

STATE OF NEW YORK  
FAMILY COURT

COUNTY OF SCHENECTADY

PRESENT: HON. KEVIN A. BURKE  
JUDGE OF THE FAMILY COURT

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In the Matter of the Commitment of Guardianship and  
Custody pursuant to § 384-b of the Social Services Law of,

**CHEROKEE YARBER**(d.o.b. 12/24/2013)  
(CIN# FB62779W)

**DECISION AND ORDER**  
(Permanent Neglect)

A child under the age of Eighteen Years,  
Alleged to be Permanently Neglected by,

Docket No. B-00079-17  
FFU No. 25361

**MATTHEW YARBER** (d.o.b. 4/22/1984)  
(CIN# EW41025M)

Respondent.

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APPEARANCES:

Michael R. Godlewski, Esq., Office of the County Attorney  
Attorney for Petitioner Department of Social Services

Lisa Marie Belrose, Esq., Office of the Public Defender  
Attorney for Respondent Matthew Yarber

Sheila Corrigan Ferrucci, Esq.  
Attorney for the Child

**PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT: AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO APPELLANT BY THE CLERK OF THE COURT, OR 30 DAYS AFTER SERVICE BY A PARTY OR THE ATTORNEY FOR THE CHILD UPON THE APPELLANT, WHICHEVER IS EARLIEST.**

**BURKE, J.**

On January 17, 2017, the Schenectady County Department of Social Services (hereinafter "the Department") filed a petition alleging that respondent Matthew Yarber, permanently neglect his

daughter, Cherokee Yarber (born December 24, 2013). The Department is seeking the custody and guardianship of the child to be committed to the Department, so as she may be freed for adoption. On January 18, 2017, the Court arraigned respondent with respect to the permanent neglect petition, and set the matter down for trial on April 11, 2017.

### **Trial Proceedings**

On April 11, 2017, respondent was present with counsel and trial commenced. Trial continued on April 12, 2017, May 10, 2017, May 16, 2017, and concluded on June 13, 2017. The Department called respondent, Cathy DiDonna, Katherine Pickett, Steven Borden, and Brenda Kuhn as witnesses. The Department also submitted documentary evidence including, court orders, police records, the Department's case notes, mental health records, substance abuse treatment records, an evaluation by David Horenstein, Ph.D., and FaceBook posts by respondent. When the Department rested, the respondent testified a second time on his own behalf, and also called Michael Malone as a witness. At the closing of the proof, the Court reserved decision.

#### **Matthew Yarber**

Respondent testified that in February 2017, he began dating and living with his girlfriend, Sara Green, in her apartment in Hoosick Falls. He identified approximately ten other places he has resided since early 2014, none of which were his own residence. During that time, he also resided at the Schenectady County Jail, the Schenectady City Mission, and Joseph House, a shelter. He was unsure of the number of times he was incarcerated between January 2015 and January 2017, but approximated it was six or seven. Respondent explained he was incarcerated from April through September 2016 for criminal contempt as a result of respondent and Christy Yarber, Cherokee's mother, being together on his birthday, in violation of an order of protection. He testified that he had

current charges pending for possession of a forged instrument, because he was mailed two money orders from an unknown source, and when he tried to deposit them, he was told the money orders were not good.

When asked what clinicians he has worked with between 2015 and 2017, respondent identified Parsons Short Term, which his caseworker Cathy DiDonna referred him to. He also identified Mohawk Opportunities, Community Fathers, and Union Counseling. He explained there were times when he was without health insurance because of a failure to reapply or re-certify.

When asked why the child Cherokee was removed from his care, respondent reported it was because of his criminal history which included being under the influence, assault and domestic violence, as well as the fact that in California, his parental rights were terminated to his other child, Tabitha. He explained that when he was in California, he was hooked on crystal meth, and Tabitha was removed from his care. Respondent testified that another reason for Cherokee's removal was that at the beginning of the case, when Cherokee was still residing with him, he tested positive for cocaine because one of his mixed martial arts team members gave him something with cocaine slipped in it.<sup>1</sup>

