To satisfy its burden, the petitioner may rely upon prior out-of-court statements of the subject children, provided that they are sufficiently corroborated (*see* Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 117-118). The out-of-court statements of siblings may properly be used to cross-corroborate one another (*see Matter of Arique D. [Elizabeth A.]*, 111 AD3d 625, 627). Where the Family Court is primarily confronted with issues of credibility, its factual findings must be accorded considerable deference on

appeal as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor (*see Matter of Ariana M. [Edward M.]*, 179 AD3d 923, 924).

Contrary to the appellant's contention, the Family Court providently exercised its discretion in determining that the out-of-court statements of the children were sufficiently corroborated (*see* Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d at 119; *Matter of Leah R. [Miguel R.]*, 104 AD3d 774, 774). Furthermore, a preponderance of the evidence established that the appellant abused the children (*see* Family Ct Act § 1012[e][iii]; *Matter of Karen B.*, 296 AD2d 403).

Matter of Tony C., 226 AD3d 1008 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, Jadiel L. appeals from an order of disposition of the Family Court, Kings County (Melody Glover, J.), dated July 29, 2022. The order of disposition, upon an order of fact-finding of the same court dated July 12, 2022, made after a fact-finding hearing, finding that Jadiel L. sexually abused the child Gina C. and derivatively abused the child Tony C., and upon the consent of Jadiel L., inter alia, directed Jadiel L. to comply with the terms of two orders of protection of the same court, both dated July 29, 2022, placed Jadiel L. under the supervision of the petitioner for a period of six months, and directed Jadiel L. to complete a sex offender treatment program or engage in treatment with a therapist qualified in sex offender treatment and/or cognitive behavioral therapy.
ORDERED that the appeal from so much of the order of disposition as, upon the consent of Jadiel L., directed Jadiel L. to comply with the terms of two orders of protection, both dated July 29, 2022, placed Jadiel L. under the supervision of the petitioner for a period of six months, and directed Jadiel L. to complete a sex offender treatment program or engage in treatment with a therapist qualified in sex offender treatment and/or cognitive behavioral therapy is dismissed, without costs or disbursements; and it is further,

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

In October 2018, the Administration for Children's Services (hereinafter ACS) commenced these related child protective proceedings against, among others, the appellant, alleging, inter alia, that he sexually abused his girlfriend's then 10-year-old daughter (hereinafter the female child), and derivatively abused his girlfriend's then 8-year-old son (hereinafter the male child). After a fact-finding hearing, the Family Court determined that the appellant was a person legally responsible for the children's care, and in an order of fact-finding dated July 12, 2022, found that the appellant sexually

abused the female child and derivatively abused the male child. Thereafter, in an order of disposition dated July 29, 2022, the court, upon the appellant's consent, inter alia, directed the appellant to comply with the terms of two orders of protection, both dated July 29, 2022, placed him under the supervision of ACS for a period of six months, and directed him to complete a sex offender treatment program or engage in treatment with a therapist qualified in sex offender treatment and/or cognitive behavioral therapy. This appeal from the order of disposition ensued.

The appeal from so much of the order of disposition as, upon the appellant's consent, directed the appellant to comply with the terms of two orders of protection, both dated July 29, 2022, placed the appellant under the supervision of ACS for a period of six months, and directed the appellant to complete a sex offender treatment program or engage in treatment with a therapist qualified in sex offender treatment and/or cognitive behavioral therapy must be dismissed, as no appeal lies from an order entered upon the consent of the appealing party (*see Matter of Eunice D. [James F.D.]*, 111 AD3d 627, 628). However, the appeal from so much of the order of disposition as brings up for review the findings in the order of fact-finding that the appellant sexually abused the female child and derivatively abused the male child "is properly before this Court as [the appellant's] timely appeal from the order of disposition 'brings up for review all non-final orders that affected'" the order of disposition (*Matter of Timothy L. [Timothy L.]*, 221 AD3d 1006, quoting *Matter of Aiden XX. [Jesse XX.]*, 104 AD3d 1094, 1095 n 3).

Family Court Act § 1012(a) grants the Family Court jurisdiction over "any parent or other person legally responsible for the child's care who is alleged to have abused or neglected such child." "A person is a proper respondent in [a Family Court Act] article 10 proceeding as an 'other person legally responsible for the child's care' if that person acts as the functional equivalent of a parent in a familial or household setting" (*Matter of Yolanda D.*, 88 NY2d 790, 796; *see Matter of Serenity R. [Truman C.]*, 215 AD3d 854, 856). "Determining whether a particular person has acted as the functional equivalent of a parent is a discretionary, fact-intensive inquiry which will vary according to the particular circumstances of each case. Factors such as the frequency and nature of the contact between the child and respondent, the nature and extent of the control exercised by the respondent over the child's environment, the duration of the respondent's contact with the child, and the respondent's relationship to the child's parent[s] are some of the variables which should be considered and weighed by a court" (*Matter of Serenity R. [Truman C.]*, 215 AD3d at 856 [internal quotation marks omitted]; *see Matter of Marjorie P. [Gerardo M.P.]*, 221 AD3d 818, 820).

Here, the evidence adduced at the fact-finding hearing, including the appellant's own testimony, demonstrated that he was the mother's paramour from late 2014 until 2018, went to the children's home daily, spent the night at the children's home once or twice a

week, took the children to and from school, assisted them with homework, and occasionally assisted financially. In addition, the evidence demonstrated that the appellant exercised control over the children's environment during the relevant period by freely accessing the children's home on a regular basis while caring for them when the mother was not at home. Moreover, the appellant testified that, at one point, the children called him daddy, he saw the children as "[his] own kids," and the children gave him presents for Father's Day. Therefore, the Family Court's determination that the appellant was a person legally responsible for the children was supported by a preponderance of the evidence.

"At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected" (*Matter of Ciniya P. [Omar S.W.]*, 217 AD3d 954, 955; *see* Family Ct Act § 1046[b][i]; *Matter of Vered L. [Yoshi S.]*, 205 AD3d 1028, 1029). "Unsworn out-of-court statements of the victim may be received and, if properly corroborated, will support a finding of abuse or neglect" (*Matter of Nicole V.*, 71 NY2d 112, 117-118; *see* Family Ct [*2]Act § 1046[a][vi]; *Matter of Jada W. [Fanatay W.]*, 219 AD3d 732, 738). Family Court Act § 1046(a)(vi) "states a broad flexible rule providing that out-of-court statements may be corroborated by '[a]ny other evidence tending to support' their reliability" (*Matter of Nicole V.*, 71 NY2d at 118, quoting Family Ct Act § 1046[a][vi]; *see Matter of Omnamm L. [Kumar L.]*, 177 AD3d 973, 975). "Family Court Judges presented with the issue have considerable discretion to decide whether the child's out-of-court statements describing incidents of abuse or neglect have, in fact, been reliably corroborated" (*Matter of Nicole V.*, 71 NY2d at 119; *see Matter of Kashai E. [Kashif R.E.]*, 218 AD3d 574, 575-576). "Moreover, where the Family Court is primarily confronted with issues of credibility, its factual findings must be accorded considerable deference on appeal" (*Matter of Ashley G. [Eggar T.]*, 163 AD3d 963, 965; *see Matter of Kaley G. [William G.]*, 214 AD3d 869, 870).

Here, contrary to the appellant's contention, ACS demonstrated by a preponderance of the evidence that the appellant sexually abused the female child. The out-of-court statements of the female child that the appellant put his penis in her mouth were corroborated by the out-of-court statements of the male child and the mother's testimony confirming certain events (*see Matter of Omnamm L. [Kumar L.]*, 177 AD3d at 975; *Matter of Antonio T. [Franklin T.]*, 169 AD3d 699, 700).

The Family Court's finding that the appellant derivatively abused the male child was also supported by a preponderance of the evidence. "[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent" (Family Ct Act § 1046[a][i]; *see Matter of Kaley G. [William G.]*, 214 AD3d at 871). Here, the evidence adduced at the

fact-finding hearing that the appellant sexually abused the female child in the presence of the male child demonstrated, by a preponderance of the evidence, a fundamental defect in the appellant's understanding of the duties of a person with legal responsibility for the care of the male child and such an impaired level of judgment as to create a substantial risk of harm to the male child, who was in the appellant's care (*see Matter of Kaley G. [William G.]*, 214 AD3d at 871).

The appellant's remaining contentions are unpreserved for appellate review, and, in any event, without merit.

Matter of Naima E., 227 AD3d 901 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, Daryl M. appeals from an order of fact-finding of the Family Court, Queens County (Peter F. DeLizzo, J.), dated December [*2]8, 2022. The order of fact-finding, insofar as appealed from, after a fact-finding hearing, found that Daryl M. abused the child Naima E. and derivatively abused the children Malachi M., Michaiah M., Ariel M., and Nkhai E.
ORDERED that the order of fact-finding is affirmed insofar as appealed from, without costs or disbursements.

In August 2021, the petitioner commenced these proceedings pursuant to Family Court Act article 10, alleging, inter alia, that Daryl M. sexually abused his stepdaughter, Naima E., and derivatively abused the children Malachi M., Michaiah M., Ariel M., and Nkhai E. In an order of fact-finding dated December 8, 2022, made after a fact-finding hearing, the Family Court, among other things, found that Daryl M. abused Naima E. and derivatively abused the other children. Daryl M. appeals.

"The Family Court Act defines an abused child as, inter alia, a child whose parent commits against him or her a sex offense as defined in article 130 of the Penal Law, or allows such an offense to be committed against the child" (*Matter of Ciniya P. [Omar S.W.]*, 217 AD3d 954, 955 [internal quotation marks omitted]). An abused child's testimony, standing alone, may be sufficient to support a finding of abuse (*see e.g. Matter of Jose E. [Jose M.]*, 176 AD3d 1201, 1202). "Where, as here, there is conflicting testimony and the matter turns upon the assessment of the credibility of witnesses, the factual findings of the hearing court must be accorded great weight" (*Matter of Lauryn H. [William A.]*, 73 AD3d 1175, 1176).

Here, the Family Court's finding that Naima E. was an abused child was supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[e][iii]; 1046[b][i]; *see also Matter of Vered L. [Yoshi S.]*, 205 AD3d 1028). The court found that Naima E. and her mother credibly testified, inter alia, to four instances of sexual abuse committed against

Naima E. by Daryl M. In addition to the court's firsthand assessment of the witnesses' credibility, the reliability of Naima E.'s testimony was amplified by her recollection of specific details related to the events in question (*see Matter of Lauryn H. [William A.]*, 73 AD3d at 1176).

Further, the Family Court properly found that Malachi M., Michaiah M., Ariel M., and Nkhai E. were derivatively abused. "Where a person's conduct toward one child demonstrates a fundamental defect in the parent's understanding of the duties of parenthood, or demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in his or her care, an adjudication of derivative abuse with respect to the other children is warranted" (*Matter of Ciniya P. [Omar S.W.]*, 217 AD3d at 955). "Such flawed notions of parental responsibility are generally reliable indicators that a parent who has abused one child will place his or her other children at substantial risk of harm" (*Matter of M.W. [Mohammad W.]*, 172 AD3d 879, 881 [internal quotation marks omitted]). Here, Daryl M. demonstrated a fundamental defect in his understanding of the duties of parenthood when he sexually abused Naima E. on three occasions while the other children were present in the home (*see Matter of Ciniya P. [Omar S.W.]*, 217 AD3d at 954; *Matter of Isabelle C. [Jarred B.]*, 179 AD3d 670).

The parties' remaining contentions are without merit.

Matter of Ashlyn M., AD3d 2024 NY Slip Op 03483 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the father appeals from (1) an order of fact-finding of the Family Court, Suffolk County (Caren Loguercio, J.), dated June 23, 2023, and (2) an order of fact-finding and disposition of the same court dated September 11, 2023. The order of fact-finding, after a fact-finding hearing, found that the father abused the child Ashlyn M. and derivatively neglected the child Jordan M. The order of fact-finding and disposition, upon the order of fact-finding and after a dispositional hearing, found that the father abused the child Ashlyn M. and derivatively neglected the child Jordan M., released the subject children to the custody of the nonrespondent mother under the supervision of the petitioner for a period of one year, placed the father under the supervision of the petitioner for a period of one year, and directed the father to comply with certain terms and conditions.
ORDERED that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as the order of fact-finding was superseded by the order of fact-finding and disposition and is brought up for review on the appeal from the order of fact-finding and disposition (*see Matter of Alexander S. [Gabriel H.]*, 224 AD3d 907, 908); and it is further,

ORDERED that the order of fact-finding and disposition is affirmed, without costs [*2]or disbursements.

The petitioner commenced these related proceedings pursuant to Family Court Act article 10, alleging, inter alia, that the father sexually abused the child Ashlyn M. and derivatively neglected the child Jordan M. based on the abuse of Ashlyn M. After a fact-finding hearing, the Family Court found that the father sexually abused Ashlyn M. and derivatively neglected Jordan M. Thereafter, the court, following a dispositional hearing, released the children to the custody of the nonrespondent mother under the supervision of the petitioner for a period of one year, placed the father under the supervision of the petitioner for the same period of time, and directed the father to comply with certain terms and conditions, including participation in a sex offender treatment program. The father appeals.

"At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected" (*Matter of Ciniya P. [Omar S.W.]*, 217 AD3d 954, 955, citing Family Ct Act § 1046[b][i]). "Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor" (*Matter of Amberlyn H.P. [Jose H.C.]*, 187 AD3d 920, 920 [internal quotation marks omitted]). "Where, as here, there is conflicting testimony and the matter turns upon the assessment of the credibility of witnesses, the factual findings of the hearing court must be accorded great weight" (*Matter of Lauryn H. [William A.]*, 73 AD3d 1175, 1176 [internal quotation marks omitted]). Moreover, "[t]he Family Court Act defines an abused child as, inter alia, a child whose parent commits against him or her a sex offense as defined in article 130 of the Penal Law" (*Matter of Vered L. [Yoshi S.]*, 205 AD3d 1028, 1029, citing Family Ct Act § 1012[e][iii][A]). "Sexual contact is defined under the Penal Law as 'any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party'" (*Matter of M.W. [Mohammad W.]*, 172 AD3d 879, 880, quoting Penal Law § 130.00[3]). "The intent to receive sexual gratification may be inferred from the nature of the acts committed and the circumstances in which they occurred" (*Matter of Vered L. [Yoshi S.]*, 205 AD3d at 1030 [internal quotation marks omitted]).

Here, the Family Court's finding that the father sexually abused Ashlyn M. and derivatively neglected Jordan M. was supported by a preponderance of the evidence (*see Matter of Nevaeh L.-B. [Marcus B.]*, 178 AD3d 706, 707; *Matter of D.S. [Shaqueina W.]*, 147 AD3d 856, 857). Ashlyn M.'s "hearing testimony established that the father sexually abused her within the meaning of Family Court Act § 1012(e)(iii)(A)" (*Matter of M.W. [Mohammad W.]*, 172 AD3d at 881). Based on the totality of the circumstances,

the court appropriately inferred the father's intent to gain sexual gratification from his conduct (*see Matter of D.S. [Shaqueina W.]*, 147 AD3d at 858; *Matter of Daniel R. [Lucille R.]*, 70 AD3d 839, 841). Contrary to the father's contention, there is no basis to disturb the court's credibility determinations (*see Matter of Abdul R. [Abdul G.]*, 225 AD3d 881, 882; *Matter of Skyli V. [Jamol V.—Shaneka E.]*, 224 AD3d 913, 915).

Moreover, since the Family Court concluded that it lacked sufficient information to render an informed determination regarding the best interests of the children, it providently exercised its discretion in requiring a dispositional hearing under the circumstances presented (*see* Family Ct Act § 625[a]; *Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 184; *Matter of Katrina W.*, 171 AD2d 250, 256-257).

Contrary to the father's contention, the record reflects that his admission to a finding of neglect was expressly conditioned on an agreed-upon disposition, which the Family Court did not accept.

In light of our determination, we need not reach the father's contention regarding the limited scope of the nonrespondent mother's right to participate in these proceedings (*see Matter of Eric W. [Tyisha W.]*, 97 AD3d 833, 834; *Matter of Telsa Z. [Rickey Z.—Denise Z.]*, 71 AD3d 1246, 1250-1251).

The parties' remaining contentions either are unpreserved for appellate review or need not be reached in light of our determination.

Matter of Dorika S., 225 AD3d 1171 (4th Dept., 2024)

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered May 18, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent abused one of the subject children and derivatively abused the other three subject children.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent appeals from an order that adjudged that he abused the eldest child of his girlfriend and derivatively abused her three youngest children, one of whom was his.

We agree with respondent that the findings of abuse and derivative abuse are properly before us despite the fact that he entered into a contract for services in lieu of a dispositional hearing inasmuch as he contested the findings of abuse and derivative

abuse at the fact-finding hearing (*see Matter of Zoe L. [Melissa L.]*, 122 AD3d 1445, 1446 [4th Dept 2014], *lv denied* 24 NY3d 918 [2015]; *see also Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1676-1677 [4th Dept 2021]).

Contrary to respondent's contention, Family Court's finding that he sexually abused the eldest of the subject children is supported by the requisite preponderance of the evidence (*see Matter of James L.H. [Lisa H.]*, 182 AD3d 990, 991 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]; *see generally* Family Ct Act § 1046 [b] [i]). "A child's out-of-court statements may form the basis for a finding of [abuse] as long as they are sufficiently corroborated by [any] other evidence tending to support their reliability" (*James L.H.*, 182 AD3d at 991 [internal quotation marks omitted]; *see* § 1046 [a] [vi]; *Matter of Nicole V.*, 71 NY2d 112, 117-118 [1987], *rearg denied* 71 NY2d 890 [1988]). "Courts have considerable discretion in determining whether a child's out-of-court statements describing incidents of abuse have been reliably corroborated and whether the record as a whole supports a finding of abuse . . . , and [t]he Legislature has expressed a clear intent that a relatively low degree of corroborative evidence is sufficient in abuse proceedings" (*Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011] [internal quotation marks omitted]).

Here, the out-of-court statements of the eldest of the subject children were sufficiently corroborated by the testimony of "caseworker[s] trained in forensic interviewing techniques" (*Matter of Skyler D. [Joseph D.]*, 185 AD3d 1515, 1516 [4th Dept 2020]), the child's " 'age-inappropriate knowledge of sexual matters' " and language (*id*.), a medical report indicating vaginal penetration of the child (*see Matter of David C. [Lawrence C.]*, 162 AD3d 1648, 1649 [4th Dept 2018]), and a caseworker's discovery of a container of lotion as and where described by the child in her out-of-court statements that detailed its use in her sexual abuse. "[C]orroborative evidence as to the identity of an abuser is not required" (*Matter of Amelia V.M.B. [Davidson B.]*, 107 AD3d 980, 981 [2d Dept 2013]; *see also Matter of Nichole L.*, 213 AD2d 750, 751 [3d Dept 1995], *lv denied* 86 NY2d 701 [1995]). Moreover, the child gave multiple, consistent descriptions of respondent's abuse and, " '[a]lthough repetition of an accusation by a child does not corroborate the child's prior account of [abuse] . . . , the consistency of the child['s] out-of-court statements describing [the] sexual conduct enhances the reliability of those out-of-court statements' " (*Matter of Brooke T. [Justin T.]*, 156 AD3d 1410, 1411 [4th Dept 2017]). Additionally, the court was entitled to draw " 'the strongest inference' " against respondent that the opposing evidence permits based upon his failure to testify (*Matter of Serenity P. [Shameka P.]*, 74 AD3d 1855, 1855 [4th Dept 2010]).

We further conclude that the findings of derivative abuse with respect to the three other subject children are supported by a preponderance of the evidence inasmuch as they were present in the home or, on at least one occasion, in the same room as respondent

during the times that he sexually abused their eldest sibling (*see Skyler D.*, 185 AD3d at 1517; *Matter of A.R.*, 309 AD2d 1153, 1154 [4th Dept 2003]).

Physical Abuse

Matter of L.M.R., 227 AD3d 577 (1st Dept, 2024)

Order of disposition, Family Court, New York County (Valerie A. Pels, J.), entered on or about January 9, 2023, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding order, same court and Judge, entered on or about March 30, 2023, determining, after a hearing, that respondent father abused the subject child, L.M.R., and derivatively abused the other three children, unanimously affirmed, without costs.

The father does not dispute that the Administration for Children's Services (ACS) made a prima facie showing that L.M.R.'s injuries were "of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child" (Family Court Act § 1046[a][ii]; *see also Matter of Philip M.*, 82 NY2d 238, 244 [1993]). L.M.R., approximately two years old and on a trial discharge to the parents, presented to the hospital unable to bear weight on the child's left leg, with two fractures near the child's left knee, multiple scratches on the child's cheeks, abdominal distension, and bruises on the child's leg and face. Upon further examination, it was determined that L.M.R. also had sustained multiple arm fractures which were at varying stages of healing. ACS's medical witness, whom the court deemed credible, opined that, due to the nature and location of the injuries, as well as L.M.R.'s listless affect, the injuries were intentionally inflicted.

In opposition, the father offered the testimony of a medical witness, who minimized the confluence of L.M.R.'s injuries, even though they were sustained within a short period of time**.** He attributed these injuries to the family's purported chaotic environment and to L.M.R. being accident prone. Given the holes in the expert's assessment, the court properly found his testimony incredible and credited the testimony and expert opinion of ACS's medical witness instead (*see Matter of Jacob V. [Shelly R. — Adonis V.]*, 203 AD3d 449, 450 [1st Dept 2022]; *Matter of Ariah L. [Darrell L.]*, 198 AD3d 648, 650 [2d Dept 2021]). The court also found the father's testimony to be self-serving and not credible. The father has failed to articulate any persuasive basis to disturb the court's credibility determinations (*see Matter of Amir A. [Matthew C.]*, 189 AD3d 401 [1st Dept 2020]). Nor did the father rebut the presumption by blaming the mother, who had made an admission in the underlying proceeding, because a finding of abuse as to one parent

is not a bar to making a finding against the other parent regarding the same incident of maltreatment (*see Matter of Adonis M.C. [Breanna V.M.]*, 212 AD3d 452, 453 [1st Dept 2023]).

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

Matter of L.V., AD3d 2024 NY Slip Op 03459 (1st Dept., 2024)

Order, Family Court, New York County (Valerie A. Pels, J.), entered on or about December 22, 2022, which, after a hearing, found that respondent mother abused the subject child, unanimously affirmed, without costs.

Petitioner made prima facie showing of abuse by introducing expert medical testimony establishing that the child suffered a fracture of the humerus, and that his injury was the result of nonaccidental trauma that would ordinarily not be sustained by a five-month-old child except by reason of the acts or omissions of the mother (*see Matter of Philip M.*, 82 NY2d 238, 243-244 [1993]).

The burden having shifted, the mother failed to rebut the presumption of culpability with a credible and reasonable explanation of how the child suffered the fracture to his humerus, or otherwise demonstrate that she was not guilty of abuse (*see Matter of Ni'Kia C. [Dominque J.]*, 118 AD3d 515, 516 [1st Dept 2014]). In petitioner's expert's medical opinion, the mother's purported explanation of "play-walking" with the child, dangling him by his wrists and moving him forward, briefly, could not have resulted in a fracture of the humerus bone. The mother's medical expert did not dispute petitioner's expert's opinion. The mother's medical expert posited that the fracture would have occurred from the child falling or something falling on the child, however the mother did not testify that the child was injured by falling or by a falling object and there is no other evidence to support a finding that this is how the injury occurred.

Contrary to the mother's arguments, both medical experts also ruled out the possibility that the child's humerus fracture could have resulted from the urgent care physician's attempt to perform a reduction maneuver on the child's elbow. Nor was petitioner required to establish that there is no possible accidental explanation for the injury (*see Matter of Kortney C.*, 3 AD3d 532, 532-533 [2d Dept 2004]).

The mother's focus on the time the child spent at the maternal grandmother's home does not avail her. The record supports the court's finding that the mother remained a caretaker of the child at the time of injury (*see Matter of Travis S. [Moezel J. — Taijon S.]*, 203 AD3d 478, 479 [1st Dept 2022]). Nor must all caretakers be named as

respondents in an abuse action (*see Matter of Grayson R.V. [Jessica D. — David P.]*, 200 AD3d 1646, 1648 [4th Dept 2021]).

Further, we defer to the court's credibility findings (*see Matter of Sara B.*, 41 AD3d 170, 171 [1st Dept 2007]).

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

Matter of Nash D., 224 AD3d 749 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the father appeals from an order of fact-finding of the Family Court, Orange County (Christine P. Krahulik, J.), dated December 21, 2022. The order of fact-finding, upon a decision of the same court dated November 4, 2022, made after a hearing, found that the father abused and neglected the child Nash D. and derivatively abused and neglected the children Cole D., Lila D., and Gabriella D.
ORDERED that the order of fact-finding is affirmed, with costs to the petitioner.

The petitioner commenced these proceedings pursuant to Family Court Act article 10, alleging that the father abused and neglected the child Nash D. and derivatively abused and [*2]neglected the children Cole D., Lila D., and Gabriella D. Nash D. was hospitalized for six weeks after sustaining injuries following the father's removal of a pacifier from the then 7½-week-old child's mouth by using needle-nose pliers. At a fact-finding hearing, the petitioner's expert in child abuse pediatrics testified, inter alia, that the "picture was consistent with child abuse" and opined that the pacifier was pushed into Nash D.'s mouth, as it was developmentally impossible for Nash D. to place or push the pacifier into his own mouth. The father's medical expert testified that he did "not have an opinion on whether it was deliberate or accidental," but testified that it was "unlikely that a two-month-old is able to put a pacifier inside their own mouth as an act of . . . their own volition." The father did not testify at the hearing. After the hearing, the Family Court found that the father abused and neglected Nash D. and derivatively abused and neglected the other three children. The father appeals.

At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected (*see id.* § 1046[b][i]; *Matter of Tammie Z.*, 66 NY2d 1, 3; *Matter of Brianna M. [Corbert G.]*, 152 AD3d 600, 601). Family Court Act § 1046(a)(ii) provides that a prima facie case of child abuse or neglect may be established by (1) evidence of an injury to a child which would ordinarily not occur absent an act or omission of respondents, and (2) evidence that respondents were the caretakers of the child at the time the injury occurred (*see Matter*

of Philip M., 82 NY2d 238, 243). "Although the burden of proving child abuse or neglect always remains with the petitioner, once a prima facie case has been established, a presumption of parental responsibility arises, and the burden of going forward to rebut the presumption shifts to the respondents" (*Matter of Peter R.*, 8 AD3d 576, 577, citing *Matter of Philip M.*, 82 NY2d at 244). The Family Court's findings with respect to credibility are entitled to great weight (*see Matter of Desiree P. [Michael H.]*, 149 AD3d 841, 841).

Here, the petitioner established, prima facie, through, inter alia, the testimony of its expert, a first responder, and investigators, that the father abused and neglected Nash D. (*see* Family Ct Act § 1046[a][ii]; *Matter of Philip M.*, 82 NY2d at 243-244; *Matter of Semenah R. [Keno R.—Shanika R.]*, 135 AD3d 503). The father failed to rebut the presumption of parental responsibility by providing a reasonable explanation for Nash D.'s injuries (*see Matter of Philip M.*, 82 NY2d at 245; *Matter of Kamryn R. [Natalie R.]*, 187 AD3d 1192, 1194), and the Family Court was entitled to draw the strongest negative inference from the father's failure to testify at the fact-finding hearing (*see Matter of Mirianne A. [George A.]*, 214 AD3d 864, 865).

Contrary to the father's contention, the Family Court's finding that he derivatively abused and neglected the other three children was supported by a preponderance of the evidence. "[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent" (Family Ct Act § 1046[a][i]). There is no per se rule that a finding of abuse or neglect of one sibling requires a finding of derivative abuse or neglect with respect to the other siblings (*see Matter of Dayannie I.M. [Roger I.M.]*, 138 AD3d 747, 749). The focus of the inquiry with respect to derivative findings is whether the evidence of abuse or neglect of another child or children demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for the other child or children in the parent's care (*see Matter of Marino S.*, 100 NY2d 361, 374; *Matter of Skye H. [Tianna S.]*, 195 AD3d 711, 714-715). Here, as the court found, the evidence adduced at the fact-finding hearing demonstrated, by a preponderance of the evidence, a fundamental defect in the father's understanding of the duties of parenthood and such an impaired level of parental judgment as to create a substantial risk of harm for any child in his care (*see Matter of Skye H. [Tianna S.]*, 195 AD3d at 715).

Matter of Alexander S., 224 AD3d 907 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, Gabriel H. appeals from (1) an order of fact-finding of the Family Court, Suffolk County (Caren Loguercio, J.), dated May 9, 2022, and (2) an order of fact-finding and disposition of the same court

also dated May 9, 2022. The order of fact-finding, after a fact-finding hearing, found that Gabriel H. abused and neglected the child Jayden J. and derivatively neglected the children Alexander S., Jaeda J., Janaya J., Jaylen J., Jerome J., and Jeromiah J. The order of fact-finding and disposition, upon the order of fact-finding and after a dispositional hearing, inter alia, placed Gabriel H. under the supervision of the Suffolk County Department of Social Services until May 8, 2023.
ORDERED that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as the order of fact-finding was superseded by the order of fact-finding and disposition and is brought up for review on the appeal from the order of fact-finding and disposition; and it is further,

ORDERED that the appeal from so much of the order of fact-finding and disposition as placed Gabriel H. under the supervision of the Suffolk County Department of Social Services until May 8, 2023, is dismissed as academic, without costs or disbursements; and it is further,

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

Six-year-old Jayden J. was observed in school with bruises and lacerations on his back. The petitioner, Suffolk County Department of Social Services, filed a petition alleging abuse and neglect of Jayden J. and petitions alleging derivative neglect of his six siblings against the mother and her live-in boyfriend, Gabriel H. The mother subsequently admitted to the use of excessive corporal punishment in the past, and the Family Court found that the mother neglected the children. The petitions against Gabriel H. proceeded to a fact-finding hearing, after which the court found that Gabriel H. abused and neglected Jayden J. by inflicting excessive corporal punishment on him and derivatively neglected Jayden J.'s six siblings. After a dispositional hearing, the court, inter alia, placed Gabriel H. under the petitioner's supervision until May 8, 2023. Gabriel H. appeals.

The appeal from so much of the order of fact-finding and disposition as placed Gabriel H. under the petitioner's supervision until May 8, 2023, has been rendered academic, since the period of supervision has expired by its own terms (*see Matter of Davasha T. [David T.]*, 218 AD3d 475). Nevertheless, the Family Court's findings of abuse, neglect, and derivative neglect against Gabriel H. are not academic, since such adjudications constitute permanent and significant stigmas which might indirectly affect his status in future proceedings (*see Matter of Kaylarose J.H. [Rena R.D.]*, 160 AD3d 953).

Family Court Act § 1046(a)(ii) provides that "proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for

the care of such child shall be prima facie evidence of child abuse or neglect, as the case may be, of the parent or other person legally responsible." Furthermore, "[g]reat deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor" (*Matter of Skye H. [Tianna S.]*, 195 AD3d 711, 713). The court's credibility determinations are entitled to considerable deference unless clearly unsupported by the record (*see Matter of Angela-Marie C. [Renee C.]*, 162 AD3d 1010).

Here, contrary to the contentions of Gabriel H., the Family Court providently exercised its discretion (*see Matter of Nicole V.*, 71 NY2d 112, 119; *Matter of Victoria C. [Tara C.]*, 155 AD3d 866) in determining that the out-of-court statements of the children Jaylen J. and [*3]Alexander S. were sufficiently corroborated (*see* Family Ct Act § 1046[a][vi]; *Matter of David H. [Octavia P.]*, 127 AD3d 1084). "Corroboration means any other evidence tending to support the reliability of the previous statements" (*Matter of Grace M. [Leighton M.]*, 180 AD3d 912, 914 [internal quotation marks omitted]). Siblings' out-of-court statements may cross-corroborate each other when they independently and consistently describe similar incidents of abuse or neglect (*see Matter of Alven V. [Ketly M.]*, 194 AD3d 725). Here, the court properly found that any inconsistencies in the out-of-court statements of Jaylen J. and Alexander S. did not render their statements unworthy of belief (*see Matter of D.S. [Shaqueina W.]*, 147 AD3d 856). The court properly concluded that those children's statements were sufficiently cross-corroborated. The statements of Jaylen J. and Alexander S. were also corroborated by the testimony of the caseworker and the two detectives who observed that Jayden J.'s injuries were consistent with being hit with a belt (*see Matter of Hayden C. [Tafari C.]*, 130 AD3d 924) and by photographs of Jayden J.'s injuries that were admitted into evidence (*see Matter of Sahyir F. [Jalessa F.]*, 212 AD3d 808; *Matter of Samuel W. [Luemay F.]*, 160 AD3d 755).

Therefore, a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]) at the fact-finding hearing supported the Family Court's finding of abuse, as the evidence demonstrated that Gabriel H. inflicted physical injury by other than accidental means upon Jayden J., which created a substantial risk of serious injury (*see id*. § 1012[e][i]; *Matter of Jonah B. [Ferida B.]*, 165 AD3d 787).

The Family Court's finding of neglect was also supported by a preponderance of the evidence. The evidence demonstrated that Jayden J.'s "physical, mental or emotional condition ha[d] been impaired or [was] in imminent danger of becoming impaired as a result of the failure of . . . [a] person legally responsible for his care to exercise a minimum degree of care . . . in providing [him] with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof,

including the infliction of excessive corporal punishment" (Family Ct Act § 1012[f][i][B]). "Although parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the use of excessive corporal punishment constitutes neglect" (*Matter of Eliora B. [Kennedy B.]*, 146 AD3d 772, 773 [internal quotation marks omitted]). "[A] single incident of excessive corporal punishment may suffice to sustain a finding of neglect" (*Matter of Grace M. [Leighton M.]*, 180 AD3d at 913 [internal quotation marks omitted]), and striking a child repeatedly with a belt can constitute excessive corporal punishment supporting a finding of neglect (*see Matter of Gary J. [Engerys J.]*, 154 AD3d 939; *Matter of Nurridin B. [Lousis J.]*, 116 AD3d 770).

As the petitioner established, prima facie, that Gabriel H. abused and neglected Jayden J., the burden shifted to Gabriel H. to rebut the evidence of abuse and neglect by presenting a reasonable and adequate explanation for Jayden J.'s injuries (*see Matter of Philip M.*, 82 NY2d 238, 244; *Matter of Jonah B. [Ferida B.]*, 165 AD3d 787). Gabriel H. offered no explanation as to how Jayden J.'s injuries occurred, simply denying knowledge of those injuries and stating that he was not present when Jayden J. was injured. Gabriel H. therefore failed to rebut the petitioner's prima facie showing of abuse and neglect.

The Family Court also properly found that Jayden J.'s six siblings were derivatively neglected by Gabriel H. "[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent" (Family Ct Act § 1046[a][i]). When a person's conduct towards one child demonstrates a fundamental defect in their understanding of the duties of parenthood or such an impaired level of parental judgment so as to create a substantial risk of harm for any child in their care, an adjudication of derivative neglect with respect to the other children is warranted (*see Matter of Iris G. [Angel G.]*, 144 AD3d 908). Such flawed notions of parental responsibility are generally reliable indicators that a person who has abused or neglected one child will place their other children at substantial risk of harm (*see Matter of Samuel A.R. [Soya R.]*, 179 AD3d 702, 703).

Here, Gabriel H.'s abuse and neglect of Jayden J. evinced a flawed understanding of his duties as a person legally responsible for a child and impaired judgment sufficient to support a finding of derivative neglect as to the other children (*see Matter of Isabella D. [David D.]*, 145 [*4]AD3d 1003). Evidence that Jaylen J. and Alexander S. witnessed Jayden J. being hit with a belt further supported a finding of derivative neglect (*see Matter of Rahmel G. [Carlene G.]*, 201 AD3d 567). Therefore, striking Jayden J. with a belt, which constituted excessive corporal punishment under the circumstances, warranted a finding of derivative neglect as to the other children for which Gabriel H.

was legally responsible (*see Matter of Gary J. [Engerys J.]*, 154 AD3d 939; *Matter of Matthew M. [Fatima M.]*, 109 AD3d 472). In the absence of evidence that the circumstances giving rise to the abuse or neglect of Jayden J. no longer existed, a finding of derivative neglect as to Jayden J.'s six siblings was proper (*see Matter of Faith A.M. [Faith M.]*, 191 AD3d 884).

Matter of Leo M., 224 AD3d 1293 (4th Dept., 2024)

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered April 8, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had abused the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent appeals, in appeal Nos. 1 and 2, from two orders of fact-finding and disposition. In appeal No. 2, respondent appeals from an order that, inter alia, determined that she abused her grandson. In appeal No. 1, respondent appeals from an order that, inter alia, determined that she neglected her four minor children.

Contrary to the contention of respondent in appeal No. 2, we conclude that petitioner established a prima facie case of abuse against her with respect to the grandson (*see Matter of Damien S.*, 45 AD3d 1384, 1384 [4th Dept 2007], *lv denied* 10 NY3d 701 [2008]; *see generally Matter of Philip M.*, 82 NY2d 238, 243 [1993]). Family Court Act § 1046 (a) (ii) "provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child which would ordinarily not occur absent an act or omission of [the] respondent[ ], and (2) that [the] respondent[was a] caretaker[ ] of the child at the time the injury occurred" (*Philip M.*, 82 NY2d at 243; *see Matter of Grayson R.V. [Jessica D.]* [appeal No. 2], 200 AD3d 1646, 1648 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022]). Here, there is no dispute that the grandson's injuries, which included fractured ribs and a lacerated liver, were non-accidental and would not have occurred in the absence of abuse. Moreover, petitioner established that the grandson had been in respondent's care for the four to five days prior to the onset of severe symptoms requiring his hospitalization, and that the injuries were sustained during a time span including those four to five days within which respondent and the grandson's mother were his only caretakers (*see Philip M.*, 82 NY2d at 243; *Matter of Avianna M.-G. [Stephen G.]*, 167 AD3d 1523, 1523-1524 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]; *see also Matter of Nancy B.*, 207 AD2d 956, 957 [4th Dept 1994]).

Inasmuch as petitioner "established a prima facie case, the burden of going forward shift[ed] to respondent to rebut the evidence of [caretaker] culpability" (*Philip M.*, 82 NY2d at 244; *see generally Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849 [4th Dept 2010]). We reject respondent's contention that she rebutted the evidence of her culpability. Respondent "fail[ed] to offer any explanation for the child's injuries" and simply denied inflicting them (*Philip M.*, 82 NY2d at 246; *see Matter of Tyree B. [Christina H.]*, 160 AD3d 1389, 1389-1390 [4th Dept 2018]; *Damien S.*, 45 AD3d at 1384). We therefore affirm the order in appeal No. 2.

With respect to the order in appeal No. 1, respondent has not raised any contentions concerning that order in her main brief on appeal, and we thus dismiss that appeal as abandoned (*see Matter of Dagan B. [Calla B.]* [appeal No. 3], 192 AD3d 1458, 1458-1459 [4th Dept 2021], *appeal dismissed* 37 NY3d 977 [2021]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Disposition of Art. 10s

Matter of Clarissa F., 227 AD3d 1543 (4th Dept., 2024)

Appeal from an order of the Family Court, Allegany County (Terrence M. Parker, J.), entered November 2, 2022, in a proceeding pursuant to Family Court Act article 10. The order placed the subject children with respondent and placed respondent under the supervision of petitioner for a period of one year.
It is hereby ORDERED that the order so appealed from is unanimously modified on the law by deleting the expiration date of the order of protection and substituting therefor the expiration date of October 31, 2023, and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of disposition that, although now expired, brings up for review the underlying fact-finding order in which Family Court found that the mother neglected the subject children (*see Matter of Justice H.M. [Julia S.]*, 225 AD3d 1298, 1298 [4th Dept 2024]).

We reject the mother's contention that petitioner failed to establish by a preponderance of the evidence that she neglected the children. Petitioner adduced ample evidence that the mother was aware that the children were in imminent danger from her boyfriend and that she failed to exercise a minimum degree of care in providing them with supervision (*see Matter of Derrick C.*, 52 AD3d 1325, 1326 [4th Dept 2008], *lv denied* 11 NY3d 705

[2008]). Even amidst the proceedings, the mother permitted the boyfriend to return to her home in violation of a temporary order of protection and continued to dismiss the children's allegations and side with the boyfriend.

However, as the mother contends and as petitioner correctly concedes, the duration of the October 31, 2022 order of protection is unlawful. "Family Court Act § 1056 (1) prohibits the issuance of an order of protection that exceeds the duration of any other dispositional order in the case" (*Matter of Sheena D.*, 8 NY3d 136, 140 [2007]) except as provided in Family Court Act § 1056 (4). "Subdivision (4) allows a court to issue an order of protection until a child's 18th birthday, but only against a person 'who was a member of the child's household or a person legally responsible . . . , and who is no longer a member of such household at the time of the disposition and who is not related by blood or marriage to the child or a member of the child's household' " (*Matter of Nevaeh T. [Abreanna T.—Wilbert J.]*, 151 AD3d 1766, 1768 [4th Dept [*2]2017]). Inasmuch as the mother's boyfriend is the biological father of one of the children and inasmuch as the children resided in the same household with the mother at the time of the disposition, subdivision (4) is inapplicable, and the duration of the order of protection, which exceeded the duration of the dispositional order in this case, is thus unlawful. We therefore modify the order of protection to expire on the same date as the dispositional order (*see id.*).

Permanency Hearings

Matter of Parvati D., 227 AD3d 605 (1st Dept., 2024)

Order, Family Court, Bronx County (Fiordaliza A. Rodriguez, J.), entered on or about September 25, 2023, which denied the subject child's application to preclude respondent father from receiving notice of her permanency hearings and obtaining a copy of the permanency hearing reports, unanimously affirmed, without costs.

The appeal is timely because there is no indication that the order was served on the Attorney for the Child by any of the methods authorized by the statute (*see* Family Court Act § 1113; *Matter of Grayson S. [Thomas S.]*, 209 AD3d 1309, 1311 [4th Dept 2022]).

As to the merits, Family Court Act § 10-A defines a child as an individual who consented to remain in foster care after turning 18 years old (Family Ct Act § 1087[a]; *see also* Family Ct Act § 1055[e]). Further, Family Court Act provides for an initial permanency hearing within eight months of a child's removal from the home, and permanency hearings every six months thereafter (Family Ct Act § 1089[a][2-3]). Before

the permanency hearing, the Administration for Children's Services (ACS) must prepare a permanency hearing report, which must include, among other things, the child's current permanency goal as well as his or her current health status, any medical conditions or mental health diagnoses, education placement, and any additional services the child needs or receives (Family Ct Act § 1089[b], [c][1]).

The statute further provides that unless parental rights have been terminated or surrendered, a child's parent is considered a party to the permanency proceeding and is entitled to receive a notice of the hearing and a permanency report before a hearing (Family Ct Act § 1089[b][1][i]; 22 NYCRR 205.17[c]).

Family Court properly concluded that the statutory language of Family Court Act § 1089(b)(1)(i) is unambiguous: A respondent parent whose parental rights were not surrendered or terminated is considered a party to a permanency proceeding and is entitled to notices and reports, notwithstanding the lack of consent by a child who opts to remain in foster care after turning 18 years old (*see generally Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd.*, 150 AD3d 13, 19 [1st Dept 2017], *lv denied* 30 NY3d 908 [2017] ["[s]tatutes should be interpreted in a manner designed to effectuate the legislature's intent, construing clear and unambiguous statutory language so as to give effect to the plain meaning of the words used"]). Moreover, unlike Family Court Act § 1089(b)(2), which states that the court may dispense with notice to certain individuals if it would be against the best interests of a child, Family Court Act § 1089(b)(1)(i) contains no such exception, thus creating a "strong presumption that the Legislature intended none" (*Matter of Jefry H.*, 102 AD3d 132, 137 [2d Dept 2012], citing *Matter of Pokoik v Department of Health Servs., County of Suffolk*, 72 NY2d 702, 712 [1988]).

We note that the child's privacy concerns are reasonable. However, both the [*2]Health Insurance Portability and Accountability Act of 1996, 42 USC § 1320d—1, et seq. (HIPAA) and the CPLR provide appropriate safeguards in the form of qualified protective orders to prohibit the parties from using or disclosing the protected information for any purpose other than the litigation or proceeding for which such information was requested (45 CFR 164.512[e][1][v][A]; *see* CPLR 3103[a]; *Matter of Kayla S. [Eddie S.]*, 46 Misc 3d 747, 751-752 [Fam Ct, Bronx County 2014]; *Matter of B. Children*, 23 Misc 3d 1119[A], 2009 NY Slip Op 50841[U], *10, 14 [Fam Ct, Kings County 2009]).

Matter of Malachi B., AD3d 2024 NY Slip Op 03534 (1st Dept., 2024)

Order, Family Court, New York County (Susan M. Doherty, Ref.), entered on or about January 31, 2023, which, to the extent appealed from as limited by the briefs, determined that pursuant to the New York State Family First Prevention Services Act (the Family First Act) Family Court lacked the decision-making authority to hold an evidentiary hearing, make specific findings, or approve an ongoing Qualified Residential Treatment Program (QRTP) placement at every permanency hearing, unanimously reversed, on the law, without costs, to the extent of declaring that Family Court has decision-making authority as to the appropriateness of the child's continued placement in a QRTP at every permanency hearing.

