SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 8, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Renwick, Manzanet-Daniels, Mazzarelli, Andrias, JJ.

4091 In re Daniella A., and Another,

Children Under the Age of
Eighteen Years, etc.,

Administration for Children's Services,
Petitioner-Appellant,

Jessica A.,
Respondent-Respondent.

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Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for appellant.

Freshfields Bruckhaus & Deringer US LLP, New York (Scott A. Eisman of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the children.

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Order, Family Court, Bronx County (Valerie Pels, J.), entered on or about July 1, 2015, which granted respondent mother's motion to modify an order of disposition entered on or about July 17, 2014, to the extent of entering in its stead a suspended judgment (the conditions of which were deemed satisfied), dismissing the neglect petition, vacating the finding of neglect, and releasing the subject children to the mother's care, unanimously affirmed, without costs.

For the reasons we explained in *Matter of Leenasia C.* (appeal No. 4092 [decided simultaneously herewith]), we reject petitioner agency's argument that, pursuant to Family Court Act § 1061, the Family Court was not authorized to modify the dispositional order to the extent of granting a retroactive suspended judgment. We also find that the mother's strict compliance with the dispositional order, and her clear dedication to ameliorating the conditions that led to the neglect finding, constituted "good cause" warranting the relief requested (*see Matter of Bernalysa K. [Richard S.]*, 118 AD3d 885, 885 [2d Dept 2014]; *see also Matter of Alexander L. [Andrea L.]*, 109 AD3d 767, 767 [1st Dept 2013], *lv dismissed* 22 NY3d 1056 [2014]; *Matter of Araynah B.*, 34 Misc 3d 566, 582 [Fam Ct, Kings County 2011]). Moreover, in vacating the neglect finding, the Family Court properly took into account the mother's ability to find work in her chosen field, as the mother's employability is in the best interests of the children (*see Matter of Whitley v Whitley*, 33 AD3d 810, 810 [2d Dept 2006], *lv denied* 8 NY3d 809 [2007]).

Given the foregoing determination, we do not reach the

parties' argument regarding whether dismissal of the neglect petition is appropriate under Family Court Act § 1051(c).

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

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 8, 2017

CLERK

Acosta, P.J., Richter, Webber, Kahn, JJ.

4298 Mark Schmidt, Index 151406/13
Plaintiff-Respondent,

-against-

One New York Plaza Co. LLC, et al.,
Defendants-Appellants.

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McManus Ateshoglou Adams Aiello & Apostolakos, PLLC, New York (Christopher D. Skoczen of counsel), for appellants.

Berson & Budashewitz, LLP, New York (Jeffrey A. Berson of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered January 25, 2017, which, in this personal injury action, denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs and the motion granted. The Clerk is directed to enter judgment accordingly.

We find that the motion court erred in denying defendants' motion for summary judgment.

Plaintiff testified that he was employed by nonparty Michael Stapleton Associates, an agency that provides security services to defendants. On the day of his accident, plaintiff was assigned to New York Plaza with his bomb-sniffing dog and was responsible for inspecting trucks as they sought entry to the loading dock at the premises. Plaintiff testified that

immediately prior to his accident, he was walking down the service ramp with his dog. As he descended the ramp, a delivery person was ascending the ramp with a pallet. Plaintiff recalled that he was on the outer side of the service ramp with his dog trailing behind him. According to plaintiff, as the person with the pallet passed him, he turned to make sure that his dog did not attempt to inspect the pallet. As he turned back to continue down the ramp, he took a step with his left foot that came down at the outer edge of the ramp, with the rear of his foot overhanging the edge of the ramp. Plaintiff stated that with his weight on his left foot, his ankle rotated inward, causing him to lose his balance and fall backward off the ramp.

Defendants moved for summary judgment dismissing the complaint, arguing that plaintiff could not establish that his accident took place as the result of any negligence on the part of defendants in the design or maintenance of the service ramp. In support of their motion, defendants submitted an architect's report from their expert which concluded that the design and construction of the ramp did not violate the New York City Building Code or any industry-wide standard.

In opposition, plaintiff averred that its expert would testify that the service ramp was defective and that the defects were in violation of "good, proper, and accepted building and

engineering standards" for ramps in equivalent buildings and were in violation of the New York City Building Code and industry standards at the time of construction.

The motion court denied defendants' motion for summary judgment and found that they failed to establish a prima facie entitlement in that defendants' expert affidavit only addressed the Building Code and Occupational Safety and Health Administration (OSHA) regulations, and failed to address other types of industry-wide standards that might be applicable to determine whether defendants were negligent.

On a motion for summary judgment, the moving party has the initial burden of establishing its entitlement to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The facts must be viewed "in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). Summary judgment should not be granted where there is any doubt as to the existence of triable issues or there are any issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Here, defendants established prima facie entitlement to summary judgment by establishing that the ramp was not designed in a negligent manner and was not in violation of

any rules, or standards applicable at the time of construction.

