

CHILD WELFARE CASELAW REVIEW

NY Court of Appeals and Appellate Division cases
Reported From July- December, 2022

2023 NYPWA Winter Conference- January 25, 2023
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Housekeeping

Codes for CLE

Introduction

These cases represent the child welfare related cases that I found between July 1, 2022 and December 31, 2022 from my review of the Slip Opinions posted on the OCA website. There are some trial court level cases included at the end of the compilation.

Introduction

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

Also, I have placed each case into a category, but any given case might involve more than one legal issue.

The materials have the full cases as found in the NY Reports.

Introduction

Because this program covers cases reported up to December 31, 2022, and the program is given on January 25, 2023, the official citations have not been issued for about a dozen or so cases. If you need the official citation, please check the court website for those, or your legal research website (Westlaw, LEXIS, etc.)

Article 10 Temporary Orders

Matter of Branson M., 209 AD3d 435 (1st Dept., 2022)

The order of Family Court, New York County which denied respondent father's application for a hearing pursuant to Family Court Act § 1028, was affirmed.

Respondent failed to show good cause for a 1028 hearing to determine whether the child should be returned to him. He contended that he complied with the August 27, 2021 order directing him to undergo a new mental health evaluation before he may reapply for the release of the child, but the two mental health evaluations upon which he relied were not evaluations contemplated by the August 2021 order. Those evaluations were performed within two weeks after the Family Court Act §1027 hearing and less than two months before the Family Court Act §1028 application, were cursory and inconclusive, and did not address all the requirements of the August 2021 order.

Furthermore, the court did not violate respondent's due process rights, as it properly followed the procedures under Family Court Act § 1028 and afforded him an opportunity to argue his application before denying a hearing.

Article 10 Temporary Orders

Matter of Ty'Shawn B., (4th Dept., 2022)

The appeal of the order of Family Court, Erie County which authorized the continued removal of the subject child from the custody of respondent was dismissed.

The order granted petitioner's application to place the subject child in the temporary custody of the Commissioner of Social Services, where the child would remain in the care of his paternal uncle and the uncle's girlfriend. The child had previously been temporarily placed with those individuals, who had since been certified as foster parents.

The 4th Dept. concluded that the mother's appeal must be dismissed inasmuch as she is not an aggrieved party. The child would have remained in the care of the paternal uncle and his girlfriend whether the court granted or denied petitioner's application. In either event, the neglect proceeding had not yet been resolved as of the time the order on appeal was entered, and the mother thus retained the right to seek return of the child to her custody pursuant to Family Court Act § 1028. Inasmuch as the order left the mother's rights unchanged, she was not aggrieved by it.

Article 10 Temporary Orders

Matter of Destiny F., 210 AD3d 1399 (4th Dept., 2022)

The appeal of order of Family Court, Onondaga County which placed the subject children in the custody of petitioner was dismissed.

The appeal was dismissed as moot because, while the appeal was pending, Family Court entered an order of fact-finding and disposition determining that respondents neglected the children and placing the children in petitioner's custody.

An appeal from an order temporarily removing children from a home during the pendency of a proceeding pursuant to Family Court Act article 10 becomes moot at the point an order of disposition has been entered. Contrary to the mother's contention, inasmuch as a temporary order of removal is not a finding of wrongdoing, the exception to the mootness doctrine does not apply.

Article 10 Temporary Orders

Matter of Nicholas M., 2022 NY Slip Op 07236AD2d (2nd Dept., 2022)

The orders of Family Court, Suffolk County, that placed the child with a relative and directed that the mother stay away from the subject child except for supervised parental access. was affirmed.

After a hearing on the issue of the child's temporary removal, by order dated October 22, 2021, the Family Court, among other things, placed the child in the care of a maternal aunt with DSS supervision. The court also entered a temporary order of protection directing that the parents stay away from the child except for supervised parental access. Thereafter, on October 25, 2021, the mother filed an application pursuant to Family Court Act § 1028 for the return of the child to her custody. The next day, on October 26, 2021, DSS filed a neglect petition against each parent in which it sought the child's continued removal pursuant to Family Court Act § 1027. After a hearing, in an order dated November 1, 2021, the court, in effect, continued the child's placement with the maternal aunt pending the determination of the neglect proceedings, and in an order dated November 10, 2021, denied the mother's application for the return of the child. The mother appeals from the temporary order of protection and the orders dated November 1, 2021, and November 10, 2021.

Here, there is a sound and substantial basis in the record supporting the Family Court's determination that the child would be at imminent risk to his life or health if returned to the mother's care during the pendency of the neglect proceedings, and that the risk could not be mitigated by reasonable efforts short of removal. Accordingly, the court properly denied the mother's application pursuant to Family Court §1028 to return the child to her care, and, in effect, continued removal of the child pursuant to Family Court Act §1027 pending the determination of the neglect proceedings.

Evidentiary Rulings in Article 10 Proceedings

Matter of Taveon J., 209 AD3d 417 (1st Dept., 2022)

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

The finding of neglect against the mother was supported by a preponderance of the evidence establishing that she placed the children's physical and psychological safety in imminent risk of impairment by refusing to enforce a final order of protection issued against her boyfriend and in favor of the child Taveon in a prior neglect proceeding. Taveon, who was then 11 years old, was heard crying on a tape of a 911 call, in which he reported that the mother's boyfriend allegedly choked her and then threatened to kill Taveon; the caseworker also testified that Taveon was crying at the police station after the incident. This evidence established, among other things, that the mother risked Taveon's emotional health by failing to enforce the order of protection issued on his behalf.

The tape of Taveon's statements to the 911 operator that the boyfriend was choking his mother was properly admitted into evidence as an excited utterance, which did not require corroboration. Taveon's consistent out-of-court statements to an ACS investigator and a police officer immediately after the incident were properly admitted because they were sufficiently corroborated by the 911 tape and other evidence.

Evidentiary Rulings in Article 10 Proceedings

Matter of Gabriele G., 209 AD3d 734 (2nd Dept., 2022)

The order of Family Court, Richmond County granting the petitioner's motion for summary judgment on the issue of derivative abuse was affirmed.

The Family Court properly granted the petitioner's motion for summary judgment on the issue of whether the father derivatively abused the subject child. The petitioner met its prima facie burden by demonstrating that the father had pleaded guilty to two counts of course of sexual conduct against a child in the first degree and one count of sexual abuse in the first degree in connection with allegations concerning three friends of the subject child who were all under the age of 11. The acts underlying the allegations were shown to have been committed in the father's home while the subject child was also present in the home and "evinced a flawed understanding of his duties as a parent and impaired parental judgment to a sufficient degree" so as to create a substantial risk of harm to the subject child.

On appeal, the father did not specifically challenge the Family Court's determination of abuse with respect to the subject child's three friends or that his actions evinced a flawed understanding of his duties as a parent, but, rather, he argued that he was denied his right to due process. This contention was unpreserved for appellate review and, in any event, was without merit.

Evidentiary Rulings in Article 10 Proceedings

Matter of Katherine L. 209 AD3d 737 (2nd Dept., 2022)

The order of Family Court, Kings County which found that the father abused the child Heymi M. and derivatively neglected the child Katherine L. was modified, on the facts, by deleting the provision determining that the father derivatively neglected the child Katherine L.

The 2nd Dept. found that the nine-year age difference between the child found to have been abused, and the other child, that the children had different mothers, different living situations, and markedly different relationships with the father, and that the abuse occurred on one occasion outside the home, and that the younger child was not in the room when it occurred, and there was no evidence that she was aware of the abuse. Under all these circumstances, the preponderance of the evidence did not support a finding of derivative neglect with respect to the younger child Katherine L.

Evidentiary Rulings in Article 10 Proceedings

Matter of Jolani P., 209 AD3d 859 (2nd Dept., 2022)

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

The mother contested the evidentiary basis of the finding of derivative neglect, which was based, in part, upon the fact that she previously consented to a finding of neglect with respect to two older children, without admitting or denying the allegations in the petitions filed in those proceedings, and then consented to the termination of her parental rights as to those children.

The 2nd Dept., held that the entry of a finding of neglect as to a child clearly constitutes proof that that child was neglected, even if the order was entered upon consent, and was admissible with respect to the issue of whether the parent derivatively neglected another child. The prior neglect finding must be so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still existed, and demonstrate a fundamental defect in the parent's understanding of the duties of parenthood. Here, the older children were surrendered approximately nine months before the birth of the subject child, which allowed for a presumption that the condition continues to exist.

Evidentiary Rulings in Article 10 Proceedings

Matter of Kimona C., AD3d 2022 NY Slip Op 07501 (1st Dept., 2022)

The order of Family Court, Bronx County which found, upon granting petitioner agency's motion for summary judgment, that respondent mother had derivatively neglected and abused the subject child, was affirmed.

