CHILD WELFARE CASELAW REVIEW

Appellate Cases

Reported From January- June, 2024

2024 NYPWA Summer Conference- July 15, 2024
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Introduction

These cases represent the appellate level child welfare related cases that I found between January 1, 2024 and June 30, 2024 from my review of the Slip Opinions posted on the OCA website. There are a few trial court level cases included at the end of the materials, but they are not included in this PowerPoint.

Introduction

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

Introduction

Because this program covers cases reported up to June 30, 2024, and the program is given on July 15, 2024, the official citations have not yet been issued for some of the cases. If you need the official citation, please check the court website for those, or your legal research website (Westlaw, LEXIS, etc.)

Venue

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

The order of Family Court , Rensselaer County, which, in two proceedings pursuant to Family Ct Act article 10, rejected a transfer from the Family Court of Schenectady County was reversed, the matter transferred to the Family Court, Rensselaer County for further proceedings, and, pending further proceedings, temporary placement of the child in foster care was continued.

Respondents 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. 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, 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.

Continued…

Venue

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

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, petitioner re-filed the neglect petitions against respondents in Schenectady County Family Court on December 13, 2022. Respondents then each separately moved by order to show cause to again transfer the proceedings to Rensselaer County Family Court. 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, with two judges from that court signing the order, rejected the transfer, finding that the matter should remain in Schenectady County.

The 3rd Dept. held that 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" per Family Ct Act § 1015 [a] 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." 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“ per Family Ct Act § 174.

Rensselaer County Family Court did not have the authority to reject the transfer from Schenectady County Family Court per NY Const, art VI, § 19 [h], [j]). 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 Ct Act § 1015). There was simply no basis for maintaining a proceeding in a county where neither of the parents nor the subject child reside.

Article 10 Temporary Orders

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

The order of Family Court, New York County, which, after a hearing, granted respondent mother's application under Family Court Act §1028, was reversed.

Family Court's finding that the child should be returned to the mother lacked a sound and substantial basis in the record. In a prior order 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. 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.

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Article 10 Temporary Orders

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

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 evidence — was determinative, as opposed to constituting merely one illustrative component of the overall situation.

The record also did not support the court's determination that the mother would comply with the conditions imposed upon her in the order under review. Instead, the record showed 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.

Article 10 Temporary Orders

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

The order of Family Court, New York County, 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, was affirmed, without costs.

The record included 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. 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. 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.

Article 10 Temporary Orders

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

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 FBI. In the FBI complaint, the mother 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.

Family Court denied the mother's application, determining that the mother's filing with the FBI, raised more concerns about her mental well being and clearly articulated the mother's refusal to cooperate with any orders that could be fashioned by the court to keep the child safe in her care.

In affirming the Family Court, the 2nd Dept. noted that under 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 1027 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.“

As the mother was present and represented by counsel during the 1027 hearing, and 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 1028 hearing was warranted

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Article 10 Temporary Orders

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

The order of Family Court, Kings County which 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 was affirmed.

In October 2022, the petitioner commenced these proceedings pursuant to Family Court Act article 10, alleging 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 Family Court's determination as to the mother's lack of credibility should not be disturbed, as it is supported by the record. There was 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. Note- this decision did not have specifics about the mother's testimony.

Article 10 Temporary Orders

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

The order of Family Court, Richmond County, which 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 was affirmed.

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.

Here, the record provided 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.

Note- the decision provided no details as to the hearing record.

Article 10 Temporary Orders

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

The order of Family Court, Suffolk County, which granted DSS's motion to dismiss the application of nonparty foster parents for a hearing pursuant to Family Court Act §1028 to determine whether the subject child should be returned to their care, was reversed, on the law, and was remitted for further proceedings.

In November 2015, the 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 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. (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.

The foster parents filed an application for a hearing pursuant to Family Court Act §1028 to determine whether the child should be returned to their care. DSS moved to dismiss the foster parents' application, which 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 2nd Dept. held that 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, and thus, the foster parents were entitled to a hearing pursuant to Family Court Act § 1028.

The 2nd Dept. quoted prior cases in stating that 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 occurs in a household or family setting. 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 parents.

Article 10 Temporary Orders

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

The order of Family Court, Kings County which granted ACS's application pursuant to Family Court Act §1027 to remove the subject child from the custody of the mother and place the child in the custody of the ACS pending the determination of the proceeding was affirmed.

ACS commenced an Article 10 proceeding, alleging 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 injuries to the child, which were treated at a local hospital.

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. 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."

Article 10 Temporary Orders

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

The order of Family Court, Otsego County, which temporarily removed the subject children from respondents' custody was affirmed.

Petitioner commenced this neglect proceeding on September 14, 2022, seeking to remove the children from respondents' care as the result of, allegations that the children were living in a home without running water, that the father had overdosed while caring for the children, and that the mother had punched and seriously injured the maternal grandmother in the children's presence. 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 §1027, hearing, temporary removal and placement was continued.

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.“

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Article 10 Temporary Orders

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

Notwithstanding the fact that the mother punched the grandmother hard enough to put her in the hospital with 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. The mother suggested 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.

According deference to the credibility determinations of Family Court, the above 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. 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.

Evidentiary Rulings in Article 10 Proceedings

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

The order of Family Court, Kings County, which granted ACS's motion for summary judgment on so much of the petitions as alleged that the mother derivatively neglected the subject children was reversed, on the law, and the motion for summary judgment on so much of the petitions as alleged that the mother derivatively neglected the subject children was denied, and the matter was remitted for a fact-finding hearing and new determinations on so much of the petition as alleged that the mother derivatively neglected the children

The subject children were born in 2020 and 2021. ACS commenced these proceedings 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.

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 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. 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

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. 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. 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.

Evidentiary Rulings in Article 10 Proceedings

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

The order of Family Court, Oneida County, which found that respondents had neglected the subject children based upon the alleged repeated incidents of domestic violence between respondents was affirmed.

The 4th Dept. rejected respondent Jason L.'s contentions that the court erred in various evidentiary rulings:

- The contention that the Utica Police Department records were not properly certified was unpreserved for review.
- The contention that the court erred in considering those records because they contained inadmissible hearsay was rejected inasmuch as with respect to those records, there was no indication that the court considered, credited, or relied upon them in reaching its determination.
- The contention 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 was also rejected. The older child's out-of-court statements relating to allegations of neglect were sufficiently corroborated by other evidence tending to support their reliability, and with respect to the mother's out-of-court statements, any error was harmless because the result reached herein would have been the same even had such statements been excluded.
- The contention with respect to hearsay testimony of a supervisor employed by petitioner was also rejected, because that testimony was admitted conditionally, and the court later noted explicitly that it may not consider the supervisor's testimony in reaching its decision, and there was no indication that the court relied upon that hearsay.

General and Mixed Neglect

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

The order of Family Court, Bronx County, which denied respondent Rayshawn's motion to vacate an order of fact-finding, which had found, upon his default, that he neglected the subject children, was affirmed.

Family Court providently exercised its discretion in denying respondent's motion to vacate his default because he failed to demonstrate a reasonable excuse for his failure to appear at the continued hearing on the family offense petition. 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. 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.

Since respondent failed to proffer a reasonable excuse for his default, this Court need not determine whether he proffered a meritorious defense. 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.

General and Mixed Neglect

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

The order of Family Court, Bronx County, which found that respondent father neglected the subject child was affirmed. 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. 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. 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.

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General and Mixed Neglect

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

The child's out-of-court statements were sufficiently corroborated by his own testimony. 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. 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 enhanced their credibility.

In addition, the father's angry and disruptive behavior displayed throughout the proceedings further supported the court's credibility findings.

General and Mixed Neglect

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

The order of Family Court, New York County, which, after a hearing, found that respondent father neglected the subject child, was affirmed.

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 supported 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. 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.

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.

General and Mixed Neglect

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

The order of Family Court, Bronx County, which determined, after a hearing, that appellant neglected the subject child was affirmed.

Initially, ACS'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 ACS)'s 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.

The finding of neglect based on domestic violence was supported by a preponderance of the evidence. 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.

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General and Mixed Neglect

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

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 supported 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 on the child's back and that he cried out in pain when she put lotion on that spot. Although the child's injuries were the result of a single incident, that fact did not preclude a finding of excessive corporal punishment or neglect.

Furthermore, a preponderance of the evidence supported 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.

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.

General and Mixed Neglect

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

The order of Family Court, Kings County, which found, upon the mother's failure to appear at a fact-finding hearing, and after an inquest, found that she derivatively neglected the subject child was affirmed.