Respondent testified that he is scheduled to have visitation with Cherokee every Tuesday from ten o'clock to eleven o'clock in the morning, at the Department's Broadway office. He will bring snacks for her when he has money, and he does not bring diapers for her because he does not know her size. Respondent stated that Cherokee comes to the visits with diapers, and a snack. He explained that his visits were previously at the Erie Boulevard office, but because of allegations that

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<sup>1</sup> The Court notes that during the neglect proceedings, respondent testified that he and Christy Yarber would use cocaine in their bedroom with the door closed, but that they would first push Cherokee's crib out of their bedroom into the dining room.

he threatened a caseworker, the visits were moved to the Broadway office. Respondent stated that he previously had six-hour long visits with Cherokee in the community, but when he was incarcerated, the visits were reduced to one-hour long. He denied ever having a visit end early due to his behaviors. He did acknowledge that he got into a verbal altercation with Kathy Pickett, who supervised his visits. Respondent stated that he called her a nigger, not because of the color of her skin, but because she mistreated his child. He testified that the Department keeps changing the visitation supervisors.

Respondent reported that he wished he did not have to work with his caseworker Cathy DiDonna because she was biased, and sends him for drug screens. He explained that his criminal matters have nothing to do with having his child returned to him, that he has a job and an apartment now, but he can not seem to get his child back. Respondent stated he has been working at NSK in Bennington, Vermont, through a temp agency for two weeks. He indicated that prior to his job, he worked at Hooters from July 2015 through August 2015. He was unemployed from August 2015 through February 2017. Respondent testified he also was employed at Wendy's for approximately three days in October 2014. He explained that job ended because he had a lot going on in his life and they could not accommodate his schedule.

Respondent acknowledged that he drank alcohol, and did not have a verifiable source of income in violation of the Court's dispositional orders related to his neglect finding. However, he stated that he is twenty-one years old and should be able to drink, and he did odd jobs like lawn mowing and shoveling, and made do to cover his basic needs and a pack of cigarettes.

When asked about his mental health, respondent stated that he does not have a diagnosis, that he went to Union Counseling and Schoharie County Mental Health, just to keep Cathy DiDonna off his back. He claimed that the Schoharie County Mental Health clinician, Joe Irish, told him there was

nothing they could do for him. Respondent stated he did not recall attending Karner Psychological or Pinnacle. He indicated he was on a wait list for Ellis Mental Health, but was never called.

Respondent testified that he was discharged from New Choices Recovery because he tested positive for alcohol, and then refused the recommended intensive inpatient treatment and halfway house. He stated that a few weeks later he brought a six pack of beer to New Choices to show them he was going to have a good time drinking and fishing. Respondent indicated that Cherokee was in the Department's custody at this point in time. He testified that Cathy DiDonna would send him for screens, and it was very inconvenient to have to wait for the staff to administer the screens. One time Cathy DiDonna sent him for a screen after a visit because he smelled of marijuana, but respondent explained that is because he hangs out with people who smoke pot, such as his girlfriend's son. He asserted that he never refused a screen, but stated that there were times he did not get a phone message to get there in time, so he would not show up for the screen.

#### Cathy DiDonna

The Department next called caseworker, Cathy DiDonna, to testify. Ms. DiDonna identified numerous services the Department put into place to assist respondent. She testified that she did referrals for Parsons Short Term program more than once, to assist respondent with getting housing, social security benefits, and public assistance. Ms. DiDonna reported that respondent failed to follow through with appointments, and providing required documentation, and Parsons Short Term closed their case.

Ms. DiDonna testified that Northeast Parent and Child Services' Families Work prevention program has been in place since May 2014. Steve Borden, from that program provides a clinical component, and has been working with respondent for some time, on parenting strategies before, and during respondent's visitations with Cherokee. She explained that she referred respondent to

Mona Stewart, the Department's CASAC, to New Choices Recovery, and Conifer Park. Ms. DiDonna testified that she would send him for drug screens, and most of the time he would go, but missed about 10 screens, and would sometimes argue that they were not needed.