The agency made a prima facie showing of derivative abuse based on the prior order, entered before the subject child was born, finding that the mother had severely abused and neglected one of her older children and derivatively abused another. The conduct underlying the prior order demonstrated that the mother's parental judgment was so flawed that any child in her care would be at risk. The conduct underlying the prior findings of severe abuse was sufficiently proximate in time to the derivative neglect proceedings to support the conclusion that the conditions still existed

Moreover, the mother's failure to participate in services, as evidenced by the fact that the older children were never returned to her care, established that the conditions that led to the prior findings still existed and the subject child would be at risk in the mother's care. In opposition to the agency's motion, the mother failed to submit any evidence sufficient to rebut the presumption that the conditions leading to the severe abuse of the child's older siblings had not been remedied.

To the extent the mother raises arguments relating to the timeliness and staleness of the summary judgment motion, those contentions are improperly raised for the first time on appeal. In any event, they are unpersuasive as the court providently exercised its discretion in setting a revised schedule for the summary judgment motion.

General and Mixed Neglect

Matter of Silas W., 207 AD3d 1234 (4th Dept., 2022)

The order of Family Court, Onondaga County which determined that respondent had neglected the subject children was reversed on the law and the petition was dismissed.

The petition alleged that respondent mother neglected the subject children based on the conditions of the mother's home and allegations that one of the children had fallen out of a window after the mother left the children unsupervised

The 4th Dept. agreed with the mother that although the record established that the mother knew that one of her children was sometimes aggressive towards his younger siblings, there was no evidence in the record that she was aware that he may open a locked window, remove the screen, and drop his sibling from a height of two stories. In making that determination, the 4th Dept. noted that the window involved in the incident was not deemed dangerous by a caseworker during a home visit less than a month before the incident.

The 4th Dept. also concluded that the hygiene of the children and the condition of the apartment, which petitioner's caseworker testified met "minimal standards," was not sufficient to establish neglect. Also, although a finding of neglect may be entered where, though being financially able to do so or offered financial or other reasonable means to do so, a parent fails to provide the child[ren] with adequate clothing and basic medical care, no evidence was presented at the fact-finding hearing concerning the financial status of the mother.

General and Mixed Neglect

Matter of Sylvie A. S., 209 AD3d 657 (2nd Dept., 2022)

The order of Family Court, Kings County which denied the mother's motion to vacate an order of fact-finding and disposition, which, upon her failure to appear at fact-finding and dispositional hearings, found that she neglected the subject child and awarded custody of the subject child to the father, was affirmed.

The 2nd Dept. was satisfied with the sufficiency of the *Anders* brief filed by assigned counsel, and also reviewed the appellant's pro se supplemental brief, concluding that there were no nonfrivolous issues which could be raised on appeal.

General and Mixed Neglect

Matter of Jada J., 210 AD3d 499 (1st Dept., 2022)

The order of Family Court, Bronx County entered upon respondent father's default, which, to the extent it brings up for review the denial of his motion to dismiss the petition for failure to establish a prima facie case of neglect, was affirmed.

On the merits, viewed in the light most favorable to petitioner agency and making all reasonable inferences in the agency's favor, the preponderance of the evidence supported Family Court's finding of neglect, as the father failed to provide a minimum degree of care while the child was in his custody and when the child was out of the home, thus placing her in danger of imminent harm. Petitioner first established that for a two-year period before mid-May 2020, while the child was living with the father, she slept on an air mattress in an unfurnished room, while the father's room was furnished. There was little food in the apartment, and even though the father told the child to buy some food, he refused to give the child money to do so, thus abdicating his parental responsibilities to provide food or proper shelter for the child.

Furthermore, in mid-May 2020, while the child was staying with a friend, the father changed the locks in the apartment and did not give the child a set of keys, and during that time, failed to ensure that the child had adequate food, clothing, or shelter. Later, and initially unbeknownst to the father, the child relocated to her paternal aunt's house, at which time the father eventually contributed only \$400 toward her care. The father later rejected the child's attempts to reconcile and return home. Nor did he present any plan for the child's care, instead rejecting ACS's attempts to engage him in formulating a viable plan.

Contrary to the father's argument, his own statements made to the caseworkers corroborated the child's out-of-court statements. Additionally, the child's consistent statements to caseworkers regarding her living situation with the father and the circumstances surrounding her stay with the paternal aunt bolstered their credibility.

General and Mixed Neglect

Matter of Adina B., 210 AD3d 981 (2nd Dept., 2022)

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

ACS alleged that the father neglected the child Adina B. by twice administering THC oil to her while she was in the hospital undergoing treatment for aggressive cancer and by stating that he would do so again in the future, despite having been advised that such action was against the medical advice of the child's treating physicians. Family Court found that the father neglected the child holding that while the father's conduct did not cause the child to suffer actual harm, the record showed that the father clearly stated his intent to continue to administer THC oil to the child against her treating physicians' advice, and that the child was at risk of actual harm.

The record on appeal demonstrated that the father administered THC oil to the child without first consulting with her treating physicians. The testimony of an ACS caseworker and the mother, which was credited by the Family Court, evidenced that the father clearly stated that he intended to continue to administer THC oil to the child against her physicians' advice, and would do so every chance he could, as he believed that THC oil would cure her cancer. The father's source of information for this belief was the Internet. Moreover, according to the mother, the father stated that oncology is a money making industry, and that oncologists had no interest in making cancer patients well. The father further stated that he wanted to use THC oil instead of following the hospital's treatment plan, and his intention was to administer THC oil to the child every two hours. The father's conduct put the child in imminent danger of impairment. Moreover, the court was entitled to draw the strongest negative inference against the father for his failure to testify.

Further, the Family Court properly gave little weight to the testimony of two expert witnesses proffered by the father. Notably, neither witness spoke with any of the child's treatment providers. Additionally, while one of the witnesses was qualified as an expert in pediatric palliative care, the father administered THC oil to the child, not as a form of palliative care, but rather as treatment meant to cure her cancer.

General and Mixed Neglect

Matter of Y. SS., 2022 NY Slip Op 07281AD2d (3rd Dept., 2022)

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

Petitioner commenced this proceeding alleging, among other things, neglect of the subject child by respondent based upon allegations that respondent was sexually abusing the subject child by photographing her in a sexually explicit manner, disseminating the photographs and allowing a friend to come to respondent's home and view the subject child naked.

It was established that respondent had a friend with whom she sometimes performed sexual services for money. At some point, in text messages, the friend began asking for things involving the subject child. Respondent testified that she "knew he wanted something with my daughter, but he wasn't getting it." Despite her knowledge of the friend's sexual interest in the subject child, respondent continued her involvement with the friend over a span of a few months. On one occasion, respondent sent a naked photograph of the subject child to the friend. On another occasion, during a telephone call with the friend, respondent offered to perform oral sex on him while allowing him to look at the subject child naked while she slept. In text messages, respondent provided her address to the friend.

Such willingness of respondent to involve her child in the performance of her sexual services for money put the subject child's physical, emotional and mental health in imminent danger and the 3rd Dept. said that it could not say that a reasonable and prudent parent would have so acted under the circumstances. Although respondent testified that she took the photograph to send to the child's doctor, Family Court found respondent's testimony incredible.

General and Mixed Neglect

Matter of Ja'layna FF., 2022 NY Slip Op 07271 AD2d (3rd Dept. 2022)

The order of Family Court, Chemung County which granted petitioner's application for summary judgment to adjudicate the subject child to be neglected was reversed and remitted to Family Court for further proceedings before a different judge.

Respondent is the mother of four children, including the subject child who was born in 2021. In 2019, respondent's oldest two children (born in 2015 and 2017) were adjudicated to be neglected, and respondent's third child (born in 2019) was removed from respondent's custody at birth, placed in foster care, and eventually found to be neglected.

The subject child was removed from respondent's custody eight days after birth, and petitioner then filed a petition alleging that respondent had neglected and derivatively neglected the child. Respondent moved to dismiss the petition for failure to state a claim, and petitioner opposed. Family Court denied the motion to dismiss. Thereafter, prior to any fact-finding hearing on the petition, petitioner moved for summary judgment as to that aspect of the petition alleging derivative neglect of the subject child, which Family Court granted.

Upon review of the record and considering the nature of the prior neglect findings, the passage of time, and the questions concerning the degree of progress made by respondent over that time, the 3rd Dept. found that there were triable issues of fact precluding summary judgment.