Although Malachi has already received his requested relief, his appeal, directed at the scope and authority of the Family Court to make findings related to a QRTP at every permanency hearing, raises a significant and novel issue that is likely to reoccur, yet evade review, and warrants an application of the mootness doctrine exception (*see generally Matter of Hearst Corp. v Clyne* , 50 NY2d 707, 714-715 [1980]).

We find that Family Court has the decision-making authority as to the appropriateness of the child's continued placement in a QRTP at every permanency hearing (*see* Family Ct Act §§ 1088[b], 1089[d][2][viii]). A contrary reading goes against the express purpose of the Family First Act, which is aimed at reducing the use of institutional group placements for children in foster care by limiting the length of time that they can spend there. The Family First Act, codified in New York State through amendments to the relevant provisions in the Family Court Act and Social Services Law, explicitly seeks to "ensure[] more foster children are placed with families by limiting federal reimbursement to only congregate care placements that are demonstrated to be the most appropriate for a child's needs, *subject to ongoing judicial review* " (HR Rep 114-628, 114th Cong, 2d Sess at 28). Furthermore, finding otherwise would lead to an absurd outcome where the court must review evidence about the continued necessity for a QRTP placement at each permanency hearing and simultaneously be powerless to exercise any level of oversight, even if there is proof that the placement is no longer appropriate. That the legislative landscape requires an assessment and court determination whenever a child simply moves between facilities, even if that move does not change the level of care, lends further support to the argument that the Legislature intended for the court to have ongoing oversight and review power in the QRTP context (*see* Family Ct Act § 1089[d]).

Matter of Rivka A. P., 226 AD3d 907 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from a permanency hearing order of the Family Court, Queens County (Connie Gonzalez,

J.), dated September 30, 2021. The permanency hearing order, insofar as appealed from, after a permanency hearing, found that the petitioner had exercised reasonable efforts to implement the permanency goal of reunification with the mother, changed the permanency goal from reunification with the mother to placement for adoption, and continued the subject children's placement in the custody of the petitioner until the completion of the next permanency hearing.
ORDERED that the appeal from so much of the permanency hearing order as continued the subject children's placement in the custody of the petitioner until the completion of the next permanency hearing is dismissed as academic, without costs or disbursements; and it is further,

ORDERED that permanency hearing order is affirmed insofar as reviewed, without [*2]costs or disbursements.

Pursuant to Family Court Act article 10, the petitioner, Administration for Children's Services (hereinafter ACS), filed three separate petitions, alleging, among other things, that the mother had neglected the three subject children, who were born in 2013, 2014, and 2016, and who were each placed in the same foster home shortly after their births. In a permanency hearing order dated September 30, 2021, made after a permanency hearing, the Family Court, inter alia, found that ACS had exercised reasonable efforts to implement the permanency goal of reunification with the mother and changed the permanency goal from reunification to placement for adoption. The mother appeals from the permanency hearing order.

The appeal from so much of the permanency hearing order as continued the children's placement in the custody of ACS until the completion of the next permanency hearing must be dismissed as academic, as that portion of the order has expired (*see Matter of Peter T. [Shay S.P.]*, 173 AD3d 1046, 1047; *Matter of Victoria B. [Jonathan M.]*, 164 AD3d 578, 580). However, the portion of the permanency hearing order that found that the petitioner had exercised reasonable efforts to implement the permanency goal of reunification with the mother and changed the permanency goal from reunification to adoption is not academic (*see Matter of Peter T. [Shay S.P.]*, 173 AD3d at 1047; *Matter of Victoria B. [Jonathan M.]*, 164 AD3d at 580-581).

"'At a permanency hearing, the petitioner bears the burden of establishing the appropriateness of a permanency goal, or a goal change, by a preponderance of the evidence'" (*Matter of Victoria B. [Jonathan M.]*, 164 AD3d at 581, quoting *Matter of Cristella B.*, 65 AD3d 1037, 1039; *see Matter of Peter T. [Shay S.P.]*, 173 AD3d at 1047). The Family Court's determinations following a permanency hearing "must be made 'in accordance with the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if returned to the parent'" (*Matter of Jamie*

J. [Michelle E.C.], 30 NY3d 275, 283, quoting Family Ct Act § 1089[d]; *see Matter of Victoria B. [Jonathan M.]*, 164 AD3d at 581).

Here, ACS established by a preponderance of the evidence that it had exercised reasonable efforts to implement the permanency goal of reunification with the mother and that modifying the permanency goal from reunification to placement for adoption was in the children's best interests (*see Matter of Peter T. [Shay S.P.]*, 173 AD3d 1043; *Matter of Jazmine P. [Shay S.P.-T.]*, 173 AD3d 1033). The children had been in foster care since shortly after their births, and the record demonstrated that although ACS provided appropriate services to the mother to support the original goal of reunification, the mother was unable to benefit from those services, and reunification was not a viable goal. Accordingly, the Family Court properly changed the permanency goal from reunification to placement for adoption (*see Matter of Peter T. [Shay S.P.]*, 173 AD3d at 1047; *Matter of Victoria B. [Jonathan M.]*, 164 AD3d at 581-582).

The mother's remaining contention is without merit.

Matter of Khadijah D., 226 AD3d 1012 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from (1) an order of the Family Court, Kings County (Jacqueline D. Williams, J.), dated January 9, 2023, and (2) an order of the same court dated January 10, 2023. The order dated January 9, 2023, insofar as appealed from, after a permanency hearing, found that the petitioner had made reasonable efforts to implement the permanency goal of reunification of the subject children Hudhayfa D. and Khadijah D. with the mother. The order dated January 10, 2023, insofar as appealed from, after a permanency hearing, found that the petitioner had made reasonable efforts to implement the permanency goal of reunification of those children with the mother and changed the permanency goal for those children from reunification with the mother to placement for adoption, with a concurrent goal of reunification with the mother.
ORDERED that the appeal from the order dated January 9, 2023, is dismissed, without costs or disbursements, as the portions of the order appealed from were superseded by the [*2]order dated January 10, 2023; and it is further,

ORDERED that the order dated January 10, 2023, is affirmed insofar as appealed from, without costs or disbursements.

The Administration for Children's Services (hereinafter ACS) filed neglect petitions against the mother, alleging, inter alia, that she suffered from a mental illness that impaired her ability to care for two of the subject children: Hudhayfa D. and Khadijah D. (hereinafter together the children). The children were removed from the mother's care,

placed in the custody of ACS, and placed in foster care. After a permanency hearing, the Family Court found that ACS had made reasonable efforts to implement the permanency goal of reunification of the children with the mother. Based on the evidence at the hearing, the court then changed the permanency goal for the children to placement for adoption, with a concurrent goal of reunification with the mother. The mother appeals.

"At the conclusion of a permanency hearing, the Family Court is required to enter an order indicating whether 'reasonable efforts have been made to effectuate the child's permanency plan'" (*Matter of Tramel V.*, 52 AD3d 520, 521, quoting Family Ct Act § 1089[d][2][iii]). When the permanency goal is to reunite the parent and child, the agency's reasonable efforts must be intended to eliminate the need for continued placement of the child and must be tailored to the parent's individual situation (*see* Family Ct Act § 1089[d][2][iii]; *Matter of Titus P.E. [Sherry S.E.]*, 213 AD3d 929, 931; *Matter of Michael A. [Claudia A.]*, 163 AD3d 654, 656). Here, the Family Court properly determined that ACS made reasonable efforts to implement the permanency plan of reunification with the mother by making a referral so that the mother could complete a parenting class for children with special needs, informing the mother of upcoming medical appointments for the children, and scheduling virtual and in-person visits between the mother and the children and encouraging her to attend those visits (*see* Family Ct Act § 1089[d][2][iii][A]; *Matter of Damani B. [Theresa M.]*, 174 AD3d 524, 526-527; *Matter of Michael A. [Claudia A.]*, 163 AD3d at 657). The record established that the mother attended only half of the scheduled in-person visits and missed one of the virtual visits. Contrary to the mother's contention, since she informed her case planner that she had a nurse and homemaking services, ACS was not required to make additional referrals for those services (*see Matter of Michael A. [Claudia A.]*, 163 AD3d at 657).

The mother's contention that the Family Court erred in changing the permanency goal for the children from reunification with the mother to placement for adoption, with a concurrent goal of reunification with the mother, is unpreserved for appellate review. In any event, the contention is without merit, as ACS established by a preponderance of the evidence that a goal of placement for adoption, with concurrent planning for reunification with the mother, was in the children's best interests. The mother has not fully addressed the issues that led to the removal of the children (*see Matter of Damani B. [Theresa M.]*, 174 AD3d at 527; *Matter of Victoria B. [Jonathan M.]*, 164 AD3d 578, 581-582).

The mother's remaining contentions are improperly raised for the first time on appeal.

1061 Motions

Matter of Cassidy B., 227 AD3d 711 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an order of the Family Court, Queens County (Elenor Reid Cherry, J.), dated September 28, 2022. The order denied, without a hearing, those branches of the mother's motion which were pursuant to Family Court Act § 1061 to modify an order of fact-finding and disposition of the same court (Connie Gonzalez, J.) dated March 15, 2022, so as to grant a suspended judgment and vacate the finding of neglect, which was entered upon her consent to the entry of an order of fact-finding without admission pursuant to Family Court Act § 1051(a).
ORDERED that the order is affirmed, without costs or disbursements.

In September 2020, the petitioner, Administration for Children's Services, commenced this proceeding pursuant to Family Court Act article 10, alleging, inter alia, that the mother abused the subject child. The mother subsequently consented to the entry of a finding of neglect without admission pursuant to Family Court Act § 1051(a) and waived her right to a fact-finding or a dispositional hearing. In an order of fact-finding and disposition dated March 15, 2022, the Family Court entered a finding of neglect against the mother and, inter alia, directed the immediate temporary discharge of the child to the mother under certain conditions.

In or around August 2022, the mother moved pursuant to Family Court Act § 1061 to modify the order of fact-finding and disposition so as to grant a suspended judgment, vacate the finding of neglect, and for a final discharge of the child to the mother. In an order dated September 7, 2022, the Family Court, upon the parties' consent, directed the final discharge of the child to the mother. Subsequently, in an order dated September 28, 2022, the court, without a hearing, denied those branches of the mother's motion which were to modify the order of fact-finding and disposition so as to grant a suspended judgment and vacate the finding of neglect. The mother appeals.

The Family Court may set aside, modify, or vacate any order issued in the course of a child protective proceeding "[f]or good cause shown" (*id.*; *see Matter of Arielle A.D. [Keith D.]*, [*2]192 AD3d 1019, 1021). There is a "'strong Legislative policy in favor of continuing Family Court jurisdiction over the child and family so that the court can do what is necessary in furtherance of the child's welfare'" (*Matter of Jveya J. [Ebony W.]*, 194 AD3d 937, 938, quoting *Matter of Aaliyah B. [Althea R.]*, 170 AD3d 712, 712 [internal quotation marks omitted]). "'As with an initial order, the modified order must

reflect a resolution consistent with the best interests of the child[ ] after consideration of all relevant facts and circumstances, and must be supported by a sound and substantial basis in the record'" (*Matter of Nila S. [Priscilla S.]*, 202 AD3d 695, 696, quoting *Matter of Jveya J. [Ebony W.]*, 194 AD3d at 938 [alterations omitted]).

Courts have identified four factors to consider when determining whether to vacate a finding of neglect: "(1) respondent's prior child protective history; (2) the seriousness of the offense; (3) respondent's remorse and acknowledgment of the abusive/neglectful nature of his or her act; and (4) respondent's amenability to correction, including compliance with court-ordered services and treatment" (*Matter of Leenasia C. [Lamarriea C.]*, 154 AD3d 1, 12 [footnote and internal quotation marks omitted]; *see Matter of Boston G. [Jennifer G.]*, 157 AD3d 675, 677).

Here, the record demonstrates that the offense was serious and that the mother failed to show remorse or acknowledge the abusive nature of the child's injuries. As such, the mother failed to establish good cause to modify the order of fact-finding and disposition and vacate the finding of neglect (*see Matter of Jessiah K. [Shakenya P.]*, 207 AD3d 724, 725; *Matter of Sophia W. [Tiffany P.]*, 176 AD3d 723, 725; *Matter of Alisah H. [Syed H.]*, 168 AD3d 842, 844). Moreover, the mother failed to demonstrate that modifying the order of fact-finding and disposition and vacating the finding of neglect served the best interests of the child (*see Matter of Sophia W. [Tiffany P.]*, 176 AD3d at 724-725; *Matter of Aaliyah B. [Althea R.]*, 170 AD3d at 713; *Matter of Alisah H. [Syed H.]*, 168 AD3d at 844).

The mother's remaining contention is without merit.

Matter of Jamel. D. C., Jr., 227 AD3d 713 (2nd Dept., 2023)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an amended order of the Family Court, Queens County (Emily Ruben, J.), dated May 4, 2023. The amended order, upon a decision dated May 2, 2023, granted, without a hearing, the petitioner's motion to modify so much of an order of fact-finding and disposition of the same court dated October 14, 2022, as placed the subject child in the custody of the petitioner with a restrictive placement with his maternal grandmother until the completion of the next permanency hearing so as to place the subject child in the custody of the petitioner with a nonrestrictive placement until the completion of the next permanency hearing and denied that branch of the mother's cross-motion which was to modify the order of fact-finding and disposition so as to place the subject child in the custody of the maternal grandmother.

ORDERED that the appeal from so much of the amended order as placed the subject child in the custody of the petitioner with a nonrestrictive placement until the completion of the next permanency hearing is dismissed as academic, without costs or disbursements; and it is further,

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

The petitioner, Administration for Children's Services (hereinafter ACS), commenced this proceeding, alleging that the mother abused and neglected the subject child by killing the child's father. In an order of fact-finding and disposition dated October 14, 2022, the Family Court, upon the mother's consent to a finding of abuse without admission pursuant to Family Court Act § 1051(a), found that the mother abused the child and placed the child in the custody of ACS with a restrictive placement with the child's maternal grandmother until the completion of the next permanency hearing. On March 22, 2023, ACS moved pursuant to Family Court Act § 1061 to modify the order of fact-finding and disposition so as to place the child in the custody of ACS with [*2]a nonrestrictive placement. The mother opposed the motion and cross-moved, inter alia, to modify the order of fact-finding and disposition so as to place the child in the custody of his maternal grandmother. In an amended order dated May 4, 2023, the court granted, without a hearing, ACS's motion and denied that branch of the mother's cross-motion. The mother appeals.

The appeal from so much of the amended order as placed the child in the custody of ACS with a nonrestrictive placement until the completion of the next permanency hearing is academic, as a subsequent permanency hearing was held on July 10, 2023 (*see Matter of Paris C. [Janaya D.C.]*, 186 AD3d 1360, 1361). However, that portion of the appeal which challenges the grounds for the Family Court's determination to modify so much of the order of fact-finding and disposition as placed the child in the custody of ACS with a restrictive placement with the maternal grandmother until the completion of the next permanency hearing so as to place the child in the custody of ACS with a nonrestrictive placement until the completion of the next permanency hearing is not academic (*see id.* at 1362; *Matter of Jasir M. [Myaisha E.]*, 167 AD3d 1014, 1015).

Pursuant to Family Court Act § 1061, the Family Court may set aside, modify, or vacate any order issued in the course of a child protective proceeding "[f]or good cause shown." This statute "'expresses the strong Legislative policy in favor of continuing Family Court jurisdiction over the child and family so that the court can do what is necessary in the furtherance of the child's welfare'" (*Matter of Yosepha K. [Chana D.]*, 165 AD3d 932, 933, quoting *Matter of Angelina AA.*, 222 AD2d 967, 968-969; *see Matter of Boston G. [Jennifer G.]*, 157 AD3d 675, 677). "'As with an initial order, the modified order must reflect a resolution consistent with the best interests of the child[ ]

after consideration of all relevant facts and circumstances, and must be supported by a sound and substantial basis in the record'" (*Matter of Yosepha K. [Chana D.]*, 165 AD3d at 933, quoting *Matter of Kenneth QQ. [Jodi QQ.]*, 77 AD3d 1223, 1224; *see Matter of Myeenul E. [Mizanul E.]*, 160 AD3d 848, 850). '"[T]he conducting of a hearing under section 1061 is not mandated, but is left entirely to the Family Court's discretion'" (*Matter of Myeenul E. [Mizanul E.]*, 160 AD3d at 850, quoting *Matter of Elizabeth C. [Omar C.]*, 156 AD3d 193, 209). "Where the court possesses information sufficient to afford a comprehensive, independent review, a hearing is not required" (*Matter of Sutton S. [Abigail E.S.]*, 152 AD3d 608, 609). Here, under the circumstances presented, the Family Court did not improvidently exercise its discretion in granting ACS's motion and denying the mother's cross-motion without conducting a hearing (*see Matter of Sebastian P. [Lovette H.]*, 204 AD3d 803, 804; *Matter of Sutton S. [Abigail E.S.]*, 152 AD3d at 609).

The parties' remaining contentions are either unpreserved for appellate review or without merit.

TERMINATION of PARENTAL RIGHTS

Abandonment

Matter of Selah J. S., 224 AD3d 634 (1st Dept., 2024)

Order, Family Court, New York County (Keith E. Brown, J.), entered on or about on or about July 6, 2022, bringing up for review an order, same court and Judge, entered on or about June 1, 2022, which denied respondent mother's motion to vacate her default at the fact-finding hearing, and which, to the extent appealed from, upon a finding that the mother had abandoned the subject child, terminated her parental rights and transferred custody of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Family Court providently exercised its discretion in denying the mother's motion to vacate her default, as her moving papers failed to demonstrate a reasonable excuse for her absence from the virtual hearing and a meritorious defense to the allegation that she abandoned the child (CPLR 5015[a][1]; *see Matter of Cain Keel L. [Derzerina L.]*, 78 AD3d 541, 542 [1st Dept 2010], *lv dismissed* 16 NY3d 818 [2011]). The record contains no evidence substantiating the mother's assertion that she could not appear for the fact-finding hearing, of which she concededly had notice, because the battery of her newly purchased cellphone died, and this excuse is therefore insufficient as a reasonable excuse for vacating a default (*see Matter of Gloria Marie S.*, 55 AD3d 320, 320 [1st Dept 2008], *lv dismissed* 11 NY3d 909 [2009]).

Because the mother failed to offer a reasonable excuse for her default, this Court need not determine whether she offered a meritorious defense to the petition seeking termination of her parental rights on the grounds of abandonment (*see Matter of Evan Matthew A. [Jocelyn Yvette A.]*, 91 AD3d 538 [1st Dept 2012]). In any event, during the six-month period immediately before the filing of the petition to terminate her parental rights, the mother visited the child only twice and contacted the agency six times to reschedule or cancel her visitation with the child. Thus, her contact with the child was too infrequent, sporadic, or insubstantial to defeat the showing of abandonment (*see Matter of Jamal B. [Johnny B.]*, 95 AD3d 1614, 1615-1616 [3d Dept 2012], *lv denied* 19 NY3d 812 [2012]).

Matter of King-Osiris A. T., 224 AD3d 839 (2nd Dept., 2024)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from an order of fact-finding and disposition of the Family Court, Westchester County (Michelle I. Schauer, J.), dated December 29, 2022. The order of fact-finding and disposition, after a fact-finding hearing, found that the mother abandoned the subject child, terminated her parental rights, and transferred guardianship and custody of the subject child to the petitioner for the purpose of adoption.
ORDERED that the order of fact-finding and disposition is affirmed, without costs or disbursements.

In August 2021, the petitioner, Westchester County Department of Social Services (hereinafter DSS), commenced this proceeding to terminate the mother's parental rights to the subject child on the ground of abandonment. After a fact-finding hearing, the Family Court determined that the mother had abandoned the child, terminated her parental rights, and transferred guardianship and custody of the child to DSS for the purpose of adoption. The mother appeals.

In order to establish that the mother abandoned the child, DSS was required to demonstrate by clear and convincing evidence that during the six months prior to the filing of the petition, the mother evinced an intent to forego her parental rights, as manifested by her failure to visit the child and communicate with him or DSS, although able to do so and not prevented or discouraged by DSS from doing so (*see* Social Services Law § 384-b[3][g][i]; [4][b]; [5][a]; *Matter of Abel J.R. [Michael S.]*, 207 AD3d 727, 728; *Matter of Dion J.L. [Danac L.]*, 183 AD3d 736, 737). The burden was on the mother to maintain contact, and DSS was not required to show diligent efforts to encourage the mother to visit the child or to communicate with the child or DSS (*see Matter of Abel J.R. [Michael S.]*, 207 AD3d at 728; *Matter of Dion J.L. [Danac L.]*, 183 AD3d at 737). A mere showing of sporadic and insubstantial contacts is insufficient to overcome a demonstration of abandonment (*see Matter of Abel J.R. [Michael S.]*, 207 AD3d at 728; *Matter of Dion J.L. [Danac L.]*, 183 AD3d at 737).

Here, contrary to the mother's contention, there was clear and convincing evidence presented at the hearing that she abandoned the child. In particular, DSS demonstrated that during the six-month period prior to the filing of the petition, the mother failed to visit the child and communicate with the child or DSS, although able to do so and not prevented or discouraged by DSS from doing so (*see Matter of Abel J.R. [Michael S.]*, 207 AD3d at 728; *Matter of Myla-Ray L. [Ryan L.]*, 195 AD3d 1024, 1025; *Matter of Dion J.L. [Danac L.]*, 183 AD3d at 737). Although the mother offered some testimony to the contrary, the Family Court found the mother's testimony wholly incredible, and we decline to disturb the court's determination in that regard (*see Matter of Female F.*, 40 AD3d 993, 994).

Upon a finding of abandonment pursuant to Social Services Law § 384-b, the Family Court is not required to hold a dispositional hearing (*see Matter of Keith B. [Sharrone S.]*, 180 AD3d 670, 671). Rather, the determination of whether to hold a dispositional hearing is within the court's discretion (*see id.* at 671). Here, the court providently exercised its discretion in terminating the mother's parental rights without conducting a separate dispositional hearing (*see id.*; *Matter of Mekhi Kahalil G. [Ainsley M.J.]*, 99 AD3d 1003, 1004). Moreover, contrary to the mother's contention, a suspended judgment is not a permissible disposition after a finding of abandonment (*see Matter of Dayyan J.L. [Dayyan L.]*, 145 AD3d 1007, 1008; *Matter of Tyshawn S. [Shana S.]*, 143 AD3d 990, 992).

The mother's remaining contentions are unpreserved for appellate review, not properly before the Court on this appeal, or without merit.

Matter of Remi-Radell J. C.-G. (Anonymous), 226 AD3d 772 (2nd Dept., 2024)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from an order of fact-finding and disposition of the Family Court, Kings County (Melody Glover, J.), dated November 21, 2022. The order of fact-finding and disposition, after fact-finding and dispositional hearings, found that the mother abandoned and permanently neglected the subject child, terminated the mother's parental rights, and transferred guardianship and custody of the subject child to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption.
ORDERED that the order of fact-finding and disposition is affirmed, without costs or disbursements.

In January 2020, the petitioner commenced this proceeding pursuant to Social Services Law § 384-b, inter alia, to terminate the mother's parental rights to the subject child, who was born in August 2016 and placed with foster parents in February 2018, on the grounds of abandonment and permanent neglect. After fact-finding and dispositional hearings, the Family Court found that the mother abandoned and permanently neglected the child, terminated her parental rights, and transferred guardianship and custody of the child to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The mother appeals.

Contrary to the mother's contention, the petitioner established, by clear and convincing evidence, that she abandoned the child for the six-month period before the petition was filed (*see id.* § 384-b[4][b]; *Matter of Annette B.*, 4 NY3d 509, 513). An intent to abandon a child is manifested by the parent's "failure to visit the child or communicate with the child or the agency although able to do so and not prevented or discouraged from doing so by the agency" (*Matter of Julius P.*, 63 NY2d 477, 481; *see Matter of "Baby Boy" N. [Albert N.]*, 163 AD3d 570, 572). The burden rests on the parent to maintain contact, and the agency need not show diligent efforts to encourage the parent to visit or communicate with the child (*see Matter of Gabrielle HH.*, 1 NY3d [*2]549, 550; *Matter of Julius P.*, 63 NY2d at 481). Here, the mother's sporadic and insubstantial contacts with the petitioner during the relevant six-month period were insufficient to defeat the showing of abandonment (*see Matter of "Baby Boy" N. [Albert N.]*, 163 AD3d at 572).

The petitioner additionally established, by clear and convincing evidence, that the mother permanently neglected the child. Contrary to the mother's contention, the record demonstrates that the petitioner made diligent efforts to strengthen the mother's parental relationship with the child by developing an appropriate service plan, scheduling parental access, providing referrals to the mother for required programs and

treatment, and explaining the importance of complying with the plan (*see Matter of Kamiah J.N.H. [Katrina H.]*, 220 AD3d 861, 862; *Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959). The record further demonstrates that, despite these efforts, the mother failed to maintain contact with the child or plan for the child's future, although physically and financially able to do so (*see Matter of Kamiah J.N.H. [Katrina H.]*, 220 AD3d at 863; *Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959).

Moreover, the Family Court did not err in declining to grant a suspended judgment (*see Matter of King-Osiris A.T. [Isis S.]*, 224 AD3d 839; *Matter of Dayyan J.L. [Dayyan L.]*, 145 AD3d 1007, 1008; *see also Matter of Vincent N.B. [Gregory B.]*, 173 AD3d 855, 856).

The mother's remaining contentions are without merit.

Matter of Quannie T., 226 AD3d 1119 (3rd Dept., 2024)

Appeal from an order of the Family Court of Schenectady County (Jill S. Polk, J.), entered September 27, 2022, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject child to be abandoned.
Respondent (hereinafter the mother) is the mother of the subject child (born in2017). In September 2017, Family Court issued an order of protection, which provided that the mother was not allowed to be the child's sole caretaker. That order was violated in October 2017, after which the child was removed and placed in the custody of petitioner. In October 2020, petitioner commenced this proceeding to terminate the mother's parental rights based upon abandonment. A permanency hearing was commenced, but not concluded, on June 28, 2022. At the end of the day, the court discussed with counsel an appropriate date to finish the permanency hearing and to hold an abandonment hearing; all agreed, on the record, to August 12, 2022. Although the mother appeared on June 28 and was present when the next date was discussed, she failed to appear on August 12 and the hearing proceeded in her absence. The mother's attorney appeared on August 12 and made no objection to continuation of the permanency hearing, but when that hearing was concluded counsel objected to the abandonment hearing being held in the mother's absence. Family Court overruled the objection, noting that the mother was aware of the hearing date. Accordingly, the abandonment hearing went forward, after which Family Court determined that the mother had abandoned the child and terminated her parental rights.**[FN1]** The mother appeals.**[FN2]**

Initially, the mother contends that Family Court abused its discretion and violated her due process rights by proceeding with the abandonment hearing in her absence. We

disagree. Family Court "may adjourn a fact-finding hearing . . . for good cause shown on its own motion," and such determination is a matter resting within the court's sound discretion (Family Ct Act § 626 [a]; *see Matter of Isaac YY. [Arielle YY.]*, 200 AD3d 1506, 1508 [3d Dept 2021]). Although this Court has recognized the significance of a parent's right to be present during proceedings to terminate parental rights, we have also stated that "[t]his right to be present . . . is not absolute and must be balanced with the child's right to a prompt and permanent adjudication" (*Matter of Eileen R. [Carmine S.]*, 79 AD3d 1482, 1483 [3d Dept 2010]; *accord Matter of Dakota W. [Kimberly X.]*, 189 AD3d 2004, 2005 [3d Dept 2020], *lv denied* 36 NY3d 911 [2021]).

Here, the mother appeared with her counsel at the permanency hearing on June 28, 2022. At the conclusion of testimony on that day, and in the mother's presence, Family Court announced that the next court date would be August 12, 2022, at which time the permanency hearing would continue, after which an abandonment hearing would be held. On August 12, all participants except the mother appeared. Although the mother's [*2]counsel objected to the hearing going forward in her client's absence, she did not assert that she was without notice. Moreover, the record shows that the mother's attorney was well prepared for the hearing and zealously represented her by cross-examining petitioner's witnesses, making timely and valid objections and presenting a well-reasoned closing argument. More importantly, the child had been in foster care at that point for over three years, with a family that desired to adopt him. Under these circumstances, and after balancing the mother's interests against those of the child to a prompt and permanent adjudication, we cannot say that Family Court abused its discretion in proceeding with the hearing in the mother's absence (*see Matter of Isaac YY. [Arielle YY.]*, 200 AD3d at 1509; *Matter of Dakota W. [Kimberly X.]*, 189 AD3d at 2005; *Matter of Jayden T. [Amy T.]*, 118 AD3d 1075, 1076 [3d Dept 2014]).

Turning to Family Court's substantive finding, "a child is 'abandoned' by his [or her] parent if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency" (Social Services Law § 384-b [5] [a]). "A finding of abandonment is warranted when [such] is established by clear and convincing evidence" (*Matter of Joseph D. [Joseph PP.]*, 193 AD3d 1290, 1291 [3d Dept 2021] [internal quotation marks and citations omitted]; *see Matter of Taj'ier W. [Joseph W.]*, 209 AD3d 1203, 1204 [3d Dept 2022]). A parent's ability to visit and communicate is presumed, unless proven otherwise (*see* Social Services Law § 384-b [5] [a]). This Court has often deemed "sporadic, infrequent and insubstantial contacts . . . to be insufficient to defeat a finding of abandonment" (*Matter of Darius L. [Daniel L.]*, 222 AD3d 1259, 1261 [3d Dept 2023] [internal quotation marks and citations omitted]). "The subjective intent of the parent, whether expressed or otherwise, unsupported by

evidence of the foregoing parental acts manifesting such intent, shall not preclude a determination that such parent has abandoned his or her child" (Social Services Law § 384-b [5] [b]). "If the petitioning agency satisfies its burden of proving that the respondent failed to maintain sufficient contact for the statutory period, the burden shifts to 'the parent to prove an inability to maintain contact or that he or she was prevented or discouraged from doing so by the petitioning agency' " (*Matter of Taj'ier W. [Joseph W.]*, 209 AD3d at 1204, quoting *Matter of Jackie B. [Dennis B.]*, 75 AD3d 692, 693 [3d Dept 2010]; *see Matter of Bradyen ZZ. [Robert A.]*, 216 AD3d 1229, 1230 [3d Dept 2023], *lv denied* 40 NY3d 905 [2023]).

At the fact-finding hearing, petitioner called the child's foster father, who testified that the child was in his and his wife's care during the relevant period of April 2020 to October 2020[*3], and that the mother made no attempt to contact him during that time. Petitioner also presented the testimony of its caseworker who testified that, during the relevant time, the mother was scheduled to have weekly virtual visits with the child, but that she did not avail herself of those visits. Rather, she attended just one virtual visit with the child, which was scheduled to last one hour, but was ended after 10 to 15 minutes for "lack of engagement." The mother did not send the child any letters, cards, pictures or gifts. The caseworker testified that during the six-month period, the mother did not contact her to inquire about the child's health, welfare and status or to request visitation. She further testified that in July 2020, without informing petitioner, the mother moved from Schenectady, New York to Alabama. The mother presented no evidence of her own.

The evidence establishes that the mother did not visit or communicate with the child during the requisite six-month period, other than the one occasion where she virtually visited with the child for less than the allotted time. That single brief visit is insufficient to defeat petitioner's showing of abandonment (*see Matter of Dimitris J. [Sarah J.]*, 141 AD3d 768, 770-771 [3d Dept 2016]; *Matter of Jazmyne OO. [Maurice OO.]*, 111 AD3d 1085, 1087 [3d Dept 2013]). Accordingly, there is no basis upon which to disturb Family Court's decision to terminate the mother's parental rights to the child on the ground of abandonment (*see Matter of Damien D. [Ronald D.]*, 176 AD3d 1411, 1413 [3d Dept 2019]; *Matter of Max HH. [Kara FF.]*, 170 AD3d 1456, 1460 [3d Dept 2019]).

Egan Jr., J.P., Aarons, Pritzker and McShan, JJ., concur.

ORDERED that the order is affirmed, without costs.

Footnote 1: Petitioner also commenced an abandonment proceeding against the father, which was litigated at the same fact-finding hearing. Following the hearing, Family Court found that the father had abandoned the child as well and terminated his

parental rights.

Footnote 2: The attorney for the child at the fact-finding hearing argued that the mother had abandoned the child and the attorney assigned to represent the child on this appeal maintains that position.

Matter of Kamariana SS., 227 AD3d 1166 (3rd Dept. 2024)

Appeal from an order of the Family Court of Schenectady County (Jill S. Polk, J.), entered June 23, 2023, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject children to be abandoned, and terminated respondent's parental rights.
Respondent (hereinafter the father) is the father of two children (born in 2019 and 2020). The older child was removed from the care of the parents in September 2020 and placed in the care of Maria SS., her paternal aunt. Shortly after the birth of the younger child in October 2020, the younger child was also removed and placed in the care of the paternal aunt. The subject children were subsequently adjudicated to be neglected, after which placement was continued with the paternal aunt. A series of temporary orders of protection were also issued that, in relevant part, prohibited the father from engaging in visitation or communication with the children except as deemed appropriate by petitioner. The father was subsequently incarcerated in the Schenectady County Jail from September 23, 2021 to May 20, 2022.

On May 11, 2022, petitioner commenced this proceeding alleging that the father had abandoned the children while he was incarcerated over the preceding six months. Following a fact-finding hearing, Family Court issued an order in March 2023 finding that the children had been abandoned by the father and that his parental rights should be terminated. The father appeals.[FN1]

We affirm. "Family Court may terminate parental rights based upon a finding of abandonment if the petitioning agency proves by clear and convincing evidence that, during the six months preceding the petition's filing, the parent 'evince[d] an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency' " (*Matter of Micah L. [Rachel L.]*, 192 AD3d 1344, 1344 [3d Dept 2021] [citations omitted], quoting Social Services Law § 384-b [5] [a]; *see Matter of Darius L. [Daniel L.]*, 222 AD3d 1259, 1259-1260 [3d Dept 2023]). Of note, "[p]arents are presumed able to visit and communicate with their children and, although incarcerated parents may be unable to visit, they are still

presumed able to communicate with their children absent proof to the contrary" (*Matter of Mason H. [Joseph H.]*, 31 NY3d 1109, 1110 [2018]; *see Matter of Darius L. [Daniel L.]*, 192 AD3d at 1260). Moreover, contrary to the suggestion of the attorney for the children, "petitioner had no obligation to exercise diligent efforts to encourage visits or communications between" the father and the children in the context of this abandonment proceeding (*Matter of Christopher MM.*, 210 AD2d 767, 768 [3d Dept 1994], *lv denied* 85 NY2d 807 [1995]; *see* Social Services Law § 284-b [5] [a], [b]; *Matter of Julius P.*, 63 NY2d 477, 481 [1984]; *Matter of Anonymous*, 40 [*2]NY2d 96, 102 [1976]; *Matter of Zakariya HH. [Ahmed II.]*, 192 AD3d 1361, 1363 [3d Dept 2021], *lv denied* 37 NY3d 905 [2021]).

With those standards in mind, petitioner presented the hearing testimony of the paternal aunt, petitioner's caseworker who was handling the father's case, and one of its supervisors. This proof reflected that the jail where the father was incarcerated did not allow the children to visit between November 2021 and May 2022 and that, as a result, any communication between them would need to be via other means. There was also no question that contacting the children through the paternal aunt posed challenges for the father, as he did not have her mailing address, and he was prohibited from having unsupervised contact with the children. That said, the paternal aunt testified that, to her knowledge, the father only communicated with the children once between November 2021 and May 2022, when he called an older sibling of the children who was visiting her residence in March 2022 and the paternal aunt allowed him to talk to the children on speakerphone for a few minutes. The paternal aunt added that she told the father that she would not allow further telephone contact during that call, reminding him that he was prohibited from having unapproved contact with the children and that she was afraid of "get[ting] in trouble for having unsupervised phone conversations." The father's caseworker further testified that he had been provided with petitioner's contact information, and she and her supervisor confirmed that they were unaware of any effort by the father to contact petitioner between November 2021 and May 2022.

As the father concedes, the proof that he made one brief phone call with the children and failed to seek additional contact with them satisfied petitioner's "initial burden on the petition, shifting the burden to [the father] to establish that he maintained sufficient contact with the child[ren] or was otherwise unable or prevented from doing so" (*Matter of Zakariya HH. [Ahmed II.]*, 192 AD3d at 1363). The father attempted to meet that burden in his testimony by suggesting that he had been prevented from maintaining contact with the children, pointing out that the paternal aunt had declined to permit additional telephonic contact with the children and that he did not have her address to write to them.**[FN2]** He was admittedly aware that his communication with the children had to be supervised by petitioner, however, and his own testimony established that he had the ability to call or write petitioner to inquire about the children or arrange for

contact with them but that he failed to do so because he was "upset" with petitioner. His testimony accordingly reflected that, even if his uncorroborated claim that he attempted to contact petitioner at some point through a third party was accurate, his lack of a role in the life of the children during his incarceration resulted from his minimal efforts to arrange one. Thus, having considered [*3]the evidence presented at the fact-finding hearing, and according appropriate deference to Family Court's credibility determinations, we are satisfied that the record established that the father abandoned the children "during the relevant six-month period, and his parental rights were appropriately terminated" (*id.* at 1364; *see Matter of David UU. [Jeanie UU.]*, 206 AD3d 1502, 1504-1506 [3d Dept 2022]; *Matter of Joseph DD. [Joseph PP.]*, 193 AD3d 1290, 1291-1292 [3d Dept 2021]; *compare Matter of Khavonye FF. [Latasha EE.]*, 198 AD3d 1134, 1136-1137 [3d Dept 2021]).

Aarons, Pritzker, Lynch and Fisher, JJ., concur.

ORDERED that the order is affirmed, without costs.

Footnote 1: The father appealed from the March 2023 fact-finding order rather than, as required, the dispositional order entered in June 2023 (*see* Family Ct Act § 1112 [a]). Upon the father's motion, this Court treated his notice of appeal as a valid notice of appeal from the dispositional order (2023 NY Slip Op 74114[U] [3d Dept 2023]).

Footnote 2: The father also claimed that he had briefly spoken to the children when he called the mother during one of her supervised visits with them, but Family Court found that uncorroborated claim to be incredible.

Permanent Neglect

Matter of Rey Ramon J.L., 223 AD3d 593 (1st Dept., 2024)

Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about January 13, 2023, which, to the extent appealed from as limited by the briefs, upon a finding of permanent neglect, terminated the parental rights of respondent mother to the subject child, unanimously affirmed, without costs.
Family Court properly found that petitioner agency established by clear and convincing evidence that it fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the mother's relationship with the child and reunite the family (Social Services Law § 384-b[7][a][f]; *see Matter of Sheila G.*, 61 NY2d 368, 373 [1984]). An agency's statutory obligation is subject to a rule of reason, and parents must assume a

measure of initiative and responsibility on their own. A parent has a duty to plan for the child's future (*see Matter of Adante A.*, 38 AD3d 243, 244 [1st Dept 2007]; *Matter of Paul Michael G.*, 36 AD3d 541, 541 [1st Dept 2007]; *Matter of Byron Christopher Malik J.*, 309 AD2d 669 [1st Dept 2003]).

The record belies the mother's arguments that the agency's efforts were pro forma and without follow-through. The testimony of the agency's caseworker, which the court found credible, and extensive agency progress notes, reflect that the agency was actively involved in monitoring the mental health and other services the mother was receiving, and proactive in altering those services when the mother's mental status and parenting skills did not improve. The mother claims that her service referrals were not tailored to her particular needs, but she does not specify what needs were unaddressed, or how the prescribed programs fell short.

As the mother acknowledges, the agency scheduled regular visitation with the child. Her own volatile behavior interfered with supervised visits, despite the efforts of agency staff to show the mother ways to bond with the child. The mother failed to accept responsibility for her own conduct — conduct so disruptive that a substantial majority of the visits had to be terminated prematurely or canceled. An agency "is not a guarantor of a parent's success" (*Matter of Imani Elizabeth W.*, 56 AD3d 318, 319 [1st Dept 2008]).

The mother points to her consistent participation in mental health therapy and other services, but this is not enough to alter the outcome here, given that the services she attended appear to have had little to no impact on her (*e.g. Matter of Victor B. [Yvonne B.]*, 91 AD3d 458, 459 [1st Dept 2012]). She does not adequately address her refusal to comply with the medication management aspect of her service plan.

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

Matter of T.J.J.J.P., 224 AD3d 552 (1st Dept., 2024)

Appeal from order, Family Court, New York County (Clark V. Richardson, J.), entered on or about May 16, 2022, which, upon respondent father's default in appearing at the fact-finding and dispositional hearings, found that he permanently neglected the subject child, terminated his parental rights, and committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously dismissed, without costs, as taken from a nonappealable paper. The father may not challenge the fact-finding determination of permanent neglect, including whether the agency expended diligent efforts to strengthen the parental relationship between him and the child, because it was entered upon his default and he

has not moved for vacatur (*see* CPLR 5511; *Matter of Felicia Malon Rogue J. [Lena J.]*, 146 AD3d 725, 726 [1st Dept 2017]).

Contrary to the father's contention, his refusal to participate in a virtual trial constituted a default (*see Matter of Rodney W. v Josephine F.*, 126 AD3d 605, 606 [1st Dept 2015]), and Family Court was entitled to draw the strongest negative inference against him for failing to testify (*see Matter of Joseph P. [Edwin P.]*, 143 AD3d 529, 530 [1st Dept 2016], *lv denied* 28 NY3d 1110 [2016]).

Even if Family Court's fact-finding determination were properly before this Court, the finding of permanent neglect was supported by clear and convincing evidence. The record shows that the agency expended diligent efforts by meeting with the father and discussing with him the necessity of completing his service plan, scheduling visitation, referring him for mental health services, substance abuse treatment, drug testing, and parenting skills and domestic violence programs, and attempting to contact the father's prison counselors to monitor his progress with services there (*see Matter of Messiah G. [Giselle F.]*, 168 AD3d 420, 421 [1st Dept 2019], *lv dismissed in part, denied in part* 32 NY3d 1212 [2019]).

The record demonstrated that the father continued to test positive for marijuana, failed to regularly visit the child, and was not consistently engaged in the required services (*see Matter of Micah Zyair F.W. [Tiffany L.]*, 110 AD3d 579, 579 [1st Dept 2013]). The father's incarceration during the statutory period did not relieve him of the responsibility to communicate with the child or to plan for his future (*see Matter of Paul Antoine Devontae R. [Paul R.]*, 78 AD3d 610, 611 [1st Dept 2010], *lv denied* 16 NY3d 707 [2011]).

The father's contention that he received ineffective assistance of counsel is raised for the first time on appeal and unpreserved for appellate review (*see Matter of Judith L.C. v Lawrence Y.*, 179 AD3d 616, 617 [1st Dept 2020]). On the merits, the attorney's refusal to participate in the fact-finding hearing after the father declined to participate was not ineffective representation, since the attorney's strategic decision preserved the father's opportunity to move [*2]to open the default (*see Matter of Mishelys R. [Garland R.]*, 165 AD3d 554, 554 [1st Dept 2018], *lv dismissed* 32 NY3d 1192 [2019]).

We have reviewed the father's remaining contentions and find them unavailing.

Matter of N.L.-G., 224 AD3d 587 (1st Dept., 2024)

Order of fact-finding and disposition (one paper), Family Court, Bronx County (E. Grace Park, J.), entered on or about November 1, 2021, which, after a hearing, determined that respondent permanently neglected the subject children, terminated her parental rights, and transferred custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding that respondent permanently neglected the children is supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). The record shows that the agency made diligent efforts to encourage and strengthen the parental relationship by making appropriate referrals, monitoring her compliance, scheduling regular meetings to counsel her on the service plan requirements, and scheduling visitation (*see Matter of Asar S.W. [Marie G.]*, 182 AD3d 519, 520 [1st Dept 2020]). It also explained to respondent the importance of complying with her service plan (*see Matter of Lania C. [Latoya C.]*, 204 AD3d 601, 602 [1st Dept 2022], *lv denied* 38 NY3d 909 [2022]).

The record also establishes that despite the agency's efforts, respondent failed to plan for the children's future during the statutorily relevant time period because she lacked insight into her behavior and failed to accept any responsibility for the circumstances that led to the children's placement in foster care (*see Matter of Jeremiah C. [Kim C.]*, 211 AD3d 598, 599 [1st Dept 2022], *lv denied*, 39 NY3d 910 [2023]). To the extent respondent complied with services, including attending parenting skills classes and individual therapy, we accord deference to Family Court's determination that she failed to gain insight or otherwise benefit from them and, accordingly, do not disturb its findings (*id.*).

A preponderance of the evidence demonstrates that it was in the children's best interests to terminate respondent's parental rights and free the children for adoption (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The children have been in foster care in a pre-adoptive home for more than four years, and their educational, emotional, and physical needs are being met. The agency is in agreement with the children's wish to remain there and be adopted by the foster mother's daughter. A suspended judgment would only prolong the children's lack of permanency and is unwarranted under the circumstances (*see Matter of Matthew Louis S. [Raymond R.]*, 150 AD3d 430, 431 [1st Dept 2017], *lv denied* 29 NY3d 913 [2017]).

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

Matter of Zamir J., 225 AD3d 407 (1st Dept., 2024)

Orders of disposition, Family Court, New York County (Jonathan H. Shim, J.), entered on or about June 3, 2022, which found that respondent mother permanently neglected the subject children, terminated her parental rights, and committed the custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.
Clear and convincing evidence supports the determination that the mother permanently neglected the children by failing to plan for their future, despite the agency's diligent efforts to encourage and strengthen the parental relationship (Social Services Law § 384-b[7][a]).