The order of fact-finding, as amended, was entered upon the mother's failure to appear at a fact-finding hearing. 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, 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 was limited to matters that were the subject of contest in the Family Court.

The mother's contention that the Family Court improvidently exercised its discretion in denying her attorney's application for an adjournment was without merit.

General and Mixed Neglect

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

The order of Family Court, Orange County, which found that the mother neglected the subject children was affirmed.

In January 2021, the petitioner removed the subject children from the father's care and commenced Article 10 proceedings 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.

Contrary to the mother's contention, the Family Court's finding of neglect was supported by a preponderance of the evidence, which demonstrated 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. No specifics given in the case about these issues.

General and Mixed Neglect

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

The order of Family Court, Suffolk County, which found that the father neglected the subject child was affirmed.

A preponderance of the evidence supported the Family Court's finding that the father neglected the child 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.

General and Mixed Neglect

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

The order of Family Court, Kings County finding that the mother neglected the subject child was affirmed.

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

Contrary to the mother's contention, the court was entitled to draw the strongest negative inference against her for her failure to testify.

General and Mixed Neglect

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

The order of Family Court, Queens County, finding that the mother neglected the subject children was modified by deleting the provision determining that the mother neglected the child Kiana B. by failing to provide that child with an adequate education, but was oterhwise affirmed.

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.

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," since "such conditions necessarily imply an imminent danger of impairment to the child's health.“ 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." 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.

Continued…

General and Mixed Neglect

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

Here, contrary to the mother's contention, the evidence adduced at the fact-finding hearing established that the mother maintained the home in a deplorable and unsanitary condition. 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. 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.

ACS also presented a prima facie case of neglect based on evidence that the mother repeatedly tested positive for cocaine. 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. 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. 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.

General and Mixed Neglect

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

The order of Family Court, Kings County, which found that Pedro H. neglected the child Janiyah S. and derivatively neglected the child DaNyla S. was affirmed.

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.

ACS)commenced these proceedings alleging that Pedro H., the live-in boyfriend of the nonrespondent mother, neglected the child Janiyah S. and derivatively neglected the child DaNyla S.

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. In this case, the Family Court's determination that ACS established that Pedro neglected Janiyah S. was supported by the record. Family 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.

Continued…

General and Mixed Neglect

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

Furthermore, while Pedro correctly contended that a violation of an order of protection, standing alone, is insufficient to establish neglect. However, 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.

Contrary to Pedro's contention, the Family Court's finding that he derivatively neglected DaNyla S. was supported by a preponderance of the evidence. 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.

General and Mixed Neglect

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

The order of Family Court, Nassau County, which found that the father neglected the subject children and, in effect, found that the father derivatively neglected the child James L. was modified 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.

Nassau County DSS alleged that the father neglected then 14-year-old Kai L., also known as Kevin L. and Kevin's then 5-year-old brother, James L.. 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.

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.

The 2nd Dept. held that the evidence did not establish that the father neglected James by engaging in acts of domestic violence. In this regard, DSS failed to establish that the altercation that occurred in the father's apartment constituted domestic violence. 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 .

The 2nd Dept. further held that DSS failed to demonstrate that the father had such an impaired level of parental 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. 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.

General and Mixed Neglect

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

The order of Family Court, Suffolk County, which, after a fact-finding hearing, found that the father neglected the subject children, was reversed, on the facts and the proceedings are dismissed.

In 2021, while executing a search warrant, police officers discovered cocaine within a bedroom of an apartment in which the father resided in the apartment with the mother and the subject children, who were born in 2016 and 2019. Suffolk County DSS filed an article 10 petition, 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."

The 2nd Dept. decision cited cases where a court may make a finding of neglect in various circumstances involving the possession, use, or sale of illegal narcotics. These included where there is proof of a parent's repeated drug use in a manner sufficient to constitute prima facie evidence of neglect; or proof that a parent stored drugs within the home in a location that was "readily accessible" to a child; or upon evidence establishing that a parent exposed a child to the very dangerous activity of narcotics trafficking; or evidence that the parent packaged and sold narcotics in the presence of the child; or resided with the child in a home in which narcotics transactions were taking place; or traveled with the child to an arranged drug transaction.

Continued…

General and Mixed Neglect

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

By contrast, a parent's mere use of illicit drugs, without more, is insufficient to support a finding of neglect. Nor will the presence of illicit drugs in the home where the child resides be sufficient, standing alone, to support a finding of neglect. In either scenario, a neglect finding would 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.

The 2nd Dept., held that Family Court's finding that the father neglected the children was not supported by the evidence. Although, 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, 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. 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. 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. 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.

General and Mixed Neglect

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

The order of Family Court, Schenectady County, which granted petitioner's applications to adjudicate the subject children to be neglected was reversed as to the respondent mother, and remitted for further proceedings

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. 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.

Continued…

General and Mixed Neglect

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

The majority reversed the finding as to the mother, holding that once the mother had been assigned an attorney, the attorney may withdraw from representation only upon reasonable notice to his or her client , and that 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.

Here, there was no indication in the record that the mother's assigned counsel had informed her that she was seeking to withdraw as counsel. Nor did the record reveal that Family Court made any inquiry into such notice or whether there was good and sufficient cause for such withdrawal. The record further failed 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." 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, the 3rd Dept. rejected the contentions of the appellate attorney for the children that the mother was in default. As it relates to petitioner's contention that there was sufficient evidence of neglect in the petition, the 3rd Dept. noted that the 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. To that end, because the directives of Family Ct Act §262 were not followed, the mother did not need to demonstrate actual prejudice. 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.

Two Justices dissented, on the ground that the neglect finding was issued on default, thus there were no contested issues presented at the fact-finding for the Court to review.

General and Mixed Neglect

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

The order of the Family Court, Ulster County, adjudicated the child to be neglected was affirmed.

The subject child was born in 2008, and 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.

The Article 10 proceeding alleged that the mother had neglected the child by failing to ensure the child's attendance in school and that he receive mental health counseling.

School records demonstrated 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 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.

Continued…

General and Mixed Neglect

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

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 testimony that the child was referred to counseling services, although he was dismissed for failing to attend.

Continued…

General and Mixed Neglect

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

The record demonstrated 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. While not minimizing the mother's health issues resulting from her cancer diagnosis, the child's school records and the testimony adduced at the fact-finding hearing demonstrated 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 demonstrated 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 had impacted the child's education detrimentally, as demonstrated by her testimony that he had failed to successfully complete the eighth grade.

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 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, the 2nd Dept. was satisfied that Family Court's finding that removal was in the child's best interests.

General and Mixed Neglect

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

The order of Family Court, Onondaga County which determined that respondent Marilyn O. neglected one of the subject children and derivatively neglected the other two subject children was affirmed.

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.

The court properly drew a negative inference against the mother based on her failure to testify at the fact-finding hearing.

The finding of derivative neglect with respect to the mother's two sons had a sound and substantial basis in the record inasmuch as the evidence with respect to the child found to be neglected demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in the mother's care.

General and Mixed Neglect

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

The order of Family Court, Erie County which found that respondent had abused the subject child was affirmed.

Respondent, who was the boyfriend of the child's mother, contended that petitioner failed to establish that he was a person legally responsible for the child within the meaning of the Family Court Act.

Pursuant to Family Court Act §1012 (g), a person 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. Family Court properly determined that respondent acted as the functional equivalent of a parent in a familial or household setting for the child. The court, in reaching its determination, was entitled to draw the strongest possible inference against respondent in light of his failure to testify.

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 extended to him. In response, respondent failed to offer any explanation for the child's injuries or to otherwise rebut the presumption of culpability.

General and Mixed Neglect

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

The order of Family Court, Erie County, which placed respondent and the subject children under the supervision of DSS was reversed on the law and the petition was dismissed.

On the appeal. the AFC asserted that the 4th Dept. could consider allegations drawn from the petition and evidence adduced at the dispositional hearing in determining whether DSS had established that the mother neglected the children**.** That assertion was devoid of merit.

The 4th Dept. reviewed and found the following three bases for finding neglect were not proved:

- 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, thus the 4th Dept. concluded that the evidence was not sufficient to establish that the mother neglected the children by failing to supply adequate shelter.
- To the extent that petitioner alleged and the court found that the mother committed educational neglect with respect to the older child, the 4th Dept. agreed with the mother that as 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, thus his attendance at school was not mandated by article 65 of the Education Law, so the mother had no duty to supply the older child with adequate education within the meaning of Family Court Act §1012(f)(i)(A).

