CHILD WELFARE CASELAW/LEGISLATIVE UPDATE

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I. Legislation, Regulations and Policies

OCFS ADMINISTRATIVE DIRECTIVE: NOTICE OF PLACEMENT CHANGE TO ATTORNEYS FOR CHILDREN

In the November 15, 2010 Newsletter, we passed on the latest version of the New York City Administration for Children's Services' new policy, "Notice of a Placement Change to Attorneys for Children." The policy requires that notice be provided to the child's attorney 10 days in advance of a change in placement or as soon as the decision to change the placement is made, and no later than the next business day after an emergency change occurs.

The New York State Office of Children and Family Services has now issued an Administrative Directive, 10-OCFS-ADM-16 (attached to the Newsletter), which creates a state-wide notification requirement. The ADM has been issued in response to a veto message issued by Governor Paterson when he vetoed legislation requiring prior notification to the court, attorney for the child, and parent before a foster child is transferred to a new foster care placement. The Governor directed OCFS to work with local departments of social services to determine ways in which appropriate notice can be given, particularly to attorneys for children.

Effective immediately, the attorney representing a child/youth must be notified by the child's local department of social services or voluntary foster care agency caseworker of a planned placement change at least 10 days in advance of the anticipated change in placement, or as soon as the decision is made, and no later than the next business day after an emergency move occurs.

The notification must include the following:

- child's name, DOB, and case number
- reason for the child's change in placement
- date and time of change in placement
- placement location prior to change
- planned or new placement location and contact information
- agency and official approving placement change

Model form OCFS-4948 - Attorney Notification of a Child's Change of Foster Care Placement (also attached) - has been developed for use in meeting these requirements. An alternative form that meets the requirements may be developed by a local department.

Attorneys for children also should keep in mind that changes in a child's foster home placement without advance notice can be restricted by obtaining a court order pursuant to FCA § 1017(2)(a)(iii) or § 1055(a)(i), or, post-termination of parental rights, an order pursuant to FCA § 1089(d)(2)(viii)(B)(I), specifying a particular foster or adoptive home and effectively requiring that the agency, before moving the child in a non-emergency situation, return to court to request a modification of the order.

Attorneys for children also have the option of requesting a court order requiring the agency to provide the type of notice that ACS has now agreed to provide. FCA § 255 should be cited in support of such a request.

ABUSE/NEGLECT - CENTRAL REGISTER REPORTS/DIFFERENTIAL RESPONSE PROGRAMS - Chapter 45 of the Laws of 2011 amends Social Services Law § 427-a to make permanent the legislation permitting social services districts, with authorization from the Office of Children and Family Services, to utilize a differential response program for appropriate reports of abuse and maltreatment, and makes New York City eligible to participate in the program.

EXCERPTS FROM SPONSORS MEMO
SSL § 427-a; enacted by Chapter 452 of the Laws of 2007, permits social services districts outside New York City to implement a family differential response (FAR) program for reports of child abuse and maltreatment with authorization from OCFS. SSL § 427-a establishes criteria to be used by social services districts in determining whether a report shall be referred to the FAR program, and prohibits reports containing certain serious allegations of abuse and maltreatment from being referred to the FAR program. OCFS was required to evaluate and report on the implementation of the FAR pilot program by January 1, 2011, including making a recommendation on continuing the program, and legislative authorization for the FAR program is set to expire on June 1, 2011.
OCFS submitted its required evaluation and report on the implementation of FAR to the Governor and Legislature on February 1, 2011. Children in families served by FAR were found to be as safe as children served by the traditional CPS approach in relation to new reports of child abuse or maltreatment.
Moreover, significantly fewer Family Court petitions were filed against FAR families when compared with the control group. Additionally, parents served by FAR in five initial pilot counties reported being quite positive about the intervention. For example, one parent explained that the caseworker was instrumental in helping the family to stabilize. Case workers from twelve participating counties were also surveyed. Significantly more FAR caseworkers than traditional CPS workers reported providing referrals to neighborhood organizations and self-help groups in order to help families meet their basic needs.
These results demonstrate that FAR has increased access to appropriate services, especially for the basic family needs of food, housing, and utilities. FAR has broadened the involvement of the community in meeting family service needs by more often referring to nontraditional service providers and self-help groups. Thus, FAR results in families being served more holistically with referrals to additional community supports that can help lessen stressors and promote family and child well-being.
Chapter 45 took effect on June 1, 2011.

Abuse/Neglect - Differential Response Programs/Central Register And Related Records - Chapter 377 amends Social Services Law §§ 427-a(4)(c) and 422(5-a) to permit access, pursuant

to SSL § 427-a(5)(d), to otherwise sealed reports assigned to, and records created under the family assessment and services track and information concerning such reports and records.
Chapter 377 also amends SSL § 427-a(5)(d) to provide that confidential Central Register reports assigned to and records created under the family assessment and services track, including but not limited to reports made or written as well as any other information obtained or photographs taken concerning such reports or records, shall be made available to:
(VI) A COURT, BUT ONLY WHILE THE FAMILY IS RECEIVING SERVICES PROVIDED UNDER THE FAMILY ASSESSMENT AND SERVICES TRACK AND ONLY PURSUANT TO A COURT ORDER OR JUDICIAL SUBPOENA, ISSUED AFTER NOTICE AND AN OPPORTUNITY FOR THE SUBJECT OF THE REPORT AND ALL PARTIES TO THE PRESENT PROCEEDING TO BE HEARD, BASED ON A JUDICIAL FINDING THAT SUCH REPORTS, RECORDS, AND ANY INFORMATION CONCERNING SUCH REPORTS AND RECORDS, ARE NECESSARY FOR THE DETERMINATION OF AN ISSUE BEFORE THE COURT. SUCH REPORTS, RECORDS AND INFORMATION TO BE DISCLOSED PURSUANT TO A JUDICIAL SUBPOENA SHALL BE SUBMITTED TO THE COURT FOR INSPECTION AND FOR SUCH DIRECTIONS AS MAY BE NECESSARY TO PROTECT CONFIDENTIALITY, INCLUDING BUT NOT LIMITED TO REDACTION OF PORTIONS OF THE REPORTS, RECORDS, AND INFORMATION AND TO DETERMINE ANY FURTHER LIMITS ON REDISCLOSURE IN ADDITION TO THE LIMITATIONS PROVIDED FOR IN THIS TITLE. A COURT SHALL NOT HAVE ACCESS TO THE SEALED FAMILY ASSESSMENT AND SERVICES REPORTS, RECORDS, AND ANY INFORMATION CONCERNING SUCH REPORTS AND RECORDS, AFTER THE CONCLUSION OF SERVICES PROVIDED UNDER THE FAMILY ASSESSMENT AND SERVICES TRACK; AND
(VII) THE SUBJECT OF THE REPORT INCLUDED IN THE RECORDS OF THE FAMILY ASSESSMENT AND SERVICES TRACK.

Chapter 377 also amends SSL § 427-a(5) by adding a new paragraph (e) which states:
PERSONS GIVEN ACCESS TO SEALED REPORTS, RECORDS, AND ANY INFORMATION CONCERNING SUCH REPORTS AND RECORDS, PURSUANT TO PARAGRAPH (D) OF THIS SUBDIVISION SHALL NOT REDISCLOSE SUCH REPORTS, RECORDS AND INFORMATION EXCEPT AS FOLLOWS:
(I) THE OFFICE OF CHILDREN AND FAMILY SERVICES AND SOCIAL SERVICES DISTRICTS MAY DISCLOSE AGGREGATE, NON-CLIENT IDENTIFIABLE INFORMATION;
(II) SOCIAL SERVICES DISTRICTS, COMMUNITY-BASED AGENCIES THAT HAVE CONTRACTS WITH A SOCIAL SERVICES DISTRICT TO CARRY OUT ACTIVITIES FOR THE DISTRICT UNDER THE FAMILY ASSESSMENT AND SERVICES TRACK, AND PROVIDERS OF SERVICES UNDER THE FAMILY ASSESSMENT AND SERVICES TRACK, MAY EXCHANGE SUCH REPORTS, RECORDS AND INFORMATION CONCERNING SUCH REPORTS AND RECORDS AS NECESSARY TO CARRY OUT ACTIVITIES AND SERVICES RELATED TO THE SAME PERSON OR PERSONS ADDRESSED IN THE RECORDS OF A FAMILY ASSESSMENT AND SERVICES TRACK CASE;
(III) THE CHILD PROTECTIVE SERVICE OF A SOCIAL SERVICES DISTRICT MAY UNSEAL A REPORT, RECORD AND INFORMATION CONCERNING SUCH REPORT

AND RECORD OF A CASE UNDER THE FAMILY ASSESSMENT AND SERVICES TRACK IN THE EVENT SUCH REPORT, RECORD OR INFORMATION IS RELEVANT TO A SUBSEQUENT REPORT OF SUSPECTED CHILD ABUSE OR MALTREATMENT. INFORMATION FROM SUCH AN UNSEALED REPORT OR RECORD THAT IS RELEVANT TO THE SUBSEQUENT REPORT OF SUSPECTED CHILD ABUSE AND MALTREATMENT MAY BE USED BY THE CHILD PROTECTIVE SERVICE FOR PURPOSES OF INVESTIGATION AND FAMILY COURT ACTION CONCERNING THE SUBSEQUENT REPORT AND MAY BE INCLUDED IN THE RECORD OF THE INVESTIGATION OF THE SUBSEQUENT REPORT. IF THE SOCIAL SERVICES DISTRICT INITIATES A PROCEEDING UNDER ARTICLE TEN OF THE FAMILY COURT ACT IN CONNECTION WITH SUCH A SUBSEQUENT REPORT OF SUSPECTED CHILD ABUSE AND MALTREATMENT AND THERE IS INFORMATION IN THE REPORT OR RECORD OF A PREVIOUS CASE UNDER THE FAMILY ASSESSMENT AND SERVICES TRACK THAT IS RELEVANT TO THE PROCEEDING, THE SOCIAL SERVICES DISTRICT SHALL INCLUDE SUCH INFORMATION IN THE RECORD OF THE INVESTIGATION OF THE SUBSEQUENT REPORT OF SUSPECTED CHILD ABUSE OR MALTREATMENT AND SHALL MAKE THAT INFORMATION AVAILABLE TO THE FAMILY COURT AND THE OTHER PARTIES FOR USE IN SUCH PROCEEDING PROVIDED, HOWEVER, THAT THE INFORMATION INCLUDED FROM THE PREVIOUS CASE UNDER THE FAMILY ASSESSMENT AND SERVICES TRACK SHALL THEN BE SUBJECT TO ALL LAWS AND REGULATIONS REGARDING CONFIDENTIALITY THAT APPLY TO THE RECORD OF THE INVESTIGATION OF SUCH SUBSEQUENT REPORT OF SUSPECTED CHILD ABUSE OR MALTREATMENT. THE FAMILY COURT MAY CONSIDER THE INFORMATION FROM THE PREVIOUS CASE UNDER THE FAMILY ASSESSMENT AND SERVICES TRACK THAT IS RELEVANT TO SUCH PROCEEDING IN MAKING ANY DETERMINATIONS IN THE PROCEEDING; AND

(IV) A SUBJECT OF THE REPORT MAY, AT HIS OR HER DISCRETION, PRESENT A REPORT, RECORDS AND INFORMATION CONCERNING SUCH REPORT AND RECORDS FROM THE FAMILY ASSESSMENT AND SERVICES TRACK CASE, IN WHOLE OR IN PART, IN ANY PROCEEDING UNDER ARTICLE TEN OF THE FAMILY COURT ACT IN WHICH THE SUBJECT IS A RESPONDENT. A SUBJECT OF THE REPORT ALSO MAY, AT HIS OR HER DISCRETION, PRESENT A REPORT, RECORDS AND INFORMATION CONCERNING SUCH REPORT AND RECORDS FROM THE FAMILY ASSESSMENT AND SERVICES TRACK, IN WHOLE OR IN PART, IN ANY PROCEEDING INVOLVING THE CUSTODY OF, OR VISITATION WITH THE SUBJECT'S CHILDREN, OR IN ANY OTHER RELEVANT PROCEEDING. IN MAKING ANY DETERMINATION IN SUCH A PROCEEDING, THE COURT MAY CONSIDER ANY PORTION OF THE FAMILY ASSESSMENT AND SERVICE TRACK REPORT, RECORDS AND ANY INFORMATION CONCERNING SUCH REPORT AND RECORDS PRESENTED BY THE SUBJECT OF THE REPORT THAT IS RELEVANT TO THE PROCEEDING. NOTHING IN THIS SUBPARAGRAPH, HOWEVER, SHALL BE INTERPRETED TO AUTHORIZE A COURT TO ORDER THE SUBJECT TO PRODUCE SUCH REPORT, RECORDS OR INFORMATION CONCERNING SUCH REPORT AND RECORDS, IN WHOLE OR IN PART.

Chapter 377 took effect on August 3, 2011.

Abuse/Neglect - Mandated Reporters - Chapter 91 of the Laws of 2011 adds to the list of mandated reporters of child abuse or maltreatment in SSL § 413(1)(a) the "director of a children's overnight camp, summer day camp or traveling summer day camp, as such camps are defined in [Public Health Law § 1392]."
Chapter 91 took effect on June 22, 2011.

DOMESTIC VIOLENCE - Chapter 11 of the Laws of 2011 amends Social Services Law § 459-a(1) to include, within the definition of "Victim of domestic violence," victims of aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, and criminal obstruction of breathing or blood circulation, or strangulation.
Chapter 11 also amends § 459-a(2) to include, within the definition of "Family or household members," persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors that may be considered in determining whether a relationship is an "intimate relationship" include, but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship."
Chapter 11 took effect on April 13, 2011.

II. ABUSE/NEGLECT

Central Register/Investigation/Removal

ABUSE/NEGLECT - Removal - Post-Fact-Finding

Upon a fact-finding hearing, the family court determined that the mother had failed to provide the children with safe and appropriate housing, and that she had failed to ensure that two of the children attend school regularly. The parties reached a tentative agreement as to the terms of a proposed disposition, pursuant to which the children would be released to the mother for a period of six months under the agency's supervision, but, about two months later, the agency moved pursuant to FCA § 1051(d) for removal of the children, relying on inter alia, an affidavit from a caseworker which stated that the family had to relocate after their home was damaged as a result of a fire set by one of the mother's adult children; that the 17-year-old subject child was living with her boyfriend much of the time, only returned to the mother's home on the first of each month to take the mother's support checks from her, and smoked marijuana and drank alcohol without the mother stopping her; that the 13-year-old subject child did not attend school, came and went as he pleased, and smoked marijuana and drank alcohol; and that the 12-year-old subject child frequently stayed out at night until 12:00 or 1:00 a.m. and often went to school dirty and emitting a foul odor. The family court ordered removal of all the children, finding that there was a substantial probability that the final order of disposition would be an order of placement.

The Second Department affirms, agreeing with the family court's "substantial probability" finding under § 1051(d). Although, in most cases, the family court should hold an additional hearing to determine whether removal is proper, in this case the family court did not err in failing to hold a hearing. The statute does not expressly require a hearing, and, in this case, the court possessed an abundance of information sufficient to make an informed determination.

Matter of Amber S.
(2d Dept., 5/24/11)

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JURISDICTION - Supreme Court - Case Or Controversy/Mootness
ABUSE/NEGLECT - Seizures Of Children By Child Protective Authorities - Constitutional Issues

In this § 1983 action in which the mother alleged that the in-school seizure of her daughter violated the constitution, the Ninth Circuit affirmed the district court's grant of summary judgment on the Fourth Amendment claims, concluding that defendants were entitled to qualified immunity because, even assuming that the child was kept for two hours in a closed room by a caseworker and a uniformed police officer carrying a firearm, defendants reasonably could have believed that the seizure was reasonable. However, the Court went on to hold that the seizure was, in fact, unconstitutional, and that although exigent circumstances permit a caseworker to seize a child without a warrant if there is reasonable cause to believe the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant,

traditional Fourth Amendment probable cause and warrant requirements apply in other cases. The Supreme Court granted certiorari.

A Supreme Court majority first holds that generally the Court may review a lower court's constitutional ruling at the behest of a government official who was granted immunity. That the victor has filed the appeal does not deprive the Court of jurisdiction. The parties in such cases may have a sufficient interest to present a case or controversy. Although the Court generally has declined to consider cases at the request of a prevailing party even though the Constitution permits it, qualified immunity cases are in a special category. Constitutional determinations in such cases are not mere dicta. They are rulings that have a significant future effect on the conduct of public officials.

However, the case is moot because the child, who is months away from her eighteenth birthday, has moved to Florida with no intention of moving back to Oregon. She faces not the slightest possibility of being seized in a school in the Ninth Circuit's jurisdiction as part of a child abuse investigation, and thus cannot be affected by the Ninth Circuit's ruling. The Court vacates the part of the Ninth Circuit's opinion that addressed the Fourth Amendment issue of whether a caseworker must obtain a warrant before interviewing a suspected child abuse victim at school.

Camreta v. Greene
2011 WL 2039369 (U.S. Sup. Ct., 5/26/11)

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ABUSE/NEGLECT - Removal - Constitutional Issues

In this § 1983 action in which plaintiff father and his children allege that defendant caseworker, employed by defendant City of New York, entered their home unlawfully and effected an unconstitutional removal of the children, the Second Circuit overturns a determination that defendant caseworker was entitled to qualified immunity with respect to all claims.

The district court erred in its application of the corrected-affidavit doctrine, under which a defendant who makes erroneous statements of fact in a search warrant affidavit is nonetheless entitled to qualified immunity unless the false statements in the affidavit were necessary to the finding of probable cause. The district court, in applying the probable cause standard in FCA § 1034(2), looked to an amended version of the statute that was not in effect at the time of defendant's application; at that time, the affiant was required to demonstrate probable cause to believe that an abused or neglected child may be found on the premises. The children defendant identified did not reside at plaintiff's home.

The Second Circuit rejects the district court’s conclusion that no reasonable juror could infer that defendant knowingly and intentionally made false and misleading statements to the family court. Substantial evidence, viewed in the light most favorable to plaintiffs, suggests that defendant had reason to know that defendant's allegedly suicidal daughter was not residing at the home, and knowingly or recklessly misrepresented the nature of a paint-swallowing incident involving

the daughter by failing to note that the incident occurred at school rather than in the father's home or that the child may have been living outside the home and free from the father's control.

With respect to plaintiffs' procedural due process claims, the Court notes that it was clearly established at the time of the removal that state officials could not remove a child from the custody of a parent without either consent or a prior court order unless emergency circumstances existed.

With respect to plaintiffs' substantive due process claims, the Court notes that although the parties appear to agree that a post-removal judicial confirmation proceeding was held, and that this proceeding took place within several days after removal, they provide no further detail upon which the Court can assess the timeliness and adequacy of the proceeding, nor can the Court determine from the record the factual basis on which the family court decided that the continued removal was warranted. In addition, the Court cannot conclude that at the time of removal, defendant lacked sufficient legal guidance by which to discern the lawfulness of his actions.

With respect to the children's Fourth Amendment claims, the Court notes that although its decision in *Tenenbaum*, after defendant effected the removal, changed the legal framework by applying Fourth Amendment rather than due process principles, it would be inappropriate to afford defendant qualified immunity for that reason.

Southerland v. City of New York
NYLJ, 6/14/11
(2d Cir., 6/10/11)

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ABUSE/NEGLECT - Removal - FCA § 1028 Hearing

The family court denied the mother's request for a FCA § 1028 hearing on the ground that a hearing was not required because the children were paroled to the father's care. The court found that there was no "removal" providing a basis for a § 1028 hearing. The court reasoned that "[FCA] 1028 hearings protect the primacy of parental right[s] as against the state, not as against the parent vs. parent." Instead, the court granted the attorney for the children's application for a hearing pursuant to FCA § 1061 to address the order of protection that prohibited all contact between the mother and her children with the exception of ACS-supervised visitation.

Reaching the now moot issue because it is likely to arise repeatedly and evade review, the Second Department concludes that the family court erred in denying the mother's application for a § 1028 hearing. There was a "removal" within the meaning of § 1028. A survey of statutes within FCA Article Ten shows that the word "removal" or "removed" is used in the context of the State's removal of the child from the home; the concept of "removal" is not qualified. Whether a child is placed in the custody of another parent, or placed in the custody of a governmental agency, the State is acting within its *parens patriae* power when it effectuated the transfer.

Matter of Lucinda R.
(2d Dept., 5/17/11)

Practice Note: Whether or not the Second Department read the statute correctly, the end result cuts sharply against the well-settled rules that govern custody proceedings involving two biological parents.

In a FCA Article Six custody battle between biological parents, either a best interests standard applies, or the non-custodial parent must prove a change in circumstances to get to a best interests hearing. Needless to say, neither parent would get the benefit of the very exacting *Nicholson v. Scoppetta* imminent risk standard. So, one might ask, why should a respondent parent get a § 1028 hearing, and the benefit of the imminent risk standard, merely because the non-respondent parent is seeking custody in the context of a FCA Article Ten proceeding? Why should the respondent parent regain temporary custody even though the non-respondent parent undoubtedly would prevail easily in an Article Six proceeding?

Although, in *Lucinda R.*, the non-respondent father had filed a custody petition, only the family court's ruling regarding the applicability of § 1028 was before the Second Department. The court focused on statutory construction, and did not address the anomaly that results when a respondent parent regains temporary custody even though the non-respondent parent would prevail in an Article Six proceeding. Accordingly, there is no reason to think that a respondent parent's right to a § 1028 hearing precludes a non-respondent parent from seeking temporary custody pursuant to FCA Article Six.

What if, in *Lucinda R.*, the father had formally requested a temporary custody hearing, and such a hearing had been consolidated with a § 1028 hearing. Obviously, if imminent risk had been established, the father would have retained custody. But, even if imminent risk had not been established, he could have argued that because an Article Six petition was also before the court, the no imminent risk determination did not preclude issuance of a temporary custody order pursuant to Article Six. The persuasiveness of such an argument becomes obvious when one contemplates a case in which a non-respondent parent appears later in the proceeding at a time when the respondent has physical custody of the children, and files an Article Six petition and requests a temporary custody hearing in the Article Six proceeding. In that scenario, § 1028 would not come into play since any order transferring temporary custody to the non-respondent parent under Article Six would not be an ACS or court-ordered "removal."

Finally, it is true that a court might be tempted to take a less charitable view of the custody application when it is made by a parent who has not been closely involved in the child's life and has stepped forward for the first time only after abuse/neglect allegations are made against the other parent and the child is at risk of being placed in foster care with strangers. However, while the non-respondent parent's prior behavior, and motive for coming forward, can and should be taken into account, the fact that the custody application has been made in the context of an Article proceeding does not justify a departure from traditional custody law principles.

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ABUSE/NEGLECT - Removal - Imminent Risk

The Second Department upholds the denial of respondents' applications pursuant to FCA § 1028 for return of their children, concluding that "[t]here was sufficient evidence presented at the hearing that the children's emotional, mental, and physical health would be at imminent risk if they were returned to [respondents'] care," and that the children should not be returned "until additional facts are adduced at a full fact-finding hearing (citations omitted)."

Matter of Nathanal C.
(2d Dept., 11/16/10)

Practice Note: The standard cited by the Second Department -- "the children's emotional, mental, and physical health would be at imminent risk" -- does not seem faithful to the standard established by the Court of Appeals in *Nicholson v. Scoppetta* (3 N.Y.3d 357), where the court referred to "the very grave circumstance of danger to life or health." In addition, the Second Department's reference to the children not being returned "until additional facts are adduced at a full fact-finding hearing" sounds suspiciously like the now-discredited "safer course" doctrine under which children are kept in foster care because of safety concerns despite the lack of concrete evidence of the requisite imminent risk.

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ABUSE/NEGLECT - Removal - Imminent Risk

After concluding that the father's appeal from the denial of his FCA § 1028 application is not academic even though he has been awarded temporary custody since the removal of the child created a permanent and significant stigma, the Second Department concludes that the § 1028 application should have been granted.

Rather than seeking court-mandated services, petitioner sought removal of the child when the father refused to accept certain services, which were never fully explained to him. The family court found that petitioner failed to make reasonable efforts to avoid removal, but found an imminent risk at the § 1028 hearing based on evidence of bruises and related injuries to the child. However, the child and the father explained that the injuries were accidentally incurred, and there was no evidence presented which ruled out that claim. The explanation that the child incurred bruises while play-fighting with other children was corroborated by the testimony of a school guidance counselor that the child engaged in aggressive play-fighting with his peers. Also, petitioner waited over six weeks after bruises were observed on the child's body before commencing this proceeding. In the interim, no new injuries were observed, indicating the absence of imminent risk to life or health.

Matter of Alan C.
(2d Dept., 6/14/11)

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ABUSE/NEGLECT - Removal - Imminent Risk

The First Department reverses an order granting respondent father's application pursuant to FCA § 1028 for a release of the child to his custody on condition that the child not be left alone with respondent mother and that the father demonstrate to the "reasonable satisfaction" of petitioner that there are appropriate arrangements in place to ensure that the child will not be left alone with the mother.

When the father spoke on the phone to the ACS specialist assigned to the case, he called her a "bitch" and threatened to "fucking kill [her]" if she tried to remove the child from the hospital. The next day, he appeared at the hospital and "made threats . . . that he wanted to kill everyone in the whole world and he also wanted to kill everyone in the hospital." On the day of the hearing, he stated that he was going "to kill all the motherfuckers associated with taking his son from him," and, referring to the ACS specialist, that he would "gut the pretty one like a fish," "continued to make threats about how he was going to get all the workers on the case even the lawyers," and instructed the mother not to talk to her attorney and not to move off the bench as they waited to see the judge.

There are questions as to how ACS workers can make a determination as to "appropriate arrangements" without coming into contact with the father, and thus putting themselves at risk. His conduct suggests that the parole of the child may pose as much of an imminent risk of harm as returning the child directly to his mother. Any doubt concerning the father's conduct must be resolved in favor of protecting the child.

In re Leroy R.
(1st Dept., 5/10/11)

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ABUSE/NEGLECT - Intervention By Grandparent
- Removal - Constitutional Issues

In this federal action, the maternal grandmother raises constitutional and common law claims in an attempt to obtain custody of the child, who has been placed by defendant agency in the temporary custody of the paternal grandmother.

The Court, while granting defendant's motion to dismiss the complaint, concludes that since the child's mother had custody prior to the agency's intervention, plaintiff does not have a relationship with the child that gives rise to a protected liberty or property interest.

Plaintiff also has no standing to assert that the seizure of the child violated plaintiff's Fourth Amendment rights since she was not the child's legal guardian.

Gause v. Rensselaer Children
NYLJ, 12/3/10
(NDNY, 11/29/11)

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ABUSE/NEGLECT - Reasonable Efforts – Pre-Removal

The Department of Social Services' initial investigation revealed that respondent parents had engaged in domestic violence in the presence of the children. DSS did not file a petition until the Central Registry received another report after the parents left one of the children propped in the corner of an overstuffed chair with a propped bottle of water while they slept upstairs, and the child died of positional asphyxia.