Defendants' expert report stated that the Building Code applicable to the premises, which was enacted in 1968 (*see* 1968 Building Code of City of NY [Administrative Code of City of NY] tit 27), was silent concerning the components of a loading dock, delivery truck parking, material loading and unloading, and in regard to an access ramp between the truck parking floor and the top of the loading dock. As a result, the expert concluded, the ramp did not violate the Building Code. The expert also concluded that because the service ramp was not part of the required egress from the loading dock area, those parts of the Building Code applicable to "Means of Egress" did not apply.

Based on his conclusion that the Building Code did not contain sections specifically applicable to the instant facts, defendants' expert reviewed the standards promulgated by OSHA. He concluded, however, that no section of OSHA applied to the instant facts. He also found that National Fire Protection Agency "Life Safety Code" did not apply to the instant facts. Defendants' expert opined that the portion of the curb of the ramp where plaintiff was alleged to have tripped was not a foreseeable pedestrian path, since it runs parallel, not across the path of pedestrians walking up and down the ramp. He noted that the use of bright yellow paint to alert pedestrians to the

presence of walkway conditions was proper and in compliance with the American Society for Testing and Materials. Overall, defendants' expert concluded that plaintiff had not cited to any valid authority in support of his contention that the ramp caused the accident, and established that the ramp did not violate any standards referenced by plaintiff's expert in his expert exchange.

In opposition, plaintiff failed to raise a triable issue of fact as to any negligence on the part of defendants (*see Hotaling v City of New York*, 55 AD3d 396, 398 [1st Dept 2008], *affd* 12 NY3d 862 [2009]).

The facts here are similar to those in *Hotaling v City of New York*. In *Hotaling*, the plaintiff was severely injured when he was hit in the head with a swinging door while in the process of exiting a school during a fire drill. The jury found that the swinging double doors were negligently designed. We reversed, holding that the design of the building did not violate building safety standards applicable at the time it was built. The plaintiffs, arguing that the "human factors" design standards were applicable, provided expert testimony that the design of the double doors was unsafe, and that the rate of speed at which the doors opened was excessive. The plaintiffs' expert did not state that the design of the doors violated the New York City Building

Code in effect when the school was constructed in 1970. However, we were persuaded by defendants' expert who testified that the building design, including the doors leading from the hallway to the stairwell, fully complied with the Building Code as it existed in 1970 when the building was built. He disputed the findings of plaintiffs' expert that the design of the double door violated any other industry standards. The Court held that the plaintiffs failed as a matter of law to make out a prima facie case of negligent design.

Here, plaintiff failed to raise a triable issue of fact as to any violation of any industry-wide standard at the time of construction. He failed to point to any industry-wide standards that may be applicable. Plaintiff's expert failed to "offer concrete proof of the existence of the relied upon standard as of the relevant time, such as a published industry or professional standard or evidence that such a practice had been generally

accepted in the relevant industry at the relevant time" (*Hotaling* at 398, citing *Jones v City of New York*, 32 AD3d 706, 707 [1st Dept 2006] [internal quotation marks omitted]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 8, 2017

CLERK

Acosta, P.J., Richter, Webber, Kahn, JJ.

4325-
4326

In re Syriah J., and Another,

Children Under Eighteen Years of Age, etc.,

Esther J., et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

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The Family Defense Center and The Innocence Network,
Amici Curiae.

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Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Heather L. Navo of counsel), for Esther J., appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for Jamesha J., appellant.

Zachary W. Carter, Corporation Counsel, New York (Mackenzie Fillow of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the children.

Winston & Strawn LLP, New York (Mark E. Rizik Jr. of counsel), for the Family Defense Center, amicus curiae.

Proskauer Rose LLP, New York (Russell L. Hirschhorn of counsel), for the Innocence Network, amicus curiae.

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Order, Family Court, Bronx County (Valerie A. Pels, J.), entered on or about February 2, 2016, which, to the extent appealed from, found, after a hearing, that respondent

grandmother and respondent mother abused the child Syriah J. and derivatively abused the child Queenzephanyia E., unanimously affirmed, without costs.

The evidence submitted on petitioner's direct case supports the court's finding that respondents abused Syriah by showing that, while she was in their care, Syriah suffered an injury that would not ordinarily occur absent an act or omission of the person responsible for her care (*see e.g. Matter of Philip M.*, 82 NY2d 238, 243-244 [1993]; *Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 74 [1st Dept 2012]). "[Petitioner] was not required to establish whether the mother or the [grandmother] actually inflicted the injuries, or whether they did so together" (*Matter of Nyheem E. [Jamila G.]*, 134 AD3d 517, 518 [1st Dept 2015]).