Continued…

General and Mixed Neglect

Matter of Justice H.M., AD3d 2024 NY Slip Op 01653 (4th Dept., 2024)

- The 4th Dept. also agreed with the mother that petitioner failed to prove 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.
- With regard to the allegations concerning mother's mental health, even assuming that DSS established that the mother suffered from an untreated mental health condition on the basis of observed behavior, the 4th Dept. concluded that DSS 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.

General and Mixed Neglect

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

The order of Family Court, Yates County, was affirmed.

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.

Parental Mental Health

Matter of C.B., III, 225 AD3d 415 (1st Dept., 20240

The order of Family Court, Bronx County, which found that respondent mother neglected the subject child, was affirmed.

The evidence showed that the mother's untreated mental illness placed the child's physical, mental, and emotional condition at imminent risk of becoming. The ACS 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. 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.

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.

The mother's 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. Petitioner was not obligated to prove that the child suffered past or present harm, because the evidence demonstrated that he was at risk of harm based on demonstrable conduct by the mother. The absence of evidence that the mother had a diagnosed condition did not preclude a finding of neglect.

Parental Mental Health

Matter of N.R., 227 AD3d 596 (1st Dept., 2024)

The order of Family Court, Bronx County, which found that mother had neglected the children, was affirmed.

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.

The mother's contention that the court abused its discretion in conforming the pleading to the proofs was improperly raised for the first time in her reply brief. 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.

Parental Substance Abuse

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

The order of Family Court, Bronx County which found that respondent father neglected the subject child was affirmed.

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. 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, as well as by the caseworker's observations. The child's statements were sufficiently detailed and there was no reason to disturb the court's credibility. The court properly drew a negative inference from the father's failure to testify. Under these circumstances, there was a statutory presumption of neglect, which the father failed to refute, as he presented no evidence that he was participating in a rehabilitative program.

The father's contention that he is entitled to a missing witness inference was unpreserved and unavailing.

Parental Substance Abuse

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

The order of Family Court, Suffolk County, which found that the father neglected the subject children was affirmed

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. The father failed to rebut this showing.

Parental Substance Abuse

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

The order of Family Court, Kings County, which found that the petitioner failed to establish that the mother neglected the subject child an, in effect, dismissed the amended petition was reversed, on the law and the facts, with a finding made that the mother neglected the subject child, and the matter was remitted to Family Court for a dispositional hearing.

In November 2021, ACS commenced an Article 10 neglect proceeding. In an order dated November 16, 2021 Family Court released the child to the mother's custody under a conditional order. In June 2022, the petitioner made an application to remove the child from the mother's custody, alleging that she was not in compliance with the conditional order. After a hearing, the court granted ACS's application, and the child was removed. ACS filed an amended petition alleging that the mother had failed to comply with the terms of the conditional order. Upon the mother's failure to appear at the fact-finding hearing, the court found that ACS failed to establish that the mother neglected the child and, in effect, dismissed the amended petition.

Contrary to Family Court's determination, 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 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 ACS. After the issuance of the conditional order, the mother tested positive for cocaine twice between 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, which the mother failed to rebut.

Parental Substance Abuse

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

The order of Family Court, Schenectady County, which found child to be neglected, was affirmed.

The child tested positive for opioids upon her birth while the mother tested positive for opioids, cocaine and marihuana. A prepetition application for removal of the child was granted, and, upon the mother's consent, the child was placed in the temporary care of the paternal grandparents, who were also caring for the mother's four older children.

Petitioner contended 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 and as such the appeal should have been dismissed. This was denied as 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 showed that the mother's counsel diligently participated on her behalf during the fact-finding hearing.

The CPS caseworker 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 the caseworker 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 using opioids. She also 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 the caseworker, 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 the caseworker 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.

Continued…

Parental Substance Abuse

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

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. 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, provided 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.

The mother's challenge to the October 2022 permanency order was also unavailing, even though the 3rd Dept. rejected petitioner's argument that the mother's appeal from this order had 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 was not moot. Turning to the merits, 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 was supported by a sound and substantial basis in the record.

Domestic Violence

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

The order of Family Court, New York County, which, after a hearing, determined that respondent father neglected the subject child, was affirmed.

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. 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. 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.

Domestic Violence

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

The order of Family Court, Bronx County, which found that father neglected the subject children was affirmed.

The record showed 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. 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. The 1st Dept. rejected the father's assertion that there was no evidence of harm to the child during the incident, as it ignored that the child's physical proximity to the domestic violence created the imminent danger of harm underlying the neglect finding.

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, provided additional support for the finding that he neglected the older child.

As to the finding that the father neglected the younger child, the father did not object to the sufficiency of the petition, and therefore 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. 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. 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.

Domestic Violence

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

The order of Family Court, Bronx County, which, upon respondent father's admission that he willfully violated an order of protection, sentenced him to a nine-month jail term, was affirmed.

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 was not excessive and the 1st Dept. declined 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. 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 did not establish extraordinary circumstances warranting a reduction of his term in the interest of justice.

Domestic Violence

Matter of G.B., 227 AD3d 581 (1st Dept., 2024)

The order of Family Court, Bronx County, which, found, after a hearing, that respondent father neglected the two subject children, was 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.

The finding of neglect is supported by the evidence insofar as it established that the father's acts of domestic violence against nonrespondent mother during the July 16, 2022 incident. 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 "scuffled" with the mother for approximately three minutes after he grabbed her cell phone while the children were in the home. The evidence also showed 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.

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-corroborated each other and were properly admitted into evidence.

Continued…

Domestic Violence

Matter of G.B., 227 AD3d 581 (1st Dept., 2024)

Furthermore, 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. 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.

The 1st Dept did find that ACS did not satisfy its burden of proving that the father neglected the children by abusing alcohol. There was no evidence that the father lost self-control during repeated bouts of excessive drinking, which was necessary to trigger the presumption of neglect under Family Court Act §1046(a)(iii).“ The 1st Dept. found that the children's out-of-court statements, testified to by the caseworker, did not cross-corroborate each other to show that the father regularly drank alcohol in excess, as the caseworker did not say that the children told her they saw the father impaired.

Domestic Violence

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

The order of Family Court, Queens County, which found that the father neglected the child George A. C. and derivatively neglected the child Nikolaos S. C. was affirmed.

ACS commenced an Article 10 alleging 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. The evidence showed that 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.

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 his presence. 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 supported a finding of derivative neglect with respect to Nikolaos S. C.- Note that this decision did not address where Nikolaos was during the incident.

The father's contention that the Family Court was biased against him was unpreserved for appellate review as he did not make an objection and move for the court to recuse itself. In any event, the 2nd Dept. wrote that the record contained no evidence of bias by the court.

Domestic Violence

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

The order of fact-finding of Family Court, Kings County, which dismissed the petitions was reversed, on the facts, the petitions were reinstated, a finding was made that the father neglected the subject children, and the matter was remitted to Family Court for a dispositional hearing.

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 ("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 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, without 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."

Continued…

Domestic Violence

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

Contrary to the determination of the Family Court, the evidence established that the father neglected the children by perpetrating acts of domestic violence against the mother in their presence. 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. However, such out-of-court statements must describe similar incidents in order to sufficiently corroborate the sibling's out-of-court allegations and be independent from and consistent with the other sibling's out-of-court statement. 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.

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.

Domestic Violence

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

The order of Family Court, Kings County, finding that the father neglected the subject child was affirmed.

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.

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. 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. 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.

Domestic Violence

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

The order of Family Court, Richmond County, which found that the mother neglected the child, was affirmed.

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.

Domestic Violence

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

The order of Family Court, Suffolk County, which, after a fact-finding hearing, found that the father neglected the subject children was affirmed.

At the 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.

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.

Domestic Violence

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

The order of Family Court, Richmond County, made after a fact-finding hearing, finding that the father neglected the subject children was reversed, on the law, and the petitions were denied and the proceedings dismissed.

Although Family Court failed to state on the record the facts which it deemed essential to its finding of neglect the 2nd Dept. held that remittal was unnecessary because the record was sufficient for it to conduct an independent review of the evidence.

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. While ACS contended that the redacted ACS progress notes were admitted into evidence, and contained 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, could not be considered.

Domestic Violence

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

The order of Family Court, Kings County, which found that the father neglected the subject child was affirmed.

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.

Domestic Violence

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

The order of Family Court, Queens County, which found that the father neglected the subject children, was affirmed.

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. 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.

Domestic Violence

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

The order of Family Court, Kings County, which found, after a fact-finding hearing, that the father neglected the children was affirmed.