The Court, having previously granted DSS's request for a removal order, now concludes that DSS did not make reasonable efforts to prevent the need for removal. DSS failed to demonstrate that the services offered were, in fact, appropriate and tailored to address respondents' problems. DSS recommended substance abuse evaluations, mental health evaluations and traumatic brain injury assessments, but there are no allegations in the petition that neglect was caused by either parent's substance abuse, mental illness, or traumatic brain injury.

DSS was required to do more than make referrals it knew were not being followed. Given the severe problems described in the petition and the parents' non-compliance with recommendations, reasonable efforts to eliminate the need for removal should have included the filing of a petition against the parents prior to the death of one of the children in order to seek orders compelling the parents to participate in appropriate programs.

Matter of Zoe "W."
(Fam. Ct., Clinton Co., 11/18/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_51993.htm

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ABUSE/NEGLECT - Removal - Imminent Risk

Upon a combined FCA § 1027 and § 1028 hearing, the Court finds no imminent risk, concluding that any risk posed by the father can be mitigated by the issuance of a temporary order of protection and an order that the mother re-enter a domestic violence shelter and resume domestic violence counseling and participate in other recommended services.

The mere possibility that the mother could resume her relationship with the father, that the father could commit acts of domestic violence against her, that these acts could take place in the presence of the children, and that the children could suffer emotional harm as a result, is not proof of danger that is "imminent," "near" or impending." Even if the mother violated an order by leaving PATH (Prevention Assistance and Temporary Housing) while awaiting placement at a domestic violence shelter and by temporarily failing to keep the agency apprised of her whereabouts, these violations did not cause harm to the children or place them at imminent risk of harm; in fact, the mother complied with an order of protection and did everything possible to protect the children from exposure to further violence.

The father's alleged violation of an order of protection issued after a previous § 1028 hearing does not constitute a change in the mother's circumstances or establish that the children would be at imminent risk in her care, and petitioner should have attempted to ensure that the father was held accountable and to assist the mother in expediting her request for housing in a secure domestic violence shelter. When petitioner removed one of the children, he was in his mother's care staying at the home of his maternal aunt, and there is no evidence that his father knew where he and his mother were staying or that he was otherwise in any immediate danger; moreover, there was more than sufficient time, consistent with the child's safety, to seek a court order.

"The decision to nevertheless conduct such a removal, in the aftermath of Nicholson, from a non-abusive parent, herself a victim of domestic violence, repeatedly rendered homeless by the actions of the alleged perpetrator, raises disturbing questions," particulary where a § 1028 hearing already had been conducted and a judicial determination had been made that any risk could be mitigated or ameliorated by reasonable efforts and a temporary order of protection.

Matter of David G. v. Blossom B. and Omar G.
(Fam. Ct., Kings Co., 10/15/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_20433.htm

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ABUSE/NEGLECT - Civil Liability

In this action in which plaintiff, the administratrix of the estates of her two deceased nephews, alleges that the County failed to do a proper child protective investigation and that a proper investigation may have prevented the deaths of the children, the Court holds that there is no private right of action for money damages.

The Court rejects plaintiff's argument that although the Court of Appeals held in *Mark G. v. Sabol*, (93 N.Y.2d 710) that there is no private right of action against Child Protective Services for its failure to adopt a plan dealing with reports of suspected child abuse and neglect, *Mark G.* does not prohibit a private right of action where a plan has been adopted and implemented by the County but County employees "utterly and completely failed to carry out" that plan.

Social Services Law § 419 expressly provides immunity to those people or entities who report child abuse or neglect or provide services based upon a report, and SSL § 420 allows a private cause of action for money damages upon the failure of any person, official or institution required by SSL Title Six to report a case of suspected child abuse or maltreatment. With the exception of § 420, the Legislature has declined to grant any private right of action for money damages under Title Six.

Rivera v. County of Westchester
NYLJ, 4/8/11
(Sup. Ct., West. Co., 4/1/11)

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ABUSE/NEGLECT - Removal - Constitutional Issues

After the parents filed a child abuse report upon the mother's discovery of bruises on their two-year-old son's arm a few hours after she picked him up from daycare at the home of Ashley Woods, an investigation was conducted and the case manager discovered a Department of Child Services file indicating that the father had been accused of child abuse by his then fifteen-year-old stepdaughter in 2003. The caseworker and her supervisor decided to remove the child from the home. Because it was a Friday afternoon, they did not obtain a court order and did not believe there was adequate time to do so. Instead of putting the child in foster care, they arranged to have the mother go with the child to his grandmother's house. A detention hearing was held the following Monday, after which the court concluded that no probable cause existed at that time to believe that the child's physical health was seriously endangered.

The parents subsequently filed suit against the case manager and her supervisor, and the DCS, alleging constitutional and state law violations. The district court concluded that the case manager and her supervisor (defendants on appeal) were entitled to summary judgment on the federal claims on qualified immunity grounds.

The Seventh Circuit affirms. With respect to the claim that defendant's violated the child's Fourth Amendment right to be free from unreasonable seizures when they compelled the mother to remove the boy from his home, the Court notes that defendants coerced the mother into taking the child to Ohio by threatening to place him in foster care if she did not cooperate, but the Court need not decide whether the child was seized since both the DCS and the juvenile court judge assumed there was an emergency detention; that a prudent caseworker (meaning one of reasonable caution) could have believed that the child faced an immediate threat of abuse based on the available information, and that the Court's determination of reasonableness is influenced, in large part, by the fact that the child remained with his mother at all relevant times.

With respect to the substantive due process claim, the Court notes that, once again, the analysis is influenced by the fact that the child remained with his mother, and that it was reasonable for defendants to suspect possible abuse by the father and their intrusion on the parents' constitutional right to familial integrity was no greater than was necessary to address that danger.

With respect to the procedural due process claim, the Court notes that reasonable, experienced caseworkers would have believed that the child was in immediate physical danger in the home, and that the scope of the removal was limited to the exigency that justified it.

Siliven v. Indiana Department of Child Services
2011 WL 891529 (7th Cir., 3/16/11)

Petitions: Amendment

ABUSE/NEGLECT - Petition – Amendment

On or about October 31, 2008, petitioner filed a neglect petition against the mother. At the time, the father's whereabouts were unknown, and the petition did not identify him as a respondent. Around June 2009, the father appeared in court and stated that he wanted to petition for custody of the child and, around December 2009, he established paternity. In early January 2010, the father agreed to be tested for drugs and to a psychiatric evaluation. After the drug test came out positive, petitioner moved pursuant to CPLR 3025(b) for leave to amend the petition to identify the father as a respondent. The court granted the motion.

The Second Department affirms. Petitioner did not unreasonably delay in seeking the amendment after learning of the father's drug use, and, in any event, the father was not prejudiced.

Matter of Audrey A.
(2d Dept., 2/8/11)

* * *

ABUSE/NEGLECT - Petition - Amendment To Conform To Proof
- Evidence - Post-Petition

The Fourth Department finds unpreserved the mother's claim regarding the admission of post-petition evidence, and also concludes that although petitioner should have moved to amend the petition, this Court may, given that the evidence was received without objection, exercise its interest of justice power and sua sponte conform the petition to the evidence.

Matter of Angel L.H.
(4th Dept., 6/10/11)

Respondents/Persons Legally Responsible

ABUSE/NEGLECT - Allowing Neglect
- Respondents
- Jurisdiction

While upholding a finding of neglect, the First Department rejects the father's contention that the family court lacked jurisdiction over him because he did not have custody of the children and was barred from contact with them by an order of protection. In order for the court to have jurisdiction, under FCA Article 10, the child need not currently be in the care or custody of the respondent if the court otherwise has jurisdiction. A respondent in a neglect proceeding may be any parent or other person legally responsible for the child's care, and a parent may not avoid his responsibilities to his children merely because they are not in his custody.

Here, the father was aware that the mother was not properly caring for the children. The fact that the father was barred from contact with the children did not relieve him of his parental duties.

In re Erica B.
(1st Dept., 12/2/10)

* * *

ABUSE/NEGLECT - Respondent/Person Legally Responsible
- Drug/Alcohol Misuse By Children
- Exposing Child To Sexual Behavior

The Third Department concludes that the mother's paramour was properly found to be a person legally responsible for the children's care where he was only a few years older than the oldest twins, but he had daily contact with the children since he had lived in the home for about a year, was often alone with the children, cooked, cleaned and helped the children prepare for school.

The Court upholds findings of neglect made against the mother and the paramour based on evidence of the children's repeated use of marihuana and alcohol, the pervasive availability of marihuana in the home, and the sleeping arrangements under which the mother's teenage daughter often slept in the same bed with her boyfriend. There was proof that the paramour smoked marihuana with at least one of the children, and that the mother had knowledge of the children's misconduct. The caseworker detected a strong smell of marihuana, particularly in one of the children's rooms, and observed a partially smoked marihuana cigarette and a large number of empty beer cans scattered around the home, including in the oldest son's room. The mother rationalized that, since her daughter responded in the negative when asked whether she was having sex, then there was nothing amiss with the sleeping arrangement.

Matter of Tyler MM.
(3d Dept., 3/10/11)

Jurisdiction/Venue

ABUSE/NEGLECT - Venue

The Third Department reverses the order of fact-finding and disposition in this Article Ten proceeding where the family court erred in failing to transfer the proceeding from Otsego County to Delaware County.

FCA § 1015(a) provides that a neglect proceeding "may be originated in the county in which the child resides or is domiciled at the time of the filing of the petition or in the county in which the person having custody of the child resides or is domiciled." Here, the mother and the children were all residents of Delaware County at the time the neglect petition was filed, and thus Otsego County was not the proper venue and the court was required to transfer it to Delaware County.

Matter of Gabriella UU.
(3d Dept., 4/21/11)

* * *

ABUSE/NEGLECT - Jurisdiction
- Service Of Process

The Court denies petitioner's application for voluntary withdrawal of this Article Ten proceeding due to lack of personal jurisdiction over respondent father, who allegedly raped his 11-year-old daughter repeatedly while in Texas. where the father lives in Georgia and is believed to have last been in New York in November 2010 during a Thanksgiving visit, and the mother and the child relocated from Texas and have been living in New York since September 2010.

The Court exercises temporary emergency jurisdiction under the UCCJEA (DRL § 76-c). No other state has jurisdiction, and New York is an appropriate forum. The family has a significant connection to New York since the child T. was born here; she returned here with her sisters and is enrolled in eighth grade at a public school here; and the alleged abuse continued in New York when T., at the father's request, sent numerous text messages to him from New York, including 4 or 5 pictures of herself in the nude. Out-of-state service on the father is authorized by DRL § 75-g.

Matter of Janie C.
NYLJ, 4/20/11
(Fam. Ct., Bronx Co., 4/4/11)

Notice To/Investigation Of/Intervention By Parent Or Other Relative

ABUSE/NEGLECT - Intervention By Non-Respondent Parent

In *Matter of Telsa Z.* (71 A.D.3d 1246), the Third Department found reversible error where the trial court, after finding that the non-respondent mother knew the father was sexually abusing one child and did nothing to protect the children, and that the mother had three older daughters removed from her care when she allowed prior boyfriends to sexually abuse the girls and then violated orders of protection to keep those boyfriends away from the girls, placed the children in foster care upon an Article Ten dispositional hearing.

While concluding that *Telsa Z.* is not binding in this case because in that case the children were residing in the mother's home at the time of disposition, whereas in this case the child never resided in the non-respondent father’s home, the Court asks the Third Department to reconsider the holding in *Telsa Z.*

Nothing in FCA § 1052 or § 1055 prohibits placement when a parent is not named as a respondent. FCA § 1027 permits the court to temporarily place a child with someone other than a non-respondent parent, FCA § 1017(2) permits but does not require the court to direct that a child reside with a suitable non-respondent parent, and FCA § 1035(d) provides for a post-removal investigation to determine whether there is a suitable non-respondent parent, and thus permits the court to refuse to release the child to an unsuitable non-respondent parent.

The Third Department apparently believed that the safety issue in *Telsa Z.* could be adequately addressed via an investigation under FCA § 1034, but that apparently assumes that upon the issuance of an order pursuant to § 1034, the Department of Social Services would file an Article Ten petition against the mother. Unfortunately, that assumption is overly optimistic since there are occasions when the court and the Department have a different view as to whether or not the filing of a petition is appropriate.

Matter of Keith B.
(Fam. Ct., Clinton Co., 9/30/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_20401.htm

* * *

FOSTER CARE - Interstate Compact

A Florida appeals court quashes an order that required the 17-year-old child to return to Florida on the ground that his continued stay in New York violated the Interstate Compact on the Placement of Children.

Even if an out-of-state placement does not strictly comply with the ICPC, a court may allow the child to remain in the out-of-state placement during the ICPC process if it is in the child's best interest. There is no reason to question whether the child is safe with his uncle or whether it is in the child's best interest to remain with the uncle during the ICPC process. Requiring the child to return to Florida for a few months would at a minimum disrupt his school work and the relationships he is developing, and there appears to be no suitable placement with family in Florida.

Although Article IV of the ICPC authorizes sending and receiving states to penalize non-compliance in accordance with laws in each jurisdiction, and a sending agency that places a child in violation of the compact could also lose its license, respondents have not cited any laws in Florida or New York that would penalize the non-compliance in this case, and there is no private sending agency that would lose its license or permit. In fact, New York courts have in some cases declined to impose sanctions and have not required strict compliance with the ICPC where it would be contrary to the best interest of a child.

The Court observes that the agency "has taken an overly legalistic position that cannot b e reconciled with the facts in this case. Courts and agencies charged with protecting the welfare of children should be concerned foremost with the best interests of the child."

R.F. v. Department of Children and Families
2011 WL 222243 (Fla. Dist. Ct. App., 4th Dist., 1/26/11)

* * *

ABUSE/NEGLECT - Kinship Foster Care

The Second Department holds that the family court properly denied, as untimely, an application pursuant to FCA § 1028-a (relatives seeking to become foster parent) where the application was filed approximately 14 months after the child was removed and placed into foster care.

Matter of Kaitlyn B.
(2d Dept., 5/31/11)

* * *

ABUSE/NEGLECT - Investigation Of Relatives/Caretakers

The Court concludes that it fulfills its obligation to make a determination regarding the suitability of a located relative under FCA § 1017 when it holds a hearing upon the filing of a motion.

The parties appear to presume that the Court should schedule such a hearing sua sponte, but, although the Court may file its own motion seeking a modification of the child's custodial status pursuant to FCA §§ 1061 and 1017, the Court is not obligated to do so.

Matter of Deonna W., et al.
(Fam. Ct., Clinton Co., 6/1/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21190.htm

* * *

ABUSE/NEGLECT - Interstate Compact

A California appeals court, agreeing with other California appeals courts, state courts in Arkansas, New Hampshire, New Jersey and Washington, and the Third Circuit U.S. Court of Appeals, holds that the Interstate Compact on the Placement of Children does not apply to an out-of-state placement with a parent. These decisions are far better reasoned than decisions in other states, including New York, holding to the contrary.

In re C.B.
2010 WL 3735454 (Cal. Ct. App., 4th Dist., Div. 2, 9/27/10)

Dismissal Of Proceeding

ABUSE/NEGLECT - Dismissal Prior To Fact-Finding Hearing - Voluntary Discontinuance

Petitioner commenced this proceeding alleging that the then seventeen-year-old child had been neglected by her father, who refused to permit her to return to his home. The child was placed in a group home for pregnant teens, and, after she gave birth, was placed in a mother and child program. Prior to the fact-finding hearing, petitioner made an application for a voluntary discontinuance on the ground that there were no longer any child protective concerns since the child had turned eighteen. The attorney for the child objected, stating that the child wanted to

remain in care and could do so only do if there was a finding of neglect. The court dismissed the petition, stating that, since the child was eighteen, it was "hard to see how the aid of the court . . . could be useful under [FCA § 1051(c)."

The Second Department reverses. In effect, the family court granted the application pursuant to CPLR 3217(b), and not pursuant to FCA § 1051(c). Under § 3217(b), courts may deny discontinuance to protect the interests of the parties. In matters involving the welfare of a child, not only the parties to the action, but also the public, has an interest in the continuation of the proceeding.

The family court has jurisdiction to adjudicate neglect petitions commenced prior to the child's eighteenth birthday even after the child turns eighteen, and, with the child's consent, a placement made after a neglect finding may be continued until the child turns twenty-one years of age. Significant prejudice would accrue to the child, since she would be discharged from foster care without services to which she would be entitled upon a finding of neglect.

Matter of Sheena B.
(2d Dept., 4/26/11)

* * *

ABUSE/NEGLECT - Dismissal - Aid Of Court Not Required

After the mother repeatedly struck the father in the head with a frying pan in a domestic violence incident while the children were present, relatives of the children petitioned for custody. While the custody proceedings were pending, petitioner commenced this neglect proceeding. After orders were entered in the custody proceedings granting custody of the two youngest children to one relative and custody of the oldest child to another relative, the mother moved to dismiss the neglect petition, asserting, inter alia, that the aid of the court was not required. The family court denied the motion.

The Third Department affirms. The custody orders granted visitation as agreed to and arranged between the custodial relatives and the mother, with no involvement by or notice to petitioner, and the orders were also subject to modification without notice to petitioner. If the neglect proceeding were dismissed, petitioner would have no authority to work with the mother or the children.

Matter of Quinton GG.
(3d Dept., 3/31/11)

* * *

ABUSE/NEGLECT - Dismissal - Aid Of Court Not Required

In this three-year-old child protective proceeding, respondent mother, supported by the attorney for the children, has moved to dismiss the petitions pursuant to FCA § 1051(c) on the ground that

the aid of the court is not required. Respondent is a public school teacher who has admitted that she inflicted excessive corporal punishment upon her now 16-year-old son.

Upon a fact-finding hearing, the Court grants the motion. The evidence is sufficient to establish neglect, and derivative neglect, based on respondent's use of excessive corporal punishment against her son. Under § 1051(c), the dispositive issue is whether there is a likelihood of present or future neglect. A court must consider, among other factors, the nature of the original allegations, whether the underlying problems have been resolved, and whether the respondent has complied with and completed all recommended services. Courts also have considered whether services are available to the family without a dispositional order and whether a dispositional order is necessary to ensure compliance.

Three years ago the mother beat her son with a belt. Although it was not the first time, it was the worst and last incident. Two days after the incident, without petitioner's help, she found service providers. She completed parenting skills and anger management training two-and-one-half years ago. Although individual and family therapy were not included in the service plan, the mother knew that she and her son needed additional help, so she found appropriate treatment providers and she and her son started attending therapy and have remained in therapy since that time. When caring for the children became difficult for the maternal aunt because of the need to transport them back and forth from Manhattan to Brooklyn, the mother reached out for help and found a family friend who ensured that the children remained in their schools and attended their extra-curricular activities. Five months after the charged incident, the Court temporarily released the children to the mother under supervision, and there has never been another incident. The children are thriving. An order of protection issued against respondent was vacated nine months ago.

The statutory scheme is intended to be remedial, not punitive, and its purpose would be subverted if it were used to punish the mother, and ultimately the children, in the name of child protection. Petitioner's claim that the mother has not been compliant or cooperative is rejected as "disingenuous in the extreme." When scheduling problems arose, the mother, but not the agency, made attempts to overcome them. The agencies involved in this case have been inflexible and unaccommodating; the only way that the mother could have cooperated with supervision and ensured that family members were always home when a caseworker made an unannounced visit would have been to quit her job and instruct the children to discontinue their extra-curricular activities and return home every day immediately after school. Petitioner cannot reconcile its belief that the mother should lose her job with its obligation to protect the children, who would lose their only means of financial support, their health insurance and their financial stability.

Matter of Robert W.
(Fam. Ct., Kings Co., 3/3/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50304.htm

* * *

ABUSE/NEGLECT - Adjournment In Contemplation Of Dismissal

Noting that FCA § 1039(b) does not explain how to file for an extension of an adjournment in contemplation of dismissal (i.e., whether by motion or petition), and contains no provisions regarding tolling or a hearing, while FCA § 1039(e) and (f) explain in detail how alleged violations should be handled, the Court concludes that it had no authority to temporarily extend the ACD period pending further proceedings absent the consent of all counsel.

"The better practice would have been to file for an extension of the ACD much sooner than two days before the order was due to expire, especially since the problems that [the child] was manifesting should have been known to Petitioner earlier, and the issue about temporarily extending the ACD period could have been avoided." Even assuming arguendo that FCA § 1061, which provides for orders to stay, modify, or vacate an order, can be used to modify ACD orders, that is not the statute under which petitioner sought relief.

The supplemental petition to extend the ACD period is dismissed.

Matter of Marquita W., Rasheena W., and Cobert P.
(Fam. Ct., Kings Co., 2/17/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50200.htm

* * *

ABUSE/NEGLECT - Drug Possession
- Dismissal - Prima Facie Standard

At the conclusion of petitioner's case, the Court dismisses neglect charges, finding that petitioner failed to establish a prima facie case where the evidence of the police seizure of seven zip lock bags of marijuana in a closed glass jar inside the bathroom cabinet of respondent father's home does not establish actual or imminent danger of impairment.

While petitioner attempted to show that the child was old enough to walk and able to use his hands and, therefore, could reach the contraband, this evidence established a mere possibility of danger. Moreover, petitioner presented no evidence that the marijuana belonged to the father or that he was even aware it was in the bathroom cabinet. Petitioner established that both parents were arrested at the time the drugs were seized in the home.

The Court notes that in ruling on the father's motion to dismiss, it looked to CPLR § 4401, which states: "Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admission." The Court must be satisfied that when petitioner completes the presentation of its case and rests, there is sufficient evidence to provide a rational basis for a finding of neglect or abuse after according petitioner every favorable inference which can be reasonably drawn from the evidence presented.

Matter of Isaiah D.

(Fam. Ct., Bronx Co., 10/12/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_51837.htm

Contempt/Orders Of Protection

ABUSE/NEGLECT - Contempt

The Second Department finds no error in the family court's denial of the mother's motion to hold the foster mother in civil contempt for an alleged failure to comply with provisions of a prior order which required that one of the children be taken to weekly therapy appointments, and that both children have visitation with their siblings.

Since the children were in the custody of the Administration for Children's Services, the provisions in the order were properly directed only at the agency. Moreover, the mother failed to show that any misconduct prejudiced any legal right or remedy which she has in this child protective proceeding.

Matter of Ayela S.
(2d Dept., 1/25/11)

* * *

ABUSE/NEGLECT - Orders Of Protection

During the pendency of these child protective proceedings, the foster care agency moved for an order of protection on behalf of its employees and against the father, and requested a temporary order of protection pending the determination of the motion. The family court granted the request for interim relief, but ultimately denied the motion for an order of protection.

The Second Department affirms. Contrary to the family court's determination, it did not lack subject matter jurisdiction. However, FCA § 1056 does not authorize the issuance of an order of protection on behalf of the agency's employees, who do not fit within any of the classes of persons in whose favor an order of protection may be issued.

Matter of Robert B.-H.
(2d Dept., 2/22/11)

* * *

ABUSE/NEGLECT - Order Of Protection - Violations

After a neglect fact-finding hearing had commenced, petitioner filed an amended neglect petition and a petition alleging a violation of an order of protection. The mother was served with the violation petition when the fact-finding hearing resumed, and, at the conclusion of the hearing, which became in effect a combined neglect/violation hearing, the family court found that the mother willfully violated the order of protection.

The The Fourth Department rejects the mother's contention that the family court violated FCA § 1041(a) by making findings of fact with respect to an untimely served petition alleging a violation of an order of protection. The mother had notice of petitioner's allegation that she violated the order of protection, was present during the neglect/violation hearing, and was served with the violation petition prior to issuance of the court's findings of fact.

Matter of Alex A.C.
(4th Dept., 4/29/11)

Right To Be Present/Defaults/Adjournments

FAMILY OFFENSES - Defaults

In this family offense proceeding, respondent wife was present at the courthouse on the scheduled date with a new attorney. The matter was called at approximately 11:30 a.m. but neither the wife nor her attorney appeared. The wife's attorney of record informed the court that he had met with the new attorney that morning and that the wife intended to request that the new attorney be substituted as attorney of record. Nevertheless, the court conducted a brief hearing on the husband's petition and issued a final order of protection which directed, inter alia, that the wife stay away from the marital residence where she had previously resided with the husband the parties' children.

The wife moved by order to show cause that afternoon to vacate the final order of protection; she and her new attorney alleged that they had checked in with a court officer at about 10:30 a.m. and had informed the court officer, and the wife's attorney of record, that they had to notarize the petitions the wife was preparing to file, and the wife also alleged that the husband was verbally and emotionally abusive toward her and denied that she had physically assaulted him during the argument which precipitated his filing of a family offense petition. The family court denied the motion.

The Second Department reverses and grants the motion. The circumstances do not establish a genuine default since the wife appeared with a new attorney intending to fully participate and her attorney of record was present when the matter was called. Even assuming there was a default, she had a reasonable excuse for her failure to appear when the case was called and has raised a potentially meritorious defense.

Matter of Dos Santos v. Dos Santos
(2d Dept., 9/21/10)

* * *

TERMINATION OF PARENTAL RIGHTS - Defaults
- Indian Child Welfare Act

The First Department upholds the denial of respondent's motion to vacate the orders terminating her parental rights upon her default where she had failed to appear at two prior proceedings and the court notified her attorney that should she fail to appear on the date in question, the court would proceed with an inquest. In addition, her counsel's bare assertion that he would have cross-examined petitioner's witnesses and presented evidence countering the allegations of abandonment does not establish a meritorious defense.

The Court also concludes that respondent, as the party asserting the applicability of the Indian Child Welfare Act, failed to meet her burden to provide information putting the court or Department of Social Services on notice that the child may be an "Indian child" and that further inquiry is necessary.

In re Cain Keel L.
(1st Dept., 11/18/10)

* * *

ABUSE/NEGLECT - Right To Be Present/Adjournments
- Excessive Corporal Punishment

Where respondent mother had previously failed to appear and had disregarded court directives, the Third Department finds no error in the family court's decision to proceed on the third day of the four-day fact-finding hearing when respondent alleged that she was unable to attend because of back pain. The court subsequently re-opened the proceeding to allow respondent to testify.

The Court also upholds a neglect finding where there was testimony that respondent regularly slapped, hit and punched the children out of anger, screamed at them, and humiliated them with disparaging epithets and obscenities, and the children feared her. In one incident, involving the child who is legally blind in his right eye as a result of a detached retina, respondent slapped him and pushed him in a laundry room, causing the right side of his head to hit the wall, and then, in a rage, forced him to the ground and pounded him with her fists. The other child witnessed the incident and testified that it scared him and made his stomach hurt.

Matter of Jack P.
(3d Dept., 1/6/11)

Collateral Estoppel/Res Judicata/Summary Judgment

ABUSE/NEGLECT - Summary Judgment

The Second Department overturns an award of summary judgment to petitioner where, in support of its summary judgment motion, ACS included the evidence submitted at a hearing held pursuant to FCA § 1028. The evidence failed to establish that the mother neglected her children, and most of the evidence was hearsay, which is not admissible at a fact-finding hearing and thus cannot be the basis for granting summary judgment.

