

**Can the Court Order Post Termination Contact?**  
**Margaret A. Burt 9/11**

**The FOURTH Dept.'s Position:**

**Matter of Kahlil S., 35 AD3d 1164 (4<sup>th</sup> Dept. 2006)**

The Fourth Department rejected its own long standing precedent as well as rulings of the three other Appellate Divisions in this unexpected decision regarding a mother's termination on mental illness grounds. The court affirmed that the lower court properly found that the mother was unable to care for the children for the foreseeable future due to her mental illness. However, the Appellate Court then remanded the matter for an admittedly non mandated dispositional hearing on the issues of "posttermination contact". The Appellate Court ruled specifically that "Family Court, may in those cases in which the court deems it appropriate, exercise its discretion in determining whether some form of post- termination contact with the biological parent is in the best interests of the child". The Appellate Court found that this was appropriate to consider in cases where the termination was on the grounds of mental illness, mental retardation and permanent neglect. The court acknowledged that it was reversing its own precedents which had clearly held that the court had no such discretion. The court did not cite any statutory authority for its decision. The court also did not define "posttermination" contact in the sense of whether it meant only before an adoption or after an adoption as well. The lower court is to review the best interests of the children by considering their ages, the bond they have with the mother and the likelihood of adoption.

**Matter of Thomas 35 AD3d 1289 (4<sup>th</sup> Dept. 2006)**

In a similar case to the **Kahlil** matter above, the Fourth Department remanded a mental illness termination matter back to Chautauqua County for a dispositional hearing on the question of "posttermination contact".

**Matter of Bert M., 50 AD3d 1509 (4<sup>th</sup> Dept. 2008)**

The Fourth Department did remand this TPR for a new dispositional hearing on the question of the court ordering "post termination contact" with the parents. The Appellate Court commented that the hearing had been held prior to the **Kahlil S.** decision. The lower court must consider in a permanent neglect termination if the children's best interests warrant ongoing contact with the birth parents whose parental rights are terminated.

**Matter of Diana M.T., 57 AD3d 1492 (4<sup>th</sup> Dept. 2008)**

An Allegany father had requested post termination visitation but the lower court properly denied the request as the father failed to establish that the visitation would be in the girl's best interests. (no comments on facts)

**Matter of Kahlil S., 60 AD3d 1450 (4<sup>th</sup> Dept. 2009)**  
**and Matter of Terrell Z., 60 AD3d 1451(4<sup>th</sup> Dept. 2009)**

In 2006, the Fourth Department reversed all precedent and ruled that Family Court had authority to order post termination contact in terminations based on permanent neglect, mental illness and mental retardation in **Matter of Kahlil S. 35 AD3d 1164**. That matter was remanded for a best interest hearing in Erie County Family Court. At the remanded hearing, the court ordered that there should be no post termination contact with one of the children and that "reasonable" post termination contact should occur with the second child. The mother then appealed both determinations. Both findings were affirmed by the Fourth Department as appropriate based on the evidence regarding each child's best interests.

**Matter of Josh M., 61 AD3d 1366 (4<sup>th</sup> Dept. 2009)**

While upholding a mental retardation termination of a father's rights, the Fourth Department remanded the disposition back to Ontario County Family Court for failing to hold a *Kahlil* inquiry about post adoption visitation. The lower court had urged the parties to consider having the father surrender with some agreement for visitation after the child's attorney and the court expressed the opinion that post termination visitation might be appropriate but the father refused to surrender when the parties could not reach agreement on the terms. The lower court then ordered a termination without holding a hearing to determine if post termination should be ordered as being in the child's best interests.

**Matter of Christopher J., 60 AD3d 1402 (4<sup>th</sup> Dept. 2009)**  
**and Matter of Christopher J., 63 AD3d 1662 (4<sup>th</sup> Dept. 2009)**

In reviewing a Oswego County Family Court's revocation of a suspended judgment in a permanent neglect termination, the Fourth Department ruled that the mother did not ask the court to consider post termination contact or to hold a hearing on that issue and that in any event, she failed to establish that the contact would be in the children's best interests. The court ruled exactly the same as to the father in the second matter.