Parental Substance Abuse

Matter of Zorren T., 209 AD3d 571 (1st Dept., 2022)

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

The evidence showed that the mother abused cocaine in close proximity, approximately three feet, to the then two-year-old child, who was walking and able to get in and out of his crib unassisted, while she was in the bathroom of the one-room apartment she shared with the child and his father. Two weeks later, the father again saw the mother with a vial of cocaine in the bathroom, while the child was in the home and could have entered the bathroom and come into contact with, ingested, or inhaled the narcotic, thereby placing the child at imminent risk of harm. The court properly drew a negative inference from the mother's failure to testify at the hearing.

Parental Substance Abuse

Matter of Mia S., AD3d 2022 NY Slip Op 06932 (2nd Dept., 2022)

The order of Family Court, Suffolk County which found that the mother neglected the children under FCA §1046, under which "proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child." was affirmed. In this case there was sufficient proof she had misused marihuana and "clearly had a substantial impairment of judgment, and/or substantial manifestation of irrationality and was disoriented and/or incompetent." Since this finding was not based on "the sole fact" that the mother "consumes cannabis," the neglect finding was affirmed.

The 2nd Dept. did hold that the March 31, 2021 amendment to Family Court Act § 1046(a)(iii) should be retroactively applied to events that occurred, and a Family Court decision that was rendered, prior to March 2021.

Parental Substance Abuse

Matter of Camila G. C., 2022 NY Slip Op 07230 AD2d (2nd Dept., 2022)

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

The child was born in March 2020 with a positive toxicology for methadone and benzodiazepines and remained in the hospital for multiple weeks after her birth to be treated for severe symptoms of withdrawals from those substances. Rockland County DSS commenced neglect proceedings against the parents based upon concerns of their abuse of drugs.

The father, who had a long history of drug use, began attending substance abuse programs in approximately 2014, at which time he had been using heroin, cocaine, benzodiazepines, and oxycodone, among other drugs. In 2021, at the time of the hearing, approximately seven years later, he was attending a methadone maintenance program which he began in January 2017. Although the father claimed that the benzodiazepines for which he was testing positive were prescribed, there were gaps in time when he failed to produce the prescriptions to the methadone maintenance program, as was required. Additionally, during the pendency of the matter, three different psychiatrists had prescribed benzodiazepines for him. The record also demonstrates that the father failed to timely advise a treating psychiatrist who was prescribing benzodiazepines for the mother and him, that he was receiving methadone treatment or that the mother was pregnant. Moreover, the father failed to cooperate with the petitioner, in that despite a court order, he refused to sign HIPAA release forms for the release of information from his treating psychiatrist who was prescribing the benzodiazepines, refused to provide the prescriptions for the drugs for which he tested positive, and refused to submit to a substance abuse assessment and drug screens. Also, subsequent to the father's counselor from the methadone program appearing for his first day of testimony, the father rescinded his HIPAA release regarding information about his psychiatric care at the methadone program. Under the circumstances, although the father was enrolled in the methadone maintenance program, his participation was not meaningful. As the court inferred from the evidence, he was engaged in a "doctor-shopping journey . . . to maintain a steady flow of opiates/methadone and benzodiazepines . . . [in his system]." Thus, the foregoing evidence, combined with the father's behavior as observed by the court over the lengthy hearing, which at best was difficult, and at worst was obstructionist, established a prima facie case of neglect.

Parental Substance Abuse

Matter of Gina R. AD3d 2022 NY Slip Op 07321 (4th Dept., 2022)

The order of Family Court, Monroe County was modified on the law by vacating the finding that respondent neglected the subject children based on her repeated use of marihuana while caring for them and as modified was affirmed, and the matter is remitted to Family Court, for further proceedings.

The 4th Dept. concluded that there was a sound and substantial basis in the record supporting Family Court's determination that petitioner met its burden of establishing that the youngest of the subject children was neglected by presenting evidence that the mother wrapped the infant to sleep, on more than one occasion, in loose blankets, despite repeated warnings that doing so created a substantial risk to the child. .

The 4th Dept. did find that the court erred in applying Family Court Act § 1046 (a) former (iii) in determining that petitioner established a prima facie case that the subject children were neglected based solely on the mother's use of marihuana, without presenting evidence that the children's condition was impaired or at imminent risk of impairment

The amendment to section 1046 (a) (iii) went into effect on March 31, 2021, two days before the court rendered its decision in this case and, as a general matter, a case must be decided upon the law as it exists at the time of the decision.

Inasmuch as petitioner's presentation of evidence was based on the state of the law at the time of the hearing, however, petitioner may not have fully explored the issue of impairment. The 4th Dept. therefore remitted the matter to Family Court to reopen the fact-finding hearing on the issue whether the children's condition was impaired or at imminent risk of impairment as a result of the mother's use of marihuana.

Domestic Violence

Matter of Jadeliz M. Q., 209 AD2d 655 (2nd Dept., 2022)

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

In December 2018, the father was arrested and charged with various acts of domestic violence allegedly committed against the mother of the subject child. In December 2019, the father was convicted, after a nonjury trial, of criminal obstruction of breathing, endangering the welfare of a child, attempted assault in the third degree, menacing in the third degree, harassment in the second degree, and two counts of criminal contempt in the second degree. Thereafter, ACS moved, inter alia, for summary judgment finding that the father neglected the child.

ACS met its prima facie burden of demonstrating that the doctrine of collateral estoppel is applicable. A criminal conviction may be given collateral estoppel effect in a Family Court proceeding where (1) the identical issue has been resolved, and (2) the defendant in the criminal action had a full and fair opportunity to litigate the issue of his or her criminal conduct. In opposition, the father failed to raise a triable issue of fact.

Domestic Violence

Matter of Kingston T., 209 AD3d 743 (2nd Dept., 2022)

The order of fact-finding of Family Court, Kings County which found that the mother neglected the subject child, was reversed.

The 2nd Dept. found that while testimony was elicited from the paternal grandmother that the subject child, then under two months old, was somewhere in an apartment with the mother and the father while they yelled at each other, the grandmother testified that she removed the child from that apartment prior to any acts of domestic violence. The evidence that the mother and the father engaged in a loud verbal argument in the presence of their infant child was insufficient to establish that the child's physical, mental, or emotional condition was impaired or in imminent danger of becoming impaired. Further, while the grandmother testified that she subsequently came out of her separate apartment into a hallway while holding the child when the mother and the father were engaged in acts of domestic violence in the hallway, no evidence was presented that the infant child observed, or was aware of, any acts of domestic violence.

Notably, the grandmother testified that she only "briefly" observed someone with a knife before leaving the hallway with the child to alert building security, and she was unable to tell whether the mother or the father was holding the knife during that "brief" period. Moreover, no evidence was presented that the child was in sufficient proximity to the mother and father during the altercation in the hallway so as to place the child at any risk of physical harm.

Domestic Violence

Matter of Mariliz G., 207 AD3d 627 (2nd Dept., 2022)

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

Even a single act of domestic violence[either in the presence of a child or within the hearing of a child, may be sufficient for a neglect finding. Furthermore, although parents and persons legally responsible have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the use of excessive corporal punishment constitutes neglect.

The Family Court properly determined that the DSS established by a preponderance of the evidence that Jamie G. neglected the children by inflicting excessive corporal punishment on them and by committing domestic violence in the presence of the children. Contrary to Jamie G.'s contention, the out-of-court statements by the children were sufficiently corroborated by each other and by the observations of the caseworker.

Domestic Violence

Matter of M.J., 210 AD3d 587 (1st Dept., 2022)

The order of Family Court, New York County which alia determined, after a fact-finding hearing, that respondent father neglected the subject children Q.T., and J.T. and derivatively neglected the subject children R.J., M.J., and P.T., was affirmed.

The record established that respondent, in violation of an order of protection, forced his way into the mother's apartment, pushed one of the children to the ground, choked the mother, brandished a knife and threatened to kill everyone. This incident evinces a strongly impaired parental judgment, and the children were exposed to a substantial risk of harm, sufficient to sustain a finding of neglect .

The child's out-of-court statements regarding the details of the incident and the injuries respondent inflicted upon the mother were corroborated by the caseworker's testimony and the criminal complaint.

The evidence supported the finding of derivative neglect on behalf of M.J, R.J, and P.T. because respondent's actions demonstrated such an impaired level of parental judgment as to create a substantial risk of harm to any child in his care.

Domestic Violence

Matter of Zuri F., 210 AD3d 583 (1st Dept., 2022)

The order of Bronx County which found that respondent father neglected the subject child was reversed on the law and the facts, the fact-finding determination vacated, and the petition dismissed.

Petitioner failed to demonstrate by a preponderance of the evidence that respondent neglected the child by committing an act of domestic violence in her presence. The record was silent as to whether the child actually witnessed the incident, and Family Court did not make a specific finding on that issue. Furthermore, there was no evidence that the single incident was part of a broader pattern of domestic violence in the home. Petitioner also failed to present any evidence about any impact of the incident on the child.