The family court did not err in denying the mother's cross motion for summary judgment dismissing the petition. A FCA § 1028 hearing occurs prior to discovery, and the parties have not had the opportunity to prepare their cases.

Matter of N. Children
(2d Dept., 7/12/11)

* * *

ABUSE/NEGLECT - Res Judicata
- Domestic Violence

In this neglect proceeding in which it was alleged that the child was exposed to a series of domestic violence incidents between May 2008 and January 2009, the Fourth Department finds no error where the family court refused, on res judicata grounds, to admit evidence of those incidents because allegations concerning those incidents were raised or could have been raised in a separate petition previously filed by petitioner against the parents in January 2009. With the reasonable exercise of due diligence, petitioner could have discovered all of the incidents that occurred during that time frame prior to the filing of the previous petition .

"To hold otherwise under the circumstances of this case would allow government agencies such as petitioner to bring successive proceedings alleging the same theory of neglect until the desired result was obtained, with the status of the child remaining undetermined throughout. . . ."

However, the court erred in granting a motion to dismiss the petition against the father at the close of petitioner's case. Petitioner presented evidence that, during one incident, the father was wielding a knife and pushed the mother onto the bed where the six-month old child was lying.

Matter of Alfonzo T.
(4th Dept., 12/30/10)

* * *

ABUSE/NEGLECT - Collateral Estoppel
- Order Of Proof - Re-Opening Hearing

On July 6, 2010, petitioner and respondent rested after two days of trial. The Curt adjourned the matter until August 19, 2010 in order to render its decision. On August 16, 2010, petitioner filed a motion to re-open the trial to have a certificate of conviction entered as proof of the alleged neglect.

On August 19, 2010, the Court dismissed the neglect petition without considering petitioner's motion or offer of proof. The Court had discretion to re-open the hearing without prejudicing respondent, but the conviction for endangering the welfare of the child does not have collateral estoppel effect because it does not establish that the child suffered actual harm or that there was an imminent risk of harm as a result of respondent's actions.

The Court also notes in a footnote that "[i]t is doubtful that the doctrine of collateral estoppel can be applied where the Family Court trial was completed before the criminal case even started since the doctrine by its very nature precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party."

Matter of the Allen Children
(Fam. Ct., Oswego Co., 10/6/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_20486.htm

Right To Counsel

ABUSE/NEGLECT - Right To Counsel

The Third Department rejects respondent's claim that he received the ineffective assistance of counsel where counsel's decision not to present evidence at the abuse hearing was reasonable in light of the pending criminal proceeding involving the same allegations. Counsel was not obliged to seek an adjournment.

Matter of Hailey JJ.
(3d Dept., 5/5/11)

Role Of Judge In Proceeding

ABUSE/NEGLECT - Judges - Role In Proceeding

The Third Department finds no error where the family court became involved in the examination of witnesses at the fact-finding hearing, and issued, on its own accord, a subpoena calling for production of the child's school records and appointed an expert to review the records and advise the court on the child's educational needs.

While this type of conduct may, in some circumstances, present legitimate questions regarding the court's impartiality, the issue is unpreserved, and the records were clearly relevant to the issues raised at this hearing and were sought for "benign" purpose of determining the child's educational needs.

Matter of Keaghn Y.
(3d Dept., 5/5/11)

Medical Neglect

ABUSE/NEGLECT - Medical Neglect

The then four-month-old child was hospitalized for ten days for treatment of presumptive meningitis. A procedure was performed to release fluid from the child's head. When the child was discharged, his head was still enlarged, but the parents were advised that this condition

would ameliorate within one week. Three days later, the mother called the child's doctor because the child had vomited and his head was still enlarged. The doctor advised that it was difficult to assess the child's condition over the phone and that the parents "should probably" bring the child to the emergency room. The mother checked the child's temperature, which was normal, and the parents decided to take the child to the doctor in the morning. The father stayed up most of the night with the child to monitor his condition. The following morning the parents took the child to the doctor, and the child was admitted to the hospital. The day after the child was admitted, he underwent another procedure to release excess fluid from his head.

The Second Department reverses a finding of neglect made against the father. There is no evidence that the child's condition was impaired by the father's conduct, and no evidence that the decision to wait until morning to seek medical care placed the child in imminent danger.

Matter of Alanie H.
(2d Dept., 4/26/11)

* * *

ABUSE/NEGLECT - Excessive Use Of Force
- Medical Neglect
- Failure To Supply Adequate Food

The First Department upholds findings of neglect where respondent hit one child with a broomstick and sometimes hit both children with her hand or with a belt, respondent admitted that she failed to take the children for medical and dental appointments for at least a year, and when the caseworker visited the home, there was no food in the refrigerator or the kitchen cabinets.

In re Alex R.
(1st Dept., 2/8/11)

Inadequate Food/Shelter/Clothing

ABUSE/NEGLECT - Failure To Supply Clothing
- Medical Neglect

The Fourth Department vacates findings that respondent "permitted the two older children to attend school daily both dirty and inappropriately dressed and did not administer [the older child's] medication in accordance with the direction by his doctor."

No evidence was presented concerning the financial status of the mother and her ability to provide adequate clothing. Although petitioner presented evidence that the prescription medications for the older child were low or had not been filled in a few months, there was insufficient evidence of that child's need for the medication or the appropriate dosage.

Matter of Annastasia C.

(4th Dept., 11/12/10)

* * *

ABUSE/NEGLECT - Failure To Provide Adequate Food

While upholding a finding of neglect where respondent failed to feed the child properly, which led to a medical diagnosis of failure to thrive, and by failing to provide the child with proper medical care and treatment for that condition, the First Department concludes that although the family court erred by refusing to qualify respondent's witness as an expert pediatrician, the error was harmless because the witness, who examined the child on May 13, 2008, was incompetent to render an opinion as to whether the child had been neglected as of May 12, 2008, when the neglect petition was filed.

Moreover, because the medical evidence could be readily understood by an average finder of fact, expert testimony was not required before the court could make a finding that the child suffered from failure to thrive caused by improper feeding and denial of adequate medical care and treatment.

In re Joshua Hezekiah B.
(1st Dept., 10/12/10)

Leaving Children Alone Or With Inappropriate Caretaker

ABUSE/NEGLECT - Leaving Child Unattended

The Third Department reverses a determination denying petitioner's challenge to an indicated Central Register report where petitioner, who was employed at a day-care center, did not conduct a head count of her students upon leaving a playground and inadvertently left one of the three-year-old children behind, and, after conducting a head count in the classroom and realizing that one child had been left in the playground, rushed to the playground and found the child unharmed in the care of another employee.

There is no evidence that the child was actually unobserved for any portion of the six-minute period during which petitioner was attending to the other children. The playground is located at the rear of the building, is not visible from any public thoroughfare, is surrounded on all sides by a chain link fence and is accessible by two gates that remain locked at all times, and is visible to other trained employees and subjected to video surveillance.

Matter of Anne FF.
(3d Dept., 6/2/11)

* * *

ABUSE/NEGLECT - Leaving Children Alone

The First Department upholds findings of neglect with respect to respondent mother's 5 children where the mother continued to use marijuana after the neglect petition was filed, failed to bring the children for several scheduled medical appointments, and, on several occasions, left the children, then ages 14, 11, 6, 5 and 1, unattended at the shelter where the family resided and permitted them to ride the subway late at night without her. The Court rejects the dissenting judge's suggestion that there was just one incident involving 14-year-old Lah De.

The dissenting judge would reverse the finding as to Lah De. While the mother used poor judgment in allowing the children to ride the subway late at night on one occasion under the supervision of Lah De and 11-year-old Joseph, this incident did not establish neglect of Lah De. Although Lah De had a speech impediment, he was attending school regularly at the proper grade level for his age, was supposed to be receiving occupational therapy, and had traveled on the subway alone on prior occasions. He was well cared for and had no other health problems that had not been addressed. There is no evidence that he could not communicate with adults.

In re Lah De W.
(1st Dept., 11/18/10)

Domestic Conflict

ABUSE/NEGLECT - Drug Possession
- Domestic Violence

The Third Department upholds a finding of neglect where the father choked the mother during the course of a physical altercation, and stated that he "wanted [her] dead," while the child was standing behind him, "[s]creaming [and] crying." In addition, there was marihuana and drug-related paraphernalia found in the child's home within the child's reach.

Evidence that the father violated an order of protection, standing alone, is insufficient to establish neglect, but when combined with the other evidence, is a relevant and appropriate factor.

Matter of Paige AA.
(3d Dept., 6/2/11)

* * *

ABUSE/NEGLECT - Domestic Conflict

The Third Department upholds a finding of neglect where respondent and her live-in boyfriend fought frequently and the boyfriend drank alcohol daily; during an extended argument, while three of the children were present, the boyfriend threatened respondent with a handgun that he kept on top of the refrigerator and discharged the weapon numerous times; and the boyfriend would grab the wrist of respondent's three-year-old daughter, and, displaying his pocket knife, threaten to cut her finger off for picking her nose, and, on a number of occasions, locked that child outside at night in her pajamas as punishment for crying.

Despite these domestic disturbances, respondent, who was a witness to her boyfriend's behavior toward her children, declined petitioner's offer to participate in preventative services, and, when questioned as to whether she would choose a relationship with her children or her boyfriend, hesitated, and then responded, "my children, I guess."

Matter of Joseph R.
(3d Dept., 7/14/11)

* * *

ABUSE/NEGLECT - Domestic Violence

The First Department upholds findings of neglect where the father engaged in acts of domestic violence against the children's mother, and placed two knives under one child's chin at his throat while threatening to kill the child.

A single incident of domestic abuse is sufficient to support a finding of neglect where the parent's judgment was strongly impaired and the child was exposed to a risk of substantial harm.

In re Jared S.
(1st Dept., 11/18/10)

* * *

ABUSE/NEGLECT - Domestic Violence
- Visitation

The Third Department upholds a finding of neglect where the mother became intoxicated and started hanging out the window of a moving vehicle, singing and yelling at cars and smacking her fiance "really hard" in the face when he tried to pull her back in the vehicle, with the child present in the back seat. The child was upset by the mother's dangerous behavior.

Later that night, the intoxicated mother punched the fiance in the course of an argument, causing him to suffer a bloody nose and a black eye. Although the child did not witness that incident, he was aware of it and was frightened. On another occasion when the child was present, the mother and the fiance choked each other, and the child attempted to intervene, telling the fiance to "[l]et go of my mommy."

Throughout the period during which these incidents occurred, the child's health was already compromised, "a special vulnerability to be taken into account in the assessment of the requisite minimum degree of care. . . ."

At disposition, the family court properly denied the mother unsupervised visitation. On more than one occasion, she engaged in violent arguments with the fiance in front of their children, used marihuana while caring for this vulnerable child and submitted a diluted urine sample for a drug test.

Matter of Kaleb U.
(3rd Dept., 10/21/10)

* * *

ABUSE/NEGLECT - Domestic Violence

The First Department upholds a finding of neglect where the father engaged in a violent altercation with the infant's mother, punching her repeatedly in the face and head, while she was only three feet away from the infant and while the infant was receiving oxygen while lying on a bed and connected to a heart monitor, having been released from the hospital days earlier.

In re Gianna C-E
(1st Dept., 10/5/10)

* * *

ABUSE/NEGLECT - Domestic Conflict

The Second Department upholds a finding of neglect where the father verbally abused the non-respondent mother in the presence of the children, made numerous unfounded allegations of maltreatment against the mother and her boyfriend, and engaged in other obstreperous behavior.

Matter of Kevin M. H.
(2d Dept., 9/21/10)

* * *

ABUSE/NEGLECT - Domestic Violence

The Second Department upholds a finding of neglect where the father slapped the mother while she was holding the child, who was only a few weeks old, in her arms, and there was additional evidence of a pattern of domestic violence and intimidation perpetrated by the father.

Matter of Kiara C.
(2d Dept., 6/21/11)

* * *

ABUSE/NEGLECT - Domestic Violence

The Second Department upholds a finding of neglect where father, while holding the then less than two year-old child, hit, shoved, and screamed at the mother, and the father had previously committed acts of domestic violence against the mother, including slapping her, some of which also occurred in the presence of the child. Although an isolated incident of domestic violence

outside the presence of a child is insufficient to establish neglect, the incident of domestic violence was neither isolated outside the presence of the child.

Matter of Ndeye D.
(2d Dept., 6/21/11)

Excessive Corporal Punishment/Causing Or Risking Injury

ABUSE/NEGLECT - Excessive Corporal Punishment

The Second Department grants an application to amend and seal an indicated report where the evidence established that petitioner's daughter developed a small, dime-sized red mark on her upper thigh as a result of petitioner hitting her one or two times with a house slipper after the daughter admittedly was disobedient, and there was no finding of prior abuse or maltreatment.

Matter of Senande v. Carrion
(2d Dept., 4/12/11)

* * *

ABUSE/NEGLECT - Excessive Corporal Punishment
- Exposing Child To Inappropriate Caretaker
- Evidence - Hearsay

Reversing the family court, the First Department concludes that the mother did not neglect the child by failing to remove him from the home after an incident in which the father struck the child in the face while the mother was at work. The father maintained that he hit the child by accident and there was no evidence that the father had previously hit the child or otherwise physically harmed him. Although the father was later adjudicated to have committed the crime of endangering the welfare of a child, the resulting physical injury was not serious, as evidenced by the testimony of a caseworker that the child did not need medical treatment. A single incident of excessive corporal punishment may constitute neglect, but this incident was relatively mild and not part of a pattern. The agency implicitly recognized the mother's ability to care for the child when it agreed to parole him to her care (on condition that the father not be in the home), long before the conclusion of the fact-finding hearing.

The Court also notes that the domestic incident reports admitted into evidence were unsworn hearsay allegations.

In re Dontay B.
(1st Dept., 2/22/11)

* * *

ABUSE/NEGLECT - Excessive Corporal Punishment
- Failure To Supply Adequate Shelter

- Medical Neglect

While reversing findings of abuse and neglect, the New Jersey Supreme Court concludes that a slap of the face of a teenager as a form of discipline, with no resulting bruising or marks, does not constitute "excessive corporal punishment" within the meaning of the statute; that a problem with central heat in the home does not, standing alone, constitute neglect since there is no evidence that the parents, who were temporarily out of work, were financially able to cure their larger central heating problem but were refusing to do so, or evidence that the agency made any attempt to assist them in fixing the heating problem; that although the parents took some portion of the child's paychecks to support the family's phone or cable bill, requiring working-age children to contribute to the support of the family is not neglect; that although the child was not taken to a pediatrician in two years, there was no evidence that her physical, mental, or emotional condition was impaired or in imminent danger of becoming impaired; that given their temporary financial setbacks, the parents' decision to delay completing the child's teeth-straightening process was not medical neglect; and that the parents' decision to limit the child's contact with her grandfather did not result in mental or emotional harm.

"In sum, although no parenting awards are to be won on this record, neither was actionable abuse or neglect proven. As stated at the outset, DYFS has many serious cases, and even more numerous referrals that necessitate investigations requiring the agency to wade into difficult family problems in order to protect children. Its task is hard and it must be vigilant, but it must be vigilant within the limitations of the law that empowers the agency's actions."

New Jersey Division of Youth and Family Services v. P.W.R.
2011 WL 222230 (N.J., 1/26/11)

* * *

ABUSE/NEGLECT - Excessive Corporal Punishment

The First Department annuls a decision finding petitioner to have committed maltreatment of a child and amends the report to "unfounded," where petitioner, in response to her daughter slamming the door of her room, crying, and "throwing things around" when asked to look for crayons and pencils to do her homework, told her daughter she could not act that way, and, when the behavior continued, found a "child's belt," and, intending to hit her daughter with the belt on her behind, accidentally hit her in the face with the belt buckle when petitioner grabbed the child as she was running away.

The Court rejects the Administrative Law Judge's determination that any accident established neglect because petitioner allegedly struck the child out of anger. Under the peculiar circumstances of this case, where there was no evidence that the child required medical treatment - petitioner put bacitracin on the scratch and it healed in a day or so - or that petitioner had ever used excessive corporal punishment, the proof did not establish neglect.

In re Parker v. Carrion
(1st Dept., 1/11/11)

* * *

ABUSE/NEGLECT - Excessive Corporal Punishment

While affirming findings of abuse and neglect, the Third Department finds sufficient evidence of excessive corporal punishment where the child, inter alia, was made to "pick cherries," a painful military exercise during which she stood with her arms outstretched and simulated picking cherries off of a wall.

Matter of Justin CC.
(3rd Dept., 10/21/10)

* * *

ABUSE/NEGLECT - Excessive Corporal Punishment
- Derivative Neglect

The Second Department finds sufficient evidence of neglect where the father engaged in excessive corporal punishment by hitting his 15-year-old daughter several times with a pole, causing bruises to her arm and back. However, the evidence does not support a finding of derivative neglect with respect to the other child.

Matter of Padmine M.
(2d Dept., 5/3/11)

* * *

ABUSE/NEGLECT - Excessive Corporal Punishment

The Fourth Department reverses an order dismissing a neglect petition, and makes a finding of neglect, where the mother admitted to a police officer that she had hit the six-year-old child in the face with a belt after the child failed to watch her younger brother.

The child corroborated that admission by informing a caseworker that the mother had hit her in the face with a belt and had thrown a toy at her that struck her lips. The caseworker observed that the child's cheek had a small cut and was red and that there was a cut just above her lips. The mother informed the caseworker that she "whooped" the child with belts because she had not picked up some clothes, refused to refrain from "whooping" the child, and implied that she had removed the child from school after the child lost her car keys but did not physically hurt the child because she knew the caseworker would be visiting the home. A single incident of excessive corporal punishment is sufficient to support a finding of neglect.

Matter of Justyce M.
(4th Dept., 10/1/10)

* * *

ABUSE/NEGLECT - Exposing Child To Inappropriate Caretaker

The Third Department upholds a finding of neglect where the mother participated in repeated violations of an order of protection by speaking with the father and then permitting him to stay in the apartment's basement, which caused the child to be visibly upset.

The mother was aware that the father, who had an alcohol problem and had engaged in domestic violence, placed his hands around the child's throat on more than one occasion, but she characterized this conduct as not being bad because the father had not proceeded to choke the child.

Matter of Thomas M.
(3d Dept., 2/17/11)

Derivative Abuse/Neglect

ABUSE/NEGLECT - Derivative Neglect

The Second Department upholds a finding of derivative neglect with respect to a child born prematurely and with serious medical complications approximately eight months after a finding of permanent neglect was made against the mother that was based, in part, upon her failure to comply with court-mandated directives to facilitate the return of her other child and her failure to visit with the child.

Matter of Jamarra S.
(2d Dept., 6/7/11)

* * *

ABUSE/NEGLECT - Derivative Abuse
- Summary Judgment

The Second Department reverses findings of derivative abuse and severe abuse, which were entered upon petitioner's summary judgment motion, where the subject child was born over three years after respondent committed an act of abuse against the child's older half-brother. Given the passage of time, it cannot be said, as a matter of law, that the condition still exists.

Matter of Elijah O.
(2d Dept., 4/26/11)

* * *

ABUSE/NEGLECT - Initial Appearance
- Derivative Neglect

The Third Department rejects respondent's contention that reversal is required because the family court failed to strictly follow the procedural requirements of FCA § 1033-b(1)(b) at his initial appearance. While the allegations in the petition were not recited, the court made sure that respondent was assigned counsel and had notice of future proceedings, and respondent was permitted to ask questions regarding the petition, demonstrating his understanding of its contents.

While upholding a 2008 finding of derivative neglect, the Court notes that prior abuse/neglect adjudications, ranging from approximately the years 2000 to 2004, were sufficiently proximate in time such that it could reasonably be concluded that the conditions still existed, and that respondent chose not to testify.

Matter of Michael N.
(3rd Dept., 12/2/10)

* * *

ABUSE/NEGLECT - Derivative Neglect

The Second Department reverses an order dismissing the neglect petition without holding a fact-finding hearing where the petition states that, according to a 2004 "indicated" report, respondent allegedly, on several occasions, committed acts of sexual abuse and sodomy against his nephew, who was then eight years old; and that, in March 2010, during the course of a DSS investigation, respondent denied the allegations regarding sexual abuse of his nephew, denied knowledge of the 2004 report despite evidence to the contrary, and acknowledged that he had never attended or completed any treatment program related to sex crimes. Respondent is the paramour of the subject child's mother.

These allegations were sufficient to require the family court to hold a fact-finding hearing.

Matter of Jayann B.
(2d Dept., 6/14/11)

* * *

ABUSE/NEGLECT - Summary Judgment
- Derivative Neglect

In a prior abuse/neglect proceeding, the Court found that on April 28, 2009, the mother left the children, ages 11 months and 2 years, unsupervised in the living room in close proximity to hazardous and dangerous conditions she had created in the bathroom. She had plugged a curling iron into an outlet above the sink, placed the curling iron on top of the sink and left the cord dangling, and ran water for the children's bath. The Court did not make a finding of abuse because ACS did not prove that the burns sustained by one of the children were intentionally inflicted, but did find that the mother failed to provide that child with adequate

medical care because she failed to take the child, who had second degree burns on her legs, to a hospital or doctor for emergency medical care and instead treated the child's burns herself.

In this case, filed on April 23, 2010, one month after the subject child's birth, the Court denies petitioner's motion for summary judgment on the allegations of derivative neglect.

To warrant the presumption of an ongoing condition, petitioner must show that the original neglect finding reflects fundamental flaws or defects in respondent's understanding of the duties of parenthood, or impairment of parental judgment to the point that it creates a substantial risk of harm for any child left in respondent's care. Under the case law, such a presumption may flow from egregious conduct or a pervasive pattern of neglect.

Here, while the mother's failure to properly supervise the other children and her failure to provide adequate medical care posed a substantial risk of harm to both children and resulted in serious physical harm to one child, the nature and duration of those events do not demonstrate a fundamental defect or flaw or sufficiently impaired judgment. The Court also notes that the older children have remained with the mother since March 23, 2010 and the subject infant child has never left her care.

The fact that the mother continues to receive services does not establish as a matter of law that the conditions which presented a danger to her children have not changed. The attorney for the child and the mother's attorney assert that because of the mother's involvement in services, the conditions underlying the prior neglect finding have been ameliorated. These are material issues of fact in controversy in this derivative neglect proceeding.

Matter of Emani
(Fam. Ct., Bronx Co., 4/27/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50963.htm

Conditions In Home

ABUSE/NEGLECT - Failure To Supply Adequate Shelter
- Physical Incapacity Of Respondent

The Third Department upholds a finding g of neglect where respondent operated her automobile with her children on board during a period of time when she was not taking medication that had been prescribed to prevent her epileptic seizures.

Also, respondent's apartment was cluttered with piles of dirty dishes, mounds of garbage, and food strewn over the floor, and, "of greatest concern," numerous plastic bags were left lying around, presenting a real danger of asphyxiation to the youngest child, who was just 20 months old.

Matter of Draven I.
(3d Dept., 7/14/11)

Sexual Abuse & Related Allegations

ABUSE/NEGLECT - Sexual Abuse - Sexual Gratification
- Corroboration

The Second Department dismisses abuse allegations, finding insufficient corroboration of the child's out-of-court statements. The statements of the other children did not consistently and independently describe the alleged sexual acts in detail. The medical records do not corroborate the child's statements that her father had sexual intercourse with her.

Moreover intent to gratify the father's sexual desire cannot be inferred from the circumstances surrounding his touching of the child; the same conduct which constitutes an act of sexual abuse by a stranger could be a mere expression of affection on the part of a parent.

Matter of Jeshaun R.
(2d Dept., 6/7/11)

* * *

ABUSE/NEGLECT - Sexual Abuse - Sexual Gratification

A California appeals court holds that there was sufficient evidence of sexual abuse in this dependency proceeding where the mother's live-in boyfriend, who was the father of the mother's 8-year-old son, engaged in tongue-to-tongue or French kissing with the mother's 12-year-old daughter. This conduct established respondent's existing sexual arousal or the wish to stimulate sexual arousal in the child.

In re R.C.
2011 WL 2320823 (Cal. Ct. App., 2d Dist., 6/14/11)

* * *

ABUSE/NEGLECT - Exposure To Sex Offender

The Court of Appeals holds that the evidence is insufficient to support a finding of neglect against respondent parents where respondent father pleaded guilty to rape in the second degree, engaging in sexual intercourse with a person less than 15 years of age, and patronizing a prostitute in the third degree, was sentenced to one year imprisonment and released with time served, was adjudicated a level three sex offender under the Sex Offender Registration Act but was never ordered to attend any sex offender treatment, and returned home, where he lived with his wife and their five children, then between the ages of 4 and 14.

Although the Department of Social Services and the attorney for the eldest child argue that because the father is an untreated, level three sex offender whose crimes involved minors, and because he failed to demonstrate sufficient introspection or remorse, the children were properly adjudicated neglected, and DSS also maintains that the mother neglected the children by allowing the father to return home, there is no presumption that an untreated sex offender

residing with his or her children is a neglectful parent. "Even where, as here, the offender's crimes involve victims younger than 18, that alone does not demonstrate harm or a substantial risk thereof to his children, or that the children's physical, mental or emotional condition was in imminent danger of becoming impaired. Even assuming that a level three SORA assessment is evidence of likely recidivism, DSS failed to introduce evidence from the plea and SORA proceedings, and the SORA designation alone is not dispositive.

Where sex offenders are convicted of abusing young relatives or other children in their care, their crimes may establish neglect, and the Court's conclusion here might be different if the father had refused sex offender treatment after being directed to participate in it, or if other evidence showed that such treatment was necessary. That the father declined to discuss the circumstances of his conviction and, in the family court's view, lacked candor or insight into his behavior does not fill the evidentiary gap.

Judge Graffeo, concurring, doubts that this holding will have broad precedential value, but it does highlight the need for an adequate evidentiary basis before a finding of neglect can be entered. DSS did not offer any evidence detailing the facts underlying the criminal convictions, or evidence establishing the basis for the father's designation as a level 3 sex offender, or evidence explaining how the father's criminal history indicated that he posed a risk of harm to his children.

Matter of Afton C.
(Ct. App., 5/5/11)

* * *

ABUSE/NEGLECT - Corroboration
- Sexual Abuse - Expert Testimony
- Visitation

The Fourth Department finds sufficient corroboration of the child's out-of-court statements where an evaluating psychologist testified that the child's statements were credible and the consistency of the child's out-of-court statements enhanced the reliability of the statements.

Although the order has expired and the claim is moot, the Court agrees with the mother's contention that the family court improperly delegated to a psychologist the authority to determine whether contact between the mother and the child should occur during therapy sessions.