ACS commenced these proceedings against the father, alleging that he neglected the children by committing an act of domestic violence against the nonrespondent mother while in an elevator with the children present.

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.

Domestic Violence

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

The order of Family Court, Steuben County, which determined that respondent Rene G. had neglected the subject child was affirmed.

Respondent contended 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.

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 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, 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 acts in which a reasonable and prudent parent or caretaker would not have engaged.

Domestic Violence

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

The order of Family Court, Erie County, which adjudged that respondent had neglected five of the subject children and derivatively neglected the other subject child was affirmed.

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. 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, 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. 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, gave sufficient indicia of reliability to each child's out-of-court statements.

There was 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.

Excessive Corporal Punishment

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

The order of Family Court, New York County, which, after a fact-finding hearing, found that respondent neglected the subject child by inflicting, or allowing to be inflicted, physical harm upon the child, was affirmed.

Although the Family Court made no explicit findings regarding the credibility of the witnesses after the fact-finding hearing, the 1st Dept made its own findings as the record was sufficiently complete to permit an independent factual review and the drawing of their own conclusions.

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

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, did 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.

Excessive Corporal Punishment

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

The order of Family Court, Bronx County, which found that the father neglected the subject children was affirmed.

A preponderance of the evidence supported 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. 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.

Contrary to the father's contention, the ACS progress notes were properly admitted under the business records exception to the hearsay rule (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. The caseworker's testimony also established that she was an ACS employee and was familiar with the agency's record-keeping practices.

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. The fact that the upper lip injury did not require medical treatment and was the result of single incident did not preclude a finding of excessive corporal punishment. The court properly rejected the father's denials of excessive corporal punishment. Furthermore, there were "adequately individualized" aspects to each child's account to support Family Court's determination that their statements were not scripted or coached.

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Excessive Corporal Punishment

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

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. That evidence supported 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.

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. 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.

Excessive Corporal Punishment

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

The order of Family Court, Bronx County, which determined, after a hearing, that respondent mother neglected the subject child was affirmed.

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. 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.

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. The record contained no evidence that these physical punishments were in any way a justified or a reasonable form of discipline. The court providently credited the child's testimony and found the mother's testimony incredible and self-serving.

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. 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.

Excessive Corporal Punishment

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

The order of Family Court, Kings County, which found that the mother neglected the subject child was affirmed.

ACS alleged 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.

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. Contrary to the mother's contention, the out-of-court statements of the child were sufficiently corroborated by the observations of the ACS caseworker.

Excessive Corporal Punishment

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

The order of Family Court, Kings County, which found that the father and the mother neglected the child Leah S. and derivatively neglected the child Liana S. was affirmed.

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. 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.

Here, 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. There was no basis for disturbing the court's credibility determinations, which are entitled to great deference. 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.

Abuse

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

The order of Family Court, Kings County, which found that the mother abused and neglected the subject child was affirmed.

ACS commenced this proceeding pursuant to Family Court Act article 10, alleging that the mother abused the 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.

The Family Court correctly found that the mother's actions constituted abuse. 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. 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.

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. 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.

Sexual Abuse

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

The order of Family Court, Bronx County, which, after a hearing, determined that respondent sexually abused the subject child S.T.B. and derivatively neglected the subject child T.D.B., was affirmed.

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. S.T.B.'s consistent statements to the Police Department, District Attorney, and child protective specialist further enhanced their credibility.

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. 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 did not provide a basis to challenge Family Court's credibility findings.

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

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.

Sexual Abuse

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

The order of Family Court, Bronx County, which found that appellant sexually abused the two older subject children and derivatively abused the youngest subject child, was affirmed.

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. 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. Appellant's intent to gain sexual gratification from raping the two older children was properly inferred from the acts themselves. 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. Furthermore, the court properly drew a negative inference from appellant's failure to testify.

The finding of derivative abuse was not undermined by the fact that the abuse of the two older children occurred about a year before the youngest child was born. 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.

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 was raised for the first time on appeal and was unpreserved for appellate review. 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 was not sufficient to demonstrate prejudice constituting 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.

Sexual Abuse

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

The order of Family Court, Queens County, finding that Jason B. abused and neglected the children Nyla S. and Alyssa S., and derivatively abused and neglected the Jayla B. and Joy B., was affirmed.

ACS demonstrated, by a preponderance of the evidence, that the appellant sexually abused Nyla S. and Alyssa S. and neglected those children by inflicting excessive corporal punishment on them. 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. Additionally, the court providently exercised its discretion in drawing a negative inference against the appellant for his failure to testify.

As to the derivative neglect of his bio children, 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.

The decision had no evidentiary details about the sex abuse or the excessive corporal punishment.

Sexual Abuse

Matter of Yeimi M., 224 AD3d 836 (2nd Dept., 2023) (boyfriend's case)

The order of Family Court, Kings County, made after a fact-finding hearing, finding that Atilio C. abused and neglected the subject child was affirmed.

The child's testimony as to multiple instances of sexual abuse by the boyfriend was sufficient to support a finding of abuse and neglect. Any inconsistencies between the child's testimony and her out-of-court statements did not render such testimony unworthy of belief.

Sexual Abuse

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

The order of Family Court, Kings County, which found that Magali M. C. abused the subject children was affirmed.

ACS commenced these related proceedings pursuant to Family Court Act article 10, alleging that Eduardo R. sexually abused the children. After a fact-finding hearing, the Family Court found, among other things, that ACS established that Eduardo R. committed sexual abuse in the third degree against the children, that Magali M. C., 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 she abused all three children by allowing Eduardo R. to commit such offenses.

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. Note- this decision did not elaborate on how the statements were corroborated.

Sexual Abuse

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

The order of Family Court, Kings County, finding that Jadiel L. sexually abused the child Gina C. and derivatively abused the child Tony C. was affirmed.

ACS alleged that Jadiel L. sexually abused his girlfriend's then 10-year-old daughter, and derivatively abused his girlfriend's then 8-year-old son. After a fact-finding hearing, the Family Court determined that Jadiel was a person legally responsible for the children's care, and that he sexually abused the female child and derivatively abused the male child.

The evidence, including the Jadiel'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 he 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, he 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.

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

The evidence that Jadiel sexually abused the female child in the presence of the male child demonstrated 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.

Sexual Abuse

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

The order of Family Court, Queens County, which found that Daryl M. abused the child Naima E. and derivatively abused the children Malachi M., Michaiah M., Ariel M., and Nkhai E. was affirmed.

The court found that Naima E. and her mother credibly testified 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.

The Family Court properly found that Malachi M., Michaiah M., Ariel M., and Nkhai E. were derivatively abused. 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.

Note- this decision does not indicate whether Daryl M. was a parent of any of the children.

Sexual Abuse

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

The order of Family Court, Suffolk County, which found that the father abused the child Ashlyn M. and derivatively neglected the child Jordan M. was affirmed.

Ashlyn M.'s hearing testimony established that the father sexually abused her within the meaning of Family Court Act § 1012(e)(iii)(A), and based on the totality of the circumstances, the court appropriately inferred the father's intent to gain sexual gratification from his conduct. The decision did not provide any detail on the child's testimony, or of the nature of the sexual abuse.

Sexual Abuse

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

The order of Family Court, Erie County which adjudged that respondent abused one of the subject children and derivatively abused the other three subject children was affirmed.

The out-of-court statements of the eldest of the subject children were sufficiently corroborated by the testimony of caseworkers trained in forensic interviewing techniques, the child's age-inappropriate knowledge of sexual matters, and language, a medical report indicating vaginal penetration of the child, 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.

Moreover, the child gave multiple, consistent descriptions of respondent's abuse and, although 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 enhanced the reliability of the out-of-court statements.

Additionally, the court was entitled to draw the strongest inference against respondent that the opposing evidence permitted based upon his failure to testify.

The findings of derivative abuse with respect to the three other subject children were 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.

Physical Abuse

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

The order of Family Court, New York County, which found, after a hearing, that respondent father abused the subject child, L.M.R., and derivatively abused the other three children, was affirmed.

The father did not dispute that 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.

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. 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. 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.

Physical Abuse

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

The order of Family Court, New York County, which, after a hearing, found that respondent mother abused the child was affirmed.

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.

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. 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.

The mother's focus on the time the child spent at the maternal grandmother's home did not avail her. The record supported the court's finding that the mother remained a caretaker of the child at the time of injury. Nor must all caretakers be named as respondents in an abuse action.

Physical Abuse

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

The order of Family Court, Orange County which 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. was affirmed.

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 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.