With respect to mental health treatment, Ms. DiDonna testified that she assisted respondent and did referrals to or contacted Union Counseling, Ellis Mental Health, Ellis Pros, Karner Psychological, Franklin Street Clinic, and Joe Irish at Schoharie County Mental Health. She explained that respondent stopped going to appointments in Schoharie because he claimed he was told he does not need mental health treatment. Ms. DiDonna stated that respondent's name did finally come up on the waiting list at Ellis Mental Health, but he missed his appointment, so his name went back on the list. She also looked for anger management programs for him, and he was put in touch with Community Fathers for one or two months. She also arranged for respondent to have an intake with Sue Morgan at Ellis Mental Health, who conducts an anger management program, but after the intake, respondent relocated out of the County, so that program discontinued.

Ms. DiDonna described the progression of respondent's visitation with Cherokee, starting with supervised visits at the Department, and at the Court's direction, moving to supervised six-hour visits in the community. In February 2016, respondent was incarcerated, and the visits went to one-hour supervised and have remained that way. Ms. DiDonna explained that after respondent threatened a caseworker, his visits with the child moved to the Department's Broadway office because it has a metal detector. She testified that throughout 2015 and 2016, she gave respondent bus tokens every week for his visitations with the child. Ms. DiDonna stated that either she, or the person supervising the visit, would counsel with respondent both before and after his visitation.

Ms. DiDonna also testified about a number of incidents when respondent's visits were ended early. She described how he would become angry and agitated and use foul language in the presence

of the child. Respondent threatened her by saying “if you don’t give her back you’ll see a monster if you do you’ll see a nice man.” Ms. DiDonna spoke of one incident when Cherokee woke from a nap during a visit with respondent, and she was crying for Mommy, and respondent started screaming at the child that the foster parents are not Mommy and Daddy.

Ms. DiDonna reported that respondent sometimes would call after hours requesting housing. She continued to counsel him to go to DSS to apply for housing. Ms. DiDonna often did not know where respondent was staying, and would find out from Steve Borden, where respondent was residing. She did look at respondent’s Schoharie residence, which did not have running water, and she visited his Lincoln Avenue home. However, the people living at the Lincoln Avenue home would not agree to sign releases for the Department to conduct a registry check for them.

#### Katherine Pickett

Ms. Pickett testified that she worked with Northeast Parent and Child Society, and that she previously supervised respondent’s visits with Cherokee. She described a few incidents when respondent was unable to control his temper during visitations. Ms. Pickett stated that when she would re-direct him to put his telephone away during a visit with Cherokee, he would, in the presence of the child, scream at her obscenities and call her names such as “nigger,” “black ass,” and “pussy.” She also recounted an incident when respondent brought Cherokee to the Salvation Army for lunch, and a physical altercation broke out right near the child, and respondent failed to take any action to remove Cherokee from the vicinity.

#### Steven Borden

Steven Borden testified that in May 2014, he was referred to work with respondent, and continues to do so. He stated that initially he facilitated couples counseling between respondent and his wife, Christy Yarber. He explained after the Court issued a stay-away order of protection between

respondent and his wife, he worked only with respondent. Mr. Borden stated he addressed, mental health needs, anger management, improving communication, as well as parenting skills. He indicated respondent had very limited parenting skills and it would be difficult for him to parent independently.

Mr. Borden testified that during an individual session with respondent in June 2014, respondent pulled a knife out and started wiping it on his knee. He explained this was near the beginning of their working together, and respondent was using the knife as intimidation, because respondent gets his self worth from being able to be dominant over other people.

On the day of Mr. Borden's testimony, respondent failed to appear in court for trial. When asked if he had heard from respondent, Mr. Borden reported that respondent sent him a text message the day before, indicating that respondent and his girlfriend had an altercation, that the police were called, and therefore, respondent would probably not have a ride to court. Mr. Borden testified that he was working with respondent to use de-escalation techniques, and secure a permanent residence for the children to come home to. He explained that although respondent always had a place to sleep, he never had a stable home of his own, and that respondent was always dealing with his immediate needs, rather than a long term solution. Mr. Borden testified that upon respondent's release from jail, he went to the City Mission, but then he was not allowed back to that shelter because of a confrontation he had there.

Mr. Borden also described a number of exchanges that he had with respondent through the years. In July 2016, while in jail, respondent told Mr. Borden that he tried to hang himself because Christy Yarber was divorcing him, and that he planned to jump off of a bridge when released from jail. Mr. Borden testified that one time he visited respondent at home and he reported to Mr. Borden that he took all of his pain medication at once. Mr. Borden could tell respondent was faking,



exaggerating, and pretending to be comatose, then respondent snapped out of it all of a sudden showing no signs of impairment.