**Matter of Samantha K., 59 AD3d 1012 (4<sup>th</sup> Dept. 2009)**

The Fourth Department found that the terminating the fathers rights , while allowing the father to still have “visitation rights” was in the child’s best interests. (no real comments on reasoning)

**Matter of Tryston M., 66 AD3d 1448 (4<sup>th</sup> Dept. 2009)**

While affirming the Jefferson County Family Court’s termination of a mother’s rights, the Fourth Department continued its position that Family Court has jurisdiction to order post termination contact and remanded the case for a **Kahlil** hearing. (DSS agreed to the remand)

**Matter of Imani W., 26 Misc3d 792 (Monroe County Family Court 2009)**

Monroe County Family Court denied a mother any post termination contact with her daughter after a **Kahlil S.** hearing. The court found it was not in the child’s best interests to have contact. The child had been in foster care since birth and was now four years old. The mother’s rights had been terminated after a contested mental illness termination. The foster mother planed to adopt the child and fears for her own and the child’s safety if visits were ordered given the mother’s mental state and stability. The foster mother has been reported to the SCR hotline over 40 times while the child has been in her home and has reason to believe that it is the mother who is reporting her. The mother has tried to bring criminal actions against the caseworker. The Medical Motor service canceled their service contract to bring the child to the mother for visitation after the mother was aggressive to the drivers. When the mother is suffering from mental instability, visitation becomes sporadic and she has behaved inappropriately at visits, threatening and using profane language. At the fact finding, the expert testimony established that the mother had a lack of insight into her mental illness. The mothers’ own testimony showed that she did not comprehend what post termination contact even meant, persisting in seeking a return of the child. Even though her rights have been terminated, the mother has advised the child that she is trying to get the child back and that she will see her soon. The conflicting messages that the child is receiving will confuse her and will not establish permanency.

**Matter of Maximus H. 25 Misc3d 1241(A) (Monroe County Family Court 2009)**

A Monroe County father’s request for post termination **Kahlil S.** visitation was denied by Family Court. The father was incarcerated and had been since the child was born and only knows the child due to court ordered one hour bimonthly visits that are supervised. The father was released from prison just a few months before the hearing and the court at that time had increased his visits to twice a week but he

was not consistent with his visitation. The foster mother has had the child in her care for four years and wishes to adopt him. She is “not comfortable at all” with post termination visitation and does not want to supervise them and feels that they can’t be unsupervised due to the father’s prior convictions and violent history. The caseworkers testified that the child would become clingy, he would wet the bed and exhibit anger and aggression after his jail visit with the father. The child did not want to go on the visits, would ask for “mommy” and was shy with his father. This continued even after the father left prison but the father was inconsistent with these visits and engaged in some questionable behavior. The father failed to appear for the last court date of the dispositional hearing, did not testify himself and failed to offer proof that any visitation was in the child’s best interests. The child considers his foster parents to be his parents and does not really know his biological father as his father.

**Matter of Malashia B., 71 AD3d 1495 (4<sup>th</sup> Dept. 2010)**

The Fourth Department affirmed the appeal of a violation of a suspended judgment from Onondaga County where the court had also held a “Kahlil” hearing. In reviewing that hearing, the Fourth Department concurred with the Family Court that the mother should not have post termination contact. She has only had supervised visitation twice a week with the child since birth. There was a bond with the birth mother, but the now 3 year old had a strong bond with the foster parents who wanted to adopt. The foster parents testified that the child tended to have temper tantrums and act out after visits with her birth mother.

**Matter of Andrea E., 72 AD3d 1617 (4<sup>th</sup> Dept. 2010)**

No post termination visitation was warranted as mother did not ask the court for any, did not ask for a hearing and failed to establish that any contact would be in the child’s best interests.

**Matter of Sean H., 74 AD3d 1838 (4<sup>th</sup> Dept. 2010)**

Oneida Family Court did not err in denying post termination visitation as mother failed to prove that the visits were in her children’s best interests. The mother had only visited the children twice in the 8 months before the hearing. The lower court did not err in failing to take testimony from the children. The court was well aware that the children loved their mother, missed her and wanted to visit her. The court considered the children’s position when reaching the decision to deny visits.

**Matter of Micah H., 74 AD3d 1837 (4<sup>th</sup> Dept. 2010)**

Onondaga County Family Court correctly denied post termination visitation for a mother. She did not establish that contact was in the child’s best interests.