The father failed to rebut the presumption of parental responsibility by providing a reasonable explanation for Nash D.'s injuries, and the Family Court was entitled to draw the strongest negative inference from the father's failure to testify at the fact-finding hearing.

The derivative abuse and neglect findings were also affirmed. The evidence at the fact-finding hearing demonstrated 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.

Physical Abuse

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

The order of Family Court, Suffolk County, which found that Gabriel H. abused and neglected the child Jayden J. and derivatively neglected the other children was affirmed.

Six-year-old Jayden J. was observed in school with bruises and lacerations on his back. Suffolk County DSS 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.

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. 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 and by photographs of Jayden J.'s injuries that were admitted into evidence.

Continued…

Physical Abuse

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

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. 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.

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. Evidence that Jaylen J. and Alexander S. witnessed Jayden J. being hit with a belt further supported a finding of derivative neglect. 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. 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.

Physical Abuse

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

The order of Family Court, Erie County which adjudged that respondent had abused the subject child was affirmed.

Petitioner established a prima facie case of abuse against her with respect to the grandson. There was 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.

Respondent failed to offer any explanation for the child's injuries and simply denied inflicting them.

Dispositions of Art. 10's

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

The order of Family Court, Allegany County, which placed respondent under the supervision of petitioner for a period of one year was modified on the law by deleting the expiration date of the order of protection and substituting therefor the expiration date of October 31, 2023.

The 4th Dept. rejected the mother's contention that DSS failed to establish that she neglected the children by being 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. Even amidst the proceedings, 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 DSS conceded, the duration of the order of protection is unlawful. FCA §1056 (1) prohibits the issuance of an order of protection that exceeds the duration of any other dispositional order in the case, except as provided in §1056 (4), which 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.

As the boyfriend was the bio father of one of the children and as the children resided in the same household with the mother at the time of the disposition, subdivision (4) was inapplicable, and the duration of the order of protection, which exceeded the duration of the dispositional order in this case was unlawful.

Note- the Legislature has looked into modifying FCA 1056 to lengthen OOP durations, although that has not included bio parents

Permanency Hearings

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

The order of Family Court, Bronx County, 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 was affirmed.

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.

The 1st Dept. noted that the child's privacy concerns were reasonable, but also noted that both 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.

Permanency Hearings

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

The order of Family Court, New York County, which 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 QRTP placement at every permanency hearing, was reversed, on the law, 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.

Family Court has the decision-making authority as to the appropriateness of the child's continued placement in a QRTP at every permanency hearing. 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.*" 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]).

Permanency Hearings

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

The order of Family Court, Queens County, which 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 was affirmed.

Although 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 was dismissed as academic, as that portion of the order has expired, the portion of that order that 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 adoption was not academic.

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. 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.

Permanency Hearings

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

The order of Family Court, Kings County, which found that ACS had made reasonable efforts to implement the permanency goal of reunification of the children with the mother and changed the permanency goal for those children to placement for adoption, with a concurrent goal of reunification with the mother was affirmed.

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. 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.

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, was 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 had not fully addressed the issues that led to the removal of the children. But what about- Third Department- Matter of David UU, 206 AD3d 1502 noted the "erroneous imposition of concurrent permanency goals," and Matter of Issac Q 212 AD3d 1449 discussed that family court was prohibited from adopting inconsistent goals.

1061 Motion

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

The order of Family Court, Queens County, which 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, 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).

In September 2020, ACS commenced a proceeding pursuant to Family Court Act article 10, alleging 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 directed the immediate temporary discharge of the child to the mother under certain conditions.

In 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. 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. .

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.

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. 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.

1061 Motion

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

The amended order of Family Court, Queens County. , granted, without a hearing, the motion to modify so much of an order of fact-finding and disposition of the same court which placed the subject child in the custody of ACS 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 ACS 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, was affirmed.

ACS commenced this proceeding, alleging that the mother abused and neglected the subject child by killing the child's father. The mother consented to a finding of abuse without admission.

A hearing under section 1061 is not mandated, but is left entirely to the Family Court's discretion. Where the court possesses information sufficient to afford a comprehensive, independent review, a hearing is not required.

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.

TPR’S

Abandonment

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

The order of Family Court, New York County, which denied respondent mother's motion to vacate her default at the fact-finding hearing, and which upon a finding that the mother had abandoned the subject child, terminated her parental rights was affirmed.

The record contained 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 was therefore insufficient as a reasonable excuse for vacating a default.

Because the mother failed to offer a reasonable excuse for her default, the 1st Dept, wrote that they need not determine whether she offered a meritorious defense to the petition seeking termination of her parental rights on the grounds of abandonment. But they did say that 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.

Abandonment

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

The order of Family Court, Westchester County which found that the mother abandoned the subject child was affirmed.

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. Although the mother offered some testimony to the contrary, the Family Court found the mother's testimony wholly incredible, and the 2nd Dept. declined to disturb the court's determination in that regard.

Family Court was not required to hold a dispositional hearing, rather, the determination of whether or not to hold a dispositional hearing is within the court's discretion. Moreover, contrary to the mother's contention, a suspended judgment is not a permissible disposition after a finding of abandonment.

Abandonment

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

The order of Family Court, Kings County, which, 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 was affirmed.

The mother's sporadic and insubstantial contacts with the petitioner during the relevant six-month period were insufficient to defeat the showing of abandonment.

The petitioner additionally established that the mother permanently neglected the child. Contrary to the mother's contention, the record demonstrated 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. 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.

Family Court did not err in declining to grant a suspended judgment.

Abandonment

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

The order of Family Court, Schenectady County, which adjudicated the subject child to be abandoned, was affirmed.

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 DSS. In October 2020, the proceeding to terminate the mother's parental rights based upon abandonment was commenced. 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.

Initially, the mother contended that Family Court abused its discretion and violated her due process rights by proceeding with the abandonment hearing in her absence. 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 counsel objected to the hearing going forward in her client's absence, she did not assert that she was without notice. Moreover, the record showed 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, the 3rd Dept. could not say that Family Court abused its discretion in proceeding with the hearing in the mother's absence.

Continued…

Abandonment

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

At the fact-finding hearing, DSS 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, and that the mother made no attempt to contact him during that time. The DSS caseworker 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 established 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 was insufficient to defeat the showing of abandonment.

Abandonment

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

The order of Family Court Schenectady County, which adjudicated the subject children to be abandoned, and terminated respondent's parental rights was affirmed.

The older child was removed from the care of the parents in September 2020 and placed in the care of her paternal aunt. The younger child, shortly after birth, 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 the abandonment proceeding, alleging that the father had abandoned the children while he was incarcerated over the preceding six months.

Continued…

Abandonment

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

The 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 getting 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.

The father suggested 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. 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.

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)

The order of Family Court, Bronx County, which, upon a finding of permanent neglect, terminated the parental rights of respondent mother to the subject child, was affirmed.

The record belied 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 claimed that her service referrals were not tailored to her particular needs, but she did not specify what needs were unaddressed, or how the prescribed programs fell short.

The mother acknowledged, 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."

The mother pointed to her consistent participation in mental health therapy and other services, but this was not enough to alter the outcome here, given that the services she attended appeared to have had little to no impact on her. She also did not adequately address her refusal to comply with the medication management aspect of her service plan.

Permanent Neglect

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

The appeal from the order Family Court, New York County, 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, was dismissed.

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.

Contrary to the father's contention, his refusal to participate in a virtual trial constituted a default and Family Court was entitled to draw the strongest negative inference against him for failing to testify.

The father’s 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 to open the default.

Permanent Neglect

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

The order of Family Court, Bronx County, which determined that respondent permanently neglected the subject children was affirmed.

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. It also explained to respondent the importance of complying with her service plan.

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. To the extent respondent complied with services, including attending parenting skills classes and individual therapy, the 1st Dept. accorded deference to Family Court's determination that she failed to gain insight or otherwise benefit from them.

The children had been in foster care in a pre-adoptive home for more than four years, and their educational, emotional, and physical needs were being met. The agency was 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 was unwarranted under the circumstances.

Permanent Neglect

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

The order of Family Court, New York County, which found that respondent mother permanently neglected the subject children, was affirmed.

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 constituted permanent neglect. Furthermore, the record showed 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, as well as the termination of parental rights as to her older children.

Permanent Neglect

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

The order of Supreme Court, Bronx County, which determined that respondent father permanently neglected the subject child, was affirmed.

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.

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.

The father's claims that the agency did not timely refer him for services or that the progress notes did not accurately reflect how often he visited the child was 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.