A preponderance of the evidence supports the court's conclusion that Syriah's injuries were inflicted and not accidentally caused. She suffered a traumatic brain injury, which resulted in anoxic ischemic encephalopathy and subdural hematoma, from which she died. Doctor Cahill, a pediatrician qualified as an expert in child abuse pediatrics, opined to a reasonable degree of medical certainty that Syriah's injuries were the result of a shaking event. Among other things, Syriah had no skull fracture, and, as one expert testified, without a skull fracture, the most likely explanation for subdural

hemorrhage and anoxic change is vigorous shaking.

Respondents failed to demonstrate that Syriah's injuries "could reasonably have occurred accidentally" so as to rebut petitioner's prima facie showing of abuse (*see Matter of Philip M.*, 82 NY2d at 244). The testimony of petitioner's experts ruled out the possibility that the injuries were caused, as respondents contend, by a short fall from a mattress to the floor. Indeed, respondents' own experts testified that it would be "unusual" and "extremely rare" for a child to suffer the injuries that Syriah suffered from a short fall.

The court properly exercised its discretion in crediting the testimony of petitioner's doctors, and particularly Doctor Cahill, a board-certified pediatrician who had a sub-certification in child abuse and was trained specifically to identify the hallmarks of shaken baby syndrome and abusive head trauma, over respondents' experts, who did not observe Syriah first-hand (*see Matter of Nakym S.*, 60 AD3d 578 [1st Dept 2009]). Doctor Cahill's failure to have reviewed certain hospital records did not require the court to reject her testimony outright. The court, in a comprehensive decision, carefully weighed all of the expert testimony, and we see no reason to disturb the court's finding that respondents' experts were less persuasive than petitioner's experts.

The court found that respondents' accounts of the relevant events were "riddled with inconsistencies, and simply not credible," and, upon our review of the record, we see no reason to depart from the general rule of deferring to the hearing court's credibility findings (*see Matter of Andrew R. [Andrew R.]*, 146 AD3d 709 [1st Dept 2017]).

In view of the foregoing, the court properly made a derivative finding of abuse as to Queenzephanyia (*see Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]).

We have considered respondents' remaining contentions, and find them unavailing.[1]

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 8, 2017

CLERK

[1] One of the amici contends that some recent scientific research has raised questions about the constellation of symptoms used to diagnose shaken baby syndrome. Although some courts have relied on these research developments (*see e.g. People v Bailey*, 144 AD3d 1562 [4th Dept 2016]), the procedural context of those cases is quite different from this matter. On appeal, respondents do not specifically argue that the court erred in not considering this research, or that a new trial is necessary. Nor do they contend that all of this research was presented to the fact-finding court.

Friedman, J.P., Mazzarelli, Moskowitz, Gische, Gesmer, JJ.

4258-
4259 Index 603243/09

Bovis Lend Lease (LMB), Inc.,
Third-Party Plaintiff-Respondent,

-against-

Arch Insurance Company,
Third-Party Defendant-Appellant.

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Torre, Lentz, Gamell, Gary & Rittmaster, LLP, Jericho (Steven H. Rittmaster of counsel), for appellant.

Jennifer W. Fletcher PC, New York (Jennifer W. Fletcher of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about July 22, 2016, which to the extent appealed from and appealable as limited by the briefs, denied third-party defendant Arch Insurance Company's cross motion to renew its motion for summary judgment dismissing the third-party complaint, unanimously reversed, on the law, without costs, renewal granted and, upon renewal, Arch's motion for summary judgment dismissing the third-party complaint granted, without costs. Appeal from order, same court and Justice, entered January 25, 2016, which, to the extent appealed from as limited by the briefs, denied the parties' motions for summary judgment as to the second and third third-party claims for indemnification and breach of the parties' Companion Agreement,

unanimously dismissed, without costs, as academic.

The facts of this case are set forth in our decisions upon prior appeals in this matter (143 AD3d 597 [1st Dept 2016]; 108 AD3d 135 [1st Dept 2013]).

Under paragraph 4 of the parties' Companion Agreement, Bovis was required to obtain Arch's consent to the settlement of the claims and counterclaims asserted by and against Bovis and Lower Manhattan Development Corporation (LMDC), in order to seek indemnification from Arch. Bovis's contractual remedy in the event of Arch's refusal to consent to a settlement, whether or not such refusal was reasonable, was to be indemnified by Arch "for all damages suffered in excess of the result that [Bovis] would have obtained if the settlement had been accepted." By entering, contrary to the plain terms of the Companion Agreement, into a settlement with LMDC to which Arch had refused to consent, Bovis breached the Companion Agreement and forfeited its right to

the contractual remedy for Arch's refusal to consent to a settlement acceptable to Bovis, whether or not Arch withheld its consent in good faith. Accordingly, Arch is entitled to summary judgment dismissing Bovis's third-party claim against it.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 8, 2017

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Mazzarelli, Andrias, JJ.

4092 In re Leenasia C., and Others,

Children Under the Age of
Eighteen Years, etc.,

Administration for Children's Services,
Petitioner-Appellant,

Lamarriea C.,
Respondent-Respondent,

Maxie B.,
Respondent.