Mr. Borden testified that in the time that he has worked with respondent, respondent had about ten to twelve different anger outbursts. He stated that during these outbursts, respondent had very little control over himself, he would swear, raise his voice, flail his arms, slam doors, threaten to punch walls. Mr. Borden indicated that if he tried to counsel respondent on his parenting, he would not admit to doing anything wrong, and would become combative. He testified that respondent has had very inconsistent employment, and was let go from positions more than once due to his confrontations with others.

#### Brenda Kuhn

The Department called Brenda Kuhn to testify. She stated that she has known respondent for approximately two or three years, and had a relationship with him when he and his wife were split up for awhile. Ms. Kuhn testified that respondent did not hit her, but would have angry outbursts and threaten her. She stated that on April 10, 2017, about a month before her testimony, she video-chatted with respondent and he showed her a gun in lap that he said he just purchased for protection.

#### Documentary Evidence

In addition to the witness testimony, the Court considered substantial documentation admitted into evidence. Records from Schoharie County Mental Health Clinic indicates “there is ample evidence of an antisocial personality disorder... He has a marked history of domestic violence and has been unable to hold a job.... Prognosis is poor because of his antisocial personality organization, limited motivation, and failure to recognize he has a problem to address.” Dr. David Horenstein’s report indicates that respondent’s testing is “consistent with a rather significant personality disorder” and states that it is likely respondent “will struggle with the task of relating to

the world appropriately and maintaining his impulses for years to come.”

Respondent’s records from New Choices Recovery Center included numerous urine screen results indicating respondent continued to test positive for alcohol throughout his treatment, and a letter dated July 7, 2014 indicated he was unsuccessfully discharged from treatment due to respondent’s refusal to engage in a higher level of treatment.

#### Respondent’s Case - Matthew Yarber

On May 15, 2017, respondent began his case and testified again. He testified that he was residing with his girlfriend in Hoosick Falls, and that he was now working at Burger King for the past couple of weeks, different from the job he had at the beginning of the trial. Respondent maintained that he has done everything requested by the Department. He testified he did a parenting program, did substance abuse treatment, established a residence and employment, and had visits with Cherokee every week. Respondent stated that at the service planning reviews he attended, the Department kept hounding him about how important it was *for them* that he follow through with mental health treatment. He stated that he was constantly told he needed safe and stable housing, but he thought that meant a roof over his head that Cherokee could come to. He said no one ever told him that “it couldn’t be like four months in one place, six months in another.” Respondent was asked about being redirected about being on his mobile telephone, during his visitations with Cherokee. Respondent replied that “they can kiss my butt.” When asked about video-chatting with a female during his visitation with Cherokee, he replied “I shouldn’t have to explain myself to anybody.”

On June 13, 2017, respondent’s testimony continued, and he reported he split up with his girlfriend, and was now living in Cohoes with Robin, a friend he met last year, who has a child. Respondent confirmed that the police were involved when he left his girlfriend’s residence in Hoosick Falls. He also stated that he was again unemployed because he did not have transportation

to get from his new residence in Cohoes to the Burger King in Hoosick Falls. Respondent stated that in early May 2017, Ms. DiDonna had sent him information about Upstate Psychological in Troy, and Latham Mental Health. Respondent claimed he did not pursue those providers, because it is too far along in the court process, and he has a personal reason for not going. Respondent stated that “just because someone has mental health issues, doesn’t mean they have to address it like intensively.” He claimed that he has come along way, in that he is not as violent as he used to be, and that he has “dabbled” in anger management. Respondent stated that he has done everything except mental health treatment and that he does not need someone telling him what is wrong with him.

#### Michael Malone

Respondent called Michael Malone to testify. Mr. Malone stated that he previously worked with respondent and supervised his visitations with Cherokee. He testified that respondent was usually appropriate with Cherokee during his visitations, and was sometimes receptive to suggestions on parenting strategies. Mr. Malone indicated that there were a few instances when respondent would get angry and frustrated. He described one incident when Cherokee was visiting with respondent in jail, and she was having a melt down in the small, very hot visiting room, and she was not being receptive to respondent. Mr. Malone stated respondent became angry and used foul language in Cherokee’s presence, and that incident prompted a follow-up meeting between respondent and Mr. Malone’s supervisor.