**Matter of Tumario B., 83 AD3d 1412 (4<sup>th</sup> Dept. 2011)**

Although the Fourth Department agreed that Onondaga County Family Court did not err in failing to enter a suspended judgment for this mother in this matter, the court did remand the case for a hearing on post termination contact. The mother did not request this in the lower court and only argued for it for the first time on appeal but the Fourth Department found that in the interest of justice the matter should be remitted for a hearing on that issue. The evidence suggested that the adoptive parents might support such visitation and the AFC also supports it. Currently the adoptive parents do visitation already with the birth mother regarding a sibling that they have already adopted.

**Matter of Hassan E., 83 AD3d 1653 (4<sup>th</sup> Dept. 2011)**

The mother did not ask the court to consider post-termination contact and did not prove that any contact would be in the child's best interests.

**Matter of Mya B., \_\_AD3d\_\_, dec'd 5/6/11 (4<sup>th</sup> Dept. 2011)**

In affirming a termination of an Onondaga County father's rights, the Fourth Department indicated that the father did not ask for post-termination contact rights, he did not preserve the issue and in any event he failed to establish that it would be in the child's best interests.

CONTRAST TO THE OTHER DEPT'S :

**First Dept.**

**Matter of Valentino G., 36 AD3d 439 (1<sup>st</sup> Dept. 2007)**

The First Department commented that there has been an agreement with the agency, the foster mother and the law guardians to continue to visit the child and so the court will not "grant respondent's alternative request for an order" for visitation post termination. (Note: court cited caselaw that open adoption cannot be ordered in any event)

**Third Dept.**

**Matter of James X. 37 AD3d 1003 (3<sup>rd</sup> Dept. 2007)**

In response to the respondent's request that the court consider allowing him visitation with the child even if his rights were terminated, the Third Department stated that "... It is axiomatic that when parental rights are terminated pursuant to an adversarial proceeding that results in a finding of permanent neglect, the court

lacks the authority to permit visitation to a respondent”. (Note: No mention was made of the 4<sup>th</sup> Department’s **Kahlil S.** ruling just 2 months earlier that allowed court to consider ordering post termination visitation on a mental illness TPR)

**Matter of Melissa DD., 45 AD3d 1219 (3<sup>rd</sup> Dept. 2007)**

The Third Department ruled that given the parental rights were being terminated instead of surrendered, the Family Court “had no authority to permit post termination visitation” between the mother and the children. (Note: no comment re the 4<sup>th</sup> Departments ruling in **Kahlil S** )

**Matter of Jasmine Pauline M., 62 AD3d 483 (1<sup>st</sup> Dept. 2009)**

The lower court was not required to issues any order regarding post termination visitation. (note: no reference made to the 4<sup>th</sup> Dept’s **Kahlil S.** ruling)

**Matter of Xionia VV., \_\_\_AD3d\_\_\_, dec’d 11/24/10 (3<sup>rd</sup> Dept. 2010)**

The Third Department finally specifically addressed the Fourth Department’s 2006 ***Kahlil S.*** ruling on the authority of the Family Court to order post termination visitation. The father in this Chemung County case appealed his termination solely on the grounds that he should have been granted post termination contact with the child and cited the Fourth Department’s ongoing rulings in this regard. The Third Department, citing its own cases specifically stated that .... “Family Court had no authority to grant it (post termination contact) in this adversarial proceeding...” Even though the Appellate Court made this clear statement, they also added that the father had not raised and preserved the issue at trial and that he had “at best” an “attenuated” relationship with the child with somewhat limited contact over the years the girl had been in foster care and the father had been in prison.

**BUT:**

**Second Dept**

**Matter of Selena C., 77 AD3d 659 (2<sup>nd</sup> Dept. 2010)**

The Second Department reviewed a mental illness TPR from Brooklyn and remanded the matter on the issue of the lower court holding a hearing on the issue of the child’s best interests in visitation with the mother post termination. The court cited the *Lovell Raeshawn McC* 308 AD2d 589 case to the effect that there is no statutory authorization for a court to order ongoing visitation but then sad that

courts have an “inherent authority” to provide for visitation between the child “and a member of his or her birth family” when it is in the best interest of the child and “does not unduly interfere with the adoptive relationship. The court cited the 4<sup>th</sup> Dept. *Kahlil S* case as well as *Corinthian Marie S.* 297 AD2d 382 (which some of us believed had been limited on it’s facts by *Lovell Raeshawn McC.*)