SELECTED CHILD WELFARE CASELAW

JULY 2016 – DECEMBER 2016

By: Margaret A. Burt, Esq.
Phone – 585-385-4252
Email - mburt5@aol.com

GENERAL EVIDENTIARY MATTERS IN ART. 10 PETITIONS

Matter of Daniel O., 141 AD3d 434 (1st Dept. 2016)

ACS successfully appealed a decision from the Bronx Family Court that allowed the parents to have unsupervised visitation while the Art. 10 abuse and neglect proceeding was pending. The Appellate Court ruled that the lower court's order as an abuse of discretion as unsupervised visitation was not in the children's best interests. The respondent parents' three month old sustained life threatening head injuries and rib fractures while in their care. Given these serious allegations, the court should not consider permitting unsupervised access to the children until the fact finding has been completed.

Matter of Sara A., 141 AD3d 646 (2nd Dept. 2016)

Although the Second Department concurred that the children in this Kings County matter were at imminent risk and should be removed while the Art. 10 was pending, the appellate court was critical that the trial court had not sufficiently weighed if the imminent risk could be mitigated by some reasonable efforts that would prevent a placement. The lower court order only "listed several areas of concern related to mitigation without actually analyzing" if the mitigation would work. In any event, the facts showed that the father would not comply with any order that would attempt to mitigate the risk and so the removal was affirmed.

Matter of Brian S., 141 AD3d 1145 (4th Dept. 2016)

Although the Fourth Department concurred with Cayuga County Family Court that the DSS did prove that a mother had neglected her children, the appellate court reversed based on ineffective assistance of counsel by the children's attorney. The matter was remanded for a full new hearing. There were three children, aged 12,13 and 15 when the proceedings began. The neglect was essentially proven using the out of court statements of the children which were cross corroborated by each other's statements and by other evidence. The mother failed to testify on her own behalf and the Fourth Department concluded that there was sufficient proof of the mother's neglect. Although the lower court did not allow the mother's counsel into chambers when the court spoke to the children, the mother did not preserve any objection to this procedure. It did appear that the court's conversation with the children was for the limited purpose of determining where the children should reside during the pendency of the proceedings and was not used by the court as evidence in the fact finding determination.

However, children in an Art. 10 matter are entitled to an effective assistance of counsel. The children were were all represented by the same AFC at the lower court. On appeal, each child was assigned their own AFC, none of whom was the trial AFC. It was claimed that AFC at the fact-finding never met or spoke to one of the three teenagers but the record was silent as to that issue. However, the AFC clearly did not advocate for the position of at least one of the teens. An AFC must zealously advocate the child's position and has only two narrow reasons that allow for a substitution of judgment – either where the child lacks capacity for a knowing, voluntary, and considered judgment or where the AFC is convinced that following the child's wishes is likely to result in a substantial risk of imminent and serious harm to the child. In this case, one teen took a position that the mother had done certain neglectful acts and the two other teens claimed that the mother had not been neglectful and that the other sibling was lying. The AFC in this matter argued that the children were neglected and cross examined the caseworker to elicit

testimony of neglect, contrary to the position of two of the three children. There was no evidence that the AFC did so after determining that he had one of the exceptions that allowed him to do so. The children were teens and therefore had capacity and although the AFC expressed concern that the children missed a lot of school and this did not amount to a substantial risk of serious harm. Even the mother's occasional drug use did not amount to a substantial risk of serious harm. Hitting one child once on the arm with a belt also did not amount to a level that would have permitted the AFC to substitute judgment. The children should have been provided with separate counsel at the lower court level. The Appellate Division ordered that the children should have new AFCs appointed and the fact finding should be retried.

Two Judges dissented, finding that although the proof did establish neglect, there was in fact enough serious neglectful behavior on the part of the mother to permit the trial AFC to substitute judgment. There was proof of educational neglect, proof that the children skipped school, proof that the children would leave the home and use alcohol and marijuana when the mother would remain in her bedroom as well as proof that the mother misused drugs. Further, the lower court was well aware of that the children had separate positions in the matter.

Matter of Ariez T., 143 AD3d 1212 (3rd Dept. 2016)

The Third Department ruled that a father's appeal of a denial of his motion to dismiss an Art. 10 petition from Schenectady County Family Court was moot given that while the appeal was pending, the lower court terminated the father's rights on abandonment grounds. Since there was no finding of neglect being appealed, the exception to the mootness doctrine due to the stigma of a neglect adjudication is not present.

Matter of Nevaeh A., __AD3d__ dec'd 11/23/16 (3rd Dept. 2016)

A Cortland mother appealed the Family Court's decision to remove her child. While the appeal was pending, the mother surrendered her parental rights. The Third Department ruled that this made the appeal moot given that a removal is not a stigma in the sense that a finding of neglect might be. The court pointed out that this has been repeatedly the ruling of the Third Department, as well as the First Department and the Fourth, although the Second Department has been less clear.

GENERAL NEGLECT

Matter of Daniela H., 141 AD3d 410 (1st Dept. 2016)

A Bronx mother neglected her five children given that the two older children were excessively tardy and absent from school without appropriate excuse. The children's education was "significantly compromised" by this. This supports a derivatively finding on the three younger children.

Matter of Malik S. 141 AD3d 428 (1st Dept. 2016)

The First Department concurred with the Bronx County Family Court that a mother neglected her 15 year child. The child missed 134 out of 139 days of school. The mother claimed she could not control the teen but provided no evidence that this was so. She also claimed that she was attempting to transfer the child to a different school, but again offered no evidence to show this to be true. The child was not only educationally neglected, but the mother failed to supervise the teenager. The mother permitted the child to live for long periods of time with someone else but had not determined if that home was appropriate and safe. The mother also failed to contact the police or anyone even though she knew the child was missing. The lower court properly refused to grant an ACD and also properly refused to allow ACS to withdraw their petition. The mother moved to dismiss at the end of the ACS proof and the court denied the motion. The mother then offered no proof and rested and the mother requested the court to reconsider the motion to dismiss. Since there had been no further proof since the first motion, it was not error to refuse to reconsider the motion to dismiss.

Matter of Samima I.A.C., 141 AD3d 582 (2nd Dept. 2016)

The Second Department agreed with the Kings County Family Court that a mother neglected her 13 year old child. The mother refused to allow the child to return to the home and would make no plans for where the child could stay. The fact that then mother was not offered respite care of a voluntary placement did not absolve her of her responsibility to arrange for the child's care.

Matter of Z'naya D.J., 141 AD3d 652 (2nd Dept. 2016)

A Brooklyn mother neglected her children. She used excessive corporal punishment on her five year old child. The same child also made out of court statements that the mother's boyfriend punched the child in the stomach and this incident was cross corroborated by the older sister. The caseworker also observed the mother berate and be verbally abusive to the five year old.

Matter of N'Zion H., 142 AD3d 1170 (2nd Dept. 2016)

The Second Department reversed a neglect adjudication in this Westchester County Family Court appeal. The mother of the child had taken a quantity of baby aspirin and was hospitalized. However, she had made arrangements for the child to be cared for while she was in the hospital and there was no evidence that the child was in imminent danger due to the taking of the baby aspirin or the hospitalization.

Matter of Agam B., 143 AD3d 702 (2nd Dept. 2016)

A Queens' mother neglected her child by failing to seek timely psychiatric treatment for him. The mother also gave the child prescription psychotropic medication that no one had in fact prescribed for the child. The mother also educationally neglected the child who was not enrolled in any school, was not being home schooled and was not receiving any services from the Dept. of Special Education.

Matter of Ricardo M.J. 143 AD3d 503 (1st Dept. 2016)

The First Department agreed with the Bronx County Family Court that a mother neglected her child. The child told the caseworker that his mother beat him "all the time" and used a belt with spikes. He was afraid of the mother and he had bruises on his body. The child told a police detective the same information and the mother admitted to beating the child. The mother claimed that the bruises were caused by other various things but she was not credible

Matter of Warren R.R., 143 AD3d 1072 (3rd Dept. 2016)

The Third Department agreed that a St. Lawrence County father had derivately neglected his son. The father had a long, problematic history. He has eight children with five women apart from the mother of this child. He is a level three sex offender based on his 2003 guilty pleas to multiple rape charges. Those incidents involved his having sex with underage girls that also resulted in his fathering children. He was sentenced to prison for those charges and twice violated the subsequent terms of his parole and ended up serving his whole sentence. He had tried unsuccessfully to have his risk classification reduced. He had been found to have neglected three of his children in 2003 based on domestic violence. He also had multiple permanent neglect findings against him from 2008, 2011 and 2014. The father's history supported a derivative finding for this child. This is due to both the 2003 neglect adjudication and the multiple permanent neglect adjudications. The history demonstrates a longstanding pattern of neglect and there is also a pattern of inability to address what are clearly serious substance abuse problems. Each of the prior matters resulted in the father being ordered to seek substance abuse counseling and treatment. He made some progress but frequently tested positive for marijuana – including on the day of this matter's dispositional hearing (he claimed this was due to the stress DSS brought to his life). Further although the father acknowledged his past rape convictions, he minimized his behavior saying that he was only 20 at the time and that the underage girls involved were in his "social circle". This child was only 4 months old at the time of the petition and is very vulnerable and needs protection from the father given his history.

The mother also neglected the baby. She knew of the father's criminal and child welfare past. She knew that he was a registered sex offender and that he had lost parental rights to most of his many other children. She claimed however, that the father would never harm the baby. She claimed that she did not ever leave the baby alone with the father and that they lived in separate apartments. The court found this claim "absurd" since they all lived in the same apartment building, shared a common kitchen and bathroom and the separate "bedroom" of the father was a place filled with clutter and no bed. The mother placed her interests above those of the baby. The court allowed the baby to remain with the mother and both parents were placed under DSS supervision.

Matter of Evelyn EE., 143 AD3d 1120 (3rd Dept. 2016)

In a complicated case involving both neglect and several custody petitions from two resources, the Third Department upheld the Schenectady County Family Court. The mother had five children and a prior neglect finding involving her abuse of alcohol as to the oldest children. This matter concerned her three younger children. The Appellate Court agreed that the three children were neglected. First there was derivative neglect based on the prior matter where the mother, passed out on the grass, had left a child, crying for 45 minutes and in a stroller near a city street . This incident had occurred in 2011 and the adjudication of neglect regarding it was made in 2013. This was sufficiently proximate in time to

conclude that the mother's problems were continuing. Further supporting the current neglect was that the mother had been hospitalized three times for mental health issues and had tried to commit suicide twice. She has ADHD, PTSD and authority defiance disorder. She is also diagnosed with bipolar disorder and borderline personality disorder. She does not admit to having mental health issues, contending that these are lies made up by a DSS worker. She did not follow safe sleep protocols with the newest baby and tested .16% of blood alcohol one day and a .14% on another day. On the day of the second test, she was caring for the children. She also tested positive for cocaine on yet another date. The appellate court also agreed with the lower court's rulings that placed the children in the custody of the several resources who had come forward.

Matter of Samiha R., __AD3d__, dec'd 11/2/16 (2nd Dept. 2016)

A Brooklyn mother neglected her 8 month old and derivatively neglected her three year old. Law enforcement, while searching her apartment pursuant to a search warrant, found a loaded gun on the floor within reaching distance to the 8 month old.