#### **Diligent Efforts**

“In a permanent neglect proceeding, the threshold inquiry is whether the agency established, by clear and convincing evidence, that it made ‘diligent efforts to encourage and strengthen the parental relationship’” (Matter of James J. [James K.], 97 AD3d 936 [3rd Dept. 2012]). This

obligation may be satisfied by the Department's showing that it assisted the parent with visitation, provided information and counseling to the parent, and offered appropriate educational and therapeutic programs and services (see Matter of Carter A. [Courtney QQ.], 121 AD3d 1217 [3rd Dept. 2014]).

The record is clear in this matter, by respondent's own testimony, as well as that of the other witnesses, that the Department engaged in diligent efforts to encourage and strengthen the parental relationship between respondent and the child Cherokee. The Department provided respondent with bus transportation, coordinated the Child's transportation, and facilitated supervision, for respondent's weekly visits with the child. Those visitations were sometimes six-hour-long community visits, as well as visits in the jail, during the periods of respondent's incarceration. The Department contracted with providers who counseled respondent prior to, and during, his visitations, as to how to best interact with the child, and to improve his parenting skills and strategies.

The Department arranged for service plan reviews, and continued to counsel respondent on the need to address his housing situation, and his mental health. In this case, the Department made referrals for respondent to parenting programs, numerous mental health providers, and substance abuse treatment providers. The Department referred respondent to agencies, which addressed with him immediate tangible needs, such as public assistance, food stamps, and housing.

The Court finds, by clear and convincing evidence, that the Department made diligent efforts to strengthen respondent's relationship with his child.

#### **Failure to Plan**

The subsequent determination is whether the Department proved, "by clear and convincing evidence, that respondent failed substantially and continuously or repeatedly to maintain contact with

or plan for the future of the child, although physically and financially able to do so' for a period of at least one year or 15 out of the most recent 22 months following the date the children were taken into [the Department'] care''' (Matter of Joannis [Joseph Q.], 110 AD3d 1188, 1190-91 [3rd Dept. 2013], quoting Matter of James J. [James K.], 97 AD3d at 938 [3rd Dept. 2012]). A parent's failure to secure steady employment and stable housing, and to address mental health difficulties, has been deemed to be a failure to plan for a child's future (see Matter of Alexander Z. [Jimmy Z.], 149 AD3d 1177 [3rd Dept. 2017]).

The respondent's own testimony established that during relevant twenty-two-month period, his housing continued to be in flux, his employment continued to be intermittent, he continued to be with his wife in violation of the orders of protection which continued to result in his arrest and incarceration, and that he had not engaged in mental health counseling other than a few sporadic appointments. At no time, during the relevant time, was respondent in a position to regain custody of his child, and be able to provide her with any sense of financial or emotional stability.

The Court finds, by clear and convincing evidence, that respondent failed to plan for the future of the child.

Therefore, it is hereby

**ORDERED and ADJUDGED** that petitioner has proven by clear and convincing evidence that the Department made diligent efforts to encourage and strengthen the parental relationship of respondent, Matthew Yarber, and the child Cherokee Yarber (born December 24, 2013); and it is further


**ORDERED and ADJUDGED** that petitioner has proven by clear and convincing evidence that for a period of at least 15 of the most recent 22 months, the child Cherokee Yarber has remained in foster care, and respondent, Matthew Yarber, has failed to plan for her future; and it is further

**ORDERED and ADJUDGED** that the child Cherokee Yarber (born December 24, 2013) is a permanently neglected child; and it is further

**ORDERED** that the matter shall be set for a dispositional hearing.

The foregoing constitutes the Decision and Order of the Court.

Signed this 28<sup>th</sup> day of September 2017  
Schenectady, New York

  
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Hon. Kevin A. Burke  
Schenectady County Family Court Judge

ENTERED:

ENTERED  
SEP 28 2017  
SCHENECTADY COUNTY  
FAMILY COURT

**MAILED**  
9/28/17 to Attys' Resp.