Matter of Nicholas J.R.
(4th Dept., 4/29/11)

Practice Note: Appellate courts agree that an expert may be used to enhance the credibility of the child's statements by opining that the child's ability to describe sexual abuse consistently on numerous occasions, and to provide details, suggests that the child is not fantasizing and has not been programmed. *See, e.g., In re Anahys V.,* 68 A.D.3d 485 (1st Dept. 2009) (expert

testified that child's narrative was spontaneous and lacked "robotic" quality of coached children); *Matter of Tracy V. v. Donald W.*, 220 A.D.2d 888 (3rd Dept. 1995) (no evidence that children had been "coached" or "programmed").

However, appellate courts have issued conflicting decisions regarding the admissibility of expert testimony that a particular child's statements were "credible" or "truthful." *Compare Matter of Jaclyn P.*, 86 N.Y.2d 875 (1995) (court notes that expert concluded that child's descriptions were accurate and reliable); *Matter of Miranda HH.*, 2011 WL 102538 (3d Dept. 2011) (court concluded that child was truthfully recalling incidents she had experienced); Matter of Caitlyn U., 46 A.D.3d 1144 (3rd Dept. 2007) (testifying therapist opined that child's recantation was false) and *Matter of Brandon UU.*, 193 A.D.2d 835 (3rd Dept. 1993) (experts "opined their belief that [child] was being truthful") *with Matter of Nikita W.*, 77 A.D.3d 1209 (3rd Dept. 2010) (expert relied on spontaneous, coherent, logical, detailed and contextually embedded account of incident elicited from child through use of Yuille Step Wise Protocol; expert's reference to child's "credibility" was "loosely used" and analysis did not involve credibility determination but rather determination as to whether certain elements found in accounts of known sexual abuse victims were present in alleged victim's account); *Matter of Kelly F.*, 206 A.D.2d 227 (3rd Dept. 1994) (insufficient corroboration where expert merely vouched for child's credibility, but dissenting judges assert that expert's opinion that child did not appear to have been programmed had adequate scientific basis); *Kravitz v. Long Island Medical Center*, 113 A.D.2d 577 (2d Dept. 1985) (it is "questionable at best whether the present state of the art" would permit such testimony).

* * *

ABUSE/NEGLECT - Sexual Abuse - Expert Testimony

The First Department upholds a finding that respondent father sexually abused his son and derivatively abused respondent mother's daughter where the boy's out-of-court statements were corroborated by the testimony of a social worker that the children's behavior, including age-inappropriate knowledge of ejaculation by the four-year-old boy, and sexual behavior manifested verbally, in activities with drawings, and in aggressive outbursts by both children, was symptomatic of sexual abuse.

In Selena R.
(1st Dept., 2/8/11)

* * *

ABUSE/NEGLECT - Sexual Abuse - Expert Testimony

The Fourth Department finds no error where the family court refused to hold a *Frye* hearing with respect to the admissibility of "validation testimony" by a court-appointed mental health counselor.

The counselor utilized the "Sgroi" method to interview the child and make a determination with respect to the veracity of her allegations. The Court of Appeals cited to Dr. Sgroi's "Handbook

of Clinical Intervention in Child Sexual Abuse" in *Matter of Nicole V.* (71 N.Y.2d 112), and other courts in New York State have admitted validation testimony given by experts who have utilized the Sgroi method. A *Frye* hearing is required only where a party seeks to introduce testimony on a novel topic.

Matter of Bethany F.
(4th Dept., 6/10/11)

* * *

ABUSE/NEGLECT - Corroboration
- Sexual Abuse - Expert Testimony

While upholding findings of abuse and derivative neglect, the Third Department concludes that petitioner presented legally sufficient corroboration of the child's out of court statements where there are inconsistencies in the child's statements, including whether there were two or three incidents of sexual abuse and where in the home the incidents occurred, but the child consistently reported that respondent touched her "pee-tail" at least twice, with one incident occurring in the bathtub and testified in camera, and there was testimony regarding the child's increased sexualized behavior.

After experts called by respondent and the children's attorney stressed the significance of spontaneity and sensory detail in evaluating sexual abuse cases, the family court concluded that the child was truthfully recalling incidents she had actually experienced rather than "reconstructing memories of events that didn't actually happen."

Matter of Miranda HH.
(3d Dept., 1/13/11)

* * *

ABUSE/NEGLECT - Sexual Abuse - Expert Testimony

In the sexual abuse proceeding, the Court concludes that petitioner's expert psychologist's testimony did not adequately corroborate the almost 4-year-old child's out-of-court statements.

The expert testified that he borrowed from various protocols, but he never described what those protocols were or why he borrowed parts from several. Respondent's expert testified that petitioner's expert's reliance on outside hearsay sources and reports without specifying them or following up with the sources violated guidelines in the field. Petitioner's expert also failed to investigate or take into account any family history, the child's ongoing therapy, or the custody and visitation litigation between the parents, and his interview of the child was rife with leading questions and he repeated areas of inquiry when he was not satisfied with the child's answers and then called the mother into the room.

Matter of D.M., Y.S. and G.R.

(Fam. Ct., Bronx Co., 11/8/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_51906.htm

* * *

ABUSE/NEGLECT - Sexual Abuse - Expert Testimony

The Third Department finds sufficient corroboration of the child's out-of-court statements where petitioner presented testimony by an expert who relied on, among other things, the spontaneous, coherent, logical, detailed and contextually embedded account of the incident elicited from the child through use of the Yuille Step Wise Protocol for interviewing alleged victims of sexual abuse.

The expert concluded that the child's abuse allegations were "consistent with accounts of known sexual abuse victims," and testified that the child's detailed descriptions of what she was wearing, body positioning, conversations that were had, games that were played, and how respondent allegedly touched her, together with the child's use of gestures to describe the incident, indicated that the child actually experienced what she described. The expert also testified that the child's description of feigning sleep during the incident is a "typical dynamic" where a sexual abuse victim is scared or trying to pretend that the incident is not happening. Although the expert referred to the child's "credibility," she explained that that term was "loosely used" and that her analysis does not involve a credibility determination, but rather a determination as to whether certain elements found in accounts of known sexual abuse victims are also present in the alleged victim's account.

Matter of Nikita W.
(3rd Dept., 10/28/10)

* * *

ABUSE/NEGLECT - Credibility Of Child

The Court dismisses sexual abuse charges, concluding that the now 14-year-old child made the allegations in an effort to thwart her father's custody application. Although the child requested that her father seek custody of her in May, 2008, by May, 2009 her circumstances had significantly changed. She had moved with her mother to Long Beach, had new friends, and had met a boy with whom she seemed quite enamored. The father was not supportive of her new style of dress and was vehemently and appropriately opposed to her involvement with a seventeen-year-old boy.

The child has a history of lying and difficulty in distinguishing between fantasy and reality, and made allegations of sexual abuse against her brother that were investigated and later dropped. When confronted by her father's attorney during cross examination, she became hesitant when answering questions, seemed to be stalling, and eventually responded that she was confused or unable to remember certain events. While she claimed that she cut herself as a result of her father's abuse, the evidence suggests that there were other reasons. Although she cried

when testifying, it appeared that this was likely due not to her father's alleged abuse, but to her anguish at accusing him.

The fact that the father refers to his daughter as sweetie, baby or mami, is not proof of abuse. Many parents refer to their children by these terms. However, the father has failed to recognize that his daughter is no longer a small child and is becoming a young adult. He must adjust his actions in accordance with her stage of development.

Matter of Isabella V.
(Fam. Ct., Nassau Co., 1/21/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50103.htm

* * *

ABUSE/NEGLECT - Credibility Of Child
- Sexual Abuse - Expert Evidence
- Impairment Of Mental Or Emotional Condition

In this neglect proceeding, it is alleged that respondent father coerced one of the children into falsely stating that the mother required the child to hold a mirror while she shaved her vagina and that the mother inflicted excessive corporal punishment upon him, which resulted in the children being removed from their home for eight days. In his first two conversations with the case worker, the child denied the sexual abuse allegations. He later confirmed them, and then recanted, saying that the father had instructed him to confirm the allegations.

The Court dismisses the petition. Petitioner's expert concluded that the child's statements, behavior and affect were not consistent with sexual abuse and that the father coached him, but offered little support for her conclusions, spent little of the evaluation time discussing the allegations or the dynamics of the relationship between the child and his parents or the relationship of the parents to each other, and at times appeared dissatisfied with the child's answers and challenged them but at other times asked leading questions. This expert's assessments were challenged by another expert who testified that neither the initial allegations of abuse nor either parent's ability to coach the child was explored in sufficient depth by petitioner's expert and who also believed that the long period of time that had passed between the child's allegations and recantations and the interview with him cast further doubt on the value of the assessment.

Even if it were true that the child lied at the insistence of his father and then recanted, and despite petitioner's expert's assertion that "psychological abuse" occurs when a child is coached to make false allegations, there is insufficient evidence that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired.

The Court also notes that ACS returned the child to his mother after he recanted, clearly signaling that they believed the recantation. Nine months later, when ACS finally decided to conduct a sexual abuse assessment, it took the opposite position.

"A finding of child neglect is reserved for acts of parental misconduct serious enough to meet the statutory definition of impairment or imminent impairment. . . . This prerequisite to a finding of neglect ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior. . . A finding of neglect is a very serious matter not to be taken lightly. It, itself, can create an interference with the parent/child relationship and if a finding is made improperly, it can impose a unnecessary stigma on a parent and child that lasts forever."

Matter of Julius G.
(Fam. Ct., Queens Co., 8/26/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_51518.htm

Drug/Alcohol Possession/Abuse

ABUSE/NEGLECT - Drug Misuse

The Second Department upholds a finding of neglect that was based on the mother's repeated use of marijuana.

Matter of Maria Daniella R.
(2d Dept., 5/31/11)

* * *

ABUSE/NEGLECT - Possession/Sale Of Drugs

The First Department upholds a finding of neglect where police officers recovered a large quantity of cocaine, empty ziploc bags and $1,451 from respondents' residence while respondents' three-month-old child was present; two undercover buys had taken place in the apartment before the search; and the strongest inference the opposing evidence permits may be drawn from respondents' failure to testify.

The Court concludes that either both respondents engaged in the sale of cocaine in the apartment, or one of them did with the knowledge of the other. The evidence demonstrates an impaired level of parental judgment that permits a finding of imminent danger of impairment of the three-month-old child's physical, mental or emotional condition.

In re Eugene L.
(1st Dept., 4/14/11)

* * *

ABUSE/NEGLECT - Drug Possession/Sale

The First Department upholds a finding of neglect where the 21-month-old child was found in an apartment by police with marijuana in the bedroom where the child was staying and a strong

odor of marijuana on the child's body, hair and clothing, and at least some of the adults in the apartment were engaged in the sale of marijuana.

In re Jaylin E.
(1st Dept., 2/8/11)

* * *

ABUSE/NEGLECT - Drug Misuse
- Allowing Neglect

The Second Department upholds a finding of neglect, noting that the father regularly used crack cocaine, at times in the presence of the child, and that by submitting proof of the father's repeated misuse of drugs, petitioner established a prima facie case of neglect pursuant to FCA § 1046(a)(iii) without having to prove actual impairment of the child's physical, mental, or emotional condition or a specific risk of impairment.

Moreover, the father was aware of the mother's drug use during the time when she was responsible for the child's care and failed to intervene.

Matter of Sadiq H.
(2d Dept., 2/1/11)

* * *

ABUSE/NEGLECT - Drug/Alcohol Misuse

The Third Department, finding sufficient evidence of neglect, notes that under FCA 1046(a)(iii), a finding can be based on evidence that the respondent chronically and persistently misuses alcohol and drugs in a manner that substantially impairs his or her judgment and has an impact on efforts to provide adequate care. As a result of respondent's use of drugs and alcohol, he repeatedly left his daughter unsupervised and alone in a room he and his family occupied at a homeless shelter.

Matter of Chassidy CC.
(3d Dept., 5/5/11)

* * *

ABUSE/NEGLECT - Evidence - Judicial Notice
- Allowing Child To Acquire Drugs

The Third Department upholds a finding of neglect where, due to respondent's heavy drinking and lack of supervision, the child had complete freedom to sneak out of the house and acquire drugs.

The Court also holds that the family court committed harmless error when it took judicial notice of respondent's prior criminal history without affording him an opportunity to challenge the relevancy or accuracy of the evidence.

Matter of Dakota CC.
(3rd Dept., 11/24/10)

* * *

ABUSE/NEGLECT - Drug Abuse

The Fourth Department upholds findings of neglect where the mother attempted to commit suicide by overdosing on prescription medication, causing her to lose consciousness for a prolonged period of time. She was not conscious when the children returned to her house following a weekend visit with their father, and the children were unable to wake her the next morning when they needed a ride to school. The mother eventually awoke later that morning but did not drive the children to school because she was physically unable to operate a motor vehicle; school officials came to the house to transport the children to school, and the mother was admitted that day to the psychiatric ward of a local hospital, where she stayed for five days.

Matter of Alexandra J.
(4th Dept., 10/1/10)

* * *

ABUSE/NEGLECT - Alcohol Abuse

The Fourth Department holds that the family court erred in dismissing, for lack of prima facie proof, a charge that respondent father's alcohol abuse impairs his ability to safely care for the child. Petitioner submitted evidence that police intervention was required on several occasions when the father engaged in violence against respondent mother while he was intoxicated.

Matter of Alfonzo H.
(4th Dept., 10/1/10)

Educational Neglect

ABUSE/NEGLECT - Educational Neglect
- Medical Neglect
- Allowing Abuse/Neglect
- Exposing Child To Inappropriate Caretaker

The Third Department upholds a finding of neglect where respondent, who was having difficulty controlling the child's behavior, sent her to live with the aunt and uncle; respondent did not first visit the aunt and uncle's home or investigate the conditions in which the child would be living; the child lived with her aunt and uncle for approximately one week before the aunt took her and

the aunt's three children to a motel room, apparently because the aunt did not feel safe living with the uncle; respondent had not given the aunt permission to relocate with the child and did not know the aunt had taken her until several days later, but did not attempt to find the child or call the police and instead believed it was the child's responsibility to call and tell her where the aunt had taken her; allowed the child to remain at a motel for five weeks even after discovering that the child's father, a registered sex offender, was also residing there and had contact with the child; knew the child was not attending school while at the motel, but did not think it was her responsibility to remedy the situation; and, after the child returned home and revealed that she had been raped, respondent waited several days before obtaining medical care for her and did so only after being instructed to do so by the police.

The Court also upholds a finding of educational neglect where respondent failed to ensure that the child, then 14 years old, attended school or was available to meet with the tutor provided by the school; claimed that the child's absence from school was due to threats, but, although the caseworker worked with the school and respondent to develop and implement a safety plan for the child, continued to permit the child to be absent; subsequently claimed that the child was medically unable to attend school but delayed getting a note from the child's doctor for at least two months; permitted the child to move out of the school district to live with her boyfriend's family despite being directed by petitioner to make the child available for schooling; and failed to make the child available to take her final exams, which resulted in the child receiving failing grades in all of her classes.

Respondent also neglected the child by permitting her to have unsupervised overnight visits with her boyfriend, which resulted in her becoming pregnant, and then permitting her to reside with her boyfriend following the birth of their baby in unsanitary and inappropriate conditions. Although respondent blames the child for her refusal to return home, it was respondent's duty to provide a minimum degree of care and supervision.

The Court also upholds a finding of derivative neglect as to respondent's other child.

Matter of Shannen AA.
(3d Dept., 1/13/11)

* * *

ABUSE/NEGLECT - Educational Neglect
- Mental Health Problems
- Failure To Supply Adequate Shelter

While upholding a finding of educational neglect, the Third Department notes that the impact of the child's absences from school was established by evidence that the child was failing all of her classes, and that the child would need to attend every school day for the rest of the year, as well as attend summer school, in order to be promoted to the next grade.

In addition, due to respondent's mental health condition, she was paranoid, mistrustful and refused to accept help; she rarely allowed the teenage child to socialize and did not follow

through on a caseworker's referral to a program that would provide the child with peer interaction; she was unusually enmeshed with the child, creating separation issues to the point where each of them was viewed as needing therapy to deal with being apart; and she did not have cooking gas in the apartment for more than a month, at one point the light bulbs in almost every room were out, and there was no hot water for a month and the child was unable to take a shower.

Matter of Regina HH.
(3rd Dept., 12/2/10)

* * *

ABUSE/NEGLECT - Educational Neglect

The First Department upholds a finding of educational neglect where the child had 24 unexcused absences during the 2007-2008 school year. The court reasonably could have concluded that the child was in imminent danger of becoming impaired, and the court did in fact find that the child's absences adversely affected her academic performance.

In re Annalize P.
(1st Dept., 11/4/10)

Mental Illness

ABUSE/NEGLECT - Mental Illness
- Mental Health Evaluations

The First Department upholds a finding of neglect where the mother gave birth to a son who was born HIV positive and required antiretroviral medication administered on a strict schedule, and the mother's mental illness and failure to administer her own medication created a substantial probability that the child would not be adequately cared for and, more specifically, would not receive his HIV medication while in the mother's custody.

The psychiatrist who has treated the mother since 2001 noted that without her medication, her bipolar disorder would prevent her from caring for the child; that she would have an even greater need for medication after giving birth, at which point she would be more vulnerable to an episode of depression or hypomania; that even one missed dose would result in insufficient medication levels and leave her less capable of responding to the demands of a newborn baby; that the mother failed to take her medications for two periods of several days at a time; and that there was doubt as to whether, even with her medications, she would have the capacity to take care of the child.

The Court rejects the dissent's observation that "if bipolar disorder and occasional failures to follow up on medication were enough to support a finding of neglect, many more children would require foster care." The dissent "fails to take into account [the child's] exceptional fragility and that newborns must be provided with the maximum protection available."

Although the mother claims that the child should have been released to her care with home services, there is no indication that this was a viable alternative. And, while the mother has passed several drug tests, “participation in a treatment program does not by itself establish that a mother with a history of neglect has successfully corrected the harmful behavior pattern"; this is particularly true where, as here, the mother has not successfully completed prior treatment programs.

The Court also finds no error in the family court’s denial of the mother’s motion for appointment of an expert. The mother’s medical records and testimony by the psychiatrist who treated her for eight years obviated the necessity for additional expert testimony.

The dissenting judge asserts, *inter alia*, that the mother’s bipolar disorder and the two short-lived instances involving a failure to take her medication were insufficient to establish that her psychiatric disorder would be likely to impede her ability to care for her child and result in imminent risk of harm.

In re Noah Jeremiah J.
(1st Dept., 12/21/10)

* * *

ABUSE/NEGLECT - Mental Illness

The First Department upholds a finding of neglect where the mother was diagnosed with a major depressive disorder, which was recurrent and moderate to severe; she had told hospital personnel that she was experiencing increasingly persistent thoughts of killing herself and drowning the children in the bathtub; and there were numerous incidents of domestic violence in the presence of the children. Expert testimony regarding how respondent’s mental illness affected her ability to care for the children was not required.

In re Jonathan S.
(1st Dept., 12/14/10)

Severe Abuse

ABUSE/NEGLECT - Severe Abuse

While upholding findings of abuse and derivative abuse where one child sustained injuries consistent with shaken baby syndrome, the Fourth Department finds insufficient evidence that the injured child was severely abused by the father. The child was also in the care of the mother and grandparents during the relevant time period, and there is no clear and convincing evidence that the father acted under circumstances evincing a depraved indifference to human life.

Matter of Jezekiah R.-A.

(4th Dept., 11/12/10)

Evidence: Post-Petition Evidence

ABUSE/NEGLECT - Evidence - Post-Petition

The First Department holds that the family court properly admitted hospital records that post-dated the filing of the petition by a few days but were relevant to respondent's mental health history and her failure to seek necessary treatment preceding the filing of the petition.

In re Jamoneisha M.
(1st Dept., 5/26/11)

* * *

ABUSE/NEGLECT - Derivative Neglect
- Evidence - Post-Filing

The First Department affirms a finding of derivative neglect where the prior neglect finding was based on the mother's conduct in leaving her nine-month old infant in a bathtub with running water without adequate supervision, resulting in the infant's death. The drowning incident occurred less than two years before the filing of the petition in this case, and this it can reasonably be concluded that the mother still lacks parental judgment.

The family court properly excluded testimony regarding the mother's willingness, post-petition, to exclude the father from the home. Generally, courts may not consider post-petition evidence in an Article Ten fact-finding hearing.

The mother was not deprived of due process or a fair trial when the court noted in its neglect findings the mother's failure to use a proper bathtub for the deceased infant. The petition specifically noted the prior finding of neglect due to the infant's drowning in a bathtub, and thus the mother was on notice of any claims involving the prior finding. The error was harmless in any event.

In re Brianna R.
(1st Dept., 11/9/10)

Evidence: Presumption Of Abuse/Neglect

ABUSE/NEGLECT - Presumption Of Abuse/Neglect
- Fractures

The First Department reverses neglect and derivative neglect findings where the statutory presumption was activated by evidence showing a single non-displaced oblique fine-line fracture of the child's femur, but that evidence was rebutted by the evidence that the injury could have occurred accidentally when the mother bent down to pick up some garbage while the child was

secured against her chest in a “snuggly,” and could have been exacerbated during the “Barlow-Ortolani” procedure (designed to detect developmental dysplasia of the hip) performed the same day by the child’s pediatrician at a previously scheduled well-child visit.

In re Jose Luis T.
(1st Dept., 2/1/11)

* * *

ABUSE/NEGLECT - Presumption Of Abuse
- Evidence - Inference From Failure To Testify

The Third Department upholds findings of abuse and derivative neglect made against respondent mother where the child had a fractured left upper arm and collar bone, fractures to bones in his upper and lower left leg, fractures to both bones in his right forearm near his wrist and six broken ribs; medical expert testimony established that the then six-week-old child could not injure himself and that the injuries were likely inflicted over the course of three or four separate events; and the mother and the father were the child’s primary caregivers. While there is evidence that the mother’s parents and a friend lived in the home during the relevant time period, the record supports the conclusion that these individuals provided only limited care for the child and had not caused the injuries. "Indeed, the severe injuries suffered by [the child], combined with his young age, sufficiently established that his injuries could not have occurred without an affirmative act of abuse on the part of at least one of his parents (citations omitted)."

The Court also rejects the mother’s assertion that because her sentencing was pending in a related criminal action, the trial court erred in drawing a negative inference against her for declining to testify at the fact-finding hearing. While a pending criminal action does have an impact on a respondent’s decision whether to testify in a related abuse proceeding, there is a strong policy in favor of expeditiously resolving abuse proceedings.

Matter of Keara MM.
(3d Dept., 5/5/11)

Evidence: Out-of-Court Statements Of Children/Corroboration, And Other Hearsay

ABUSE/NEGLECT - Corroboration
- Failure To Supply Adequate Shelter - Unsafe Conditions In Home

The Third Department, upholding a finding of neglect, finds sufficient corroboration of the child’s out-of-court statements regarding respondent’s touching of her breast area and attempted touching of her crotch area where some corroboration can be found in the consistency of the child’s repeated out-of-court statements, in respondent’s criminal history involving the sexual abuse of his own daughter, and in his failure to deny the allegations when confronted by the child’s mother about them.

The Court also upholds a finding based on evidence that the home was not safe for the youngest children in that the older children left pencils and scissors on the floor where the younger children crawled; that the home was "dirty [with] a foul odor"; that the children "were often in dirty clothes, and their faces were usually somewhat dirty"; and that there was partially-eaten food on the railing and fence outside the house.

Matter of Joshua UU.
(3d Dept., 2/17/11)

* * *

CUSTODY - Evidence - Hearsay
ABUSE/NEGLECT - Corroboration Of Out-of-Court Statements

The Third Department affirms an order modifying a prior order of custody by awarding sole custody to the mother, concluding that the child's out-of-court statements regarding sexual abuse were adequately corroborated.

The child made statements to the mother, a nurse, a childcare provider and several relatives that were consistent in detail, and did not include a repetition of phrasing that might indicate coaching or coercion. Several witnesses testified that the child exhibited violent outbursts, self-abusive behavior and sexual behavior such as stimulating or rubbing herself, which appeared to coincide with the time frame in which the alleged incidents of sexual abuse occurred. There was also testimony from a Lincoln hearing.

Matter of Kimberly CC. v. Gerry CC.
(3d Dept., 7/12/11)

* * *

ABUSE/NEGLECT - Excessive Corporal Punishment
- Corroboration
- Derivative Neglect

The First Department upholds findings of neglect and derivative neglect where respondent struck two of the children with a broomstick and prodded one child's ear with the broomstick, and also punched the other child and rammed her head through a wall. The children's out-of-court statements were corroborated by the caseworker's testimony that she observed bruises on both children, including a swollen arm and scabbed ear on one child, and a large hole in the wall of the family home.

In re Ameena C.
(1st Dept., 4/28/11)

* * *

ABUSE/NEGLECT - Corroboration

The Second Department holds that the child's out-of-court statements alleging that the father inappropriately touched his buttocks were sufficiently corroborated by testimony from the child's case worker and high school principal, both of whom stated that the child related to them that such activity occurred, and the negative inference drawn from the father's failure to testify. The child's testimony recanting his prior allegations does not mandate that the finding be set aside.

Matter of Charlie S.
(2d Dept., 3/29/11)

* * *

ABUSE/NEGLECT - Corroboration

The Second Department reverses findings that respondent stepfather sexually abused one child and derivatively abused five other children, concluding that the family court erred in finding that the out-of-court statements by the child who was allegedly abused were sufficiently corroborated. While the court could properly draw a strong inference against the stepfather for failing to testify, that inference cannot establish corroboration where it otherwise does not exist.

Matter of Iyonte G.
(2d Dept., 3/1/11)

* * *

ABUSE/NEGLECT - Order Of Protection - Violations
- Corroboration

During a phone conversation with a caseworker, respondent, with the child in the background, repeatedly used profane language when referring to the caseworker. On another occasion, when the caseworker confronted respondent about the inappropriateness of her telling the child that she was going to have the child's grandparents (with whom the child resided) arrested and put in jail, respondent stated "so . . . I was mad." Also, the child told the grandmother that respondent had made her "double pinkie promise" to act badly when with the grandparents so that they would not want her anymore and she could return to respondent.

The Third Department upholds the family court's finding that respondent violated a protective order that prohibited her from creating an unreasonable risk to the child's emotional health. The grandmother's observations of the child's unusual misconduct immediately after visitation with respondent provided sufficient corroboration of the child's out-of-court statements.

Matter of Destiny F.
(3d Dept., 6/2/11)

Right Of Confrontation/In Camera Testimony

CUSTODY/VISITATION - In Camera Testimony
VISITATION - Change In Circumstances
- Child's Wishes

The Fourth Department finds a change in circumstances warranting a reduction of visitation previously ordered where the father relocated from Virginia to Texas and the directive in the prior order requiring the child to spend six weeks of her summer vacation with the father at his residence would interfere with the child's increasing participation in social and extracurricular activities.

Although the wishes of the 15-year-old child are not determinative, they are entitled to great weight where, as here, the age and maturity of the child make her input particularly meaningful.