The record shows that the agency developed a plan for appropriate services, including referring the mother to programs for parenting, mental health, domestic violence counseling and substance abuse treatment, and scheduled regular visits with the children. The mother's failure to maintain contact with the children through consistent and regular visitation alone constitutes permanent neglect (*see Matter of Aisha C.*, 58 AD3d 471, 472 [1st Dept 2009], *lv denied* 12 NY3d 706 [2009]). Furthermore, the record shows that she failed to complete any portion of her service plan, demonstrating a lack of insight into the conditions that led to the children's removal (*see Matter of Maria G.T. [Maria T.]*, 213 AD3d 556, 557 [1st Dept 2023]; *Matter of Amanda M. T. [Charles Franklin T.]*, 189 AD3d 470, 471 [1st Dept 2020], *lv denied* 36 NY3d 907 [2021], as well as the termination of parental rights as to her older children.

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

Matter of Tashenea J.S., 227 AD3d 514 (1st Dept., 2024)

Order of fact-finding and disposition (one paper), Supreme Court, Bronx County (Fiordaliza A. Rodriguez, J.), entered on or about May 1, 2023, which, to the extent appealable and as limited by the briefs, determined that respondent father permanently neglected the subject child, unanimously affirmed, without costs.

Clear and convincing evidence supports the determination that petitioner agency made diligent efforts to encourage and strengthen the parental relationship (*see* Social Services Law § 384-b[7][a], [c], [f]). The agency's efforts included developing a plan for appropriate services, discussing with the father the necessity of completing his service plan and the need to regularly and consistently visit the child, referring him for random drug screenings, referring him to a support group for the child's medical needs, and providing him with subway fare, among other things (*see Matter of Z.Z.Z.K.F. [Katrina*

F.], 213 AD3d 601, 602 [1st Dept 2023]; *Matter of Antonio James L. [Eric David L.]*, 156 AD3d 554, 554 [1st Dept 2017]).

The finding of permanent neglect is supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]). Despite the agency's diligent efforts, the father failed to plan for the child's future during the statutorily relevant time period. The case planner's fact-finding testimony and the agency's progress notes in evidence established that he did not complete his service plan, and demonstrated a lack of insight into the condition that led to the child's removal (*see Matter of Maria G.T. [Maria T.]*, 213 AD3d 556, 557 [1st Dept 2023]; *Matter of Amanda M.T. [Charles Franklin T.]*, 189 AD3d 470, 471 [1st Dept 2020], *lv denied* 36 NY3d 907 [2021]). The father's claims that the agency did not timely refer him for services or that the progress notes do not accurately reflect how often he visited the child are not supported by the record. Even if the father could establish consistent visitation, that would not preclude a finding of permanent neglect given that he did not complete a parenting skills course nor attend the one-on-one training that would have helped him to properly address the child's medical needs (*see Matter of Autumn P. [Alisa R.]*, 129 AD3d 519, 520 [1st Dept 2015]).

Matter of N.S., AD3d 2024 NY Slip Op 03149 (1st Dept., 2024)

Order of disposition, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about September 11, 2023, which, to the extent appealed from as limited by the briefs, terminated the mother's parental rights, and bringing up for review a fact-finding order, same court (Susan K. Knipps, J.), entered on or about April 1, 2016, which found that the mother permanently neglected the subject child, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that despite the agency's diligent efforts to encourage and strengthen the parental relationship, the mother failed to plan for the child's return (Social Services Law § 384-b[7][a]). The mother's service plan called for a mental health evaluation, attendance at the child's medical appointments and dyadic therapy, regular visits with the child, and consistent contact with the agency, and the agency made repeated attempts to engage the mother in her service plan (*see Matter of Maria G.T. [Maria T.]*, 213 AD3d 556, 557 [1st Dept 2023]).

Despite these efforts, the mother failed to plan for the child's future by failing to submit to mental health evaluations or participate in dyadic therapy, repeatedly refusing to allow the agency to make home visits or to inform the agency whether she was planning for the child's return jointly with the father. She also failed to inform the agency of any services in which she engaged, failed to attend more than half of the child's medical

appointments and objected to the tests and procedures recommended by her treating physicians (*see Matter of Amanda M.T. [Charles Franklin T.]*, 189 AD3d 470, 471 [1st Dept 2020], *lv denied* 36 NY3d 907 [2021]). Moreover, she missed visits with the child during a three-month period because she abruptly left for Texas, during which time she never inquired about the child's welfare (*see Matter of Zariah M.E. [Alexys T.]*, 171 AD3d 607, 608 [1st Dept 2019]).

Matter of K.Y.Z., AD3d 2024 NY Slip Op 03458 (1st Dept., 2024)

Order of fact-finding and disposition (one paper), Family Court, New York County (Valerie A. Pels, J.), entered on or about December 6, 2022, which, upon findings that respondent father permanently neglected the subject child and that respondent mother is unable to care for the subject child presently and for the foreseeable future due to mental illness, terminated respondents' parental rights to the subject child and transferred the child's care and custody to petitioner agency and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence, including expert testimony from the court-appointed clinical psychologist who examined the mother and reviewed all her available medical records, supported the determination that the mother is presently and for the foreseeable future unable to provide proper and adequate care for the child by reason of mental illness (Social Services Law § 384-b [4][c]; 6[a]; *see Matter of Jasmine Pauline M.*, 62 AD3d 483, 484 [1st Dept 2009]). The psychologist's expert testimony demonstrated that the mother suffers from schizophrenia, which affects her ability to parent and places the child in danger of being neglected if returned to her care (*see Matter of Muhamad Omar W. [Jessica W.]*, 200 AD3d 630 [1st Dept 2021], *lv denied* 38 NY3d 904 [2022], *cert denied* — US —, 143 S Ct 461 [2022]; *Matter of Jeremiah M. [Sabrina Ann M.]*, 109 AD3d 736, 736 [1st Dept 2013], *lv denied* 22 NY3d 856 [2013]). The psychologist based her opinion on interviews with the mother and review of her medical records spanning about 10 years, and testified that access to other recent treatment records would have been helpful but was not necessary. The mother did not call any witnesses or offer any rebuttal evidence to counter the psychologist's expert opinion (*see Matter of Ariella D. [Sharon D.]*, 150 AD3d 620, 621 [1st Dept 2017]). The court properly drew a negative inference from the mother's failure to testify (*see Matter of Alford Isaiah B. [Alford B.]*, 107 AD3d 562 [1st Dept 2013]). Contrary to the mother's argument, there is no requirement that the agency show that it made diligent efforts to reunite her with the child when it seeks to terminate parental rights by reason of mental illness (*see Matter of Roberto A. [Altagracia A.]*, 73 AD3d 501, 501-502 [1st Dept 2010], *lv denied* 15 NY3d 703 [2010]).

As for the father, clear and convincing evidence supports the determination that, despite the agency's diligent efforts, he permanently neglected the child by failing to consistently maintain contact with or plan for the future of the child for a period of one year after the child entered foster care (*see* Social Services Law § 384-b[7][a]). The agency showed it made diligent efforts to encourage and strengthen the parental relationship by, among other things, developing a plan for appropriate services and referring the father for a parenting skills class, [*2]dyadic therapy to improve and strengthen his relationship with the child, scheduling regular visitation, providing him with MetroCards to visit the child, assisting him in obtaining housing, and regularly meeting with him (*see* Social Services Law § 384—b[7][a], [c], [f]; *Matter of Antonio James L. [Eric David L.]*, 156 AD3d 554, 554 [1st Dept 2017]; *Matter of Felicia Malon Rogue J. [Lena J.]*, 146 AD3d 725, 726 [1st Dept 2017]; *Matter of Yasmine F. [Junior F.]*, 145 AD3d 455, 455 [1st Dept 2016], *lv denied* 29 NY3d 973 [2017]).

The agency adequately addressed the language barrier by using Mandarin interpreters to communicate with him and referring him for dyadic therapy and a parenting skills class that were provided in Mandarin, which he understood (*see Matter of Chelsea C. [Bethania C.]*, 84 AD3d 504 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]). Although the agency placed the child in foster homes that spoke Spanish and English, it showed that there was no foster home available in which Mandarin or Foochow were spoken that also could handle the child's extensive special needs. The agency urged the father to attend classes to learn English, but he refused to do so.

Despite the agency's diligent efforts, the father failed to plan for the child's future during the relevant time period, as he visited the child only about once a month before the petition was filed (*see* Social Services Law § 384-b[7][a], [f]; *Matter of Alexander R.H. [Renzo N.H.]*, 201 AD3d 465, 466 [1st Dept 2022], *lv denied* 38 NY3d 903 [2022]). To the extent the father received dyadic therapy and completed a parenting class, there is no evidence that he gained insight into his parental decisions or the mother's inability to be a caregiver for the child (*see Matter of Julianna Victoria S. [Benny William W.]*, 89 AD3d 490, 491 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]).

A preponderance of the evidence demonstrates that it was in the child's best interests to be freed for adoption (*see Matter of Leroy Simpson M. [Joanne M.]*, 122 AD3d 480, 481 [1st Dept 2014]). Contrary to the father's contention, a suspended judgment was not warranted here, because the child was living in a loving foster home, where his extensive special needs were being met, and his foster mother wanted to adopt him (*see Matter of Angelica D. [Deborah D.]*, 157 AD3d 587, 588 [1st Dept 2018]; *Matter of Fernando Alexander B. [Simone Anita W.]*, 85 AD3d 658, 659 [1st Dept 2011]). Furthermore, the father failed to demonstrate that he could ensure that the child's special needs would be met if his son were in his care.

Matter of Alexis M. B., 224 AD3d 679 (2nd Dept., 2023)

In related proceedings, inter alia, pursuant to Social Services Law § 384-b, the mother appeals from an order of fact-finding and disposition of the Family Court, Queens County (Joan L. Piccirillo, J.), dated July 20, 2022. The order of fact-finding and disposition, insofar as appealed from, after fact-finding and dispositional hearings, found that the mother permanently neglected the subject child, terminated the mother's parental rights, and transferred custody and guardianship of the subject child to the petitioner and the New York City Administration for Children's Services for the purpose of adoption.

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

The New York Foundling Hospital (hereinafter the agency) commenced this proceeding pursuant to Social Services Law § 384-b to terminate the mother's parental rights to the subject child on the ground of permanent neglect. Following a fact-finding hearing, at which the mother testified, the Family Court determined that the agency established by clear and convincing evidence that the child was a permanently neglected child. After a dispositional hearing, the court found that it was in the child's best interests to terminate the mother's parental rights and free the child for adoption. In an order of fact-finding and disposition dated July 20, 2022, the court, inter alia, found that the mother had permanently neglected the child, terminated the mother's parental rights, and transferred custody and guardianship of the child to the agency and the New York City Administration for Children's Services for the purpose of adoption. The mother appeals.

In a proceeding to terminate parental rights because of permanent neglect, the agency must demonstrate "'by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship'" (*Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 960, quoting *Matter of Shimon G. [Batsheva G.]*, 206 AD3d 732, 733 [internal quotation marks omitted]; *see Matter of Skylah R. [Heather S.]*, 211 AD3d 1027, 1028; *Matter of Elizabeth M.G.C. [Maria L.G.C.]*, 190 AD3d 730, 731). Once the agency demonstrates that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan [*2]for the child's future, although physically and financially able to do so (*see Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 961; *Matter of Geddiah S.R. [Seljeana P.]*, 195 AD3d 725, 726; *Matter of Samantha B. [Cynthia J.]*, 159 AD3d 1006, 1008). A parent who only "'partially complie[s] with his or her service plan and who has not gained insight into the issues that caused the removal of the child has not planned for the child's future'" (*Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 961,

quoting *Matter of Shimon G. [Batsheva G.]*, 206 AD3d at 733; *see Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d 952, 954).

Here, the agency met its burden of establishing that the mother had permanently neglected the child. Contrary to the mother's contention, the agency demonstrated, by clear and convincing evidence, that it made diligent efforts to strengthen the parent-child relationship by forming a service plan that served the needs of the mother, scheduling parental access, and providing referrals to programs for the mother (*see Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 961). The record shows that despite the agency's diligent efforts, the mother failed to maintain contact with the agency, as there were several periods where the mother did not have any contact with the agency, did not complete any required programs but for one, did not consistently attend parental access sessions, and continued to test positive for drugs (*see Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d at 954).

The mother's remaining contention is unpreserved for appellate review (*see Matter of Nyasia E.R. [Michael R.]*, 121 AD3d 792, 794).

Matter of Phoenix E. P.-W., 225 AD3d 875 (2nd Dept., 2024)

In related proceedings, inter alia, pursuant to Social Services Law § 384-b to terminate the mother's parental rights on the ground of permanent neglect, the mother appeals from two orders of fact-finding and disposition of the Family Court, Kings County (Melody Glover, J.) (one as to each child), both dated November 7, 2022. The orders of fact-finding and disposition, insofar as appealed from, after fact-finding and dispositional hearings, found that the mother permanently neglected the subject children, terminated her parental rights, and transferred guardianship and custody of the subject children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.
ORDERED that the appeal from so much of the order of fact-finding and disposition relating to the child Nevaeha-Milagros P.-W as terminated the mother's parental rights and transferred guardianship and custody of that child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption is dismissed as academic, without costs or disbursements; and it is further,

ORDERED that the order of fact-finding and disposition relating to the child Nevaeha-Milagros P.-W is affirmed insofar as reviewed, without costs or disbursements; and it is further,

ORDERED that the order of fact-finding and disposition relating to the child Phoenix E. P.-W is affirmed insofar as appealed from, without costs or disbursements.

The petitioner, New Alternatives for Children, Inc. (hereinafter the agency), commenced these proceedings, inter alia, to terminate the mother's parental rights as to the subject children. Following fact-finding and dispositional hearings, the Family Court found that the mother had permanently neglected the subject children, terminated her parental rights, and transferred guardianship and custody of the children to the agency and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother appeals.

The appeal from so much of the order of fact-finding and disposition relating to the child Nevaeha-Milagros P.-W as terminated the mother's parental rights and transferred guardianship and custody of that child to the agency and the Commissioner of Social Services of the City of New York for the purpose of adoption must be dismissed as academic, as that child has since reached the age of 18 (*see Matter of Rhiannon D. [Dari L.]*, 215 AD3d 964, 965; *Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d 952, 953). "Nevertheless, the [mother's] challenge[ ] to the Family Court's finding[ ] that [she] permanently neglected the child[ ] [is] not academic, since a finding of permanent neglect constitutes a permanent and significant stigma that might indirectly affect the mother's status in future proceedings" (*Matter of Marthina S.J.Z.H.-B.R. [Calvin R.]*, 198 AD3d 655, 657; *see Matter of Rhiannon D. [Dari L.]*, 215 AD3d at 965).

"When a foster care agency brings a proceeding to terminate parental rights on the ground of permanent neglect, it must, as a threshold matter, prove by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Shimon G. [Batsheva G.]*, 206 AD3d 732, 733 [internal quotation marks omitted]; *see Matter of Sheila G.*, 61 NY2d 368, 373). Once the agency demonstrates that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving "by clear and convincing evidence, that for a period of one year following the child's placement with the agency, the parent failed to maintain contact with the child or, alternatively, failed to plan for the future of the child, although physically and financially able to do so" (*Matter of Daniel J.L. [Sayid L.]*, 213 AD3d 939, 940; *see* Social Services Law § 384-b[7][a]). "A parent who has only partially complied with his or her service plan and who has not gained insight into the issues that caused the removal of the child has not planned for the child's future" (*Matter of Shimon G. [Batsheva G.]*, 206 AD3d at 733).

Here, the agency met its burden of establishing that the mother permanently neglected the subject children. The agency demonstrated, by clear and convincing evidence, that it made diligent efforts to strengthen the mother's relationship with the children by formulating a service plan that served the needs of the mother, providing referrals to programs for the mother, explaining the importance of compliance with the mother's service plan, making attempts to visit the mother's home, and facilitating visitation

between the mother and the children. Moreover, the record shows that the mother failed to plan for the children's futures, despite the agency's diligent efforts, as she only partially complied with her service plan (*see Matter of Damaris E.A. [Johanna A.M.]*, 217 AD3d 860, 861; *Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d at 954). Accordingly, the Family Court properly determined that the mother permanently neglected the children.

The evidence adduced at the dispositional hearing established that termination of the mother's parental rights was in the best interests of the child Phoenix E. P.-W (*see Matter of Abygail H.M.G. [Eddie G.]*, 205 AD3d 913, 914; *Matter of Elizabeth M.G.C. [Maria L.G.C.]*, 190 AD3d 730, 731). Contrary to the mother's contention, a suspended judgment would not be in Phoenix's best interests, as such a disposition would "only prolong the delay of stability and permanenc[y]" in the child's life (*Matter of Elizabeth M.G.C. [Maria L.G.C]*, 190 AD3d at 732; *see Matter of Abbygail H.M.G. [Eddie G.]*, 205 AD3d at 914-915). Further, the record supports the Family Court's determination that Phoenix's best interests would be served by freeing her for adoption by her foster mother with whom the child has bonded and resided over a prolonged period of time (*see Matter of Abbygail H.M.G. [Eddie G.]*, 205 AD3d at 915; *Matter of Elizabeth M.G.C. [Maria L.G.C]*, 190 AD3d at 732).

Matter of Alice Z., 225 AD3d 887 (2nd Dept., 2024)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from an order of fact-finding and disposition of the Family Court, Kings County (Ilana Gruebel, J.), dated August 10, 2023. The order of fact-finding and disposition, insofar as appealed from, after fact-finding and dispositional hearings, found that the mother permanently neglected the subject child, terminated her parental rights, and transferred guardianship and custody of the subject child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.
ORDERED that on the Court's own motion, the notice of appeal from a decision dated April 11, 2023, is deemed to be a premature notice of appeal from the order of fact-finding and disposition (*see* CPLR 5520[c]); and it is further,

ORDERED that the appeal from so much of the order of fact-finding and disposition as terminated the mother's parental rights and transferred guardianship and custody of the subject child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption is dismissed as academic, without costs or disbursements; and it is further,

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

In 2021, the petitioner commenced this proceeding, inter alia, to terminate the mother's parental rights to the subject child. Following fact-finding and dispositional hearings, in an order of fact-finding and disposition dated August 10, 2023, the Family Court, among other things, found that the mother permanently neglected the child, terminated her parental rights, and transferred guardianship and custody of the child to the petitioner and the Commissioner of Social Services of the City of New York (hereinafter the Commissioner) for the purpose of adoption. The mother appeals.

The appeal from so much of the order of fact-finding and disposition as terminated the mother's parental rights and transferred guardianship and custody of the child to the petitioner [*2]and the Commissioner for the purpose of adoption must be dismissed as academic, as the child has reached the age of 18 (*see Matter of Rhiannon D. [Dari L.]*, 215 AD3d 964, 965; *Matter of Kolsuma B. [Nosira B.]*, 154 AD3d 842, 844). Nevertheless, the mother's challenge to the Family Court's finding that she permanently neglected the child is not academic, since a finding of permanent neglect constitutes a permanent and significant stigma that might indirectly affect the mother's status in future proceedings (*see Matter of Rhiannon D. [Dari L.]*, 215 AD3d at 965; *Matter of Marthina S.J.Z.H.-B.R. [Calvin R.]*, 198 AD3d 655, 657).

"Generally, to establish that a parent has permanently neglected a child, an agency must establish, by clear and convincing evidence, that for a period of one year following the child's placement with the agency, the parent failed to maintain contact with the child or, alternatively, failed to plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Elizabeth M.G.C. [Maria L.G.C.]*, 190 AD3d 730, 731; *see* Social Services Law § 384-b[3][g][i]; [4][d]; [7][a]).

Here, the petitioner established by clear and convincing evidence that, despite its diligent efforts to encourage and strengthen the parental relationship between the mother and the child, the mother failed to adequately plan for the child's future (*see* Social Services Law § 384-b[7][a]; *Matter of Jayson C. [Kimberly C.]*, 219 AD3d 949, 952). The evidence at the fact-finding hearing demonstrated that the mother failed to gain insight into the problems that caused the child's removal and were preventing the child's return to her care (*see Matter of Nathaniel T.*, 67 NY2d 838, 840-842; *Matter of Scott I.R. [Jennifer M.I.]*, 180 AD3d 686, 687; *Matter of Tynell S.*, 43 AD3d 1171, 1173).

Accordingly, the Family Court properly found that the mother permanently neglected the child.

Matter of Ruth C., 226 AD3d 677 (2nd Dept., 2024)

In related proceedings pursuant to Social Services Law § 384-b and Family Court Act article 10, the mother appeals from (1) a decision of the Family Court, Kings County (Ilana Gruebel, J.), dated October 10, 2019, and (2) an order of fact-finding and disposition of the same court dated September 12, 2022, and Jeanty O. separately appeals from (1) a decision and order (one paper) of the same court dated August 23, 2022, and (2) the order of fact-finding and disposition. The decision and order, insofar as appealed from, after a dispositional hearing, inter alia, granted that branch of the motion of MercyFirst, made in the proceeding pursuant to Family Court Act article 10, which was to suspend visitation between Jeanty O. and the subject child. The order of fact-finding and disposition, upon the decision, upon the decision and order, and after fact-finding and dispositional hearings, found that the mother permanently neglected the subject child, determined that the consent of Jeanty O. to the adoption of the subject child was not required, terminated the mother's parental rights, and transferred custody and guardianship of the subject child to MercyFirst and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The mother's notice of appeal from the decision and order is deemed to be a notice of appeal from the order of fact-finding and disposition (*see* CPLR 5512[a]).
ORDERED that the appeal by the mother from the decision is dismissed, without [*2]costs or disbursements; and it is further,

ORDERED that the appeal by Jeanty O. from the decision and order is dismissed, without costs or disbursements; and it is further,

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

The appeal by the mother from the decision dated October 10, 2019, must be dismissed, as no appeal lies from a decision (*see Schicchi v J.A. Green Constr. Corp.*, 100 AD2d 509). The appeal by Jeanty O. from the decision and order dated August 23, 2022, must be dismissed. To the extent the portion of the decision and order appealed from constitutes a decision, no appeal lies from a decision (*see id.*). To the extent the portion of the decision and order appealed from constitutes an order, the appeal therefrom must be dismissed as academic in light of our determination on the appeals from the order of fact-finding and disposition dated September 12, 2022.

The subject child was born in November 2015. She was placed in foster care within days of her birth. The man to whom the mother was married at the time of the child's conception died three months prior to the child's birth. No man was listed as the child's father on the child's birth certificate.

In 2016, in a proceeding pursuant to Family Court Act article 10, the Family Court found that the mother derivatively neglected the child, as the mother's three older children were removed from her care and placed in foster care due to grossly excessive corporal punishment, and, despite agency assistance, she not only never regained custody of the children, but had her parental rights terminated with respect to those children.

In August 2017, MercyFirst commenced a proceeding pursuant to Social Services Law § 384-b to terminate the mother's parental rights to the child on the ground, inter alia, of permanent neglect. The petition alleged that no other individual was entitled to notice, as the child's birth certificate did not identify any individual as the father, there was no individual listed on the putative father registry as the father of the child, and the mother had identified her deceased husband as the child's father.

In December 2017, after learning that he might be the child's father, Jeanty O. filed a paternity petition. An order of filiation adjudicating Jeanty O. to be the father of the child was issued in October 2018. Jeanty O. thereafter moved to be joined as a respondent in the termination of parental rights proceeding. In December 2018, the Family Court denied the motion.

After a fact-finding hearing, the Family Court found that the mother permanently neglected the child. The court also determined that Jeanty O. was entitled to notice of the proceeding and to present evidence at the dispositional hearing. However, the court determined that the consent of Jeanty O. to any adoption of the child was not required.

After a dispositional hearing during which the mother, Jeanty O., a MercyFirst case planner, and the foster parent testified, the Family Court terminated the mother's parental rights and transferred custody and guardianship of the child to MercyFirst and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The mother and Jeanty O. separately appeal.

To establish that a parent has permanently neglected a child, a petitioning agency must establish by clear and convincing evidence that, for a period of one year following the child's placement with the agency, the parent failed to maintain contact with the child or, alternatively, failed to plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parent-child relationship (*see* Social Services Law § 384-b[4][d]; [7][a]). Here, contrary to the mother's [*3]contention, MercyFirst was properly excused from its obligation to demonstrate diligent efforts since the Family Court previously determined, pursuant to Family Court Act § 1039-b, "that reasonable efforts to make it possible for the child to return safely to [the child's] home [were] not required" (Social Services Law § 384-b[7][a]; *see Matter of "No Given Name" D. [Melissa L.D.]*, 165 AD3d 1107, 1108).

Contrary to the mother's contention, MercyFirst established by clear and convincing evidence that she permanently neglected the child by failing to maintain contact with MercyFirst for several months during the relevant period (*see Matter of Dariuss M.D.-B. [Darnell B.]*, 187 AD3d 904, 906) and by failing to plan for the child's future. Where, as here, a parent has only partially complied with his or her service plan and has not gained insight into the issues that caused removal of the child, the parent has not planned for the child's future (*see Matter of Elizabeth E.H. [Camille M.M.]*, 196 AD3d 578, 580).

Contrary to the mother's contention, the Family Court did not err in failing, sua sponte, to appoint a guardian ad litem for her. The record demonstrates that she was capable of understanding the proceedings, defending her rights, and assisting counsel (*see* CPLR 1201; *Matter of Barbara Anne B.*, 51 AD3d 1018, 1019).

The evidence adduced at the dispositional hearing established that termination of the mother's parental rights was in the child's best interests (*see Matter of Malazah W. [Antoinette W.]*, 206 AD3d 1003, 1005). Contrary to the mother's contention, a suspended judgment was not appropriate in light of, inter alia, her failure to consistently visit the child and to maintain contact with MercyFirst (*see Matter of Quadir C.B. [Emmanuel D.]*, 166 AD3d 968, 970). Moreover, such a disposition would "only prolong the delay of stability and permanenc[y]" in the child's life (*Matter of Elizabeth M.G.C. [Maria L.G.C.]*, 190 AD3d 730, 732).

Contrary to Jeanty O.'s contention, the Family Court properly determined that his consent was not required for the adoption of the child. Notably, Jeanty O. never expressly argued to the court that his consent was required for the adoption. Instead, at multiple points during the fact-finding hearing, his counsel expressly declined to advance such an argument and, in effect, conceded that Jeanty O.'s consent was not required for the adoption of the child. In any event, the court's determination that Jeanty O.'s consent was not required for the adoption of the child was supported by clear and convincing evidence (*see* Domestic Relations Law former § 111[1][d]; *Matter of Robert O. v Russell K.*, 80 NY2d 254, 262; *Matter of Jasiah T.-V.S.J. [Joshua W.]*, 112 AD3d 717). Additionally, Jeanty O.'s contention that his counsel was ineffective for failing to argue that he was a consent father is without merit (*see generally Matter of Assatta N.P. [Nelson L.]*, 92 AD3d 945, 945-946), as is his contention that the court lacked personal jurisdiction over him (*see Matter of Richardson v Richardson*, 80 AD3d 32, 35). Further, Jeanty O.'s constitutional challenge to Domestic Relations Law § 111(1) is improperly raised for the first time on appeal and not properly before this Court (*see Matter of Baby Boy O. [Robert—Kyle S.M.]*, 181 AD3d 606, 607).

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

Matter of Farah B. P., 226 AD3d 905 (2nd Dept., 2024)

In related proceedings pursuant to Social Services Law § 384-b, the mother appeals from three orders of fact-finding and disposition of the Family Court, Queens County (Connie Gonzalez, J.) (one as to each child), all dated September 8, 2022. The orders of fact-finding and disposition, insofar as appealed from, after fact-finding and dispositional hearings, found that the mother permanently neglected the subject children, terminated her parental rights, and transferred guardianship and custody of the subject children to the petitioner and the New York City Administration for Children's Services for the purpose of adoption.
ORDERED that the orders of fact-finding and disposition are affirmed insofar as appealed from, without costs or disbursements.

The petitioner commenced these proceedings, one as to each of the three subject children, who were each placed in the same foster home within days of their births, inter alia, alleging that the mother permanently neglected the children and seeking to terminate the mother's parental rights so as to free the children for adoption. After fact-finding and dispositional hearings, at which the mother represented herself, the Family Court found that the mother permanently [*2]neglected the children, terminated her parental rights, and transferred guardianship and custody of the children to the petitioner and the New York City Administration for Children's Services for the purpose of adoption. The mother appeals.

A respondent in a proceeding pursuant to Social Services Law § 384-b has the right to the assistance of counsel (*see* Family Ct Act § 262[a][iv]; *Matter of Neferteir A.R. [Jesse R.R.]*, 221 AD3d 605, 606). "A respondent may waive that right and proceed without counsel provided he or she makes a knowing, voluntary, and intelligent waiver of the right to counsel" (*Matter of Alivia F. [John F.]*, 167 AD3d 880, 881). "In determining whether a respondent's waiver is made knowingly, voluntarily, and intelligently, the trial court is obligated to conduct a searching inquiry" (*id.* [internal quotation marks omitted]; *see Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 385). "The court must advise the respondent and must be sure that the 'dangers and disadvantages of giving up the fundamental right to counsel have been impressed' upon him or her" (*Matter of Alivia F. [John F.]*, 167 AD3d at 881, quoting *Matter of Kathleen K. [Steven K.]*, 17 NY3d at 386 [internal quotation marks omitted]).

Here, after the mother asked that her counsel be relieved and that she be permitted to represent herself, and after receiving the results of a mental health evaluation determining that the mother was competent to understand these proceedings and waive counsel, the Family Court adequately explained the importance of having a lawyer and the dangers and disadvantages of proceeding without one. The mother acknowledged

that she understood the right she was waiving and expressed that she wished to proceed without counsel. Accordingly, the record demonstrates that the court conducted a sufficiently searching inquiry to ensure that the mother's waiver of her right to counsel was knowingly, voluntarily, and intelligently made (*see Matter of Cecile D. [Kassia D.]*, 189 AD3d 1036, 1037-1038; *Matter of Saunders v Scott*, 172 AD3d 724, 725).

"Generally, to establish that a parent has permanently neglected a child, an agency must establish, by clear and convincing evidence, that for a period of one year following the child's placement with the agency, the parent failed to maintain contact with the child or, alternatively, failed to plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Noel Sean CJ Ivan W. [Danica W.]*, 179 AD3d 1078, 1079; *see Matter of Rhiannon D. [Dari L.]*, 215 AD3d 964, 965).

Here, the petitioner met its initial burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the children by, inter alia, referring the mother to appropriate services and scheduling parental access with the children (*see Matter of Skylah R. [Heather S.]*, 211 AD3d 1027, 1028). The petitioner also demonstrated, by clear and convincing evidence, that despite these efforts, the mother failed substantially and continuously to maintain contact with the children or plan for their future (*see Matter of Rhiannon D. [Dari L.]*, 215 AD3d at 965).

Finally, the evidence at the dispositional hearing demonstrated that terminating the mother's parental rights and freeing the children for adoption was in their best interests (*see Matter of Skylah R. [Heather S.]*, 211 AD3d at 1029).

The mother's remaining contentions are without merit.

Matter of Prince B. H., 227 AD3d 1077 (2nd Dept., 2024)

In related proceedings pursuant to Social Services Law § 384-b, the father appeals from two orders of fact-finding and disposition of the Family Court, Kings County (Ilana Gruebel, J.) (one as to each child), both dated September 14, 2023. The orders of fact-finding and disposition, insofar as appealed from, after fact-finding and dispositional hearings, found that the father permanently neglected the subject children, terminated his parental rights, and transferred custody and guardianship of the subject children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.
ORDERED that the orders of fact-finding and disposition are affirmed insofar as appealed from, without costs or disbursements.

In 2020, the petitioner commenced these proceedings, inter alia, to terminate the father's parental rights to the two subject children. Following fact-finding and dispositional hearings, the Family Court, among other things, found that the father had permanently neglected the children, terminated his parental rights, and transferred custody and guardianship of the children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The father appeals.

Contrary to the father's contention, the petitioner established by clear and convincing [*2]evidence that he permanently neglected the children (*see* Social Services Law § 384-b[7][a]), despite the petitioner's diligent efforts to strengthen the parent-child relationships. Those efforts included developing an appropriate service plan that involved parenting skills courses, mental health counseling, anger management classes, psychological and psychiatric evaluations, and visits with the children. Despite those efforts, the father failed to plan for the return of the children because, despite participating in the services offered by the petitioner, he failed to learn and benefit from the programs he attended (*see Matter of William E.P. [Monasha A.B.]*, 137 AD3d 918, 919; *Matter of James T.L. [Robert L.]*, 133 AD3d 759, 760).

The evidence adduced at the dispositional hearing established that termination of the father's parental rights was in the children's best interests (*see Matter of Damaris E.A. [Johanna A.M.]*, 217 AD3d 860, 861-862; *Matter of Christina M.A.R. [Megan M.R.]*, 154 AD3d 690, 691). Moreover, a suspended judgment was not appropriate in light of the father's lack of insight into his problems and his failure to acknowledge and address the issues preventing the return of the children to his care (*see Matter of Christina M.A.R. [Megan M.R.]*, 154 AD3d at 691; *Matter of Stephon B.M. [Barry J.M.]*, 149 AD3d 1080, 1081).

The father's remaining contentions are either unpreserved for appellate review or without merit.

Matter of Dynasty S.G., AD3d 2024 NY Slip Op 03045 (2nd Dept., 2024)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from an order of fact-finding and disposition of the Family Court, Queens County (Joan L. Piccirillo, J.), dated June 6, 2023. The order of fact-finding and disposition, after fact-finding and dispositional hearings, found that the mother permanently neglected the child, terminated the mother's parental rights, and transferred custody and guardianship of the subject child to the petitioner and the New York City Administration for Children's Services for the purpose of adoption.

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

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b to terminate the mother's parental rights to the subject child on the ground of permanent neglect. Following a fact-finding hearing, at which the mother testified, and a dispositional hearing, in an order of fact-finding and disposition dated June 6, 2023, the Family Court found that the mother had permanently neglected the child, terminated the mother's parental rights, and transferred custody and guardianship of the child to the petitioner and the New York City Administration for Children's Services for the purpose of adoption. The mother appeals.

"In a proceeding to terminate parental rights because of permanent neglect, the agency must demonstrate by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d 679, 680 [internal quotation marks omitted]; *see Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 960). "Once the agency demonstrates that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child's future, although physically and financially able to do so" (*Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 680; *see Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 961). "A parent who has only partially complied with his or her service plan and who has not gained insight into the issues that caused the removal of the child has not planned for the child's future" (*Matter of Shimon G. [Batsheva G.]*, 206 AD3d 732, 733; *see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 681).

Here, the petitioner met its burden of establishing that the mother had permanently neglected the child. Contrary to the mother's contention, the petitioner demonstrated, by clear and convincing evidence, that it made diligent efforts to strengthen the parent-child relationship by forming a service plan that served the needs of the mother, scheduling parental access, and providing referrals to programs for the mother (*see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 681; *Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 961). The record shows that, despite the petitioner's diligent efforts, the mother failed to maintain contact with the petitioner and failed to plan for the child's future, as she only partially complied with her service plan (*see Matter of Phoenix E.P.-W. [Felicita P.]*, 225 AD3d 875, 877; *Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 681). Accordingly, the Family Court properly found that the mother permanently neglected the child.

The evidence adduced at the dispositional hearing established that termination of the mother's parental rights was in the best interests of the child (*see Matter of Phoenix*

E.P.-W. [Felicita P.], 225 AD3d at 877; *Matter of Abbygail H.M.G. [Eddie G.]*, 205 AD3d 913, 914). Contrary to the mother's contention, a suspended judgment would not be in the child's best interests, as such a disposition would "only prolong the delay of stability and permanenc[y]" in the child's life (*Matter of Elizabeth M.G.C. [Maria L.G.C.]*, 190 AD3d 730, 732; *see Matter of Abbygail H.M.G. [Eddie G.]*, 205 AD3d at 914-915). Further, the record supports the Family Court's determination that the child's best interests would be served by freeing her for adoption by her foster mother and aunt, with whom the child has bonded and resided over a prolonged period of time (*see Matter of Phoenix E.P.-W. [Felicita P.]*, 225 AD3d at 877; *Matter of Abbygail H.M.G. [Eddie G.]*, 205 AD3d at 915).

The mother's remaining contention is without merit.

Matter of Aviana R., AD3d 2024 NY Slip Op 03431 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10 and Social Services Law § 384-b, the mother appeals from (1) an order of fact-finding and disposition of the Family Court, Queens County (Joan L. Piccirillo, J.), dated January 14, 2019, concerning the proceedings pursuant to Family Court Act article 10, (2) a determination of the same court, made after fact-finding and dispositional hearings, which occurred on March 14, 2023, concerning the proceedings pursuant to Social Services Law § 384-b, and (3) an order of the same court dated May 30, 2023. The order of fact-finding and disposition, insofar as appealed from, upon the mother's consent to a finding of neglect without admission pursuant to Family Court Act § 1051(a), found that the mother neglected the subject children and placed the subject children in the custody of the Commissioner of Social Services of the City of New York. The determination which occurred on March 14, 2023, [*2]upon the mother's failure to appear at the fact-finding and dispositional hearings, found that the mother permanently neglected the subject children and directed the termination of the mother's parental rights. The order dated May 30, 2023, denied the mother's motion pursuant to CPLR 5015(a) to vacate her default in appearing at the fact-finding and dispositional hearings, in the proceedings pursuant to Social Services Law § 384-b.
ORDERED that the appeals from the order of fact-finding and disposition and the determination which occurred on March 14, 2023, are dismissed, without costs or disbursements; and it is further,

ORDERED that on the Court's own motion, the notice of appeal from the order dated May 30, 2023, is deemed to be an application for leave to appeal from that order, and leave to appeal from that order is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order dated May 30, 2023, is affirmed, without costs or disbursements.

In proceedings pursuant to Family Court Act article 10, the mother consented to the entry of a finding of neglect without admission pursuant to Family Court Act § 1051(a). In an order of fact-finding and disposition dated January 14, 2019, the Family Court, inter alia, entered a finding of neglect against the mother and placed the subject children in the custody of the Commissioner of Social Services of the City of New York. Thereafter, HeartShare St. Vincent's Services commenced proceedings pursuant to Social Services Law § 384-b, among other things, to terminate the mother's parental rights to the children on the ground of permanent neglect. On March 14, 2023, the mother failed to appear, and fact-finding and dispositional hearings were held in her absence. Following the hearings, the court found, inter alia, that the mother permanently neglected the children and directed the termination of her parental rights. The mother subsequently moved pursuant to CPLR 5015(a) to vacate her default in failing to appear at the fact-finding and dispositional hearings in the proceedings pursuant to Social Services Law § 384-b. In an order dated May 30, 2023, the court denied the mother's motion. The mother appeals.

The appeal from the order of fact-finding and disposition must be dismissed, as the finding of neglect was made upon the consent of the appealing party and the mother does not raise any issue concerning the disposition (*see Matter of Violet P. [Catherine P.]*, 199 AD3d 810, 811). Additionally, the appeal from the determination which occurred on March 14, 2023, must be dismissed, on the ground that no appeal lies from a decision (*see Schicchi v J.A. Green Constr. Corp.*, 100 AD2d 509).

The determination of whether to relieve a party of a default is within the sound discretion of the Family Court (*see Matter of Caden Y.L. [Kathy L.]*, 198 AD3d 780, 781; *Matter of Brandon G. [Tiynia M.]*, 155 AD3d 626, 626). "A parent seeking to vacate a default in a proceeding for the termination of parental rights must establish a reasonable excuse for the default and a potentially meritorious defense to the relief sought in the petition" (*Matter of Harlem H.H. [Coty H.]*, 218 AD3d 579, 581; *see* CPLR 5015[a][1]; *Matter of Caden Y.L. [Kathy L.]*, 198 AD3d at 781).

Here, the mother failed to establish a reasonable excuse for her failure to appear at the fact-finding and dispositional hearings in the proceedings pursuant to Social Services Law § 384-b. Although the mother claimed that she had been hospitalized the day prior to the hearings, she failed to submit any documents to substantiate this claim (*see Matter of Elysia R.M. [Shamaya M.]*, 161 AD3d 870, 871; *Matter of Raphanello J.N.L.L. [Rasheem L.]*, 119 AD3d 580, 580). In addition, the mother failed to explain why she did not contact her attorney or the Family Court regarding her inability to appear on the scheduled date (*see Matter of Justyn H. [Laverne H.]*, 191 AD3d 877, 878). Since the

mother failed to set forth a reasonable excuse for her default, we need not reach the issue of whether the mother demonstrated that she had a potentially meritorious defense to the relief sought in the termination of parental rights petitions (*see Matter of Malcome X.K. [Amber N.M.]*, 179 AD3d 684, 685).

Accordingly, the Family Court providently exercised its discretion in denying the mother's motion to vacate her default in appearing at the fact-finding and dispositional hearings which occurred on March 14, 2023.

Matter of Nikole V., 224 AD3d 1102 (3rd Dept., 2024)

Appeal from an order of the Family Court of Albany County (Amy E. Joyce, J.), entered May 13, 2022, which, among other things, granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject children to be permanently neglected, and terminated respondent's parental rights. Respondent (hereinafter the father) is the father of two children (born in 2017 and 2018). Shortly after their births, both children were removed from the care and custody of the father and the mother and placed with different foster families, where they have resided ever since. In December 2019, petitioner filed a petition to terminate the father's parental rights on the basis of permanent neglect. Following fact-finding and dispositional hearings, Family Court found that the children were permanently neglected and terminated the father's parental rights. The father appeals.

Initially, the father concedes that his appeal from the dispositional order is moot since, during the pendency of this appeal, the children have been adopted. Thus, while any challenge to Family Court's disposition has been rendered moot, a challenge to the adjudication of permanent neglect is not moot given the "permanent and significant stigma which is capable of affecting a parent's status in potential future proceedings" (*Matter of Matthew C.*, 227 AD2d 679, 680 [3d Dept 1996]; *see Matter of Iyanna KK. [Edward KK.]*, 141 AD3d 885, 886 [3d Dept 2016]; *Matter of Mahogany Z. [Wayne O.]*, 72 AD3d 1171, 1172 [3d Dept 2010], *lv denied* 14 NY3d 714 [2010]).

In a permanent neglect proceeding, the petitioner "[bears] the burden of proving by clear and convincing evidence that, first, it made diligent efforts to encourage and strengthen the relationship between [the] respondent[ ] and the child" (*Matter of Nevaeh N. [Heidi O.]*, 220 AD3d 1070, 1070 [3d Dept 2023]; *see Matter of Kamiah J.N.H. [Katrina H.]*, 220 AD3d 861, 862 [2d Dept 2023]). "To satisfy that burden, the agency must develop a plan that is realistic and tailored to fit the respondent's individual situation" (*Matter of Willow K. [Victoria L.]*, 218 AD3d 851, 852 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]; *see Matter of Austin A.*, 243 AD2d

895, 896-897 [3d Dept 1997]). "Such efforts should be designed to address the problems that led to the children's removal, and to strengthen the family relationship and may include assisting the parent[ ] with visitation, providing information on the children's progress and development, and offering counseling and other appropriate educational and therapeutic programs and services" (*Matter of Dawn M. [Michael M.]*, 174 AD3d 972, 973 [3d Dept 2019] [internal quotation marks, brackets and citations omitted], *lv denied* 34 NY3d 907 [2020]; *see Matter of Chloe B. [Sareena B.]*, 189 AD3d 2011, 2012 [3d Dept 2020]). "In assessing whether petitioner has demonstrated permanent neglect, we accord great weight to the factual findings and credibility [*2]determinations of Family Court, and its findings will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter of Ryan J. [Taylor J.]*, 222 AD3d 1207, 1209 [3d Dept 2023] [citations omitted]).

At the fact-finding hearing, petitioner presented testimony from the father's caseworker, his clinician from the Albany Prevention Program and a foster care family specialist from Berkshire Farm. The father testified on his own behalf. Testimony from petitioner's witnesses demonstrated that they were working with the father to monitor and assist him in reaching requirements set forth in a prior order of supervision entered relative to a previous neglect proceeding. These requirements included undergoing a mental health evaluation and following any recommendations therefrom, completing parenting and anger management programs, obtaining and maintaining a safe, stable and clean home, participating in supervised visitation and acknowledging the reasons why the children were removed from the father's care and custody. To aid the father in accomplishing the requirements, petitioner and the service providers referred the father to various services, including a prevention program, mental health care, anger management services and a parenting program. The father was also offered assistance in his attempt to find regular employment and suitable housing. Additionally, regular meetings were held to discuss the father's progress and keep him apprised of the children's progress and development. Supervised visitation with the children was also facilitated. Testimony demonstrated that the father was provided with transportation assistance, primarily in the form of bus tokens, to attend supervised visitation with the children, medical appointments, mental health treatment and job interviews. Although the father "did not appreciably benefit from or meaningfully improve following these efforts, petitioner was obligated to only make reasonable efforts, and it will be deemed to have fulfilled its obligation if appropriate services are offered but the parent . . . does not progress" (*Matter of Jessica U. [Stephanie U.]*, 152 AD3d 1001, 1003-1004 [3d Dept 2017] [internal quotations marks and citations omitted]; *see Matter of Dawn M. [Michael M.]*, 174 AD3d at 973). Moreover, although the father asserts that petitioner did not engage in diligent efforts by failing to provide him with certain accommodations he required due to physical limitations, the record does not demonstrate that he ever asked

for any accommodations. "Accordingly, Family Court's determination that petitioner made diligent efforts to encourage and strengthen [the father's] relationship with the children is amply supported in the record" (*Matter of Chloe B. [Sareena B.]*, 189 AD3d at 2013 [citations omitted]; *see Matter of Nevaeh N. [Heidi O.]*, 220 AD3d at 1071).