_____

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for appellant.

The Bronx Defenders, New York (Saul Zipkin of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the children.

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Order, Supreme Court, Bronx County (Robert D. Hettleman, J.), entered on or about November 16, 2015, affirmed, without costs.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Dianne T. Renwick
Sallie Manzanet-Daniels
Angela M. Mazzarelli
Richard T. Andrias, JJ.

4092

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In re Leenasia C., and Others,

Children Under the Age of
Eighteen Years, etc.,

Administration for Children's Services,
Petitioner-Appellant,

Lamarriea C.,
Respondent-Respondent,

Maxie B.,
Respondent.
_____x

Petitioner appeals from an order of the Supreme Court, Bronx County (Robert D. Hettleman, J.), entered on or about November 16, 2015, which granted respondent mother's motion to modify the order of disposition entered on or about October 15, 2014 to the extent of entering in its stead a suspended judgment set to expire the same day as entry, dismissing the neglect petition, and vacating the neglect finding.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon and Deborah A. Brenner of counsel), for appellant.

The Bronx Defenders, New York (Saul Zipkin of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the children.

RENWICK, J.

This Family Court Act article 10 child neglect proceeding raises an issue of apparent first impression for this Court: whether the Family Court properly granted respondent mother a suspended judgment, "retroactively," in order to vacate a neglect finding and dismiss a neglect proceeding. Initially, the mother consented to a neglect finding and the Family Court's dispositional order released the children to the mother, under the supervision of petitioner, Administration for Children Services (ACS), for 12 months. At the end of this period, upon satisfactorily completing the terms of the dispositional order, the mother made a postdisposition motion to modify the dispositional order. The court granted a suspended judgment, retroactively, due to the mother's compliance with the conditions of the dispositional order, and vacated the neglect finding, as consistent with the children's best interest. For the reasons explained below, we find not only that the Family Court Act permits such a retroactive remedy, but that the remedy served the children's best interest under the circumstances of this case.

FACTUAL AND PROCEDURAL HISTORY

The facts that led to the mother consenting to the neglect finding are essentially not in dispute. The mother, Lamarriea C., has four children who were the subject of this neglect

proceeding. On or about May 22, 2014, ACS filed neglect petitions against the mother and her allegedly abusive boyfriend, who was also legally responsible for the children.[1] The petition against the mother alleged that police found 22 bags of PCP in the refrigerator of the mother's apartment, cartridges in the living room, and marijuana cigars in several rooms.[2] The apartment was dirty and crawling with roaches and spiders. The petition further alleged that the mother admitted to leaving her children in the care of her boyfriend, while she went to her job as a home health aide, and that she herself occasionally used marijuana and PCP. The mother also admitted that she did not manage the medication for her eldest daughter, who suffered from PTSD, ADHD, bipolar disorder, and depression.

The children were remanded to ACS, and eventually transferred to the kinship foster home of their mother's great aunt. After the abusive boyfriend was removed from the home, the mother moved under Family Court Act § 1028 for the children's return. The court denied the mother's motion, stating that it still had concerns about the children's safety. However, the

[1] The ultimate disposition of the petition against the boyfriend is not the subject of this appeal.

[2] As a result of the police's search of the apartment, the boyfriend was prosecuted for selling drugs and incarcerated until February 2015.

mother was granted liberal supervised visitation.

On July 15, 2014, the mother appeared at court seeking unsupervised visitation with her children. She reported that she had been seeing the children up to six times a week in their foster home, and had begun treatment at Women in Need (WIN) five days a week. The attorney for the children (AFC) supported unsupervised visitation and reported that the children wanted to return home with their mother; ACS opposed unsupervised visitation. The agency caseworker reported that on an announced visit to the mother's home two weeks earlier, he did not see any vermin or other "safety factors." In addition to the liberal visitation schedule in place, the Family Court granted the mother one-hour unsupervised "sandwich visits" twice a week.

On August 20, 2014, a WIN report was submitted to the court. The mother's WIN case manager reported that she was doing "very well" in treatment, and was scheduled to attend five days a week for anger management, parenting skills, relapse prevention, peer support and individual counseling. Random drug testing since July 25, 2014 had consistently yielded negative results. The Family Court ordered visits four days a week, for a minimum of four hours, and six hours one day a week.

On September 30, 2014, the mother requested that the case be adjourned for disposition. Instead, a finding of neglect was

entered on consent. The Family Court stated that it would "hold off" on disposition, but would consider an application for a suspended judgment or some other remedy in the future. ACS agreed that the mother could have additional overnight visitation with the children at least two nights per week since she and her abusive boyfriend had not been in contact since the petition was filed.

On October 15, 2014, the agency reported that the mother was still testing negative for drugs, she was "cooperative and engaged," and the children were doing well at school. The children were "very excited" to be in the home, which had ample food, proper bedding, and no sign of the earlier insect infestation. The Family Court, by dispositional order, released the children to the mother, under ACS supervision, for 12 months upon certain conditions, such as continued negative results from random drug testing, compliance with recommended services, and maintenance of a clean and stable home for the children.