Matter of Mary R.F., _AD3d___, dec'd 11/10/16 (4th Dept. 2016)

Cayuga County Family Court was affirmed on appeal to the Fourth Department. The mother neglected her children as her home was unsanitary and unsafe. The mother failed to follow up, as instructed, in obtaining further medical treatment for one of the children after an ER visit for alleged sexual abuse. The mother was not providing a minimum degree of care for the children.

Matter of Iris G., _AD3d__, dec'd 11/16/16 (2nd Dept. 2016)

In a unique Westchester County neglect case, a father was found to have derivatively neglected his two young children based on his having sexually abused the children's mother when she herself was a child. The father had lived with the mother when she was a child and acted as a stepfather to her. From the time the mother had been 8 years old until she was 18, he had lived with her and during that time he had sexually abused her. The father also had pled guilty to sexually abusing a 14 year old girl and have gone to prison for that crime. He refused to admit any wrong doing, and did not show that he had attended any treatment for his proclivity for sexually abusing children.

Matter of Keniya G., __AD3d__, dec'd 11/17/16 (1st Dept. 2016)

A New York County respondent was a person legally responsible for the subject children. He cared for the younger children every week day. He transported them to and from school, made the meals, cleaned the home, took care the children's clothing and did the grocery shopping and provided some of the money to run the household. He was living in the home and although he did not involve himself as much with the older child, she was part of the household and had frequent contact with her. The older child made out of court statements that the respondent made a "sexually threatening comment to her". This was

corroborated by the fact that the respondent had pled guilty to raping two girls who were only a year or two younger than this older child in the home. He was a level three violent sex offender who had been determined to be at high risk of recidivism.

Matter of Amyn C., __AD3d__, dec'd 11/18/16 (4th Dept. 2016)

The Fourth Department affirmed an Erie County Family Court's finding of derivative neglected regarding a newborn. This baby was born 2 days after a neglect finding regarding the mother's four other children. The mother had failed to address the mental health issues that had led to the neglect adjudication and the foster care placement of the older children.

Matter of Choice I., __AD3d__, dec'd 11/23/16 (3rd Dept. 2016)

A Schenectady County Family Court neglect adjudication was reversed on appeal to the Third Department. The father did not appear for the fact finding but the matter was not a default as his counsel appeared for him and fully participated. The lower court found that the newborn in the matter was derivately neglected based on 1999 and 2010 indicated CPS reports against the father. The Appellate Court ruled that this was insufficient, pointing out that neither of the reports resulted in a neglect adjudication against the father. Further, the conduct in the prior reports did not rise to the level of demonstrating a fundamentally flawed understanding of parenting. The 1999 report was against the parents of a child and this respondent was only 18 at the time and was living with the parents and the report did not establish which of the three adults was in fact the person who had neglected the child. Although that report had resulted in an Art. 10 petition being filed against the respondent, there was no court adjudication of neglect as it was ACDed. The 2010 report was against the respondent and his then girlfriend based on the children witnessing domestic violence, which may not in fact constitute neglect unless the child was affected.

Matter of Essence J., __AD3d__, dec'd 11/29/16 (1st Dept. 2016)

The First Department affirmed Bronx County Family Court's determination that a father neglected his child and the two other children he was legally responsible for. He admitted that knew that the mother was drinking to the point of intoxication at least three times a week. The court had determined that the mother was actually drinking every single day to intoxication. The father did nothing to protect the children. Also the father had failed to accept responsibility for sexually abusing another child 13 years earlier. This child was a sibling of the children who were the subject of this petition and was only 10 years old when he sexually abused her. He had been court ordered to go to a sexual abuse program under two prior court orders and had never done so. The youngest child in this matter was born just 15 days before the adjudication of neglect and the father's parental judgment remained impaired.

Matter of Nassair S., __AD3d___, dec'd 11/29/16 (1st Dept. 2016)

A Bronx mother neglected her children by leaving them with the grandmother saying it would be for just one day and then failing to return for them for ten days. The grandmother then just left the children in the

hallway outside of another relative's home. The caseworker testified that the mother admitted she did this. This statement was admissible as an admission against a party. The mother made no offer of proof that there was more to what she said to the caseworker to explain what had happened and the mother failed to testify in her own behalf. The court appropriately drew "the strongest inference" against her.

Matter of Natasha W. v NYS OCFS ___AD3d__, dec'd 12/1/16 (1st Dept. 2016)

The First Department reversed the ALJ on a fair hearing and ordered the indicated report to be unfounded. The mother in this matter took her five year old child to an upscale department store and in a dressing room, dressed herself and the child in layers of the clothing in an attempt to shoplift the clothing. The mother and child were stopped and the mother was arrested and the child's aunt was called to come and get the child. The mother ultimately pled guilty to disorderly conduct and her criminal record was sealed. CPS indicated her for neglect for exposing the child to criminal behavior. The CPS records commented that they were going to refer her to community services but did not indicate that they in fact did so. No action was brought in Family Court. The mother had no prior criminal or CPS problems. The First Department found that the ALJ erred in ruling that her behavior constituted encouraging a child to commit crimes or that somehow it was teaching the child how to shoplift. The ALJ was using "subjective views of parental behavior" and that the preponderance standard at the fair hearing level was intended to correct this type action being indicated. Further, the Appellate Court ruled that the mother wanted to work in childcare and that this indicated report would, of course, impact that option. However, her behavior was not something that was "reasonably related" to work in child care. The ALJ erred in finding that the mother's failure to testify somehow meant that the mother's behavior would reoccur.

Two Judges dissented, opining that exploiting a child to commit a crime and teaching a child that this is acceptable behavior has long standing consequences for a child. This is particular so when the child is old enough to understand what is happening and young enough to still be primarily learning from the observation of his parent. Even a minor crime like shoplifting also puts the child in a position of possible physical harm given the potential for physical confrontation.

Matter of Unique T., __AD3d__, dec'd 12/15/16 (1st Dept. 2016)

The First Department affirmed New York County Family Court's determination that a mother neglected her child. The mother was mentally ill and diagnosed with anti social personality, disorder with borderline traits, a cluster B personality disorder, bipolar 1 disorder and substance abuse mood disorder. She was aggressive and violent on many occasions and would not accept treatment. She also abused drugs and alcohol. She admitted to using "Molly", Ecstasy, and marijuana. She abused alcohol. She had been hospitalized in the past for drug use and would not enroll in drug treatment. The mother had neglected an older child and that child had been freed for adoption due to the mother's failure to get mental health treatment or drug treatment. The mother's issues continued to result in neglect of this second child.

Matter of Era O., __AD3d__, dec'd 12/21/16 (2nd Dept. 2016)

A Richmond County father neglected three children. He used excessive force to discipline one child. This was proven by the out of court statements of the child corroborated by the testimony of the CPS worker as

well as the in court testimony of another child. Further the father regularly used marijuana in the home and was not in any rehab program. Lastly, the court was permitted to draw a negative inference from the father's failure to appear at the hearing and failure to offer his own testimony.

Matter of Kenneth C., __AD3d__, dec'd 12/23/16 (4th Dept. 2016)

An Onondaga County mother neglected her children. Two of the children had a combined 150 unexcused absences during the school year which is a prima facie case of educational neglect. The mother did not rebut the presumption that the children were educationally neglected with any appropriate explanation. Also under FCA § 1046 (a)(iii) the mother's use of heroin, her inability to function at times and her failure to seek treatment established a presumption of neglect of the children which again the mother did not rebut. The court did not err in going forward with the fact finding and dispositional hearings in this matter in the mother's absence. The court had told the mother of the date and had warned her that the hearing would go forward if she did not appear. The mother's attorney fully represented her in any event at the hearings.

Matter or Danaryee B., __AD3d__, dec'd 12/23/16 (4th Dept. 2016)

The Fourth Department affirmed neglect findings in an Erie County case. The child was in imminent danger of neglect as she was living in deplorable, unsanitary conditions. The floors of the home were covered in animal feces and "ankle-deep piles of garbage." The child had no bed and there were no diapers in the home for the child.

Matter of Isabella D., ___AD3d__, dec'd 12/28/16 (2nd Dept. 2016)

A Kings County father neglected his three children. The father committed acts of domestic violence against the mother in front of the children. He also used excessive corporal punishment of one of the children, hitting her with a belt and belt buckle.

Matter of Genesis R., ___AD3d___, dec'd 12/29/16 (1st Dept. 2016)

The First Department agreed with New York County Family Court that a respondent's violent acts put the children at risk of neglect. He acted aggressively and angrily toward the caseworkers on numerous occasions, causing the older of the two children to become distressed and cry. When he went to the hospital to visit the child who had just been born, he was disruptive and verbally violent to the extent that he was escorted out of the hospital and barred from returning. The appellate court found there were two other incidents that each standing alone would merit a neglect finding. Once he screamed at the mother, grabbed at her phone and pushed her into an elevator in the presence of a caseworker and the older child. The other incident involved him allowing the mother, who was only to have agency supervised visits, to have access to the older child.

Matter of Gabriella UU., __AD3d__, dec'd 12/29/16 (3rd Dept. 2016)

An Ulster County toddler was neglected by her father. The child had a spiral fracture to her radial bone and a mid shaft fracture to her ulna bone. The emergency room doctor testified that that the positioning of the bruising was consistent with the child having been grabbed by a hand grip. Further that the fractures would have occurred at the same time and would be the result of a direct hit to the child's forearm or a forceful grab, pull and twist of the arm. An accidental fall on an outstretched hand would not have caused both bones to fracture at the same time and in the way that they did. The explanations given by the parents were not consistent with the child's injuries. The mother testified that she had left the child alone with the father and her time frames were consistent with when the medical evidence said the injuries occurred. The mother further testified that the father told her he had pulled on the child's arm and DSS offered into evidence Facebook messages in which the respondent told the mother he was responsible for the child's injuries. This all gave rise to a presumption that the father caused the injury and the father did not rebut the presumption. He presented no proof and did not testify. His failure to testify allowed Family Court to draw the strongest negative inference against him.

Matter of Daleena T., __AD3d__, dec'd 12/29/16 (1st Dept. 2016)

Two New York County parents neglected their two children**.** The father left the infant in a stroller on the street, unattended for over a half hour. The father has a long history of mental illness. The mother would not comply with orders of protection to keep the father from the home and would continue to leave the children in his care. She would not acknowledge that he posed a threat to the children. The mother would not comply with the ordered ACS supervision and would not sign a release so that ACS could determine that she was receiving needed therapy.

Parental Substance Abuse

Matter of Essleiny A., 142 AD3d 862 (1st Dept. 2016)

The First Department agreed with Bronx County Family Court that a father had neglected his children by engaging in narcotics sales in the apartment where the children lived which created an imminent danger to the children. The father was arrested leaving the family apartment building with a half kilo of heroin in his possession. A search of the apartment uncovered a kilo press in the children's bedroom. One of the children testified in court that she had seen her father counting money with another man in the family apartment. The father failed to testify in his own defense and thus the court could draw a negative inference against him.