The trial court did not err in conducting an in camera interview before additional evidence was presented. At the time of the interview, the court was aware of all issues presented by the parties and the evidence presented following the interview did not raise any new issues.

Matter of Vandusen v. Riggs
(4th Dept., 10/1/10)

* * *

HEARSAY EVIDENCE - Case Records

In this wrongful death action, the Court of Appeals of Tennessee holds that certain case records which were completed on November 4, 2004, and reflected events that occurred on September 13, 2004 and September 15, 2004, were not admissible as business records or as public records.

In order to be admissible as business records, case records must be made "at or near the time" of the event recorded. Here, "in the absence of proof that [the maker of the record] had some phenomenal memory, or interim notes that captured the events and allowed him to record them later, or some other explanation of why the documents were accurate despite the lapse of over a month, the State, as the proponent of the evidence failed to make the required showing that they were made "at or near the time" of the occurrence.

In re Demitrus M.T.
2011 WL 863288 (Tenn. Ct. App., 3/14/11)

Motion to Vacate

ABUSE/NEGLECT - Motion To Vacate - Newly Discovered Evidence

In a case in which the Third Department previously found that respondent derivatively neglected his two children because he had sexually abused their nine-year-old relative, the Court now

upholds the denial of respondent's motion to vacate the findings of derivative neglect and for a new fact-finding hearing where respondent submitted affidavits regarding the victim's recantation, but no affidavit from the victim or members of her immediate family. Moreover, this "newly-discovered evidence," given its timing and its source, would not have made a difference at a hearing.

Matter of Kole HH.
(3d Dept., 5/12/11)

* * *

ABUSE/NEGLECT - Motion To Vacate
- Dismissal - Aid Of Court Not Required

The Court denies respondent's motion to vacate findings of neglect and dismiss the petitions where respondent argues: (1) that the drug-related findings inhibit her ability to obtain employment in her chosen field of geriatric care and that this constitutes good cause for vacatur under FCA § 1061; and (2) that she has remedied the problem that caused the petitions to be filed and thus the petitions should be dismissed pursuant to FCA § 1051(c) because the aid of the court is not required.

Good cause in this context means that the findings were incorrectly or unfairly made, or that the Court's failure to vacate the findings would have a significant effect on the children's best interest. The respondent's inability to obtain employment in her field does not have a significant adverse effect on the children's best interest since it is not the only occupation she can pursue. In addition, respondent is merely speculating that she will be unable to obtain such employment.

More importantly, the Court "is not willing to pretend that the respondent's long history of substance abuse and neglect of her children did not happen. Vacating the findings would be an act of dishonesty by the court. Although the court commends the respondent for successfully completing the Family Treatment Court program, the court cannot turn a blind eye to the respondent's past transgressions and continual relapses. The neglectful treatment of the subject children at the hands of the respondent was a reality. The respondent must live with the consequences of her actions."

The Court also notes that § 1051(c) applies only before a fact-finding has been made.

The Court does reject petitioner's assertion that the Court does not have the discretionary authority to dismiss a case three years after entering a finding of neglect. The Court's authority to vacate any order issued under Article Ten is not time-limited under § 1061.

Matter of O, N, W, and H Children
(Fam. Ct., Queens Co., 12/10/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_52133.htm

Disposition/Permanency/Court-Ordered Services/Reasonable Efforts

PERMANENCY HEARINGS - Reasonable Efforts
- Permanency Reports
- Appeals - Mootness

After noting that the agency's appeals are not moot because the family court's finding of a failure to make reasonable efforts may have an adverse effect on receipt of federal funding, the Third Department concludes that while it might be better practice to provide more specificity in permanency reports regarding the dates services were provided, the reports submitted sufficiently demonstrated that the agency's efforts were reasonable under the circumstances.

Matter of Bianca QQ.
(3d Dept., 1/6/11)

* * *

PERMANENCY HEARINGS - Reasonable Efforts
- Permanency Goal
- Appeals - Mootness

The child, born in 1994, has been freed for adoption. Due to his developmental disabilities, he is placed at a residential facility. After a permanency hearing, the family court approved the plan of placement in an adult residential care facility with a significant connection to an adult resource, but found that petitioner failed to make reasonable efforts to finalize that plan.

After noting that the appeal is not moot, despite the issuance of a subsequent permanency order, because the finding regarding a lack of reasonable efforts may have an effect on petitioner's receipt of federal funding, the Third Department affirms. Petitioner suggested to the residential facility that one of its teachers could be the child's adult resource, but the idea was abandoned because it violated the facility's policies regarding appropriate student-employee boundaries. The permanency report stated that "it could be possible in the future, to see if the adoptive parents [of the child's siblings] might consider being a significant connection for him." The caseworker brought the subject up with the adoptive mother on the morning of the permanency hearing, and she mother stated that she would consider the possibility.

However, there is no indication as to when petitioner made its suggestion to the facility or how long it took for the facility to reject it. Although petitioner stated that no relatives were willing, suitable and available to adopt the child, petitioner did not explain whether it investigated to see if any relatives would be willing to serve as a significant connection or resource. The child had lived in the community for approximately 13 years before his placement with petitioner, yet petitioner did not indicate whether it attempted to locate any adults in the community with whom he may have had an established relationship to see if they would be willing to serve as his significant connection. "The [family] court was justified in finding that petitioner's negative view of [the child], as manifested by statements in the permanency hearing report, infected the process and contributed to petitioner's lack of efforts to further [the child's] placement goal."

Matter of Taylor EE.
(3d Dept., 1/6/11)

* * *

ABUSE/NEGLECT - Consolidation Of Hearings
- Disposition/Permanency - Placement
- Visitation

The Third Department finds no due process violation where the family court conducted dispositional and permanency hearings at the same time. The Court notes, inter alia, that the "material and relevant" evidentiary standard governed both hearings, at each of which the best interests and safety of the children were the paramount consideration.

The Court also upholds the family court's determinations continuing placement and denying the mother visitation. The father had sexually abused the older child repeatedly, and the mother witnessed it and instructed the child not to tell anyone. The mother failed to attend or successfully complete programs and services addressing her own mental health problems and parenting deficiencies, and to make any progress or gain insight into the abuse suffered by the older child and her role in it. As recently as the month prior to the dispositional hearing, she continued to doubt whether the older child had been sexually abused by the father, and has not severed her contacts with and dependence on the father. The older child remains a child in crisis, unstable, with significant behavioral and psychiatric problems requiring repeated hospitalizations. The mother has no real understanding of the child's emotional trauma and needs. She has never called the younger child's teachers, counselors or the social worker to discuss how she is doing. Under these "extreme circumstances," denial of all visitation was a provident exercise of discretion.

Matter of Telsa Z.
(3d Dept., 5/19/11)

* * *

PERMANENCY HEARINGS - Trial/Final Discharge

The Third Department holds that since the record contains no evidence that the family court authorized the children's final discharge by petitioner, the purported final discharge and the cancellation by the court clerk of the scheduled permanency hearings had no legal effect.

The family court properly determined that the release of the children to respondent should be characterized as a trial discharge, that the dispositional orders remained in effect and that the court retained jurisdiction to proceed on petitioner's allegations regarding violations of the existing orders.

Matter of Christopher G.
(3d Dept., 3/31/11)

* * *

PERMANENCY HEARINGS - Permanency Goal

The Third Department holds that the family court had authority to modify the permanency goal without any request from the parties. When the court determines that the child is not to be immediately returned to the parent, it must indicate whether the permanency goal for the child "should be approved or modified" and may select a goal from among various alternatives. Notably, FCA § 1089(c)(5)(i) characterizes petitioner's proposed permanency goal as a "recommendation."

Matter of Jacelyn TT.
(3d Dept., 1/27/11)

* * *

PERMANENCY HEARINGS - Permanency Goal

The Fourth Department agrees with the children's attorney and concludes that the family court erred in determining that the permanency goal of placement for adoption is in the children's best interests. The Court approves the permanency goal of placement in another planned permanent living arrangement.

The children, 16 years old and 15 years old, had adamantly opposed adoption for many years despite the substantial efforts of counselors, caseworkers, their foster parent and an adult sibling to encourage them to consider adoption. They are very loyal to their birth family, enjoy a significant connection with their biological siblings and had recently been reintroduced to their birth mother. A psychological evaluation report recommended that petitioner honor the brothers' wishes not to be adopted.

The brothers have a significant connection to an adult willing to be a permanency resource for them, as required for an APPLA placement. Their foster parent signed permanency pacts with each of them, in which he agreed to be a permanent resource for the boys for as long as they need him, and he has assisted the brothers with independent living skills by, inter alia, assigning household chores and helping them open savings accounts.

The absence of the children from the hearing was not a rational basis for rejecting the permanency goal of APPLA where the Referee had sufficient information to determine the best interests of the children.

Matter of Sean S.
(4th Dept., 6/10/11)

* * *

ABUSE/NEGLECT - Permanency Hearing - Permanency Goal

The Third Department affirms an order that, after a permanency hearing, continued the foster care placement and changed the permanency goal from "return to parent" to "placement for adoption."

During the nearly 18 months the children were in foster care, respondent made no meaningful progress in addressing the issues related to mental health, housing and employment. She had a number of unexcused absences from therapy, stopped attending group therapy altogether, stopped utilizing a program designed to help her find employment, continued to live in a studio apartment unsuitable for overnight visitation and, instead of finding a job, was "volunteering" at her friend's grocery, which consisted mainly of hanging out there with her friends. She did not appropriately manage her children's behavior or address their issues during supervised visitation, and had expressed the belief that the father had not sexually abused one of the children.

Matter of Destiny EE.
(3d Dept., 3/3/11)

* * *

ABUSE/NEGLECT - Permanency Hearing - Release To Parent
- Appeal - Mootness

In this permanency proceeding, the Third Department holds that the family court did not err in including as a condition for the return of respondent's two daughters to her custody a requirement that she relocate to Clinton County, where the children had resided most of their lives.

Although respondent relocated to Clinton County after filing her notice of appeal and the children are now in her custody, this appeal is not moot since the orders are still in effect and still affects respondent.

The reasons set forth by the family court include: petitioner's caseworkers had lengthy relationships with the children and respondent and knowledge of the history of the case; the children were in beneficial counseling relationships that would continue uninterrupted if they remained in Clinton County; the children were in the midst of an academic year and should remain in the same school, particularly since the school had been exceptionally attentive to and supportive of the children's unique and difficult situation; remaining in Clinton County kept the children in closer proximity to their other sibling; respondent had lived in many locations in several different states, whereas the children had lived all but two years in Clinton County; respondent did not have a job in Vermont and there was no need to remain there since her current husband is in the military and deployed overseas; and respondent's children by her current husband were not yet old enough to be in school in Vermont.

The court's decision did not run afoul of the constitutional right to travel. The state has a compelling interest in furthering the best interests of children who come into its custody and spend years in foster care.

Matter of Lauren L.
(3rd Dept., 12/2/10)

* * *

ABUSE/NEGLECT - Excessive Use Of Physical Force
- Disposition - Children Over 18

The Second Department reverses an order dismissing neglect charges brought against the father, and grants the petition, where the father choked the child in response to a dispute over whether the child would babysit her younger siblings.

Matter of Chanyae S.
(2d Dept., 3/29/11)

Practice Note: Presumably, the Second Department granted the petition, and made a fact-finding of neglect, because the child was under 18 and came within the definition of a neglected child when the petition was filed. However, the court, noting that the child is now over 18, found it unnecessary to remit the matter for a dispositional hearing.

Apparently, the court believes that once the child turns 18 and no longer comes within the definition of a neglected child, a dispositional hearing is not necessary. *See Matter of Daniel W.*, 37 A.D.3d 842 (2d Dept. 2007) (while finding derivative abuse, court notes that dispositional hearing need not include children who had turned eighteen since they could no longer be considered derivatively abused).

In *Matter of April D.*, 300 A.D.2d 657 (2d Dept. 2002), the court went even further. Although it granted the petition with respect to children who were over 18 in *Chanyae S.* and *Daniel W.*, and merely found that a dispositional hearing was unncessary, in April D. the court dismissed an appeal from an order dismissing abuse charges because the child had turned 18. That ruling is, to say the least, inexplicable. It is true that a proceeding can be dismissed despite sufficient evidence of neglect when a court concludes that the aid of the court is not required (see FCA § 1051[c]). However, dismissal pursuant to § 1051(c) may not be ordered in an abuse case, and, in any event, the Second Department presumably did not have a record before it in *April D.* that would support dismissal.

The Second Department's assumption that there is no basis upon which to hold a dispositional hearing after the child has turned 18 seems unwarranted. Because the family court can place or continue the placement of a child who is over 18 with the child's consent, and maintains jurisdiction to conduct permanency hearings until the child turns 21 or a final discharge is permitted before that time, the family court obviously has a crucial role to play in those cases in which the child should be, and wants to be, in foster care. *See Matter of Jonathan M.*, 306 A.D.2d 413 (2d Dept. 2003) (where child was consenting to extension of placement, petitions were not academic where child turned eighteen before reversal of dismissal order). Indeed, in Chanyae S., the child's attorney obtained a stay of the family court's dismissal order and the

child remained in foster care beyond the age of 18 while this appeal was pending. Therefore, a dispositional hearing is necessary so that the child can remain in foster care if she so desires.

* * *

PERMANENCY PROCEEDINGS - Best Interests
- Placement With Siblings

The Supreme Court of Nebraska upholds the juvenile court's determination that the subject child, who has been freed for adoption, should remain in placement with her foster parents rather than be moved to the home where her two older siblings reside with their adoptive parents.

Nebraska statutes and regulations which reflect a policy favoring preservation of a sibling relationship do so within the context of best interests determinations, but do not provide the siblings in this case with a cognizable interest in the sibling relationship separate and distinct from that of the subject child.

In addition, no court has recognized the existence of a constitutionally protected right to maintain a sibling relationship following termination or relinquishment of parental rights.

In re Meridian H.
2011 WL 1707080 (Neb., 5/6/11)

* * *

ABUSE/NEGLECT - Permanency Hearing - Placement Of Child Over 18

The child's last permanency hearing took place immediately prior to her eighteenth birthday. Approximately five months after the child turned eighteen and two weeks before the next permanency hearing, the Commissioner petitioned the Surrogate's Court for a decree appointing a guardian of the person for the child. The Commissioner alleged, inter alia, that the child "has been duly certified as a person incapable of managing herself and her affairs by reason of mental retardation and developmental disability, and such condition is permanent in nature. . . ." The day before the permanency hearing, the Surrogate's Court issued a decree appointing a temporary guardian of the person.

At the permanency hearing, the temporary guardian consented to the child remaining in foster care past her eighteenth birthday. However, at the request of the child's attorney, the Court attempted to take the child's testimony, but was unable to do so because the child did not understand the nature of an oath. The Court spoke to the child in a closed courtroom, and the child stated she wanted to continue living with her foster mother, but could not explain the concept of foster care.

The Court concludes that the child's placement has ended. Consent to continued foster care provided by an individual over the age of eighteen must be knowing, intelligent and voluntary. Here, the evidence presented to the Surrogate's Court shows that the child was not, at any time

after her eighteenth birthday, capable of understanding the concept of foster care. Even assuming that the guardian can now consent, that consent was required at the time of the child's eighteenth birthday. Although a new law, effective November 11, 2010, makes it possible for a child to re-enter foster care, at this time an individual who left foster care after turning eighteen cannot elect to re-enter.

Matter of Tashia "R"
(Fam. Ct., Clinton Co., 10/18/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_20419.htm

* * *

ABUSE/NEGLECT - Appeal - Mootness
- Disposition - Violations/Modification

The Third Department holds that the mother's appeal from an order placing the child is not rendered moot by her consent to continued placement at a subsequent permanency hearing. An order placing a child in foster care may affect a parent's status or parental rights in future proceedings.

The Court then holds that there was good cause for modification of the original disposition order. The child, who had been left under his aunt's supervision while the mother went to Long Island to receive medical treatment and attend a court appearance, became involved in a violent incident at a neighborhood pool with an 11-year-old girl and her father. The child refused to agree to a possible safety plan and became verbally abusive to the caseworker, started to come at her and had to be restrained. During a subsequent meeting with caseworkers, the child hurled an expletive at the caseworkers and stormed out of the meeting, at which point the mother announced that the meeting was over and left herself.

Matter of Kenneth QQ.
(3rd Dept., 10/28/10)

* * *

ABUSE/NEGLECT - Order Directing Filing Of TPR Petition

The Court directs the filing of a termination of parental rights petition based on permanent neglect where the family has a 10-year child protective history, during which the parents have failed to remain drug and alcohol free; failed to consistently visit with the children; failed to attend medical, educational and mental health appointments; failed to maintain stable housing; and failed to recognize the distress they have caused their offspring by engaging in such conduct over so many years.

The parents have at times accepted services and demonstrated their ability to comply, but "[p]ermanency . . . will never be achieved for these children if they continue to languish in foster care and if releases or trial discharges to their parents continue to fail."

Matter of Children's Services v. Sonia R.
(Fam. Ct., Bronx Co., 12/6/10)
http://www.law.com/jsp/nylj/CaseDecisionNY.jsp?id=1202476688966

* * *

ABUSE/NEGLECT - Permanency Hearing - Release To Parent
- Custody Order
CUSTODY - Extraordinary Circumstances

Upon a permanency hearing at which respondent father sought a return of the children and Mr. and Mrs. M., friends of now-deceased respondent mother, seek custody of the children pursuant to FCA § 1089-a and FCA Article Six, the Court orders that the children be returned to the father, concluding that the agency has established by a preponderance of the evidence the appropriateness of the permanency plan of "return to parent."

The father has completed all mandated programs, secured suitable housing and demonstrated that he is capable of providing for needs of his children and that the children would not be at risk of abuse or neglect if returned to him.

Since the permanency plan is not "placement with a fit and willing relative or other suitable person," FCA § 1089-a is arguably inapplicable, but the Court has considered the custody application. Mr. and Mrs. M. argue that extraordinary circumstances have been established given the prolonged separation between the children and the father, his history of domestic violence and substance abuse, and the emotional bonds which have developed since Mr. and Mrs. M. started caring for the children in April, 2007. During much of that period, the father was participating in and completing court-mandated programs. And, where a period of separation is attributable to the parent's efforts to regain custody, that period is entitled to little, if any, consideration. The period of separation also is in large measure attributable to the pace of these proceedings, a circumstance over which the father could exercise virtually no control. The father repeatedly expressed a desire to have contact with his children, and part of the delay was due to the difficulties he encountered in establishing paternity. The father and the mother had a tumultuous relationship, and he was found to have neglected his son as a result of an incident of domestic violence, but all other allegations concerning domestic violence were unsubstantiated.

Mr. and Mrs. M. are in "the unenviable position of having to relinquish custody of the two children that they've bonded with when they opened their homes to provide respondent's children with a loving, safe and secure environment." However, to refuse to return the children to the father "would not only deprive these young children of a true life-long relationship with their only living biological parent as well as their maternal relatives but would thwart the inherent purpose of FCA Article 10; to not only safeguard children in danger of being neglected by their parent(s), but to foster and achieve reunification of the family unit."

Matter of C.H.
NYLJ, 2/28/11

(Fam. Ct., Suffolk Co., 1/18/11)

* * *

ABUSE/NEGLECT - Failure To Cooperate With Agency Supervision - Disposition - Direct Placement

The neglect petition alleges that respondent father was intoxicated to the point of impairment when he arrived to pick his four-year-old son up from school; that in the evening that day, the DSS Emergency Services Unit went to respondent's home, where he refused to allow them to enter; that the police forcibly entered the apartment, and found the child to be safe but discovered a baseball bat and a knife with a 10-inch blade underneath a bed and readily accessible to the child; and that the child had a discoloration under one of his eyes which, according to the child, had been caused when respondent struck him after he dropped a toy.

Upon a fact-finding hearing, the Court makes a finding of neglect. The child was directly placed with respondent pursuant to FCA § 1055(a)(ii), and respondent freely agreed and was ordered to submit to DSS supervision, including periodic and possibly random visits by DSS to his home, for any reason or for no reason. Respondent alleges that he had safety concerns when DSS appeared at his door, but the door had a chain lock which would have allowed him to open the door slightly and permit the DSS workers to, at the very least, display their identification, as they had repeatedly offered to do.

DSS's decision to conduct a home visit, albeit at night, was fully justified. Respondent had appeared that day at the child's school stumbling, bumping into walls, and slurring his speech. His claim that his behavior resulted from illness and prescribed medication, even if true, does not alter the fact that the DSS response visit to the home was entirely proper. And, even if respondent was ill rather than intoxicated, and assuming further that no knife or bat were ever found, respondent's refusal to afford DSS access to the child placed the child in imminent danger of becoming impaired. In essence, respondent neglected the child by neglecting his responsibilities to the entity ultimately charged by statutory directive to keep the child safe.

Matter of Joshua J.
(Fam. Ct., West. Co., 8/18/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_51577.htm

Contempt

ABUSE/NEGLECT - Contempt

Upon a motion filed by the attorney for the child, the Court finds by clear and convincing evidence that ACS and the foster care agency violated orders which directed them to initiate "intrastate" compact procedures in order to provide supervision for the home and services to the child, and ensure that Early Intervention Services, including neurological and audiological evaluations, were provided and were in place in Schenectady, New York.

When a child is placed in a foster home that is at a great distance from the child's county of residence, an "intrastate compact" request is made to the new county of residence to ensure that face-to-face visits with the child and the foster parent will continue to occur, at least on a monthly basis. In addition, so that Early Intervention Services were not disrupted, ACS and the agency had a duty to inform the Schenectady County Health Department of the child's current location and the services that would be required.

The orders were clearly directed to the ACS caseworker, the agency case planner and the ACS attorney, who were present in Court when the orders were issued. The Court rejects the agency's contention that the Court is without power to find the agency in contempt because the Court failed to use the agency's corporate name in the orders; because the orders were not served upon the agency; and because the agency was not a party to the pending neglect proceeding and thus not properly before the Court.

The fact that ACS and the agency now say that they intended or attempted to comply but erred by making a referral to the wrong municipality (Albany County) does not relieve them of responsibility for disobeying the orders. In a civil contempt proceeding, evidence of disobedience, regardless of motive, is sufficient to sustain a finding of contempt. The good faith of the charged party is not a defense. By disobeying the orders and failing to provide or arrange for services for a child with severe developmental delays, ACS and the agency denied to the child the aid of the Court, defeated, impaired, impeded, and prejudiced the child's rights and remedies in the pending neglect proceeding, and placed his physical, mental and emotional well-being at risk of harm.

Judiciary Law § 773 permits the Court to impose upon ACS and the agency a fine of $250.00, which they share jointly and severally.

Matter of Michael D.
(Fam. Ct., Bronx Co., 10/4/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_20426.htm

* * *

ABUSE/NEGLECT - Contempt

While making a contempt finding against respondent mother, the Court finds by clear and convincing evidence that she has violated court orders by withholding information which would facilitate locating the children.

Her responses to questions the Court directed her to answer were evasive, non-responsive, and incomplete. Her repeated claims that she does not recall such pivotal facts as the addresses, telephone numbers, and birth dates of close relatives, amounts to a direct refusal to obey the Court's orders. These acts of disobedience are sufficient to sustain a finding of civil contempt regardless of motive.

The mother's disobedience was calculated to and actually has defeated, impaired, impeded, and prejudiced the rights and remedies of ACS in the prosecution of this child neglect proceeding by delaying ACS's investigation and presentation of its case to the Court, and by preventing ACS (and the Court) from ensuring the safety of the children and providing them with the services they need.

The Court incarcerates the mother in the county jail, where she will remain charged with civil contempt until the children are produced in Court or at an ACS office, or for six months, whichever period is shorter.

Matter of Debra W.
(Fam. Ct., Bronx Co., 8/13/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_51568.htm

Appeal

ABUSE/NEGLECT - Appeal - Standing/Aggrieved Party

The Third Department dismisses respondent's appeal, concluding that respondent is not aggrieved where the family court conducted a fact-finding hearing at which respondent testified that on a single occasion he struck his son four times with his belt, and the court found that respondent's actions constituted neglect but dismissed the petition because the aid of the court was not required.

As no adjudication of neglect was made, no prejudicial impact in potential future legal proceedings results. Although respondent allegedly suffered a loss of employment as a result of the determination, that is indistinguishable from other collateral consequences of involvement in legal proceedings and does not demonstrate that a substantial and important right of respondent has been adversely affected and that the interests of justice require that he be permitted to appeal the adverse finding.

Matter of Xavier II.
(3d Dept., 2/24/11)

* * *

ABUSE/NEGLECT - Appeal

The Fourth Department concludes that the stepdaughter's appeal from a determination that respondent father abused her must be dismissed. She testified at the fact-finding hearing that she was sexually abused by the father, and thus is not aggrieved by the determination.

Matter of Zanna E.
(4th Dept., 10/1/10)

Special Immigrant Juvenile Status

GUARDIANSHIP - Immigration Issues/Special Immigrant Juvenile Status

In this guardianship proceeding commenced for the purpose of facilitating an application for special immigrant juvenile status by a person over the age of 18, the Second Department holds that the family court had the authority under FCA § 255 to direct the New York City Administration for Children's Services to conduct an investigation or home study with respect to the prospective guardian.

Although ACS argues that § 255 requires agencies to render only that assistance and cooperation which is "within [their] legal authority," and that ACS is responsible only for protecting children who are under the age of 18, the Legislature's 2008 amendment of FCA § 661(a) extended the provisions for appointing a guardian for the person of a minor or infant - terms which are elsewhere defined as referring to persons under the age of 18 - to persons between the ages of 18 and 21.

Moreover, the purposes of a child protective service include preventing "[a]bused and maltreated children in this state" from "suffering further injury and impairment," "investigating such reports [of suspected child abuse and maltreatment] swiftly and competently," and "providing protection for the child or children from further abuse or maltreatment" (SSL § 411). These objectives are congruent with those underlying § 661(a), particularly when that statute is employed to facilitate the procurement of special immigrant juvenile status. Indeed, the very reason for the existence of special immigrant juvenile status is to protect the applicant "from further abuse or maltreatment" by preventing him or her from being returned to a place where he or she is likely to suffer further abuse or neglect.

The Court also notes that while FCA §§ 252(d) and § 662 provide that the probation service shall be available to assist the court, neither statute vests the authority or responsibility for conducting investigations exclusively in the probation service or precludes appointment of some other agency, such as ACS, to conduct such investigations. It was within the power of the Chief Administrative Judge to adopt § 205.56 of the Uniform Rules for the Family Court, which specifically requires any "authorized agency," upon a request by the court, to "interview such persons and obtain such data as will aid the court in . . . exercising its power under [FCA § 661]."

Matter of Sing W.C.
(2d Dept., 3/22/11)

* * *

ABUSE/NEGLECT - Special Immigrant Juvenile Status

The Second Department holds that the family court properly determined, after a FCA § 1027 hearing, that the child was at imminent risk of harm and placed him in the temporary care and custody of the Westchester County Department of Social Services.