"Once diligent efforts have been shown, the petitioner must then prove by clear and convincing evidence that the respondent failed [*3]to substantially plan for the child[ren]'s future" (*Matter of Issac Q. [Kimberly R.]*, 212 AD3d 1049, 1051 [3d Dept 2023] [internal quotation marks, brackets and citations omitted], *lv denied* 39 NY3d 913 [2023]; *see Matter of Ryan J. [Taylor J.]*, 222 AD3d at 1210). "A parent plans for the future by utilizing available medical, social and psychological services as needed and providing a stable and adequate home environment" (*Matter of Chloe B. [Sareena B.]*, 189 AD3d at 2013 [internal quotation marks and citations omitted]; *see Matter of Makayla I. [Sheena K.]*, 201 AD3d 1145, 1148 [3d Dept 2022], *lvs denied* 38 NY3d 903 [2022], 38 NY3d 903 [2022]). "The plan for the children 'must be realistic and feasible,' as good faith alone is insufficient" (*Matter of Arianna K. [Maximus L.]*, 184 AD3d 967, 969-970 [3d Dept 2020], quoting *Matter of Dawn M. [Michael M.]*, 174 AD3d at 974).

Although the testimony demonstrated that the father completed a parenting program and anger management, he continued to find himself in situations he characterized as "chaotic" and that involved physical violence and, at trial, he minimized his role in these incidents. The father also did not establish safe, stable and clean housing. Testimony demonstrated that he continued living with the children's mother despite characterizing it as not being "conducive to [his] mental health." Although he also testified that he did eventually find a new living situation, the record demonstrates that he did not report this change to petitioner or his other service providers nor was it safe and stable for the children. Despite admitting that he had suffered mental health problems his whole life, he failed to engage in and complete mental health treatment. While he did complete multiple evaluations, he missed appointments without rescheduling, which led to his discharge. The father explained that he could not complete the mental health treatment because of side effects from prescribed medications, but Family Court did not find this testimony to be convincing. Testimony also demonstrated that visitation with the children had not progressed due to a significant number of missed visits, leaving early on multiple occasions and needing to regularly "go outside to get air." When the father did attend visits, he was unprepared as he failed to bring diapers and formula for the younger child and snacks for the older child; instead he relied on the foster parents to provide these things. While no conversation was had about the father's visitation increasing, testimony demonstrated that had that conversation occurred, such a request would have been denied due to safety concerns. It is abundantly clear from the record that the father loves the children, wants to be their parent and put in a good faith effort to plan for them, however his plans were neither realistic nor feasible (*see Matter of*

Dustin D. [Paul D.], 222 AD3d 1250, 1253 [3d Dept 2023]; *Matter of Issac Q. [Kimberly R.]*, 212 AD3d at 1053). "Accordingly[*4], when deferring to Family Court's credibility determinations, we conclude that there is a sound and substantial basis in the record to support the permanent neglect finding" (*Matter of Issac Q. [Kimberly R.]*, 212 AD3d at 1053-1054 [citations omitted]).

Matter of Drey L., 227 AD3d 1134 (3rd Dept., 2024)

Appeal from an order of the Family Court of St. Lawrence County (Andrew S. Moses, J.), entered July 8, 2022, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject children to be permanently neglected, and terminated respondent's parental rights.
Respondent is the mother of four children (born in 2011, 2012, 2013 and 2014). In November 2017, the children were removed from the care and custody of respondent and, based on their needs, placed with either a foster family or in a residential treatment facility, where they have resided ever since. In March 2021, petitioner filed a petition to terminate respondent's parental rights on the basis of permanent neglect. Following fact-finding and dispositional hearings, Family Court found that the children were permanently neglected and terminated respondent's parental rights.**[FN1]** Respondent appeals.

We affirm. In a permanent neglect proceeding, the petitioning agency must prove, by clear and convincing evidence, that it made "diligent efforts to encourage and strengthen the parental relationship" and that the parent failed to adequately "plan for the future of the child[ren]," despite being able to do so (Social Services Law § 384-b [7] [a]; *see Matter of Nevaeh N. [Heidi O.]*, 220 AD3d 1070, 1070 [3d Dept 2023], *lv denied* 41 NY3d 903 [2024]; *Matter of Harmony F. [William F.]*, 212 AD3d 1028, 1029 [3d Dept 2023]). "Diligent efforts means reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child[ren]" (*Matter of Issac Q. [Kimberly R.]*, 212 AD3d 1049, 1050-1051 [3d Dept 2023] [internal quotation marks, brackets and ellipsis omitted]), *lv denied* 39 NY3d 913 [2023]; *accord* Social Services Law § 384-b [7] [f]), which includes "assisting the parent with visitation, providing information on the child[ren]'s progress and development, and offering counseling and other appropriate educational and therapeutic programs and services" (*Matter of Zaiden P. [Ashley Q.]*, 211 AD3d 1348, 1351-1352 [3d Dept 2022] [internal quotation marks and citations omitted], *lvs denied* 39 NY3d 911 [2023], 39 NY3d 911 [2023]). "The petitioning agency will be deemed to have fulfilled that obligation if appropriate services are offered but the parent refuses to engage in them or does not progress" (*Matter of Issac Q. [Kimberly R.]*, 212 AD3d at 1051 [internal quotation marks, brackets and citations omitted]).

Here, the fact-finding hearing testimony demonstrates that petitioner arranged counseling for mental health and substance abuse issues, a peer advocate, caseworker visits and scheduled therapeutic visitation between the children and respondent. For the relevant time period between February 2020 through February 2021, a caseworker testified that respondent attended her mental health classes and chemical dependency appointments, but that she had relapsed in February 2020 requiring in-patient treatment and [*2]subsequently tested positive for cocaine on one occasion as a result of that relapse. The caseworker further testified that she remained in regular contact with respondent's counselors, including the peer advocate assisting respondent, but had difficulty meeting with respondent for monthly caseworker visits. Specifically, the caseworker testified that she was unable to meet with respondent on several occasions during the relevant time period — including multiple attempts in a row when respondent had previously confirmed the appointment but was not home at the time of the visit. According to the caseworker, August 2020 was the last time that she was able to meet with respondent before the filing of the petition in March 2021. Both the caseworker and a licensed clinical social worker, who served as a therapist during therapeutic visitation between respondent and the children, testified that respondent did not regularly attend visitation. According to the social worker, between April 2020 and October 2020, the mother attended two telephone visits and one virtual visit with the children. For her part, respondent's testimony generally corroborated that of the caseworker and the social worker, further admitting that she missed five or six meetings with the caseworker and another five or six scheduled visits with her children during the relevant time period. Although the appellate attorney for the children contends that the record does not adequately explain why petitioner did not fully explore the option to reschedule such missed meetings or visits, the record also reveals that respondent had confirmed her availability prior to the appointment being scheduled and did not consistently notify anyone in advance that she was no longer able to meet. Based on the foregoing, we are satisfied that petitioner met its threshold burden (*see Matter of Nevaeh N. [Heidi O.]*, 220 AD3d at 1071; *Matter of Zaiden P. [Ashley Q.]*, 211 AD3d at 1352-1353; *Matter of Leon YY. [Christopher ZZ.]*, 206 AD3d 1093, 1095-1096 [3d Dept 2022]).

Similarly, although not challenged by respondent, we conclude that petitioner satisfied its burden in proving that respondent "failed to substantially plan for the children's future by taking meaningful steps to correct the conditions that led to their removal" (*Matter of Chloe B. [Sareena B.]*, 189 AD3d 2011, 2013 [3d Dept 2020]). The record reflects that respondent had not met with the caseworker since August 2020, therefore not allowing the caseworker to visit and evaluate the suitability of respondent's home environment for the children. As it specifically related to respondent's intentions to have all four children returned to her, the record demonstrates that her proposed living arrangements failed to consider several medical, psychiatric, psychological and other social and

rehabilitative needs that each child required — a point that she conceded during the hearing (*see Matter of Issac Q. [Kimberly R.]*, 212 AD3d at 1051; *Matter of Harmony [*3]F. [William F.]*, 212 AD3d at 1031-1032).

Finally, we disagree with respondent and the father that Family Court should have issued a suspended judgment instead of terminating respondent's parental rights. "Following an adjudication of permanent neglect, the sole concern at a dispositional hearing is the best interests of the child[ren], and there is no presumption that any particular disposition, including the return of [the] child[ren] to a parent, promotes such interests" (*Matter of Nevaeh N. [Heidi O.]*, 220 AD3d at 1072 [internal quotation marks and citations omitted]). Indeed, "a suspended judgment is warranted only when the parent, under the facts presented, has clearly demonstrated that he or she deserves another opportunity to show that he or she has the ability to be a fit parent" (*Matter of Issac Q. [Kimberly R.]*, 212 AD3d at 1054 [internal quotation marks and citations omitted]). In that situation, "[a] suspended judgment offers a brief grace period designed to prepare the parent to be reunited with the child[ren], but is only appropriate where a delay would be consonant with the best interests of the child[ren]" (*Matter of Isabella H. [Richard I.]*, 174 AD3d 977, 981-982 [3d Dept 2019] [internal quotation marks and citations omitted]). Here, although respondent testified that she had made improvements in her mental health and chemical dependency since the children were removed from her custody, the record fails to demonstrate how the children — particularly two children in residential treatment facilities due to their mental health — can be safely reunited with respondent. Further considering that the children have been in petitioner's care and custody since November 2017, and the record reveals limited action toward reunification by respondent during this time, we conclude that there is a sound and substantial basis in the record to support Family Court's determination to terminate her parental rights (*see Matter of Issac Q. [Kimberly R.]*, 212 AD3d at 1054-1055; *Matter of Zaiden P. [Ashley Q.]*, 211 AD3d at 1356). We have examined the remaining contentions of the parties and have found them to be without merit or rendered academic.

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

ORDERED that the order is affirmed, without costs.

Footnote 1: Petitioner also filed a permanent neglect proceeding against the father, and Family Court similarly found that the children were permanently neglected by the father and terminated his parental rights. Although the father appealed from such order, this Court dismissed same for failure to perfect. Therefore, to the extent that the father filed a brief in this appeal contending that this Court should vacate the termination of the father's parental rights, he is not an appealing party in this proceeding, his substantive

arguments are not properly before this Court and he may not be granted the affirmative relief that he seeks (*see Matter of Brandon N. [Joseph O.]*, 165 AD3d 1520, 1521-1522 [3d Dept 2018]; *see also Matter of Bashier v Adams*, 217 AD3d 764, 765 [2d Dept 2023]; *Matter of Khavonye FF. [Latasha EE.]*, 198 AD3d 1134, 1135 n 3 [3d Dept 2021]).

Matter of Asiah S., AD3d 2024 NY Slip Op 03113 (3rd Dept., 2024)

Appeal from an order of the Family Court of Delaware County (Gary A. Rosa, J.), entered January 30, 2023, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject child to be permanently neglected, and terminated respondent's parental rights.
In March 2021, the subject child (born in 2007) was removed from the care and custody of respondent (hereinafter the mother) and placed in petitioner's care. While in the mother's care, the child had online sexual interactions with an adult, engaged in self-harm, kept a knife under her pillow and brought a knife to school (212 AD3d 1062 [3d Dept 2023], *lv denied* 39 NY3d 913 [2023]). Despite such alarming conduct, the mother rejected offers for alternative housing and saw no benefit to enrolling the child in mental health treatment (*id.*). In September 2021, Family Court (Northrup Jr., J.) adjudicated the child to be neglected. On appeal, we upheld such determination, noting that the mother had chosen to remain at a residence where she and the child were subjected to verbal abuse and where the child was exposed to two sex offenders, at least one of whom had previously sexually abused a child (*id*.). In May 2022, petitioner filed a petition alleging that the child was a permanently neglected child as a result of the child continuing in care and the mother's failure to plan for the child's future and seeking to terminate her parental rights. Following a joint fact-finding and dispositional hearing, Family Court (Rosa, J.) adjudicated the child to be permanently neglected, terminated the mother's parental rights and freed the child for adoption. The mother appeals.

"As relevant here, a permanently neglected child is one who is in the care of an authorized agency and whose parent has failed, for at least one year after the child came into the agency's care, to substantially and continuously or repeatedly 'plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship' " (*Matter of Jason O. [Stephanie O.]*, 188 AD3d 1463, 1464 [3d Dept 2020], *lv denied* 36 NY3d 908 [2021], quoting Social Services Law § 384-b [7] [a]). To make the threshold showing of diligent efforts, the petitioning agency must establish, by clear and convincing evidence, that it "made practical and reasonable efforts to ameliorate the problems preventing reunification and strengthen the family relationship by such means

as assisting the parent with visitation, providing information on the child's progress and development, and offering counseling and other appropriate educational and therapeutic programs and services" (*Matter of Harmony F. [William F.]*, 212 AD3d 1028, 1029 [3d Dept 2023] [internal quotation marks and citations omitted]; *see Matter of Kaylee JJ. [Jennifer KK.]*, 159 AD3d 1077, 1078 [3d Dept 2018]). Following the child's removal, petitioner offered the [*2]mother housing applications and listings to help her obtain appropriate housing, provided her budgeting assistance and referred her to an employment agency to assist her with preparing a resume and obtaining employment. Petitioner also provided the mother with updates on the child's mental health treatment and her academic progress, facilitated regular visitation between the mother and the child and provided the mother with parenting education as well as referrals for mental health treatment. On appeal, the mother argues that the services petitioner offered her were insufficient, but, throughout the hearing, she testified that petitioner offered her various services and, importantly, that she chose not to avail herself of those opportunities. Accordingly, Family Court correctly determined that petitioner met its burden of establishing, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the mother's relationship with the child (*see Matter of Nevaeh N. [Heidi O.]*, 220 AD3d 1070, 1071 [3d Dept 2023], *lv denied* 41 NY3d 903 [2024]; *Matter of Cordell M. [Cheryl O.]*, 150 AD3d 1424, 1425 [3d Dept 2017]; *Matter of Landon U. [Amanda U.]*, 132 AD3d 1081, 1084 [3d Dept 2015]).

Next, we address the mother's contention that she did substantially plan for the child's future. Petitioner has the burden of establishing, by clear and convincing evidence, that a parent has failed to make a realistic and feasible plan and "take[n] meaningful steps to correct the conditions that led to the child's removal" (*Matter of Jason O. [Stephanie O.]*, 188 AD3d at 1466; *see* Social Services Law § 384-b [7] [c]; *Matter of Paige J. [Jeffrey K.]*, 155 AD3d 1470, 1474 [3d Dept 2017]). Prior to the child's removal by petitioner, the mother, her paramour and the child moved in with the paramour's relatives; according to the mother, she was initially unaware that one of those relatives had previously sexually abused a child. However, after learning of the relative's history, the mother remained there and failed to recognize the danger that the relative posed to the subject child. The mother only began to seek alternative housing six months after the child's removal — once the paramour left her — and finally obtained her own apartment a year after said removal. Notably, the mother admitted that the relative was verbally abusive to her and the child, and that the child had observed the relative hitting the mother, yet she continued to deny that the relative's residence had been unsafe for the child. Throughout her testimony, the mother discounted the child's fear of residing with the relative and instead excused and minimized the impact of his conduct (*see e.g. Matter of Paige J. [Jeffrey K.]*, 155 AD3d at 1474). The mother testified that she was actively engaged in mental health treatment and that her therapist tried to help her work through

her attachment issues, yet, during visits with the child, the mother shared various plans to relocate herself [*3]and the child to reside with out-of-state men that she had recently met online but never met in person. During the mother's supervised visits with the child, the mother disregarded the parent educator's attempts to redirect her away from inappropriate topics of conversation. Among other things, the mother forced discussions about the child's past trauma, mocked the child's wish to learn her father's identity and said that her life was meaningless without the child. The mother demonstrated an inability to control her own impulses, and she was unable to accept responsibility for her role in the child remaining in care, instead blaming petitioner and the child — a belief she shared with the child. Based on the foregoing, petitioner established, through clear and convincing evidence, that the mother failed to substantially plan for the child's future in the year preceding the petition, and Family Court properly adjudicated the child to be permanently neglected (*see Matter of Jason O. [Stephanie O.]*, 188 AD3d at 1466-1467; *Matter of Jessica U. [Stephanie U.]*, 152 AD3d 1001, 1004-1005 [3d Dept 2017]; *Matter of Landon U. [Amanda U.]*, 132 AD3d at 1085).**[FN1]**

As to disposition, the mother contends that Family Court should have granted a suspended judgment instead of terminating her parental rights. Upon a finding that a child has been permanently neglected, Family Court's "sole concern at a dispositional hearing is the best interests of the child and there is no presumption that any particular disposition, including the return of a child to a parent, promotes such interests" (*Matter of Angelica VV.*, 53 AD3d 732, 733 [3d Dept 2008]; *accord Matter of Asianna NN. [Kansinya OO.]*, 119 AD3d 1243, 1248 [3d Dept 2014], *lv denied* 24 NY3d 907 [2014]; *see* Family Ct Act § 631). A suspended judgment is only appropriate where a parent has made significant progress such that a brief grace period would allow him or her to demonstrate the ability to be a fit parent, and such delay is consistent with the child's best interests (*see Matter of Issac Q. [Kimberly R.]*, 212 AD3d 1049, 1054 [3d Dept 2023], *lv denied* 39 NY3d 913 [2023]; *Matter of Isabella H. [Richard I.]*, 174 AD3d 977, 981-982 [3d Dept 2019]). Since entering petitioner's care, the child had become a better communicator, allowing her to advocate for herself when she felt uncomfortable rather than engaging in inappropriate and aggressive behaviors. According to the parent educator, the child, who was 15 years old as of the hearing, had expressed that she did not want to have visits with the mother but did so because she feared that the mother would harm herself if the child stopped visiting. The child also communicated feeling unsafe with the mother, and did not believe that the mother would ever be able to provide her with a safe and stable home. Given the mother's failure to make any significant progress toward reunification, a suspended judgment would not be in the child's best interests, and Family Court's determination [*4]to terminate her parental rights is supported by a sound and substantial basis in the record (*see Matter of Nevaeh*

N. [Heidi O.], 220 AD3d at 1072-1073; *Matter of Jessica U. [Stephanie U.]*, 152 AD3d at 1006; *Matter of Angelica VV.*, 53 AD3d at 733).

To the extent not expressly addressed herein, the mother's remaining arguments on appeal have been considered and found to be lacking in merit.

ORDERED that the order is affirmed, without costs.

Footnote 1: As the attorney for the child highlights while arguing in favor of affirmance, the mother's own admissions, made throughout her testimony, support the finding that she failed to plan for the child's future.

Matter of Patience E., 225 AD3d 1178 (4th Dept., 2024)

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 17, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In appeal Nos. 1 through 3, respondent mother appeals from orders terminating her parental rights to the subject children pursuant to Social Services Law § 384-b on the ground of permanent neglect. We now affirm in all three appeals.

In all three appeals, we conclude that petitioner met its burden of establishing by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the mother's relationship with the children (*see* Social Services Law § 384-b [7] [a]; *Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]; *see generally Matter of Star Leslie W.*, 63 NY2d 136, 142-143 [1984]). Although Family Court failed to comply with CPLR 4213 (b) when it neglected to make specific findings of fact with respect to the fulfillment of petitioner's statutory obligation (*see Matter of Paulette B.*, 270 AD2d 949, 949 [4th Dept 2000]; *Matter of Kelly G.*, 244 AD2d 709, 709-710 [3d Dept 1997]), the record is sufficiently developed to enable us to make the necessary findings (*see Matter of Howard R.*, 258 AD2d 893, 893 [4th Dept 1999]).

Contrary to the mother's further contention in these appeals, the evidence at the hearing establishes that, despite those diligent efforts, the mother failed to plan for the future of the children. "It is well settled that, to plan substantially for a child's future, 'the parent must take meaningful steps to correct the conditions that led to the child's removal' " within a reasonable period of time (*Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d

1550, 1551 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]; *see Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986]; *Matter of Faith K. [Jamie K.]*, 203 AD3d 1568, 1569 [4th Dept 2022]; *see generally* Social Services Law § 384-b [7] [c]). Here, the mother was discharged from mental health counseling, anger management classes, and substance abuse treatment for failure to attend (*see Matter of Brady J.C. [Justin P.C.]*, 154 AD3d 1325, 1326 [4th Dept 2017], *lv denied* 30 NY3d 909 [2018]), thereby demonstrating that she failed to "take meaningful steps to correct the conditions that led to the child[ren]'s removal" (*Matter of Ayden D. [John D.]*, 202 AD3d 1455, 1456 [4th Dept 2022] [internal quotation marks omitted]), and "did not successfully address or gain insight into the problems that led to the removal of the [children] and continued to prevent [their] safe return" (*Giovanni K.*, 62 AD3d at 1243; *see Matter of Soraya S. [Kathryne T.]*, 158 AD3d 1305, [*2]1306 [4th Dept 2018], *lv denied* 31 NY3d 908 [2018]).

Finally, we reject the mother's contention that a suspended judgment was warranted and conclude that it was in the children's best interests to terminate the mother's parental rights. "A suspended judgment is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Aiden T. [Melissa S.]*, 164 AD3d 1663, 1663 [4th Dept 2018], *lv denied* 32 NY3d 917 [2019] [internal quotation marks omitted]; *see* Family Ct Act § 633; *Matter of Michael B.*, 80 NY2d 299, 310-311 [1992]) and "may be warranted where the parent has made sufficient progress in addressing the issues that led to the child[ren]'s removal from custody" (*Matter of Brandon I.J. [Daisy D.]*, 198 AD3d 1310, 1311 [4th Dept 2021], *lv denied* 38 NY3d 901 [2022]).

Here, the mother's progress in completing her parenting classes, which was only one of several required services, "was made after the [termination of parental rights] petition[s were] filed, and she failed to complete th[at] requirement [or any of her other required services] during [the time between when] the petition was filed and the hearing was concluded" (*Matter of Elijah D. [Allison D.]*, 74 AD3d 1846, 1847 [4th Dept 2010]). Thus, we conclude that any progress "made by [the mother] in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the [children's] unsettled familial status" (*id.* [internal quotation marks omitted]). Our conclusion is further supported by the foster parents' desire to adopt the children, which adoption would provide them with a "sense of stability" (*Matter of Tumario B. [Valerie L.],* 83 AD3d 1412, 1412 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011] [internal quotation marks omitted]), and the fact that the children spent a significant portion of their lives in the foster parents' care and established a bond with them that they lacked with the mother (*see Matter of Ty'Keith R.*, 45 AD3d 1397, 1397 [4th Dept 2007], *lv denied* 10 NY3d 701 [2008]). We therefore conclude that the court properly determined that a suspended judgment was unwarranted (*see Matter of Nathan N. [Christopher R.N.]*, 203 AD3d 1667, 1669 [4th Dept 2022], *lv denied* 38 NY3d 909 [2022]; *Brandon*

I.J., 198 AD3d at 1311; *Matter of Cheyenne C. [James M.]*, 185 AD3d 1517, 1520-1521 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]).

Matter of Tori-Lynn L. (Troy L.), 227 AD3d 1455 (4th Dept., 2024)

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered December 2, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject children.
It is hereby ORDERED that the order so appealed from is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6 and Social Services Law § 384-b, respondent father appeals from an order of fact-finding and disposition that, inter alia, adjudicated the subject children to be permanently neglected by the father and terminated the father's parental rights. We affirm.

The father and non-appellant mother are the biological parents of the subject children, who are twin girls. In early July 2018—when the children were approximately three months old—the police responded to a domestic violence report at the residence where the father and the mother had been staying with the children. Upon a safety assessment by petitioner the following day, the mother admitted that the father had subjected her to physical domestic violence, and a representative for petitioner observed that the father's bedroom contained, among other things, a dirty portable crib that contained hypodermic syringes, one of which contained blood. During the investigation, the mother admitted to using heroin just weeks prior to the children's birth and to using cocaine after the children were born, and the father admitted to using cocaine and "molly" during the weekend of the domestic violence incident.

The children were immediately removed from the biological parents' care and thereafter placed with foster parents, with whom they have since remained. Petitioner filed a neglect petition and, upon the admissions of the biological parents, Family Court adjudicated the children neglected in October 2018. The father was ordered to cooperate and make progress in parenting classes, family counseling, and domestic violence counseling. In addition, the court ordered that the father obtain psychological and substance abuse evaluations and follow the recommendations thereof, including any inpatient care. Among other things, the father was also required to submit to random drug screens and avoid any consumption of alcohol, illegal substances, or non-prescribed medications in the presence of the children. The father was permitted to have contact with the children supervised by a person deemed appropriate by petitioner.

The children remained in foster care for years as periodic permanency hearings continued and, eventually, petitioner filed a petition seeking to terminate the parental rights of the biological parents. Petitioner alleged that the father permanently neglected the children on the [*2]ground that, notwithstanding petitioner's diligent efforts, the father failed for a period of at least one year—specifically December 1, 2020 to December 22, 2021—substantially and continuously or repeatedly to plan for the future of the children, although physically and financially able to do so. Petitioner alleged in particular that the father disclosed to a psychiatrist in June 2021 that he had been hearing voices telling him to sexually abuse the children, and that he failed to comply with the service plan and failed to ameliorate the problems preventing the safe return of the children to his care.

Following a fact-finding hearing during which petitioner presented, inter alia, the testimony of its caseworker and the father's psychiatrist, the court rendered a bench decision in which it determined that, despite petitioner's diligent efforts, the father had failed to appropriately plan for the future of the children by taking steps necessary to provide an adequate, stable home and parental care. The court further determined after a subsequent dispositional hearing that terminating the father's parental rights and freeing the children for adoption was in the best interests of the children.

Preliminarily, contrary to the assertion of the Attorney for the Children, we conclude on this record that the father timely filed his notice of appeal (*see* Family Ct Act §§ 1113, 1115). On the merits, the father contends that the court erred in determining that petitioner met its burden at the fact-finding hearing of establishing that he permanently neglected the children. We reject that contention.

"An authorized agency that brings a proceeding to terminate parental rights based upon permanent neglect bears the burden of establishing [by clear and convincing evidence] that it has made 'diligent efforts to encourage and strengthen the parental relationship' " (*Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 429 [2012], quoting Social Services Law § 384-b [7] [a]; *see Matter of Sheila G.*, 61 NY2d 368, 373, 380-381 [1984]). "Once diligent efforts have been established, the agency must prove [by clear and convincing evidence] that the parent has permanently neglected the child" (*Hailey ZZ.*, 19 NY3d at 429) by, as relevant here, "fail[ing] for a period of . . . at least one year . . . substantially and continuously or repeatedly to . . . plan for the future of the child, although physically and financially able to do so" (§ 384-b [7] [a]). "[T]he planning requirement contemplates that the parent shall take such steps as are necessary to provide a home that is adequate and stable, under the financial circumstances existing, within a reasonable period of time. Good faith alone is not enough: the plan must be realistic and feasible" (*Matter of Star Leslie W.*, 63 NY2d 136, 143 [1984]; *see* § 384-b [7] [c]). "In determining whether a parent has planned for the future of the child, the court may consider the

failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent" (§ 384-b [7] [c]). "At a minimum, [the] parent[ ] must 'take steps to correct the conditions that led to the removal of the child from their home . . . [T]he planning requirement also obligates [the] parent[ ] to project a future course of action, taking into account considerations of how the child will be supported financially, physically and emotionally' " (*Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986]).

Here, contrary to the father's contention, we conclude that the court did not err in determining that petitioner established by clear and convincing evidence that, despite its diligent efforts, the father failed to adequately plan for the return of the children (*see* Social Services Law § 384-b [7] [a]; *Matter of Steven D., Jr. [Steven D.*, *Sr.]*, 188 AD3d 1770, 1771 [4th Dept 2020], *lv denied* 36 NY3d 908 [2021]). The record establishes that, "[a]lthough [the father] participated in some parts of the [service] program, [he] failed to address or mitigate on a consistent basis the problems preventing the return of the child[ren] and thus failed to plan for the future of the child[ren]" (*Matter of Rasyn W.*, 254 AD2d 827, 827 [4th Dept 1998]). While the father is correct that, prior to June 2021, petitioner had considered the father to be in compliance with the service plan such that the children were scheduled to return to the biological parents that month, petitioner's excusable misperception of the father's progress at that point was, through no fault of its own, as the court properly held, based on the father's active concealment that he was experiencing auditory hallucinations—i.e., hearing voices—that had been instructing him to sexually abuse the children (*see generally Matter of Keith UU.*, 256 AD2d 673, 674-675 [3d Dept 1998], *lv denied* 93 NY2d 801 [1999]). Indeed, the caseworker testified that petitioner received an additional CPS report in June 2021 informing it that the father had disclosed the auditory hallucinations to his psychiatrist. The caseworker specifically explained that, prior to [*3]the father's disclosure, petitioner was unaware of the auditory hallucinations issue, and the father would not have been considered compliant with treatment if he was being dishonest with his mental health provider.

Following the father's disclosure, the caseworker asked him to enroll in a counseling program that treats people with sexualized behaviors. The father, however, did not enroll in that program prior to the end of the statutory period alleged in the petition. Additionally, the father neither completed nor made substantial progress in a mental health treatment program and, after June 2021, he failed to complete a domestic violence education program. During subsequent supervised visitations, the children would often run away from the father and would refer to him as "scary daddy." The caseworker had never used that phrase in the presence of the children, nor was there any indication that the foster parents had spoken to the children about the voices that the father was hearing. Visitation with the father was later terminated in October 2021.

Based on the foregoing, the record establishes both that petitioner's perception of the progress that the father had made prior to June 2021 was due to his own non-disclosure of dangerous delusional thinking regarding the children, and that the father failed to sufficiently comply with the service plan for the remainder of the alleged one-year period (*see Matter of Natalee F. [Eric F.]*, 194 AD3d 1397, 1398 [4th Dept 2021], *lv denied* 37 NY3d 911 [2021]; *Matter of Dakota S.*, 43 AD3d 1414, 1415 [4th Dept 2007]). We thus conclude that, under the circumstances of this case, "the finding of permanent neglect [is not] undermined by the evidence that [petitioner] took steps to arrange for [the] discharge of the child[ren] to [the father], which never materialized due to" the father's newly disclosed and unaddressed auditory hallucinations that were telling him to sexually abuse the children (*Matter of Wilfredo A.M.*, 56 AD3d 338, 338 [1st Dept 2008]).

We further conclude that a different result is not warranted even if the court erred in admitting the full testimony of the psychiatrist on the ground that the father's confidential communications remained subject to physician-client privilege (*see* CPLR 4504; *see generally People v Rivera*, 25 NY3d 256, 260-265 [2015]). The psychiatrist, as a mental health professional, was required to report that he had reasonable cause to suspect that the children were maltreated based on the father's disclosure that he was hearing voices instructing him to sexually abuse the children (*see* Social Services Law § 413 [1] [a]; *see also* § 412 [2] [a]; Family Ct Act § 1012 [f] [i]). The psychiatrist made such a report by immediately placing a telephone call to the caseworker (*see* Social Services Law § 415). The caseworker testified about receiving that report in June 2021 and the actions that petitioner took in response thereto (*see generally Matter of Samaj B. [Towanda H.-B.—Wade B.]*, 98 AD3d 1312, 1313-1314 [4th Dept 2012])**.** The caseworker's testimony alone is sufficient to establish that petitioner's initial position approving the return of the children was based on incomplete information about the father's mental health and the children's safety. As the caseworker's testimony establishes, had the father promptly disclosed his mental health issue while he was under the supervision of petitioner, there would never have been a recommendation to return the children to his care and, having failed to deal with that significant child safety issue, the father would not have been considered compliant with his obligation to plan for the safe return of the children. Inasmuch as the father thereafter failed to comply with the requested services, including sexualized behavior counseling, the record establishes that the father "did not successfully address or gain insight into the problems that . . . continued to prevent the child[ren's] safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]).

Finally, even assuming, arguendo, that the court erred in admitting in evidence the father's hospital records and in considering one exhibit that had not been properly received into evidence, we conclude that any error is harmless because "the result

reached herein would have been the same even had such record[s], or portions thereof, been excluded [or not considered]" (*Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1626-1627 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018] [internal quotation marks omitted]; *see Matter of Carmela H. [Danielle F.]*, 185 AD3d 1460, 1461 [4th Dept 2020], *lv denied* 35 NY3d 915 [2020]).

All concur except Montour and Nowak, JJ., who dissent and vote to reverse in accordance with the following memorandum: We agree with the majority that petitioner met its burden of establishing that respondent father failed to plan for the children's future from April 2021—when the father began hearing voices but failed to disclose it—through December 2021. [*4]However, inasmuch as petitioner failed to meet its burden of establishing by clear and convincing evidence that the father failed to plan for the children's future for one full year (*see Matter of Lisa Ann U.*, 52 NY2d 1055, 1057 [1981]; *Matter of Tai-Gi K.Q.-N.B. [Nadine B.]*, 179 AD3d 1056, 1057 [2d Dept 2020]; *see also Matter of Winstoniya D. [Tammi G.]*, 123 AD3d 705, 706-707 [2d Dept 2014]), we respectfully dissent.

To that end, the only evidence of a failure to plan for the children's future from December 2020 to April 2021 was petitioner's exhibit 5, a medical record that referenced the father's admission to continued use of synthetic marihuana. However, that exhibit was withdrawn by petitioner as not properly authenticated and was thereafter never entered into evidence or placed into the record. Inasmuch as the record lacks other admissible evidence that the father failed to plan for the children's future from December 2020 to April 2021, Family Court's improper reliance upon facts outside the record is not harmless (*cf. Matter of Cynthia C.*, 234 AD2d 929, 929 [4th Dept 1996]), and petitioner failed to meet its burden by clear and convincing evidence (*see generally Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 429 [2012]). Therefore, we would reverse the order and dismiss the petition against the father.

Matter of Danyel J. (Alan J.), 227 AD3d 1484 (4th Dept., 2024)

Appeal from an order of the Family Court, Jefferson County (Daniel R. King, A.J.), entered October 1, 2019, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondents with respect to the subject children.

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

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

We reject the mother's contention that the record does not establish a knowing, voluntary, and intelligent waiver of her right to counsel. "New York State law recognizes that '[p]ersons involved in certain family court proceedings may face the infringement of fundamental interests and rights, including the loss of a child's society . . . , and therefore have a constitutional right to counsel in such proceedings' " (*Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1081 [4th Dept 2019], quoting Family Ct Act § 261). Parties entitled to counsel include, as pertinent here, "the parent . . . in any proceeding under . . . social services law [§ 384-b]" (§ 262 [a] [vi]). "When determining whether a party may properly waive the right to counsel in favor of proceeding pro se, the trial court, [i]f a timely and unequivocal request has been asserted, . . . is obligated to conduct a searching inquiry to ensure that the party's waiver is knowing, intelligent, and voluntary" (*DiNunzio*, 175 AD3d at 1081 [internal quotation marks omitted]; *see Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 385 [2011]). Here, when considering the totality of the record, it is clear that the mother "was aware of the dangers and disadvantages of proceeding without counsel," and nevertheless made a knowing, intelligent, and voluntary waiver of that right (*DiNunzio*, 175 AD3d at 1083 [internal quotation marks omitted]; *see Matter of Brown v Brown*, 127 AD3d 1180, 1181 [2d Dept 2015]; *Matter of Jazmone S.*, 307 AD2d 320, 321-322 [2d Dept 2003], *lv dismissed* 100 NY2d 615 [2003], *lv dismissed* 1 NY3d 584 [2004]).

Contrary to the mother's contention, we conclude that petitioner established by clear and convincing evidence that it made the requisite diligent efforts, i.e., "reasonable attempts . . . to assist, develop and encourage a meaningful relationship between the parent and child[ren]" (Social Services Law § 384-b [7] [f]; *see Matter of Ayden D. [John D.]*, 202 AD3d 1455, 1456 [4th Dept 2022]).

We likewise reject the mother's contention that petitioner failed to establish by clear and [*2]convincing evidence that she permanently neglected the children. Permanent neglect "may be found only after it is established that the parent has failed substantially and continuously or repeatedly to maintain contact with or plan for the future of the child[ren] although physically and financially able to do so" (*Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]). Here, the mother often left visits early when she grew frustrated with the children's behavior, and spent much of her time at visits focusing on the neglect proceedings rather than spending time building her relationship with the children. Thus, we conclude that Family Court properly found that the mother failed to maintain substantial contact with the children (*see Matter of Cheyenne C. [James M.]*, 185 AD3d 1517, 1519-1520 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]). Similarly, we

conclude that the court properly found that the mother had failed "to plan for the future of the child[ren]" by taking "such steps as may be necessary to provide an adequate, stable home and parental care for the child[ren]" (*id.* at 1519 [internal quotation marks omitted]; *see* Social Services Law § 384-b [7] [c]). Despite the fact that the children were removed due, in part, to concerns over domestic violence, the mother refused to acknowledge the history of domestic violence between her and respondent father, and failed to "take meaningful steps to correct the conditions that led to the child[ren]'s removal" (*Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1551 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016] [internal quotation marks omitted]).

TPR Mental Illness

Matter of M. R.V., 224 AD3d 579 (1st Dept., 2024)

Amended order of fact-finding and disposition (one paper), Family Court, New York County (Valerie A. Pels, J.), entered on or about March 9, 2023, which, upon a fact-finding determination that respondent mother is unable to care for the subject child presently and for the foreseeable future due to mental illness, terminated her parental rights to the child and transferred her guardianship to petitioner New York Foundling (agency) and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The agency established by clear and convincing evidence that, due to the mother's mental illness, the mother is presently and for the foreseeable future unable to provide proper and adequate care for the subject child (*see* Social Services Law § 384-b [4][c]; *Matter of Muhamad Omar W. [Jessica W.]*, 200 AD3d 630, 630 [1st Dept 2021], *lv denied* 38 NY3d 904 [2022], *cert denied* — 143 S Ct 461 [2022]). The evidence includes a report and testimony by a court-appointed psychologist who, after examining the mother and reviewing medical and other records, opined that she suffers from mental illness, a combination of post-traumatic stress disorder and major depressive disorder with a history of psychotic features and catatonia, and that the symptoms manifested by these mental illnesses cause impairment of parental functioning to the extent that if the child were returned to her care she would be in danger, now and in the foreseeable future, of becoming a neglected child (*id.*).

Given that the mother's visitation with the child had been suspended for a number of years by a court order, largely due to the child's unwillingness to see her, it was not necessary for the psychologist to observe interactions between the mother and child

before reaching his conclusion (*see Matter of J.C. [Joycelyn L.]*, 221 AD3d 561, 562 [1st Dept 2023]).

The mother did not offer "countervailing psychiatric, psychological or medical evidence" (*Matter of Joyce T.*, 65 NY2d 39, 45-46 [1985]).

A separate dispositional hearing was not required because this is a case of termination for mental illness (*see Matter of Ariella D. [Sharon D.]*, 150 AD3d 620, 621 [1st Dept 2017]).

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

Matter of Megan A. F., 224 AD3d 684 (2nd Dept., 2024)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from an order of fact-finding and disposition of the Family Court, Kings County (Melody Glover, J.), dated June 10, 2022. The order of fact-finding and disposition, insofar as appealed from, after a hearing, found that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the subject child, terminated her parental rights to the subject child, and transferred guardianship and custody of the subject child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.
ORDERED that the order of fact-finding and disposition is affirmed insofar as appealed from, without costs or disbursements.

In March 2018, the petitioner commenced this proceeding pursuant to Social Services Law § 384-b, inter alia, to terminate the mother's parental rights to the subject child on the ground of mental illness. Following a hearing, the Family Court, among other things, found that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child, terminated her parental rights to the child, and transferred guardianship and custody of the child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother appeals.

An agency seeking termination of parental rights on the ground of mental illness or intellectual disability must demonstrate by clear and convincing evidence that the parent is "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 who has been in the care of [the] agency for the period of one year immediately prior to the date on which the petition is filed" (*id.* § 384-b[4][c]; *see Matter of Sebastian Y. [Alice Y.]*, 214 AD3d 893, 893). For the purpose of Social Services Law § 384-b, "'mental illness' means an affliction with a mental disease or mental condition which is

manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger [*2]of becoming a neglected child as defined in the family court act" (*id.* § 384-b[6][a]). "Where the petition is premised on a parent's inability to care for the child[ ] by reason of mental illness, the mere possibility that the parent's condition may improve does not preclude termination of parental rights" (*Matter of Kasimir Lee D. [Jasmaine D.]*, 198 AD3d 754, 755).

Here, a psychologist interviewed the mother, reviewed the mother's records, including prior mental health evaluations, and concluded that she suffers from severe post-traumatic stress disorder, bipolar disorder, and personality disorder with antisocial, paranoid, and borderline features. The psychologist opined that due to, among other things, the mother's history of emotional instability and disregard for the safety of the child and her siblings and the inadequate reduction in the mother's symptoms during her intermittent compliance with mental health treatment in the past, the child would be at risk of neglect or abuse if placed in the mother's care. Contrary to the mother's contention, this evidence established by clear and convincing evidence that she was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child, and supported the Family Court's determination to terminate the mother's parental rights to the child (*see Matter of Sebastian Y. [Alice Y.]*, 214 AD3d at 893-894; *Matter of Kasimir Lee D. [Jasmaine D.]*, 198 AD3d at 756).

Matter of Bella S., 225 AD3d 883 (2nd Dept., 2024)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from an order of fact-finding and disposition of the Family Court, Orange County (Christine P. Krahulik, J.), dated March 12, 2021. The order of fact-finding and disposition, after a hearing, found that the mother was presently and for the foreseeable future unable, by reason of mental illness and intellectual disability, to provide proper and adequate care for the subject child, terminated her parental rights, and transferred guardianship and custody of the subject child to the petitioner for the purpose of adoption.
ORDERED that the order of fact-finding and disposition is affirmed, without costs or disbursements.

In June 2019, the petitioner commenced this proceeding pursuant to Social Services Law § 384-b to terminate the mother's parental rights to the subject child on the grounds of mental illness and intellectual disability. Following a hearing, the Family Court found that the mother was presently and for the foreseeable future unable, by reason of mental illness and intellectual disability, to provide proper and adequate care for the

child, terminated her parental rights, and transferred guardianship and custody of the child to the petitioner for the purpose of adoption. The mother appeals.

An agency seeking termination of parental rights on the ground of mental illness or intellectual disability must demonstrate by clear and convincing evidence that the parent is "presently and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate care for a child who has been in the care of [the] agency for the period of one year immediately prior to the date on which the petition is filed" (*id.* § 384-b[4][c]; *see Matter of Sebastian Y. [Alice Y.]*, 214 AD3d 893, 893).

Here, the evidence presented at the hearing established, by clear and convincing evidence, that the mother was presently and for the foreseeable future unable, by reason of mental [*2]illness and intellectual disability, to provide proper and adequate care for the child, and supported the Family Court's determination to terminate the mother's parental rights to the child (*see* Social Services Law § 384-b[4][c]; *Matter of Sebastian Y. [Alice Y.]*, 214 AD3d at 893-894).

The mother's contention that the Family Court erred in commencing the hearing in her absence is unpreserved for appellate review, as her attorney failed to object or request an adjournment. In any event, the contention is without merit, since, under the circumstances, the court providently exercised its discretion in proceeding in the mother's absence on the first date of the hearing (*see Matter of Neferteir A.R. [Jesse R.R.]*, 221 AD3d 605, 606; *Matter of Demetrious L.K. [James K.]*, 157 AD3d 796, 797). Contrary to the mother's contention, she was not deprived of due process due to the court proceeding in her absence (*see Matter of Demetrious L.K. [James K.]*, 157 AD3d at 797; *Matter of Sean P.H. [Rosemarie H.]*, 122 AD3d 850, 851).

The mother's contention that the Family Court erred in continuing the hearing after it relieved the law firm that represented her on the first date of the hearing is without merit. Under the circumstances, which included the mother's confirmation that she no longer wanted the firm to represent her and that she wanted the court to reassign an attorney who had previously represented her, the court did not improvidently exercise its discretion in permitting the firm to withdraw (*see Alvarado-Vargas v 6422 Holding Corp.*, 85 AD3d 829, 830; *Ben-Yu Zhan v Sun Wing Wo Realty Corp.*, 208 AD2d 668, 668). Moreover, contrary to the mother's contention, she suffered no prejudice by the court's decision to permit the firm to withdraw since the attorney who represented the mother on the first date of the hearing was no longer with the firm.

The mother's contention that the forensic psychiatrist's opinion, as set forth in his testimony and report, was improperly admitted into evidence to the extent that it relied, inter alia, on collateral sources absent a proper foundation is unpreserved for appellate

review, since the mother did not object to the admission of the psychiatrist's testimony or report (*see Matter of Layla S. [Alice Y.]*, 222 AD3d 982, 982; *Matter of Sebastian Y. [Alice Y.]*, 214 AD3d at 894). In any event, under the circumstances, any error in this regard was harmless (*see Matter of Layla S. [Alice Y.]*, 222 AD3d at 982; *Matter of Bruce P.*, 138 AD3d 864, 865).