Matter of Hunter K., 142 AD3d 1307 (4th Dept. 2016)

A Livingston County mother neglected her four children. The Fourth Department affirmed the lower court's finding that the mother's substance abuse resulted in the children being neglected under the presumption in FCA § 1046 (a)(iii). The mother told the caseworker that she would drink vodka for days at a time and that she felt guilty that her drinking, and her husband's drinking impacted the children. The oldest child told the caseworker that he would have to make dinner for the children when his parents were too drunk. Sometimes the older child would have to arrange for a neighbor to care for the youngest child because he would have to go to work and his parents were too intoxicated to care for the child. Once the youngest child hid under the furniture when the parents were drinking and fighting. The father would become physically abusive toward the children and the mother would be too intoxicated to stop him. The mother failed to rebut the statutory presumption that her drinking put the children at imminent risk of neglect.

Matter of Pawel S., 143 AD3d 724 (2nd Dept. 2016)

Kings County Family Court's adjudication of neglect regarding a father was affirmed on appeal. The father regularly abused alcohol to the point of intoxication. He also physically abused the mother in front of the children and left the children with caretakers who were intoxicated. The children made out of court statements about the patterns of behavior and specific incidents that were corroborated by other evidence. The fact that there was no evidence of actual harm to the children does not require a reversal as FCA §1012 (f)(i) only requires the imminent danger of impairment which is presumed as per FCA § 1046 (a)(iii)

Matter of Brian F., Jr., 143 AD3d 983 (2nd Dept. 2016)

The Second Department affirmed a neglect adjudication regarding the Westchester County father of two children. He knew of should have known that the mother's drug use posed a risk of harm to the children and he failed to take any action to protect them.

Matter of Grace F., __AD3d__, dec'd 11/2/16 (2nd Dept. 2016)

The Second Department affirmed a Suffolk County Family Court determination that a mother had neglected her 9 year old daughter. The child had called her grandfather in a "panic" that the mother was sick, had vomited and that the child could not wake the mother up. The grandfather went to the home and found the child alone with the mother who was unconscious on the couch. He was able to wake the mother who screamed, cursed, kicked and went into convulsions. The mother was then in the hospital for five days where it was determined that her blood alcohol level showed that she had been drinking. She denied the drinking. After the Art. 10 petition was filed, she was asked to take a hair follicle test and the court informed her that if she refused the court would draw a negative inference. She did refuse to take the test for some two weeks and then agreed. The test showed her to be clean for the last month but positive for opiates, codeine and hydrocodone for the two and three months earlier. The child was neglected by the mother's failure to exercise a minimum degree of care due to her misuse of drugs and/or alcohol to the extent that she lost control of her actions.

Matter of Anthony L., __AD3d__, dec'd 11/18/16 (4th Dept. 2016)

A Steuben County mother admitted that she was taking more morphine than was prescribed to her. She smoked marijuana to deal with morphine withdrawal. She often slurred her speech as though she was intoxicated when talking to caseworkers. She fell asleep in the afternoon while she was the sole caretaker of her two year old who was awake. The child's father said he did not believe the child was safe with the mother overnight. These actions established a prima facie case of neglect under FCA §1046 (a)(iii) and the court did not credit the mother's testimony denying the problem.

Matter of Yisrael R., __AD3d__, dec'd 12/8/16 (1st Dept. 2016)

The First Department agreed that a New York County mother neglected her baby. The mother tested positive for PCP two times in the month before she gave birth to the child. The mother had a prior history of PCP use. Although she failed to complete a drug treatment program in the past and tested positive in the latter stages of pregnancy, she continued to take a position that she did not have a drug problem and that treatment was not needed. The lack of actual harm to the child is irrelevant.

Matter of Jeremy M., __AD3d__, dec'd 12/29/16 (1st Dept. 2016)

The First Department concurred with Bronx County Family Court that a father neglected his children. The children made out of court statements, which were corroborated, to the caseworker about the father's alcohol and how that affected them. The father did not rebut the presumption under FCA § 1046 (a)(iii) that the substance abuse was resulting in neglect. He did not testify and did not present any evidence and did not offer any proof that he was involved in rehab. The failure of the father to even testify permits the court to draw the strongest inference against the father,

Domestic Violence

Matter of Andre K., 142 AD3d 117 (2nd Dept. 2016)

The Second Department reversed the dismissal of a neglect petition by Kings County Family Court. The respondent was the father of some of the 6 children in the home and was a person legally responsible for all of them. On one occasion in the presence of at least one of the children, he threatened to kill the mother. On another occasion her punched the mother in the face while the 6 children were in the next room. This caused the mother to fall into a bathtub which resulted in bruising. All 6 children observed this. Again when all the children were present, he threw his keys at the mother and the keys hit one of the children in the face. The children were described as being "afraid", "scared" and "upset" by these incidents. These actions resulted in imminent danger of neglect to the 6 children as well as derivative neglect to the infant child who was born after the respondent's domestic violence.

Matter of Matthew L., 143 AD3d 645 (1st Dept. 2016)

New York County Family Court was affirmed on appeal to the First Department. The father neglected he children due to domestic violence and excessive corporal punishment. The mother testified to multiple incidents where the father was violent to her. In front of the children, he dragged her by the hair and kicked her. She also testified that he caused physical injuries to the children. The children made out of court statements that the father was violent to the mother and that he also pulled their hair and hit them with a belt and with his hands. The children's accounts cross corroborated each other and the behavior described by them was similar to the mother's testimony. The father admitted that he punished the older three children by pulling their hair and their ears. This was all well beyond reasonable parenting and there was no need to show actual injury to the children.

Matter of Nah-Ki B., 143 AD3d 703 (2nd Dept. 2016)

The Kings County Family Court's dismissal of a neglect petition was reversed on appeal. The Second Department ruled that the respondent had neglected his two children and a third child he was legally responsible for in a situation where he had hurt both the mother and the children. The father threw a cup of soda at both the mother and one of the children and began to fight with the mother, punching her in the head. Another child tried to intervene and protect the mother but the father pushed that child out of the way and continued to hit the mother. She lost consciousness while all the children watched. After the mother passed out the father pushed and choked the child who had attempted to intervene. The mother testified as to these events and to a history of domestic violence. The records of her similar statements to the hospital personnel were admitted into evidence. The child who was choked gave similar out of court statements to the caseworker. The father did not appear for the fact finding and did not offer any evidence. The AFC supported a finding that the children had been neglected. The Second Department found that father in this case clearly used excessive corporal punishment when he pushed and choked the child who tried to protect her mother. The child's out of court statements were corroborated by the mother's testimony and the medical records. The history of domestic violence and this particular incident clearly impacted the children. The father involved two of the children in this event directly and all of the children were present and saw the father punch the mother in the head until she was unconscious.

Matter of Melady S., __AD3d___, dec'd 11/16/16 (2nd Dept. 2016)

The Kings County Family Court dismissed a neglect petition against a father and the Second Department reversed on appeal. The father's actions did neglect the children. He engaged in a pattern of domestic violence against the mother in front of the children. He told the caseworker that he "always hit" the mother because she was "always saying stupid stuff". One of the children told the caseworker that the parents always fought in front of the children. The same child told the foster mother "poppy was always fighting" her mommy. These statements by the child were not only corroborated by the father's admissions, they were corroborated by the mother's bruises and the scratches on the father's hands. The father claimed that the marks on his hands were due to "boxing". However, he did not testify in court and a negative inference can be drawn. The appellate court made an adjudication of neglect and remanded the matter for a disposition.

Matter of Cori XX., __AD3d__, dec'd 12/8/16 (3rd Dept. 2016)

The Third Department agreed with Otsego County Family Court that a father neglected his daughter based on a "harrowing" incident of domestic violence. The father had been drinking and berated the mother for hours, physically attacked her and attempted to rape her. He struck her in the head several times and poured wine on her. This all occurred while the child was in the family mobile home in her bedroom. The mother ran to the child's room and told the child to call 911. The father grabbed the child's hand, bruising her wrist and shoved her against the wall to take the phone away. The mother and child ran from the mobile home while being chased by the father who grabbed the mother's hair and tried to drag her. The child said she could hear her mother "whimpering" as she struggled to get away. The father chased the child who ran through the home to a neighbor where the police were called. The mother sustained a concussion. The child said that although this was the first time she had seen a physical fight between them, she was scared and crying. The father told a very different story and the lower court found him not credible. The Family Court also noted that the father had a disdainful demeanor and attitude while in court. The child's bruising, her fear and her forced run from her home was "unquestionably" sufficient to show neglect. The father claimed that the caseworker had a conflict of interest and that his counsel did not sufficiently investigate this. The conflict of interest was brought to the lower court's attention and consisted of the caseworker have gone to high school with the mother's older daughter over 15 years earlier. This alone is not a conflict of interest. The father argued that he wanted the court to review the caseworker's notes and the court agreed to review all the interviews of family members. There is no evidence that the court did not do this. The father's counsel conducted appropriate direct and cross examinations and made appropriate objections and provided meaningful representation.

Parental Mental Health

Matter of Zariah O., 143 AD3d 494 (1st Dept. 2016)

A New York County mother's mental illness caused her children to be neglected. The mother had a long history of irrational behavior that resulted in frequent arrests and stays in psychiatric hospitals. One time she drove off with the children at night and would not tell the father where they were for over three days. Ultimately she just left the children at a drug store. The children were dirty, hungry, smelled of urine and confused. On another occasion, the mother grabbed the then 18 month old from the baby sitter, held the child under her arm and ran into oncoming traffic. That occasion resulted in her arrest. The mother does not understand that she has untreated mental illness and that this results in the children being neglected.

Matter of Matigan G., __AD3d___, dec'd 12/23/16 (4th Dept. 2016)

Onondaga County Family Court ruled that a mother had neglected her children and the adjudication was affirmed on appeal. The mother had exhibited bizarre and paranoid delusions, believing that there were intruders in her home who intended to kill her. She was hospitalized and diagnosed with bipolar II disorder. She also tested positive for amphetamines, cocaine and cannabinoids. The mother continued to suffer with vivid paranoia but refused treatment. The two older children described the harmful emotional

impact of their mother's delusional behavior. The children had been present in an earlier incident where the mother believed there were footprints outside her home and called the police. A reasonable and prudent parent would have accepted mental health treatment. Instead the mother continued to argue that her delusions were real. She lacked insight into the effect her illness had on the children and on her ability to care for the children. Although there was no proof of repeated use of drugs to the extent that the lower court should not have relied on the FCA 1046 (a)(iii) presumption, the mother did use illegal substances and claimed that people administered them to her so she would appear to be crazy. The children would be at substantial risk of neglect should they be released to the mother's care.

Matter of Justin L., __AD3d___, dec'd 11/16/16 (2nd Dept. 2016)

The Second Department reversed a Kings County Family Court adjudication of neglect. The mother may have had a mental illness but no evidence was presented that the child was at any imminent danger of becoming impaired as a result of the mother's behavior. In fact the child was healthy, athletic and doing well in school.