On January 6, 2015, both ACS and WIN submitted favorable reports about the mother, who was complying with all conditions placed upon her in the dispositional order. Positive reports from ACS and the Fordham Treatment Center, where two of the children were receiving mental health services, were submitted to the court on May 12, 2015.

On September 25, 2015, the mother brought a motion pursuant to Family Court Act § 1061, seeking 1) to change the October 15, 2014 dispositional order to a suspended judgment; 2) to vacate the September 30, 2014 fact-finding order; and 3) to dismiss the neglect petition. The mother argued that the Family Court was empowered to grant such relief, which was warranted in her situation. As support, the mother relied on the positive reports from ACS, WIN, and the Fordham Treatment Center, and her negative random drug test results dating back to July 2014. Specifically, the mother argued that a suspended judgment would help her to expunge the "neglect" finding in the State Central Register, which had interfered with her job as a home health aide, and could act as a barrier to other employment opportunities in working with children, thus harming her ability to financially support her children.[3]

ACS opposed the motion, arguing that the mother had not satisfied the "good cause" requirement under Family Court Act § 1061 simply by complying with the dispositional order. Furthermore, ACS argued that vacating the neglect finding was not in the children's best interest, given the seriousness of the

[3] By July 2014, the mother was no longer working. She reports that she was suspended from her position as a home health aide during the neglect proceeding because she was deemed unqualified for her job because she had a neglect case.

allegations that gave rise to the neglect finding, for example, the presence of drugs, guns, and vermin in the home. ACS also asserted that, even if a suspended judgment had been appropriate at the time of disposition, issuing a post-disposition suspended judgment ran contrary to the text and purpose of the Family Court Act. ACS expressed concern that entering a retroactive suspended judgment would not only be improper, but would also violate public policy by allowing parents to vacate a neglect finding or circumvent the requirements of a suspended judgment simply by complying with court orders. According to ACS, the mother's "barriers to employment" argument was merely hypothetical, and, in any event, improving the mother's job prospects was not the Family Court's central concern; its central concern was only protecting the children's best interests.

The AFC submitted an affirmation in support of the motion, based on conversations with the children, the mother, the social worker, and a review of the record. Arguing that Family Court Act § 1061 enabled the Family Court to grant the motion for good cause, the AFC asserted that the mother had met this criteria because "she successfully overcame the problems that led to the initial filing of the petition, completed her service plan, completed 17 months of ACS supervision, and had demonstrated a close bond with her children throughout the entirety of this

case." The AFC opined that ACS's argument that a suspended judgment could only be issued for prospective obligations was "nonsensical," as it was uncontested that the mother had already satisfied all of the conditions imposed upon her. Likewise, the AFC rejected ACS's argument that granting retroactive relief here would implicate broader public policy issues, countering that each case turned on its own specific facts. The AFC maintained that the family would only be destabilized by poverty if the mother's employment opportunities were curtailed by the neglect finding, and, therefore, the requested relief was in the children's best interest.

On November 16, 2015, the Family Court granted the mother's motion for a retroactive suspended judgment, to expire the same day, with no further conditions or supervision. Noting that it considered the impact on the mother's employment opportunities, the court also vacated the neglect finding, stating, "I believe the children are safe, and nobody has suggested that they're not in good care right now." ACS now appeals.

DISCUSSION

As a threshold consideration, we find that a postdispositional, retroactive grant of a suspended judgment is consistent with the statutory scheme for child protective proceedings contained in the Family Court Act. To be sure, we

are cognizant that the Family Court is a court of limited jurisdiction. "[It] has only such jurisdiction and powers as the Constitution and the laws of the State expressly grant it. [It] can only determine matters before it in accordance with the powers expressly granted to it" (Besharov, Practice Commentary, McKinney's Cons Laws of NY, Book 29-A, Family Ct Act § 115 at 23 [1983 Ed.]).

The pertinent statute is Family Court Act article 10, entitled "Child Protective Proceedings," which concerns both child neglect and abuse proceedings. Its purpose as stated in Family Court Act § 1011 is "to help protect children from injury or mistreatment and to help safeguard their physical, mental and emotional well-being" by providing "a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that [her or] his needs are properly met." The statutory scheme is intended to be remedial, "not punitive in nature" *(Matter of Diane P.*, 110 AD2d 354, 358 [2d Dept 1985], *appeal dismissed*, 67 NY2d 918 [1986]). Accordingly, courts have consistently held that the purpose of the provision is subverted when it is used to punish parents in the name of child protection (*see e.g. Matter of Jessica FF.*, 211 AD2d 948, 951 [3d Dept 1995, Casey, J. dissenting in part]; *Matter of Jessica C.*, 132 Misc 2d 596, 597-

598 [Fam Ct, Queens County 1986]; *Matter of Linda S.*, 148 Misc 2d 169, 173 [Fam Ct, Westchester County 1990]; *Matter of Theresa C.*, 121 Misc 2d 15, 20 [Fam Ct, NY County 1983]).