Permanent Neglect

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

The order of Family Court, New York County, which terminated the mother's parental rights, was affirmed.

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.

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. 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.

Permanent Neglect

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

The order of Family Court, New York County, which, upon findings that the father permanently neglected the child and that respondent mother is unable to care for the subject child presently and for the foreseeable future due to mental illness, and terminated respondents' parental rights to the child was affirmed.

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. 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. The court properly drew a negative inference from the mother's failure to testify. 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.

As for the father, 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. 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, 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.

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. 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.

The father visited the child only about once a month before the petition was filed. 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.

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. 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.

Permanent Neglect

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

The order of Family Court, Queens County, which found that the mother permanently neglected the subject child was affirmed.

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. The record showed 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.

Permanent Neglect

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

The orders of Family Court, Kings County, which found that the mother permanently neglected the subject children and terminated her parental rights were affirmed.

The appeal relating to the child Nevaeha-Milagros P.-W was dismissed as academic, as that child had since reached the age of 18, nevertheless, the challenge to the permanent neglect finding was 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.

The agency demonstrated 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 showed 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.

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 permanency in the child's life. Further, the record supported the determination that Phoenix's best interests would be served by freeing her for adoption by her foster mother with whom the child had bonded and resided over a prolonged period of time.

Permanent Neglect

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

The order of Family Court, Kings County, which found that the mother permanently neglected the subject child and terminated her parental rights was affirmed.

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 and the Commissioner for the purpose of adoption was dismissed as academic, as the child has reached the age of 18.

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

Permanent Neglect

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

The orders of Family Court, Kings County, which found that the mother permanently neglected the child and found that he consent of Jeanty O. to the adoption of the child were affirmed.

The 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, 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, a proceeding was commenced to terminate the mother's parental rights to the child on the ground 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.

Continued…

Permanent Neglect

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

On appeal, the petitioner established by clear and convincing evidence that mother permanently neglected the child by failing to maintain contact with MercyFirst for several months during the relevant period 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. 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 demonstrated that she was capable of understanding the proceedings, defending her rights, and assisting counsel.

The evidence at the dispositional hearing established that termination of the mother's parental rights was in the child's best interests. Contrary to the mother's contention, a suspended judgment was not appropriate in light of her failure to consistently visit the child and to maintain contact with MercyFirst.

Contrary to Jeanty O.'s contention, 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. Jeanty O.'s contention that his counsel was ineffective for failing to argue that he was a consent father is without merit as was his contention that the court lacked personal jurisdiction over him. Further, Jeanty O.'s constitutional challenge to Domestic Relations Law § 111(1) was improperly raised for the first time on appeal and not properly before the 2nd Dept.

Permanent Neglect

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

The orders of Family Court, Queens County, which found that the mother permanently neglected the subject children and terminated her parental rights were affirmed.

Each of the three children were placed in the same foster home within days of their births.

The mother represented herself at the fact-finding and dispositional hearings.

While a respondent in a proceeding pursuant to Social Services Law § 384-b has the right to the assistance of counsel, they may waive that right and proceed without counsel provided he or she makes a knowing, voluntary, and intelligent waiver of the right to counsel. In determining whether a respondent's waiver is made knowingly, voluntarily, and intelligently, the trial court is obligated to conduct a searching inquiry. 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.

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 demonstrated 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.

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 referring the mother to appropriate services and scheduling parental access with the children. 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. 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.

Permanent Neglect

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

The orders of Family Court, Kings County, which found that the father permanently neglected the subject children were affirmed.

Petitioner's diligent efforts to strengthen the parent-child relationships 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.

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.

Permanent Neglect

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

The order of Family Court, Queens County, which found that the mother permanently neglected the child and terminated her parental rights was affirmed.

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. 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.

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 permanency in the child's life. Further, the record supported 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.

Permanent Neglect

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

The orders of Family Court, Queens County dated January 14, 2019, which, 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, and which denied the mother's motion pursuant to CPLR 5015(a) to vacate her default in appearing at the fact-finding and dispositional hearings were affirmed.

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. 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. Since the mother failed to set forth a reasonable excuse for her default, the 2nd Dept. did 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.

Permanent Neglect

Matter of Nikole V., 224 AD3d 1102 (3rd Dept., 2024)

The appeal from an order of Family Court, Albany County which terminated respondent's parental rights was rendered moot by the adoption of the children.

However the challenge to the adjudication of permanent neglect was not moot given the "permanent and significant stigma which is capable of affecting a parent's status in potential future proceedings."

The 3rd Dept. found that DSS did make diligent efforts to encourage and strengthen the father's relationship with the children.

The testimony demonstrated that although 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. Despite admitting that he had suffered mental health problems his whole life, he failed to engage in and complete mental health treatment. 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."

Permanent Neglect

Matter of Drey L., 227 AD3d 1134 (3rd Dept., 2024)

The order of Family Court, St. Lawrence County, which adjudicated the children to be permanently neglected, and terminated respondent's parental rights was affirmed.

The fact-finding hearing testimony demonstrated 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 AFC contended that the record did not adequately explain why petitioner did not fully explore the option to reschedule such missed meetings or visits, the record also revealed 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.

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Permanent Neglect

Matter of Drey L., 227 AD3d 1134 (3rd Dept., 2024)

Although not challenged by respondent, 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. The record reflected 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 demonstrated 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.

A suspended judgment was not warranted, as 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 failed to demonstrate how the children — particularly two children in residential treatment facilities due to their mental health — could be safely reunited with respondent. Considering that the children had been in care since November 2017, and the record revealed limited action toward reunification by respondent during that time, there was a sound and substantial basis in the record to support Family Court's determination to terminate parental rights.

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, the Court dismissed same for failure to perfect.

Permanent Neglect

Matter of Asiah S., AD3d 2024 NY Slip Op 03113 (3rd Dept., 2024)

The order of Family Court, Delaware County, which found the child to be permanently neglected, and terminated mother's parental rights was affirmed.

In March 2021, the subject child (born in 2007) was removed from the care and custody of the mother and placed in foster 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. Despite such alarming conduct, the mother rejected offers for alternative housing and saw no benefit to enrolling the child in mental health treatment). In September 2021, Family Court adjudicated the child to be neglected. On appeal, the 3rd Dept. 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 .

Following the child's removal, petitioner offered the 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 argued 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.

Continued…

Permanent Neglect

Matter of Asiah S., AD3d 2024 NY Slip Op 03113 (3rd Dept., 2024)

Prior to the child's removal, 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. 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 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 DSS and the child — a belief she shared with the child.

As to disposition, 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.

Permanent Neglect

Matter of Patience E., 225 AD3d 1178 (4th Dept., 2024)

The order of Family Court, Erie County, which terminated the parental rights of respondent with respect to the subject child was affirmed.

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.

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 to make findings of diligent efforts to reunite, the record was sufficiently developed to enable us to make the necessary findings.

The evidence at the hearing establishes that, despite those diligent efforts, the mother failed to plan for the future of the children. The the mother was discharged from mental health counseling, anger management classes, and substance abuse treatment for failure to attend.

A suspended judgment was warranted and it was in the children's best interests to terminate the mother's parental rights. The mother's progress in completing her parenting classes, which was only one of several required services, was made after the TPR petitions was filed, and she failed to complete that requirement or any of her other required services]during the time between when the petition was filed and the hearing was concluded.

The foster parents' desire to adopt the children, which adoption would provide them with a sense of stability, 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 was another factor in determining that a suspended judgment was unwarranted.

Permanent Neglect

Matter of Tori-Lynn L. (Troy L.), 227 AD3d 1455 (4th Dept., 2024)

The order of Family Court, Onondaga County, which terminated respondent's parental rights with respect to the subject children was affirmed.

The father and non-appellant mother are the biological parents of the subject children, who are twin girls. 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.

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 record established that, although 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 children and thus failed to plan for their future. While 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 that had been instructing him to sexually abuse the children. 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 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.

Continued…

Permanent Neglect

Matter of Tori-Lynn L. (Troy L.), 227 AD3d 1455 (4th Dept., 2024)

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 established 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. Thus, under the circumstances of this case, the finding of permanent neglect was not undermined by the evidence that petitioner took steps to arrange for the discharge of the children 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.

Continued…

Permanent Neglect

Matter of Tori-Lynn L. (Troy L.), 227 AD3d 1455 (4th Dept., 2024)

A different result was 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. 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. The psychiatrist made such a report by immediately placing a telephone call to the caseworker. The caseworker testified about receiving that report in June 2021 and the actions that petitioner took in response thereto**.** The caseworker's testimony alone was 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 established, 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 established that the father did not successfully address or gain insight into the problems that continued to prevent the children's safe return.