PHYSICAL ABUSE

Matter of Mason F., 141 AD3d 764 (3rd Dept. 2016)

An Ulster County mother of two boys were alleged to have been severely abusive resulting in the death of one child and derivately severely abusive to the younger child. The older toddler died due to blunt impact trauma to his head, torso and his limbs, after the mother allowed her recently acquired boyfriend to babysit the children. The boyfriend was ultimately convicted of second degree murder. Ulster County Family Court found that the mother had neglected and abused the deceased child and derivately neglected and abused the younger child but denied the DSS' request for a severe abuse finding. The mother appealed the court's ruling that she had been abusive and neglectful so the DSS then cross appealed the denial of the severe abuse finding. The Appellate Division reversed and made a finding of severe abuse against the mother. There was clear and convincing evidence that the mother had acted with depraved indifference which resulted in the child's death.

The mother allowed her boyfriend of two weeks' time to move in to her home with her two young children and let him watch the children while she went to work. She knew that the boyfriend went out at night to obtain drugs. She allowed the new boyfriend to continue to care for her children even after observing serious and abnormal bruising of the toddler . She unreasonably claimed that she believed the bruising was accidental. She failed to seek any medical help for the child even as his symptoms became extreme. The mother admitted that the abnormal bruising began after the boyfriend moved into the home. In the days before the toddler was killed, the mother admitted that the child walked as though he "had a stick up his ass". She knew that the child's eating patterns were not normal and that he was sleeping a lot. The mother was aware that the child had bruises on his eye, stomach, groin and back and that he had vomited a black substance and had a blood clot in his bowel movement. The mother posted on her social media account that her child was "horribly sick". Multiple people had encouraged the mother to seek medical treatment but she chose not to do so as she was concerned about CPS becoming invovled. The

boyfriend had another child by another woman. This woman testified that she saw the deceased child two days before his death and that the child was pale, had a black eye, multiple bruises on both of his cheeks, a cut lip and bruises on his arms and legs. Even the boyfriend described the child as looking like he had been hit by a bus. The paramedics described finding the child with dried blood on his lips, bruises covering his body and that he had a clenched fist and constricted eyes suggesting the kind of pain he was in at the time of his death. The autopsy revealed over 60 bruises that had been inflicted at different times, a fractured rib and a severed pancreas, and an older abdominal injury which would have caused bloody vomit. The bruises did not appear to be accidental and one in the rib cage was in the shape of a hand.

The mother placed her interests and concerns about CPS involvement above the health and safety of her young, dependent child. This was clear and convincing evidence that she acted with such disregard to his life as to constitute severe abuse. The younger child is derivately severely abused as the mother's judgment and impulse control are defective. Further at the time of the death, the younger child also had a severe ear infection that had not been medically treated and had "very inflamed nipples" and a "suction injury or hickey" below one nipple, indicative of trauma and possibly sexual abuse.

The Third Department found no reason to modify the lower court's disposition which placed the younger child in the custody of his non respondent father.

Matter of Avery KK., __AD3d__, dec'd 11/23/16 (3rd Dept. 2016)

A Franklin County Family Court adjudication of abuse was affirmed on appeal. The respondent was the father of three children. The middle child – a toddler - sustained skull fractures. The medical testimony was that the child had a complex, non linear skull fracture that was caused by non accidental means. The parents various explanations – that the child fell off a garbage can, that he was hit by a cupboard door and that he interacted with his siblings – were all unlikely to have the force that would cause the injuries. Further there were increased social risk factors in the home, such as incidents of domestic violence. On appeal, the father argued that the lower court erred in allowing the doctor to testify about the X rays of the child's skull when the X rays were not actually admitted into evidence- but this issue was not preserved. The DSS established prima facie proof under FCA § 1046 (a)(ii) that the child sustained injuries that would not exist except by reason of acts or omissions of the parent and the parents were not able to offer a reasonable explanation.

Matter of Baby Boy D., __AD3d__, dec'd 11/23/16 (2nd Dept. 2016)

A Queens County mother was found to have derivately abused her newborn baby based on injuries another child had received in 2011 that had resulted in an abuse finding in 2012. This new baby had been born in 2014 and an Art. 10 petition was immediately filed. The earlier adjudication had been based on the mother's then 19th month old suffering a fractured skull while in the mother's care. This had resulted in the three children then in her care being removed and abuse and derivative abuse findings made. Subsequently the mother was diagnosed with paranoid personality disorder. She was in violation of the dispositional order in this prior matter in that she stopped her therapy. She did ultimately re-engage in therapy, but only just shortly before the birth of this child. Also the mother had recently told the caseworker that in reference to the prior abuse that she had not done anything wrong and would not do anything differently if she had to do it again. The mother also did not testify at the fact finding and provided no evidence that that her condition had improved. The prior abuse finding was sufficiently proximate in time that the conditions can be presumed to still exist.

Matter of Natalia J., __AD3d___, dec'd 12/21/16 (2nd Dept. 2016)

A Westchester County child died from a head injury caused by blunt force trauma. The father was arrested for murder and the DSS filed severe abuse, abuse and neglect petitions regarding the deceased child, a sibling and a third child that the father was legally responsible for. The father pled guilty to manslaughter in the second degree and the Family Court granted a motion for summary judgment on the Art. 10 petitions. The father appealed the adjudications and the Second Department affirmed. The conviction for manslaughter is collateral estoppel on the same issue in Family Court. The father's actions were prima facie evidence that there was severe abuse, abuse and neglect of the deceased child and also meant he had derivately abused and neglected the two surviving children.

Matter of Charity M., __AD3d__, dec'd 12/23/16 (4th Dept. 2016)

The Fourth Department concurred with Erie County Family Court that a father abused his child and derivately abused the other children. The child had second degree burns on his back, his left side and is left upper arm in a pattern that was not explained by any history the father gave nor was it consistent with the child burning himself. The medical opinion was that the burns were intentionally inflicted. The father was the sole caretaker at the time the child sustained the burns. The child gave out of court statements that his father had burned him. The father's statements were inconsistent and not supported by the medical proof. This abuse establishes the derivative abuse of the other children as it demonstrates a fundamental defect in the understanding of parenthood. Since the father consented to the dispositional order, he cannot appeal that portion of the matter.

SEX ABUSE

Matter of Alexander TT., 141 AD3d 762 (3rd Dept. 2016)

A Tompkins County stepfather pled guilty in criminal court to sexual abuse of his stepdaughter and to criminal contempt regarding pressuring the child to recant. The DSS brought Art. 10 petitions alleging the abuse and neglect of the stepchild and derivative neglect of the father's two biological children. The DSS moved for summary judgment based on the criminal convictions and Family Court granted the motion. On appeal, the respondent argued that the court should not have granted summary judgment regarding his biological children. The Third Department affirmed. The sexual offense conviction involved the step father admitting that he orally sodomized his 12 year old stepdaughter and then engaged in efforts to have others – including the child's mother – pressure the child to recant. This is the identical issue in the Art. 10 petition and also demonstrated that he has such an impaired view of understanding of parental duties, that there is a risk of harm to his own children. Summary judgment was appropriate as there were no triable issues of fact.

Matter of Fendi B., 142 AD3d 878 (1st Dept. 2016)

The First Department affirmed that the Bronx County Family Court's determination of sexual abuse was correct. The child testified in open court and under oath that the respondent had sexually abused her. The minor inconsistencies in her testimony with her prior statements were not significant. Also medical records supported the child's statements as did caseworker testimony.

Matter of Sania S., 143 AD3d 545 (1st Dept. 2016)

A Bronx grandmother adopted her grand children and then failed to protect them from sexual abuse. The respondent knew that the children were engaged in sexual activities with each other and did nothing to protect them or obtain treatment. The oldest child was sexually abusing the younger children and they complained to the grandmother. The younger children's out of court statements about sexual activity were detailed, consistent and they cross corroborated each other. The children used explicit and age inappropriate words to describe the sexual activities. The adoptive grandmother admitted that a therapist had told her that the oldest child had been sexually abused and had reported that the children were sexually active with each other. The grandmother did not get the oldest children to therapy on a regular basis and allowed a male in the home at night. She also allowed the birth mother to baby sit the children even after the oldest child told her that the child had watched pornography with the mother.

Matter of Fedeline A., 143 AD3d 977 (2nd Dept. 2016)

The Second Department affirmed a sex abuse finding regarding a respondent from Kings County. The respondent's girlfriend's child testified that the respondent had sexually abused her. However, the appellate court reversed a derivative finding regarding the respondent's son who was not in the home but in fact lived in Haiti. This child did not move into the home under 20 months after the sexual abuse.

ART. 10 DISPOSITIONS and PERMANENCY HEARINGS

Matter of Zachery M., 141 AD3d 771 (3rd Dept. 2016)

An Otsego County mother had admitted to neglect and accepted an ACD. The DSS later filed a violation petition and the mother consented to a restoration of the original neglect petition, consented to findings based on the prior admissions and agreed to another year of supervision. She then appealed claiming that the original petition did not allege facts sufficient for a neglect finding. The Third Department dismissed the appeal as there is no appeal on an order that the respondent consented to. Her remedy is to move to vacate the order in Family Court.

Matter of Freedom R., 142 AD3d 922 (1st Dept. 2016)

Although the First Department ruled the matter moot since the children had already been vaccinated, the appellate court commented that the New York County Family Court's order that the children be vaccinated so they could attend school was appropriate. The mother had failed to demonstrate that her opposition to the children being immunized stemmed from a sincere, religious belief.

Matter of Kessiah A., 143 AD3d 526 (1st Dept. 2016)

The First Department concurred with New York County Family Court that a respondent willfully violated an order of protection that he was to have no to contact the subject child. The respondent admitted to a police detective that he had mailed two letters to the child. Although the caseworker intercepted the letters and the child did not read them, it was the writing and mailing of the letters violated the order. The court did not violate the best evidence rule by admitting copies of the letters as the content of the letters was not an issue. The respondent claimed that a written copy of the order of protection was never served on him. However, this does not matter as he was present in court, consented to the order and the court questioned him as to his understanding of the terms. The court properly sentenced the respondent to 6 months in jail.

Matter of Geovany S., 143 AD3d 578 (1st Dept. 2016)

The First Department ruled that the children in a Bronx County Family Court matter "are not aggrieved" by a finding that a respondent derivatively neglected them. Also to the extent that they are aggrieved by the dispositional order that order that the respondent could not live with the children for a year, that issue is moot since the order has expired. The two older children are now over 18 in any event.

Matter of Alexis A., 143 AD3d 700 (2nd Dept. 2016)

The Second Department modified an order of protection in an Art. 10 disposition from Kings County Family Court. There were three children in the home, only one of which was the respondent's biological child. The lower court had ordered no contact until the 18th birthday of the two non biological children but the appellate division ruled that FCA §1056 (1) and (4) do not permit an order to the 18th birthday of any biological child AND not for any child in the home with someone related to the respondent. Since the children are all in the same home and one is related to the respondent, the order of protection for each child can only be one year, subject to extensions.

Matter of Tito T., __AD3d__, dec'd 11/9/16 (2nd Dept. 2016)

A Queens' father had been adjudicated to have sexually abused his child in 2014. He was ordered to complete a sex offender treatment program, engage in individual psychotherapy and to have only supervised visitation. The child was placed in the custody of the mother and the father was to be supervised by ACS for a year. After the one year of supervision, ACS sought an extension of the supervision with the same terms and it was granted. During that second year, the father filed a petition for unsupervised visitation. The mother submitted a "sworn narrative statement" and the court asked the father some questions and then granted him a modification such that he could have one supervised visit a week and one unsupervised visit a week "in the community". ACS sought a stay of the order, which was granted and on appeal the Second Department reversed. Family Court should not have awarded unsupervised visitation as there was no proof of good cause to do so. ACS reports that were submitted to the lower court showed that the father had been inappropriate with the child during supervised visitation and that he still did not accept responsibility for the sexual abuse.