Contrary to the mother's contention, she was not deprived of the effective assistance of counsel. "A respondent in a proceeding pursuant to Social Services Law § 384-b has the right to the assistance of counsel (*see* Family Ct Act § 262[a][iv]), which encompasses the right to the effective assistance of counsel" (*Matter of Deanna E.R. [Latisha M.]*, 169 AD3d 691, 692; *see Matter of Sebastian Y. [Alice Y.]*, 214 AD3d at 894). "[T]he statutory right to counsel under Family Court Act § 262 affords protections equivalent to the constitutional standard of effective assistance of counsel afforded to defendants in criminal proceedings" (*Matter of Nassau County Dept. of Social Servs. v King*, 149 AD3d 942, 943; *see Matter of Adam M.M. [Sophia M.]*, 179 AD3d 801, 802). Here, viewed in totality, the record reflects that the mother received meaningful representation (*see Matter of Sebastian Y. [Alice Y.]*, 214 AD3d at 894; *Matter of Fatoumata A.C. [Amadou C.]*, 206 AD3d 991, 992).

TPR Severe Abuse

Matter of Adam M.C., 224 AD3d 1295 (4th Dept., 2024)

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered March 28, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order of Family Court (Nesser, J.), following a dispositional hearing, that, inter alia, terminated her parental rights with respect to the subject child on the ground that she severely abused the child. In a prior Family Court Act article 10 proceeding, the court (Romeo, J.) determined, inter alia, that the mother severely abused the subject child (*see* Family Ct Act § 1012 [e] [i]; Social Services Law § 384-b [8] [a] [i]). We affirm.

Inasmuch as the mother never appealed from the order of disposition in the Family Court Act article 10 proceeding (*see* Family Ct Act §§ 1052, 1112 [a]), which "clearly advised the mother of her obligation to timely appeal from that order" (*Matter of Byler v Byler*, 207 AD3d 1072, 1076 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022]; *see* § 1113), we conclude that her challenge to the court's determination that she severely abused the subject child as defined by Social Services Law § 384-b (8) (a) (i) is not properly before us (*see generally Byler*, 207 AD3d at 1076).

We have reviewed the mother's remaining contention and conclude that it is without merit.

TPR DISPOSITIONS

Matter of Troy S. H., 225 AD3d 872 (2nd Dept., 2024)

In a proceeding pursuant to Social Services Law § 384-b, the Dutchess County Department of Community and Family Services appeals from an order of fact-finding and disposition of the Family Court, Dutchess County (Joseph A. Egitto, J.), dated October 21, 2022. The order of fact-finding and disposition, insofar as appealed from, after an inquest, and upon a finding that the mother permanently neglected the subject child, suspended judgment for a period of one year without holding a dispositional hearing.

ORDERED that the order of fact-finding and disposition is reversed insofar as appealed from, on the law, without costs or disbursements, and the matter is remitted to the Family Court, Dutchess County, for a dispositional hearing and a determination thereafter.

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b to terminate the mother's parental rights to the subject child on the ground of permanent neglect. The mother failed to appear at a scheduled court date, and the Family Court scheduled an inquest, which was conducted in the mother's absence. In an order of fact-finding and disposition dated October 21, 2022, the court found that the mother permanently neglected the child, stated that it had sufficient information to issue a dispositional order without any further hearing, and suspended judgment for a period of one year. The petitioner appeals from the dispositional portion of the order.

The Family Court should not have dispensed with the dispositional hearing in the absence of the consent of the parties (*see* Family Ct Act §§ 625[a]; 631; *Matter of*

Isabella R.W. [Jessica W.], 142 AD3d 503, 504-505; *Matter of Imani M.*, 61 AD3d 870, 871). Accordingly, we remit the matter to the Family Court, Dutchess County, for a dispositional hearing and a determination thereafter.

Matter of Amir E., 226 AD3d 1015 (2nd Dept., 2024)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals, and the subject child separately appeals, from an order of the Family Court, Westchester County (Michelle I. Schauer, J.), dated December 12, 2022. The order, after a hearing, inter alia, terminated the mother's parental rights and transferred guardianship and custody of the child to the petitioner for the purpose of adoption.
ORDERED that the order is affirmed, without costs or disbursements.

The subject child was born in December 2011. In May 2012, the child was removed from the mother's care. In December 2018, the petitioner commenced this proceeding pursuant to Social Services Law § 384-b to terminate the mother's parental rights to the child on the ground of permanent neglect. The mother consented to a suspended judgment.

In March 2020, the petitioner filed a violation petition, alleging that the mother failed to comply with the terms and conditions of the suspended judgment and seeking to terminate the mother's parental rights. After a hearing, the Family Court, among other things, terminated the mother's parental rights. These appeals ensued.

Contrary to the mother's contention, the evidence adduced at the hearing supported the Family Court's determination that the best interests of the child would be served by terminating the mother's parental rights (*see Matter of Joel K.S. [Duane S.]*, 218 AD3d 589; *Matter of Sameeya H.L.W. [Renee L.]*, 207 AD3d 553; *Matter of Ashwantewa P.W.L. [Doris L.]*, 174 AD3d 714; *Matter of Kafayat N.D. [Karlene N.D.]*, 174 AD3d 600).

The child's contention on appeal is without merit.

The mother's remaining contention is without merit.

Matter of Zackery S., 224 AD3d 1336 (4th Dept., 2024)

Appeal from an order of the Family Court, Yates County (Joseph G. Nesser, A.J.), entered July 12, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject children.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, revoked a suspended judgment entered upon her admission that she had permanently neglected the subject children and terminated her parental rights. We affirm.

It is well settled that, "[w]here petitioner establishes by a preponderance of the evidence that there has been noncompliance with ***any of the terms*** of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights" (*Matter of Ramel H. [Tenese T.]*, 134 AD3d 1590, 1592 [4th Dept 2015] [internal quotation marks omitted & emphasis added]; *see* Family Ct Act § 633 [f]; *Matter of Ronald O.*, 43 AD3d 1351, 1352 [4th Dept 2007]). Contrary to the mother's contention, the record establishes that she violated the terms of the suspended judgment by failing to arrange for the children's transportation to the New Year's Day home visit in 2022, failing to confirm every scheduled visit 24 hours in advance when required to do so, and missing scheduled appointments or home visits with the caseworker.

Finally, a preponderance of the evidence supports that it was in the children's best interests to terminate the mother's parental rights (*see Matter of Jenna D. [Paula D.]*, 165 AD3d 1617, 1619 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]; *Matter of Mikel B. [Carlos B.]*, 115 AD3d 1348, 1349 [4th Dept 2014]). "Although [the mother's] breach of the express conditions of the suspended judgment does not compel termination of [her] parental rights, [it] is strong evidence that termination is, in fact, in the best interests of the child[ren]" (*Matter of Jerimiah H. [Kiarra M.]*, 213 AD3d 1298, 1299 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023] [internal quotation marks omitted]). Here, we conclude that "any progress that [the mother] made was not sufficient to warrant any further prolongation of the child[ren]'s unsettled familial status" (*Matter of Brendan S.*, 39 AD3d 1189, 1190 [4th Dept 2007] [internal quotation marks omitted]).

Matter of Noah C., 225 AD3d 1178 (4th Dept., 2024)

Appeals from an order of the Family Court, Ontario County (Jacqueline E. Sisson, J.), entered July 12, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondents' parental rights with respect to the subject children.
It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the disposition with respect to the three oldest children, and as modified the order is affirmed without costs and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following memorandum: In this

proceeding pursuant to Family Court Act article 6 and Social Services Law § 384-b, respondent parents and the four subject children appeal from an order that, inter alia, revoked prior suspended judgments entered upon respondents' admissions to permanently neglecting the children, terminated respondents' parental rights, and directed that the children be freed for adoption. We conclude that there is a sound and substantial basis in the record to support Family Court's determination that petitioner established by a preponderance of the evidence that respondents violated numerous terms of the suspended judgments and that, given the facts and circumstances at the time of the hearing, it was in the children's best interests to terminate respondents' parental rights (*see Matter of Dominic T.M. [Cassie M.]*, 169 AD3d 1469, 1470 [4th Dept 2019], *lv denied* 33 NY3d 902 [2019]; *Matter of Aiden T. [Melissa S.]*, 164 AD3d 1663, 1664 [4th Dept 2018], *lv denied* 32 NY3d 917 [2019]).

Nevertheless, the three oldest children, along with the father, assert that new facts and allegations warrant remittal for a new dispositional hearing to determine the best interests of those children. We may "consider . . . new facts and allegations 'to the extent [that] they indicate that the record before us is no longer sufficient' to determine whether termination of . . . parental rights is in [a child's] best interests" (*Matter of Gena S. [Karen M.]*, 101 AD3d 1593, 1595 [4th Dept 2012], *lv dismissed* 21 NY3d 975 [2013], quoting *Matter of Michael B.*, 80 NY2d 299, 318 [1992]; *see Matter of Darlenea T. [Wanda A.]*, 122 AD3d 1416, 1417 [4th Dept 2014]; *Matter of Malik S. [Jana M.]*, 101 AD3d 1776, 1777-1778 [4th Dept 2012]; *Matter of Shad S. [Amy C.Y.]*, 67 AD3d 1359, 1360 [4th Dept 2009]). Here, the court's best interests determination was based, in part, on the fact that the oldest child had been successfully placed with a kinship guardian, and that the second oldest child, the third oldest child, and the youngest child had long lived with foster parents who were willing to adopt them. The attorneys for the oldest child, the second oldest child, and the third oldest child now report that, in the intervening 20 months since the entry of the order on appeal, among other things, the oldest child's kinship guardianship has been terminated, the second oldest child's adoptive placement has been disrupted inasmuch as he repeatedly absconded from the foster parents' home and his paternal grandmother has been awarded custody of him, and there is a pending custody petition by the paternal grandmother for the third oldest child, who will turn 14 years old later this year and remains steadfast in his opposition to being adopted (*see Malik S.*, 101 AD3d at 1777; *see also Darlenea T.*, 122 AD3d at 1417; *Gena S.*, 101 AD3d at 1595; *Shad S.*, 67 AD3d at 1360). Although other new facts and allegations asserted by petitioner suggest that termination of respondents' parental rights might remain in the best interests of the oldest child, the second oldest child, and the third oldest child, we conclude that the record before us is no longer sufficient to determine whether termination of respondents' parental rights is in the best interests of those children (*see Darlenea T.*, 122 AD3d at 1417; *Gena S.*, 101 AD3d at

1595; *Malik S.*, 101 AD3d at 1777-1778; *Shad S.*, 67 AD3d at 1360; *see generally Michael B.*, 80 NY2d at 318). We therefore modify the order by vacating the disposition with respect to the three oldest children and remit the matter to Family Court for a new dispositional hearing to determine the best interests of those children. We note that there are no new facts or allegations with respect to the circumstances of the youngest child, and that "the conflict between the result with respect to [the youngest child] and the results with respect to [the three oldest children] is of no moment inasmuch as termination has been upheld with respect to younger siblings in similar circumstances" (*Gena S.*, 101 AD3d at 1595).

We have considered the parties' remaining contentions and conclude that none warrants further modification or reversal of the order.

Matter of Rodcliffe M., Jr., AD3d 2024 NY Slip Op 03267 (4th Dept., 2024)

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered July 15, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject children.
It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by vacating the first and second ordering paragraphs and as modified the order is affirmed without costs and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum:
In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order terminating his parental rights with respect to the two subject children on the ground of permanent neglect. The father contends that petitioner failed to establish that it exercised diligent efforts to encourage and strengthen the parental relationship during the period of his incarceration as required by Social Services Law § 384-b (7) (a). We reject that contention.

The father was incarcerated during the relevant time period, and petitioner demonstrated that its caseworker sent the father a series of letters that informed him of the status of the children and invited him to participate in service plan reviews. The father repeatedly failed to respond, but did ultimately communicate with the caseworker by telephone, identifying his sister, a resident of the State of Florida, as a potential placement resource. The caseworker informed the father that his sister was not responding to contact attempts, but the father did not provide any alternative resources. Where, as here, "[a]n incarcerated parent has failed on more than one occasion while incarcerated to cooperate with an authorized agency in its efforts to assist such parent to plan for the future of the child" (Social Services Law § 384-b [7] [e] [ii]; *see Matter of*

Eric L., 51 AD3d 1400, 1403 [4th Dept 2008], *lv denied* 10 NY3d 716 [2008]), diligent efforts to encourage and strengthen the parental relationship are not required.

The father additionally contends that the record lacks a sound and substantial basis to support Family Court's determination of permanent neglect based on the father's failure to maintain contact with or plan for the future of the children during his incarceration. We reject that contention inasmuch as the resources proposed by the father "were not realistic alternatives to foster care" (*Matter of Jaylysia S.-W.*, 28 AD3d 1228, 1229 [4th Dept 2006] [internal quotation marks omitted]; *see also Matter of Gena S. [Karen M.]*, 101 AD3d 1593, 1594 [4th Dept 2012], *lv dismissed* 21 NY3d 975 [2013]).

The father further contends that the court abused its discretion in refusing to issue a suspended judgment. A suspended judgment "provides a brief grace period to give a parent found to have permanently neglected a child a second chance to prepare for reunification with the [*2]child" (*Matter of Grace G. [Gloria G.]*, 194 AD3d 712, 713 [2d Dept 2021]). Notably, we may substitute our discretion for that of the trial court even in the absence of an abuse of discretion (*see Matter of Montgomery v List*, 173 AD3d 1657, 1658 [4th Dept 2019]), and here we conclude that a suspended judgment, rather than termination of parental rights, was in the children's best interests (*see generally Grace G.*, 194 AD3d at 713-714; *Matter of Trinity J. [Lisa F.]*, 100 AD3d 504, 504-505 [1st Dept 2012]). At the time of the dispositional hearing—just two months after his release from prison—the father had found full-time employment, participated in weekly visitation with the children, had started communicating regularly with the children's foster family regarding the children, and was in the process of finding housing and completing a mental health evaluation and parenting classes, while the children were reportedly happy to be visiting with the father regularly. "Given the child[ren]'s . . . young age, [the father's] recommencement of regular visitation, . . . the sustained efforts on the part of [the father following his release from prison], and the Legislature's express desire to return children to their natural parents whenever possible" (*Trinity J.*, 100 AD3d at 505, citing Social Services Law § 384-b [1] [a] [ii]), we conclude that the father "should have been granted a 'second chance' in the form of a suspended judgment" (*id.*), and we therefore modify the order by vacating the first and second ordering paragraphs and remit the matter to Family Court for the entry of a suspended judgment, the duration and conditions of which are to be determined by Family Court.

SURRENDERS and ADOPTIONS

Matter of Gabriel E., 227 AD3d 1147 (3rd Dept., 2024)

Appeal from an order of the Surrogate's Court of Otsego County (John F. Lambert, S.), entered April 27, 2022, which granted petitioners' application, in a proceeding pursuant to Domestic Relations Law article 7, to determine that respondent's consent was not required for the adoption of his child.
Petitioner Barbara F. (hereinafter the mother) and respondent (hereinafter the father) are the parents of the subject child, Gabriel (born in 2012). The mother and the father separated after Gabriel was born and the mother is now married to petitioner Brian F. (hereinafter the stepfather). The father has been incarcerated for approximately 5 of the last 10 years and has had minimal contact with Gabriel throughout his life. In August 2021, petitioners filed the instant petition, requesting an order approving Gabriel's adoption by the stepfather. The father opposed the petition, asserting that he did not consent to Gabriel's adoption and that adoption would not be in his best interest. A hearing ensued to determine if the father's consent to the adoption was required. Following the hearing, Surrogate's Court found that the father's consent to the adoption was unnecessary, as he evinced an intent to forgo his parental rights when he failed to communicate with Gabriel for more than six years. The father appeals.

Domestic Relations Law § 111 (2) (a) provides that consent to adoption shall not be required from a parent "who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so." If the petitioner establishes by clear and convincing evidence that the parent has evinced an intent to forgo his or her parental rights, then "the burden shifts to the parent to demonstrate sufficient contact or an inability to engage in such contact" (*Matter of Madelyn V. [Lucas W.-Jared V.]*, 199 AD3d 1249, 1250 [3d Dept 2021] [internal quotation marks and citations omitted], *lv denied* 38 NY3d 901 [2022]; *see Matter of Lori QQ. v Jason OO.*, 118 AD3d 1084, 1084 [3d Dept 2014], *lv denied* 23 NY3d 909 [2014]). "[T]he mere fact that a parent is incarcerated does not relieve him or her of the obligation to make contact and to support the child" (*Matter of Hayden II. [Renee II.-Devan JJ.]*, 135 AD3d 997, 998 [3d Dept 2016] [internal quotation marks and citation omitted], *lv denied* 27 NY3d 904 [2016]; *see Matter of Lillyanna A. [William ZZ.-John B.]*, 179 AD3d 1325, 1326-1327 [3d Dept 2020], *lv denied* 35 NY3d 908 [2020]; *Matter of Colby II. [Chalmers JJ.]*, 140 AD3d 1484, 1485-1486 [3d Dept 2016]).

At the fact-finding hearing, the mother testified that she and the stepfather have been together for four years, have been married for approximately one year and have lived together, with Gabriel, for approximately 3½ years. Also living in the household are the stepfather's two teenage children [*2]and the mother's adult son from her first marriage. The mother testified that Gabriel has a good relationship with the other members of the household and that he and the stepfather's son call each other "brothers." The mother also stated that Gabriel and the stepfather are closely bonded, that Gabriel refers to him as "daddy" and that he looks up to the stepfather as a hero. Overall, Gabriel is doing well in school and has shown improvement in his emotional regulation, which he once struggled with.

A custody order referenced at the hearing appears to indicate that the father had previously been granted supervised visits with Gabriel.**[FN1]** However, the mother testified that Gabriel has not seen the father in at least four years and that the father "has been in prison a lot." She also testified that the father has not reached out to Gabriel in any capacity since their last visit, failing to send him any gifts or cards. When the father was in contact with Gabriel, the mother stated that the father did not act appropriately, describing an incident in which he cursed at her in front of Gabriel and grabbed him out of her arms, bruising him in the process. Gabriel also appeared to dislike the visits, "trash[ing] the whole classroom" when he knew a visit was upcoming and becoming angry after the visits. Gabriel also informed the mother that he "never wants to go again." In addition to testifying as to the lack of contact between the father and Gabriel, the mother also stated that the father gave her one government stimulus check but that she has otherwise received no child support payments from him.

The stepfather also testified at the hearing, describing the bond between himself and Gabriel. He confirmed that Gabriel referred to him as his dad and he called Gabriel his "little boy" in return. He also discussed the outdoor activities he enjoyed engaging in with Gabriel and described him as inquisitive, smart and helpful. He confirmed that he wished to adopt Gabriel and believed the adoption to be in Gabriel's best interest.

During his testimony, the father stated that he is currently incarcerated, has been in prison for 5 of the last 10 years and that he anticipates he will remain incarcerated for another 14 to 20 months. Although he disputed some of the mother's testimony, he admitted that it had been six years since he had seen Gabriel and three years since he had written him a letter.

Although not determinative (*see Matter of Holly F. v Daniel G.*, 193 AD3d 1292, 1294 [3d Dept 2021], *lvs denied* 37 NY3d 904 [2021], 37 NY3d 904 [2021]), we note that the attorney for the child supports petitioners' application and argues that the father's consent to Gabriel's adoption is not required.

Surrogate's Court specifically credited petitioners' testimony and found "by clear and convincing evidence that [the father] failed to communicate or visit with the child, for a period well in excess of six months, although he was able to do so," and that the father "offered [*3]no credible information to this court as to why he has not had contact with the child in the last six months." Deferring to the trial court's factual findings and credibility determinations (*see Matter of Cecelia BB. v Frank CC*., 200 AD3d 1411, 1414 [3d Dept 2021]), we discern no basis upon which to disturb its conclusion that the father's consent to Gabriel's adoption is not required (*see Matter of Daniel OO. [William BB.-Faith OO.]*, 200 AD3d 1418, 1421-1422 [3d Dept 2021]; *Matter of Madelyn V. [Lucas W.-Jared V.]*, 199 AD3d at 1251; *Matter of Lori QQ. v Jason OO.*, 118 AD3d at 1085).

Clark, J.P., Aarons, Reynolds Fitzgerald and McShan, JJ., concur.

ORDERED that the order is affirmed, without costs.

Footnote 1: There is no custody order in the record on appeal.

Matter of Tricia A.C. v Saul H. and Julie H., AD3d 2024 NY Slip Op 03242 (4th Dept., 2024)

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered November 18, 2022. The order dismissed the petition with prejudice.
It is hereby ORDERED that the order so appealed from is affirmed without costs.

Memorandum: In appeal Nos. 1 and 2, petitioner appeals from orders that dismissed with prejudice her petitions seeking to enforce a post-adoption contact agreement with respect to her two biological children, who had been adopted by respondents. The agreement, which was incorporated into a judicial surrender of petitioner's parental rights to the subject children, provides that petitioner shall be permitted a minimum of three visits per year with the children, with petitioner being required to contact the adoptive parents three times each year to schedule those visitations. If petitioner missed two scheduled visits in a row, she would lose her rights to future visitations unless she could prove that her failure to attend was the result of an emergency. The agreement further provides that petitioner will be afforded phone contact with the children once a month. Petitioner alleged in the petitions that respondents improperly refused her visitation. Following a fact-finding hearing, Family Court dismissed the petitions on the ground that petitioner failed to have regular visitation with her children and that resuming visitation is not in the children's best interests. We affirm.

It is well settled that an order incorporating a post-adoption contact agreement "may be enforced by any party to the agreement . . . [, but t]he court shall not enforce an order [incorporating such an agreement] unless it finds that the enforcement is in the child's best interests" (Domestic Relations Law § 112-b [4]; *see Matter of Bilinda S. v Carl P.*, 193 AD3d 1355, 1356 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021]). Thus, this agreement should be enforced only if it is in the children's best interests (*see Bilinda S.*, 193 AD3d at 1356; *Matter of J.B. [Lakoia W.—Paul B.]*, 188 AD3d 1683, 1683 [4th Dept 2020]; *Matter of Kristian J.P. v Jeannette I.C.*, 87 AD3d 1337, 1337 [4th Dept 2011]). Here, at the fact-finding hearing, the evidence established that petitioner made minimal and inconsistent efforts to schedule visits with the children and had not seen them for over two years. The evidence further established that petitioner did not attend at least one scheduled visitation. The children's treating psychologist opined at the hearing that it was not in the children's best interests to resume contact with petitioner. His opinion was based, in part, on his observation that since the children's contact with petitioner had ceased, the children's behaviors had improved. The court's determination that it is not in the best interests of the children to resume visits with petitioner is supported by a sound and substantial basis in the record (*see Matter of Sapphire W. [Mary W.—Debbie R.]*, 120 [*2]AD3d 1584, 1585 [4th Dept 2014]; *Kristian J.P.*, 87 AD3d at 1337-1338).

Petitioner's further contention that the provision of the agreement allowing her monthly telephone contact with the children is severable from the other provisions of the agreement and should be enforced is unpreserved for our review (*see Matter of Frandiego S.*, 270 AD2d 144, 144 [1st Dept 2000]; *see generally Matter of Abigail H. [Daniel D.]*, 172 AD3d 1922, 1923 [4th Dept 2019], *lv denied* 34 NY3d 901 [2019]). In any event, given petitioner's inconsistent and minimal prior monthly phone contact with the children, it would not be in the children's best interests to enforce that provision.

All concur except Ogden, J., who dissents and votes to modify in accordance with the following memorandum: I agree with the majority in both appeals that Family Court's determination that it was not in the children's best interests to resume visitation with petitioner is supported by a sound and substantial basis in the record.

I disagree, however, with the majority in both appeals with respect to petitioner's monthly telephone contact with the children, and therefore I respectfully dissent. In the proceedings in Family Court, petitioner sought enforcement of the post-adoption contact

agreement, and she contended, among other things, that she had been denied her monthly telephone contact with the children. Thus, contrary to the majority's determination, petitioner's contention seeking enforcement of the part of the agreement providing for such contact is preserved for this Court's review (*see generally Matter of Frandiego S.*, 270 AD2d 144, 144 [1st Dept 2000]). Furthermore, in my view, the court should have granted the petition insofar as it sought to enforce that part of the agreement providing that petitioner have monthly telephone contact with the children. During the hearing, the children's treating psychologist was not asked and did not opine whether phone contact with the children would be detrimental to the best interests of the children. Moreover, the court's findings of fact and conclusions of law focused on the resumption of in-person physical visitation rather than petitioner's phone contact with the children. I therefore conclude that the court erred in failing to grant the petitions to that extent (*see generally Matter of Sapphire W. [Mary W.—Debbie R.]*, 120 AD3d 1584, 1585 [4th Dept 2014]), and I would modify the respective orders accordingly.

CUSTODY

Matter of Prince T.A.M.-F., 224 AD3d 509 (1st Dept., 2024)

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about November 29, 2022, which, after a hearing, granted the petition of petitioner-respondent Kimberly A., to appoint her kinship guardian of the subject child and dismissed petitioner father's petition for custody, unanimously affirmed, without costs.
Family Court's determination that the award of guardianship to the great-aunt was in the child's best interests is supported by a fair preponderance of the evidence (*see* Family Ct Act § 1055-b[a][ii]; *Matter of Caron C.G.G. [Alicia G.-Jasmine D.]*, 165 AD3d 476, 476-477 [1st Dept 2018]). The father does not dispute that extraordinary circumstances to entertain the petition existed (*see* Family Ct Act § 1055-b[a][iv][A]). The child was placed in foster care with the great-aunt at infancy after a neglect finding was entered against his mother and while the father was incarcerated. The great aunt, who has now cared for the child for almost the entirety of his life, provides a stable and loving home environment, and has been meeting his medical, educational, and emotional needs (*see Matter of Jason Jiyell J.*, 203 AD3d 460, 461-462 [1st Dept 2022]). Moreover, since his release, the father has had inconsistent visits with the child and has not otherwise planned for the child's return. There is no basis to depart from the findings of Family

Court, which had the ability to view the witnesses and hear the testimony (see *Matter of Celenia M. v Faustino M.*, 77 AD3d 486 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]).

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

FAIR HEARINGS

Matter of Ciccarelli v New York State Off. of Children & Family Servs., 227 AD3d 1066 (2nd Dept., 2024)

DECISION & JUDGMENT
Proceeding pursuant to CPLR article 78 to review a determination of the respondent New York State Office of Children and Family Services dated June 21, 2021. The determination, after a fair hearing pursuant to Social Services Law § 422(8), denied the petitioner's application to amend and seal an indicated report maintained by the New York State Central Register of Child Abuse and Maltreatment.

ADJUDGED that the determination is confirmed, the petition is denied, and the proceeding is dismissed on the merits, with costs to the respondent New York State Office of Children and Family Services.

In February 2020, the petitioner was the subject of a report made to the New York State Central Register of Child Abuse and Maltreatment after her child had been absent from school for 43 days and late for school 23 times during the 2019-2020 school year. The Kings County Child Protective Service investigated the report and thereafter determined that the report was indicated. In a determination dated June 21, 2021, made after a fair hearing pursuant to Social Services Law § 422(8), the respondent New York State Office of Children and Family Services (hereinafter OCFS) denied the petitioner's application to amend and seal the indicated report maintained by the New York State Central Register of Child Abuse and Maltreatment. The petitioner subsequently commenced this proceeding pursuant to CPLR article 78 to review OCFS's determination. By order dated March 22, 2022, the Supreme Court, inter alia, transferred the proceeding to this Court pursuant to CPLR 7804(g).

"Social Services Law § 422(8)(a)(ii) provides that when the subject of an indicated report petitions for an amendment of the report, OCFS must review the evidence and determine [*2]whether the report is supported by a fair preponderance of the evidence" (*Matter of Robles v New York State Off. of Children & Family Servs.*, 220 AD3d 798, 798 [internal quotation marks omitted]; *see Matter of Podell v New York State Cent.*

Register of Child Abuse & Maltreatment, 215 AD3d 751, 752). "Judicial review of a determination that a report of child maltreatment has been substantiated is limited to whether the determination is supported by substantial evidence in the record" (*Matter of Robles v New York State Off. of Children & Family Servs.*, 220 AD3d at 799 [internal quotation marks omitted]; *see Matter of Podell v New York State Cent. Register of Child Abuse & Maltreatment*, 215 AD3d at 752). "Substantial evidence is 'less than a preponderance of the evidence' and 'demands only that a given inference is reasonable and plausible, not necessarily the most probable'" (*Matter of Doe v New York State Off. of Children & Family Servs.*, 173 AD3d 1020, 1022, quoting *Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1045-1046). "Where substantial evidence exists, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently" (*Matter of Robles v New York State Off. of Children & Family Servs.*, 220 AD3d at 799 [internal quotation marks omitted]; *see Matter of Podell v New York State Cent. Register of Child Abuse & Maltreatment*, 215 AD3d at 752). "It is the function of the administrative agency, not the reviewing court, to weigh the evidence or assess the credibility of the witnesses" (*Matter of Robles v New York State Off. of Children & Family Servs.*, 220 AD3d at 799 [internal quotation marks omitted]; *see Matter of Podell v New York State Cent. Register of Child Abuse & Maltreatment*, 215 AD3d at 752-753).

Here, the determination that a fair preponderance of the evidence established that the child's physical, mental, or emotional condition was impaired or in imminent danger of being impaired as a result of her excessive school absences and tardiness was supported by substantial evidence in the record, including the agency records admitted into evidence at the hearing (*see Matter of Nevetia M. [Tiara M.]*, 184 AD3d 836, 837; *Matter of Madison G. [Lynn T.]*, 181 AD3d 597, 599). Moreover, contrary to the petitioner's contention, "hearsay is admissible as competent evidence in an administrative proceeding, and if sufficiently relevant and probative may constitute substantial evidence even if contradicted by live testimony on credibility grounds" (*Matter of Conklin v New York State Off. of Children & Family Servs.*, 204 AD3d 668, 670 [internal quotation marks omitted]; *see Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d at 1046).

Substantial evidence also supported the determination that the petitioner's maltreatment of the child was relevant and reasonably related to childcare employment (*see* Social Services Law § 422[8][c][ii]; *Matter of Conklin v New York State Off. of Children & Family Servs.*, 204 AD3d at 670).

Matter of Hastings v New York State Off. of Children & Family Servs., 227 AD3d 1446 (4th Dept., 2024)

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Robert E. Antonacci, II, J.], entered September 14, 2023) to review that part of the determination that petitioner's acts of child maltreatment are relevant and reasonably related to employment in the childcare field.
It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted by annulling that part of the determination finding that petitioner's acts of child maltreatment are relevant and reasonably related to employment in the childcare field and by directing that respondent New York State Office of Children and Family Services shall be precluded from informing a provider or licensing agency which makes an inquiry that petitioner is the subject of an indicated child maltreatment report, and as modified the determination is confirmed without costs.

Memorandum: Petitioner, at the age of 17 years old, gave birth to the subject child. Petitioner and the child's father, who is several years older than petitioner, thereafter continued an on-again, off-again relationship over the years, during which time the father subjected petitioner to severe physical and emotional domestic violence. Eventually, when the child was in her early teenage years, petitioner and the child resided together in an apartment and, during his frequent visits to the apartment, the father would scream at, use derogatory names for, and threaten petitioner in the child's presence. Later, tensions between petitioner and the father increased with a series of acrimonious incidents. Even though the father did not have legal custody of her at that time, the child began staying at the father's residence. Petitioner, fearing that the child was not safe with the father and was being unduly influenced by him, made two desperate attempts within a matter of weeks to get the child to leave the father and come with her by, among other things, physically grabbing the child.

Following an investigation into a report of suspected child maltreatment, respondent Onondaga County Children and Family Services (County respondent) determined that the allegations of inadequate guardianship were substantiated with respect to the two incidents in which petitioner made physical contact with the child and filed an indicated report with respondent New York State Central Register of Child Abuse and Maltreatment (Central [*2]Register), which is maintained by respondent New York State Office of Children and Family Services (OCFS) (collectively, State respondents). After the State respondents denied petitioner's request to amend the indicated report to unfounded and seal the report, the matter proceeded to a fair hearing before an Administrative Law Judge (ALJ). The ALJ thereafter rendered a determination finding

that the County respondent met its burden of establishing by a fair preponderance of the evidence that petitioner committed the acts of child maltreatment giving rise to the indicated report. The ALJ further found that the indicated report was relevant and reasonably related to employment in the childcare field**.** Without providing any explanatory rationale, the ALJ proclaimed that, after considering the subject guidelines, the indicated report "remain[ed] relevant to child care issues for the following reasons: (1) number of incidents involved in report; (2) seriousness of incidents; (3) recency of report; and finally (4) lack of rehabilitative evidence."

Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul that part of a determination finding that her acts of child maltreatment are relevant and reasonably related to employment in the childcare field. We agree with petitioner that she is entitled to that relief.

"Upon a determination made at a fair hearing . . . that the subject has been shown by a fair preponderance of the evidence to have committed the act or acts of child abuse or maltreatment giving rise to the indicated report, the hearing officer shall determine, based on guidelines developed by [OCFS] . . . , whether such act or acts are relevant and reasonably related to employment" in the childcare field (Social Services Law § 422 [8] [c] [ii]). The aforementioned guidelines published by OCFS provide 10 factors that the hearing officer may consider in making a determination, including "[t]he seriousness of the incident cited in the indicated report"; "[t]he length of time that has elapsed since the most recent incident of child abuse and maltreatment"; and "[t]he number of indicated reports of abuse and maltreatment regarding th[e] subject" (NY St Off of Children & Fam Servs Child Protective Services Manual [OCFS CPS Manual], ch 3, § C [3] [a], available at https://ocfs.ny.gov/programs/cps/manual [last accessed Mar. 26, 2024]). The guidelines provide that the hearing officer may also consider documentation produced by the subject regarding rehabilitation, under which factor the term "rehabilitation" means "[n]o apparent repeat of the act of child abuse and maltreatment"; "[e]vidence of actions taken by the [subject] to show that they are able to deal positively with a situation or problem that gave rise to the previous incident(s) of child abuse and maltreatment"; and "[e]vidence of success with professional treatment (e.g., counseling or self-help groups) if relevant" (OCFS CPS Manual, ch 3, § C [3] [a]). When, for example, a subject refuses to take responsibility for their actions, acknowledge that they endangered a child, or appreciate the seriousness of their conduct, or fails to recognize and address the causes of their detrimental behavior despite a claim of rehabilitation, the record will support a finding that the subject is likely to commit maltreatment again, which is a factor reasonably related to employment in the childcare field (*see Matter of Leeper v New York State Off. of Children & Family Servs.*, 164 AD3d 1614, 1615 [4th Dept 2018]; *Matter of Warren v New York State Cent. Register of Child Abuse &*

Maltreatment, 164 AD3d 1615, 1617 [4th Dept 2018]; *Matter of Velez v New York State Off. of Children*, 157 AD3d 575, 576 [1st Dept 2018]).

"Judicial review of a determination that the . . . acts of maltreatment are relevant and reasonably related to employment as a childcare provider 'is limited to whether the determination is supported by substantial evidence' " (*Matter of Robles v New York State Off. of Children & Family Servs.*, 220 AD3d 798, 799 [2d Dept 2023]; *see e.g. Leeper*, 164 AD3d at 1614; *Warren*, 164 AD3d at 1617). "[S]ubstantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably—probatively and logically" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]). "The standard is not an exacting one; it is less than a preponderance of the evidence . . . [and] demands only that a given inference is reasonable and plausible, not necessarily the most probable" (*Matter of Kelly v DiNapoli*, 30 NY3d 674, 684 [2018] [internal quotation marks omitted]). Nonetheless, "substantial evidence does not rise from bare surmise, conjecture, speculation or rumor" (*300 Gramatan Ave. Assoc.*, 45 NY2d at 180), and "[a] mere scintilla of evidence sufficient to justify a suspicion is not sufficient to support a finding upon which legal rights and obligations are based" (*Matter of Stork Rest. v Boland*, 282 NY 256, 273-274 [1940]). "Where substantial evidence exists, the reviewing court [*3]may not substitute its judgment for that of the agency, even if the court would have decided the matter differently" (*Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1046 [2018]).

Here, we agree with petitioner that, when viewed in light of the definition of "rehabilitation" provided by the guidelines, there is no support for the ALJ's determination that the record lacks rehabilitative evidence. First, the record establishes that there was "[n]o apparent repeat of the act of child abuse and maltreatment" by petitioner (OCFS CPS Manual, ch 3, § C [3] [a]). As petitioner contends, nothing in the record suggests any allegations or risk of repeat misbehavior, much less any actual repeated acts of child abuse or maltreatment, and there was "no evidence presented at the hearing" that petitioner had committed abuse or maltreatment either prior to the indicated report or during the nearly two years thereafter (*Matter of Hattie G. v Monroe County Dept. of Social Servs., Children's Servs. Unit*, 48 AD3d 1292, 1294 [4th Dept 2008]; *cf. Leeper*, 164 AD3d at 1614-1615).

Second, the record establishes that petitioner had taken actions to show that she "[is] able to deal positively with [the] situation or problem that gave rise to the previous incident(s) of child . . . maltreatment" (OCFS CPS Manual, ch 3, § C [3] [a]). As petitioner contends, the ALJ failed to consider the evidence of psychological rehabilitation showing that she could deal positively with the trauma she suffered as a

result of the domestic violence inflicted upon her by the father, which precipitated the indicated report. Petitioner's marriage and family therapist submitted a letter explaining that petitioner had suffered from post-traumatic stress disorder "as a result of the relationship" with the father, but that petitioner "ha[d] made an enormous amount of progress and ha[d] reached her treatment goals," and "in no way presented as an unfit parent" during the course of her treatment. The psychologist who performed a comprehensive evaluation and testing of petitioner opined that, despite having been "aggressively abused" by the father, there was no indication that petitioner harbored "resentments toward others," petitioner showed "no defensiveness or tendency to distort the facts of the situation," and petitioner scored "unusually low" on the potential for abuse scale, which demonstrated that petitioner had "none of the characteristics, personal status or problems with the child or family members that would raise the question of abusive potential on her part." Petitioner also had a "significantly elevated score on the scale indicating . . . the tendency to maintain emotional stability and to adequately deal with interpersonal exchanges." Moreover, the ALJ ignored petitioner's testimony about her improved ability to deal positively with emotionally challenging situations and the letters from other individuals attesting to petitioner's ability to properly parent the child. The record therefore indisputably establishes that petitioner is able to deal positively with the situation or problem that gave rise to the indicated report.

Third, the record contains uncontroverted evidence of "success with professional treatment" (OCFS CPS Manual, ch 3, § C [3] [a]). In addition to the participation of petitioner and the child in a creative arts therapy program that helps heal and strengthen domestic violence survivors and their children, petitioner's marriage and family therapist opined that petitioner—whose treatment also focused on her relationship with the child by assessing her capacity to be a healthy, emotionally-present parent—had made progress, had reached her treatment goals, and did not present as an unfit parent.

To summarize with respect to the rehabilitation factor, the uncontroverted evidence in the record establishes that petitioner took responsibility for her actions and acknowledged that she endangered the child (*cf. Matter of Garzon v New York State Off. of Children & Family Servs.*, 85 AD3d 1603, 1604 [4th Dept 2011]), and that she rehabilitated herself by successfully attending professional therapy and addressing the causes of her detrimental behaviors (*cf. Leeper*, 164 AD3d at 1615; *Warren*, 164 AD3d at 1617). The ALJ's determination that petitioner failed to rehabilitate herself is therefore not supported by substantial evidence.

Next, we agree with petitioner that the other three factors upon which the ALJ apparently relied do not provide the requisite substantial evidence to support his determination that petitioner's acts of maltreatment remain relevant and reasonably

related to employment in the childcare field. Neither the "number of incidents involved in [the] report" nor the purported "seriousness of the incidents" support the ALJ's determination. As petitioner contends, none of the evidence indicated that petitioner acted with any malice toward the child, and the ALJ "never explicitly found that petitioner intended" to harm the child (*Matter of Parker v Carrión*, 80 [*4]AD3d 458, 459 [1st Dept 2011]). Moreover, the ALJ noted that the child was not physically injured as a result of the incidents, which occurred within a matter of weeks as part of a single continuing dispute about the child's residence and safety, and there was "no evidence presented at the hearing indicating that the [child] received medical treatment . . . , or that petitioner had used [similar forceful tactics] on any other occasion" before or after the subject incidents (*Hattie G.*, 48 AD3d at 1294). To the extent that the recency of the indicated report had any relevance here, the ALJ arbitrarily excised that factor from its context by completely ignoring petitioner's rehabilitative efforts in the interim (*cf. Leeper*, 164 AD3d at 1614-1615).

We further agree with petitioner that the ALJ failed to "sufficiently address[ ] the [other] relevant guideline factors" (*Matter of Frank C. v Poole*, 214 AD3d 433, 434 [1st Dept 2023], *lv denied* 39 NY3d 915 [2023]; *cf. Matter of Adalisa R. v New York State Off. of Children & Family Servs.*, 190 AD3d 436, 437 [1st Dept 2021]). Most significantly, the ALJ overlooked "[t]he relevant events and circumstances surrounding [petitioner's] actions and inactions as . . . relate[d] to the indicated report" (OCFS CPS Manual, ch 3, § C [3] [a]). The record indisputably establishes that petitioner acted out of desperate concern about the child's safety in the care of the father, a person who had an unmitigated long-term history of engaging in severe domestic abuse against petitioner. The record further establishes that the child suffered no physical injuries as a result of petitioner's actions (*see* OCFS CPS Manual, ch 3, § C [3] [a]). The ALJ also ignored petitioner's prior demonstrated success as a substitute teacher (*see* OCFS CPS Manual, ch 3, § C [3] [a]).

Based on the foregoing, we conclude that substantial evidence does not support the ALJ's determination that the acts of child maltreatment are relevant and reasonably related to employment in the childcare field (*cf. Leeper*, 164 AD3d at 1614-1615; *Warren*, 164 AD3d at 1617; *see generally Hattie G.*, 48 AD3d at 1292-1294). We therefore modify the determination and grant the petition by annulling that part of the determination finding that petitioner's acts of child maltreatment are relevant and reasonably related to employment in the childcare field and by directing that OCFS shall be precluded from informing a provider or licensing agency which makes an inquiry that petitioner is the subject of an indicated child maltreatment report (*see* Social Services Law § 422 [8] [c] [ii]).

JUDICIAL CONDUCT

Matter of Zyion B., 224 AD3d 1285 (4th Dept., 2024)

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered September 21, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, placed the subject child with petitioner.
It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: In this Family Court Act article 10 proceeding, Family Court entered an order in July 2020 that, among other things, temporarily removed the subject child from respondent mother's care based on allegations made by petitioner, Onondaga County Department of Children and Family Services (DCFS), that the mother had, inter alia, failed to maintain a safe and sanitary home. The subject child was then placed with a relative, but was later returned to the mother's care after the mother moved into a new apartment. Subsequently, the court entered an order of fact-finding and disposition, premised on the mother's admission of neglect, pursuant to which the subject child was to remain in the mother's custody and the mother was to be placed under DCFS supervision for a period of 12 months between April 2022 and April 2023. However, in August 2022, the court, on its own motion and over the objection of DCFS, held a fact-finding hearing to determine whether the subject child should be removed from the mother's care. At the close of the hearing, the court issued a temporary removal order determining, inter alia, that it was in the best interests of the child to be placed with DCFS until the completion of the next permanency hearing in February 2023. The mother now appeals from that order.

We conclude that the appeal must be dismissed as moot "inasmuch as it is undisputed that superseding permanency orders have since been entered, in which [the mother] stipulated that it would be in the best interests of the child[ ] to continue [her] placement with" DCFS (*Matter of Nyjeem D. [John D.]*, 174 AD3d 1424, 1425 [4th Dept 2019], *lv denied* 34 NY3d 911 [2020]; *see Matter of Victoria B. [Jonathan M.]*, 164 AD3d 578, 580 [2d Dept 2018]; *cf. Matter of Kenneth QQ. [Jodi QQ.]*, 77 AD3d 1223, 1224 [3d Dept 2010]). Moreover, during the pendency of this appeal, an order of release was issued returning the subject child to the mother with a 12-month order of supervision, which provides an additional basis for dismissing the appeal as moot (*see generally Matter of Faith B. [Rochelle C.]*, 158 AD3d 1282, 1282-1283 [4th Dept 2018], *lv denied* 31 NY3d 910 [2018]; *Matter of Gaige F. [Carolyn F.]*, 144 AD3d 1575, 1576 [4th Dept 2016]).

Nevertheless, under the unusual circumstances of this case, we are compelled to express our deep concern with the Family Court Judge's abandonment of her neutral judicial role during the sua sponte removal hearing. Family Court Act § 1061 provides, as relevant here, that the [*2]court may, "[f]or good cause shown and after due notice, . . . on its own motion . . . set aside, modify or vacate any order issued in the course of a proceeding under this article" (*see generally Matter of Mario D. [Marina L.]*, 147 AD3d 828, 828 [2d Dept 2017]; *Matter of Tina XX*., 73 AD2d 1013, 1014 [3d Dept 1980]). That broad grant of authority is necessary inasmuch as "[i]t is the Family Court and not [DCFS] which acts as *parens patriae* to do what is in the best interests of the child[ ]" (*Matter of Shinice H.*, 194 AD2d 444, 444 [1st Dept 1993]), and thus the court is "empowered to guard the welfare of the child" (*Matter of Dale P.*, 84 NY2d 72, 80 [1994]). Here, however, we conclude that the Judge failed to properly balance her role in parens patriae with her statutory obligation to ensure that the parties received due process at the hearing, specifically with respect to the due process requirement that the hearing be conducted before an impartial jurist (*see* Family Ct Act § 1011; *People v Novak*, 30 NY3d 222, 225 [2017]; *Matter of Marie B.*, 62 NY2d 352, 358 [1984]).