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, any error was harmless because.

Two judges dissented, writing that while they agreed 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, that 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, inasmuch as the record lacked other admissible evidence that the father failed to plan for the children's future from December 2020 to April 2021.

Permanent Neglect

Matter of Danyel J. (Alan J.), 227 AD3d 1484 2024 NY Slip Op 02472 (4th Dept., 2024)

The order of Family Court, Jefferson County, which terminated the parental rights of respondents with respect to the subject children, was affirmed.

The established a knowing, voluntary, and intelligent waiver of her right to counsel. Here, when considering the totality of the record, it was 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.

As to the merits of the petition, 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, Family Court properly found that the mother failed to maintain substantial contact with the children.

Similarly, the court properly found that 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 children's removal.

TPR Mental Illness

Matter of M.R.V., 224 AD3d 579 (1st Dept., 2024)

The order of Family Court, New York County, which, upon a fact-finding determination that respondent mother was unable to care for the subject child presently and for the foreseeable future due to mental illness, was affirmed.

The evidence included 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.

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.

The mother did not offer countervailing psychiatric, psychological or medical evidence.

A separate dispositional hearing was not required because this is a case of termination for mental illness.

TPR Mental Illness

Matter of Megan A. F., 224 AD3d 684 (2nd Dept., 2024)

The order of Family Court, Kings County, which 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 was affirmed.

Here, a psychologist interviewed the mother, reviewed the mother's records, including prior mental health evaluations, and concluded that she suffered 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.

TPR Mental Illness

Matter of Bella S., 225 AD3d 883 (2nd Dept., 2024)

The order of Family Court, Orange County, terminated mother's parental rights was affirmed.

The mother's contention that the Family Court erred in commencing the hearing in her absence was unpreserved for appellate review, as her attorney failed to object or request an adjournment.

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 was also 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. 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. In any event, under the circumstances, any error in this regard was harmless.

Lastly, the mother was not deprived of the effective assistance of counsel.

TPR Severe Abuse

Matter of Adam M.C., 224 AD3d 1295 (4th Dept., 2024)

The order of Family Court, Monroe County which terminated the parental rights of respondent on the ground that she severely abused the child was affirmed.

Inasmuch as the mother never appealed from the order of disposition in the Family Court Act article 10 proceeding, which clearly advised the mother of her obligation to timely appeal from that order, her challenge to the severe abuse TPR was not properly before the 4th Dept.

TPR Dispositions

Matter of Troy S. H., 225 AD3d 872 (2nd Dept., 2024)

The order of Family Court, Dutchess County which found that the mother permanently neglected the subject child, and suspended judgment for a period of one year was reversed, on the law, remitted to Family Court for a dispositional hearing.

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. Dutchess County DSS appealed from the dispositional portion of the order.

Family Court should not have dispensed with the dispositional hearing in the absence of the consent of the parties.

TPR Dispositions

Matter of Amir E., 226 AD3d 1015 (2nd Dept., 2024)

The order of Family Court, Westchester County, which terminated the mother's parental rights and transferred guardianship and custody of the child to the petitioner for the purpose of adoption was affirmed.

The subject child was born in December 2011.

In May 2012, the child was removed from the mother's care.

In December 2018, a petition was filed 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.

In April, 2024, the 2nd Dept. affirmed.

TPR Dispositions

Matter of Zackery S., 224 AD3d 1336 (4th Dept., 2024)

The order of Family Court, Yates County, which terminated the parental rights of respondent with respect to the subject children was affirmed.

It is well settled that, where 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.

The record established that the mother 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.

Although the mother's breach of the express conditions of the suspended judgment did not compel termination of her parental rights, it was strong evidence that termination was, in fact, in the best interests of the children. Any progress that the mother made was not sufficient to warrant any further prolongation of the children's unsettled familial status.

TPR Dispositions

Matter of Noah C., 225 AD3d 1178 (4th Dept., 2024)

The order of Family Court, Ontario County which terminated respondents' parental rights with respect to the subject children was modified by vacating the disposition with respect to the three oldest children, and as modified the order was affirmed and remitted to Family Court, Ontario County, for further proceedings.

Although the 4th Dept. found that there was 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, it agreed with the three oldest children, and the father, that new facts and allegations warranted remittal for a new dispositional hearing to determine the best interests of those children.

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 had been terminated, the second oldest child's adoptive placement had been disrupted inasmuch as he repeatedly absconded from the foster parents' home and his paternal grandmother has been awarded custody of him, and there was a pending custody petition by the paternal grandmother for the third oldest child, who was about to turn 14 years old and who remained steadfast in his opposition to being adopted.

Although other new facts and allegations asserted by DSS suggested that termination of parental rights might remain in the best interests of the oldest child, the second oldest child, and the third oldest child, The 4th Dept concluded that the record before it was no longer sufficient to determine whether termination of respondents' parental rights is in the best interests of those children.

The 4th Dept. did 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 was of no moment inasmuch as termination has been upheld with respect to younger siblings in similar circumstances.

TPR Dispositions

Matter of Rodcliffe M., Jr., AD3d 2024 NY Slip Op 03267 (4th Dept., 2024)

The order of Family Court, Monroe County, which terminated respondent's parental rights with respect to the subject children was modified in the exercise of discretion by vacating the denial of a suspended judgement, and remitting 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.

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, an 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, diligent efforts to encourage and strengthen the parental relationship are not required.

The father also contended that the record lacked 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. That was rejected inasmuch as the resources proposed by the father were not realistic alternatives to foster care.

However, the 4th Dept. did conclude that a suspended judgment, rather than termination of parental rights, was in the children's best interests. 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 children'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, the father“ should have been granted a second chance in the form of a suspended judgment.

Surrenders and Adoptions

Matter of Gabriel E., 227 AD3d 1147 (3rd Dept., 2024)

The order of Surrogate's Court, Otsego County which determined that respondent's consent was not required for the adoption of his child was affirmed.

A custody order referenced at the hearing appears to indicate that the father had previously been granted supervised visits with Gabriel. 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, "trashing 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.

During his testimony, the father stated that he was currently incarcerated, has been in prison for 5 of the last 10 years and that he anticipated he would 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.

Surrenders and Adoptions

Matter of Tricia A.C. v Saul H. and Julie H., AD3d 2024 NY Slip Op 03242 (4th Dept., 2024)

The order of Family Court, Ontario County, which dismissed the petition to enforce the contact agreement with prejudice was affirmed.

The agreement, which was incorporated into a judicial surrender of petitioner's parental rights to the subject children, provided 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 provided 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.

An order incorporating a post-adoption contact agreement may be enforced by any party to the agreement but the court shall not enforce an order incorporating such an agreement unless it finds that the enforcement is in the child's best interests. 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.

Petitioner's further contention that the provision of the agreement allowing her monthly telephone contact with the children was severable from the other provisions of the agreement and should be enforced was unpreserved for review. 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.

Custody

Matter of Prince T.A.M.-F., 224 AD3d 509 (1st Dept., 2024)

The order of Family Court, New York County, which, after a hearing, granted the petition of the great aunt to appoint her kinship guardian of the child and dismissed the father's petition for custody, was affirmed.

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. The father did not dispute that extraordinary circumstances to entertain the petition existed.

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. Moreover, since his release, the father had had inconsistent visits with the child and had not otherwise planned for the child's return.

MISCELLANEOUS

Fair Hearing

Matter of Ciccarelli v New York State Off. of Children & Family Servs., 227 AD3d 1066 (2nd Dept., 2024)

The determination, after the fair hearing which denied the application to amend and seal the indicated report maintained by the SCR was confirmed.

In February 2020, the petitioner was the subject of a report made to the SCR after her child had been absent from school for 43 days and late for school 23 times during the 2019-2020 school year. CPS investigated the report and determined that the report was indicated. The fair hearing resulted in a denial of the application to amend and seal the indicated report.

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.

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.

Substantial evidence also supported the determination that the petitioner's maltreatment of the child was relevant and reasonably related to childcare employment.

Fair Hearing

Matter of Hastings v New York State Off. of Children & Family Servs., 227 AD3d 1446 (4th Dept., 2024)

The determination of the ALJ was 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,

Onondaga County Children and Family Services 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 the SCR. Petitioner requested a fair hearing, after which the ALJ rendered a determination finding that a fair preponderance of the evidence was entered 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 remained 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.