Matter of Jamie J., __AD3d___, dec'd 11/10/16 (4th Dept. 2016)

In an unprecedented decision, the Fourth Department affirmed the Wayne County Family Court's ruling that a permanency hearing order of continued placement was not negated by the dismissal of the underlying Art. 10 petition. In 2014, the then one week old baby was placed in foster care on a FCA §1022 order. There after an Art. 10 petition was filed alleging that the mother lacked housing and was not caring for her own medical needs. The Art. 10 petition was still pending when in June of 2015, the Wayne County Family Court held a permanency hearing and ordered the continued placement of the child "until the completion of the next permanency hearing or pending further orders of the court". The fact finding was finally held at the end of 2015 when the child had then been in care 13 months. At that hearing, the DSS moved to amend the original petition, now over a year old, to conform to proof of the mother's issues beyond the date of the original filing. The court denied the motion and ultimately dismissed the petition ruling that the child had only been in the care of the mother for a week of its life and that the DSS failed to proof that there was neglect during that week. The DSS did not appeal that order but did take the position that the permanency hearing order kept the child in foster care legally and sought a date for the next permanency hearing. The mother filed an OTSC seeking the return of the child and the cancellation of the scheduled second permanency hearing. The court denied the mother's OTSC and held the second permanency hearing. At that hearing, the mother consented to the child remaining in foster care while reserving her right to challenge the lower court's position that it had ongoing jurisdiction over the matter given its dismissal of the Art.10 petition. The mother then appealed.

The Fourth Department ruled that the statutory language in Art. 10-A explicitly states that the court maintains jurisdiction over the child until the child is discharged from placement. Further the appellate court found that the statute reflects that the discharge from placement is based on the proof adduced at the permanency hearing regarding the child's best interests and the risk of abuse or neglect if returned. The Fourth Department found that there is nothing in Art. 10-A that provides that the child's placement is terminated because an Art. 10 petition is dismissed, it is only that the court cannot issue a dispositional order under the Art. 10. The Fourth Department ruled that if the legislature had meant for jurisdiction to end when the underlying Art. 10 had been dismissed, they would have said so. Since the mother had consented to the second permanency order continuing the child in care, she cannot raise at this time her due process rights – she only retained the right to challenge the court's subject matter jurisdiction. That issue is therefore not preserved. In any event, the permanency hearing procedures provided her with due process as the court was still required to rule on the risk of abuse or neglect before it could continue the permanency ordered placement.

Two Judges dissented. They opined that the dismissal of the underlying Art. 10 ended any jurisdiction the lower court had to block, delay or impose conditions on the return of the child. To interpret the statue in any other way is unconstitutional as the FCA § 1022 ex parte order cannot be used to create an ongoing, open ended placement of a child after the neglect petition was dismissed on its merits. The mother's due process rights were violated by the process and she preserved that argument in that she repeatedly and continuously argued that the court did not have subject matter jurisdiction.

Matter of Isaiah M., __AD3d__, dec'd 11/23/16 (3rd Dept. 2016)

Franklin County Family Court issued a supervision order as the disposition of an Art. 10 case. The DSS filed a violation months later alleging in particular that the mother was violating the order by failing to adhere to the rules concerning drug testing, that she was using marijuana and also visiting one of the children in an unsupervised setting. The mother admitted that she had willfully violated the order in exchange for a suspended jail sentence that the court indicated it would delay pending satisfactory

compliance. Thereafter her compliance with the order was spotty. There was a pattern of low creatinine levels in her urine screens alleged to be indicative of an attempt to flush drugs out of the system. After several extensions and ongoing issues the court indicated it would impose the suspended sentence but wanted some medical proof of the significance of low creatinine levels first and adjourned for that proof. During the adjournment, the mother missed a drug screen and the court indicated it was prepared to impose the incarceration on that basis. The Appellate Division stayed the jail sentence while the matter was appealed. On appeal, the argument was made that the court should have held a hearing on the violation before imposing the incarceration order. The Third Department ruled that a hearing was not necessary as the incarceration order was based on the suspended sentence due to the initial admission by the mother. She had willfully violated the order and the mother was provided with sufficient due process at that hearing. The mother did admit to missing the drug screen during the adjournment period - it was uncontroverted that she had missed it. This was good cause to impose the prior suspended judgment.

Matter of Angel RR., __AD3d__, dec'd 12/1/16 (3rd Dept. 2016)

A non respondent father in this Sullivan County matter was incarcerated at the time that the children had a permanency hearing. The court allowed the father to appear by phone and he was provided with counsel. His counsel told him not to speak but the father did speak out and said he just wanted to see his kids when he got out of prison. The court advised him that there was an order of protection in place that he could not see the children for at least 8 years after the maximum expiration of his sentence. The father appealed claiming he was denied the right to participate. However, the father did appear at a subsequent permanency hearing while this appeal was pending and so this appeal is moot. The appellate court commented that a non-respondent parent has a "limited statutory role and narrow rights" to either seek temporary custody while a neglect is pending or permanent custody at the dispo. Since he was incarcerated for an extended time, he was in no position to seek custody of the children.

Matter of Anise C., __AD3d__, dec'd 12/21/16 (2nd Dept. 2016)

A Kings Count mother had been found to have abused two of her children and neglected another and she was given only supervised visitation. ACS then moved to suspend her visitation with the children after she exhibited hostile and violent behavior toward the children during the visits. The Family Court correctly suspended visitation indefinitely. There was substantial evidence that even supervised visitation was detrimental to the children.

TERMINATION OF PARENTAL RIGHTS

GENERAL and EVIDENTIARY ISSUES in TPRs

Matter of Iyanna KK., 141 AD3d 885 (3rd Dept. 2016)

Broome County Family Court terminated the parental rights of a father and he appealed. At oral argument on her appeal, the AFC informed the court that the child had since been adopted. The Appellate Division was unhappy that no attorney had revealed this fact earlier particularly since the adoption was finalized months before the briefs for the appeal were filed. The adoption rendered the appeal of the TPR moot and the appeal was dismissed.
NOTE: 18 NYCRR § 421.19(i)(5)(i) specifically prohibits DSS/ACS from consenting to an adoption when a TPR is on appeal – and the adoption cannot legally go forward without a DSS/ACS formal consent. If DSS does not follow the regulation, defense counsel could and probably should seek a "stay" on the adoption which is very likely to be granted.

Matter of Isabella R.W., 142 AD3d 503 (2nd Dept. 2016)

The Second Department remanded a TPR matter back to Orange County Family Court for a dispositional hearing. The mother had failed to appear on the date of the fact finding of the termination petition and the lower court found clear and convincing evidence for both permanent neglect and mental illness grounds. The court did not hold a dispositional hearing but terminated parental rights directly. The appellate court agreed that the mother did not offer sufficient proof to warrant reopening the default fact finding which requires a reasonable excuse for the failure to appear and a potentially meritorious defense. However, the lower court should have held a dispositional hearing. A dispositional hearing is not required in a mental illness petition but the facts in this case warranted one and there is a requirement for a dispositional hearing on a permanent neglect petition.
Note the companion cases reported below as ***Matter of Weiss v Orange County Dept of Social Services 142 AD3d 505 (2nd Dept. 2016) and Matter of Weiss v Weiss 142 AD3d 507 (2nd Dept. 2016)*** where the lower court was also reversed for dismissing the grandmother visitation and custody petitions regarding the child that should have been integrated and heard in the disposition of the TPR.

Matter of Chole N., 143 AD3d 1114 (3rd Dept. 2016)

An out of state father's rights were terminated in this Broome County matter. The father had engaged in permanency mediation with DSS and had reached an agreement for a possible conditional surrender prior to the scheduled TPR trial date. The court was so informed. Meanwhile, the court sent out a new court date to all counsel but did not indicate that it was to be a trial date. Apparently the father's attorney believed it to be an appearance only date to discuss the conditional surrender that the parties wanted. However, on the court date, the father's attorney was informed that the matter was in fact on for trial. The attorney informed the court that he had not told his client that this was a trial date and his client was not present. The attorney then asked to be relived which the court denied. There was no record that the father, who had been appearing by phone in the past, was phoned at that time. The DSS presented its case. Before proof was closed, the father's attorney requested an adjournment to permit the father to appear and present a case and that request was denied. The court said that if the attorney wanted to provide

testimony before the court issued a written decision in approximately a month, that the attorney could ask the court to re-open the matter. The court then issued an order that terminated parental dated just some eleven days later along with a second order staying the first order for over a month. Although the termination order was served on the father, there was no record that the second stay order was served. The father appealed.

The Third Department reversed. The father in fact did not abandon the child as he communicated with the child and the foster family in the six months before the TPR petition was filed. Further, the father indicated that had he been present at the hearing, he would also have presented evidence on other attempts he made to remain in contact with the child. The record does not demonstrate that either the father or his attorney had reason to expect that the date was for actual testimony nor were they aware that the lower court had issued its own stay to allow for the father to present any further evidence. The father was denied an opportunity to participate in a meaningful way and is entitled to a new hearing with new counsel appointed.

Matter of Adele T., 143 AD3d 1202 (3rd Dept. 2016)

A Tioga County mother failed to appear on her permanent neglect petition and the Family Court issued a warrant for her arrest. The mother was arrested and the court advised her that the permanent neglect matter was scheduled for fact finding the following week and that if she failed to appear, the proceeding would occur without her. Her attorney appeared for the fact finding, but the mother did not. The court called the mother on the phone and she said she had no ride to court but refused to give details and declined the lower court's offer to pause the proceeding until a relative could pick the mother up and bring her to court. The court declared her to be in default and proceeded with an inquest and found permanent neglect. The mother than also failed to appear for the dispositional hearing and the court freed the child for adoption. The mother appealed both rulings. The Third Department ruled that the fact finding was a default even though mother's counsel had appeared and a default cannot be appealed. The appeal of the dispositional order was also dismissed as there was not explanation offered for the mother's failure to appear and her counsel indicated she had been unable to reach the mother. Counsel did not participate and made no motions and therefore the dispositional hearing was also a default and cannot be appealed. Mother's only recourse is to move to vacate the orders at the Family Court level and if denied, appeal the denial of that motion.

Matter of Trinity E. __AD3d__, dec'd 11/18/16 (4th Dept. 2016)

The Fourth Department reversed the TPR of a father's rights to his daughter. The lower court had concluded a fact finding with a permanent neglect adjudication and had scheduled the dispositional hearing. The father then made death threats to the Judge, the AFC, the caseworker and the police. He was criminally charged and an order of protection was issued in favor of the Judge. The father then requested that the Judge recuse herself for the dispositional hearing which the lower court denied. The court terminated the father's rights. On appeal, the Fourth Department found that the Judge abused her discretion and should have recused herself after the death threat and subsequent criminal charges. The appellate court remanded the dispositional hearing back before another Judge.