At the hearing, the Judge "took on the function and appearance of an advocate" by choosing which witnesses to call and "extensively participating in both the direct and cross-examination of . . . witnesses" (*Matter of Jacqulin M.*, 83 AD3d 844, 845 [2d Dept 2011]), with a clear intention of strengthening the case for removal. For example, she asked a DCFS caseworker whether the mother was "hostile, aggressive, violent or out of control," and repeated questions to that caseworker using the same or similar phrasing at least 10 times. When the mother's counsel objected to the Judge's leading questions of another witness regarding incidents outside the relevant time period, the Judge overruled the objection, stating that "there's no one else to run the hearing except for me." She also introduced and admitted several written documents during the mother's testimony over the objection of the mother's counsel, and despite the mother's statement that she could not read and was not familiar with the documents. In short, the Judge "essentially 'assumed the parties' traditional role of deciding what evidence to present' " while simultaneously acting as the factfinder (*id.*, quoting *People v Arnold*, 98 NY2d 63, 68 [2002]) and thereby "transgressed the bounds of adjudication and arrogated to [herself] the function of advocate, thus abandoning the impartiality required of [her]" (*Matter of Carroll v Gammerman*, 193 AD2d 202, 206 [1st Dept 1993]; *see Matter of Kyle FF.*, 85 AD3d 1463, 1463-1464 [3d Dept 2011]).

This " 'clash in judicial roles,' " in which the Judge acted both as an advocate and as the trier of fact, "[a]t the very least . . . created the appearance of impropriety" (*Matter of Stampfler v Snow*, 290 AD2d 595, 596 [3d Dept 2002]; *see Matter of Baby Girl Z. [Yaroslava Z.]*, 140 AD3d 893, 894-895 [2d Dept 2016]), particularly when the Judge aggressively cross-examined the mother regarding topics that were not relevant to the

issue of the child's removal and seemed designed to embarrass and upset the mother (*see Matter of Siegell v Iqbal*, 181 AD3d 951, 952 [2d Dept 2020]). One such area of cross-examination concerned the fact that the mother had become pregnant several months before the hearing, but had been forced to terminate the pregnancy when it was determined to be ectopic. The Judge repeatedly questioned the mother regarding how many times the mother had engaged in sexual intercourse with the father of the terminated fetus, even though such information does not appear to have been relevant to the issue of the subject child's placement inasmuch as, inter alia, there was no indication that the man was ever in the subject child's presence. The Judge also asked the mother baseless questions about whether that man was a pedophile.

We reiterate that "it is the function of the judge to protect the record at trial, not to make it[, and] the line is crossed when," as here, "the judge takes on either the function or appearance of an advocate at trial" (*Arnold*, 98 NY2d at 67). We are thus compelled here to remind the Judge that even difficult or obstreperous litigants are entitled to "patient, dignified and courteous" treatment from the court, and that judges must perform their duties "without bias or prejudice" (22 NYCRR 100.3 [B] [3], [4]; *see generally Matter of O'Connor [New York State Commn. on Jud. Conduct]*, 32 NY3d 121, 126 [2018]). Given the "lack of impartiality repeatedly exhibited by the . . . Judge in this case" (*Matter of Amanda G.*, 64 AD3d 595, 596 [2d Dept 2009]), we strongly recommend that she consider whether recusal is appropriate for future proceedings involving the mother (*see Stampfler*, 290 AD2d at 596; *see generally Matter of State of New York v Richard F.*, 180 AD3d 1339, 1340-1341 [4th Dept 2020]).

Matter of Anthony J., 224 AD3d 1319 (4th Dept., 2024)

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered June 13, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.
It is hereby ORDERED that the order so appealed from is unanimously reversed in the interest of justice and on the law without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order of disposition that, inter alia, adjudicated the subject child to be permanently neglected, terminated the mother's parental rights, and transferred custody of the child to petitioner. We reverse.

We agree with the mother that she was denied due process of law based upon the bias against her displayed by the Family Court Judge. Initially, we note that the mother's

contention is unpreserved for our review inasmuch as the mother did not make a motion for the Family Court Judge to recuse herself (*see Matter of Baby Girl Z. [Yaroslava Z.]*, 140 AD3d 893, 894 [2d Dept 2016]; *see generally Matter of Melish v Rinne*, 221 AD3d 1560, 1561 [4th Dept 2023]; *Matter of Tartaglia v Tartaglia*, 188 AD3d 1754, 1756 [4th Dept 2020]). Nevertheless, we exercise our power to review that contention in the interest of justice.

It is well established that "[i]n New York, the factfinding stage of a state-initiated permanent neglect proceeding bears many of the indicia of a criminal trial" (*Santosky v Kramer*, 455 US 745, 762 [1982]). The State "must provide the parents with fundamentally fair procedures" (*id.* at 754; *see Matter of Tammie Z.*, 66 NY2d 1, 4 [1985]; *Matter of Jaleel F.*, 63 AD3d 1539, 1540-1541 [4th Dept 2009]), including the right to a hearing before an impartial factfinder (*see Baby Girl Z.*, 140 AD3d at 894-895). Here, however, the record demonstrates that Family Court "had a predetermined outcome of the case in mind during the hearing" (*id.* at 894). During a break in the hearing testimony, a discussion occurred on the record with regard to a voluntary surrender. When the mother changed her mind and stated that she would not give up her child, the court responded, "Then I'm going to do it." At that point, the only evidence that had been presented was the direct testimony of one caseworker. The court's comments, in addition to expressing a preconceived opinion of the case, amounted to a threat that, should the mother continue with the fact-finding hearing, the court would terminate her parental rights (*cf. Matter of Jenny A. v Cayuga County Dept. of Health & Human Servs.*, 50 AD3d 1583, 1583 [4th Dept 2008], *lv dismissed* 11 NY3d 809 [2008]). Those comments were impermissibly coercive (*see generally* Social Services Law § 383-c [6] [d]). That the court made good on its promise to terminate the mother's parental rights cannot be tolerated.

The record further demonstrates that the Family Court Judge was annoyed with the mother's refusal to surrender her parental rights to the child. We are compelled to remind the Family Court Judge "that even difficult or obstreperous litigants are entitled to 'patient, dignified and courteous' treatment from the court, and that judges must perform their duties 'without bias or prejudice' " (*Matter of Zyion B.*, — AD3d — [Feb. 2, 2024] [4th Dept 2024], quoting 22 NYCRR 100.3 [B] [3], [4]).

Given the preconceived opinion expressed and the lack of impartiality exhibited by the Family Court Judge in this case, the matter must be remitted to Family Court for a new hearing and determination by a different judge (*see Matter of Amanda G.*, 64 AD3d 595, 596 [2d Dept 2009]).

In light of our determination, we do not reach the mother's remaining contentions.

LIABILITY FOR DAMAGES BY CHILD PLACED IN HOME

Falso v Children & Family Servs., 227 AD3d 1466 (4th Dept., 2024)

Appeal from an order of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered October 26, 2022. The order granted the motion of defendant to dismiss the complaint and denied the cross-motion of plaintiff for leave to file a late notice of claim and to amend the complaint.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking compensation for damage to his home and for mental anguish caused by a child, who was placed with him temporarily. Plaintiff was friends with the child's mother, and they lived with him for over a month in the spring of 2022 until the mother was able to secure new housing. Shortly after the mother and the child moved into new housing, the mother's ex-boyfriend broke into their apartment. Defendant's caseworkers asked plaintiff, upon the mother's suggestion, if the child could live with him until the mother again obtained new housing. Plaintiff agreed, and the child moved in with him in early June 2022. The child, however, allegedly caused damage to plaintiff's home, such as stains on the carpet and scratches on the furniture. Plaintiff asked defendant to remove the child, and she was removed a few days later. In his complaint, plaintiff asserted causes of action for breach of fiduciary duty and negligence. Plaintiff alleged that defendant knew or should have known that the child posed a danger to herself and others, yet never informed plaintiff before placing her with him. Plaintiff alleged that he agreed to be the child's foster caregiver upon defendant's express and implied assurances that the child would not present any problems, risks, or dangers for him by living with him.

Defendant moved to dismiss the complaint for, inter alia, failure to state a cause of action. Plaintiff cross-moved for leave to file a late notice of claim and to amend the complaint. Supreme Court granted the motion and denied the cross-motion. Plaintiff appeals, and we affirm.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), we must "accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). In assessing a motion under CPLR 3211 (a) (7) where the court has considered evidentiary material in support of or

in opposition to the motion, "[t]he criterion is whether the proponent of the pleading has a cause of action, not whether [the proponent] has stated one" (*id.* at 88 [internal quotation marks omitted]).

Contrary to plaintiff's contention, defendant did not owe any duty to him inasmuch as, during the relevant time period, he was not a "foster parent" nor was the child a "foster child" as defined by Social Services Law § 371 (19). Defendant submitted documentary evidence establishing that the child was not "in the care, custody or guardianship" (*id.*) of defendant until [*2]the issuance of a removal order that was made after the child left plaintiff's home.

Even, assuming, arguendo, that plaintiff was a foster parent and the child was a foster child, we further conclude that the allegations in the complaint do not establish the existence of a special duty with respect to the negligence cause of action (*see Weisbrod-Moore v Cayuga County*, 216 AD3d 1459, 1459 [4th Dept 2023]; *Abraham v City of New York*, 39 AD3d 21, 28-29 [2d Dept 2007], *lv denied* 10 NY3d 707 [2008]). "When a negligence claim is asserted against a municipality acting in a governmental capacity, as here, the plaintiff must prove the existence of a special duty" (*Maldovan v County of Erie*, 39 NY3d 166, 171 [2022], *rearg denied* 39 NY3d 1067 [2023]; *see McLean v City of New York*, 12 NY3d 194, 199 [2009]). "[A] special duty may arise in three situations: where '(1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition' " (*Maldovan*, 39 NY3d at 171; *see McLean*, 12 NY3d at 199). "[T]he special duty rule is based on the rationale that exposing municipalities to tort liability may 'render them less, not more, effective in protecting their citizens' " (*Maldovan*, 39 NY3d at 174). "[T]he government is not an insurer against harm suffered by its citizenry at the hands of third parties" (*Valdez v City of New York*, 18 NY3d 69, 75 [2011]), and "a 'crushing burden' should not be imposed on a governmental body 'in the absence of [statutory] language clearly designed to have that effect' " (*McLean*, 12 NY3d at 204).

Plaintiff did not allege defendant's violation of any statutory duty or that the third situation applies, and thus only the second situation is at issue here. "[T]o establish that the government voluntarily assumed a duty to the plaintiff beyond what it generally owes to the public, the plaintiff must establish: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*Maldovan*, 39 NY3d at 172 [internal quotation marks omitted]; *see Valdez*, 18 NY3d at

80; *McLean*, 12 NY3d at 201). Here, plaintiff failed to make the necessary allegations that defendant voluntarily assumed a duty to him beyond what it generally owed to the public. There were no " 'promises or actions' by which [defendant] assumed a duty to do something on [plaintiff's] behalf" (*McLean*, 12 NY3d at 201). Defendant's "duty to [plaintiff] was neither more nor less than its duty to any other [foster parent taking in a child]" (*id.*). Defendant's alleged assurances that the child would not present any problems, risks or dangers for plaintiff does not constitute an assumption of an affirmative duty to act.

Plaintiff failed to address the breach of fiduciary duty cause of action in his brief and has thus abandoned that cause of action (*see Behrens v City of Buffalo*, 217 AD3d 1589, 1590 [4th Dept 2023]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). In any event, the court properly dismissed that cause of action because plaintiff failed to allege that there was a fiduciary relationship between plaintiff and defendant (*see generally Health v Hyland*, 200 AD3d 1654, 1655 [4th Dept 2021]).

Contrary to plaintiff's further contention, the court properly denied his cross-motion. Although leave to amend a pleading is freely granted, it should be denied where the proposed amendment is patently lacking in merit (*see Broyles v Town of Evans*, 147 AD3d 1496, 1497 [4th Dept 2017]; *Emergency Enclosures, Inc. v National Fire Adj. Co., Inc.*, 68 AD3d 1658, 1662 [4th Dept 2009]). Plaintiff's proposed amended complaint simply added parties, i.e., employees of defendant, and did not add any new substantive allegations or causes of action. Inasmuch as the proposed amended complaint was patently without merit, the cross-motion seeking leave to file an amended complaint and late notice of claim was properly denied (*see Turner v Roswell Park Cancer Inst. Corp.*, 214 AD3d 1376, 1377-1378 [4th Dept 2023]; *Magic Circle Films Intl., LLC v Entertainment One U.S. LP*, 199 AD3d 1444, 1445 [4th Dept 2021]; *Matter of Lo Tempio v Erie County Health Dept.*, 17 AD3d 1161, 1161-1162 [4th Dept 2005]).

LIABILITY FOR INJURY TO FOSTER CHILD

P.D. v County of Suffolk, AD3d 2024 NY Slip Op 03405 (2nd Dept., 2024)

This appeal concerns the novel issue of whether a municipality is immune from liability for personal injuries allegedly sustained by a foster child during visitation supervised by

a department of social services caseworker. We hold that under such circumstances, a municipality may assume a special duty to the foster child and be subject to liability.

I. Background

The plaintiff father (hereinafter the father) and nonparty mother (hereinafter the mother) have two children together, including the infant plaintiff, who was born in 2017. In 2017, the children were removed from their parents' custody and placed in kinship foster care with their paternal grandmother (hereinafter the foster parent).

On September 21, 2019, the foster parent drove the infant plaintiff, then two years old, and the infant plaintiff's four-year-old sister to Mashashimuet Park in Sag Harbor for a supervised visit with the mother. After leaving the children in the care of Kevin Byrne, the assigned caseworker for the Suffolk County Department of Social Services (hereinafter the DSS), the foster parent left the park to go to work. Byrne testified at his deposition that it was the policy and procedure of the DSS that no visit could start until an employee of the County was present to supervise. After the foster parent dropped off the children, Byrne walked them to the playground for the visit with the mother, who had brought a 10-year-old daughter who was in the mother's custody.

During the supervised visit, the infant plaintiff allegedly was injured when she fell on a slide while attempting to walk up the portion intended for children to slide down. The slide on which the accident occurred was in an area of the playground designated with a sign as intended for children 5 to 12 years old. The foster parent testified at her deposition that she believed that the slide was "[w]ay too big for [the infant plaintiff]." Byrne acknowledged that he did not observe the accident or the infant plaintiff walking up the slide prior to the accident, and that he learned of the [*2]accident shortly thereafter from the mother's 10-year-old daughter. Byrne estimated that the infant plaintiff was playing on the slide for approximately four to five minutes prior to the accident. According to Byrne, at the time of the accident, the mother was standing by the top of the slide. The mother testified at her deposition that after the accident, Byrne told her to "give [the infant plaintiff] a couple of minutes" because there was no visible redness or swelling.

The foster parent testified that when she arrived at the playground, she learned that Byrne had not called for an ambulance because he was "fumbled for words." She also indicated that Byrne was "not in good health" and, therefore, was "[p]hysically unable" to pick up the infant plaintiff, who was unable to walk following the accident.

Byrne testified that his role during the supervised visit was to "[b]asically observe," although he acknowledged that he could intervene if he observed anything during the visit that he believed "might be inappropriate or dangerous for the child" or if the mother permitted the infant plaintiff to engage in an activity that he felt was inappropriate.

In 2020, the infant plaintiff, by the father, and the father individually (hereinafter together the plaintiffs), commenced this action, inter alia, to recover damages for personal injuries against, among others, the County of Suffolk. The plaintiffs alleged, among other things, that the accident was caused by the negligent supervision of Byrne.

After joinder of issue, the County moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against it. In support of the motion, the County argued, among other things, that it was immune from liability, since Byrne was performing a governmental function involving the exercise of discretion and did not owe a special duty to the infant plaintiff. The County asserted that Byrne's role was "simply to observe that the children in fact visit with their parent in an effort to maintain and strengthen the parental bond," and that the accident took place "under the direct supervision of [the infant plaintiff's] biological mother." The County also argued that there was no evidence that any action or inaction by Byrne proximately caused the accident.

In an order dated April 6, 2023, the Supreme Court, inter alia, denied that branch of the County's motion which was for summary judgment dismissing the complaint insofar as asserted against it. The court determined, among other things, that the County failed to establish, prima facie, that it was immune from liability based on discretionary conduct and that Byrne's alleged negligent supervision was not a proximate cause of the infant plaintiff's injuries. The County appeals.

On appeal, the County argues, inter alia, that it did not owe a special duty to the infant plaintiff. The County also contends that even assuming, arguendo, a special duty existed, it is immune from liability for the performance of a governmental function involving the exercise of discretion. In any event, the County argues that its alleged negligent supervision was not a proximate cause of the accident.

II. Analysis

A. Governmental Immunity

"When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425; *see Marino v City of New York*, 223 AD3d 888, 889). "If the municipality is engaged in a proprietary function, it is subject to suit under the ordinary rules of negligence" (*Trenholm-Owens v City of Yonkers*, 197 AD3d 521, 523; *see Applewhite v Accuhealth, Inc.*, 21 NY3d at 425). "In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers" (*Applewhite v Accuhealth, Inc.*, 21 NY3d at 425 [internal quotation marks omitted]).

"Once it is determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a duty to the injured party" (*Santaiti v Town of Ramapo*, 162 AD3d 921, 924; *see Applewhite v Accuhealth, Inc.*, 21 NY3d at 426). "In order to sustain liability against a municipality engaged in a governmental function, 'the duty breached must be more than that owed the public generally'" (*Santaiti v Town of Ramapo*, 162 AD3d at 924, quoting *Lauer v City of New York*, 95 NY2d 95, 100). "Indeed, 'although a municipality owes a general duty to the public at large . . . this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created'" (*Santaiti v Town of Ramapo*, 162 AD3d at 924, quoting *Valdez v City of New York*, 18 NY3d 69, 75). The issue of whether a special duty exists "'is generally a question for the jury'" (*Santaiti v Town of Ramapo*, 162 AD3d at 924, quoting *Coleson v City of New York*, 24 [*3]NY3d 476, 483). A special duty can arise where, as relevant here, "'the [municipality] voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally'" (*Koyko v City of New York*, 189 AD3d 811, 812, quoting *Applewhite v Accuhealth, Inc.*, 21 NY3d at 426). "A municipality will be held to have voluntarily assumed a special duty where there is: '(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking'" (*Koyko v City of New York*, 189 AD3d at 812, quoting *Cuffy v City of New York*, 69 NY2d 255, 260).

Further, "[u]nder the doctrine of governmental function immunity, government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (*Kralkin v City of New York*, 204 AD3d 772, 772; *see McLean v City of New York*, 12 NY3d 194, 203). "Discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results, whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*Kralkin v City of New York*, 204 AD3d at 773; *see Tango v Tulevech*, 61 NY2d 34, 41). Additionally, a municipality is not immune from liability based upon the exercise of discretionary authority "'unless the municipal defendant establishes that the discretion possessed by its employees was in fact exercised in relation to the conduct on which liability is predicated'" (*Ferreira v City of Binghamton*, 38 NY3d 298, 311, quoting *Valdez v City of New York*, 18 NY3d at 76).

1. Governmental Function

Here, with regard to the threshold issue of whether the County acted in a proprietary or governmental function, the plaintiffs do not dispute that Byrne was engaged in a governmental function at the time of the accident. "The function of dealing with children in need of foster care is deemed best executed by government and is undertaken without thought of profit or revenue" (*Kochanski v City of New York*, 76 AD3d 1050, 1052). Since Byrne was supervising visitation as part of his duties for the DSS on behalf of a child in foster care at the time of the accident, he was engaged in a governmental function. Thus, the inquiry turns to whether the County owed a special duty to the infant plaintiff.

2. Special Duty

Contrary to the County's contention, it failed to establish, prima facie, that it did not owe a special duty to the infant plaintiff.

The issue of whether a municipality owes a special duty to children placed in foster care has generally arisen in the context of actions involving children who were subjected to sexual or physical abuse while in foster care. For instance, in *Bartels v County of Westchester* (76 AD2d 517, 522), this Court determined that a county may be liable for physical injuries suffered by an infant in a foster home, as the county "undertook to care for the infant plaintiff, and this duty, once assumed, had to be carried out with due regard for the child's safety."

Similarly, in *G.F. v Westchester County* (2024 NY Slip Op 30447[U] [Sup Ct, Westchester County]), which involved allegations that a child in foster care was sexually abused, the Supreme Court determined that a county assumed a special duty to the infant plaintiff. The court explained that "[i]n contrast to its general population, the [c]ounty seized responsibility for plaintiff's care and upbringing," as the county had custody of the child in foster care and "exercised its *parens patriae* function to safeguard the best interests of plaintiff and had control over him during the time of the abuse" (*id.* at *5).

By contrast, in *Weisbrod-Moore v Cayuga County* (216 AD3d 1459), the Appellate Division, Fourth Department, determined that a complaint alleging that the plaintiff was subjected to sexual and physical abuse while in foster care was insufficient to allege the existence of a special duty owed by a county to the plaintiff. The court explained that the allegations in the complaint pertained specifically to the county's failure to meet its obligations to foster children pursuant to the Social Services Law, and that "'[t]he failure to perform a statutory duty, or the negligent performance of that duty, cannot be equated with the breach of a duty voluntarily assumed'" (*id.* at 1462, quoting *Estate of M.D. v State of New York*, 199 AD3d 754, 757).

The circumstances of the case at bar are distinguishable from the aforementioned cases, as the infant plaintiff did not sustain injuries while in a foster home, but rather during visitation with the mother at a public location under supervision by a caseworker for the DSS. It is [*4]an issue of first impression whether the municipality assumed a special duty to the foster child in such instance. We hold that under these circumstances, a municipality may owe a special duty to the foster child.

It is well settled that a school owes a special duty to provide its students with adequate supervision, which "derives from the fact that the school, in assuming physical custody and control of the students, takes the place of the parents or guardians, and therefore acts in loco parentis" (*Hauburger v McMane*, 211 AD3d 715, 716; *see Pratt v Robinson*, 39 NY2d 554, 560; *Ferguson v City of New York*, 118 AD3d 849, 849-850). This special duty of a school to its students is temporary in nature and ceases once a student "has passed out of the orbit of its authority" (*Pratt v Robinson*, 39 NY2d at 560).

Here, the infant plaintiff was injured under circumstances analogous to a child injured on a playground while at school. At the start of the visit, the foster parent surrendered physical custody and control of the infant plaintiff to Byrne and then left the park for the duration of the visit. While the mother was present during the visit, it is undisputed that she was not the custodial parent and, indeed, was not even permitted to interact with the infant plaintiff outside the presence of the assigned caseworker. Notably, Byrne acknowledged that it was the policy and procedure of the DSS that no visit could start until an employee of the County was present to supervise, and that he was empowered to intervene if he observed anything he believed "might be inappropriate or dangerous for the child" or if the mother permitted the infant plaintiff to engage in an inappropriate activity. Therefore, the mother did not possess an unfettered degree of control over the infant plaintiff such that she could be deemed the party in physical custody of the infant plaintiff during the supervised visit. Rather, by assuming physical control over the infant plaintiff in the parking lot when the foster parent dropped off the infant plaintiff for the visit, Byrne acted in loco parentis during the visit.

Thus, the County's contention that the mother was the individual responsible for supervising the infant plaintiff is not supported by the record. Moreover, the County cannot reasonably take the position that it was entitled to rely on the mother to ensure the safety of the infant plaintiff during visitation when the mother was not permitted to have unsupervised visitation with the infant plaintiff. If the presence of a caseworker was deemed necessary to ensure that the mother acted appropriately during visitation, then it necessarily follows that the caseworker was obligated to ensure that the mother did not permit the infant plaintiff to engage in any unsafe behavior.

Consequently, we hold that the County may assume a special duty to a foster child during the course of visitation supervised by a DSS caseworker. We also determine that

the County's conclusory assertions regarding the lack of a special duty were insufficient to meet its burden of establishing, prima facie, that it did not owe a special duty to the infant plaintiff (*see Stevens v Town of E. Fishkill Police Dept.*, 198 AD3d 832, 833; *Morgan-Word v New York City Dept. of Educ.*, 96 AD3d 1025, 1026).

3. Discretionary Conduct

Although discretionary governmental action, as opposed to ministerial governmental action, may not be a basis for liability even if a special duty exists (*see Ferreira v City of Binghamton*, 38 NY3d at 311-312; *Kralkin v City of New York*, 204 AD3d at 772-773), the County's bare assertion that Byrne's conduct was discretionary was insufficient to meet its prima facie burden, as "'a municipality must do much more than merely allege that its employee was engaged in activities involving the exercise of discretion'" (*Coleson v City of New York*, 125 AD3d 436, 437, quoting *Valdez v City of New York*, 18 NY3d at 79).

To the extent the County contends that Byrne's conduct was discretionary because "New York State guidelines set forth by the Office of Children and Family Services" provide for "the least restrictive level of supervision necessary for children in foster care," the County's contention is improperly raised for the first time on appeal (*see Shahid v City of New York*, 144 AD3d 1127, 1129-1130).

Moreover, even assuming, arguendo, that the County established, prima facie, that Byrne's authority to supervise visitation was discretionary in nature, the County failed to demonstrate that such discretion "'was in fact exercised in relation to the conduct on which liability is predicated'" (*Ferreira v City of Binghamton*, 38 NY3d at 311, quoting *Valdez v City of New York*, 18 NY3d at 76). Since Byrne acknowledged that he did not observe the infant plaintiff walking up the portion of the slide intended for children to slide down prior to the accident, it cannot be said that he made a discretionary decision whether or not the infant plaintiff's behavior warranted his intervention. Thus, any exercise of discretion by Byrne during visitation bore no relation to the [*5]conduct on which liability is predicated.

Consequently, the County failed to establish, prima facie, that it was immune from liability for a claim of negligent supervision for the subject accident.

B. Proximate Causation

Generally, the adequacy of a defendant's supervision of children on a playground and whether inadequate supervision was a proximate cause of an accident are questions of fact for a jury (*see L.S. v Massapequa Union Free Sch. Dist.*, 215 AD3d 708, 709-710). "However, where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the

proximate cause of the injury and summary judgment in favor of the . . . defendant is warranted" (*id.* at 710; *see R.B. v Sewanhaka Cent. High Sch. Dist.*, 207 AD3d 607, 610).

Contrary to the County's contention, it failed to establish, prima facie, that Byrne provided adequate supervision to the infant plaintiff, or that a lack of adequate supervision was not a proximate cause of the accident (*see L.S. v Massapequa Union Free Sch. Dist.*, 215 AD3d at 710; *B.T. v Bethpage Union Free Sch. Dist.*, 173 AD3d 806, 808). Viewing the evidence in the light most favorable to the plaintiffs (*see Rodriguez v American Airlines, Inc.*, 219 AD3d 948), there were triable issues of fact as to whether the infant plaintiff was engaged for an extended period of time in a dangerous activity given her young age, which warranted more heightened supervision, and if so, whether such supervision would have prevented the accident (*see SM v Plainedge Union Free Sch. Dist.*, 162 AD3d 814, 817; *DiGiacomo v Town of Babylon*, 124 AD3d 828, 829). The mother testified that the infant plaintiff and her sister were playing on the big slide where the accident occurred—which was intended for older children ages 5 to 12—for approximately 10 to 15 minutes prior to the accident, and Byrne estimated that they were playing on that slide for 4 to 5 minutes. Thus, the County's evidentiary submissions were insufficient to establish, prima facie, that the accident occurred in so short a span of time that even the most intense supervision could not have prevented it (*see M.P. v Mineola Union Free Sch. Dist.*, 166 AD3d 953, 955).

III. Conclusion

In light of the foregoing, the County failed to establish its prima facie entitlement to judgment as a matter of law, and thus, we need not consider the sufficiency of the plaintiffs' submissions in opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

The parties' remaining contentions either were improperly raised for the first time in reply papers, and thus, are not properly before this Court, or are without merit.

Accordingly, the Supreme Court properly denied that branch of the County's motion which was for summary judgment dismissing the complaint insofar as asserted against it, and the order is affirmed insofar as appealed from.

BARROS, J.P., WARHIT and VENTURA, JJ., concur.

ORDERED that the order is affirmed insofar as appealed from, with costs.

MENTAL HEALTH RECORDS

Matter of J.J.D. v M.D., 227 AD3d 441 (1st Dept., 2024)

Order, Family Court, New York County (Grace Oboma-Layat, J.), entered on or about September 25, 2023, which granted the motion of petitioner Commissioner of Administration for Children's Services of the City of New York (ACS) for permission to subpoena respondent mother M. D.'s mental health records from certain mental health treatment facilities, directed those facilities to provide certified copies of those records to Family Court, and issued qualified protective orders and subpoenas duces tecum for those three facilities, unanimously modified, on the law, to vacate so much of the order as granted ACS's motion to subpoena records from Success Counseling Services, to vacate the qualified protective order and the accompanying subpoena duces tecum for Success Counseling Services, to limit the production of the records from the remaining mental healthcare facilities to records dated on or after August 26, 2014 and on or before November 16, 2022, and to remand the matter for an in camera review of the records produced by those two facilities, and otherwise affirmed, without costs.

ACS has withdrawn its request for records related to the mother's treatment at Success Counseling Services. Accordingly, with respect to the request for records from that facility, we modify the order and vacate the qualified protective order and accompanying subpoena duces tecum as indicated.

ACS argues that disclosure of documents pursuant to Family Court Act § 1038 need not take into consideration the balancing test set out in Mental Hygiene Law § 33.13 (c) (1). We reject that argument (*see Matter of Briany T. [Justino G.]*, 202 AD3d 408, 409 [1st Dept 2022]; *Matter of Elliot P.N.G. [Jonathan H.G.]*, 181 AD3d 961, 963-964 [2d Dept 2020]).Applying the appropriate statutory standard, we hold that, given Family Court's need to assess the mother's mental health, "the interests of justice significantly outweigh the need for confidentiality" of records from the remaining mental health treatment facilities (Mental Hygiene Law § 33.13 [c] [1]; *see Matter of Lyndon S. [Hillary S.]*, 163 AD3d 1432, 1433 [4th Dept 2018] ["Indeed, the paramount issue in this case was the mother's mental health and its alleged impact upon the subject child which required an assessment of the mother's mental health."]). Furthermore, the mother's admissions that she received mental health treatment at the remaining facilities, in her testimony at the Family Court Act § 1028 hearing and as set forth in the prior fact-finding orders entering neglect findings against her on consent, demonstrate that the records from those facilities are material and necessary to a determination of the issues before Family Court, and ACS's need for the discovery to assist in the preparation of its case

outweighs any potential harm to the children from the discovery (*see* Family Court Act § 1038[d]; *Matter of Elliot P.N.G.*, 181 AD3d at 962-963). Nor is production of records from those facilities cumulative of other evidence [*2]in the proceeding.

Nevertheless, although the mother had difficulty at the Family Court Act § 1028 hearing recalling where and when she received mental health treatment, Family Court should not have granted ACS's request for records from the remaining facilities that were dated before August 26, 2014 or after the filing date of the current petition, because there is no evidence in the record that she received treatment at either one of those facilities before August 26, 2014 or after the date of the current petition.

Additionally, Family Court should have granted the request by the mother and the attorney for the children that the court review the mother's mental health records in camera (*see Briany T.*, 202 AD3d at 409; *Matter of Dean T., Jr. [Dean T., Sr.]*, 117 AD3d 492, 493 [1st Dept 2014]). ACS's request has the potential of producing records that are not material and relevant to the underlying petition. Family Court's solution of having the parties submit objections to the records after production does not appropriately balance the court's need for relevant information with the mother's need for confidentiality, as ACS would have already seen the information before the parties submitted their objections. Thus, an in camera review of the records before the disclosure ruling is necessary. Moreover, at appellate argument, ACS consented to in camera review of the records.

We have considered the remaining contentions and find them unavailing.

VIOLATION OF ORDER OF PROTECTION

Matter of Angel P. H., 223 AD3d 808 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, Angel P. Q. appeals from (1) an order of fact-finding and disposition (one paper) of the Family Court, Queens County (Joan L. Piccirillo, J.), dated December 19, 2022, and (2) an order of commitment of the same court also dated December 19, 2022. The order of fact-finding and disposition found that Angel P. Q. willfully violated a temporary order of protection of the same court dated July 27, 2022, and directed that he be committed to the custody of the New York City Department of Correction for a period of 10 months. The order of

commitment committed Angel P. Q. to the custody of the New York City Department of Correction for a period of 10 months.
ORDERED that the appeal from so much of the order of fact-finding and disposition as committed Angel P. Q. to the custody of the New York City Department of Correction for a period of 10 months and the appeal from the order of commitment are dismissed as academic, without costs or disbursements; and it is further,

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

The Administration for Children's Services (hereinafter the agency) commenced a child protective proceeding against Angel P. Q., alleging that in the presence of the five subject children, he engaged in acts of domestic violence against their mother. Angel P. Q. consented to a finding of neglect, the children were released to the mother under agency supervision, and a temporary order of protection was issued in favor of the children and the mother against Angel P. Q. Three months later, the agency brought a petition, alleging that Angel P. Q. violated the temporary order of protection on several occasions. After Angel P. Q. consented to the entry of an order of fact-finding and disposition, without admitting or denying the allegations in the violation petition, the Family Court found that Angel P. Q. willfully violated the temporary order of protection and committed him to the custody of the New York City Department of Correction for a period of 10 months. Angel P. Q. appeals.

The appeal from so much of the order of fact-finding and disposition as committed Angel P. Q. to the custody of the New York City Department of Correction for a period of 10 months and the appeal from the order of commitment must be dismissed as academic, as the period of incarceration has ended (*see Matter of Omari J.T.*, 216 AD3d 1102). However, in light of the enduring consequences that could flow from the finding that Angel P. Q. violated the temporary order of protection, the appeal from so much of the order of fact-finding and disposition as determined that Angel P. Q. willfully violated the temporary order of protection is not academic (*see Matter of Lobb v Nanetti*, 192 AD3d 1034).

To incarcerate a party for violation of a court order, the Family Court must find beyond a reasonable doubt that he or she willfully failed to obey an order of the court (*see Matter of DiSiena v DeSiena*, 167 AD3d 1006). Knowingly failing to comply with a court order gives rise to an inference of willfulness (*see Gomes v Gomes*, 106 AD3d 868). To establish that a party had knowledge of the order, the evidence must show that he or she was made aware, either orally or in writing, of the substance of the order and the conduct it prohibited (*see People v McCowan*, 85 NY2d 985, 987; *Matter of Lobb v Nanetti*, 192 AD3d 1034, 1035-1036; *Matter of Er-Mei Y.*, 29 AD3d 1013, 1016).

Here, the record demonstrated that Angel P. Q. was aware of the substance of the temporary order of protection, and that his conduct, as alleged in the violation petition, was prohibited by that order. In particular, Angel P. Q. was present during the remote proceeding, with his attorney and a Spanish language interpreter, when the Family Court informed him that the court was issuing a stay-away order of protection in favor of the children and the mother, inter alia, providing for supervised visitation on a schedule, in a location, and for a duration known to the agency, with all visitation supervisors to be cleared and approved by the agency, and pick up and [*2]drop off to be accomplished by a third party. Notice of the conduct prohibited by an order of protection may be given orally (*see People v Clark*, 95 NY2d 773, 775). Angel P. Q., therefore, knew that the conduct that he was alleged to have committed in the violation petition would constitute violations of the temporary order of protection (*see Matter of Cori XX. [Michael XX.—Katherine XX.]*, 155 AD3d 113; *cf. People v John*, 150 AD3d 889).

Furthermore, Angel P. Q. failed to meet his burden "to overcome the presumption that the crime charged is petty and establish a Sixth Amendment right to a jury trial" (*People v Suazo*, 32 NY3d 491, 507). There is generally no right to a jury trial in violation proceedings because the maximum sentence for each willful violation is only six months (*see* Family Ct. Act §§ 846-a, 1072; *Matter of Dyandria D.*, 22 AD3d 354). "[A] noncitizen defendant charged with a deportable crime is entitled to a jury trial under the Sixth Amendment, notwithstanding that the maximum authorized sentence is a term of imprisonment of six months or less" (*People v Suazo*, 32 NY3d at 508). Here, however, Angel P. Q. failed to show that his removal would be "practically inevitable," "virtually automatic," or would "invariably" flow from his conviction (id. at 491, 499, 502, 506 n 7). The conclusory allegation that he is deportable simply by reference to categories of deportable aliens in 8 USC § 1227(a)(2)(E)(ii) is insufficient to establish his right to a jury trial (*see People v Garcia*, 38 NY3d 1137), as the offenses that Angel P. Q. was found to have committed necessarily call for a circumstance-specific inquiry to determine removability (*see Alvarez v Garland*, 33 F4th 626, 640-641 [2d Cir]).

VISITATION

Matter of Leroy W., AD3d 2024 NY Slip Op 03238 (1st Dept., 2024)

Order, Family Court, Bronx County (David J. Kaplan, J.), entered on or about November 30, 2022, which, to the extent appealed from as limited by the briefs, after a fact-finding hearing, granted the father's petition for visitation with the subject child to the extent of awarding one in-person visit every six months at any facility where he was incarcerated,

unanimously modified, to vacate the portion of the order requiring the child to visit her incarcerated father once every six months, without costs.
Family Court's determination that visitation with the father once every six months was in the child's best interests, does not have a sound and substantial basis in the record. Visitation with a noncustodial parent, including an incarcerated parent, is generally presumed to be in the best interests of the child (*Matter of Granger v Misercola*, 21 NY3d 86, 91 [2013]). However, that presumption is rebuttable, and "a demonstration that such visitation would be harmful to the child will justify denying such a request" (*id.* at91, quoting *Matter of Mohammed v Cortland County Dept. of Social Servs.*, 186 AD2d 908, 908 [3d Dept 1992], *lv denied* 81 NY2d 706 [1993]).

Here, the evidence was sufficient to overcome the presumption in favor of visitation. The father is incarcerated in connection with his conviction for robbing and stabbing the mother while she was holding their child in her arms. The record indicates that the father has been incarcerated for most of the child's life and that the father has had no meaningful relationship with the child (*see Matter of Derek G. v Alice M.*, 187 AD3d 465, 465 [1st Dept 2020]; *Matter of Ellett v Ellett*, 265 AD2d 747, 748 [3rd Dept 1999]). Notably, at a previous court date, the father testified that the child should not be required to visit him in prison and be exposed to that setting but subsequently, he changed his mind. Moreover, the now five-year-old child would have to travel several hours each way to visit the prison at which the father is incarcerated, and the child is not comfortable being in a car or being away from her mother for an extended period (*see Ellett*, 265 AD2d at 748; *Rogowski v Rogowski*, 251 AD2d 827, 828 [3rd Dept 1998]).

Further, the mother testified that the father has used his permitted phone-calls with the child to harass the mother, despite her order of protection against him (see *Matter of Trombley v Trombley*, 301 AD2d 890, 891-892 [3rd Dept 2003]). The position advocated by the attorney for the child was also entitled to serious consideration and supports modification of the court's order (*see Yolanda R. v Eugene I. G.*, 38 AD3d 288, 291 [1st Dept 2007]).

MISCELLANEOUS TRIAL LEVEL CASES

1028

Matter of Jake G. v Jorge G., Misc3d 2024 NY Slip Op 50421(U) (Family Court, Kings County, 2024)

Jacqueline B. Deane, J.
Procedural History

This Court held an emergency hearing today pursuant to Family Court Act § 1028 after the Respondent father, Mr. G., requested to be permitted to return to the home of his three boys, ages 12, 11 and 8. The father's application is supported by the Attorney for the Children ("AFC"). The Administration for Children's Services ("ACS" or "Petitioner") introduced several exhibits and made the Caseworker Supervisor available for cross-examination and rested. For the reasons stated below, this Court granted the prima facie motion made by the Respondent and the AFC.

ACS filed this neglect petition on February 5, 2024, based on an allegation of excessive corporeal punishment due to the father's hitting the 12-year-old subject child Jake with a belt twice in the arm on January 30th and Jake's claims that he had been hit with a belt in the past. The father was arrested after Jake called the police and was later released by Criminal Court with an order of protection in favor of the child Jake and subject to subsequent Family Court orders. At the first court appearance here, ACS requested that the three children be released to their mother, Ms. H. with the father excluded from the family home and his visits supervised. Mr. G. has complied with those orders since.

Given that the father's work schedule as a cab driver made agency supervised visits impossible, the boys had minimal visits with their father since that time. The stress the court orders have put on the family since has been evident in court appearances, as the mother has been left to handle three young boys, ages 12, 11 and 8, on her own. The Court notes that the parents are both primary Spanish-speakers and that the father is their sole source of support working 12-hour days, 7 days a week, as a cab driver.

In an ACS Court Report submitted to the Court and all parties on the March 14th court date, the caseworker verified that the father had completed one third of the anger management and parenting skills program that he had engaged in on his own soon after the case was filed, and the case manager of the program reported that he was an active participant and had shown insight. There had been no concerns with the father's supervised visits and all 3 boys, including Jake, expressed to the caseworker that they missed their father, were not fearful of him and wanted him to return home. As a result,

this Court permitted the father evening visits in the home for 3 hours each day which have been in place for the past week. The Respondent father requested to be allowed to return to the home fulltime and this hearing pursuant to FCA § 1028 was held today.

ACS introduced ORTs, several pages of case records and photographs into evidence and rested. The photographs show faint redness on Jake's right upper arm and a mark below his elbow. The case records reference redness and one "welt." There were no medical records introduced. On cross-examination of the casework supervisor, she reported that the family had accepted preventive services, which was already in the home, and that the father completed one random toxicology screen which was negative. Additionally, a caseworker observed one of the father's visits in the home this week, again without any safety concerns, and the children and mother continued to want the father to return. The caseworker testified that the two younger boys reported that they had never been hit by their father and they usually were not allowed to [*2]play video games as punishment. The supervisor also confirmed that the subject child Jake is diagnosed with ADHD and receives therapy and takes medication for his behavior issues. At the prima facie motion made by the father, the AFC argued strenuously on behalf of the 3 boys for their father's return home, which was also strongly supported by counsel for the mother.

For the purpose of the prima facie motion, this Court accepted as true that the Respondent father used a belt to discipline his almost 13-year-old son Jake on January 30th and the mother was upset with the child Jake at the hospital for calling the police and saying that his father hit him. These are the bases of ACS's opposition to allowing the Respondent father back in the home. However, this is merely the beginning of the required legal analysis at a hearing pursuant to FCA § 1028, not the end.

Family Court Act § 1028 states:

Upon the application of the parent . . . for the care of a child temporarily removed under this part . . . the court shall hold a hearing to determine whether the child should be returned . . . Upon such hearing, the court shall grant the application, unless it finds that the return presents an imminent risk to the child's life or health.

In *Nicholson v Scopetta*, 3 NY3d 357, 376 [2004], the Court of Appeals recognized the real emotional harm that children often suffer when removed from their parents and required Courts to carefully balance that harm against risk of return. *See Nicholson* 3 NY3d at 378-79. This Court must "weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests. Additionally, the court must specifically consider whether imminent risk to the child might be eliminated by other

means, such as issuing a temporary order of protection or providing services to the victim." *Id.*

Thus, even accepting all of the allegations as true, the Court must assess whether court orders can be put in place that would eliminate or mitigate any imminent risk which would exist if the father returns home. Notably, both parents have obeyed the order excluding the father from the home and limiting his contact with the children since this case was filed almost 2 months ago, even though this meant extremely limited contact with the 3 boys who were expressing upset at missing their father as reported by their attorney. The fact that both parents complied with an order that went against their, and the children's, wishes is highly significant to this Court and predictive of their willingness to comply with orders in the future. The purpose of the Family Court, and ACS's intervention in particular, is remedial - with the objective of reunifying families as soon as safely possible. There are occasions when the effect of court intervention and the resulting ramifications are enough to change behavior sufficiently to reduce or eliminate the risk of harm. This Court has had the opportunity to see the impact of the consequences that these particular parents have faced, with Mr. G. arrested and excluded from the family home for two months, followed by their complete compliance with the court orders and voluntary engagement with services since then, is sufficient evidence for this Court to find that the Respondent father can return home with protective orders in place.

The evidence at this hearing showed that the use of a belt is not the father's primary or regular discipline practice. Rather it was a response to defiant behavior by his almost 13-year-old son who has a history of behavioral regulation issues which, according to the mother, have become much worse in recent months. In the case records, Petitioner's Ex. 5e in evidence, Ms. [*3]H. expressed to the caseworker the depth and severity of the challenges she was having with Jake, her concerns about him, and her desire for and openness to any services for Jake. The two younger boys stated that their father generally takes away privileges to discipline them and had never used a belt on them and no marks were seen on either of them. While the Court does not condone use of a belt as discipline, this is not *per se* neglect under the law and the issue of what is "excessive" is one for fact-finding.

ACS has also raised concern about the Court's ability to rely on the mother to enforce orders and protect the children given her statements to Jake on the night these events unfolded. This Court does not believe that Ms. H.'s reliability in following court orders should be judged solely based on her behavior during the highly emotional events that unfolded on the night of January 30th. Based on the mother's statements to the caseworker contained in Petitioner's Ex. 5b in evidence, she was on the phone in another room and only heard the father yelling at Jake over Jake's refusal to help with

the laundry. The next thing she knew, the police were at her home, having been called by Jake, saying the father had hit Jake with a belt. The mother did not witness nor hear this happen, nor did the other children. The father was then arrested, and the mother and children were brought to the hospital by the police and ACS was called. In this midst of this upheaval to a normal family evening, the mother evidently responded emotionally, according to Petitioner's exhibit, asking Jake why he had called the police and telling him that he "should tell the truth and his father did not hit him." Petitioner's Ex. 5c in evidence. Under those circumstances, without endorsing her response, this Court can appreciate why Ms. H. reacted in this way and that this was not a considered, thought through response about how to handle the turmoil her family has suffered. In contrast to this one night, Ms. H. has followed court orders for 50 days since, even though those orders have added stress to her life and caused her and her children emotional harm. This Court believes Ms. H. has demonstrated that she can be relied on to continue to act as she has for the past 50 days, rather than on that 1 extremely difficult night, and comply with new orders with the father back in the home.