Domestic Violence

Matter of Sydelle P. 210 AD3d 1098 (2nd Dept., 2022)

The order of Family Court, Kings County was affirmed.

ACS filed a petition alleging that the father neglected the subject child by perpetrating an act of domestic violence against the mother in the child's presence. The petition alleged, inter alia, that on September 21, 2019, the father pushed the mother, and when the child tried to stop him, he pushed the child to the floor, that as a result of the father's actions the child incurred injury and pain to her back, and that the child is afraid of the father and afraid for her mother. The same incident that provided the basis for the neglect petition also provided the basis for a family offense petition filed by the mother in September 2019. On consent of the parties, the Family Court held consolidated hearings on both petitions. Following the hearings, in an order of fact-finding and disposition entered in the neglect proceeding, the court, inter alia, found that the father neglected the child..

Even a single act of domestic violence, either in the presence of a child or within the hearing of a child, may be sufficient for a neglect finding. Where the hearing court is presented with sharply conflicting accounts regarding the subject events, and chooses to credit the testimony of certain witnesses over that of others, its determination will not be disturbed unless clearly unsupported by the record.

Here, contrary to the father's contention, a preponderance of the credible evidence established that he neglected the child by pushing the mother to the floor in the child's presence and in pushing the child into the wall when she

Domestic Violence

Matter of Divine K. M., AD2d 2022 NY Slip Op 06929 (2nd Dept., 2020)

The order of Family Court, Kings County which found that the father neglected all of the subject children was modified by deleting the provisions which found that the father neglected the children who were not present when the father threw an object at the mother and the finding that he neglected the children by verbally abusing the nonrespondent mother in their presence.

Contrary to the father's contention, the Family Court properly admitted the ACS caseworker's notes of interviews with the children as a business record.

Family Court providently exercised its discretion in determining that the out-of-court statements of Tawdrea G., Terel R., and Micah M. G. to an ACS caseworker that the father threw an object at the mother cross-corroborated each other, and that the record as a whole demonstrated by a preponderance of the evidence that the physical, mental, or emotional condition of Tawdrea G., Terel R., and Micah M. G. was impaired or was in danger of becoming impaired when the father threw an object at the mother in their presence.

However, the Family Court erred in determining that a preponderance of the evidence established that the father neglected Tyresse M., Makai G., Tamera P.-C. M., or Divine K. M., based on the father throwing an object at the mother. There was no evidence that Tyresse M., Makai G., Tamera P.-C. M., or Divine K. M. witnessed that event. Moreover, there was insufficient evidence to establish that the physical, emotional, or mental condition of Tyresse M., Makai G., Tamera P.-C. M., or Divine K. M., was impaired or placed in imminent danger of impairment based on that incident.

The Family Court also erred in determining that a preponderance of the evidence established that the father neglected any of the children by verbally abusing the mother in the presence of the children. While it was inappropriate for the father to yell at the mother in the presence of the children, the evidence concerning those arguments was insufficient to establish that the children's physical, mental, or emotional condition was impaired or in imminent danger becoming impaired.

Domestic Violence

Matter of Everett, AD3d 2022 NY Slip Op 07506 (1st Dept., 2022)

The order of Family Court, Bronx County, insofar as it found that respondent father neglected the child by committing acts of domestic violence against the mother in the child's presence, failed to follow the court's order of protection, and neglected the child based on excessive corporal punishment, was modified to vacate the finding of excessive corporal punishment, and otherwise affirmed.

The evidence established that respondent neglected the child by committing an act of domestic violence against the mother in the child's presence that resulted in physical, mental or emotional impairment or imminent danger to the child. Respondent arrived home in an intoxicated state, threatened to kill the mother in front of the child, and dragged her out of the bedroom into the hallway where he started to strangle her. In the meantime, the child remained nearby, and at one point tried to intercede by grabbing respondent's leg and pleading with him to leave his mother and him alone.

Respondent failed to preserve his arguments that the court could not consider violation of the temporary order of protection because it was unjustifiably issued, and because he was never served a copy of that order, thus they were not considered on the appeal.

The 1st Dept. did find that a preponderance of the evidence did not support the finding of neglect based on excessive corporal punishment as a result of a separate incident. The child's out-of-court statement made to the mother that respondent had slapped him were not sufficiently corroborated. Although the mother testified that the child was yelling during the incident, it appeared that he was distraught by the fact that his parents were arguing and not by any alleged slap. Furthermore, there was no evidence of any prior incident of corporal punishment by respondent or evidence of serious injury to the child.

Excessive Corporal Punishment

Matter of Raveena B., 209 AD3d 640 (2nd Dept., 2022)

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

Family Court properly found that the subject child's out-of-court statements that the mother hit the subject child with a cord and with the mother's hand were adequately corroborated by both the subject child's testimony and the testimony of her school guidance counselor. The evidence of those incidents was sufficient to support the court's finding that the mother neglected the subject child by inflicting excessive corporal punishment upon her.

ACS also established that the mother neglected the subject child by failing to provide her with proper supervision and guardianship, which resulted in actual or threatened harm to her. The testimony of the school guidance counselor and the child that the mother imposed excessive household and childcare responsibilities on the child, the guidance counselor's testimony that those responsibilities caused the child to feel like a "second-class citizen," and evidence demonstrating that the subject child expressed in writing that she "felt like dying," provided sufficient evidence of impairment of the subject child's emotional well-being.

Excessive Corporal Punishment

Matter of Grayson S., 209 AD3d 1309 (4th Dept., 2022)

The order of Family Court, Oswego County which determined that respondent had neglected the subject child, was reversed on the law and the petition against respondent was dismissed.

The record established that, during the course of a multi-person melee that included the 15-year-old sister beating up the 18-year-old daughter of the father's girlfriend, the 14-year-old child threw a rock at the vehicle causing the window to break, to which provocation the father instantly reacted by striking the child once either in the face or the back of the head

Petitioner presented no evidence that the child sustained any injury or required medical treatment as a result of the single strike by the father during the altercation, and the police who investigated the incident did not file any charges.

Consequently, even though the court properly drew the strongest possible negative inference against the father after he failed to appear or testify at the fact-finding hearing the evidence presented by petitioner established nothing more than an isolated incident, and while losing one's temper does not excuse striking and potentially injuring one's child, one such event does not necessarily establish neglect.

Excessive Corporal Punishment

Matter of Desiree D., 209 AD3d 547 (1st Dept., 2022)

The order of Family Court, Bronx County which found that respondent mother neglected and derivatively neglected the two subject children was affirmed.

The child's out-of-court statement to the caseworker that the mother bit her hand, hit her in the head with a cane, and scratched her face after she tried to intervene in a physical altercation between the mother and her boyfriend was supported by the caseworker's testimony as to her own observations of the child's injuries, along with the color photographs the caseworker took depicting the injuries she observed on the child's hand and face a few hours after the mother assaulted her.

Regardless of whether the mother had a valid reason for disciplining the older child, the descriptions of her violence towards the child and the resulting injuries as seen in the photographs show that the mother's actions were inappropriate and went well beyond any common-law right to use reasonable force to discipline her children. That the older child's injuries were the result of a single incident does not preclude a finding of excessive corporal punishment.

The mother's claim that petitioner's failure to produce the older child to testify at the fact-finding hearing violated her constitutional right of confrontation is improperly raised for the first time on appeal because the record shows that the mother never requested the child's testimony.

In addition, the mother's use of excessive corporal punishment against the older child supports the finding of derivative neglect as to the younger child, because her behavior demonstrated such an impaired level of judgment as to create a substantial risk of harm to any child in her care. The testimony established that the younger child witnessed, or was present for, part of the altercation between the older child and the mother, further supporting the finding of derivative neglect.

Sexual Abuse

Matter of Olivia RR., 207 AD3d 822 (3rd Dept., 2022)

The order of Family Court of Warren County which after a fact-finding hearing, found that respondent had committed sexual abuse in the first degree against the child.

Petitioner offered testimony from one of its caseworkers, who stated that she observed two forensic interviews between the child and State Police investigators. As reflected in the caseworker's testimony, as well as her notes from the first interview, which were admitted into evidence, the child reported that respondent tickled her breasts and vagina on multiple occasions both under and over her clothing and that the tickling made her feel bad. The caseworker testified that the child was asked the same general questions during the second interview and that the child again disclosed sexual abuse by respondent.

A State Police investigator testified that he interviewed respondent as part of the investigation and that, during the course of that interview, respondent admitted that he had previously had sexual thoughts about the child touching his penis and him touching her sexually. The investigator additionally testified that respondent admitted that he had become erect while the child sat and wiggled on his lap and that he would leave her on his lap for a few seconds when that occurred. Respondent testified at the fact-finding hearing and maintained that any touching of the child's private parts was accidental or incidental to playing with the child. However, respondent admitted during his testimony that he did get an erection once or twice when the child was climbing on his lap, although he insisted that his arousal was not intentional.