Matter of Latonia W., __AD3d__ dec'd 11/18/16 (4th Dept. 2016)

Monroe County Family Court revoked a father's suspended judgment and terminated his parental rights to three children. The father, who had been represented by assigned counsel during the lower court proceedings, appealed, arguing that the court abused its discretion by denying his repeated requests for an adjournment of the hearing to obtain new counsel. The Fourth Department found that the father initially requested an adjournment to obtain new counsel in the middle of the violation hearing and the lower court indicated that he could obtain new counsel but that the new counsel had to appear on the next date. On the next date the father claimed he had hired counsel but no attorney appeared or contacted the court. The court then refused another adjournment. The permanent neglect petition in this matter had been pending for 6 years (!!) while the children's situation remained unsettled and the court's denial of an adjournment under these circumstances was not an abuse of discretion.

Matter of Colby II., __AD3d___, dec'd 12/15/16 (3rd Dept. 2016)

The Third Department reversed an abandonment TPR from Albany County Family Court ruling that the lower court had erred in not admitting the Facebook transmittals that the mother had offered in her defense. The caseworker and clinical case manager both testified that the mother did not contact the child in the relevant period. The mother however claimed that she had in fact communicated with her child by using the Facebook account of her adult son. The parties in fact stipulated that the child did communicate with the mother by Facebook but the lower court ruled that a proper foundation was not made to allow copies of the entries to be admitted in court on the issue of the frequency of this communication. The Third Department ruled that this was an error. A printed copy of the content of cell phone type instant messages and Facebook type messaging can be authenticated by the witness testifying that it is a complete and accurate reproduction of the conversation and that it has not been altered. The mother testified that she was present when her attorney printed all the Facebook messages and that she reviewed them and stated that it was a full and complete copy of their conversations. Her adult son testified that he has given his mother account and password information and permission to use his account to communicate with the child. This was sufficient for the printed copy to have been admitted. The appellate court reversed the abandonment adjudication and remanded the matter for a new hearing.

ABANDONMENT

Matter of Dimitris J., 141 AD3d 768 (3rd Dept. 2016)

A Broome County mother abandoned one of her children. During the relevant six months, the mother did not visit this child or request visits and did not communicate with the caseworkers. The visitation time had been changed at the mother's request just before the six month period but she never visited after that. She did not communicate directly with the child or inquire of anyone about the child. There were conversations with the caseworker but at no time did the mother initiate conversation about the child with

the caseworker or ask for the foster mother's contact information. She did not ask about this child when she visited her other children. The mother claimed that she missed the first three months of visitation in the six month period due to a lack of transportation and that she missed the last three months as she feared being arrested on an outstanding warrant if she showed up. The mother did visit her other children whose visitation was scheduled on weekdays as she had a friend who could drive her then. She provided no reason why she did not ask for a change in the visitation schedule with this child or why she did not ask for help with her claimed transportation issue.

Matter of Amanda EE v Nicholas FF., __AD3d___, dec'd 11/23/16 (3rd Dept. 2016)

In a private stepparent adoption, the Third Department affirmed Chemung County Family Court's finding that the birth mother abandoned the child. The mother conceded that she had not see the child in two years but claimed that she attempted to communicate with the child by sending letters to a paternal grandmother. The mother was incarcerated at the time. The paternal grandmother testified that she never received any letters and the father and stepmother testified that there were no cards or letters from the mother. Even if the father had moved and changed his phone number during the time period, the mother had an address for the paternal grandmother and did not make even minimal efforts to contact the grandmother to learn of the child's status

Matter of Dayyan J.L., __AD3d__, dec'd 12/28/16 (2nd Dept. 2016)

The Second Department concurred with Orange County Family Court that a father had abandoned his child. The burden to contact the child is on the parent, there need not be evidence that the DSS offered any diligent efforts to encourage the contact. No suspended judgment can be issued on an abandonment determination.

PERMANENT NEGLECT TPR

Matter of Himallay M.F.G., 141 AD3d 521 (2nd Dept. 2016)

Westchester County Family Court was affirmed on appeal. The lower court had terminated the rights of a mother to her child. The DSS proved that they made diligent efforts to reunite by offering therapy, parenting skills classes, domestic violence counseling and visitation. The mother was unable to resolve her issues.

Matter of Tracy B., 142 AD3d 499 (1st Dept. 2016)

A New York County father's rights to his two children were properly terminated. The father was offered diligent efforts towards reunification. The agency created an appropriate service plan and set up visitation. Caseworkers referred the father for drug testing, gave him transportation money, told him of

the children's medical appointments and urged him to comply with services. The father failed to visit the children regularly, including for a five week period before the dispositional hearing. He did not act appropriately at the visits he did attend. He refused to take over half of the random drug tests and did not complete substance abuse treatment. He did not go to the children's medical appointments and did not obtain suitable housing. The children have lived with the current foster family since February 2014 and the family wishes to adopt.

Matter of Jahnel B., 143 AD3d 416 (1st Dept. 2016)

Bronx County Family Court's termination of a mother's rights on both permanent and abandonment grounds was affirmed on appeal. The mother made only sporadic and minimal attempts to visit the children or communicate with the agency and she abandoned the children. She also permanently neglected the children. The agency had offered her diligent efforts by creating a service plan, providing referrals to individual and group counseling, substance abuse treatment, domestic violence counseling, referrals for mental health evaluations and urged her to maintain a stable home and income. The caseworker set up visitation. The mother did not attend the programs regularly and did not benefit from them. She failed to cooperate with the agency and failed to appear for many of the visits with the children. When she did visit the children, she did not engage with them. The mother defaulted on the dispositional hearing so she may not appeal that aspect of the case.

Matter of Desiree M., 143 AD3d 512 (1st Dept. 2016)

The First Department affirmed the Bronx County Family Court's termination of a mother's rights to her two children. The foster care agency provided diligent efforts by meeting with the mother to discuss the service plan, attempting to find kinship resources for the children, referring the mother to mental health treatment, domestic violence counseling, anger management and parental skills training. The caseworkers helped the mother to seek housing and monitored her when the children were temporarily discharged to her for a period in 2010. The mother failed to complete a mother – child program, did not complete her mental health services, refused housing assistance and refused to sign releases. She did not gain insight and had no feasible plan for the children. In was in the children's best interests to be freed for adoption. The small amount of progress the mother made before the dispositional hearing was insufficient to prolong permanency for the children. The lower court was not required to interview the daughter.

Matter of Joseph P., 143 AD3d 529 (1st Dept. 2016)

New York County Family Court was affirmed on appeal. The parents' rights to their three children were terminated on permanent neglect grounds. There was clear and convincing evidence of agency efforts to strengthen and encourage the parental relationship. A service plan was devised and the father's cognitive limits were taken into account. The parents were offered regular visits with the children, individual and group counseling, parenting skills, drug testing, housing assistance. The father was also offered substance abuse treatment referrals, anger management treatment and an employment program. The mother did not make reasonable progress and she also continued to remain with the father who totally failed to resolve his issues. The father continued to abuse drug use and have anger issues. Neither of the parents went to the medical or education meetings for the children. They failed to attend counseling and did not maintain

themselves on public assistance or find suitable housing. The parents did not submit to drug screens and the father tested positive at one point. The father also failed to testify on his own behalf. The children were in preadoptive homes where their special needs were being met. The children were all in separate foster homes but the foster families indicated that they want to maintain the sibling relationship.

Matter of Tyshawn S., 143 AD3d 990 (2nd Dept. 2016)

The Second Department affirmed the termination of the parental rights of a Suffolk County couple to their son. The mother permanently neglected the child. The DSS offered her services including parenting classes, mental health services and visitation. She did complete a parenting class and had a mental health evaluation but there was no change in her ability to care for the child. The father abandoned the child by having no contact with the child in the six months prior to the petition. The father was not entitled to a suspended judgment as that option is not a dispositional option in an abandonment TPR.

Matter of Vaughn M.S., ___AD3d__, dec'd 11/9/16 (2nd Dept. 2016)

The Second Department concurred with Richmond County Family Court that a mother had permanently neglected her children. The agency made diligent efforts to reunite the family. The caseworkers offered weekly visitation and referred the mother to mental health treatment and asked her to comply with random drug screening. They let her know how the children were doing and supported her compliance with the service plan. The mother did not engage in any of the services and did not have consistent or appropriate visitation with the children.

Matter of Jayden Isaiah O., __AD3d__, dec'd 11/10/16 (1st Dept. 2016)

A Bronx County mother's rights to her child were terminated. The agency offered diligent efforts by developing an individual plan for the mother, offering her domestic violence counseling, parenting skills, individual counseling and by setting up visitation and doing random drug testing. She failed to attend the services and continued to deny her responsibility for the placement. She often failed to visit the child, at one point going more than six months without seeing him even though she knew the impact her not visiting was having on the child emotionally. She gave excuses that were not credible – that she lost her Medicaid and that she feared she would see her other children's father if she went to agency visits. The child's best interests support adoption. He has lived in the same stable and loving foster home for years where they want to adopt him. A suspended judgment would be inappropriate. Although the mother did try to complete services, belatedly, she testified she had learned nothing from the parenting class and that her child didn't want to see her. In fact she has not seen the child since the summer of 2014 and that the child is better off not having contact with her.

Matter of Angelica S., __AD3d___, dec'd 11/15/16 (1st Dept. 2016)

The First Department affirmed the Bronx County Family Court's termination of the parental rights of a mother to her children. The evidence demonstrated clearly and convincingly that the agency provided

diligent efforts toward reunification. The caseworkers set up visitation, referred the mother for all court ordered programs and supported the importance of compliance. The mother failed to visit the children consistently and did not complete her mental health treatment, the parenting classes or a drug treatments program. Although she made efforts to comply after the filing of the petition, these efforts were too late and she has no realistic plan to care for her children. There was no evidence that she was successful with drug treatment. The court was under no obligation to order a forensic evaluation of the relationship of the mother and the children in order to be able to determine that adoption was in the children's best interests.

Matter of Kendalle K., __AD3d__, dec'd 11/18/16 (4th Dept. 2016)

Erie County Family Court correctly terminated the rights of a mother to her child. The child had been placed in care after being sexually abused by the mother's boyfriend. The mother admitted that the child had told her of the abuse and she had not taken action to protect the child. The agency thereafter made diligent efforts by setting up parenting classes and mental health services. The caseworkers also arranged for visitation and conducted service plan reviews. The mother failed to plan. Even though she attended some services, she did not consistently attend the mental health counseling and did not gain insight into the problems that led to the child's removal. A suspended judgment was not warranted as the mother had made little progress and the child's unsettled future should not be prolonged.

Matter of Mya Malaysha W., __AD3d___, dec'd 11/22/16 (1st Dept. 2016)

Two New York County parents' had their rights terminated to their daughter. Both parents were offered visitation and a visitation coach, as well as referrals to individual counseling, drug treatment counseling and parenting skills classes. The mother was also referred to an anger management program. The child refused to speak to the father and did not want to visit with him and the agency offered twice to have the child's counselor discuss this with the father. The father completed services but he did not gain insight into the parenting issues and would not separate from the mother who continued to use drugs. The mother, whose drug use had caused the foster care placement did not complete a drug treatment program, tested positive twice and refused to submit to other drug screenings. The visits with the child went poorly as the parents fought with each other in front of the child. This child has been in and out of foster care her entire life and wants to be adopted. The extra time in foster care for the child that would result from a suspended judgment is not warranted.