Pursuant to the balancing required by the Court of Appeals in *Nicholson*, this Court finds that, under the particularized facts of this case, the Court finds the emotional and mental harm, and added family stress, of continued separation from their father to be greater than any physical risk to the children of his return home and such a return is in their best interests. Thus, Mr. G.'s application pursuant to FCA § 1028 to return to the home is granted prima facie and the Court hereby orders that the subject children are to be released to the care and custody of both parents under the following conditions:

1) Both parents are to cooperate with ACS supervision including announced or unannounced home visits.

2) Both parents are to comply with preventive services including any reasonable referrals;

3) The Respondent father is to comply with a TOP not to use any corporal punishment on the subject children;

4) The Respondent father is to continue to comply with anger management and parenting skills classes;

5) Both parents are to insure that the child Jake attends school, individual therapy and [*4]medication management;

6) The mother is required to enforce the TOP and inform ACS if there are any violations as well as take any protective measures needed.

1061 Request

Matter of G.D., Misc3d 2024 NY Slip Op 50761(U) (Family Court, Bronx County, 2024)

David J. Kaplan, J.
M.R., having previously been found to have neglected the Subject Child G.D. (dob XX/XX/2022), moves pursuant to Family Court Act § 1061 to modify this Court's September 15, 2023 Order of Disposition [FN1] to retroactively suspend judgment pursuant to Family Court Act § 1053 and vacate the finding of neglect and dismiss the petition. New York City Administration of Children's Services ("ACS") and the Attorney for the Child each submitted responsive papers opposing the motion. Movant thereafter submitted a letter dated February 26, 2024 from a social worker at The Jewish Board and an April 11, 2024 letter from her clinical team at Montefiore Medical Center, where she participated in their Group Attachment Based Intervention ("GABI") program, for the Court's consideration.

The underlying article 10 petition was filed by ACS against M.R. and co-respondent T.D. on November 18, 2022 alleging the abuse and neglect of the Subject Child G.D. resulting in G.D. being remanded to the care of ACS. On September 15, 2023, the Court accepted a Family Court Act § 1051(a) submission to neglect by M.R. on consent of the parties. As pertinent here, the Court found M.R. neglected G.D., who was approximately five months old at the time of the filing of petition, in part based on:

"According to Dr. XXXXX of Jacobi Hospital, the child was brought into the hospital on or about November 10, 2022 due to not being able to move her arm. According to Dr. XXXXX, x-rays were conducted and a fracture to the left arm was discovered. According to Dr. XXXXX, there was a skeletal survey of the child completed and it was learned the child had femur fractures on both legs, a fracture by the knee on both legs, and a fracture by the ankle on both legs. According to Dr. XXXXX, the child's arm fracture was acute and the other fractures were older and healing. According to Dr. XXXXX these injuries are highly suspicious for non-accidental trauma. According to Dr. XXXXX, blood work was taken and a family history was obtained and the child does not have any known medical conditions that would explain the injuries."

Additionally, the Court found that:

"According to the maternal aunt, she has text messages between her and the Respondent Mother from on or about November 1, 2022 and the maternal aunt told the respondent mother the child kept crying and the respondent mother responded that she has been like that all day. According to the maternal aunt, she then told the Respondent mother that the maternal grandmother thinks the Respondent mother should take the child to the doctor because every time they moved the child she would cry and

respondent mother responded 'Mmmmm.' The maternal aunt then told the Respondent mother that the child looks pale and the respondent mother stated 'Theyre not gonna do anything unless shes breathing weird.' According to the maternal aunt, she then informed the respondent mother that the child keeps snorting and twitching when she sleep and hyperventilating and the Respondent mother responded 'Yeah I warned mom.' According to the maternal aunt, she also has text messages with the Respondent Mother from on or about November 8, 2022, where she informed the respondent mother that the child is non-stop crying and that the maternal grandmother indicated that the child was crying really loud and the Respondent mother asked the maternal aunt if the maternal grandmother just changed the child's diaper or something and when the maternal aunt responded yes, the respondent mother stated 'For some reason her legs and arms be really sensitive.'"

An Order of Disposition was thereafter entered on consent whereby G.D. was placed in the care of the Commissioner of ACS with an immediate trial discharge of the Subject Child to M.R. and co-respondent T.D.. M.R. was further ordered, *inter alia*, to engage in preventive services, comply with the GABI program, engage in individual therapy, and comply with a limited order of protection on behalf of the Subject Child. Thereafter, on January 3, 2024, the parties consented to G.D. being final discharged to the care of M.R. and co-respondent T.D.. Counsel for M.R. noted at that time that she intended to file a motion to have the finding of neglect against her client vacated. On March 5, 2024, counsel for M.R. filed the subject motion seeking to modify the Order of Disposition retroactively to suspend judgment, vacate the finding of neglect and dismiss the petition; and the matter was calendared to be heard on April 16, 2024.

ACS and the Attorney for the Child oppose the motion, in part, by arguing that the Court lacks jurisdiction to entertain the application as supervision under the Order of Disposition expired on January 3, 2024. In support of its position, ACS cites to *Matter of Jamie J. (Michelle E.C.)*, 30 NY3d 275, 287 (2017), for the proposition that "the Court's jurisdiction ends with the order of disposition." *Matter of Jamie J.* involved the issue of whether the Court could conduct permanency hearings and continue foster care after the underlying article 10 petition has been dismissed. The Court of Appeals held that the Family Court does not have jurisdiction to do so as such power is not delineated by Family Court Act § 1088 which addresses, *inter alia*, limited situations where the court can continue to hold hearings regarding placement of a child. In reaching this conclusion, the Court of Appeals noted that "Article 10 erects a careful bulwark against 'unwarranted state intervention into private family life' for which its drafters had a deep concern" (*Matter of Jamie C.*, 30 NY3d at 284 *quoting Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]).

The *Matter of Jamie J.* is not applicable here as movant is not seeking further governmental intervention but rather relief from the stigmas associated with a finding of neglect which is expressly provided for by Family Court Act § 1061 (*see Matter of Jveya J. [Ebony W.]*, 194 AD3d 937, 938 [2d Dept 2021] [noting that "Pursuant to Family Court Act § 1061, the [*2]Family Court may set aside, modify, or vacate any order issued in course of a child protective proceeding for good cause shown"]). Moreover, "Family Court Act § 1061 does not include a time limit and a finding of neglect does not expire with an order but constitutes a 'permanent and significant stigma which might indirectly affect [a person's] status in future proceedings'" (*Matter of Josephine G.P. [Madeline P.]*, 126 AD3d 906, 906-7 [2d Dept 2015] [citations omitted]). As noted in the practice commentaries relating to Family Court Act § 1061,"[t]here is no statute of limitations to govern a Section 1061 motion . . . The evidence upon which a *Leenasia C.* motion could be justified may hence mature months or years down the road from disposition" (Prof. Merril Sobie, Prac Commentaries, McKinney's Family Court Act § 1061 [online version]).

This Court is not persuaded by ACS and the Attorney for the Child's argument that movant's failure to request this relief prior to the final discharge of her child to her care precludes it from entertaining this application.**[FN2]** As noted in the *Matter of Leenasia C. [Lamarriea C.]*, 154 AD3d 1, 9 (1st Dept 2017), "[g]iven that the Family Court has broad authority to modify any order issued in the course of a child protective proceeding, upon a good cause showing that the modification promotes the best interests of the children, it follows that the Family Court Act does not prohibit the Family Court from granting a respondent a suspended judgment, 'retroactively,' in order to vacate a finding of neglect and dismiss a neglect proceeding." Consistent with *Leenasia C.*, courts have repeatedly considered such applications after supervision has expired (*see e.g. Matter of Boston G. [Jennifer G.]*, 157 AD3d 675 [2d Dept 2018] [affirming trial court's granting of respondent's application to vacate a finding of neglect pursuant to Family Court Act § 1061 which was made six months after supervision under the Order of Disposition expired]; *see also Matter of Arielle A.D. [Keith D.]*, 192 AD3d 1019 [2d Dept 2021] [Order denying application for retroactive suspended judgment and dismissal of petition, which was requested after the Order of Disposition expired, affirmed on the merits and not jurisdictional grounds]). To adopt ACS and the Attorney for the Child's rationale in arguing that the present application is time-barred would take a punitive approach to child protective proceedings which would run contrary to "the statutory scheme [which] is intended to be remedial, 'not punitive in nature'" (*Matter of Leenasia C.*, 154 AD3d at 7).

ACS further voices concern that if the Court were to find it has jurisdiction to entertain the present motion, similar applications may be raised years later causing great burden on it and the courts. Such considerations cannot serve as a bar to an aggrieved

individual seeking relief from the courts absent legislative intervention. Rather the delay in making the application is merely a factor for the Court to consider as to whether to grant such relief. Accordingly, the Court finds it has jurisdiction to address the merits of M.R.'s application seeking a retroactive [*3]suspended judgment, vacatur of the finding of neglect, and dismissal of the proceeding.

While movant frames the requested relief as one for a retroactive suspended judgment pursuant to Family Court Act § 1053, the heart of the matter is ultimately whether good cause exists to vacate the finding of neglect as there is no longer a statutory basis for further supervision over the family and none is being sought. Courts have identified four factors to consider when determining whether to vacate a finding of neglect: "(1) respondent's prior child protective history; (2) the seriousness of the offense; (3) respondent's remorse and acknowledgment of the abusive/neglectful nature of his or her act; and (4) respondent's amenability to correction, including compliance with court-ordered services and treatment" (*Matter of Leenasia C.*, 154 AD3d at 12).

Despite ACS's insistence in both its opposition papers and at oral arguments that the Court conduct an evidentiary hearing on the motion, there are no issues warranting such a hearing as the Court has sufficient information before it to render a decision (*cf. Matter of Jamel V.D.C. [Charlene M.],* 2024 NY Slip Op 02320 [2d Dept May 1, 2024] [noting that the "conducting of a hearing under section 1061 is not mandated, but is left entirely to the Family Court's discretion"]; *Matter of Sutton S. [Abigail E.S.]*, 152 AD3d 608, 609 [2d Dept 2017] [holding that "Where the court possesses information sufficient to afford a comprehensive, independent review, a hearing is not required").**[FN3]** In respect to prior child protective history, ACS represented at the initial court appearance on this matter on November 18, 2022 that G.D. was M.R.'s only child and there had not been prior child protective involvement with the family. Turning to consideration of the seriousness of offense, there is no dispute that there was a finding of neglect based in part that the child had femur fractures on both legs, a fracture by the knee of each leg, and a fracture by the ankle on both legs. The fractures were determined to be highly suspicious for non-accidental trauma by an attending physician and were in different stages of healing indicating that they did not all occur at the same time. In terms of remorse and acknowledgment, M.R. in her affidavit in support of the motion continues to deny knowing how the child incurred the various fractures but states that "I'm so sorry that anything bad happened to her and I will do anything I can to protect her ...I know that her safety is always my responsibility." Finally, it is undisputed that M.R. timely completed her service plan with positive reports from her providers and the foster agency during their respective involvement.

Counsel for M.R. explains in her moving papers that the relief being sought is largely in part due to the impact that being listed in the State Central Registry ("SCR") can affect

M.R.'s ability to work with children and that she intends to seek to have her name expunged from the [*4]registry if the finding is vacated. M.R., in her supporting affidavit, states that although currently employed, she is enrolling in a social worker program and plans to "work in the child welfare system to guide families through it."

As with an initial order, a modified order "must reflect a resolution consistent with the best interests of the children after consideration of all relevant facts and circumstances, and must be supported by a sound and substantial basis in the record" (*Matter of Elijah Q.*, 36 AD3d 974, 976 [3d Dept 2007] [internal quotation marks omitted] *lv denied* 8 NY3d 809 [2007]). Here, after giving consideration to the requisite factors, the Court finds that movant has failed to demonstrate good cause to modify the Order of Disposition and vacate the finding of neglect. Although the Court commends M.R. for her completion of her service plan and successful reunification with her child, it does not believe that the ultimate relief sought — vacatur the finding of neglect — is appropriate under the circumstances. As noted above, the seriousness of the finding of neglect is a material factor in deciding whether to afford the relief requested. Implicit in consideration of that factor is also the broader consideration as to whether a lasting finding of neglect is not only necessary to ensure the safety of the Subject Child, but that of any future children who may be in M.R.'s care. The finding of neglect here — involving several broken bones at different stages of healing on a five-month-old child and a further failure by movant to recognize the need for and timely seek medical care — is of such a serious nature that it should not be set aside absent compelling reasons. Notably, while M.R. has expressed remorse that the injuries occurred, she still has yet to acknowledge any meaningful degree of responsibility for how the injuries arose or why she failed to obtain medical care for the injured infant in a timely manner.

In light of the severity of the finding of neglect in this instance, and the limited insight that has been offered by movant, the Court finds not only that good cause has not been set forth to modify the Order of Disposition but that it is in the best of the interests of the Subject Child not to modify the Order; and further that compelling reasons remain to leave the finding of neglect intact along with any restrictions that may result in her ability to be employed to work with children in certain areas as a result of name remaining on the State Central Registry over the requisite eight-year period (*see generally* Social Services Law § 422; *cf. Matter of Sophia W. [Tiffany P.]*. 176 AD3d 723, 725 [2d Dept 2019] [holding that court did not abuse its discretion in denying mother's request to modify disposition for a suspended judgment and vacatur of the finding of neglect despite her compliance with her service plan noting the "grave medical harm" to the child and that the child was seven months old at the time of the incident]; *Matter of Alisah H. [Syed H.]*, 168 AD3d 842, 844 [2d Dept 2019] [reversing trial court finding that it erred in modifying disposition to vacate finding of neglect despite completion of service plan "given the serious and repeated nature of his conduct and his lack of

remorse for his actions"]; *Matter of Jessiah K. [Shakenya P.]*, 207 AD3d 724, 725 2d Dept 2022] [holding that "the Family Court providently exercised its discretion in denying the mother's motion to vacate the finding of neglect given, inter alia, the serious nature of the mother's conduct and the evidence showing the mother's lack of remorse for her actions"]; *Matter of Cassidy B. [Cyntora B.]*, 2024 NY Slip Op 02319 [2d Dept May 1, 2024] [holding that trial court did not err in denying a motion to modify disposition to a suspended judgment without a hearing where "the offense was serious and that the mother failed to show remorse or acknowledge the abusive nature of the child's injuries"]).

Accordingly, M.R.'s motion requesting that the Court modify the September 15, 2023 Order of Disposition to retroactively enter a suspended judgment and vacate the finding of [*5]neglect is denied.

Footnote 1: Counsel for M.R. attached an incorrect copy of the Order of Fact-Finding and Disposition to the moving papers. The Court finds this error to be de minimis and proceeds on the motion as it relates to the September 15, 2023 Order relating to M.R..

Footnote 2: The Court further notes that movant could not have requested a suspended judgment at any point while the child was in foster care as Family Court Act § 1052 (a) prohibits the Court from issuing a suspended judgment if the child is placed under Family Court Act § 1055. While M.R. could have requested that the Court modify the Order of Disposition to a release of the child to her care during the trial discharge period so that she could have sought a suspended judgment, that would have likely led to a disruptive result if granted as it would have required a change in the case planning responsibility from the foster agency to ACS at a late stage of the proceeding.

Footnote 3: The parties appeared before the Court on April 16, 2024 for oral arguments on the motion. At the appearance, counsel for ACS usurped the time allotted for oral arguments by repeatedly and unrelentingly challenging the statutory basis for the motion and demanding a hearing on the matter if the motion was not summarily denied that day. Movant, on the other hand, acknowledged that the Court had sufficient information before it to render a decision but agreed to an evidentiary hearing if the Court found it necessary. The Court thereafter set the matter down for a hearing to take place on May 20, 2024. However, upon further review of the motion and transcript of oral arguments, the Court informed the parties that it would be deciding the motion on written submissions alone as no issues of fact had been identified by the parties that warranted a hearing under the circumstances.

Cooperation of Non-Respondent Parent

Matter of Danna T., 82 Misc3d 723 (Family Court, Kings County, 2024)

Erik S. Pitchal, J.
The contested issue before the Court in this matter touches on a central question in the modern welfare state: when a child is at risk of harm from one parent, what is the proper role of the government vis a vis the child's other, non-offending parent in protecting her? In this case, the Administration for Children's Services ("ACS") asserts that it is best positioned to ensure the safety of a vulnerable child and that the rights of the non-offending parent must be subordinated to the state's involvement. Counsel for the child's mother claims that because she has done nothing wrong, lives apart from the respondent, and is the victim of violence at his hands, she should not suffer the liberty intrusion and affront to her dignity that ACS's suggested course of action would entail. The Court is called on to resolve this challenging issue, and, for the reasons that follow, rules in favor of the mother.

By petition dated January 11, 2024, ACS alleges that respondent Miguel T. neglected his child Danna, by perpetrating acts of domestic violence against Danna's mother, Raquel C.At the first appearance on the petition, ACS asked for a temporary order releasing the child to Ms. C. with court ordered supervision and a temporary order of protection against Mr. T. Ms. C. is not being charged with any parental malfeasance and is a non-respondent in this proceeding. Her attorney agrees the child should be in her care and that there should be an order of protection against the child's father, but on behalf of the mother, he objects to court-ordered supervision over her.

ACS concedes that prior to the filing of the petition, the child lived exclusively with Ms. C.. Mr. T. lived elsewhere, and in fact, his whereabouts are presently unknown; Ms. C. was the child's de facto sole custodian. She has other children in her care; the respondent was not charged with being a person legally responsible for them and they are not named on the petition.

Every day in New York City, ACS files petitions pursuant to Article 10 of the Family [*2]Court Act, invoking the jurisdiction of the court to authorize state intervention into the otherwise constitutionally protected realm of family life. While the government is

entitled to exercise its parens patriae role to protect children, *Prince v. Massachusetts*, 321 U.S. 158 (1944), that role is constrained when there is an available, fit parent. *Stanley v. Illinois*, 405 U.S. 645 (1972). Absent evidence that they are unfit or that their actions put their children at risk of harm, parents have the fundamental right to decide what is best for them; that an agent of the state might disagree with these decisions is not an entryway for valid state intervention. *Troxel v. Granville,* 530 U.S. 57 (2000).

New York law attempts to balance these interests — child protection on the one hand, and the sanctity of family life on the other — through its statutory scheme. The purpose of Article 10 of the Family Court Act itself is "to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being. It is designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met." Family Court Act § 1011.

In particular, Family Court Act § 1017 provides a framework for the involvement of non-respondent parents — those who are not charged with maltreating their children — once state intervention has been properly initiated on allegations that the other parent did commit child abuse or neglect. It is this section that ACS typically cites, and on which Family Court daily relies, for orders requiring non-respondent parents to cooperate with ACS supervision. However, as the facts of this case illustrate, § 1017 is not applicable to every family who become the subjects of an Article 10 filing. In fact, it appears that § 1017 has been misunderstood and misapplied in countless cases.

There are three typical scenarios involving one parent who is a respondent and the other who is a non-respondent. In the first, the respondent was the primary physical custodian of the child prior to the filing of the petition, and ACS seeks an order removing the child from the respondent's home and care and releasing the child to the non-respondent instead. Under the law, this is considered a "removal" of the child from a parent, as defined by Family Court Act § 1027. See *Matter of Lucinda R.*, 85 AD3d 78 (2d Dep't. 2011).

In the second scenario, the two parents resided together with the child prior to the filing of the petition. In such a case, ACS seeks an order excluding the respondent parent from the home, leaving the child in the care of the second, non-respondent parent. Though the child does not change residences, this is nevertheless also considered a "removal" of the child from a parent. See *Matter of Elizabeth C.*, 156 AD3d 193 (2d Dep't. 2017).

In the third scenario, the child lived exclusively with the non-respondent parent prior to ACS filing a case against the non-custodial, respondent parent. In these cases, ACS

seeks an order of protection against the respondent to limit his contact with the child, but does not seek any order which changes custody or the physical home where the child resides.

In all three of these scenarios, ACS typically asks for an order of protection against the [*3]respondent, and an order "releasing the child to the non-respondent parent, with ACS supervision, including announced and unannounced home visits" to the home of the non-respondent. Family Court has the statutory authority to enter orders that non-respondent parents cooperate with ACS supervision in the *Lucinda R*. and *Elizabeth C.* type scenarios, but it does not have this authority under the third type of case described above. Put simply, § 1017 does not apply to the third category.

The first rule of statutory construction is that words should be given their plain meaning. McKinney's Cons. Laws of NY, Statutes § 232. And § 1017 is plain on its face: it applies "[i]n any proceeding under this article, when the court determines that a child must be removed from his or her home, pursuant to part two of this article." Family Court Act § 1017(1). Part two of Article 10 includes § 1027, and as noted above, the meaning of "removed" under § 1027 has been defined by cases such as *Lucinda R.* and *Elizabeth C.*

However, there is no sensible reading of § 1017 or § 1027 which could make the third scenario — the one at issue in this particular case — one in which the child has been "removed" from a parent. On January 5, 2024, the child Danna was living with her mother, when her father allegedly came to the mother's home and violently assaulted her. On January 11, 2024, ACS filed a petition against Mr. T. ACS's request, at the end of the first appearance, is for the child to continue living with her mother, in the same residence as always. This is not a removal from the non-respondent parent, and it is not a removal from the home. Nor is it a removal from the respondent parent. The child did not live with her father. The child is not being moved from one parent's home to another, as was the case in *Lucinda R.* The child is not being deprived of the daily care of her father through an order of exclusion, as was the case in *Elizabeth C.* At most, the child is experiencing a limitation on her visitation with her non-custodial parent, but visitation restrictions — made pursuant to § 1029 and/or § 1030, are not removals.

The language ACS typically seeks in all one-respondent cases in which there is a suitable non-respondent available to care for the child originates from subsection 3 of § 1017. Even in those cases where § 1017 is applicable, the type of order which ACS requests is optional, not mandatory. "An order temporarily releasing a child to a non-respondent parent. . .may not be granted unless the person. . .to whom the child is released. . .submits to the jurisdiction of the court with respect to the child. The order shall set forth the terms and conditions applicable to such person. . .and may include,

but may not be limited to, a direction for such person to cooperate with. . .visits by the child protection agency, including visits in the home." Family Court Act § 1017(3).

Quite clearly, however, as noted above, § 1017 is not applicable at all to cases such as the one presently before the Court. And therefore, the Court has no authority to require Ms. C. to submit to its jurisdiction, or even to "release" the child to her. The child has not been removed, so there is no cause to "release." The status quo ante regarding custody and care remains in effect, limited only by an order of protection against Mr. T. In this case, the sole focus of the court, as limited by statute, is on the respondent and the child, not the non-respondent.

ACS may be concerned that this reading of § 1017 hampers its child protective mission. However, all other statutory provisions that might apply generally would still apply in this case [*4]and others like it. For example, if Ms. C. does not voluntarily cooperate in making the child available for reasonable, periodic assessments — to verify that Mr. T. is not violating the order of protection, for example — then the provision of Family Court Act § 1034 (requiring a parent to produce a child to ACS for an interview) remain available. Fundamentally, however, because Ms. C. is not alleged to be unfit, and because the child has not been removed from a parent or her home, the only person responsible under the law for protecting Danna is her mother. That her father is alleged to have harmed the child does not give the state carte blanche to make demands on her mother. The proper balance is reached by giving § 1017 its plain meaning, and leaving Ms. C. as the primary protector of her child.

THEREFORE, for the foregoing reasons, IT IS HEREBY ORDERED THAT ACS's application for an order directing Ms. Caceras to cooperate with ACS supervision is denied.

Custody- “Extraordinary Circumstances”

Matter of D.P. v S.R., 82 Misc3d 1201(A) (Family Court, Kings County, February 16, 2024)

Robert A. Markoff, J.
Recitation, as required by CPLR §2219(a), of the papers considered in the review of the respondent's motion for an order pursuant to CPLR § 3212 granting him summary judgment:

Notice of Motion
Attorney Affirmation
Decision and Order After Trial dated March 30, 2023
Petition dated May 18, 2023
AFC's Motion by OSC dated April 4, 2023, to set aside the Decision and Order After Trial

Affirmation in Opposition to Respondent's Motion for Summary Judgment
Petitioner's Exhibits 1-2

Affirmation in Opposition
Exhibits A-I

Attorney Affirmation (Respondent's Reply)
Exhibit 1
Exhibit A

I. Introduction

Before the court is the father's motion for summary judgment dismissal of the maternal [*2]aunt's custody petition on the ground that the aunt lacks standing to petition for custody. In opposition, the attorney for the child contends that the aunt has standing based on alleged harm that would come to the child if de facto custody with the aunt were disturbed. Resolution of the motion requires, inter alia, examination of cases recognizing that a nonparent may demonstrate the requisite extraordinary circumstances to seek custody where the "psychological trauma of removal [from the nonparent] is grave enough to threaten the destruction of the child" (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 550 [1976]; *Matter of Adoption of L.*, 61 NY2d 420, 428 [1984]). For the reasons set forth herein and under the circumstances of this case, the alleged psychological trauma of the child cannot be the basis of an extraordinary circumstances finding. This determination is made in the context of the family court's prior determination, following a hearing, that without the father's consent, the aunt took custody of the child in derogation of the father's parental rights and responsibilities, and that prior to this, the father and child enjoyed a positive parent-child relationship. As such, this Court must grant the father's motion for summary judgment dismissal of the aunt's second custody petition.

II. Procedural and Factual History

A. The Prior Proceeding

On May 25, 2021, the petitioner D. P. ("the aunt") filed a petition against the respondent S. R. ("the father") seeking sole custody of P. S. ("the child"). The Family Court (Friederwitzer, J.) held a fact-finding hearing that occurred over four days in January 2023, and conducted an *in camera* interview with the child. By order dated March 30, 2023, the Family Court (Friederwitzer, J.) issued a typed 15-paged Decision and Order After Trial in which it dismissed the aunt's petition for lack of standing.

In the Decision and Order After Trial, the court set forth the following findings of fact and conclusions of law. The child was born in Maryland on January 11, 2023. When the child was 9 months old, A.S. ("the mother") moved with the child to New York, and the father stayed in the Washington, D.C. area. The mother and child lived in New York until 2017. During the period when the mother and child resided in New York, the father's access to the child was limited. It was undisputed that the father voluntarily provided financial support to the child. Although the father was not proactive in seeking a relationship with the child during that early period, he made visits to New York to spend time with the child. During that early period, the maternal aunt resided with the child and the child's mother.

In 2017, the mother and child moved out of New York and returned to Maryland. From 2017 to April 2021, the father regularly visited the child, including having the child for overnight visits. On April 15, 2021, the child's mother died. The Family Court found that during the four-year period that the child lived in Maryland until the mother's death, the father and child "undeniably enjoyed a parent-child relationship and engaged in regular visitations."

On April 16, 2021, the day after the mother's death, the aunt and the father met to discuss custody of the child. Initially, the father agreed that the child should live with the aunt in New York. A few hours after the meeting, however, the father telephoned the maternal aunt to inform her that he wanted custody of the child. During the telephone conversation, the maternal aunt proposed that the father have only weekend and holiday visits, a proposal which the father rejected. The next day, on April 17, 2021, the aunt, without the father's permission, took the child from Maryland to New York and informed the father that she intended to keep the child in her [*3]custody.

Immediately thereafter, the father retained counsel and commenced a proceeding in Maryland.**[FN1]** The aunt then filed a custody petition in New York in May 2021. Delaying the ultimate resolution of the custody case was the aunt's unsuccessful challenge to the father's paternity. During the pendency of the first New York custody proceeding, the father sought unsupervised access to the child, but settled on court-ordered supervised visits. The father traveled from Washington, D.C. to New York for all court-ordered in-person visits. While he missed one phone call with the child due to a change in his work schedule, he attended all the in-person supervised visitation sessions. Notably, the father did not provide financial support once the aunt unilaterally took custody of the child. The father did not contact the aunt to inquire about the child's medical,

educational, and extracurricular status, preferring to obtain such information through court proceedings.

In the Decision and Order After Trial, the court dismissed the aunt's custody petition based upon its determination that, as a nonparent, the maternal aunt failed to establish that she had standing to seek custody against the child's father *(see Matter of Bennett v Jeffreys*, 40 NY2d 543, 550 [1976]).

In reaching its determination, the court rejected the maternal aunt's claim that the father abandoned and persistently neglected the child. Indeed, the court found that the deterioration of the father-child relationship occurred "while the child was under the maternal aunt's care, casting a shadow on her claim for custody." The court found that the maternal aunt "created a situation where the child depended solely on her and the maternal side of the family when she took the child just two days after the mother's death," and perhaps "negatively influenced the child's access to emotional support from the father during her bereavement." The court found that "the record offers no evidence to refute the father's claim that he shared a loving relationship with the child at the time of the mother's passing," and that only after coming under the maternal aunt's care during a vulnerable emotional period has the child developed "animosity towards her father." The court found that "the maternal aunt's actions effectively deprived the child of her one remaining parent following her mother's death, further exacerbating the child's distress and loss." The court determined that the maternal aunt failed to show that the father was absent from the child's life or was unfit to care for the child.

The court rejected the argument of the attorney for the child (hereinafter "AFC") that extraordinary circumstances existed based upon the mother's death, the child's grieving process with the maternal aunt, and the father's lack of any primary custodial role in the child's life. The court determined that it could not find that the aunt had equal rights to seek custody of the child based on the father's consent to a custodial arrangement with the mother while the mother was [*4]alive; further, the father "wasted no time seeking custody after the mother's passing."

Recognizing that the maternal aunt had assumed the role of the child's primary caretaker since April 2021 and had forged a strong bond with the child, the court determined, in accordance with *Bennett v Jeffreys* (40 NY2d at 548), that a parent cannot be displaced merely because another person would do a "better job of raising the child" or because the child has bonded psychologically with a nonparent (*id*.). In reaching its conclusion, the court also determined that there was "no testimony or evidence offered to demonstrate that the child would suffer what some courts define as 'psychological trauma'" in the event of a change of custody from the aunt to the father.

B. Post-Trial Motions

On April 5, 2023, the AFC moved, by order to show cause, for an order pursuant to CPLR § 4404[b] setting aside the Decision and Order After Trial, restoring the matter to

the trial calendar, and either granting a new trial or reopening the extraordinary circumstances hearing to permit introduction of evidence regarding new developments since the court issued its final order, and to permit introduction of evidence that was not presented at the trial due to the child's refusal to waive her therapist-patient privilege with respect to her ongoing mental health treatment. Alternatively, the AFC sought an order, pursuant to CPLR § 5015(a)(2), vacating the dismissal order based on newly discovered evidence. As interim relief, the AFC sought a stay of the dismissal of the maternal aunt's petition.

According to the AFC, the maternal aunt told the child that she had to leave her home in New York and move to the Washington, D.C. area to reside with her father. Upon learning this information, the child became distressed and experienced anxiety attacks. According to the AFC, on April 3, 2023, the aunt found the child in the bathroom vomiting uncontrollably. The child told the maternal aunt that she searched online for ways to kill herself because she did not want to live with the father and that she wanted to be with her mother in heaven. The child was admitted to New York Presbyterian Hospital. The AFC reported that she interviewed the maternal aunt, a hospital social worker, the child's therapist, and an adult cousin of the child, and that based on these interviews it was evident that the child was experiencing extreme anxiety at the prospect of moving from her aunt's home in New York to live with her father in the Washington, D.C. area.

Additionally, the AFC affirmed that the hospital social worker reported that she had spoken to the father about the child's condition, and that the father believed the incident was a ploy by the aunt to keep custody of the child. The hospital social worker allegedly told the AFC that "unless the father consented to continued hospitalization, the hospital would have to seek involvement by ACS and . . . hold [the child] involuntarily."

In her motion, the AFC sought to reopen the trial so that she could present new evidence to "prove that [the child] is so bonded with the aunt, and that her level of grief at the mother's death and lack of connection with the father is such that removing [the child] from the aunt's care and allowing the father to take custody of her at this time, without even a transition period, would 'threaten the destruction of the child'" (*see Bennett v Jeffreys*, 40 NY2d 543, 550 [1976]).

By order, dated April 5, 2023, the Family Court (Gliedman, J.) granted the AFC's *ex parte* requests for interim relief, including a direction that the child remain in the temporary custody of the maternal aunt. At the same time, the court issued an order, pursuant to Family Court Act § [*5]1034, directing the Administration for Child Services (ACS) to investigate allegations that the child experienced panic attacks and attempted suicide following the maternal aunt's revelation of the case outcome. ACS was directed to interview the parties, the child's medical providers, and to report on the child's treatment plan and whether there was a safety plan in place. On May 3, 2023, ACS issued its report.

On May 8, 2023, the Family Court (Friederwitzer, J.) directed that neither the maternal aunt nor the father was to discuss with the child the possibility of the child moving. The court also ordered that the name of the child's therapist be disclosed to the father for purposes of arranging therapy sessions with the child, father, and aunt.
On May 9, 2023, the AFC moved for an order requesting that the court so-order subpoenas for the AFC to obtain hospital, therapy, and school counseling records for the subject child, and finding that such records are "necessary to the appropriate resolution of this case."
The father opposed the AFC's motion to set aside the Decision and Order After Trial. The father filed an affidavit in which he argued that the claim that the child threatened to kill herself was based upon unsubstantiated hearsay statements. He argued that, regardless of whether the child did what was claimed, that it was the aunt and her family members who have "completely ruined a once flourishing, healthy, positive relationship that we have had for years, and that they have poisoned her to such a degree that she needs to be kept away from these people unless supervised." The father also stated that he believed his daughter needed counseling and asserted that he was "ready and able to enroll her in the same immediately after she is rightfully returned" to him.
By order, dated May 22, 2023, the Family Court (Friederwitzer, J.) denied both AFC's post-trial motions in their entirety.

III. The Subject Proceeding
On May 18, 2023, the maternal aunt filed a second petition against the father seeking an order of custody. The petition summarizes the prior history including that on May 25, 2021, the aunt filed a prior petition against the child's father seeking custody, which was dismissed by order dated March 30, 2023, for lack of standing.
In her new petition, the maternal aunt alleges that there has been a "dramatic change of circumstances which necessitates the filing of the instant petition." In this regard, she alleges that the child attempted suicide by ingesting pills after learning that she will no longer be living with her and that the father planned to come to New York on April 9, 2023, to take the child to live with him in Washington, D.C. The child was hospitalized where she was diagnosed with unspecified depressive disorder, unspecified anxiety disorder, bereavement, and post-traumatic stress disorder. The petition alleges that "upon information and belief" the child "was not able to agree that she would not make another attempt to harm herself if she is released to the care of her father." The petition asserts that it would be in the child's best interest for the petitioner to have custody of the child because the child has been totally acclimated to life in New York, that the child wishes to remain with the petitioner in New York, that the child does not want to live with the father, that the father has never been a primary caretaker, that the child has never slept overnight at the father's home, and the child has no or little relationship with the father or his fiancé.

Thereafter, by order dated May 22, 2023, the Family Court (Friederwitzer, J.) ordered that [*6]the child remains living with the aunt until further order of the court and directed, by separate orders dated May 22, 2023, and June 26, 2023, that the father have therapeutic visitation with the child. Those orders have continued to date.
The AFC moved for an order directing a forensic evaluation of the parties and the child. The father moved for an order to compel the aunt to respond to a demand for production and a bill of particulars, and separately moved for an order, inter alia, directing that the aunt be held financially responsible for the costs and fees of the therapeutic supervisor.[FN2]

A. The Father's Motion for Summary Judgment

The father now moves, pursuant to CPLR § 3212, for an order granting him summary judgment dismissal of the aunt's custody petition. The father relies upon the factual findings and legal determinations from the prior proceeding, and the allegations set forth in the aunt's second custody petition. The father contends that the events occurring after the dismissal order, including the child's act of self-harm, do not amount to extraordinary circumstances to overcome the father's superior right to seek custody.
In opposition to the father's motion, the aunt argues, inter alia, that, given the unique set of facts and circumstances regarding the child's mental health and risk of suicide, the court should focus on the child's best interest rather than blindly applying legal rules. The aunt contends that the court should exercise its powers to protect the child from injury and mistreatment and should award the aunt custody to safeguard the child's physical, mental and emotional well-being.
The AFC asserts that the father' contentions are not appropriately made in a summary judgment motion under CPLR § 3212, and that, in any event, the court should conduct a second hearing to determine whether the aunt and the AFC can prove extraordinary circumstances warranting a finding that the aunt has standing to seek custody. The AFC submits, inter alia, a copy of the child's hospital records and, in effect, requests that she be excused from the requirement that such records be submitted in admissible form. She argues that these records support the allegations in the aunt's second petition including that the child experienced extreme distress, suicidal ideations and behavior upon learning the outcome of the first proceeding, and that the child's psychological trauma is sufficient to raise a triable issue of fact regarding the maternal aunt's standing. The AFC contends that extraordinary circumstances may be found even in the absence of evidence of the father's fault, and notwithstanding that the aunt's failure to facilitate the father's relationship with the child. She also contends that the child's strong wishes, in themselves, constitute extraordinary circumstances that may warrant a finding that the aunt has standing.

IV. Analysis

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce [*7]evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp*., 68 NY2d at 574; *Winegrad v New York Univ. Med. Center*, 64 NY2d at 853). "The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his [or her] failure to meet the strict requirement of tender in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 597-598 [1980]).

Initially, contrary to the position of the AFC, the father's motion is appropriately made under CPLR 3212 as opposed to CPLR 3211(a)(7). By submitting the record of the prior proceeding, the father is not merely testing the sufficiency of the allegations contained in the aunt's second petition but is asking the court to consider the record of the prior proceeding *in addition to* the allegations in the new petition to determine whether there exists any triable issue of fact (*see Tenzer v Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467 [1st Dept 1987]). Essentially, he is arguing that the events that occurred after the dismissal of the maternal aunt's first petition are not a sufficient change of circumstances to warrant a second full evidentiary hearing on the issue of the aunt's standing (*see Matter of Newton v McFarlane*, 174 AD3d 67, 68 [2d Dept 2019]). The father acknowledges that, for purposes of his summary judgment motion, the allegations in the second petition must be taken as true and that all inferences must be resolved in favor of the maternal aunt.

Given that there has already been a full hearing and determination on the issue of the aunt's standing to seek custody of the child, this Court must first determine whether the aunt, in her petition and in response to the father's summary judgment motion, has articulated an appropriate basis for continued judicial intervention. In considering the aunt's request for a second evidentiary hearing, the court bears in mind that a second contested custody hearing can, itself, "create trauma and uncertainty for the child, as well as trauma, uncertainty, and expense for the [litigants]" (*Matter of Newton v McFarlane*, 174 AD3d 67, at 76).

"Absent extraordinary circumstances, *narrowly categorized*, it not within the power of a court, or, by delegation of the Legislature or court, a social agency, to make significant decisions concerning the custody of children, merely because it could make a better decision or disposition. The State is parens patriae and always has been, but it has not displaced the parent in right or responsibility" (*Matter of Bennett v Jeffreys*, 40 NY2d at 545 [emphasis added]). Under existing constitutional principles, the courts are

"powerless to supplant parents except for grievous cause or necessity," which may include, for example, "fault or omission by the parent seriously affecting the welfare of a child, the preservation of the child's freedom from serious physical harm, illness or death, or the child's right to an education, and the like" (*Matter of Bennett v Jeffreys*, 40 NY2d at 545; *see Troxel v Granville*, 530 US 57 [2000]; *Stanley v Illinois*, 406 US 645, 651 [1972]).

In the seminal case *Matter of Bennett*, the Court of Appeals created a two-pronged inquiry for determining whether a nonparent may obtain custody as against a parent (see *Matter of Suarez v Williams*, 26 NY3d 440, 446 [2015]). First, the nonparent must prove the existence of extraordinary circumstances such as surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the [*8]child (*Matter of Suarez v Williams*, 26 NY3d at 446 [internal quotation marks and citations omitted]; *Matter of Bennett v Jeffreys*, 40 NY2d at 544-546). "If extraordinary circumstances are established such that the non-parent has standing to seek custody, the court must make an award of custody based on the best interest of the child" (*Matter of Suarez v Williams*, 26 NY3d at 446, citing *Matter of Bennett v Jeffreys*, 40 NY2d at 548; *see Matter of Gonzalez v Pagan*, 178 AD3d 1039, 1039 [2d Dept 2019]; *Matter of Canabush v Wancewicz*, 193 AD2d 260, 263 [3d Dept 1993]).

Critically, in *Matter of Bennett*, the Court recognized that "a child may be so long in the custody of the nonparent, even though there has been no abandonment or persisting neglect by the parent, the psychological trauma of removal is grave enough to threaten destruction of the child" (*Matter of Bennett v Jeffreys*, 40 NY2d at 550). Even so, such a "situation would offer no opportunity for the court, under the guise of determining the best interest of the child, to weigh the material advantages offered by the adverse parties" (*id*.) The opinion in *Matter of Bennett* is not clear whether the "psychological trauma of removal" is considered an "extraordinary circumstance" under the first prong to establish a nonparent's standing, or whether it is a factor to be considered in the second prong on the child's best interests. Either way, the Court's discussion of "the psychological trauma of removal" is limited to situations where the child had been "so long in the custody of the nonparent." In other words, it was presumed that the "psychological trauma" derived from breaking the psychological bond developed over time between the nonparent and the child, as opposed to other potential reasons for the psychological trauma.

In *Matter of Adoption L.* (61 NY2d 420 [1984]), the Court of Appeals clarified and reiterated the principle " 'the child may be so long in the custody of the nonparent that separation from the natural parent *amounts to an extraordinary circumstance*, especially when 'the psychological trauma of removal is grave enough to threaten destruction of the child'" (*id*.[emphasis added], quoting *Matter of Bennett v Jeffreys*, 40 NY2d at 550).

But, in that case, the Court of Appeals made clear that "when the separation between the natural parent and child is not in any way attributable to a lack of interest or concern for the parental role, that separation does not amount to an extraordinary circumstance and, indeed, deserves little significance" (*Matter of Adoption L.,* 61 NY2d at 429; *see Matter of Guzzey v Titus*, 220 AD2d 976, 977 [3d Dept 1995]). The Court stressed that "courts may not deny the natural parent's persistent demands for custody simply because it took so long" (*Matter of Adoption L.,* 61 NY2d at 429 [internal quotation marks and citations omitted]; *see Dickson v Lascaris*, 53 NY2d 204, 210 [1981]; *Matter of Sanjivini K*., 42 NY2d 374, 382 [1979]).

Moreover, the Court of Appeals cautioned that the "resolution of cases must not provide incentives for those likely to take the law into their own hands. Thus, those who obtain custody of children unlawfully, particularly by kidnapping, violence or flight from the jurisdiction of the courts, must be deterred. Society may not reward, except at its peril, the lawless because the passage of time has made correction inexpedient. Yet, even then, circumstances may require that, in the best interest of the child, the unlawful acts be blinked" (*Matter of Bennett v Jeffreys*, 40 NY2d at 550; *see Matter of Adoption L*., 61 NY2d at 429-430). The Court of Appeals rejected the notion that "third-party custodians may acquire some sort of squatter's rights in another's child. Third-party custodians acquire 'rights'—really the opportunity to be heard—only derivatively by virtue of the child's best interests being considered, a consideration which arises [*9]only after, as the cases have always held, the parent's rights are responsibilities have been displaced" (*Matter of Bennett v Jeffreys*, 40 NY2d at 552, fn. 2).

Here, considering the record of the prior proceeding and accepting the maternal aunt's and AFC's allegations as true, the child became distressed and attempted suicide upon being informed that, because of the court's determination in the prior proceeding, she must leave New York and live with her father in Maryland. In her post-trial motion, the AFC reported that the child explained to the aunt that she attempted to kill herself to join her deceased mother in heaven, and because she did not want to move from New York to live with her father. Even assuming that the aunt's allegations are true, a significant cause of the child's psychological trauma is her continuing grief following the death of her mother. Indeed, the Family Court (Friederwitzer, J.) found that that by precipitously transporting the child from Maryland to New York within days of the mother's death, the aunt exacerbated an already-traumatic situation for the child and deprived the child of the opportunity to grieve her mother's loss in Maryland with her only remaining parent. Notably, the child's alleged psychological trauma and suicide attempt occurred while the child was under the care and custody of the maternal aunt in New York. The father's alleged insistence—in the aftermath of the dismissal of maternal aunt's prior petition—that the child be returned to him does not evince a lack of interest or concern for the parental role, but in fact just the opposite. In retrospect, as suggested by the AFC in her motion papers, the father should have developed a transition plan in consultation with

the child's mental health providers, the AFC and the aunt. Even so, the subsequent events do not change the facts, as found by the Family Court (Friederwitzer, J.), that the maternal aunt, in effect, took custody of the child without the father's permission and in derogation of the father's parental rights, and that the father has been persistent in his attempts to obtain custody ever since (*see Tyrell v Tyrell*, 67 AD2d 247 [4th Dept 1979] [no extraordinary circumstances found where parent never acquiesced in custody by nonparent stepmother and promptly commenced proceeding against nonparent upon death of the child's other parent]).