The 4th Dept. agreed with petitioner that, when viewed in light of the definition of "rehabilitation" provided by the guidelines, there was no support for the ALJ's determination that the record lacked rehabilitative evidence. First, the record established that there was no apparent repeat of the act of child abuse and maltreatment by petitioner and 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.

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Fair Hearing

Matter of Hastings v New York State Off. of Children & Family Servs., 227 AD3d 1446 (4th Dept., 2024)

Second, 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 had made an enormous amount of progress and had 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 established that petitioner is able to deal positively with the situation or problem that gave rise to the indicated report.

Third, the record also contained uncontroverted evidence of "success with professional treatment." 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.

Continued…

Fair Hearing

Matter of Hastings v New York State Off. of Children & Family Servs., 227 AD3d 1446 (4th Dept., 2024)

The 4th Dept. also agreed with petitioner that the other three factors upon which the ALJ apparently relied did 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" supported the ALJ's determination. 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. 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. 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.

The 4th Dept. held that the ALJ failed to sufficiently address the other relevant guideline factors. Most significantly, the ALJ overlooked the relevant events and circumstances surrounding her actions and inactions as related to the indicated report. The record indisputably established 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, and the ALJ also ignored petitioner's prior demonstrated success as a substitute teacher.

Judicial Conduct

Matter of Zyion B., 224 AD3d 1285 (4th Dept., 2024)

Although the 4th Dept. dismissed the appeal from an order of Family Court, Onondaga County as moot, it did comment on the Family Court Judge's apparent abandonment of her neutral judicial role during the sua sponte removal hearing.

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, 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 and thereby transgressed the bounds of adjudication and arrogated to herself the function of advocate, thus abandoning the impartiality required of her.

This clash in judicial roles, in which the Judge acted both as an advocate and as the trier of fact, at the very least created the appearance of impropriety, 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. The 4th Dept. reiterated 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, and felt compelled 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. The 4th Dept. also recommended that she consider whether recusal is appropriate for future proceedings involving the mother.

Judicial Conduct

Matter of Anthony J., 224 AD3d 1319 (4th Dept., 2024)

The order of Family Court, Onondaga County which terminated respondent's parental rights with respect to the subject child was reversed and remanded for a new hearing before a different judge.

The 4th Dept. agreed with the mother that she was denied due process of law based upon the bias against her displayed by the Family Court Judge. It noted that the mother's contention was unpreserved for our review inasmuch as the mother did not make a motion for the Family Court Judge to recuse herself, however, the 4th Dept. exercised its power to review that contention in the interest of justice.

The 4th Dept. found that the record demonstrated that Family Court had a predetermined outcome of the case in mind during the hearing. 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. The 4th Dept. found those comments were impermissibly coercive, that the court made good on its promise to terminate the mother's parental rights could not be tolerated.

The record further demonstrated that the Family Court Judge was annoyed with the mother's refusal to surrender her parental rights to the child. The 4th Dept. felt 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, and cited the *Matter of Zyion B*. discussed above- it was the same judge in both cases.

Liability for Damages to Home by Child

Falso v Children & Family Servs., 227 AD3d 1466 2024 NY Slip Op 02448 (4th Dept., 2024)

The order of Supreme Court, Monroe County, which 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 was affirmed.

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.

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" of defendant until 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, the 4th Dept. concluded that the allegations in the complaint did not establish the existence of a special duty with respect to the negligence cause of action. 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. The 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.

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Liability for Damages to Home by Child

Falso v Children & Family Servs., 227 AD3d 1466 2024 NY Slip Op 02448 (4th Dept., 2024)

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. To 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. 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. Defendant's duty to plaintiff was neither more nor less than its duty to any other foster parent taking in a child. 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 thus abandoned that cause of action. 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.

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. 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.

Liability for Injury to Foster Child

P.D. v County of Suffolk, AD3d 2024 NY Slip Op 03405 (2nd Dept., 2024)

The order of Supreme Court, Suffolk County, which denied the County's motion for summary judgement on the ground of governmental immunity, was affirmed.

The plaintiff father and nonparty 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.

On September 21, 2019, the grandmother drove the infant plaintiff, then two years old to a park for a supervised visit with the mother. After leaving the children in the care of the assigned caseworker for Suffolk County DSS, grandmother left the park to go to work. The caseworker 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 grandmother dropped off the children, the caseworker walked the children 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 caseworker testified that his role during the supervised visit was to basically 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.

The County moved for summary judgment dismissing the complaint insofar as asserted against it, arguing, among other things, that it was immune from liability, since the caseworker was performing a governmental function involving the exercise of discretion and did not owe a special duty to the infant plaintiff.

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Liability for Injury to Foster Child

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Supreme Court's denied of the motion, finding that the County failed to make a *prima facie* showing that it did not owe a special duty to the child.

The 2nd Dept. distinguished some earlier 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, finding this to be an issue of first impression whether the municipality assumed a special duty to the foster child in such instance.

The 2nd Dept. found this case to be analogous to those where a child is 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 the caseworker and then left the park for the duration of the visit. While the mother was present during the visit, it was 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, the caseworker 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, the caseworker acted in loco parentis during the visit. Thus, the County's contention that the mother was the individual responsible for supervising the infant plaintiff was not supported by the record.

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Liability for Injury to Foster Child

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Moreover, the County could not 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 followed that the caseworker was obligated to ensure that the mother did not permit the infant plaintiff to engage in any unsafe behavior.

Although discretionary governmental action, as opposed to ministerial governmental action, may not be a basis for liability even if a special duty exists the County's assertion that the caseworker'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.

As to the issue of proximate causation, the 2nd Dept. held that 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, 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. Here, the County failed to establish, prima facie, that the caseworker provided adequate supervision to the infant plaintiff, or that a lack of adequate supervision was not a proximate cause of the accident. Viewing the evidence in the light most favorable to the plaintiffs, 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. 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 the caseworker 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.

Mental Health Records

Matter of J.J.D. v M.D., 227 AD3d 441 (1st Dept., 2024)

The order of Family Court, New York County, which granted the motion of 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, was 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.

ACS had 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, the order was modified to 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). The 1st Dept. rejected that argument. However, applying the appropriate statutory standard, it held 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 as required by Mental Hygiene Law § 33.13 [c] [1].

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. Her testimony at the §1028 hearing and as set forth in the prior fact-finding orders entering neglect findings against her on consent, demonstrated that the records from those facilities were 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 outweighed any potential harm to the children from the discovery. Nor was production of records from those facilities cumulative of other evidence in the proceeding.

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Mental Health Records

Matter of J.J.D. v M.D., 227 AD3d 441(1st Dept., 2024)

Although the mother had difficulty at the §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 was 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. ACS's request had the potential of producing records that were not material and relevant to the underlying petition. Family Court's solution of having the parties submit objections to the records after production did 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.

Violation of Order of Protection

Matter of Angel P. H., 223 AD3d 808 (2nd Dept., 2024)

The order of Family Court, Queens County, which found that Angel P. Q. willfully violated a temporary order of protection and directed that he be committed to the custody of the New York City Department of Correction for a period of 10 months was affirmed.

Respondent 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.

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. Knowingly failing to comply with a court order gives rise to an inference of willfulness. 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.

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Violation of Order of Protection

Matter of Angel P. H., 223 AD3d 808 (2nd Dept., 2024)

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 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 drop off to be accomplished by a third party. Since notice of the conduct prohibited by an order of protection may be given orally 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.

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. There is generally no right to a jury trial in violation proceedings because the maximum sentence for each willful violation is only six months. Angel P. Q. apparently raised the issue that 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. Here, the 2nd Dept. found that Angel P. Q. failed to show that his removal would be "practically inevitable," "virtually automatic," or would "invariably" flow from his conviction. The conclusory allegation that he is deportable simply by reference to categories of deportable aliens in 8 USC § 1227(a)(2)(E)(ii)0 was insufficient to establish his right to a jury trial as the offenses that Angel P. Q. was found to have committed necessarily call for a circumstance-specific inquiry to determine removability.

Visitation

Matter of Leroy W., AD3d 2024 NY Slip Op 03238 (1st Dept., 2024)

The order of Family Court, Bronx County, which, 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, was modified, to vacate the portion of the order requiring the child to visit her incarcerated father once every six months.

Family Court's determination that visitation with the father once every six months was in the child's best interests, did 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. However, that presumption is rebuttable, and a demonstration that such visitation would be harmful to the child will justify denying such a request.

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. 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.

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. The position advocated by the attorney for the child was also entitled to serious consideration and supported modification of the court's order.

The End

Thank You!