Matter of Jazmyne II., __AD3d__, dec'd 11/23/16 (3rd Dept. 2016)

The Third Department affirmed Clinton County Family Court's termination of a father's rights. The DSS offered diligent efforts to the incarcerated father. He was informed of the child's well being and progress. The caseworker responded to any questions the father had and also investigated the relatives he suggested as placement resources. The father had never lived with the child and had not been in contact with her when he went to prison. The caseworker encouraged contact to resume and set up written communication between them. They did not have regular in person visitation due to the long trip between the child's home and the prison but the caseworker did set up two face to face visits when the father was incarcerated

closer. The caseworker investigated both a paternal grandmother and an aunt as possible resources for the child but they were unwilling to assume responsibility for the child in a timely manner.

Even taking the father's incarceration into account, he failed to develop a realistic plan for the child. His plan that his mother would care for the child was unrealistic. The grandmother lived in South Carolina and had never met the child and made no timely efforts to seek placement or custody. There was no need to offer a suspended judgment. The child and her half brother have lived in the same foster home since 2014 where they are very bonded to each other and the family. The child has no strong relationship with the father or his family and there is uncertainty about when the father would be released from prison.

Matter of Zaya Faith Tamarez Z., __AD3d__, dec'd 12/6/16 (1st Dept. 2016)

The Bronx County Family Court was affirmed on appeal regarding the termination of the rights of two parents to their daughter. The agency developed an individualized plan for each parent and made multiple referrals for domestic violence counseling, parenting skills training, individual counsel, random drug testing and provided visitation. The parents did not attend the programs and when they did attend, they did not benefit and continued to deny responsibility for the removal. The mother routinely failed to come to visits with the child. The agency was not under any "special obligation to treat the father more favorably" based on his extensive incarceration. When he was not in prison he did not engage in services or visit the child. The child has been in a stable, loving foster home for years. Her foster mother meets the child's needs and wants to adopt. There is no reason to offer a suspended judgment.

Matter of Yasmine F., __AD3d__, dec'd 12/6/16 (1st Dept. 2016)

A Bronx father permanently neglected his child. The agency offered diligent efforts by developing an appropriate service plan and regularly meeting with the father. The father could not visit the child due to a court order. However, it was not the responsibility of the agency to seek a modification of the court order and in fact the child did not want to see her father. The father complied with services but he continued to fail to take responsibility for the child being placed in care and continued to be aggressive. The child is happy in her foster home and wants to be adopted. It was not improper of the lower court to free the child to be adopted by the foster home even though it would separate the child from her half siblings. The child had only resided with those children for a two year period and she had never expressed a desire to see them.

Matter of Joe J.R.L., __AD3d__, dec'd 12/8/16 (1st Dept. 2016)

Bronx County Family Court's termination of a mother's rights to her child was affirmed on appeal. The agency offered diligent efforts to reunite as they referred the mother to mental health services and parenting classes. The caseworkers offered to escort her to the mental health examination. They offered visitation with the child. The mother failed to plan in that she did not complete the mental health exam and would not let the caseworkers visit her at her home. The home had been extremely unsafe for the child at the time of the removal and the caseworker needed to determine if that had been remedied. The child has been in foster care since he was a week old and the foster mother meets his special needs and wants to adopt him. The mother has no safe or realistic plan.

Matter of Joshua J.C., __AD3d___, dec'd 12/21/16 (2nd Dept. 2016)

The Second Department agreed with Westchester County Court that a father permanently neglected his four children. The DSS engaged in diligent efforts to assist the father. First they located the father, who was incarcerated under a false name. Then they contacted him and told him about the children's progress, asked him to be involved in planning for the children and investigated resources for the children's placement. Visitation was not offered but this was appropriate given the young ages of the children, the visitation conditions at Rikers Island, the children's stated anxiety about visitation and the recommendations for the children's therapist. The father failed to identify any realistic alternative to foster care for the children. Every resource brought up was not viable or would not take all four children and keeping them together was a priority. The foster parents wish to adopt all the children. The court cannot order post termination contact order as it is not authorized by law.

Matter of Karina J.M., __AD3d__, dec'd 12/21/16 (2nd Dept. 2016)

The foster care agency in this matter had brought a first TPR petition against the Kings County mother. That petition was dismissed after the lower court ruled that the agency did not prove it had offered the mother diligent efforts toward reunification with her children. The agency brought a second petition and the Family Court did terminate on the second petition. The mother appealed to the Second Department. The mother argued that the agency should not have been permitted to bring a second petition given the ruling that they had not provided diligent efforts on the first petition. However, the second petition concerned a different period of time than the first petition and therefore the question of diligent efforts is not precluded by the earlier dismissed petition. The agency did prove that they provided diligent efforts in this second time period. The primary issue in this matter has been the mother's failure to visit the children consistently. More than 100 visits were scheduled for the mother in the 16 months that is the subject of this petition and the agency offered efforts to help the mother attend the visits. . The mother attended less than half the time. She did not provide a credible explanation for the majority of the missed visits. The children should be adopted by their foster parents.

Matter of Elias P., __AD3d__, dec'd 12/30/16 (2nd Dept. 2016)

The four children who were the subjects of this Queens Family Court appeal to the Second Department had spent five years in foster care. The mother had signed a conditional surrender but the father's rights were terminated and he appealed. After the children had been removed and there had been a neglect adjudication, the father was offered visitation and was ordered to cooperate with ACS referrals for services. When the children had been in care for about 18 months, the mother alleged that the father had violated an order of protection she had obtained and he was arrested on the alleged violation. The arrest resulted in his then being deported to Mexico two months later. The mother's allegations of domestic violence were in fact dismissed on the merits two months later but the father was still deported. Approximately one month after he was deported, the agency filed the TPR. The Appellate Division found that the agency had offered diligent efforts toward the father during the relevant time period. They had scheduled family team meetings, reviewed the service plan with him, urged him to comply with services and set up visitation. The agency also referred the father to individual therapy, parenting skills classes and domestic violence counseling. The father did visit the children until his arrest but he did not complete his therapy and it appeared that he did not complete the parenting program. He never really understood that he had to plan separately from the mother. There was a point during the relevant time

when the caseworker could not reach the father for some three months. Although in the final month of the time period, the father had been deported to Mexico, he could have contacted the caseworker and the children from Mexico but he did not.

The father participated in the dispositional hearing by phone from Mexico. He testified that he had a home for the children in Mexico and presented a report from a family agency in Mexico that he had suitable arrangements. However, he had only infrequent, irregular contact with the children since he had been deported. The older children did not want to move to Mexico and did not want to have contact with the father but wanted to be adopted by the foster mother they had lived with for five years. The older children had special needs and it was not clear that the father could address those needs.

One Judge dissented and saw the father's situation quite differently. He pointed out that before the father was arrested, he had been complying with the service plan and had an apartment. It was the mother's claim that there was domestic violence – a claim that was later dismissed by the courts – that resulted in the agency requiring domestic violence counseling that apparently was not in fact needed. Also the mother's action resulted in the father's arrest and his deportation. In effect the mother's claims, which proved false, completely derailed the man's life and his ability to get his children back. Meanwhile he had obtained work and a home for his children in Mexico. Once he got a phone in Mexico, he would try to call the children at the foster home. The foster mother did not speak Spanish and the oldest child, the only one who spoke Spanish refused to help translate. The dissent opined that it was the mother's actions that broke up the home by the original neglect, it was the mother who sabotaged the father's efforts in the US. The dissent disagreed that there was proof that he had failed to plan for the children.

TERMINATION DISPOSITIONS

Matter of Blake T.L., 141 AD3d 525 (2nd Dept. 2016)

The Second Department affirmed Suffolk County Family Court's finding that a father had violated the terms of a suspended judgment. By a preponderance of the evidence, the DSS proved that the father had failed drug testing. The testimony of the caseworker regarding the results was hearsay but hearsay is admissible in a hearing on the violation of a suspended judgment as it is part of the dispositional phase. It was not error to refuse the father's request for his counsel to be relieved and for new counsel appointed as no good cause was shown.

Matter of Maykayla FF., 141 AD3d 898 (3rd Dept. 2016)

After the father consented to a permanent neglect finding, the Washington County Family Court granted a suspended judgment. Slightly less than a year later, DSS filed a violation seeking a revocation and a termination of the father's rights. Family Court terminated his parental rights and father appealed. The Third Department affirmed. The father claimed that he could not be held to have violated the term that required him to "maintain a safe and stable home if released" since he was in prison the entire time. However, the respondent had claimed to the court that he was expected to be released during the time

period of the suspended judgment. He subsequently was not released as he did not complete a substance abuse treatment program while incarcerated. He therefore failed to show progress was being made by failing to do what was needed to be released.

The father had hoped that the mother would be able to resume care for the children while he was incarcerated. However, the mother surrendered her parental rights and the father was advised that he needed another plan. He sent letters to family members asking them to petition for custody, only his sister petitioned and her petition was denied. Although this was a good faith effort, he is required to have an actual realistic and feasible plan. He has no plan except for the children to remain in foster care until he is released. This is likely to be four more years – the remainder of his full sentence - given that the father had been incarcerated twice before and violated parole both times. The suspended judgment violation is based on his failure to correct his "longstanding inability to realistically plan for the children's future". Termination was in the children's best interests. The children "adamantly expressed their lack of desire to visit" their father in prison and would act out in a physically aggressive way if they were told of an upcoming visit. The children have been in foster care most of their lives and in the current foster home since June 2013. The foster family wishes to adopt and has worked to deal with both children's special needs. The father has no understanding of the children's special needs.

Matter of Donte LL., 141 AD3d 907 (3rd Dept. 2016)

In 2014 a Broome County mother admitted to the permanent neglect of her two children who had been in foster care since 2011. She was given a suspended judgment for six months and the DSS filed to violate the suspended judgment five months later. The Third Department concurred with the lower court that the mother violated the terms. She did not complete her ordered mental health treatment and was kicked out of substance abuse treatment for missing sessions. She tested positive for alcohol and marijuana and refused other drug tests. She failed to keep the DSS informed of her phone number and address. The mother repeatedly missed visitation with the children and had not had contact with them for two months when the violation was filed. Her explanations for these failures were not sufficient. It is in the childrens' best interests to be freed for adoption.

Matter of Anthony R.L.O., 143 AD3d 475 (1st Dept. 2016)

A New York County father admitted he had violated the terms of the suspended judgment and the lower court correctly terminated parental rights. There were four children and the oldest was 11 at the time of the hearing. The children have spent the last six of their years in foster care in one foster home that wishes to adopt them. Although the father visited regularly, he was not able to resolve his cocaine addiction. He tested positive for cocaine twice during the time of the suspended judgment. It is in the children's best interests to be adopted. The 11 year old expressed a strong preference to return to his father but a child's preference is not dispositive. The child did say that if he could not be reunited with this father, he would want to be adopted but the current foster family.