There is no question that the child's bond with the maternal aunt has grown stronger over the pendency of this litigation, and that the child's bond with her father, which had been a positive one prior to the aunt's actions, has been strained. Even so, the strong bond formed between the aunt and the child is not a sufficient reason to displace the father's parental rights. To hold otherwise would defy the warning by the Court of Appeals that nonparents do not acquire "squatter's rights" to another person's child (*Matter of Bennett v Jeffreys*, 40 NY2d at 552, fn. 2; *see also Matter of Adoption of L*, 61 NY2d at 429 [courts may not deny the natural parent's "persistent demands for custody simply because it took so long"]). Thus, the father, who has persistently been demanding that the aunt return his child since the aunt first removed her from Maryland, established *prima facie* entitlement to summary judgment (*see Matter of Thompson v Bray*, 148 AD3d 1364 [3d Dept 2017] *Matter of Burghdurf v Rogers*, 233 AD2d 713 [3d Dept 1998]; *Matter of Titus v Guzzey*, 244 AD2d 684, 686-687 ["Assuming, arguendo, that (the child) has suffered some degree of emotional trauma as a natural consequence of the separation (from the nonparent), we nonetheless conclude that the record is devoid of any proof of neglect, abuse or unfitness on (the parent's) part, thereby precluding a finding of extraordinary circumstances"]).

The maternal aunt and the AFC fail to demonstrate the existence of a triable issue of fact [*10]on the issue of the aunt's standing. The maternal aunt does not submit any evidence in opposition to the motion, and, in effect, relied upon the same documentation that was submitted by the father. The AFC submitted uncertified copies of the hospital records, to the effect that they document and support the allegations contained in the petition. Even excusing that the records were not submitted in admissible form (*see Zuckerman v City of New York*, 49 NY2d at 597-598), they nonetheless, for the reasons stated above, do not raise a triable issue of fact on the aunt's standing.

The cases relied upon by the AFC in support of her argument that this Court should conduct a second hearing are inapplicable. For example, although *Matter of P.T. v T.R* (2004 NY Slip Op. 51000[U] [Fam Ct, Orange County 2004), has some factual similarities to this case, it is distinguishable because, unlike this case, there had never been a full hearing and determination on the nonparent's custody petition. The case *Matter of Michael B*. (80 NY2d 299 [1993]) did not involve a custody proceeding between a nonparent and a parent, but rather a "best interest" inquiry under Social

Services Law § 392, and therefore is not applicable to the facts of this case. In *Matter of Curry v Ashby* (129 AD2d 310 [1st Dept 1987]), the First Department held that there may be facts establishing extraordinary circumstances in the absence of culpable conduct on the part of the parent. However, it is distinguishable on the facts because, in contrast to this case, the nonparent did not acquire custody of the child through impermissible means.

The rule that nonparents must prove extraordinary circumstances before the court reaches the issue of the child's best interests may lead to outcomes that cause psychological trauma to the child and may not actually be in the child's best interest. For example, in *Matter of Adoption of L*., the Court of Appeals, applying its precedent in *Matter of Bennett*, determined that then 4-year-old child had to be removed from the custody of the nonparents and given to the birth mother. The nonparents had raised the child from birth and were described as "exemplary parents," and the child's birth mother, who had not seen the child since the time of birth, was described as being "poor, unwed, and an illegal alien who speaks little English and has no settled plans for the child's and her own future" (*Matter of Adoption L*., 61 NY2d at 423; *see Matter of Thompson v Bray*, 148 AD3d 1364 [3d Dept 2017] [significant psychological bond with nonparent and period of no contact with parent did not amount to extraordinary circumstances]; *Matter of Burghdurf v Rogers*, 256 AD2d 1023 [3d Dept 1998]; *Matter of Titus v Guzzey*, 244 AD2d 684 [3d Dept 1997]). While this court is concerned about the potential for the child to suffer additional psychological trauma, it is constrained by the law in this area. Accordingly, the father's motion for summary judgment dismissal of the aunt's petition is granted.

The court would be remiss if it did not address the allegation that the child attempted suicide after learning that the aunt's first custody petition was dismissed, notwithstanding that such allegations were not presented in admissible form. It is with the child's mental health and physical wellbeing in mind that this Court therefore stays its own order for a period of thirty days. This Court hereby directs that counsel and the parties appear for a conference prior to the order going into effect on March 18, 2024. Further, this period will ensure that the father has the most up-to-date information regarding the child's mental health from her direct care providers, which shall be used by the father to guide his actions. Were the father to act in a way that places the child at imminent risk of impairment of emotional health or condition, those actions may be subject to State scrutiny and interference (Family Court Act § 1012[f][i][A] [defining a [*11]"neglected child" as one whose "physical, mental or emotional condition . . . is in imminent danger of becoming impaired as a result of (her) parent . . . to exercise a minimum degree of care in supplying the child with adequate . . . medical . . . care, though financially able to do so"]; Family Court Act § 1012[h] [including "self-destructive impulses" within definition of conduct that may constitute "impairment of mental or emotional condition"]; Family Court Act § 1027[a][3][providing, inter alia, that the AFC

may apply for an order to determine whether the child's interests require protection]; *Matter of Hofbauer*, 47 NY2d 648 [1979]).
Accordingly, the Court's decision is stayed until March 18, 2024. The parties are directed to appear for a virtual court conference on or before March 15, 2024 in part 9a, with the conference date to be selected with the court attorney.

PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO APPELLANT BY THE CLERK OF COURT, OR 30 DAYS AFTER SERVICE BY A PARTY OR THE ATTORNEY FOR THE CHILD UPON THE APPELLANT, WHICHEVER IS EARLIEST.
Dated: February 16, 2024
Hon. Robert A. Markoff

Footnotes

Footnote 1: The Maryland custody proceeding was dismissed for reasons unknown to this Court. Given the undisputed facts regarding the child's residence, Maryland was the child's home state under Domestic Relations Law § 75-a(7), and, therefore, had jurisdiction to determine initial custody under Domestic Relations Law § 76. However, since both the New York and Maryland proceedings are concluded, the issue of which court had subject matter jurisdiction in those prior proceedings is now academic. Further, it should be noted that the father's paternity was established in the New York proceedings.

Footnote 2: The father's motion for a bill of particulars was denied, and the other motions are held in abeyance pending determination of the instant summary judgment motion.

Evidence- Recorded Conversation

S.G. v K.W., 81 Misc3d 1243(A) (Family Court, Kings County, July 27, 2023)

Judith Waksberg, J.

Relevant Procedural History

The narrow issue that is the subject of this decision is whether or not a recording of a conversation between the Respondent Father K. W. (hereinafter "the Father") and the subject child is admissible during a Best Interests hearing where neither parent was aware the child was recording the conversation. For the reasons stated below, the Court finds that the recording is admissible.

On or about September 20, 2019, the Petitioner Mother S. G. (hereinafter "the Mother") filed an amended custody modification petition against the Father. At the time of the filing, there was a Final Order of Custody dated June 28, 2016, which granted the Father sole legal and physical custody.

The Court first held a hearing to determine whether there had been a change of [*2]circumstances since the order of custody. In the course of that hearing, the Court held an *in camera* interview with the Child. After the hearing, the Court determined that the Mother had met her burden of establishing a change of circumstances, and a hearing began on whether modification was in the best interests of the child. In the course of the Best Interests hearing, the Court conducted another *in camera* interview with the Child.

During the cross-examination of the Father by the Attorney for the Child, the Attorney for the Child asked the Father questions as to whether he had made specific statements to the Child. The Father denied making any of those statements to the Child.

After hearing the Father's denials of these statements, the Attorney for the Child established that the Father and Child had a conversation soon after the Father's mother passed away in January 2022. The Attorney for the Child also established that the Child has the ability to record conversations on her cell phone. The recorded conversation was then played for the Father. He acknowledged that this was a recording of the conversation he and the Child had after the Father's mother passed away. He acknowledged that the recording was an accurate recording of the conversation. After the recording was played, the Father was asked again about the specific statements he made to the Child during that conversation. The Father then testified that he did in fact make those statements to the Child.

The Attorney for the Child then attempted to move the recording into evidence. The Father's Attorney objected. The Court asked that written memoranda of law be submitted, and a briefing schedule was set. After a request for an extension by the Attorney for the Child supported by Attorneys for both parents, responses were timely submitted by both the Attorney for the Child and the Attorney for the Father on or about

April 28, 2023. The Attorney for the Mother indicated on the same day that he was not going to file papers on behalf of the Mother.

Legal Analysis

The Court is granted great discretion when it comes to issues of admissibility of evidence. *Chihuahua v. Birchwood Estates*, LLC, 203 AD3d 1015 (2nd Dept. 2022); *Berrouet v. Greaves*, 35 AD3d 460 (2nd Dept. 2006); *Messinger v. Mount Sinai Medical Center*, 15 AD3d 189 (1st Dept. 2005). As the Court of Appeals stated in *People v. Wise*, 46 NY2d 321, 327 (1978), with respect to impeachment evidence: "In case of doubt . . . the balance should be struck in favor of admissibility, leaving to the [factfinder] the function of determining what weight should be assigned the impeachment evidence. Applied in this fashion, the law of previous contradictory statements will advance rather than impede the truth-seeking process."

Audio recordings, where there is a participant party in the conversation, have commonly been introduced to impeach a witness or have been held to be admissible to the case-in-chief. *Hirsh v. Stern*, 74 AD3d 967 (2nd Dept. 2010) (affirming the admission of an audio recording, where a participant to the conversation testified that the conversation had been accurately and fairly produced, and finding that a chain of custody analysis was not required); *see also Donald G. v. Hope H.*, 160 AD3d 1061 (3rd Dept. 2018) (finding the lower court properly admitted two recordings for impeachment purposes where the mother identified her voice on each recording, acknowledged the recordings fairly represented statements that she had made, and was given the opportunity to explain the inconsistencies between her hearing testimony and her remarks on the recording); *Lipton v. New York Transit Authority*, 11 AD3d 201(1st Dept. 2004) (affirming that an audio recording made by the plaintiff's investigator was properly admitted as impeachment evidence where the investigator was a participant in the conversation, that the tape accurately reproduced the conversation and had not been altered, and that the necessary foundation was laid [*3]to admit the tape).

In its discretion, the Court therefore holds that in the instant case the audio recording can be admitted for impeachment purposes. An adequate foundation was laid for the introduction of the audio recording. The Attorney for the Child introduced a recording voluntarily made by the Child on her iPhone. The Court finds that a proper foundation was laid in that the Father confirmed he was a participant in the conversation and that the other voice on the recording is that of the Child, that the conversation took place right after his mother passed away in January 2022, and that the recording is an accurate depiction of the conversation he had with this Child. Given that chain of custody need not be established, the Court finds that a sufficient foundation has been laid for the introduction of the audio recording.

In opposing the introduction of the recording, the Father's Attorney contends that the Child, as a minor, is not capable of consenting to the recording of the conversation. The Court rejects that contention and finds that the Child, although only 11 years old, is capable of providing consent to having the conversation recorded.

In *People v. Badalamenti*, 27 NY3d 423 (2016) the New York Court of Appeals in its discussion of a case pertaining to vicarious consent on behalf of a child to record a conversation between the other parent and the child noted that, in making an admissibility determination, the Court should consider factors which include but are not limited to "the parent's motive or purpose for making the recording, the necessity of the recording to serve the child's best interests, and ***the child's age, maturity, and ability to formulate well-reasoned judgments of his or her own regarding best interests***[emphasis added]." *Id.* at 439.

Similarly, in *People v. Bartholomew*, 150 AD3d 1138 (2nd Dept. 2017), a 14-year-old victim of rape recorded four conversations (in person and over the phone) between her and the defendant, her father, in which he apologized to her, asked her not to tell anybody and told her he deserved to go to jail for the rest of his life. The rape was reported to the police two days later and the police made a digital copy of the tape recordings. At trial, the recordings were admitted, and the defendant was convicted of rape in the first degree. The Second Department addressed the admissibility of eavesdropping evidence and found that the trial court correctly determined that the 14-year-old, in recording the conversations with her father, did not commit any eavesdropping crime, and then found that under the circumstances of that case, she was capable of giving consent to recording these conversations. *See also People v. K.B.*, 43 Misc 3d 478 (Sup. Ct. Kings Co. 2014) (denying a motion to preclude a taped conversation initiated by a 14-year-old victim of rape with the defendant, also her father, where he pleaded with her not to have him arrested, and finding that the 14-year-old in fact "consented" to the recording).

In this case, the Court met with the Child during two *in camera* interviews and was able to assess her maturity and her ability as an 11-year-old to "consent" to recording the conversation between her and her father and finds that this Child was fully able to so consent. The fact that her Attorney is now seeking to introduce the contents of the recording into evidence as a direct advocate for the Child, means that the Child wished the Court to hear the contents of recording and consider it in making its decision to modify the existing custody arrangement.

Thus, in addition to admitting the recording for impeachment purposes, the Court holds that the recording on its own is admissible as evidence in chief. The Child has made the recording and has consented through her Attorney to the conversation being recorded and [*4]introduced into evidence. The contents of the conversation between the Child

and her Father are indeed relevant for the Court's consideration of Best Interests. *See Moses v. Williams*, 138 AD3d 861 (2nd Dept. 2016) (enumerating additional considerations for best interests as cited by other cases including which parent will promote the best stability and the past performance of each parent); *Berrouet v. Greaves*, 35 AD3d 460 (2nd Dept. 2006) (listing factors for best interest analysis as including parental guidance provided by custodial parent, each parent's ability to provide for the child's emotional and intellectual development, the ability of the parent to provide for the child financially, the relative fitness of each parent and the effect an award of custody to one parent might have on the child's relationship with the other parent). Recognizing that this is only one conversation the Father had with the Child, the Court is admitting the recording in evidence and will determine the weight to give it in light of all the other evidence before the Court. *People v. Wise*, 46 NY2d 321 (1978).

In sum, for the above stated reasons, the Court finds that the Attorney for the Child laid the proper foundation for introducing the audio recording and that the recording can be admitted as impeachment evidence and is admissible as evidence in chief based on the Child's consent and its relevance to the Best Interests of the Child.

Notify Counsel and Parties.

Ineffective Assistance of Counsel

Matter of Adjournment of a Motion for Summary Judgment, Misc3d 2024 NY Slip Op 24039 (Supreme Court, Kings County, February 14, 2024)

Aaron D. Maslow, J.

Question Presented

Should a judge assigned to a Civil Term Part exercise the inherent discretion to adjourn a motion sua sponte when an attorney appearing at oral argument is significantly unprepared? This Court found no appellate authority on the issue.

Facts

The instant matter involved an action by a plaintiff merchant cash advance company alleging a breach of contract on the part of the defendant seller of future receivables, thereby resulting in defendant company and defendant guarantor being liable for the unpaid receivables plus various fees. The matter was before this Court for oral argument on a motion for summary judgment by the plaintiff merchant cash advance company.

At oral argument, the attorney appearing for the defendants in an of counsel capacity was flustered from the outset, and began presenting arguments at variance with the defendants' submitted papers in opposition.[FN1]

The thrust of the plaintiff merchant cash advance company was that the seller of future receivables breached the merchant cash advance contract and, therefore, it was entitled to summary judgment. In opposition, the defendant seller of future receivables argued in its attorney's affirmation that the plaintiff failed to establish a breach of contract. Hence, this Court was startled when the of counsel attorney appearing for the defendant argued as follows:

ATTORNEY: Your Honor, there was a contract. There was a breach of contract. There were damages that accrued, and - -

COURT: You're agreeing that your client broke the contract?

ATTORNEY: No, no.

COURT: You just said that there was a breach of contract.

ATTORNEY: Sorry, I'm reading from the wrong - -

COURT: You're reading from the wrong case now?

ATTORNEY: Yeah.

COURT: Oh.

ATTORNEY: Sorry.

COURT: Do you know which case we're in?

ATTORNEY: Yeah, yeah, _____.

COURT: Yes, versus _____.

ATTORNEY: Yeah, mm-hm. And we represent _____ in _____.

COURT: Excuse me. All right. I'm sorry, _____. You do not represent _____. You represent _____.

At that point, the Court became quite concerned. Being of the view that the attorney was, at the very basic minimum, simply not prepared to represent the defendants, the Court sua sponte discontinued oral argument and adjourned the motion. The Court directed that the attorney of record appear in person to represent the clients.

COURT: And I think that the Court has a responsibility to — the Court isn't here to judge the capability of counsel representing parties, but when the Court sees that there's inadequate representation to the extent I have seen here, the Court cannot in good conscience continue this oral argument. This is going to be adjourned, and I'm going to direct that _____ appear on behalf of Defendant. I'm going to issue an interim order.

This Court now elucidates further its reasoning in support of taking the above-described actions.

Discussion

In a criminal matter a state court bears a greater responsibility to insure that that the defendant is adequately represented inasmuch as the United States Constitution affords due process to criminal defendants, and that incorporates the Sixth Amendment's right to assistance of counsel, which has been defined as a right to effective assistance of counsel (*see McMann v Richardson*, 397 US 759, 771 n 14 [1970] ["It has long been recognized that the right to counsel is the right to the effective assistance of counsel."]). The State Constitution's right "to appear and defend in person and with counsel as in civil actions," likewise subsumes the right to effective assistance of counsel (*see People v Baldi*, 54 NY2d 137, 147 [2007] [citing NY Const art I, § 6]).

However, within the context of a civil action, should the judge intervene when it is evident that a party is not being adequately represented?

"It is well settled that in the context of civil litigation, an attorney's errors or omissions are binding on the client and, absent extraordinary circumstances, a claim of ineffective assistance of counsel will not be entertained (*see, Olmstead v Federated Dept. Stores,* 208 AD2d 979; *Department of Social Servs. v Trustum C. D.,* 97 AD2d 831)" (*Matter of Saren v Palma*, [*2]263 AD2d 544 [2d Dept 1999]; *see Estafanous v New York City Environmental Control Bd.*, 136 AD3d 906 [2d Dept 2016] [ALJs denial of adjournment to secure counsel did not violate due process]; *Baywood Elec. Corp. v New York State Dept. of Labor*, 232 AD2d 553 [2d Dept 1996] [denial of adjournment to secure counsel for underpayment of wages hearing did not violate due process]; *Fu Kuo*

Hsu v Hsuan Huang, 149 AD2d 405 [2d Dept 1989] [rejection of claim of denial of effective assistance of counsel in divorce action]).

In a professional disciplinary action against a medical professional, where the attorney failed to appear at a hearing after various adjournments, it was likewise held that with certain narrow exceptions, the right to the effective assistance of counsel does not extend to civil actions or administrative proceedings (*see Patricia W. Walston, P.C. v Axelrod*, 103 AD2d 769 [2d Dept 1984]). The exceptions apparently include the right to be *advised* that one may have counsel at a child neglect hearing (*see Matter of Ella B.*, 30 NY2d 352 [1972]); the right to counsel at a parole revocation hearing (*see People ex rel. Menechino v Warden, Green Haven State Prison*, 27 NY2d 376 [1971]); and the right to assignment of counsel to an indigent mentally disabled patient in a proceeding to establish sanity (*see People ex rel. Rogers v Stanley*, 17 NY2d 256 [1966]). Obviously none of these exceptions applied in the instant situation.

"There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' " (*Link v Wabash R.R. Co.*, 370 US 626, 633-634 [1962] [internal citation omitted].)

The Court distinguishes the foregoing case law by noting that the context in which it determined that further argument should be halted and the matter adjourned was not a trial or hearing where an attorney failed to appear and an adjournment was requested and denied; neither was it a trial where an attorney did not pursue the best strategy on behalf of the client, and neither was this an instance where a party appeared pro se and made an ineffectual presentation despite the right to be represented by counsel.

Rather the context in which the proceedings were stopped and an adjournment ordered was oral argument on a dispositive motion in which a party was represented by an attorney who was befuddled and evinced lack of knowledge of the identity of the client and the client's written arguments in opposition. Where there is a potential substantial violation of the Rules of Professional Conduct a judge "shall take appropriate action" (Rules Governing Jud Conduct [22 NYCRR] § 100.3 [D] [2]). "A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." (Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.1 [a].) Moreover, "A judge shall accord to every person who has a legal interest in a proceeding, or that

person's lawyer, the right to be heard according to law" (Rules Governing Jud Conduct [22 NYCRR] § 100.3 [B] [6]).

Taken together, these ethical prescriptions impose a basic duty upon a judge to take remedial action when it is evident that a lawyer's representation is so significantly diminished due to lack of knowledge of the facts of the case that it would be fundamentally unfair to the client and impair the latter's ability to be heard, and no prejudice inures to the opposing party [*3]from a brief adjournment at the pre-trial stage. The instant situation was not one where a trial was about to commence and witnesses were ready to testify. At issue was a summary judgment motion which could easily have been adjourned for reasons unrelated to the effectiveness of counsel, such as an attorney's illness or engagement in another courthouse.

This Court took seriously the prescription to "take appropriate action" (*id.* § 100.3 [D] [2]), since an attorney's failure to provide competent representation can result in disciplinary action, an example having taken place as follows:

We find that, when the respondent represented the Trents in the foregoing transaction, her professional experience was principally in criminal law, and she had limited experience in real estate transactions. Notwithstanding the respondent's knowledge of the Trents' limited reading proficiency, she did not insure that they understood what was at stake in the absence of security for the seller-financed loan. The Special Referee found, and we agree, that "the terms of sale were . . . seriously skewed" against the Trents, and that the respondent never explained the inherent risks of the transaction to them. Although the respondent's testimony indicates that she may not have fully understood the seller financing clause, the unusual and unfamiliar terms of this transaction should have signaled a need for the respondent to consult an attorney with greater experience in real estate transactions. The respondent's failure to appreciate the inherent risk in an unsecured, seller-financed transaction, or to seek assistance from a more experienced attorney, put her clients at risk for the substantial financial loss that ultimately occurred. Consequently, we find, based upon a preponderance of the evidence, that the respondent failed to provide competent legal representation to her clients, which conduct adversely reflects on her fitness as a lawyer.

(*Matter of Totten*, 123 AD3d 118, 123 [2d Dept 2014].)

While some may view the actions taken as tipping the scale in favor of one of the competing parties in the construct of a commercial dispute, this Court perceives vindication in a scholarly article which included the following within a discussion of judicial prescriptive action in the pre-trial phase of the civil — as opposed to the criminal — process:

Manifest incompetence[FN2] in civil proceedings is no less a violation of counsel's professional obligations than in criminal cases, even if the constitutional implications are more tenuous. The absence of a constitutional right to effective representation[ ] and the economic considerations which govern civil litigation make it more difficult to define the appropriate role for the trial judge with respect to incompetence. Nevertheless, if the adversary process is to operate fairly, it is incumbent upon the judge to monitor counsel's performance and intervene where egregious deficiencies appear. The obligation of the [*4]judge to do so is accepted without question in those cases where parties are legally incompetent — most commonly cases involving minors or absent parties — and the judge is expected to make an independent judgment concerning their interests.[ ] Similarly, in class actions the judge is obligated to determine the adequacy of the representation of class members.[ ] It is, of course, not desirable for the judge to take on a similar obligation in civil litigation generally. That he sometimes bears the obligation to consider whether the interests of parties are adequately represented shows, however, that it is within his capacity to monitor the performance of counsel for manifest incompetence and take remedial steps when necessary.

. . .

For the most part, what is suggested here is not a revolutionary departure from the practice of many judges who take an active part in the management of the litigation before them. Nevertheless, difficult questions may arise when the apparent incompetence of one side seems to confer a substantive advantage on the other. What, for example, should the judge do when one side presents an apparently meritorious motion for summary judgment but fails to file the necessary affidavit to support a critical factual assertion? Only if the judge accepts the adversary process as an end in itself would he be satisfied to dispose of a contested matter substantially affecting a party's rights knowing that the outcome most likely is the result of one side's lack of attention or skill. It would seem preferable for the judge to do what he feels necessary to satisfy himself that both sides of the case have been adequately presented.

(William W. Schwarzer, *Dealing With Incompetent Counsel — The Trial Judge's Role*, 93 Harv L Rev 633, 665-669 [1980].)

The Court's decision to adjourn the motion sua sponte does not mean that every time an attorney comes to a motion argument unprepared they will be rewarded with an adjournment. An attorney of record's sending an unprepared of counsel to appear is not to be deemed a strategy to obtain an adjournment when the Part Rules' provisions regarding adjournment requests [FN3] were not complied with. What transpired here, however, was exceptional such that the Court could not in good conscience continue

the oral argument and concomitantly preserve "the maintenance of [minimum] professional standards in the courtroom" (*id.* at 669).

Conclusion

This Court determines that a judge does possess the inherent discretion to adjourn a motion sua sponte when an attorney appearing at oral argument is significantly unprepared. Where the maintenance of minimum professional standards in the courtroom is impaired, a judge should exercise such discretion where no prejudice inures to the opposing counsel and the parties they represent.

On the adjourned date for oral argument of the within plaintiff's motion for summary [*5]judgment, counsel of record for the defendants shall appear in this Part to represent the client.

HON. AARON D. MASLOW
Justice of the Supreme Court of the State of New York

Footnote 1:. This attorney had already appeared confused during a prior oral argument the same day and at arguments on previous motion calendar days.

Footnote 2:. This article uses the word "incompetence" but this Court declines to make such a conclusion with respect to the attorney's performance. The lack of preparation might be attributed to other factors, but the article's analysis of the issue of intervention by a court when representation is clearly ineffective does not bear any less weight if the ineffectiveness is a product of factors not rising to the level of incompetence.

Footnote 3:. IAS Part 2's rules regarding adjournment requests are set forth on the New York State Unified Court System's website at https://ww2.nycourts.gov/courts/2jd/kings/civil/MaslowRules.shtml.

Unfounded Reports

N.G. v G.F., 82 Misc3d 1210(A) (Supreme Court, Westchester County, 2024)

James L. Hyer, J.

The following documents, numbered 1 to 11, were considered in connection with Defendant's Order to Show Cause, dated January 30, 2024, (hereinafter referred to as "Motion Sequence No.3"), seeking the entry of an Order:

1. Referring the Plaintiff to the Westchester County District Attorney's office for an investigation, and potential criminal charges, due to the Plaintiff's false reporting of sexual abuse claims, both directly and indirectly, to the State Central Register, as contemplated in NYS Penal Law 240.50(4)(a) and (b); and

2. Pursuant to Social Services Law 422, issuing to Defendant a So Ordered subpoena (attached hereto as Exhibit "A"), served upon the Westchester County Department of Social Services directing them to produce unredacted, certified copies of DSS/CPS records concerning investigations and findings relative to all unfounded child/sex abuse complaints filed concerning the child, J.F. (DOB: XX/XX/XX19), directly to the Court, which shall be held in-camera by the Court and used at trial by the Defendant; and

3. For such other and further relief as the Court deems just and proper.

PAPERS NUMBERED

Order to Show Cause/Affirmation/Exhibit A-G 1-9

Affirmation in Opposition 10

Affirmation of Attorney for the Child 11

RELEVANT FACTUAL AND PROCEDURAL HISTORY

This matrimonial action was commenced on August 10, 2022, after which a Notice of Appearance and Demand for Complaint were filed on August 18, 2022. On February 28, 2023, a Preliminary Conference was held wherein all parties and counsel appeared, after which a Preliminary Conference Order was entered indicating that the issue of custody and access of the [*2]parties' minor child J.F. (DOB: XX/XX/XX19) (hereinafter referred to as the "Child") was unresolved. On April 27, 2023, an Order Appointing Privately Paid Attorney for the Child[ren] was entered appointing as Attorney for the Child Robin Dale Carton, Esq.

On September 18, 2024, Defendant's counsel submitted a letter to the Court requesting an emergency conference asserting:

"For the past few weeks, I informed counsel for both the Plaintiff and the Child that I intended to seek an emergency conference with the Court to address ongoing and very serious issues with the access schedule and the Mother's behavior and parenting choices at home. At the request of all counsel, I agreed to try and resolve issues

amicably and to have a settlement conference instead. Unfortunately, those attempts have proven unsuccessful and now, in a desperate attempt to deflect the Court's attention to the Mother's issues, the Mother has made up allegations that the subject child was somehow sexually abused by my client's nephew. This is something my client adamantly denies. Over this past weekend and according to the police and CPS caseworker, allegations were made that something occurred between the child and the nephew on Saturday. This is despite the fact that the child was not even around my client's nephew at all this past weekend. I am respectfully requesting an immediate conference with Court on all issues of access and custody."

In response to counsel's submission, the Court scheduled a Conference to be held on September 19, 2023, at 3:30 p.m.

On September 19, 2023, Plaintiff's then counsel filed an Order to Show Cause, (hereinafter referred to as "Motion Sequence #1"), seeking the entry of an Order granting the following relief:

"(1) Issuance of an Order of Protection on behalf of the child, J.F. (DOB: XX/XX/XX19) born XX XX, XX19, directing that the Defendant, G.F., keep the subject child away from the person, and home of J.F. (D.O.B.: XX/XX/XX10), age 13, including but not limited to keeping the subject child away from the home of the paternal grandparents located across the street from the home of J.F. (D.O.B.: XX/XX/XX10); and

(2) Directing that the Defendant's access with the subject child J.F., be supervised pending the investigation by CPS; and

(3) For such other and further relief as to the Court may deem just and proper."

On September 20, 2023, three Temporary Orders of Protection were entered: (1) Against J.F. (D.O.B.: XX/XX/XX10) for the benefit of the Child; (2) Against Plaintiff for the benefit of the Child; and (3) Against Defendant for the benefit of the Child.

On September 21, 2023, Plaintiff's then counsel filed an Order to Show Cause (hereinafter referred to as "Motion Sequence #2), seeking the entry of an Order granting the following relief:

"(a) Pursuant to CPLR § 321(b)(2), relieving John C. Guttridge, Esq., and Guttridge & Cambareri, P.C., as attorneys of record for the Plaintiff N.G., and declaring that John C. Guttridge, Esq., and Guttridge & Cambareri, P.C., have no further responsibility in this proceeding; and

(b) Staying this matter for a period of thirty (30) days to allow Plaintiff the opportunity to obtain new counsel; and

(c) For such other, further or different relief as to this Court may seek just, proper and equitable."

A Status Conference was held on September 21, 2023, after which a Decision and Order was entered pertaining to Motion Sequence #2, which granted the relief requested to the extent that Plaintiff's then counsel was permitted to withdraw as counsel for Plaintiff noting that Arlene Wexler, Esq., was to be appointed as 18-B counsel for Plaintiff which was completed by separate Order of Appointment entered that day. On September 21, 2023, three Amended Temporary Orders of Protection were entered modifying the previously entered Orders.

On September 22, 2023, two Orders were entered being: (1) Order for Recording and Release of Forensic Interview at Children's Advocacy Center and Related Child Protective Services Notes and Records; and (2) Order For Investigation was entered inclusive of the following directives:

"The above referenced matter is pending before this Court. The Westchester County Department of Social Services is hereby directed to conduct a CPS Investigation concerning allegations that the child was subjected to multiple incidents of sexual assault. Upon information and belief, SCR reports were called in with respect to these allegations. Upon information and belief, there is a current CPS investigation pursuant to possible multiple SCR reports received alleging sexual abuse of the child (J.F. (DOB: XX/XX/XX19)). And that it is the Court's understanding that the mother has made allegations that the father (G.F.) has sexually abused the child, and that a minor relative of the child (J.F. (D.O.B.: XX/XX/XX10)) has sexually abused the child. The father vehemently denies all allegations. The Court has assessed the mother during in person proceedings whereby this Court has had an opportunity to assess her credibility, and also has learned that she violated the Court's September 18, 2023 Order that directed the subject child to sleep at the maternal grandparents' home that night and have no contact with either parent prior to the child's interview with CAC on September 19, 2023. At the Court's September 21, 2023 conference, the Court learned that the mother did not remain separated from the child and was with the child after the Court issued its Order and prior to the child's interview. Accordingly, the Court has concerns that the mother may be falsely reporting and would like CPS to investigate that possibility as well. This Order authorizes access by the Westchester County Department of Social Services to any and all information as provided by law regarding the following individuals: N.G., [redacted], Pelham, New York 10803, [redacted], [redacted]; G.F., [redacted], Pelham, New York 10803, [redacted], [redacted], J.F. (D.O.B. XX/XX/XX10). Please be advised that the next Court appearance is scheduled for Tuesday, September 26, 2023 at 9:30 a.m. in Courtroom 1003. ORDERED that DSS shall appear

on the next court appearance to provide a report on the pending CPS investigation regarding the subject child J.F. (DOB: XX/XX/XX19)."

On September 24, 2023, Plaintiff's current counsel filed a Notice of Appearances.

On September 26, 2023, two Orders were entered, being: (1) Order Appointing Neutral Forensic Evaluator Dr. Alan V. Tepp to conduct a forensic evaluation pertaining to the parties and Child; and (2) Decision and Order setting forth temporary custody and access of the Child; directing therapeutic supervised access of the parties with the Child; directing that the [*3]Westchester Department of Social Services shall provide to the Court a status report on the pending Investigation by October 24, 2023; relieving 18-B counsel for Plaintiff; and directing a Status Conference to be held on October 25, 2023, at 9:00 a.m.

On September 29, 2023, an Order was entered permitting the Attorney for the Child to produce documents to Dr. Tepp on notice to counsel.

On October 1, 2023, an Order was entered pertaining to further custody and access directives involving the parties and Child.

A Status Conference was held before the Hon. James L. Hyer, J.S.C., on October 25, 2023, at which time all counsel and parties appeared. Counsel for the Westchester County Department of Social Services appeared and reported that the investigation conducted by the agency included a finding of no misconduct and would be determined to be unfounded as it was the agency's determination that the Child is safe.

On October 25, 2023, following the Conference, the Court entered the following: (1) Decision & Order pertaining to the temporary custody and access of the parties and Child; (2) Order of Vacatur of the September 22, 2023 Order for Recording and Release of Forensic Interview at Children's Advocacy Center and Related Child Protective Services Notes and Records; (3) Order of Vacatur of the September 20, 2023 Temporary Order of Protection in favor of the subject child, J.F. (DOB: XX/XX/XX19) and against Plaintiff; (4) Order of Vacatur of the September 20, 2023 Temporary Order of Protection in favor of the subject child, J.F. (DOB: XX/XX/XX19) and against Defendant; (5) Order of Vacatur of the September 20, 2023 Temporary Order of Protection in favor of the subject child, J.F. (DOB: XX/XX/XX19) and against J.F. (DOB: XX/XX/XX10); and (6) Order of Vacatur of the portion of the October 1, 2023 Order directing supervised visitation with the subject child, J.F. (DOB: XX/XX/XX19).

On November 27, 2023, an Order was entered setting forth a discovery schedule.

On December 21, 2023, Defendant's counsel submitted a letter to the Court requesting an emergency Court Conference noting:

"As the Court will recall, this office represents G.F. I write to the Court now with a heavy heart. I was just made aware that [Plaintiff] once again has fabricated sex abuse allegations against my client and is accusing him of sexually abusing their son. The source of the details of the allegations is based on what the CPS caseworker told my client, but apparently, [Plaintiff] has now alleged that my client ejaculated on their child's chest and choked the child. I am told that the police and CPS were called and that neither of them believe the allegations made by [Plaintiff]. My client is genuinely concerned for the well-being of his child around [Plaintiff]. I am further advised (indirectly as I never spoke with the Child's therapist) that the child's therapist has concerns about [Plaintiff]'s parenting and strongly believes the allegations that are being made are fabricated. I recognize that I am writing this letter to you the day before the break. I note that the child is with my client starting tomorrow for one week. In light of the Holiday break and the fact that I am traveling out of the County, it is requested that the Court schedule an emergency premotion conference on January 2, 2024. Specifically, I am asking permission to make a motion for an updated forensic evaluation of [Plaintiff] based on these new allegations, for supervised visitation for [Plaintiff], and for counsel fees. It is further requested that the Court Order a COI from CPS and direct they be present so that they can update the Court with respect to these new allegations. The Court's attention to this matter is greatly appreciated."

In response to counsel's submission, a Pre-Motion Conference was scheduled to be held on January 2, 2023, at 3:30 p.m.

On January 2, 2024, a Pre-Motion Conference Order was entered wherein all prior Decisions and Orders pertaining to interim custody of the Child were vacated; providing new directives regarding interim custody and access of the Child; directing a second Court ordered investigation to take place; requiring an updated forensic evaluation by Dr. Tepp; directing a custody Trial and Pre-Trial Conference to take place on the dates currently scheduled; directing a status conference to be held on January 26, 2024, at 2:00 p.m. for Child Protective Services to provide a status report; and providing a discovery schedule.

On January 3, 2024, a Pre-Trial Conference Order For Custody Trial was entered directing, *inter alia*: (1) a Pre-Trial Conference to be held on March 29, 2024, at 2:00 p.m.; and (2) Trial to commence on April 9, 2024 and proceed day-to-day through April 12, 2024, from 9:00 a.m. through 5:00 p.m. each day.

On January 3, 2024, an Order for Investigation was entered providing:

"The above referenced matter is pending before this Court. The Westchester County Department of Social Services is hereby directed to conduct a CPS Investigation concerning allegations that the child was subjected to multiple incidents of sexual

assault. Upon information and belief, SCR reports were called in with respect to those allegations. Upon information and belief, there is a current CPS investigation pursuant to possible SCR reports received alleging sexual and physical abuse of the child (J.F. (DOB: XX/XX/XX19)). And that it is the Court's understanding that the mother (N.G.) has made allegations that the father (G.F.) has sexually and physically abused the child. The father vehemently denies all allegations. The Court has assessed the mother during multiple in person proceedings whereby this Court has had an opportunity to assess her credibility. There were earlier report(s) that was(were) investigated by CPS and the Westchester County Department of Social Services, which was(were) deemed unfounded. There was delay in reporting these new alleged incidents to CPS. Accordingly, the Court has concerns that the mother may be falsely reporting and would like CPS to investigate that possibility as well. This Order authorizes access by the Westchester County Department of Social Services to any and all information as provided by law regarding the following individuals: N.G., [redacted], Pelham, New York 10803, [redacted], [redacted]; G.F., [redacted], Pelham, New York 10803, [redacted], [redacted]. Please be advised that the next Court appearance is scheduled for Friday, January 26, 2024, at 2:00 p.m. in Courtroom 1003. ORDERED that DSS shall appear on the next court appearance to provide a report on the pending CPS investigation regarding the subject child J.F. (DOB: XX/XX/XX19)."

On January 4, 2024, an Order was entered reappointing Dr. Tepp to conduct an updated forensic evaluation of the parties and Child.

On January 26, 2024, a Status Conference was held wherein all parties and counsel appeared, along with the Westchester County Attorney's Office. Counsel for the Westchester County Attorney's Office reported that the investigation would be unfounded and provided the following statement to the Court:

"MS. HOLLY YOUNG: So Your Honor, we filed, E-Filed, a lengthy report that included conversations with the child's regular pediatrician, a covering physician, the child's [*4]therapist, the parties. And what is notable is at this point, Judge, there was a simultaneous, because there being three reports being called in, not only was Ms. McLeod, as the MDT worker investigating, in particular, sex abuse allegations, there was a worker in Mount Vernon that was simultaneously investigating. So now what we have in J.F.'s life is five DSS Case Workers over the course of a very short time.

* * *

But there were three reports that had to be investigated. There were two prior reports that had to be investigated. That's five reports with the same or similar allegations. All unfounded. All leading this child to be traumatized. And I'm not saying this to be dramatic, but this is what's happening. My 16 years in this type of job, in my 20 years of

practice. Ms. Gray's 20 years plus of experience. Ms. McLeod's 15 years plus of experience. Ms. Pondfield out of Mount Vernon, his 16, almost 17 years of experience at this point. We know it when it happens. We can see it when it happens. We're watching this child get traumatized by this. And it's very concerning, Judge. It's very concerning, the impact that this is going to have on this child. It looks like it was almost pawn shopping with pediatricians. It did not work with this pediatrician, maybe it will work with that pediatrician. We're using mandated reporters for these reports. That could be investigated by the DA's office and charges can be brought by the DA's office, if they find a sufficient basis for false reporting and a harassment claim. A Family offense petition could be brought bringing forth a harassment claim."

On January 26, 2024, the Court entered the following: (1) Decision & Order providing temporary custody of the Child to Defendant subject to supervised access of Plaintiff to be set forth by future Court Order; and (2) Temporary Order of Protection against Plaintiff for the benefit of the Child. On January 29, 2024, a Decision and Order was entered further setting forth additional directives pertaining to interim custody and access of the Child.

Defendant's counsel asserts that referral to the Westchester District Attorneys' Office is appropriate as Plaintiff must be held accountable for making, either directly to Child Protective Services or indirectly to mandated reporters, false accusations of sexual abuse. Defendant's counsel asserts Plaintiff's conduct is violative of New York Penal Law § 240.50 and without the requested referral Plaintiff will continue to make false reports against Defendant to the determinant of the Child.

Defendant's counsel further requests that this Court "so order" the proposed subpoena annexed to Motion Sequence #3 as Exhibit "A". While Defendant's counsel concedes that the information sought is generally confidential, he argues that the relief requested is appropriate pursuant to New York State Social Services Law § 422(5)(b)(i).

The Attorney for the Child submitted an affirmation wherein she asserts that evidence (or lack thereof) acquired during Child Protective Services investigations is protected by New York State Social Services Law § 422(5) permitting unfounded reports to be unsealed in limited circumstances. The Attorney for the Child expressed her support for Defendant's application for the Court to "so order" the proposed subpoena noting her position that Defendant's application for a subpoena of unfounded reports falls within the portion of the Social Services Law permitting release of this information and that such information is relevant and material to the issues before the Court.

Plaintiff's counsel opposes both items of relief requested by Defendant. Plaintiff's counsel [*5]asserts that referral to the Westchester District Attorney's Office would be improper. With respect to the request for the Court to "so order" the proposed

subpoena, Plaintiff's counsel offers no legal authority against the request but asserts that in the event that the relief is granted that the materials be provided to both parties and their counsel, as well as the Attorney for the Child.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The New York State Social Services Law § 422(5)(a) provides:

"Unless an investigation of a report conducted pursuant to this title that is commenced on or before December thirty-first, two thousand twenty-one determines that there is some credible evidence of the alleged abuse or maltreatment or unless an investigation of a report conducted pursuant to this title that is commenced on or after January first, two thousand twenty-two determines that there is a fair preponderance of the evidence that the alleged abuse or maltreatment occurred, all information identifying the subjects of the report and other persons named in the report shall be legally sealed forthwith by the central register and any local child protective services which investigated the report. Such unfounded reports may only be unsealed and made available:

* * *

(iv) to the subject of the report; and. . ."

The New York State Social Services Law § 422(b) provides, in part, that:

". . .Notwithstanding section four hundred fifteen of this title, section one thousand forty-six of the family court act, or, except as set forth herein, any other provision of law to the contrary, an unfounded report shall not be admissible in any judicial or administrative proceeding or action; provided, however, an unfounded report may be introduced into evidence: (i) by the subject of the report where such subject is a respondent in a proceeding under article ten of the family court act or is a plaintiff or petitioner in a civil action or proceeding alleging the false reporting of child abuse or maltreatment;..."

In a matter affirming the Trial Court's determination to permit the use of unfounded Child Protective Services reports to be utilized in the context of a contested child custody action, the Appellate Division Third Department held:

"Petitioner and the Law Guardian next argue that Family Court erred by admitting the testimony of Barnes and the report of the child protective agency. Although unfounded child abuse reports are required to be sealed (see Social Services Law § 422[5]), such reports may be introduced into evidence *767 "by the subject of the report where such subject * * * is a plaintiff or petitioner in a civil action or proceeding alleging the false reporting of child abuse or maltreatment" (Social Services Law § 422[5]). Here, although respondent did not commence the proceeding in the first instance, he did cross-petition

for sole custody. In his cross petition, respondent specifically stated that petitioner "bombarded [him] with completely false allegations in criminal and family court of child abuse." Since respondent unequivocally alleged the false reporting of child abuse, and is considered a petitioner with respect to this claim (see Ferguson Elec. Co. v. Kendal at Ithaca, 274 AD2d 890, 892, 711 N.Y.S.2d 246; L & L Painting Co. v. Columbia Sussex Corp., 225 AD2d 670, 670, 639 N.Y.S.2d 491), the admission of the unfounded report is [*6]proper. Likewise, the testimony of Barnes was admissible. *See*, *Youngok Lim v. Sangbom Lyi, 299 AD2d 763, (2d Dept. 2002)*.

As in *Youngok*, while Defendant did not commence this action, he is requesting custody of the Child and is claiming that Plaintiff has made or caused to be made numerous investigations by the Child Protective Services of Westchester County by asserting false allegations of child abuse making him an appropriate party to seek and utilize in this action the information sought by the proposed subpoena.

Based upon the foregoing it is the determination of this Court that the Defendant's request for the Court to "so order" the subpoena annexed to Motion Sequence #3 is appropriate as it is supported by well-settled law with the caveat that any information received from the subpoena shall be made accessible to all counsel of record in this action.

NOW, THEREFORE, IT IS HEREBY:

ORDERED that Motion Sequence #3 is granted to the extent that the Court shall "so order" the proposed subpoena annexed to Motion Sequence #3 and that any information obtained by Defendant's counsel shall be served upon Plaintiff's counsel and the Attorney for the Child within twenty-four (24) hours of receipt by e-mail; and it is further

ORDERED that to the extent relief requested has not been granted herein it is denied; and it is further

ORDERED that Defendant's counsel shall serve a copy of this Decision and Order with Notice of Entry and file proof of service by March 15, 2024.

The foregoing constitutes the Decision and Order of the Court.