Consistent with that purpose, the Family Court Act provides the Family Court with the discretion to dismiss a petition at different stages of a neglect proceeding when doing so would be consistent with the best interest of the subject children. For instance, at the fact-finding stage, Family Court Act § 1051(c) authorizes dismissal upon two separate and distinct grounds. First, under that subdivision the Family Court is required to dismiss a neglect petition (as well as an abuse petition), "[i]f facts sufficient to sustain the petition under this article are not established."

Second, at the fact-finding stage, the subdivision permits a dismissal of a neglect petition (but not an abuse petition) that satisfies the formal requirements of neglect where the Family Court has concluded that "its aid is not required" (*id.; see also Matter of Angela D.*, 175 AD2d 244, 245 [2d Dept 1991]; *Matter of Baby Girl W.*, 245 AD2d 830, 831-832 [3d Dept 1997]; *Matter of Diana Y.*, 246 AD2d 340, 340 [1st Dept 1998]). The Family Court's exercise of its authority under this subdivision is discretionary and must be utilized in a manner that emphasizes and promotes the best interests of the child (*id.*). Thus, in *Matter of J.H.*, the

court held that "[d]ismissal of a neglect case on the grounds that the aid of the court is no longer required should be [granted] in cases where the risk of danger to the child has passed" (15 Misc 3d 1111[A], 2007 NY Slip Op 50587[u],*4 [Fam Ct, Bronx County 2007]. For example, in *Matter of Angel R.* (285 AD2d 407 [1st Dept 2001]), this Court found that the Family Court did not err in dismissing a neglect petition based on the petitioner's lack of readiness to proceed at a fact-finding hearing, where the Family Court concluded that its aid was not required because the respondents' two older children were in Puerto Rico with their grandmother and the youngest child was already under the petitioner's supervision.

Likewise, at the postdispositional stage of the neglect proceeding, Family Court Act provides the Family Court with the discretion to dismiss a petition. Family Court Act § 1061 authorizes the Family Court to modify any order in a child protective proceeding "[f]or good cause shown." As this Court has noted, "Section 1061 'expresses the strong Legislative policy in favor of continuing the Family Court jurisdiction over the child and family so that the court can do what is necessary in the furtherance of the child's welfare'" (*Matter of Shinice H.*, 194 AD2d 444, 444 [1st Dept 1993], quoting Besharov, Practice Commentary, McKinney's Cons Laws of NY, Book 29A, Family Ct Act §

1061 at 461). Thus, as with an initial order, a modified order "must reflect a resolution consistent with the best interests of the children after consideration of all relevant facts and circumstances, and must be supported by a sound and substantial basis in the record" (*Matter of Elijah Q.*, 36 AD3d 974, 976 [3d Dept 2007] [internal quotation marks omitted], *lv denied* 8 NY3d 809 [2007]; *see also Matter of Brandon DD. [Jessica EE.]*, 74 AD3d 1435, 1437 [3d Dept 2010]).

Significantly, Family Court Act § 1061 applies to both fact-finding and dispositional orders. In fact, the language of the statute, in relevant part, authorizes the court to modify or vacate "any order issued in the course of a proceeding under this article." This "conclusion [that the Family Court may modify or vacate fact-finding and dispositional orders] is supported by the principle of statutory interpretation that, had the Legislature intended to exclude predispositional orders, it would have done so explicitly" (*Matter of Chendo O.*, 193 AD2d 1083, 1084 [4th Dept 1993], citing McKinney's Cons Laws of NY, Book 1, Statutes § 74). Indeed, "a more general, all encompassing statement of authority over any prior order is hard to imagine" (*Matter of Chendo O.*, 193 AD2d at 1084 (quoting Besharov, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 1051, 1993, Pocket Part at 174).

Given that the Family Court has broad authority to modify any order issued in the course of a child protective proceeding, upon a good cause showing that the modification promotes the best interests of the children (*see Matter of Chendo O.*, 193 AD2d at 1084), it follows that the Family Court Act does not prohibit the Family Court from granting a respondent a suspended judgment, "retroactively," in order to vacate a finding of neglect and dismiss a neglect proceeding.

ACS, however, argues that granting a suspended judgment retroactively rewards a respondent's compliance with the terms of a different disposition and circumvents the "good cause" requirements of Family Court Act § 1061. In other words, ACS argues that, since a suspended judgment is a dispositional alternative, which statutorily prescribes what the parents must do in the future, compliance with the terms of a different dispositional alternative could not have been contemplated as a basis for satisfying the good cause requirement of Family Court Act § 1061.

Petitioner's interpretation of the suspended judgment statute is flawed. Family Court Act § 1053 is the statute governing suspended judgments. The statute does not define suspended judgments nor provide any guidance as to the proper scenarios in which a court should consider a suspended judgment.