The facts are not included in the Second Department's decision, but this announcement was released in connection with this case:
Catholic Charities and St. John's University School of Law wish to share a recent, good result (see below) in litigation before the NY State Court on behalf of immigrant children in federal immigration custody in Dobbs Ferry (at Children's Village). Last week, the NY appeals court sustained a decision (first of its kind in New York) by a family court judge in Westchester County ordering that a (UAC) child -- who had been abandoned and severely abused by his parents in Mexico -- be allowed to remain in county care (Department of Social Services), not be returned to federal custody, and, of course, be permitted to continue to pursue SIJ status. The child was just about to turn 18 and be transferred to adult detention. DSS had resisted the placement, thus creating an unequal treatment between detained and non-detained immigrant children in New York State.
The family court case was litigated principally by Prof. Jennifer Baum (St. John's School of Law, Child Advocacy Clinic) and Alison Kamhi (Skadden Fellow, Catholic Charities). The immigration case is being represented by Catholic Charities.

Matter of Daniel T.-H.
(2d Dept., 2/22/11)

* * *

GUARDIANSHIP - Immigration Issues

In this guardianship proceeding in which the child sought an order that would enable him to petition the United States Citizenship and Immigration Services for special immigrant juvenile status, the Second Department reverses an order which, after a hearing, denied the child's motion for the necessary findings.

The Court has appointed a guardian and thus the child is dependent on a juvenile court. In Bangladesh, the child would have nowhere to live and no means of supporting himself.

Matter of Alamgir A.
(2d Dept., 2/22/11)

* * *

GUARDIANSHIP - Immigration Issues/Special Immigrant Juvenile Status

Upon a hearing in this guardianship proceeding that was commenced by the child's former teacher, the family court awarded guardianship, but declined to make the findings that would enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status.

The Second Department reverses and makes the necessary findings. The child lived primarily with his grandmother and older brother while growing up in Sierra Leone, and he testified that, during the limited time that he lived with his parents, his father beat him regularly and both

parents neglected him. When he lived with other family members, his parents did not provide him with emotional or financial support. His father died in Sierra Leone in 2007, and his mother remains in that country. In 2006 he won a scholarship competition sponsored by a Connecticut church, and the church obtained a visa for him for the purpose of visiting the United States. Prior to his scheduled return to Sierra Leone, he became separated from his hosts while on a trip to Manhattan, and, thereafter, lived with natives of Sierra Leone he met in New York City, and eventually enrolled in high school. Since February 2009, he has lived in New York with petitioner, who has provided him with financial and emotional support and the ability to pursue educational goals.

The family court focused on the circumstances surrounding the child's separation from his hosts, which had no bearing on the issues before the court. The court's finding that the child's testimony on the subject of his separation was incredible is not supported by the record.

Matter of Mohamed B.
(2d Dept., 4/12/11)

III. FOSTER CARE/TERMINATION OF PARENTAL RIGHTS/ADOPTION

Foster Care: Payments To Foster Parent

FOSTER CARE - Payments To Foster Parent

The Ninth Circuit U.S. Court of Appeals holds that the federal Child Welfare Act, which provides money to state governments to pay for children's foster care and adoption assistance programs and spells out the specific foster care provider expenses that states' payments are supposed to cover, creates a federal right enforceable through this § 1983 action brought by foster parents who claim that the State's payments are not covering their costs to the extent required by federal law.

California State Foster Parent Association v. Wagner
2010 WL 3385532 (9th Cir., 8/30/10)

Foster Care: Discharge Of Child Due To Criminal Activity

FOSTER CARE - Criminal Activity By Child
TERMINATION OF PARENTAL RIGHTS - Surrenders

The child, who came into care by way of a judicial surrender by his mother and has been in foster care since 2005, was arrested in 2009 at the age of 17 for stealing his foster family's car. After pleading guilty, he remained in jail until September 2009, when he was transferred to a substance abuse treatment facility with the understanding that if he completed a treatment program he would not be sentenced to prison. Petitioner then moved to terminate the foster care placement, claiming that placement for 12 months in an in-patient treatment facility or for a longer period in prison would prevent petitioner from providing services to the child. The family court granted the application, holding that the child "forfeited his right to be in the guardianship and custody of [petitioner] by committing a serious crime."

The Third Department reverses. The statute does not authorize the agency to make an application to revoke or annul a judicial surrender. Furthermore, SSL § 398(6)(h) states that the agency has the duty to "[s]upervise children who have been cared for away from their families until such children become [21] years of age or until they are discharged to their own parents, relatives within the third degree or guardians, or adopted," and the statute does not contain any circumstances under which a child under the age of 21 may be deemed to have forfeited that statutory right. The Court rejects petitioner's claim that it is fulfilling its duties by voluntarily providing a discharge plan that will keep the child on an aftercare case load until the age of 21.

Matter of Michael TT.
(3rd Dept., 11/24/10)

Foster Care: Certification/Approval

ABUSE/NEGLECT - Specification/Certification Of Foster Home

FOSTER CARE - Certification/Approval Of Caretaker

The Fourth Department reverses an order directing the agency to certify the child's caregiver as an emergency foster care provider. Family Court Act § 1017(2)(a)(iii) provides that "where the court determines that the child may reside with a . . . relative or other suitable person, . . . [the court shall] remand or place the child, as applicable, with the local commissioner of social services and direct such commissioner to have the child reside with such relative or other suitable person and . . . to commence an investigation of the home of such relative or other suitable person within twenty-four hours and thereafter approve such relative or other suitable person, if qualified, as a foster parent." Pursuant to 18 NYCRR § 443.7(a), "[a] potential foster home or the home of a relative of a foster child may be certified or approved as an emergency foster home" if the child is removed from his or her own home. Neither the statute nor the regulation requires that the agency certify the person with whom the child is placed. The agency is required only to certify the person upon determining that the person is qualified.

The family court also impermissibly encroached upon powers granted by SSL § 398 to the agency to "receive and care for any child alleged to be neglected, . . . including the authori[zation] to establish, operate, maintain and approve facilities for such purpose in accordance with the regulations. . . ." Family Court Act § 255 does not provide authority to issue an order directing executive agencies to take specific discretionary action.

Matter of Jermaine H.
(4th Dept., 12/30/10)

TPR: Discovery

TERMINATION OF PARENTAL RIGHTS - Discovery - Drug Treatment Records

In this permanent neglect proceeding in which petitioner alleges that the mother failed to cooperate with substance abuse treatment programs, the Court, referencing the confidentiality provisions in 42 USC § 290dd-2 and 42 C.F.R. § 2.63(a), orders disclosure of records of three programs after concluding that the potential injury to the physician-patient relationship and to treatment services is de minimis because the mother no longer receives services at the programs. However, petitioner has not demonstrated a need for access to all of the records in order to support the limited allegations in the petition.

The Court orders disclosure of one program's admission records, records that specify the reason for discharge, and records that specify discharge recommendations; another program's admission records, records related to the payment of services provided, and documents specifying discharge recommendations; and the third program's records identifying any referring entity, records related to the payment of services, records which document treatment recommendations, and attendance records for treatment services provided between certain specified dates.

Similarly, under Mental Hygiene Law § 33.13(c)(1), the Court finds that the interest of justice significantly outweighs the need for confidentiality since the public interest and the need for

disclosure outweigh the potential injury to the physician-patient relationship and treatment services.

Matter of Havyn-Leiy "A."
(Fam. Ct., Clinton Co., 1/20/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50102.htm

TPR: Right To Counsel

TERMINATION OF PARENTAL RIGHTS - Right To Counsel - Waiver Of Right

The Court of Appeals, assuming, without deciding, that a parent in a termination of parental rights proceeding has the same right of self-representation that a criminal defendant has, finds no showing in the record that respondent father made unequivocal and timely applications for self-representation that would have triggered a "searching inquiry."

On one occasion, respondent's counsel stated that she wanted "to be relieved from this case" without advising the court that the respondent wished to proceed pro se. When the court sought further explanation from respondent himself, he proffered non-responsive answers that did not provide any clarity as to the basis of the application. He also did not unequivocally seek to represent himself when he later informed the court, "that's why I want a different counsel."

Respondent's second request, made after the commencement of trial, was untimely. At that point, the right to proceed pro se is severely constricted and the court must exercise its sound discretion and grant the request only under compelling circumstances. Here, counsel reiterated her earlier application and proffered no compelling circumstances.

Concurring, Judge Smith asserts that respondent was not equivocal when he answered, "If I have to," to the court's question: "You're ready to proceed on your own?" The court's response was: "You can't proceed on your own. You don't know the law." This would not be an appropriate response to a defendant's request to go pro se in a criminal case. Judge Smith reaches the question the majority did not decide and concludes that no right to proceed pro se protected in criminal cases does not apply in a termination of parental rights proceeding. "A criminal defendant who chooses to go without a lawyer will ordinarily harm no one but himself, but a parent who makes that choice in a parental rights proceeding can harm his children. Weighty as appellant's own interest in the outcome of this proceeding is, the interests of his two daughters are no less so. It was essential for their protection that both sides of the case be competently presented; otherwise there would be an unacceptable danger that parental rights would be terminated when they should not be."

Matter of Kathleen K.
(Ct. App., 6/9/11)

* * *

TERMINATION OF PARENTAL RIGHTS - Right To Counsel

- Defaults

In this termination of parental rights proceeding, the Fourth Department rejects the mother's contention that she was deprived of effective assistance of counsel because her attorney, inter alia, failed to ensure that she knew when to appear in court for the continuation of the fact-finding hearing. The mother and her attorney were notified of the continuation date of the fact-finding hearing, and under the circumstances the mother's attorney was not ineffective for failing to do more to ensure that the mother would be present.

Matter of Charity W.
(4th Dept., 12/30/10)

* * *

TERMINATION OF PARENTAL RIGHTS - Right To Be Present
- Right To Counsel

In this termination of parental rights proceeding charging abandonment, the Third Department holds that incarcerated father's counsel was ineffective, and respondent's right to due process of law was violated, where respondent was prevented from participating in the termination hearing.

Before counsel was assigned, the family court informed respondent by telephone that the court did not "allow testimony over the telephone" and would proceed in his absence and "make a decision based on the testimony presented by [petitioner]." However, telephonic testimony is permitted under the Family Court Act in child support and paternity proceedings where an incarcerated parent cannot be present, and courts have authorized the use of testimony by telephone to protect the due process rights of parents who are physically absent from termination proceedings. While the family court is not required to permit testimony by telephone or other electronic means in a particular case, there can be no blanket policy barring it.

After being assigned, counsel acquiesced in the family court's policy, and essentially waived respondent's right to be present by stating, "I've had contact with [respondent] and he understands, judge, that this matter is going forward without his participation." Counsel failed to press the court for an explanation as to why it allowed respondent to appear by telephone initially and issued an order authorizing respondent to appear by telephone on the first day scheduled for the hearing, but then abruptly changed its position. Counsel did not request that respondent be permitted to present evidence or his own testimony, and it appears that respondent may have been the only witness who could support his defense that he had attempted to contact the children. Counsel did not request adjournments so he could review transcripts of testimony with respondent prior to cross-examining petitioner's witnesses, and, while one witness had given direct testimony prior to an adjournment, counsel did not request transcripts for respondent to review. Counsel could not comprehensively cross-examine without input from respondent.

Matter of Eileen R.
(3d Dept., 12/23/10)

* * *

TERMINATION OF PARENTAL RIGHTS - Right To Counsel

In this termination of parental rights proceeding, the First Department rejects respondent's contention that he received ineffective assistance of counsel where his attorney conceded that respondent was simply a "notice" father without pressing for a hearing as to whether he was a consent father.

After investigating the facts and presumably discussing the matter with her client, the attorney made a strategic decision not to request a hearing. Evidence adduced at the hearing demonstrated, in any event, that respondent was not a consent father.

In re Bryant Angel Malik J.
(1st Dept., 9/30/10)

TPR: Visitation

TERMINATION OF PARENTAL RIGHTS - Visitation During Proceeding

The First Department upholds the family court's determination that the mother should have no visitation rights during the pendency of termination of parental rights proceedings.

The child was removed, and respondent was eventually found guilty of neglect upon her default, after she left a homeless shelter and began to sleep in a park with her child so that she could spend time with her boyfriend. For over two years, the mother, who is reportedly illiterate and mentally retarded, failed to visit the child, and the foster parents plan to adopt and do not intend to permit post-adoption visitation by the mother.

In re Carlos G.
(1st Dept., 5/24/11)

TPR: Right To Be Present At Hearing

TERMINATION OF PARENTAL RIGHTS - Right To Be Present At Hearing

The Fourth Department finds no due process violation where the dispositional hearing in this termination of parental rights proceeding was held in the mother's absence.

The court initially adjourned the hearing when the mother was unable to appear, and she provided documentation from a doctor establishing that one of her other children had suffered a brain aneurism and underwent surgery. The mother was absent again on the next court date, and her attorney indicated that the mother felt she could not travel because of the medical condition of the child but had provided no documentation to justify her absence. In light of the amount of time the children had spent in foster care and the fact that the mother's attorney vigorously represented her interests at the hearing, the court did not abuse its discretion.

Matter of La'Derrick J.W.
(4th Dept., 6/10/11)

TPR/Adoption: Abandonment

TERMINATION OF PARENTAL RIGHTS - Abandonment
ADOPTION - Consent - Unwed Father

The Second Department reverses an order dismissing a termination of parental rights petition charging abandonment where the father was not afforded the notice to which he was entitled of the original removal proceeding, and of permanency hearings that predated the filing of the petition to terminate his parental rights, but these inexcusable derelictions by petitioner neither prevented nor discouraged the father from maintaining contact with the child.

In addition, the father did not establish, by clear and convincing evidence, that he maintained regular communication with the child or petitioner and provided financial support, according to his means, for the child. Thus, his consent to the child's adoption is not required. His incarceration did not absolve him of these responsibilities.

Matter of Jayquan J.
(2d Dept., 10/26/10)

TPR: Mental Illness/Expert Testimony

TERMINATION OF PARENTAL RIGHTS - Mental Illness
EXPERT TESTIMONY - Basis Of Opinion

The Third Department reverses orders terminating parental rights on mental illness grounds where the experts who testified were never asked whether certain hearsay evidence upon which they relied was normally relied on within the profession for the performance of this type of evaluation, or asked what impact the evidence had in the formulation of a final opinion as to the respondent's fitness as a parent. As a result, a proper foundation was not laid for the admission of the psychologist's testimony or reports.

The Court also shares the family court's "concern" regarding petitioner's decision to seek termination of parental rights based on mental illness while a suspended judgment was still in effect in a permanent neglect proceeding. Petitioner made no claim that respondents did anything during the period of suspension that would warrant vacating that order or commencing this proceeding, and it appears that respondents made progress in planning for their children's future and facilitating their return to the family home.

Matter of Anthony WW. v. Michael WW.
(3d Dept., 7/7/11)
Matter of Anthony WW. v. Karen WW.
(3d Dept., 7/7/11)

TPR: Incarcerated Parents

TERMINATION OF PARENTAL RIGHTS - Failure To Plan/Diligent Efforts - Incarceration/Substance Abuse Treatment

The Fourth Department holds that recent amendments to SSL § 384-b (ch 113, §§ 2-4) affecting permanent neglect causes of action brought against parents who were incarcerated or participating in a residential substance abuse treatment program, are not to be applied retroactively. Here, the amendments became effective after the mother's parental rights had been terminated.

Matter of Yasiel P.
(4th Dept., 12/30/10)

TPR: Failure To Plan/Maintain Contact

TERMINATION OF PARENTAL RIGHTS - Failure To Plan - Substance Abuse Problems

One judge dissents from a First Department ruling upholding an order terminating parental rights on grounds of permanent neglect.

The dissenting judge asserts that if respondent's "success in staying off drugs for at least four to five months had occurred at the end rather than the beginning of [the] 16-month period, I think it clear that a neglect finding could not be sustained. I do not mean to suggest, however, that a failure at the end of the period is no more significant than a failure at the beginning. Unquestionably, substance abuse by a parent presents a serious risk of harm to the parent's child. Accordingly, I do not doubt that a parent who is able to stay off drugs for only a brief period or intermittently could claim no immunity from a neglect finding. But given both the reality that those who are attempting to conquer drug addictions face enormous difficulties and the long-standing and fundamental importance of New York's policy in favor of "keeping biological families together" (citation omitted), I would conclude that the statute requires a failure for a more protracted period than the one established here."

In re Destiny S.
(1st Dept., 12/28/10)

* * *

TERMINATION OF PARENTAL RIGHTS - Failure To Plan

The Second Department concludes that petitioner failed to establish, by clear and convincing evidence, that the mother failed to maintain contact with or plan for the future of her children where the mother substantially complied with the terms of a prior court order, and her failure to meet with the case worker at least monthly, and her failure to continue with counseling after she

had been discharged, absent proof that further counseling was warranted, did not establish a failure to plan.

Matter of Austin C.
(2d Dept., 10/26/10)

* * *

TERMINATION OF PARENTAL RIGHTS - Failure To Plan

While agreeing with respondent father that petitioner failed to establish that he did not substantially plan for the future of the child, the Third Department notes that the court was obliged to consider respondent's efforts during the interim between the end of the one-year period of alleged permanent neglect and the commencement of this proceeding.

Matter of Tatianna K.
(3rd Dept., 12/2/10)

TPR: Disposition

TERMINATION OF PARENTAL RIGHTS - Disposition
- Intervention By Relative Seeking Custody
CUSTODY - Great-Grandparents

Upon a consolidated hearing in a termination of parental rights proceeding brought against respondent mother and a custody proceeding brought by the maternal great-grandmother, the Court commits guardianship and custody of the children to the Commissioner and the foster care agency for the purpose of adoption, and dismisses the custody petition.

The threshold issue is whether or not the Court should terminate the mother's parental rights and free the children for adoption, or issue a custody order. A grandparent or great-grandparent has no preemptive statutory or constitutional right to custody surpassing that of persons who might be selected by the agency as suitable adoptive parents.

"It is not appropriate for this court or any agency to 'experiment' with B. G., a child with significant special needs who is closely bonded to a loving, nurturing parent, the only parent he has ever known, by having him transition into what some would consider a dysfunctional household because the head of that household is a relative three generations removed from the child. Not only would such a course of conduct be 'wrenching' for the child, as described by the forensic examiner, but it would be both misguided and cruel."

Although E. N. has formed a bond with the great-grandmother, there is no evidence indicating that it is comparable to the close bond he has formed with the adoptive mother or that it is or could be other than a child-grandparent-type relationship. It would not be in E. N.'s best interest to wrench him from the only parent he has ever known in an attempt to transition him to being raised by the great-grandmother. The great-grandmother faced "a virtually impossible task,"

since she had to demonstrate not only that she would make a suitable adoptive parent, but also that she would provide a better adoptive home than that planned by the agency.

Matter of E.N.
(Fam. Ct., N.Y. Co., 7/22/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_51486.htm

* * *

TERMINATION OF PARENTAL RIGHTS - Disposition

While affirming orders terminating parental rights, the Second Department notes that although it appears that the oldest child might not be adopted, a suspended judgment was not appropriate in light of the parents' lack of insight into the severity of the child's problems and their failure to acknowledge and address the primary issue which led to her removal in the first instance.

Matter of Amber D. C.
(2d Dept., 12/14/10)

* * *

TERMINATION OF PARENTAL RIGHTS - Disposition - Violations
- Suspended Judgment

The Third Department reverses orders terminating respondents' parental rights where respondents failed to comply with their suspended judgments by failing to submit to random drug screening, missing visits with the children without providing documentation and not attending counseling, but it is not apparent that the family court adequately considered the best interests of the children before terminating parental rights.

The family court did not allow testimony regarding the children's status or progress in their placements and questioned the relevance of such testimony. Respondents expressed a desire to regain custody of the children, and mitigated their noncompliance by presenting testimony that they refused to submit to random drug screening on the advice of counsel representing them in a related personal injury action against petitioner, that they called their caseworker with reasons for missing visits but the caseworker did not request written documentation, and that they had trouble securing appropriate counseling programs and did not receive any assistance from petitioner.

Petitioner and the foster care agencies admitted providing no services to respondents once the permanent neglect proceedings were commenced.

Matter of Krystal B.
(3rd Dept., 10/21/10)

* * *

VISITATION - Post TPR/Adoption
TERMINATION OF PARENTAL RIGHTS - Disposition - Visitation

The Second Department holds that after terminating the mother's parental rights, the family court should have determined, after a hearing, whether it is in the child's best interests for the court to direct visitation between the mother and the child, as requested by the mother.

Although there is no statutory authorization for continued visitation with the parents once their rights are terminated, courts have the inherent authority to provide for visitation between an adopted child and a member of his or her birth family where such visitation is in the best interest of the child and does not unduly interfere with the adoptive relationship.

Matter of Selena C.
(2d Dept., 10/5/10)

* * *

TERMINATION OF PARENTAL RIGHTS - Disposition - Violations
- Suspended Judgment

In this termination of parental rights proceeding, the First Department, while rejecting the mother's contention that she was not afforded sufficient time to show progress towards reunification, concludes that the agency's decision to seek revocation of the suspended judgment within three months of its entry was proper.

The burden rested with the mother to show progress during the period of the suspended judgment and compliance with the terms, and lapses by an agency do not relieve a parent of the duty to comply.

In re Christian Anthony Y.T.
(1st Dept., 11/4/10)

* * *

TERMINATION OF PARENTAL RIGHTS - Disposition - Suspended Judgment
- Intervention By Relative Seeking Custody

Upon a dispositional hearing in this permanent neglect proceeding, the Court denies the maternal grandmother's application for custody and terminates the mother's parental rights.

The grandmother does not have rights superior to those of the foster mother. She did not file for custody until fourteen months after the children were placed with the foster mother. Her explanations for the delay -- she hoped her daughter would plan for the children, and she was caring for her ailing mother -- are not sufficient. By failing to step up earlier, she allowed a strong emotional bond to form between her grandsons and the foster mother. The children were

only three years old and ten months old at the time they were placed with the foster mother and have been in her care for three years.

The grandmother and respondent, who want to respondent to be involved in the lives of the children, seek a suspended judgment. But respondent has failed to take any of the necessary steps to avoid having her rights terminated, and she has a warrant history. “While [the grandmother] may love her grandsons, and wants to care for them, it is clear to this Court that an additional motivation in seeking custody is to circumvent the termination of her daughter's parental rights.”

Matter of the Nassau County Department of Social Services o/b/o Joseph W. and Kenneth W. v. Monica W.
(Fam. Ct., Nassau Co., 2/10/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50280.htm

TPR: Motion To Vacate/Revocation Of Surrender

TERMINATION OF PARENTAL RIGHTS - Surrender - Revocation/Reinstatement Of Parental Rights

The father’s judicial surrender contained a condition precedent to adoption that the child be adopted by a specific adoptive resource. When that resource was no longer viable, the Court, with the consent of the father and the attorney for the child, ordered that the surrender remain valid for the circumscribed purpose of adoption by the child’s biological sister. Since the sister is no longer a feasible adoptive resource, the parties now support discharge to the father, and the child will turn 18 in September of this year and refuses to consent to adoption, the Court revokes the surrender, and, while noting that legislation which takes effect in November of this year allows for reinstatement of parental rights under certain circumstances, Court reinstates the father’s parental rights.

Although there appears to be no decisional law holding that a parent’s rights may be reinstated after a judicial surrender is revoked, "it is axiomatic that if the parties in this type of situation are placed in their original positions, that a biological parent's parental rights may be reinstated upon application, after taking into account the best interests of the child and barring any grounds precluding the restoration of parental rights."

Matter of S.D.
(Fam. Ct., Queens Co., 8/23/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_20346.htm

Adoption/TPR: Unwed Father

ADOPTION - Consent - Unwed Father

The Second Department upholds a determination that the father is not a "consent" father where he testified that he was not aware of the mother's pregnancy and that she told him she was not pregnant, and the mother testified that she sought to prevent the father from learning about her

pregnancy and told him that her weight gain and pregnancy symptoms were caused by a stomach problem and that she did not inform him about the pregnancy because he had previously told her that he did not think he ever wanted children and because she was worried that he would end their relationship.

During the six-month period preceding the child's placement for adoption, the father did nothing to manifest his parental interest. While it may be possible for an unwed father's failure to manifest his parental interest in a timely fashion to be excused by active concealment of a pregnancy, "under the unique circumstances presented here" the father’s failure is not excusable since it cannot be said that he did all that he could to protect his parental interest.

Matter of John Paul B. v. Dominica B.
(2d Dept., 10/26/10)

IV. CUSTODY/GUARDIANSHIP/VISITATION

Service/Jurisdiction

CUSTODY/VISITATION - Jurisdiction

The Second Department finds reversible error where the family court, upon a hearing to determine whether it should decline to exercise jurisdiction pursuant to DRL § 76-g by reason of unjustifiable conduct on the part of the mother, declined to exercise jurisdiction over these custody and visitation proceedings and directed the parties to seek any further relief in Florida.

While the decision of the Florida court dismissing the father's visitation proceeding was later determined to be incorrect, the error was not caused by any fraudulent misrepresentations made by the mother. There was no misconduct on the part of the mother when she returned with the child to New York, which was her state of residence prior to the child's birth, and where she had been residing with the child since his birth before she relocated to Florida. There was no order of a court that prevented the move, and is no allegation that the father was ever unaware of the child's whereabouts.

Even if there was "unjustifiable" conduct, the statute allows the court to exercise jurisdiction if it otherwise has jurisdiction and determines that this state is a more appropriate forum. Here, the court determined that Florida was an inconvenient forum and that New York was a more appropriate forum.

Matter of Schleger v. Stebelsky
(2d Dept., 12/28/10)

Standing/Right To File Petition

CUSTODY - Standing

Petitioner, the mother's boyfriend, filed for custody after the mother, who had allegedly violated an order directing her to ensure that her children have no contact with petitioner, surrendered her parental rights. The mother had previously admitted to allegations of neglect that were based, in part, on her conduct in allowing petitioner, who has a history of exposing himself to children, to have unsupervised contact with the children, sleep in the same bed with the male middle child, and shower and urinate in the toilet together with the oldest male child. The family court dismissed the custody petitions, concluding that petitioner lacked standing.

The Third Department affirms. Since petitioner and the children have no biological relationship, his standing to seek custody is determined under the common-law standard requiring proof of extraordinary factual circumstances. While the mother's surrender, the absence of the biological fathers from the children's lives and the lack of any other suitable relative might normally be considered extraordinary circumstances, it would be antithetical to grant standing given the existence of the no contact order and the circumstances underlying it.

Matter of Thomas X.
(3d Dept., 7/7/11)

* * *

CUSTODY - Sanctions For Frivolous Filings

While awarding custody to the mother, the Court "take[s] the unusual step of requiring the father to get the advance written permission of this Court prior to filling any legal proceeding in Family Court concerning custody or parental access. The mother testified very credibly that the father has filed a variety of petitions against her, and the Court takes judicial notice of these filings. She stated that she is the sole support of the children and is very concerned about the impact that time away from her job from repeated Court appearances may have on her continued employment. She also stated that her income is such that she does not usually qualify for assigned counsel. This Court has no intention of depriving Mr. L. from exercising his legal rights, but it appears that since his divorce he is conducting a thinly disguised campaign to eliminate his child support obligation. The Court has a duty to prevent the misuse of the justice system for such a purpose."