The 3rd Dept. found no abuse of discretion in Family Court's finding that the child's out-of-court statements were corroborated by respondent's admissions, both to the investigator and during his testimony, as well as the child's consistent repetition of such allegations.

Sexual Abuse

Matter of Anthony M.-B., 208 AD3d 1327 (2nd Dept., 2022)

The father's appeal from the orders of Family Court, Kings County which found that the father sexually abused the child Ariana M.-B., derivatively abused the child Anthony M.-B., and neglected both of the children, and which released the subject children to the custody of the nonrespondent mother were affirmed.

At the fact-finding hearing ACS demonstrated by a preponderance of the evidence that the father sexually abused Ariana M.-B. Ariana M.-B.'s out-of-court statements were sufficiently corroborated by the mother's testimony confirming certain events.

A derivative finding of abuse as to Anthony M.-B. was warranted, as the evidence demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in the father's care.

A preponderance of the admissible evidence also supported a finding that the children's physical, mental, or emotional conditions were impaired or in imminent danger of impairment by the father's commission of an act of domestic violence against the mother in the presence of the children.

Sexual Abuse

Matter of E.H., 209 AD3d 582 (1st Dept., 2022)

The order of Family Court, Bronx County which determined, after a hearing, that respondent sexually abused the subject eldest child and derivatively abused the subject younger child was affirmed.

The court properly determined that the child's statements to the hospital staff at Four Winds and Dr. Khan were independently admissible and did not require corroboration because they were relevant to her treatment, diagnosis and discharge. In any event, the child's out-of-court statements were properly corroborated by the testimony of the ACS caseworker, her treating therapist, her medical records, and by the expert testimony of a child psychologist that the child suffered from post-traumatic stress disorder culminating in a suicide attempt, consistent with sexual abuse and not otherwise explained.

Respondent's sexual abuse of the eldest child supported a finding of derivative abuse with respect to the younger child since it demonstrated that his understanding of his parental obligations was so defective as to place her at substantial risk, particularly since the younger child was present in the same room when the abuse occurred.

Sexual Abuse

Matter of Brittney B., AD2d 2022 NY Slip Op 06881(1st Dept., 2022)

The order of Family Court, Bronx County which found that respondent father sexually abused the older child and derivatively neglected the younger child was affirmed.

The older child's sworn testimony at the fact-finding hearing constituted competent evidence that the father began sexually abusing her when she was around six years old, and the absence of a physical injury does not render the testimony unworthy of credibility.

Contrary to the father's contention, there was no basis for disturbing Family Court's credibility determinations, including its evaluation of the older child's testimony regarding how long the father had been touching her in a sexual manner and what acts of abuse he committed against her. The court's determination of the witnesses' credibility was based on observations of their demeanor, and the court rejected the father's claim that he was never alone with his daughter, determining that the testimony was not credible.

Also, Family Court properly entered a derivative neglect finding against the father as to the younger child. The fact-finding testimony established that the younger child was spending weekends in the home during the period the father sexually abused the older child.

Physical Abuse

Matter of Mea V., 210 AD3d 1408 (4th Dept., 2022)

The order of Family Court, Orleans County was affirmed.

Respondents did not dispute they were exclusively responsible for the child's care at all relevant times, but they contended that they rebutted the presumption of parental culpability by providing a reasonable explanation for how the child's injuries could have occurred without any act or omission on their part. Respondents originally claimed to the pediatrician and the Child Protective Services caseworker that the child's injuries, which included 28 rib fractures and an injured lung, were accidental, but none of the medical evidence supported that claim.

The 4th Dept. concluded that Family Court properly rejected respondents' subsequent claim at trial that the injuries were due to an underlying medical condition: the testimony of respondents' expert witnesses was incredible and their conclusions were not consistent with the other evidence. The record supported the court's determination that the testimony of petitioner's three expert medical witnesses was based on credible evidence despite the fact that the testimony differed from that of respondents' medical experts.

Physical Abuse

Matter of Amaris A. A. 210 AD3d 1077 (2nd Dept., 2022)

The order of Family Court, Suffolk County which found that the mother abused the child Amaris A. A. and derivatively neglected the children Zylon R., Julius E. A., Reminisce M. R., Jayceon F., Jaziah F., James A. F., and Jeramiah N. R. was affirmed..

The six-month-old child, Amaris A. A. was brought to the hospital in respiratory distress and was found to have injuries consistent with abusive head trauma. The child's chest X ray also showed that she had multiple healing rib fractures. Suffolk County DSS commenced an abuse proceeding

DSS presented the testimony of, among other witnesses, the child's treating pediatric radiologist, who testified that the blood found around the child's brain and her retinal hemorrhages were "highly concerning for . . . non-accidental trauma, or child abuse." He also testified that the child's rib fractures were "at least two weeks old, . . . probably closer to a month or more." DSS also presented the testimony of Jean Montague, the case worker assigned to the child's case. Montague testified that the mother and the mother's boyfriend, Joel A., were the only two custodians of the child.

The mother testified that she and Joel A. were the only caregivers of the child from the time the child was previously discharged from the hospital in April 2018 until June 1, 2018. The mother further testified that Joel A. had shaken the child, but she denied doing anything that she believed would cause the child to sustain multiple rib fractures. After the hearing, in an order of fact-finding dated March 31, 2020, the Family Court found, inter alia, that the mother had abused the child as a result of the child's multiple, unexplained rib fractures, and derivatively neglected the other seven children..

Here, contrary to the mother's contention, DSS established a prima facie case of child abuse against the mother by presenting evidence that the injuries the child sustained would not ordinarily occur absent an act or omission of the caregiver, and that the mother was one of the caregivers of the child at the time the injuries occurred. In response to DSS's prima facie case of abuse, the mother did not present any evidence to rebut the presumption of culpability.

Dispositions of Art. 10's

Matter of Tristan R., 209 AD3d 508 (1st Dept., 2022)

The order of Family Court, Bronx County which granted petitioner foster care agency's motion to modify a prior visitation order to authorize agency supervised visitations only was affirmed.

The requisite evidentiary basis existed for Family Court's finding that unsupervised visitation would have a negative impact on the child's well-being, namely that the father lacked sufficient insight on how to appropriately discipline the child who had significant special needs, and that the father has problems controlling his anger.

To the extent the court's determination turned almost entirely on assessments of the credibility of the witnesses and particularly on the assessment of the character and temperament of the father, its findings must be accorded the greatest respect.

Dispositions of Art. 10's

Matter of Y. SS., 2022 NY Slip Op 07281AD2d (3rd Dept., 2022)

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

In addition to appealing the finding of neglect, the Respondent also argued that some of the conditions of Family Court's dispositional order were unconstitutional.

She challenged the condition that she maintain and provide documentation of legal income source(s) sufficient to support the child. She had admitted to engaging in illegal prostitution and testified as to a desire to no longer earn money this way. It is unclear how this condition, which encourages her not to engage in prostitution as a means of income, violates her constitutional rights.

She also challenged the condition that she acknowledge and demonstrate an understanding of her role in the neglect of the subject child . . . , specifically how her prostitution and involvement of child in that prostitution as sexual bait for a pedophile harmed the child and placed her at risk of further harm. Contrary to respondent's argument, this condition did not require her to admit to a finding of neglect, but rather that she recognize and understand how involving the subject child in her prostitution put the child at risk. Certainly, such demonstration of understanding would decrease the chance of such behavior recurring. Thus, this condition did implicate respondent's right to due process of law.

Finally, she challenged the requirement that she utilize day care services for the child through a licensed provider. Contrary to respondent's contention, this condition did not prohibit family or friends from babysitting the child, especially in light of the previous sentence of the dispositional order which states that, respondent shall have all babysitters for the child] approved by DSS prior to utilizing them.

As the dispositional order reflected a resolution consistent with the best interests of the subject child after consideration of all relevant facts and circumstances, and was supported by a sound and substantial basis in the record the 2nd Dept. declined to modify any of the conditions.

Permanency Hearings

Matter of Fatuma I., 2022 NY Slip Op 07234AD2d (2nd Dept., 2022)

The order of Family Court, Kings County that directed that the father shall not be present with the subject children unsupervised, that the father's parental access with the subject children shall be supervised by the mother or the maternal grandfather, and that the father shall not reside in or spend the night in the subject children's home while the subject children are present, was is reversed and remitted to Family Court for further proceedings.