However, at its core, a suspended judgment affords a respondent the opportunity to correct his or her neglectful actions (*see* Family Court Act § 1053[a]; *accord Matter of Eric Z. [Guang Z.]*, 100 AD3d 646, 647-648 [2d Dept 2012]; *Matter of MN,* 16 Misc 3d 499, 508 (Fam Ct. Monroe County 2007]).

Indeed, a suspended judgment is always preceded by a finding of neglect, unlike an adjournment in contemplation of dismissal (*compare* Family Court Act § 1039[f] *with* Family Court Act § 1053[a]). In addition, in a suspended judgment order, the respondent is required to abide by certain terms and conditions, much like suspended judgments in termination of parental rights cases [*see* Family Court Act § 1053[a]). The statute requires that the terms and conditions must "relate to the acts or omissions of the parent" (*id.*). The statute also mandates that the rules of court shall define the permissible terms of a suspended judgment (*id.*). These rules require that the order include at least one of the following directives to the respondent: (1) refrain from acts/conditions that were found to have caused the abuse or neglect; (2) provide adequate food, clothing, medical care and other needs for the child; (3) provide proper care to the child and cooperate in getting the child an appropriate psychiatric diagnosis and treatment; (4) take steps to ensure the child's attendance at school; and (5) cooperate in

getting needed services for the respondent and the child (Rules of Fam Ct. § 205.83 [22 NYCRR]). Finally, Family Court Act § 1053[b] specifically states that none of the terms of a suspended judgment can last more than a year, absent a showing of exceptional circumstances after the expiration of that period (*see Matter of Crystal* S. [*Elaine S.*], 74 AD3d 823 [2d Dept 2010]).

Family Court Act § 1053, however, is silent as to what it means in practical terms for a respondent at the expiration of the suspended judgment. But because there is no statutory presumption of compliance with the terms and conditions of a suspended judgment, a judgment itself does not expire by operation of law *(see Matter of Jonathan B.*, 5 AD3d 477, 479 [2d Dept 2004] *lv dismissed* 2 NY3d 791 [2004]). As such, the Family Court retains jurisdiction over the neglect proceedings to determine compliance with the terms and conditions (*id.; see Matter of Amelia W.* [*Gloria D.W.*], 77 AD3d 841 [2d Dept 2010]). Moreover, compliance with the terms of a suspended judgment may but does not necessarily lead to vacatur of the neglect finding (*see Matter of Anoushka* G. [Cyntran M.], 132 AD3d 867, 868 [2d Dept 2015], citing Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 1053 at 57; *see also Matter of Baby Girl W.*, 245 AD2d 830, 833 [3d Dept

1997]). Rather, pursuant to Family Court Act § 1061, the Family Court retains jurisdiction to consider a motion by any party to enforce, modify, or vacate an article 10 fact-finding order or dispositional order at any time, upon a proper factual showing of compliance or noncompliance with the order's terms and conditions and a showing of good cause (*see e.g. Matter of Araynah B.*, 34 Misc 3d 566 [Fam Ct, Kings County 2011] [granting a suspended judgment, dismissing a neglect petition and vacating the initial finding of neglect because it was in the children's best interests]; *see also Matter of Kenneth QQ. [Jodi QQ.]*, 77 AD3d 1223, 1224 [3d Dept 2010]; *Matter of Elijah Q.*, 36 AD3d 974 [3d Dept 2007], *lv denied* 8 NY3d 809 [2007]).

Still, ACS contends that the Family Court improperly employed a "legal fiction" by changing the dispositional release[4] into a suspended judgment, the conditions of which had already been completed at the time of its entry, when the purpose of a suspended judgment is to impose prospective conditions on a parent. However, as the mother and the AFC correctly point out, this argument ignores that the conditions imposed upon the mother

[4] As aforementioned, the dispositional order released the children to the mother, under ACS supervision, for 12 months upon certain conditions, such as continued negative results from random drug testing, compliance with recommended services, and maintenance of a clean and stable home for the children.

by the dispositional order were the same as would have been required under a suspended judgment.[5] Thus, for all intents and purposes, the remedial intent of the statute was satisfied.

We reject ACS's alternative argument that the mother did not demonstrate good cause for the requested relief. To begin with, it is undisputed that the mother substantially, if not fully, complied with the dispositional order, and that the children were doing well under her care. As indicated, the AFC supported the motion, maintaining that a suspended judgment leading to vacatur of the neglect finding was in the children's best interest because the mother would have access to more employment opportunities. Significantly, ACS did not cite specific concerns as to the children's safety in opposing the motion, only a generalized objection that, in the event of future neglect, ACS would not have access to the mother's files.