Matter of J.L. v. E.L.
(Integrated Domestic Violence Part, Sup. Ct., Onondaga Co., 1/18/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50049.htm

* * *

VISITATION - Child's Wishes
- Domestic Violence
- Right To File Petition

The Court denies the father's application for visitation, concluding that it would be unconscionable for the Court to coerce the children, ages 17 and 13, to visit with their father over their consistent and vehement objections. Forced visitation would not serve the children's best interests and would instead cause them great anxiety.

The father has squandered each opportunity to re-establish a relationship with his children by using the time to ridicule the mother and express his own self-serving version of events, with no thought as to how it would affect the children. The father also has been physically, verbally, and emotionally abusive towards the mother since the parties were married, and much of the abuse took place in the presence of the children, who often attempted to intervene. The children were also victims of domestic violence, often being slapped, and/or berated by the father.

In addition, the Court, noting that the father has filed at least sixteen petitions and that the mother has filed twelve, dismisses the petition and issues an order enjoining the father from any future filings for visitation without prior approval from the court in which he is attempting to file. While public policy mandates equal access to the courts, a parent's right to visit is secondary to the rights of a child and must be sacrificed if it conflicts with the child's best interests. A party may forfeit the right to file future petitions by abusing the judicial process by engaging in

litigation motivated by spite or ill will. The father's insistence on compelling the children to visit with him against their will has become vexatious.

Matter of J.R. v. N.R.
NYLJ, 5/31/11
(Sup. Ct., Richmond Co., 5/18/11)

* * *

CUSTODY - Co-Habitating Parents

The parties in this custody proceeding are unmarried and live together with their two children. Petitioner father has moved for appointment of a forensic psychiatrist to provide a report as to the relative fitness of each party. The mother has moved for dismissal of the petition, arguing that where the parties continue to live together and there is no controversy between them as to the welfare of the children, the Court must dismiss the action.

The Court denies the father's motion and dismisses the petition. Although the father argues that there are serious allegations regarding the mother's stability and mental state, in the more than one year period during which this case has been pending the father has not filed any emergency motions or sought any interim relief due to the mother's alleged mental health issues, nor has the father requested drug and/or alcohol testing for the mother. The father has been able to effectively address each situation.

The father's petition for custody and, in particular, his request for a forensic evaluator are premature. The Court cannot regulate the internal affairs of a home where there has been no showing that would indicate that the children's welfare is in danger or that their reasonable needs are not being met.

Matter of A.K. v. A.S.
NYLJ, 6/13/11
(Fam. Ct., N.Y. Co., 5/25/11)

* * *

CUSTODY - Standing

The Court denies a motion to dismiss a petition filed by the attorney for the child seeking to modify a custody order, noting that the allegations relate directly to the child's desire to live with his father, and that the child has a stake sufficient to confer standing to file a petition.

Matter of Trosset v. Susan A.
(Fam. Ct., Otsego Co., 4/28/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21151.htm

Right To Counsel

CUSTODY - Right To Counsel

In this matrimonial proceeding, the Court grants the wife's request to have her private counsel appointed as 18-B counsel where the wife has established that she can no longer afford to pay counsel.

Under FCA 262(a)(v), an indigent parent seeking custody or contesting a substantial infringement of her right to custody has a right to counsel. The supreme court has constitutional authority to assign counsel in like circumstances. Here, the contentious nature of the proceeding, and the custody issues involving mental health and severe parental alienation allegations, put the children at severe risk and require an expeditious resolution. Each party must be represented by counsel who is familiar with the proceeding and can proceed on the scheduled trial date. Denial of the wife's motion would result in further delay and injustice to the parties and the children.

Herbert L. v. Maria L.
NYLJ, 7/25/11
(Sup. Ct., West Co., 7/15/11)

Discovery

ABUSE/NEGLECT - Confidentiality - Records Of DSS Investigation
CUSTODY - Discovery

In this custody proceeding, the child's great aunt alleges that the child was born with gastroschisis, a life threatening condition that requires daily medical care and intense monitoring, and that the parents have not been providing adequate care. The Court directed pursuant to FCA § 1034 that the Department of Social Services conduct a child protective investigation. The DSS's report referred to one indicated report against the parents which involved concerns about domestic violence, but contained no additional information regarding the report and stated that DSS did not find any credible evidence that the parents were not adequately meeting the child's medical needs. The attorney for the child then moved for, among other things, an order requiring the DSS to release to the Court "the contents of all child protective reports indicated against the [parents], and any other information, including written reports and photographs taken, concerning such reports in the possession of the [CCDSS]" pursuant to SSL § 422(4)(A)(e). The DSS filed the only response in opposition.

The Court grants the motion. "The fact that the [DSS] concludes something is true does not require the rest of the world to accept their conclusion." The attorney for the child is entitled to take a different position. The report provided virtually no details, and the Court understands why the attorney for the child seeks more details. This is no "fishing expedition." Information regarding domestic violence is necessary for the determination of two issues: (1) do extraordinary circumstances exist which would permit the Court to consider awarding custody to a non-parent over the objection of the parents; and (2) if extraordinary circumstances exist, is it in the best interest of the child to award custody to his great aunt?

Matter of Brenda P. v. Patrisha W.

(Fam. Ct., Clinton Co., 12/23/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_52253.htm

Hearing And Fact-Findings Requirement/Collateral Estoppel

CUSTODY - Fact-Findings

The Fourth Department reverses an order awarding primary physical custody to the father and visitation to the mother where the family court failed to set forth its findings of fact and the reasons for its custody determination, as required by CPLR § 4213(b). The court's limited "findings" that both parties were "nice people" and "good parents" and that they would each be awarded "substantial quality parenting time with these children" were conclusory and do not enable this Court to provide effective appellate review.

Although the record is sufficient to enable this Court to make its own findings of fact, the Court declines to do so in this case, which involves an initial award of custody, since effective appellate review requires that appropriate factual findings be made by the court best able to measure the credibility of the witnesses.

Matter of Rocco v. Rocco
(4th Dept., 11/19/10)

Hearsay Evidence

CUSTODY - Evidence - Hearsay

In this custody proceeding, the Court holds that report cards and teacher comments are not admissible as business records. While the holding of *Crawford v. Washington* is not directly applicable to this civil proceeding, the principles articulated therein caution against an expansive interpretation of traditional hearsay exceptions to curtail a litigant's right to confront witnesses in civil proceedings involving important interests, such as the right to continued custody of one's children. The attorney for the child or the father could have called the child's teachers to testify as to the basis for the given grades and the accompanying comments, and the mother would have had the opportunity to cross-examine those teachers and test the reliability of those grades and comments.

The Court also concludes that certain test reports are, to the extent they are intended to demonstrate how the child is progressing in school, subjective judgments, opinions, or testimonial assessments which can only be admitted through live testimony.

However, there is no indication that attendance records include any "testimonial" matter, and they are admissible.

Devon S v. Aundrea B-S
(Fam. Ct., Kings Co., 3/8/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21163.htm

Change In Circumstances

VISITATION - Interference With Visitation

Because of the mother's interference with the father's parenting time -- the Court notes that child has one finger on the text button when she is with the father, and that the mother shows up frequently during the father's parenting time, allegedly to bring the child an item left behind that she desperately wants, or just happens to appear at an adventure park when the father has scheduled an activity -- the Court directs as follows: (1) the mother shall neither initiate nor respond to any electronic or telephone communication to/from the child during the father's parenting time except in the case of an emergency, when the mother shall call the father, and, when the child is in the custody of her father, the mother may telephone or text the child one time per day during the hours of 5:00 to 7:00 p.m., or at such other time that is agreed to by the parties; (2) the mother is prohibited from scheduling events for the child or buying tickets for events that take place during the father's parenting time, without the prior written consent of the father; (3) the mother is prohibited from initiating or scheduling social activities, dates, or parties for the child during the father's parenting time, without prior written consent of the father, and any social activity that occurs during the father's parenting time must be discussed by the child and her father to insure that the father is available to transport the child and willing to permit the child's attendance; and (4) the mother is prohibited from appearing at the father's home or at activities arranged by the father during his parenting time, without the prior consent of the father, and any items that are required by the child during the time she is with her father that have been forgotten or require purchasing must be discussed by the child and her father, who will determine what action, if any, will be taken.

W.J.F. v. L.F.
NYLJ, 6/10/11
(Sup. Ct., Nassau Co., 6/1/11)

* * *

VISITATION - Change In Circumstances

The Third Department, finding a change of circumstances sufficient to warrant an examination of whether a change in the mother's visitation was necessary where she unilaterally stopped visiting, and there is evidence that the children do not want to resume visitation, nevertheless agrees with the family court that her visitation should not be terminated.

The family court accepted her explanation that she acted out of frustration caused by the children's repeated refusal to see her. Neither the one-time argument between the maternal grandmother and one of the children, in which the mother chose not to intervene even though the child became upset, nor the other evidence cited by the attorney for the children, including the mother's failure to attend the children's various extracurricular activities or her continued relationship with a man whom her children do not like, justifies a termination of visitation.

Matter of Bond v. MacLeod
(3d Dept., 4/21/11)

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CUSTODY - Change In Circumstances
- Interference In Parent-Child Relationship
- Mental Health Evaluations
VISITATION
SUPPORT - Emancipation
- Denial Of Visitation

The Third Department upholds a determination that the father established a change in circumstances, and an order awarding him custody of his son, where there the evidence supports the trial court's conclusion that the mother interfered in the father's relationship with the children. The mother, among other things, refused to let the son participate in visitation with the father because of inclement weather despite the fact that both parties had already driven to the custody exchange point; told the daughter that she did not have to participate in a spring break visit with the father; indicated that there was nothing she could do when the daughter refused to participate in visitation with the father, and that the child had a mind of her own; and, during an attempted exchange at a restaurant parking lot that never occurred, refused to transfer the son's suitcase to the father's car and then laughed at the father and took a photograph of him with her cell phone while she walked inside the restaurant with the children.

While a psychologist who treated the children from 2003 to 2008 testified that it would be "devastating" to remove the son from the mother's custody, the family court found that his testimony was of "limited utility" because, among other things, he was unaware of a prior psychologist's report opining that the mother had alienated the children from the father, and he failed to focus on the issue of parental alienation in therapy. The therapist who treated the son commencing in 2008 testified that removing him from his mother's custody might be necessary to preserve his relationship with the father, and that although the son would be initially "devastated," he would slowly accept the change.

The family court found that the father's shortcomings, including, among others, his use of physical discipline, his exercise of poor judgment when he picked up a hitchhiker while driving with his son, and incidents in which the father has engaged in name-calling and has ridiculed his son in the presence of strangers, may be addressed with continued therapy.

The Court also finds no error in the family court's decision to suspend the father's child support obligation as to his son in light of the mother's alienating behavior. The family court erred in terminating the father's support obligation as to his daughter since she was only 16 years of age at the time and was unable to abandon the father and forfeit support, but the facts clearly support a finding that the father's support obligation should be suspended.

Based on the therapist's testimony that the best chance for an orderly change in custody required that the son have an initial period without any contact with the mother in order to break her

influence over him, the family court did not err by ordering that she have no contact with her son for the first month after custody is transferred to the father.

Matter of Dobies v. Brefka
(3d Dept., 4/7/11)

* * *

VISITATION - Hearing Requirement
- Supervised
- Change Of Circumstances

While concluding that the court erred in dismissing the father's custody/visitation petition without a hearing where he alleged that he had obtained a permanent residence, the lack of which was the primary ground cited by the mother when she previously obtained a modification of visitation, the Third Department also concludes that the court erred in issuing a final order suspending the father's visitation rights and ordering that all other contact between the father and the child be supervised. The attorney for the child orally requested that relief based on allegations that the father was improperly discussing custody proceedings with the child and the child did not wish to visit with the father. While a temporary order pending a quickly scheduled evidentiary hearing would have been appropriate, making a final order based on the request or offer of proof of an attorney was error.

Matter of Twiss v. Brennan
(3d Dept., 3/31/11)

* * *

CUSTODY - Change In Circumstances
- Interference With Parent-Child Relationship - False Allegations Against Other Parent
VISITATION - Supervised

The Third Department concludes that the father met his burden to demonstrate a change in circumstances, and that the court properly awarded custody to the father, where the mother, among other things, asked the children to call three different men "daddy" after only weeks into a relationship; continued, after she was advised that a report of a skull fracture suffered by her daughter was false and that, instead, the child had a virus, to tell others that the father had fractured the daughter's skull; conditioned the children to fear their father; and caused her son to be admitted to a medical clinic, where he stayed for nearly a month and was administered drug treatment for post-traumatic stress disorder, based at least in part on her false allegation that he witnessed his father fracture the daughter's skull.

The family court properly required that the mother's visitation be supervised (by either a grandparent or other supervisor agreed upon by the parties) or in a public place.

Matter of Opalka v. Skinner
(3d Dept., 2/3/11)

* * *

CUSTODY - Change In Circumstances

While upholding an order changing joint custody to sole custody for the father, the Fourth Department concludes that the father demonstrated a change in circumstances where the mother moved four times between 2004 and 2009, causing one of the children to attend five different schools over that period, and the mother testified that she was planning another move in the near future, which would require the children to change schools again.

Matter of Moore v. Moore
(4th Dept., 11/12/10)

* * *

CUSTODY - Change In Circumstances

The First Department, finding no material change in circumstances, reverses an order that directed that the children reside primarily with the father upon attaining the age of four and awarded final decision-making authority to the father concerning the children's education, extracurricular activities and medical care.

The Referee found that the father was "more likely to promote meaningful contact and a relationship between the other parent and the children," but acknowledged that the mother's conduct never reached the level of deliberately frustrating, denying or interfering with the father's parental rights so as to raise doubts about her fitness. The Referee also speculated, based solely on lay testimony, that the children, by reason of their nontraditional family background (they were born through artificial insemination), would more easily fit in with other children in the father's West Village neighborhood than in the mother's predominantly Greek-American neighborhood in Queens.

In re Lawrence C. v. Anthea P.
(1st Dept., 12/16/10)

* * *

CUSTODY - Change In Circumstances

The Court, finding a change in circumstances, transfers primary physical custody from the mother to the father where the children, ages 16, 15, and 10, all have excessive absences from school.

It appears that the wishes of the children rule the mother, not their best interests, while the father is willing and able to monitor the children's attendance by staying in contact with school officials. Also, the children will have the benefit of extended family living next to them. Ordering the children to leave their friends in the city to reside in a rural area will require an adjustment, especially where "they would be leaving a place where they have had free reign," but the Court has found that the mother is unfit.

Matter of Foster v. Foster
2011 NY Slip Op 30232(U)
Fam. Ct., Oneida Co., 1/31/11)

In Camera Interview Of Child/Child's Wishes

CUSTODY - In Camera Interviews

The Third Department, remitting the case for a custody hearing, notes that the family court and the parties inaccurately referred to the in camera interviews with the children as a Lincoln hearing.

The purpose of a Lincoln hearing in a custody proceeding is to corroborate information acquired through testimonial or documentary evidence adduced during the fact-finding hearing. Thus, a true Lincoln hearing is held after, or during, a fact-finding hearing. There is no authority or legitimate purpose for employing such interviews instead of a fact-finding hearing, and the family court erred in doing so here.

Also, the trial court in a custody proceeding must protect the children's right to confidentiality by avoiding disclosure of what they reveal in camera .

Matter of Spencer v. Spencer
(3d Dept., 6/2/11)

* * *

CUSTODY - In Camera Interviews

The Court, having awarded temporary custody to the mother after interviewing the children in camera, denies a motion made by the children's attorney for an order directing that the transcripts of the in camera interviews remain confidential and be sealed for transmission to the appellate court in the event of appellate review.

While FCA § 664 and CPLR 4019 require that stenographic records be made of in camera interviews of children and that, in the event of an appeal, the transcripts of the interviews be sealed and transmitted as part of the record to the appellate court, no court has held that sealing the transcripts during the course of the trial is mandatory or that courts lack discretion to provide the parties or their counsel with copies or otherwise test the accuracy of the in camera disclosures.

It is important to distinguish between disclosures regarding the relative merits of the parents or the child's preference for one of the parents, or disclosures that help the judge get to know the child, and crucial factual information about the conduct of the parents. "Due process concerns are not implicated in the child's opinions or answers to the judge's 'impression' questions, which are not subject to proof one way or the other. However, factual disclosures about one or both parents, which will likely influence the custodial determination and which are subject to proof, should clearly be disclosed, in some manner, to the parents or their attorneys so that they may be afforded the opportunity to gather and produce evidence to refute or counter or explain the child's statements." Courts in Article Ten proceedings have conducted "modified Lincoln hearings" in which the children are questioned and cross-examined by the attorneys for the parents without the parents being present: parents in custodial conflicts have the same due process right to challenge the child's factual assertions in some manner through the normal adversary process. In permitting disclosure, a court must consider whether disclosure poses a risk of reprisal against the child or other injurious conduct by a parent, and implement appropriate protective remedies.

In this case, the children's statements, for the most part, were allegations of specific conduct by the parents rather than expressions of the children's preferences or opinions about their parents' relative parenting abilities. The Court will review the transcripts and redact all "opinion" or "preference" statements. Upon request, copies of the redacted transcripts shall be made available to the attorneys for the mother and the father. The children's attorney, who was present during the in camera interviews, shall be provided unredacted copies of the transcripts. The attorneys for the parents may review the redacted transcripts with their clients in their offices, but may not make additional copies or allow their clients to take the copies out of the attorney's office.

Matter of Sandra S. v. Abdul S.
(Fam. Ct., Kings Co., 10/20/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_20536.htm

* * *

CUSTODY - Change In Circumstances
- Child's Wishes
- Relocation

The Court denies the mother's application for a change of custody and for permission to move the child to Michigan, where the mother now resides. Although the child has unequivocally expressed her desire to live with her mother, and this desire is so strong that she is willing to leave her father, her friends, her schoolmates, her neighbors and her community to move to Michigan to be with her mother, the mother has not offered any proof that a change of residential custody would be in the child's best interests.

"The Court points out to [the child] that in four years, she will be graduating from high school and of an age to determine whether and where she will pursue a post high school education, and where she will reside…. The Court acknowledges that [the child] believes she would be happier

in Michigan with her mother, but things that make one happy are not always in one's best interests…. [The child] must address her disappointment with the Court's decision and move forward with her life during the next four years."

Y G v. D G
NYLJ, 8/30/10
(Sup. Ct., Nassau Co., 8/18/10)

* * *

VISITATION - Change In Circumstances
- Child's Wishes

The First Department affirms an order modifying visitation to eliminate the father's overnight visits where the child did not want to have overnight visits due to the father's failure to maintain a sanitary home and to engage with her during their visits, and his comments about her developing body and his physical altercation with her over her use of a cell phone caused her to be uncomfortable in his presence.

In re Celenia M.
(1st Dept., 10/19/10)

* * *

VISITATION - Children's Wishes
- Interference With Visitation/Parent-Child Relationship

Refusing, in this appeal by the children's attorney, to further reduce the father's visitation, the Third Department notes that while the wishes of the children should be given consideration, it appears that the children perceive visitation as an inconvenience or annoyance, and that the mother has fostered their dismissive attitude toward their father and their unwillingness to visit with him.

Giving the children the final decision on visitation would be tantamount to the termination of visitation without justification. The mother's "failure to genuinely and affirmatively encourage the children to visit with their father has contributed significantly to their inability and unwillingness to look beyond his parental imperfections so as to benefit from a wholesome relationship with him."

Matter of Brown v. Erbstoesser
(3d Dept., 6/30/11)

* * *

CUSTODY - Child's Wishes

While noting that the older child was nearly 11 years old at the time of the *Lincoln* hearing -- an age at which his wishes were not necessarily entitled to the "great weight" accorded to the preferences of older adolescents, but were entitled to consideration given his level of maturity and ability to articulate his preferences -- the Third Department, troubled by the possibility that the court failed to give sufficient weight to the children's wishes, reverses an award of primary physical custody to the father and remits the matter for further proceedings.

Matter of Rivera v. LaSalle
(3d Dept., 5/5/11)

Joint Custody

CUSTODY - Joint Custody
- Change In Circumstances

The Third Department, finding a change in circumstances, concludes that the parties' joint physical custody arrangement should be modified.

The child's psychologist not only diagnosed him with pervasive development disorder, a tic disorder and attention deficit hyperactivity disorder, but also testified that he was having a difficult time adjusting to being transferred between his parents in the middle of each week and that it would be more advantageous given his psychological disorders that the transfer occur on a weekend. The therapist also noted a slight regression in the child's school work during the past school year and attributed it, in part, to the fact that the father has moved out of the school district and the child, when with the father, has a 25-minute commute to school. The child should be in the mother's custody while attending school.

Matter of Slovak v. Slovak
(3rd Dept., 10/21/10)

Relocation And Related Issues

CUSTODY - Relocation

The Second Department grants the mother's cross-petition to modify a prior custody order to permit her to relocate with the children to Maryland.

The mother wanted to move the children away from the gun violence and drug-dealing occurring in her Brooklyn neighborhood. In Maryland, the mother rents a two-bedroom apartment in a complex that includes amenities such as a swimming pool, volleyball court, and soccer and barbeque areas. The apartment is only a short distance from an elementary and middle school that her children can attend, and the middle school is equipped to handle the needs of the older child, who was attending a school that requires him to travel up to four hours round trip. There were past instances where the father struck the mother and the older child. The attorney for the children supported relocation.

A liberal visitation schedule, including extended visits during summer and school vacations, will allow for the continuation of a meaningful relationship between the father and the children.

Matter of Jennings v. Yillah-Chow
(2d Dept., 5/31/11)

* * *

CUSTODY - Relocation

In a 3-2 decision, the First Department affirms an order permitting the mother to relocate to California with the parties' child. The California home is financially more stable than the father's home, since the stepfather has a steady job that provides health insurance, while the father is not currently working. Although the father has been offered a job as a teacher's aide, he has postponed his start date and is currently on some type of public assistance and receives money from his parents. He is not currently in a relationship, and it would appear that there is nothing keeping the father from moving to San Diego himself to be closer to his son. In San Diego, the child will grow up in the same house as his half-brother, and the step-father's status as a veteran will allow the child to attend college within California's university system free of charge. The mother has gone out of her way to facilitate communication between the child and his father, while the same cannot be said of the father with respect to communication between the child and his mother. The child's attorney recommended that the court permit the mother to relocate with the child, which "militates in favor of affirming the result the court reached." The dissent's characterization of the mother as putting her own romantic interests ahead of her son's welfare is rank speculation. It is just as likely that the mother, herself an only child, was pursuing marriage aggressively to produce a sibling for her son, before he became much older, and an intact family.

The dissenting judges note, *inter alia*, that the strong father-son bond cannot be sustained through a visitation schedule consisting of longer-than-usual summer visits and some school vacations, which cannot create or maintain the depth of the bond created when the child lives with the parent full time or at least for a substantial portion of each week, nor can videoconferencing through computer interfaces fill the gap; that a 3000-mile relocation virtually precludes the non-custodial parent from maintaining any realistic presence for various events in the child's life; that the mother sought a new romantic partner on Match.com, heedless of where potential mates might be located, and that led directly to her moving to California; that the mother's move "demonstrates that there was nothing more important to her than beginning a new life with her new boyfriend," while "her child came second, and she gave no thought to his need to maintain the close day-to-day bond with his father"; and that "[t]he majority's suggestion that permitting the relocation is particularly appropriate because the father is free to relocate to San Diego in view of his lack of a 'career' or family in New York turns the situation on its head," since "[t]he father should not have to create a completely new life for himself in an unknown community 3,000 miles from his home in order to maintain a close relationship with his son."

In re Alaire K. G. v. Anthony P. G.
(1st Dept., 5/31/11)

* * *

CUSTODY - Relocation
CONTEMPT

The Third Department holds that the court properly declined to hold the father in contempt for violating an order prohibiting him from smoking where he admitted to smoking in the car while the child was present on one occasion and claimed never to have done so again, and, while he acknowledged smoking in his bedroom, claimed not to have known that smoking in another area of the house where the child was not present constituted a violation of the court's order.

The Court also upholds the family court's denial of the mother's request that she be permitted to relocate with the child to California. The mother has been the child's primary caregiver, the child wants to be with the mother in California and has developed a healthy relationship with the mother's new husband and her other children, all of whom were to reside in California, and the mother's new husband has a new job in California that would allow her to stay at home and raise her children However, the father has developed a strong relationship with the child and has made every effort to become an important part of her life, and the proposed move would have a significant and potentially adverse impact on that relationship and seriously jeopardize it. The move would also affect the child's relationship with the father's fiancée, their children, and other members of her extended family who live in the area.

Matter of Munson v. Fanning
(3d Dept., 5/5/11)

* * *

CUSTODY - Relocation

The Fourth Department affirms an order granting the mother permission to relocate with the child to Louisiana, rejecting the father's contention that the request should be denied because his financial circumstances preclude him from traveling to Louisiana to visit the child.

The father pays minimal child support, leaving the mother as the only financial source for the child's health care, child care, and education. The mother testified that the jobs that were available closer to or in New York were temporary, whereas the position she obtained in Louisiana was permanent, year-round, paid a generous salary and offered excellent benefits. Since the father was not closely involved in the child's everyday life, the need to give appropriate weight to the feasibility of preserving the relationship between the father and child through suitable visitation does not take precedence over the need to give appropriate weight to the economic necessity for the relocation.

Matter of Canady v. Binette
(4th Dept., 4/29/11)

* * *

CUSTODY - Relocation

The Second Department upholds a determination permitting the father to relocate with the child to North Carolina after the father requested permission while alleging that he had been "given a unique business opportunity in Hempstead, North Carolina" and planned to operate a restaurant there with his parents; that the mother was residing with her fiancé and was estranged from the older son; and that the father married a woman who had three children from her prior marriage, had one child in common with her, and was the sole support of his family.

Permitting the children to relocate with their father would strengthen the post-divorce family formed by the father. The prospects of a strong post-divorce family with the mother were limited in view of her plans to marry her fiancé since the older child is estranged from the mother and her fiancé.

Matter of Englese v. Strauss
(2d Dept., 4/5/11)

* * *

CUSTODY - Relocation

The Second Department reverses the trial court's determination denying the mother permission to relocate with the children to Pennsylvania.

The mother has at all times served as the primary caregiver, whereas the father had little involvement with the children when the parties lived together.

The court failed to give enough weight to evidence of domestic violence that was often in the presence of the children, permeated the parties' relationship and caused the mother to remove herself and the children from the parties' home. The father denied that there was any domestic violence in the home, but exhibited his temper during the course of the hearing when he left the witness stand while yelling at the mother's attorney and admitted that he engaged in harassing and intimidating behavior after the mother left.