In 2015, the three subject children were removed from the care of their parents on the grounds of sexual abuse and derivative abuse, and the children were placed in kinship guardianship with the maternal grandfather. Thereafter, the Family Court conducted several permanency hearings over the next few years to plan for the children's future. On January 13, 2022, the Family Court issued an order (hereinafter the January 2022 order) granting a final discharge of the children to the care of the mother. The January 2022 order directed that the father shall not be present with the children unsupervised, that the father's parental access with the children shall be supervised by the mother or the maternal grandfather, and that the father shall not reside in or spend the night in the children's home while the children are present.

The Family Court did not hold a hearing before entering the provisions of the order regarding the father's access to the children, and the father had no opportunity to be heard with respect to those provisions in the order. The record demonstrated that at the last permanency hearing, the court, noting that both the father and the petitioner's caseworker were absent due to circumstances beyond the parties' control, directed the petitioner to hold a final discharge conference and to issue an updated report, so that the father could be apprised of the proposed discharge plan and the court could "have a meaningful permanency hearing" at the next court date. Notwithstanding the foregoing, the court issued the January 2022 order, apparently with the consent of the petitioner and the mother. No court proceeding occurred, nor did the record reflect that the father was present for a discharge conference that was to be held by the petitioner. Under these circumstances, the provisions of the January 2022 order relating to the father's access to the children must be reversed and the matter remitted to the Family Court to conduct a new permanency hearing with respect to the father's access to the children.

1061 Motions

Matter of Jessiah K., 207 AD3d 724 (2nd Dept., 2022)

The order of Family Court, Queens County which, after a hearing, denied the mother's motion pursuant to Family Court Act § 1061 to modify an order of fact-finding and disposition so as to grant a suspended judgment and vacate the finding of neglect, which was entered upon her consent to the entry of an order of fact-finding without admission pursuant to Family Court Act §1051(a).

Here, the Family Court providently exercised its discretion in denying the mother's motion to vacate the finding of neglect given the serious nature of the mother's conduct, which was excessive corporal punishment ,and the evidence showing the mother's lack of remorse for her actions.

1061 Motions

Matter of Elizabeth C., 210 AD3d 891 (2nd Dept., 2022)

The order of Family Court, Queens County which denied the mother's motion pursuant to Family Court Act §1061 to modify an order of fact-finding and disposition so as to grant a suspended judgment, vacate the finding of neglect, which was entered upon her consent to the entry of an order of fact-finding without admission pursuant to Family Court Act §1051(a), and dismiss the petitions insofar as asserted against her was affirmed.

The mother had consented to the entry of a finding of neglect without admission against her pursuant to Family Court Act §1051(a). In late August, 2020 Family Court entered a finding of neglect against the mother and directed her to complete certain services. In June 2021, the mother moved pursuant to Family Court Act §1061 to modify the order of fact-finding and disposition so as to grant her a suspended judgment, vacate the finding of neglect against her, and dismiss the petitions insofar as asserted against her.

Family Court Act § 1061 provides that, for good cause shown, a court may set aside, modify, or vacate any order issued in the course of a child protective proceeding.

Here, the Family Court providently exercised its discretion in denying the mother's motion to modify the order of fact-finding and disposition so as to vacate the finding of neglect given, among other things, the serious and prolonged nature of the mother's conduct. Moreover, the mother failed to demonstrate that modifying the order of fact-finding and disposition and vacating the finding of neglect served the best interests of the children.

TPR's and More

Abandonment

Matter of Abel J. R., 207 AD3d 727 (2nd Dept., 2022)

The order of fact-finding and disposition of Family Court, Westchester County made after a fact-finding hearing, which determined that the father abandoned the subject child, and terminated his parental rights was affirmed.

The father's minimal, sporadic, and insubstantial contacts were insufficient to overcome a finding of abandonment.

Abandonment

Matter of Taj'ier W., 209 AD3d 1203 (3rd Dept., 2022)

The order of Family Court Chemung County which granted petitioner's application to adjudicate the subject child to be abandoned and terminated respondent's parental rights was affirmed..

The evidence established that, during the relevant six-month period from May 2020 through November 2020, respondent had no contact with petitioner outside of court appearances, no contact with the child's foster parents and only one phone conversation with a family specialist/counselor at Pathways Incorporated, who testified that respondent did not inquire about the child during that conversation. Petitioner's caseworker testified that respondent did leave one voicemail for her in September 2020, during which he inquired about the child, but stated that her same-day attempts to call him back were unsuccessful and that she was never able to connect with respondent thereafter. The evidence further demonstrated that respondent did not request photographs or seek updates about the child's extensive medical issues or send the foster parents any cards or gifts for the child. In short, respondent's sporadic and insubstantial contacts were insufficient to preclude a finding of abandonment and the burden, therefore, shifted to respondent to demonstrate that he was unable to maintain contact or, if able, was prevented or discouraged from doing so by petitioner.

Respondent did not contest his failure to maintain contact during the relevant six-month period. Rather, he blamed his lack of contact on having been advised by his attorney to not incriminate himself during the pendency of a related criminal action against him, as well as an order of protection prohibiting contact with the child. However, these circumstances neither precluded nor relieved respondent from fulfilling his obligation to maintain contact with petitioner regarding the child. Respondent did not present any evidence establishing that petitioner's caseworkers discouraged him from maintaining contact. Accordingly, as there was clear and convincing evidence that respondent failed to maintain sufficient contact with petitioner for the relevant six-month period, there is no basis upon which to disturb Family Court's finding of abandonment.

Permanent Neglect

Matter of Jiryan S, 207 AD3d 1247 (4th Dept., 2022)

The order of Family Court, Onondaga County which terminated the parental rights of the parents was modified on the law by vacating those parts finding that respondent mother permanently neglected the subject child and the matter was remitted to Family Court.

The mother and the father each failed to appear at the fact-finding hearing on the petition to terminate their parental rights and, although their attorneys were present at the hearing, neither attorney participated. Each parent's failure to appear constituted a default.

Although the 4th Dept. rejected the father's contention that the court abused its discretion in denying his attorney's request for an adjournment, it did agree with the mother that the court abused its discretion in denying her attorney's request for an adjournment. The mother had not previously requested an adjournment, and there was no indication in the record that an adjournment would have adversely affected the child. Further, the mother was experiencing COVID-like symptoms and, under the court's own rules, she was prohibited from entering the courthouse.

Permanent Neglect

Matter of Logan P.G., 208 AD3d 1643 (4th Dept., 2022)

The order of Family Court, Monroe County which, among other things, adjudged that respondent permanently neglected the subject child was affirmed.

The father's sole contention on appeal is that Family Court abused its discretion in denying the request of his attorney for an adjournment so that the father, who was not present, could testify. Here, in support of the request, the father's attorney offered no explanation as to why the father failed to appear. Moreover, the court noted that the father had been informed of the date of the hearing and the consequences of his nonappearance, and the court stated that the hearing had been scheduled prior to an earlier hearing date at which the father had been present. The father's counsel did not dispute any of those facts and could not explain the father's absence. Counsel thus failed to demonstrate that the need for the adjournment was not based on a lack of due diligence on the part of the [father] or [his] attorney.

Permanent Neglect

Matter of Patrice H.W., 209 AD3d 554 (1st Dept., 2022)

The orders of fact-finding and disposition of Family Court, Bronx County which found, respectively, that respondent permanently neglected the child Patrice and violated suspended judgments as to the other three children, and which, after a dispositional hearing, terminated respondent's parental rights to the children and committed their guardianship and custody to petitioner agency and the Commissioner of Social Services for purpose of adoptions, were affirmed.

The finding of permanent neglect with respect to Patrice was supported by clear and convincing evidence. Respondent failed to plan for the child, evidenced by her refusal to acknowledge the problems that led to the foster care placement of the child in the first place, blaming the children, the biological mother, and the agency and denying that the children were subject to sexual abuse. Regardless of whether a parent has complied with the recommended service plan, she has failed to plan for the child's future if she fails to gain insight into her parenting problems or take responsibility for the issues that prompted foster care placement in the first place.

With respect to the other children, a preponderance of the evidence established that respondent materially violated the terms of the underlying suspended judgments. Among other things, respondent failed to interact constructively with agency staff, failed to be available for the required monthly home visits, berated case workers during meetings and visitation, often in front of the children, and did not provide the required releases and consents. Moreover, the court did not credit respondent's testimony to the contrary, and its assessment should not be disturbed as it was in the best position to make this evaluation.

The court providently exercised its discretion in denying respondent's request for an adjournment of the dispositional hearing in that she provided no legal excuse for her failure to appear either by telephone or virtually, and it was not in the best interests of the children to protract the proceedings. As a result, the order of disposition from which respondent purports to appeal was entered upon her default, and therefore is not appealable. Respondent's remedy upon default was to move to vacate the default. Were we to consider it on the merits in the interest of justice, a preponderance of the evidence demonstrated that termination of respondent's parental rights was in the best interests of the children.