Matter of Merinda MM., 143 AD3d 1095 (3rd Dept. 2016)

Broome County Family Court was correct in not ordering suspended judgments for either parent after they admitted to permanent neglect. It was in the child's best interests to be freed for adoption. The

child had been in foster care since her birth in 2012. The child's mother was appropriate during visits but she did not complete a mandated sexual abuse treatment program. The mother was a convicted sexual offender, having sexually abused her older five children. She was dropped from the treatment program when another sexual abuse charge was brought against her – which she ultimately pled guilty to – and even though she re-engaged after that, she did not achieve her treatment goals. She violated the program rules by engaging with social media and told her counselor that the only reason she admitted to sexual abuse of her older children was because the children had disclosed. The mother was sentenced to a ten year term of probation that precluded all contact with minors. It was also in the child's best interests to have the father's rights terminated as he failed to become a protective ally for the child. The father derived no benefit from a counseling program for non-offenders who were involved with offenders. He resisted efforts to locate separate housing from the sex offending mother and it was doubtful that he in fact was living apart. The father allowed the mother to have contact with the child and also allowed an older brother of the child, who was himself a sex offender, to have contact. The father did not complete an anger management program.

Matter of Lundyn S. __AD3d__ dec'd 11/10/16 (4th Dept. 2016)

A Cayuga County paternal grandmother filed for custody of a foster child who was the subject of a TPR petition. After her petition was dismissed, she appealed. She argued that a reversal was required because DSS has not contacted her early on and advised her of her options for obtained custody or becoming a foster parent. Even if that was true, the test is still a best interest test and the Fourth Department had previously ruled in the father's appeal in this matter that it was in the child's best interests to be freed for adoption and not be placed in the custody of the grandmother. The grandmother does not have any greater right to custody than the child's foster parents at this stage. Further the grandmother claimed that she had ineffective assistance of counsel as her attorney did not move to vacate the foster care placement order under FCA § 1061 when he filed her custody petition. Even if it is accurate to say she was entitled to effective counsel, her attorney filed a custody petition which would have, had it been successful, allowed the court to change its order and issue a custody order to the grandmother. There is little or no chance that filing a motion under FCA § 1061 would have been successful either.

Matter of Dominique VV., ___AD3d__ dec'd 12/1/16 (3rd Dept. 2016)

Delaware County Family Court was affirmed on appeal regarding the violation of the suspended judgment terms of two parents to three children. The children had been in foster care since 2010. The parents each consented to a permanent neglect finding and were each given suspended judgments. The DSS proved by a preponderance of the evidence that they then violated the terms of the suspended judgment. The parents did not make progress on their issues with budgeting and home safety. They participated in required budgeting classes but they were confrontational in the class and only made minimal progress. They were late paying their utility bills but spent money on nonessential things. The house was cluttered with garbage, debris, cigarette butts and smelled of urine. A dead mouse was on the floor and blood was on the toilet seat. There was vomit in the bathtub and bird and mouse droppings on the furniture, bedding, blankets and shoes. The sink contained unwashed dishes and the children had stepped on exposed tacks when they visited. The children have been in foster care most of their lives and non compliance with the terms of a suspended judgment constitutes strong evidence that a TPR is in the best interests of the children.

Matter of Landyn M., __AD3d__, dec'd 12/13/16 (1st Dept. 2016)

The First Department agreed with Bronx County Family Court that there was no reason to vacate her default on a hearing which determined that she violated the conditions of her suspended judgment and freed her child for adoption. Not preserved was her argument that the Indian Child Welfare Act applied to the matter. In any event the mother failed to show that she or the child was eligible for membership in a tribe. The mother also did not preserve an ineffective assistance of counsel argument that her lawyer failed to represent her interests when she defaulted. To the contrary, the attorney's choice was strategic and preserved the mother's opportunity to move to vacate the default.

RIGHTS OF UNWED FATHERS

Matter of Star Natavia B., 141 AD3d 430 (1st Dept. 2016)

A Bronx father's consent was not necessary for a child to be adopted. The court had clear and convincing evidence that the father failed to provide consistent financial support and failed to maintain contact with the child. The father claimed the caseworker told him not to pay child support but even if that did occur, he was not excused from supporting the child. He claimed to have provided $1,500 in clothing to the child but this is not the same as a consistent or reliable source of support. The father failed to show that he provided the child with assistance that was fair and reasonable based on the father's means.

Matter of Jaden Blessing R., 143 AD3d 540 (1st Dept. 2016)

A New York County father was not a consent father. He failed to contribute to the child's support in any meaningful way and did not remain in contact with the child or the caretakers. The fact that he was incarcerated did not mean he was excused from these parental duties. He claimed to have visited and supported but provided no documentation that this was so.

Matter of Nickie M.A., __AD3d__, dec'd 11/10/16 (4th Dept. 2016)

Erie County Family Court correctly ruled that the putative father of the children in this matter was not a father whose consent was required for the children to be adopted but that he was only a "notice" father. Under DRL § 111 (1)(d), this father did not have the requisite contact with the children. He had been incarcerated for more than two years and did not support the children at all during that time and did not have any communication with them for at least seven months before the proceeding. He is still responsible to support the children even while incarcerated unless he can show that he had no income or resources. His incarceration did not relive him of his responsibility to communicate with the children. He claimed he sent letters to the caseworker but the caseworker credibly denied that he had.

SURRENDERS and ADOPTIONS

Matter of Omia M., __AD3d__ dec's 11/18/16 (4th Dept. 2016)

An Erie County mother conditionally surrendered her five children in court and then brought a CPLR § 5015(a) motion to vacate the surrenders based on the interests of justice. She appealed when that motion was denied. The Fourth Department ruled that her claim that she did not knowingly enter in the surrenders was not preserved for review. In any event only fraud, duress or coercion can revoke or annual a surrender. The lower court's record demonstrated that the court's vior dire of the mother substantially complied with the requirements in Social Services Law.

Matter of Adrianna __AD3d__, dec'd 11/30/16 (2nd Dept. 2016)

In a private adoption case, the adoptive couple proved that the birth mother's consent was not required as she had abandoned the child. The mother had not seen the child for five years and had not supported her. The only contact she had was three cards sent to the child during the five year period.

Matter of Lynn X., __AD3d__, dec'd 12/15/16 (3rd Dept. 2016)

The Third Department reversed Schenectady County Family Court for failing to hold a hearing on a birth father's allegations that the conditions of his surrender were violated. The father had surrendered his daughter and the child was adopted in 2005. The surrender including a postadoption contact agreement that the father was to have two visits a year with the child. In 2015, the father filed a petition alleging that he had not had any visits since 2011. There were three appearances on the petition and the child's adoptive parents, the attorney for the child appeared and opposed the petition and opposed any further contact with the birth father. They claimed that it had been years since any visits and it would no longer be in the child's best interests to reinstate them. Although there were factual and legal arguments made on each appearance and on one occasion, the court swore in the parties, no actual testimony was ever taken and no evidence was actually admitted. The father was entitled to a hearing on his petition. The appellate court also commented that the adoptive parents should have been specifically named as parties in the case.

MISCELLANEOUS

Matter of Weiss v Orange County Dept of Social Services 142 AD3d 505 (2nd Dept. 2016)
Matter of Weiss v Weiss 142 AD3d 507 (2nd Dept. 2016)

In the first of these two decisions, the Second Department reversed Orange County Family Court's dismissal of a grandmother's petition for visitation. The grandmother had filed a petition seeking to visit a foster child that was the subject of a termination of parental rights petition. The lower court dismissed the grandmother's petition without a hearing, ruling that the grandmother had no rights to visitation after the child had been freed for adoption. The Second Department reversed, saying that a grandparent can seek visitation even after a parent's rights have been terminated. The court commented that the case law

requires that a grandparent seeking visitation must show that first they have standing due to the death of the parent or equitable circumstances and second that the visitation would be in the best interests of the child. Here the grandmother's petition alleged that there was a sufficient prior relationship with the child to create standing and there should have been a hearing conducted to determine standing and best interests. Further the mother's termination had actually been reversed on appeal.

In the second action, the Second Department reversed Orange County Family Court's dismissal of the same grandmother's petition for custody. The grandmother had also filed a petition for custody of the same child two months before the DSS filed a TPR on the child. The court deferred the custody petition until after the anticipated termination was resolved. The lower court then held the fact finding on the termination and the mother failed to appear. The lower court terminated the mother's rights on the grounds of both mental illness and permanent neglect and freed the child for adoption. The lower court then dismissed the custody petition ruling that since the child was freed, the grandmother no longer had standing. The Appellate Division reinstated the custody order finding that the grandmother was entitled to a hearing on it in the context of the dispositional hearing of the TPR.

The companion case that reversed Orange County Family Court for failing to hold a dispositional hearing in this matter as to the mother's TPRs is reported above as ***Isabella R.W., 142 AD3d 503 (2nd Dept.*** **2016)**

Matter of Timothy V v Sarah W., __AD3d__ dec'd 11/23/16 (3rd Dept. 2016)

In a private custody case, the Third Department reversed Tompkins County Family Court for relying on information from DSS that was in a FCA § 1034 report. The report was not admitted into evidence as it was hearsay. However, the court erred when it considered the information in the report and made factual determinations based on the allegations in the report that were not part of the testimony presented in the hearing.

People v Rodas ___AD3d___ dec'd 12/23/16 (4th Dept. 2016)

The Fourth Department affirmed a Yates County Court decision to suppress a statement a criminal defendant made to a CPS worker. The suppression of the statement resulted in a dismissal of the criminal sexual abuse charges. The defendant was incarcerated on an unrelated charge in the local jail and was represented by counsel on that criminal charge. The CPS worker conducted a number of interviews at the jail regarding the alleged sexual abuse of the defendant's girlfriend's daughter. The appellate court agreed with the lower court that there was a "degree of investigatory cooperation between the caseworker and a Village of Penn Yan police investigator". The caseworker acted as an agent of the police in questioning the defendant and obtaining certain letters from him outside of the presence of his counsel. The caseworker violated the defendant's right to counsel as she and the police investigator communicated at least four times about the matter and kept each other apprised of each of their investigations. When the caseworker went to speak to the defendant the first time, she called the police investigator first and asked him to accompany her to the jail. The investigator told the CPS worker, he could not go with her as the defendant had counsel. The investigator did not give the CPS worker any "instructions or directions" about interviewing the defendant. However, the investigator told the CPS worker not to talk about certain letters it was believed the defendant had that would implicate him in the alleged sexual abuse as the investigator did not want the defendant to destroy the letters before the investigator could obtain a search

warrant. The CPS worker told the defendant that she was "working with" law enforcement and would be "sharing" anything he told her with the police. After the interview, the CPS worker told the investigator what the defendant had said to her. She also gave the investigator copies of the letters that she had gotten from the defendant that the worker knew the investigator wanted. The investigator provided the CPS worker with other letters that had been obtained from the defendant's girlfriend. The CPS worker also told the investigator what she had learned about the location of even more letters. The CPS worker knew that law enforcement was not permitted to interview the defendant and so she acted as an agent of law enforcement by sharing information and evidence she had obtained with him. The indictment regarding the defendant's alleged conspiracy with his girlfriend to sexually abuse his girlfriend's daughter was dismissed for lack of evidence once the statements and evidence the CPS worker had obtained was supressed.