The relocation was an opportunity to escape domestic violence, reside in close proximity to supportive family members, and secure affordable housing. The mother made unsuccessful attempts to obtain affordable housing on Long Island, but was able to secure a suitable rental home in Pennsylvania.

Matter of Clarke v. Boertlein
(2d Dept., 3/15/11)

* * *

CUSTODY - Relocation

In a 3-2 decision, the Third Department permits the mother to relocate with the children from Schoharie County to St. Lawrence County. Since the children were born, the mother has been their primary caregiver and has received little support from the father in raising them. The father tested positive for marihuana and, because he was on probation, was required to enter a treatment facility. The mother has a relationship, and a child, with a man who is gainfully employed and has expressed a willingness to assist her in supporting the children, and she maintains that he enjoys a constructive relationship with the children. The mother, who now lives with the children in cramped quarters at her mother's home in Schoharie County, has leased a residence in St. Lawrence County with the man which is large enough for her entire family and has been approved by the Department of Social Services. The mother would transport the children to Schoharie County so that they can visit with the father.

The dissenting judges agree with the family court that the mother failed to demonstrate that the children's lives may be enhanced economically, emotionally and educationally by the proposed move of approximately 185 miles from the maternal grandmother's home where the children have lived for more than three years.

Matter of Sniffen v. Weygant
(3d Dept., 2/10/11)

* * *

CUSTODY - Relocation
VISITATION

The Third Department finds no error in the family court's decision allowing the child to relocate to Thailand with the father. The Court notes, inter alia, that the father's current spouse had been offered a transfer by the French corporation for which she worked, with lucrative pay and benefits; that the move would severely restrict the mother's parenting time, but that might be positive for the child since the mother (and her parents) had frequently engaged in behavior that had a harmful effect on the child, including making derogatory comments about the father, attempting to manipulate the child to say negative things about the father, using profanity around the child, and showing the child a photograph of a fetus she lost in a miscarriage; that the mother failed to attend many supervised visits; and that the child had visited Thailand with the father to view his potential future home and school and found both desirable, and would be exposed to a different culture and enhanced educational opportunities.

The Court strikes a visitation condition requiring the mother to post a $10,000 bond or $5,000 cash. This imposes upon the mother, who qualified for assigned counsel, an undue burden that is not supported by the record and may serve to totally bar visitation.

Matter of Hissam v. Mancini
(3d Dept., 1/6/11)

* * *

CUSTODY - Relocation

The Fourth Department upholds an order permitting the father to relocate with the children from Arcade, New York to Maryland. The father demonstrated an economic necessity and, although no single factor should be treated as dispositive or given such disproportionate weight as to predetermine the outcome, economic necessity may present a particularly persuasive ground for permitting a proposed move.

Matter of Thomas v. Thomas
(4th Dept., 12/30/10)

* * *

CUSTODY - Relocation

The Third Department upholds an order granting the mother permission to relocate the child to Florida, where the mother already had moved.

There was no meaningful economic enhancement as a result of the move. However, the child expressed her wishes to relocate to Florida in order to maintain her close relationships with her mother and half-sister. In addition, the mother was significantly more involved in managing the child's educational and medical needs, and had concrete plans for the child's future education, while the father presented no evidence regarding his plans for the child's education or childcare if he received custody. There was evidence that the child's relationship with her father would be negatively impacted and that the mother had disparaged the father, but the father had failed to regularly exercise visitation with the child until 2009, and the court crafted a generous visitation schedule that would permit the child to spend more time with the father than she had in the past.

Matter of Vargas v. Dixon
(3rd Dept., 11/24/10)

* * *

CUSTODY - Relocation
- Domestic Violence

The Third Department upholds a determination permitting the mother to relocate with her son to South Carolina where the mother wanted to relocate to start fresh, away from the intimidation of the father who was previously found to have committed acts of domestic violence against her.

The father opposed the move to harass the mother and because he wanted to continue exercising control over the mother and her life. The father was engaged in individual counseling and a domestic violence education program and appeared to have made some progress in addressing his anger issues, but continued to hedge his acknowledgment of and responsibility for engaging in domestic violence.

Many paternal family members live in South Carolina and the mother intended to live near them and receive support from them. While the father expressed concerns that his family members were violent and abused drugs and alcohol, he had not seen some of them in nearly 20 years and had not spoken to any of them in approximately one year. The mother planned to move into a three-bedroom house and had made financial arrangements for the rent, which would improve the situation over her temporary quarters in her mother's home in New York. The mother planned to return to Tompkins County in New York, where her parents and brother live, during the holidays and the summer to permit visitation between her son and the father and between the son and his half sisters.

While the mother violated a temporary order by moving to South Carolina following the hearing but prior to the court's decision, the court not abuse its discretion by declining to hold her in contempt and instead issuing a new temporary order permitting the relocation.

Matter of Sara ZZ.
(3rd Dept., 10/21/10)

* * *

CUSTODY - Relocation

The Third Department upholds an order awarding custody to the mother, who was moving with the child from Freeville in Tompkins County to Dolgeville in Herkimer County, about 2½ hours away.

Since this case involves an initial custody determination, it is not necessary to adhere to a strict application of the factors identified in *Matter of Tropea v. Tropea* (87 N.Y.2d 727). The Court notes that the father had supported the mother from 2002 until 2007, but after the parties' relationship deteriorated, the father's financial assistance significantly decreased, resulting in the mother and her children losing their home and vehicle and causing her to file for bankruptcy. Dolgeville is where the mother grew up and where she lived in 2002, when the father persuaded her to move to Freeville. In Dolgeville, she and the child would have a viable support network that would be able to help care for the child while the mother is at work, as well as housing and employment. Although the child will be residing a significant distance away from the father, the arrangement should not significantly impede his ability to foster a close and loving relationship with his daughter.

Matter of Lynch v. Gillogly
(3d Dept., 3/31/11)

* * *

CUSTODY - Relocation

The Fourth Department grants the mother permission to relocate with the child to Pennsylvania. The mother requested permission to relocate because she and her husband lost their jobs within a relatively short period of time and the husband's health insurance, which also covered the mother and the child, and his severance pay ran out. They depleted their savings and their house was placed into foreclosure. They unsuccessfully attempted to locate jobs in Western New York, and the husband accepted the job in Pennsylvania out of financial necessity.

They also testified that they would transport the child to and from Pennsylvania every other weekend, and offered to pay for a hotel for the father in Pennsylvania on his off-weekends so that he could obtain additional access to the child. The mother also testified that the holiday access schedule would remain the same because she and her husband would be returning to Western New York at those times to visit with their respective families, and the husband purchased video conferencing equipment for his household and the father's household to enable the father and the child to communicate during the week and on the father's off-weekends.

Matter of Butler v. Hess
(4th Dept., 6/17/11)

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CUSTODY - Interference With Parent-Child Relationship
- Relocation

The Second Department, while upholding the family court's determination awarding sole custody to the father and permitting him to return with the child to their native country of Peru, asserts that by removing the child from the marital home and relocating to a distant foreign country without informing the father of the child's whereabouts, the mother severely interfered with the father's relationship with the child and raised a strong probability that she is unfit to act as a custodial parent.

Matter of Ortega-Bejar v. Morante
(2d Dept., 2/22/11)

* * *

CUSTODY

The Second Department reverses an order granting the father's cross-petition for custody, and awards custody to the mother.

The father testified that if he were awarded custody he would transfer the child from her current school in Queens, which was located within walking distance from where the mother resided, to a school in Manhattan near his place of employment. The father's proposed weekday routine would entail waking the child earlier in the morning, traveling 45 minutes on public transportation from Queens to Manhattan, caring for the child in the his office for two hours each day after school, and returning home at 6:00 or 7:00 p.m. The forensic evaluator agreed that this schedule would be "long" and "grueling" for the child.

The mother would provide more direct care to the child due to her work schedule, and was capable of continuing to foster the child's relationship with her father, as she has done in the past.

Matter of Moran v. Cortez
(2d Dept., 6/7/11)

* * *

CUSTODY - Best Interests
- Relocation

The father commenced this proceeding seeking return of the child from Ohio to Essex County and modification of a 2008 custody order. The family court granted the petition, awarded the parties joint legal custody and ordered the mother to either return to Essex County with the child, in which case she would retain primary physical custody, or, alternatively, remain in Ohio and return the child to Essex County, in which case the father would assume primary physical custody and she would be granted liberal visitation.

Upon the mother's appeal, the Third Department reverses. Although the father helped take care of the child while living with the mother in Ohio, the mother was the primary caregiver throughout the child's life. The father did not live with or substantially care for the child, except during brief periods of visitation, after he moved out of the parties' shared home in August 2007, did not know the names of her teachers or friends at school, did not attend parent-teacher conferences, rarely attended her extracurricular activities and has never taken her to a doctor's appointment. It was the father's criminal conduct in Ohio, and a probation condition requiring him to relocate to Essex County, that triggered the disruption of his relationship with his daughter. The father receives Social Security disability benefits due to an unspecified mental illness that apparently includes an "explosive disorder," for which he receives counseling, and he has a lengthy history of alcohol abuse and has had several alcohol-related driving offenses despite not possessing a valid driver's license.

The mother returned to Ohio after losing her job in New York and was pursuing a medical assistant degree, and the parties were lifelong residents of Ohio prior to moving here, and have significant ties to and extended family living in Ohio.

Matter of Baker v. Spurgeon
(3d Dept., 6/30/11)

* * *

CUSTODY - Relocation

The Court grants the mother's application for permission to relocate from Nassau County to Buffalo with the parties' 4-year-old child.

The Court notes that the high cost of living on Long Island in comparison to upstate locations is well known; that the presence of the mother's and father's families will add to the child's socialization and the mother's support network; that a more peaceful setting and relief from domestic violence will add immeasurably to the emotional well being of the mother and the child; that domestic violence, often in the presence of the child, permeates the parties' relationship and caused the mother to remove herself and the child from the parties' home; and that the father has denied any recollection of the alleged violence.

The father could visit with his own family in Rochester and see the child on a regular basis there or in Buffalo. He could visit on weekends and holidays and during school recess and summer vacation. Moreover, Skype transmissions would allow the father and the child to regularly see and hear each other.

Matter of G.M.C. v. K.H.V.
NYLJ, 8/15/11
(Fam. Ct., Nassau Co., 8/2/11)

Grandparents, Siblings and Other Relatives/Extraordinary Circumstances

CUSTODY - Extraordinary Circumstances

The Second Department upholds the family court's determination that the maternal grandmother failed to establish the existence of extraordinary circumstances where the children resided with the grandmother for the majority of their lives, but the mother did not relinquish the care and control of her children, lived with them for significant periods of time, visited when possible during the periods of time that she did not live with them, and provided the grandmother with financial support.

Matter of Richards v. Williams
(2d Dept., 5/24/11)

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CUSTODY - Extraordinary Circumstances

In this custody proceeding involving the mother and the paternal grandmother, the Second Department affirms an order transferring custody to the mother based on a substantial change in circumstances, but also notes that a stipulation in which a parent agrees that a non-parent need not show extraordinary circumstances in a future custody dispute may not be enforced.

Matter of Souza v. Bennett
(2d Dept., 2/15/11)

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CUSTODY - Extraordinary Circumstances

- *Substance Abuse*

While upholding an order awarding custody to the father rather than the maternal grandfather, the Third Department finds no extraordinary circumstances.

The father has a history of drug and alcohol abuse, but, in conjunction with a conviction for driving while under the influence of alcohol, he completed substance abuse classes. That same year, he completed anger management and parenting classes and underwent counseling. Apart from the alcohol-related conviction, the father has been drug-free since May 2007 and has been consistently employed since July 2007. Hr has continuously attempted to maintain contact with the children and, at one point, filed a petition for custody because the grandfather threatened to refuse summer visitation. He now lives with his current wife and her two children in a stable home and is leading a healthy, drug-free life.

Matter of Ferguson v. Skelly
(3d Dept., 1/13/11)

* * *

CUSTODY - Extraordinary Circumstances
- *Best Interests*

Upon the father's appeal, the Third Department, agreeing that extraordinary circumstances were established, affirms an order granting custody to the father of the child's older half-sister, who has fostered a close relationship with the child over the course of several years.

Prior to the mother's death, the father failed to play any significant role in the child's life, visiting inconsistently and failing to attend to the child's emotional needs. A psychologist opined that the father had emotionally abandoned the child and demonstrated a fundamental lack of understanding of her needs. The father often left the child with other adults even when he did pick her up for visits, and did not attend her school conferences or special education meetings until after the mother's death, did not know her teachers' names and never helped her with homework even though he knew she needed special assistance.

During the child's time with him, the father had not provided her with enough food, nor did he supply her with essentials such as soap or deodorant. When the child sustained an injury while performing physical work for the father's brother, neither the father nor his brother furnished appropriate medical care. The father knew that his brother had "badgered" the child about her desire to live with her half-sister's father, and that the brother had threatened the child by stating that the brother's conduct should not be mentioned in court; despite this knowledge, the father did not intervene or seek to protect the child.

During the period in which the father had custody after the mother's death, the child felt isolated from her other family contacts and had limited interaction with them at a time when any responsible caretaker should have recognized that such support was essential.

Matter of Pettaway v. Savage
(3d Dept., 8/18/11)

* * *

VISITATION - Grandparents

The Second Department reverses an order which, after a hearing, dismissed the maternal grandmother's visitation petition for lack of standing where the children lived with her intermittently for the first 2¼ years and 1¼ years of their lives respectively, and, after the filing of a neglect petition against the children's mother, the children were placed with petitioner but were later removed due to the condition of her home and placed with their paternal grandmother and have resided with her since.

Petitioner has alleged that the paternal grandmother frustrated her relationship with the grandchildren, and has established that she made a sustained and concerted effort to maintain contact with the children after they were removed.

Matter of Sylvia W. v. Azalee G.
(2d Dept., 12/14/10)

* * *

TERMINATION OF PARENTAL RIGHTS - Disposition
- Consolidation
CUSTODY/VISITATION - Grandparents
- In Camera Interview
- Consolidation

After noting that the family court properly consolidated the dispositional hearing in the permanent neglect proceedings with a hearing on the grandmother's custody/visitation petition, the Third Department affirms an order dismissing the grandmother's petition and transferring custody of the children to petitioner for purposes of adoption by their foster parents.

The grandmother has helped care for her grandchildren since birth, but allowed the mother to assume custody in violation of an order placing the children in the grandmother's custody. The grandmother has engaged in inappropriate and aggressive conduct toward petitioner's employees in the presence of the children. The foster parents, one of whom has a graduate degree in developmental psychology, have provided a stable, loving home and the children are happy, thriving in school, and making progress in therapeutic counseling that addresses their behavioral problems. Given the grandmother's open hostility to the foster parents and opposition to the adoption, visitation was properly denied.

The Court, while noting that the children's love for and attachment to their grandmother were not disputed, also concludes that the family court did not abuse its discretion in concluding that there was no real value in interviewing the children where there was testimony about the children's emotional turmoil and delicate age.

Matter of Carolyn S.
(3d Dept., 1/27/11)

Incarcerated Parents

VISITATION - Incarcerated Parent

The family court awarded custody to the mother, and granted the father, an elementary school teacher who pleaded guilty to sexually molesting a number of boys in his class and was sentenced to 12 years in prison, four visits per year with the child at the correctional facility where the father is confined or another facility that is within 150 miles of the mother's residence. The court ordered that the child be accompanied by a responsible adult (other than the mother) with whom the child is familiar and who will cooperate with the parents in effectuating each visit, that the child and her escorts engage in counseling in preparation for and subsequent to each visit, and that the father have monitored telephone contact and written communication with the child. The mother was directed to bear the cost of the counseling and telephone calls.

In a 3-2 decision, the Third Department upholds the visitation provisions. According to the mother, and corroborating testimony by others, the father enjoyed "[a] decent father-daughter relationship" prior to his arrest, and the child has now begun to inquire about his whereabouts. The child has received mail from the father on a regular basis, and the child's paternal aunt and paternal grandparents are willing to transport her to the correctional facility and comply with the mother's request that they not discuss the circumstances surrounding the father's incarceration and attend counseling in order to facilitate the visits. The father has agreed to abide by any limitations the mother imposes with respect to the content of the conversations between himself and the child. There was conflicting expert testimony, and the majority, like the family court, is persuaded by the father's witness, a licensed psychologist with significant experience in the field of child psychology, who concluded that visitation would not be traumatic for the child and could be facilitated by therapeutic counseling. The expert noted that the child seems to be comfortable in new situations and is quite inquisitive, that children who are separated from their parents, without a clear understanding, tend to develop feelings of abandonment, and that although the child has not seen her father since she was 18 months old, there is an established relationship.

However, the mother should not be required to pay for the telephone calls and the counseling for the child and her escorts. Requiring her to pay would deplete the resources available to the child. The father should bear the responsibility (or pursue third-party or family assistance) to pay expenses associated with visitation.

The dissenting judges note that the record is bereft of any evidence that the father attempted to obtain treatment for his urges and conduct prior to his arrest or incarceration, or thereafter. He has refused to acknowledge his conduct or his need for sex abuse counseling. More than three years have elapsed since he has seen the child.

Matter of Culver v. Culver

(3d Dept., 3/3/11)

Post-TPR/Adoption Contacts

VISITATION - Post-Termination
- Siblings

While affirming an order dismissing the mother's post-termination of parental rights petition for visitation due to a lack of standing, the Third Department also concludes that petitioner, who is the children's sister, has failed to show that equitable circumstances exist that support standing under DRL § 71.

The Court also rejects petitioner's claim that the statutory scheme, as applied to her, is unconstitutional because parents who voluntarily surrender their parental rights may seek post-termination visitation but a parent whose parental rights have been terminated by a judicial determination finding permanent neglect may not. Petitioner's parental rights were terminated because she defaulted on the petition alleging permanent neglect, not because she challenged the allegations or refused to surrender her children.

Matter of Carrie B. v. Josephine B.
(3d Dept., 2/3/11)

* * *

VISITATION - Post-Adoption
TERMINATION OF PARENTAL RIGHTS – Surrenders

The Fourth Department holds that the family court properly applied principles of contract law in determining that the mother was not entitled to specific performance of a post-adoption contact agreement, which was incorporated into a conditional surrender order, unless she demonstrated that she was ready, willing and able to perform her obligations under the contract regardless of the other party's breach.

The agreement provided that it would be voided if the mother missed two visits within any 12-month period. The mother missed a June 2008 visit because she was incarcerated and, although the adoptive parents ceased visitation after August 2008, she would have missed the December 2008 visit as a result of her incarceration. Therefore, she failed to demonstrate that she was ready, willing and able to perform her obligations under the agreement.

However, the family court erred in failing to determine whether enforcement of the agreement was in the best interests of the child.

Matter of Mya V.P.
(4th Dept., 12/30/10)

V. PATERNITY/SUPPORT

SUPPORT - Right To Counsel/Due Process

A United States Supreme Court majority holds that the Fourteenth Amendment's Due Process Clause does not automatically require the State to provide counsel at a civil contempt hearing to an indigent defendant from whom support is sought when incarceration is a possibility, at least where the custodial parent seeking support has no counsel. However, the State must have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question of whether the defendant is able to comply with the order. These safeguards include: notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; the use of a form (or the equivalent) to elicit relevant financial information; an opportunity at the hearing for the defendant to respond to statements and questions about his financial status; and an express finding by the court that the defendant has the ability to pay. In this case, defendant received neither counsel nor the benefit of alternative procedures like those the Court has described.

The Court does not address contempt proceedings where the underlying support payment is owed to the State - for example, for reimbursement of welfare funds paid directly to the custodial parent. In such proceedings, the Government is likely to have counsel or some other competent representative.

The dissenting judges agree that the Constitution does not mandate appointed counsel, and would not reach the question of whether there were adequate procedural safeguards since that issue was not raised below. The dissent also suggests that the *Matthews v. Eldridge* balancing test applied by the majority does not account for the interests of the child and custodial parent.

Turner v. Rogers
2011 WL 2437010 (U.S. Sup. Ct., 6/20/11)

* * *

PATERNITY - Equitable Estoppel

On behalf of the mother, who lives in Georgia with the child, petitioner initiated this proceeding under the Uniform Interstate Family Support Act, seeking an order of filiation and support. After respondent requested genetic paternity testing, the attorney for the child moved to preclude testing and to equitably estop respondent from denying paternity because of his established relationship with the child. The family court found that the record was insufficient, and ordered the mother to produce the child so the court could conduct an interview.

The Second Department finds no error. While remote participation by audiovisual and electronic means may sometimes be sufficient, the family court, recognizing that determination of the equitable estoppel issue required a full and careful inquiry with the child into his relationship with respondent, properly concluded that the child’s presence in New York was necessary.

Matter of Nassau County Department of Social Services v. Alford
(2d Dept., 3/29/11)

* * *

PATERNITY - Equitable Estoppel
- Collateral Estoppel
- Acknowledgment Of Paternity

The Second Department reverses an order which, after a hearing, dismissed a proceeding seeking to vacate an acknowledgment of paternity pursuant to FCA § 516-a. The record establishes that petitioner executed the acknowledgment due to a material mistake of fact. The family court credited petitioner's testimony that respondent told him that he was the child's biological father and that he believed her because they had engaged in sexual relations during the relevant time period and already had one child together, but that he later learned, from respondent's family, that she had another sexual partner during the relevant period.

The family court erred in concluding that petitioner was estopped from denying paternity. No parent-child relationship existed between petitioner and the three-year-old child, who had only limited contact with petitioner during the first 18 months of her life, and virtually no contact thereafter. There was no evidence that the child would suffer irreparable loss of status, destruction of her family image, or other harm to her physical or emotional well-being if this proceeding were permitted to go forward.

The Court also concludes that a prior order of support issued with petitioner's consent does not have collateral estoppel effect, since petitioner, proceeding pro se, informed the family court that he intended to move to vacate the acknowledgment of paternity and filed the instant petition the same day.

Matter of Derrick H.
(2d Dept., 3/29/11)

* * *

PATERNITY - Right To Counsel

In this paternity proceeding in which petitioner seeks to be declared the father, the Court, citing FCA §262(b), holds that he has a constitutional right to counsel.

"A petitioning father . . . who seeks recognition of his paternity as well as the opportunity to establish a relationship with his child and to provide a father's care, affection and financial support to his child has constitutional rights no less worthy of due process protection than a respondent who seeks to protect his property and liberty interests against erroneous paternity determinations and orders of support."

Matter of Felix O. v. Janette M.

(Fam. Ct., Kings Co., 8/14/08)
http://courts.state.ny.us/Reporter/3dseries/2008/2008_28553.htm

VI. ETHICAL ISSUES AND ROLE OF ATTORNEY FOR THE CHILD

CUSTODY - Right To Counsel - Child

The Fourth Department finds no error where the attorney for the approximately nine-year-old child properly advised the court that the child had expressed the wish to live with his mother, and then advocated that he remain in the grandfather's custody based upon the attorney's determination, in accordance with Chief Judge's Rule 7.2, that the child lacked the capacity for knowing, voluntary and considered judgment.

Matter of Rosso v. Gerouw-Rosso
79 A.D.3d 1726 (4th Dept., 12/30/10)

* * *

ABUSE/NEGLECT - Right To Counsel

The Second Department upholds the denial of a motion made by the children's attorney for an order directing the Suffolk County Department of Social Services to refrain from interviewing the children concerning any issues beyond those related to safety, without 48 hours notice to the attorney.

While the child has a constitutional and statutory right to legal representation, and Rule 4.2 of the Rules of Professional Conduct protects the child's right to counsel by prohibiting an attorney representing another party in the litigation from communicating with or causing another to communicate with the child without the prior consent of the attorney for the child, Rule 4.2 applies only to attorneys and does not prohibit a DSS caseworker from interviewing a child entrusted to the agency's care or justify a significant restriction on the agency's access to the child by imposing a requirement that the caseworker notify the child's attorney before interviewing the child on issues unrelated to safety.

DSS has constitutional and statutory obligations which distinguish the role of a DSS caseworker from that of an attorney representing a parent or another party. Once a child is placed in foster care, the agency has a duty to conduct family assessments and develop a plan of services while consulting with the family and each child over 10 years old, whenever possible (18 NYCRR § 428.6[a][1][vii]; see Social Services Law § 409-e). Additionally, after the first 30 days of placement, a DSS caseworker is required to have monthly "face-to-face" contact with the child for the purpose of "assess[ing] the child's current safety and well being, to evaluate or re-evaluate the child's permanency needs and permanency goal, and to guide the child towards a course of action aimed at resolving problems of a social, emotional or developmental nature that are contributing towards the reason(s) why such child is in foster care" (18 NYCRR § 441.21[c][1]). Thus, DSS has a mandate to maintain regular communications with a child in foster care on a broad range of issues that go beyond the child's immediate health and safety.

Matter of Cristella B.
(2d Dept., 10/5/10)

Practice Note: The Legal Aid Society submitted an amicus curiae brief in this case, asking the Second Department to limit the authority of caseworkers to interfere with the child's relationship with counsel by speaking to and possibly "lobbying" the child with respect to fact-finding issues and other litigation-related matters. It appears that the court, while finding that the order requested by the children's attorney would impair caseworkers' ability to comply with statutory and regulatory mandates, did not reach the issues addressed by The Legal Aid Society. Perhaps the court, if this had been a case involving such overreaching by the agency, would have found it objectionable and banned it. Indeed, in *In re Tiajianna M.*, 55 A.D.3d 1321 (4th Dept. 2008), which was cited by the Second Department, the child's attorney requested an order similar to that sought in this case. The Fourth Department, while finding no error in the family court's ruling denying the request, did note that the family court "restricted petitioner's scope of questioning to matters involving the safety of the child and would preclude, if appropriate, any statements made by the child that might be against her interest." 55 A.D.3d at 1323.

* * *

VISITATION - Right To Counsel - Child
- Attorney's Fees

The Court holds that although there is no statute which specifically authorizes a court to direct a grandparent to pay the fees of the child's attorney in a proceeding brought under DRL § 72, the Court has authority under its parens patriae powers to appoint an attorney for the child and require a petitioning non-parent to contribute to the attorney's costs.

Judges in the matrimonial parts of the Supreme Court and in the Family Court exercise this inherent authority daily when making best interests determinations; if the court believes that appointment of an attorney for the child will enhance its ability to make a decision in the child's best interests, it must exercise its discretion to appoint an attorney and allocate the cost reasonably between the parties.

People ex rel. KM v. SF et al.
(Sup. Ct., N.Y. Co., 2/4/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21054.htm

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CUSTODY - Right To Counsel - Child
ETHICS - Ex Parte Submissions - Report By Attorney For Child

The Second Department reverses an order awarding temporary custody to the mother, and awards temporary custody to the father, concluding that the Judicial Hearing Officer erred in relying on the report of the attorney for the child and refusing to take testimony and receive documentary evidence offered by the father to refute the report. While attorneys for the children, as advocates, may make their positions known to the court orally or in writing, presenting reports

containing facts which are not part of the record or making ex parte submissions to the court are inappropriate practices.

Matter of Swinson v. Brewington
(2d Dept., 5/24/11)