Respondent's claim of ineffective assistance of counsel was unavailing, as the record showed that respondent was afforded meaningful representation throughout the proceedings. Respondent failed to show that she was deprived of meaningful representation by counsel's failure to request a mistrial after being assigned to her matter or to not participate in the dispositional hearing in her absence, and that she suffered actual prejudice as a result.

Permanent Neglect

Matter of Briana S.-S., 210 AD3d 1390 (4th Dept, 2022)

The order of Family Court, Genesee County which terminated the parental rights of the parents was affirmed.

Petitioner fulfilled its duty to exercise diligent efforts to encourage and strengthen respondents' relationships with the children by providing appropriate referrals to respondents for mental health counseling, domestic violence and parenting classes, and housing and public assistance. In addition, petitioner scheduled regular visitation between respondents and the children, during which petitioner provided the services of a parent aide to educate respondents on appropriate parenting techniques.

Respondents failed to successfully complete the programs and services that were made available to them and continued to violate orders of protection directing that they have no contact with each other. In addition, in the mother's case, despite petitioner's best efforts, a trial discharge of the children lasted only approximately six weeks.

Permanent Neglect

Matter of Mark M. L. 210 AD3d 1093 (2nd Dept., 2022)

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

Since the order appealed from was made upon the mother's default, review was limited to matters which were the subject of contest in the Family Court, in this case the court's finding that the mother permanently neglected the subject child.

Contrary to the mother's contentions, the petitioner established, by clear and convincing evidence, that it exercised diligent efforts to encourage and strengthen the parental relationship between the mother and the child

The record reflected that despite the petitioner's efforts, the mother failed to plan for the return of the child. The mother's mere participation in anger management and parenting classes was insufficient to meet the requirement to plan for the child's future since she failed to gain insight into the issues that caused the removal of the child, failed to benefit from the services offered, and did not utilize the tools or lessons learned in those classes in order to successfully plan for the child's future.

Permanent Neglect

Matter of Daleena Q.T., AD3d 2022 NY Slip Op 07016 (1st Dept., 2022)

The order Family Court, New York County (Valerie Pels, J.), which, upon findings of permanent neglect, terminated respondent mother's parental rights to the subject children was modified to vacate the order terminating respondent's parental rights to the child D. and freeing her for adoption, and to remand the matter to Family Court for a new dispositional hearing regarding D.'s best interests.

The agency demonstrated by clear and convincing evidence that it made the requisite diligent efforts to strengthen the parental relationship. The evidence shows that it developed an appropriate service plan, repeatedly referred the mother to mental health services and other programs, made home visits to ensure that her living arrangements were suitable for the children, scheduled regular case planning conferences, informed the mother of each child's progress, development and health, and arranged for visitation, including therapeutic visits with three different providers. Despite these diligent efforts, and the mother visiting the children and engaging in some services, overall, the mother failed to plan for the children, as she continued to exhibit aggressive and volatile behavior toward agency staff and the foster parents, and repeatedly accused multiple foster care families of abusing the children. She also refused to sign HIPAA consent forms to allow the agency to monitor her mental health progress, and repeatedly refused to sign consent forms for the children to receive mental health evaluations and services, despite evidence that their behavior was worsening. To the extent the mother engaged in therapeutic visits, there was no evidence that she gained any insight into her behavior or otherwise benefitted from the service long-term, because she reverted back to the same behavior after the therapeutic supervisor ceased to be involved in the case.

The court's finding that termination of the mother's parental rights was in the children's best interests is supported by a preponderance of the evidence. The record showed that the child J. was doing well living with the foster mother, who had cared for him since 2018, and that the foster mother wished to adopt him. Although the record also supported the determination that termination of the mother's parental rights to D. was in her best interests, the case was remanded for a new dispositional hearing with respect to her due to changed circumstances- her attorney advised that she was no longer in the same pre-adoptive foster home, is now 15 years old, and did not consent to being adopted.

Permanent Neglect

Matter of Jeremiah C., 2022 NY Slip Op 07292 AD2d (1st Dept., 2022)

The order of Family Court, New York County, which, terminated respondent mother's parental rights upon a finding of permanent neglect, was affirmed.

The record showed that the agency made diligent efforts to encourage and strengthen the parental relationship by, among other things, developing a plan for appropriate services and referring the mother to drug treatment, mental health treatment, parenting skills classes, dyadic therapy to improve and strengthen her relationship with the child, and scheduling regular visitation.

The record also established that despite the agency's diligent efforts, the mother failed to plan for the child's future during the statutorily relevant time period because she lacked insight into her behavior, and failed to accept any responsibility for causing her other son's death, even though it affected her daughter who witnessed the assault, and even though it resulted in the mother's incarceration and termination of her rights as to Heaven H. To the extent that the mother attended therapy and parenting classes, there was no evidence that she gained insight or otherwise benefitted from them. That the mother consistently visited the child does not preclude a finding of permanent neglect, particularly since the mother had never been permitted to have unsupervised visits with the child.

A suspended judgment was not warranted here, because the dispositional testimony of the mother's expert established that the timeframe for the mother to become the child's primary parent "would be a long one," and that he should not "be alone with his mother in private places" because there was no evidence that she "could control her responses when she felt threatened." Finally, the evidence presented at the dispositional hearing established that the child had been living with his foster parents for most of his life, he was doing well in their care, and that his foster parents wanted to adopt him.

Permanent Neglect

Matter of Alonso S. C. O., 2022 NY Slip Op 07237 AD2d (2nd Dept., 2022)

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

As a threshold matter, the agency established that it had made diligent efforts to encourage and strengthen the parent-child relationship. The agency demonstrated that it had contacted the mental health program that the mother stated she found and attended on her own, provided her with referrals for mental health treatment at other programs, and explained to her that mental health treatment was part of her service plan. The agency had regularly discussed the possibility of parental access with the older child, supervised the mother's parental access with the younger child, and provided the mother with constructive feedback when she made negative comments about the older child to the younger child. The agency made weekly attempts to visit the mother's home and informed the mother of safety issues that were observed during home visits. Further, the agency asked the mother for documentation of her income and provided her with employment referrals. Contrary to the mother's contentions, the evidence demonstrated that the agency made referrals in a timely manner and that the agency facilitated and supported parental access in a manner that was suitable under the circumstances of this case. Moreover, the agency established that the mother had failed to plan for the children's futures, as she only partially complied with her service plan and failed to gain insight into the issues that led to the children's removal. The evidence at the fact-finding hearing demonstrated that the mother had not completed mental health treatment and that she continued to blame one of the children for the removal of the children from the mother's custody.

Family Court correctly determined that it was in the best interests of the younger child to terminate the mother's parental rights and transfer guardianship and custody of that child for the purpose of adoption. At the time of the dispositional hearing, the mother had not had contact with the younger child for more than three years, the child did not want to return to the mother's care or to have contact with the mother, and the child was in a stable, pre-adoptive foster home.

Permanent Neglect

Matter of Navyiah Sarai U., 2022 NY Slip Op 07241AD2d (2nd Dept., 2022)

The order of Family Court, Richmond County which terminated the parental rights of the mother was affirmed.

In a decision of fact-finding dated March 10, 2021, made after a hearing at which the mother testified, the Family Court found that the mother had permanently neglected the subject child, and scheduled the matter for a dispositional hearing. In a subsequent order of disposition dated August 23, 2021, following a hearing at which the mother defaulted by failing to appear, the court terminated the parental rights of the mother.

Since the order of disposition appealed from was made upon the mother's default, review was limited to matters which were the subject of contest in the Family Court, so the review was limited to the finding that the mother permanently neglected the child.

Here, contrary to the mother's contention, the Agency established that it made diligent efforts to strengthen the parental relationship between the mother and the child by, among other things, developing an appropriate service plan, scheduling regular parental access between the mother and the child, and referring the mother to programs for parenting, as well as mental health treatment and substance-abuse screenings. The record showed that, despite the Agency's diligent efforts, the mother failed to plan for the return of the child as she failed to successfully attend or complete parenting programs, mental health treatment and substance-abuse screenings, and did not consistently attend scheduled parental access. Accordingly, the Family Court correctly found that the mother permanently neglected the child.

Permanent Neglect

Matter of Zaiden P., 2022 NY Slip Op 07268 AD3d (3rd Dept., 2022)

The orders of Family Court, Cortland which adjudicated the subject children to be permanently neglected, and terminated respondents' parental rights were affirmed.

In this lengthy decision, the 3rd Dept. found that DSS made diligent efforts to work with both parents in addressing the issues that brought the children into foster care. The parents failed to plan for the future of the children.

Permanent Neglect

Matter of Skylah R. AD3d 2022 NY Slip Op 07445 (2nd Dept., 2022)

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

Here, the petitioner met its initial burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the subject child. The efforts included, inter alia, referring the mother to outpatient substance abuse programs and scheduling supervised visitation with the child.