We recognize the fine balance between protecting children from future neglect and destigmatizing a parent in an effort to stabilize the family unit. However, courts have identified four factors, that we also find relevant, in determining whether to vacate a neglect finding: "(1) respondent's prior child

[5] In this case, 22 NYCRR 205.83 was appended to the dispositional order. The dispositional order closely tracked the terms and conditions for a suspended judgment.

protective history;[6] (2) the seriousness of the offense; (3) respondent's remorse and acknowledgment of the abusive/neglectful nature of his or her act; and (4) respondent's amenability to correction, including compliance with court-ordered services and treatment" *(Matter of Araynah B.*, 34 Misc 3d 566, 575 [Fam Ct, Kings County 2011]; see *Matter of MN*, 16 Misc 3d 499, 504 [Fam Ct, Monroe County 2007]).

Here, we find that consideration of the above factors weighs in favor of vacating the neglect finding and dismissing the petition. The mother had no prior history of neglect, the children were not actually harmed, and the mother actively engaged with services and treatment. Throughout the proceedings, the mother tested negative for illicit substances during random drug testing. It is also undisputed that the mother displayed an unwavering commitment to be reunited with her children and to maintain sobriety in the face of ending an abusive relationship that contributed to the neglect finding *(compare Matter of Maria S.* [*Samnatha S.-Angela*],45 Misc 3d 1213[A], 2014 NY Slip Op 51553[u] [Fam Ct, Kings County 2014], *appeal dismissed* 135 Ad3d 944 [2d Dept 2016]]*; Matter of O,* 29 Misc 3d 1233[A], 2010 NY

[6] ACS argues that this factor suggests the importance of maintaining findings of neglect, but we find that the analysis involves a calculation informed by the particular circumstances of the case.

Slip Op 52133[u] [Fam Ct, Queens County 2010]).

Moreover, we find that the Family Court properly considered the practical effect of vacating the neglect finding, that is, removal of a barrier to the mother's ability to find work in her chosen field which was in the best interest of the children (*see Matter of Whitley v Whitley*, 33 AD3d 810, 810 [2d Dept 2006][noting that "the financial status and ability of each parent to provide for the child" is a factor to be considered in determining a child's best interest] [internal quotation marks omitted], *lv denied* 8 NY3d 809 [2007]). From a practical standpoint, it cannot be said that the Family Court was elevating the mother's interests above her children's by considering matters of employment; poverty makes families vulnerable.

We recognize that the mother could still seek to ameliorate a neglect finding through other channels. Such a finding, however, would still hinder the mother's ability to find work, as employers would need to justify their hiring decision in writing, or the mother would be required to request a fair hearing on the issue (*see generally Matter of Natasha W. v New York State Off. of Children & Family Servs.*, 145 AD3d 401, 405-06 [1st Dept 2016]).[7] With the neglect finding vacated, the mother could seek

[7] "All childcare agencies and other agencies licensed by the state to provide certain services to children are required to

to expunge the indicated finding in the State Central Register (*see McReynolds v City of New York*, 18 AD3d 316 [1st Dept 2015], *lv denied* 5 NY3d 707 [2005], *cert dismissed* 546 US 1027 [2005]). This possibility may be in the best interest of the children if it would open new avenues for the mother to better support her family.

Finally, we find unpersuasive ACS's argument that granting the mother's motion in this case would set a "bad precedent." Any such motion would still be subject to close scrutiny of and would depend heavily on the particular facts of each individual case, which would directly inform the Family Court's decision. As such, it is nothing more than exaggerated hyperbole to argue that the floodgates will open with the rare grant, herein, of a retroactive suspended judgment leading to the dismissal of the petition and vacatur of the neglect finding. On the contrary,

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inquire whether applicants for employment or to become foster or adoptive parents are subjects of indicated reports (Social Services Law § 424-a). An agency may choose to hire or approve persons on the list of those with indicated reports, but if it does, the agency must 'maintain a written record, as part of the application file or employment record, of the specific reasons why such person was determined to be appropriate' for approval (Social Services Law § 424-a[2][a]). The names of subjects of indicated reports remain on the list until 10 years after the youngest child referred to in the report turns 18, unless earlier expunged (Social Services Law § 422[6])" (*Matter of Natasha W. v New York State Off. of Children & Family Servs.*, 145 AD3d 401, 405-406 [1st Dept 2016]).

those parents who work assiduously toward reversing the negative and detrimental forces that led to the finding of neglect in the first instance will have a real opportunity to benefit from the Family Court's remedial power. Ultimately, where children's welfare is at stake, public policy militates toward enabling the Family Court greater dexterity to fashion relief, not less, in accordance with the intent and purpose of Family Court Act § 1061.

Accordingly, the order of the Supreme Court, Bronx County (Robert D. Hettleman, J.), entered on or about November 16, 2015, which granted respondent mother's motion to modify the order of disposition entered on or about October 15, 2014, to the extent of entering in its stead a suspended judgment set to expire the same day as entry, dismissing the neglect petition, and vacating the neglect finding, should be affirmed, without costs.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 8, 2017

CLERK