The petitioner also established by clear and convincing evidence that, despite those efforts, the mother failed to plan for the return of the child, as she did not complete all of the required services.

Contrary to the mother's contention, the evidence at the dispositional hearing demonstrated that terminating her parental rights and freeing the child for adoption, as opposed to entering a suspended judgment, was in the best interests of the child.

TPR Dispositions

Matter of "No Given Name" O., 209 AD3d 443 (1st Dept., 2022)

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

The evidence presented at the dispositional hearing established that the children were doing well living with their foster mothers with whom they have been living for almost their entire lives, and that their foster mothers wanted to adopt them. Furthermore, the mother's dispositional testimony established that it had been over a year since she last visited the children and that she failed to complete her service plan, including obtaining suitable housing for the children and participating with mental health services and domestic violence counseling in the one year before the permanent neglect petitions were filed against her.

A suspended judgment was not appropriate here, because it would only serve to prolong the children's lack of permanence given that the mother failed to demonstrate any meaningful progress toward reunification, nor had she addressed the conditions which led to the children's removal. After spending nearly their entire lives in foster care, the children should not be denied permanence through adoption to provide the mother additional time to demonstrate that she can be a fit parent.

Surrenders and Adoptions

Matter of Elizabeth W., 208 AD3d 787 (2nd Dept., 2022)

The order of Family Court, Suffolk County which, after a hearing, denied the petitions of the child Elizabeth W. to vacate the judicial surrenders of the children Gabriella W. and Aleah W., and denied those branches of the mother's petition which sought the same relief, and dismissed the paternal grandfather's petitions for custody of the children Gabriella W. and Aleah W. was affirmed.

The appeal was filed by the child Elizabeth W. The 2nd Dept. found that she was not aggrieved by the portions of the order appealed from denying those branches of the mother's petition which were to vacate the judicial surrenders of Gabriella W. and Aleah W. and dismissing the paternal grandfather's petitions for custody of Gabriella W. and Aleah W., as those portions of the order neither denied any relief sought by the appellant nor made a determination concerning the custody of the appellant.

The 2nd Dept. also found that although she was aggrieved by the portion of the order denying her own petitions to vacate the judicial surrenders of Gabriella W. and Aleah W., since, in those petitions, asked for relief but that relief was denied in whole or in part, that she did not have standing as she was not a party to or subject of those surrenders.

Miscellaneous

ICPC

Matter of D.L. v S.B., NY3d 2022 NY Slip Op 05940 (NY Court of Appeals, 2022)

The Court of Appeals held that the Interstate Compact on the Placement of Children (ICPC) does not apply to out-of-state, noncustodial parents seeking custody of their children who are in the custody of New York social services agencies.

This decision settles the dispute between the Appellate Divisions on this issue. The Court of Appeals held that the ICPC was intended to regulate the sending of children out of state "for placement in foster care" and "for the purpose of adoption," and thus was not intended to apply in a situation where an out-of-state parent was involved.

The C of A noted that the Family Court Act contains other effective means to ensure the safety of a child before awarding custody to an out-of-state parent. Among other things, Family Court can hold hearings and request courtesy investigations and reports from the local social service agencies or department of probation in order to make determinations regarding a child's best interests. Additionally, rather than awarding an out-of-state parent full custody, Family Court Act §1052(a) provides for other dispositional options, including release to a parent with supervision. Similarly, Family Court may grant a temporary order of custody or guardianship to a noncustodial parent which requires that a parent submit to Family Court's continuing jurisdiction and comply with the terms and conditions of the court's order—which may include making the child available for visits with social services officials.

UCCJEA

Matter of Chester HH. V Angela GG., 208 AD3d 945 (3rd Dept., 2022)

The order of Family Court Tompkins County, which, in a proceeding pursuant to Family Ct Act article 6, granted respondent's motion to dismiss the petition, was reversed and remanded for a hearing.

The mother and the child reside in Michigan. When the child was visiting father in New York, the father filed a modification petition in Family Court seeking to modify the Michigan order on a temporary emergency basis pursuant to Domestic Relations Law § 76-c. The petition alleged neglect and abuse of the child by the mother and the mother's family. Mother moved to dismiss the petition on the basis that Family Court lacked jurisdiction under the UCCJEA, as Michigan is the child's home state. Family Court granted the mother's motion to dismiss the petition and, based on the MDHSS report attached to the mother's motion, the court denied the request by the AFC to conduct a hearing to determine whether the risk of imminent harm to the child warranted the court to exercise temporary emergency jurisdiction.

The 3rd Dept held that In determining the mother's motion to dismiss, the allegations in the father's petition must be accepted as true, and the petition is to be afforded a liberal construction and afforded the benefit of every possible favorable inference. To survive the motion to dismiss, the father was required to establish that the child would be at risk of imminent harm if returned to the mother in Michigan and must be protected.

Applying that standard to the petition, the 3rd Dept. concluded that the father alleged sufficient facts to warrant a hearing as to whether an imminent risk existed.

Fair Hearing

Matter of Vanessa Vega v New York State Office of Children and Family Services, 207 AD3d 1179 (4th Dept., 2022)

The determination which denied petitioner's application to amend the indicated report of maltreatment with respect to her daughter to an unfounded report was confirmed.

Here, testimony from a Monroe County Child Protective Services caseworker established that petitioner coached the child to fabricate allegations of abuse against the child's father and his girlfriend, thereby causing the child to be subjected to unnecessary professional examinations and interviews and harming the child's physical, mental, or emotional well-being.

Moreover, the evidence at the hearing established that petitioner failed to acknowledge that her behavior was harmful to the child and failed to appreciate the seriousness of her conduct, and the 4th Dept. therefore concluded that substantial evidence supports the ALJ's determination that petitioner's maltreatment of the subject child was likely to recur and was reasonably related to her employment working with children with disabilities.

Caseworker Liability

Maldovan v County of Erie, NY3d 2022 NY Slip Op 06632 (2022)

The public administrator of Laura Cumming's estate commenced actions against the County of Erie and the Erie County Sheriff, alleging, among other things, that the CPS and APS caseworkers, as well as the Sheriff's deputies, were negligent in the performance of their duties, leading to Laura's death.

The parties moved for summary judgment, and Supreme Court denied both motions. The Appellate Division affirmed the order denying plaintiff's motion for summary judgment but reversed the order denying defendants' motion and granted summary judgment to defendants, dismissing the complaints against them.

The Appellate Division concluded, as relevant here, that no special duty existed as a matter of law because the fourth element necessary to show a special relationship with the municipality, justifiable reliance, could not be met in this case.

The Court of Appeals affirmed, with a lengthy dissent by Justice Wilson.

The Court of Appeals did not address whether the Appellate Division correctly concluded that a cause of action for negligent investigation is not recognized in New York.

Abuse of Judicial Process

S.P. v M.P., 207 AD3d 1247 (4th Dept., 2022)

The order of Supreme Court, Niagara County which precluded plaintiff from filing any new application without leave of court or approval of an attorney was affirmed.

Plaintiff mother appealed from an order that effectively denied her requests for various relief and precluded her from filing any new application for legal relief without leave of court or approval of an attorney. Contrary to the mother's contention, her requests for relief were all without merit, and Supreme Court did not abuse its discretion in placing restrictions on future filings. Although public policy mandates free access to the courts, a party may forfeit that right if she or he abuses the judicial process by engaging in meritless litigation motivated by spite or ill will.

The mother had made multiple motions for various relief, many of which were repetitive, and each motion was accompanied by voluminous and mostly irrelevant exhibits. When her requests for relief were denied, the mother ignored the court's ruling and continued making the same meritless arguments. Moreover, the mother was sending copies of her papers, which contain sensitive issues, to people who have no involvement at all in the case. The 4th Dept. agreed with the court that the mother had abused the judicial process by engaging in meritless, frivolous or vexatious litigation.

Foster Care Records

Cowan v Nassau County Department of Social Services, , 209 AD3d 975 (2nd Dept, 2022)

In this CVA case, the 2nd Dept. held that the court should have held a discoverability hearing before deciding that branch of defendant Little Flower's motion which sought a protective order regarding the purportedly confidential portions of the foster care records.

The 2nd Dept. noted that while SSL 372 makes foster care records generally discoverable pursuant to the rules found in CPLR Art. 31, that they are not always entitled to unfettered disclosure. For example, even when considering a request for disclosure from a former foster child, an agency may move for a protective order where some part of the record should not be produced. It may be appropriate, for example, for a court to withhold information that implicates the confidentiality, privacy, or safety of nonparties, including other foster children and their families, or even the former foster child's biological siblings, depending on the circumstances.

The End

Thank You!