# SELECTED CHILD WELFARE DECISIONS

# JULY 2023 – DECEMBER 2023

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# Introduction

These cases represent the child welfare related cases that I found between July 1, 2023 and December 31, 2023 from my review of the Slip Opinions for the Court of Appeals and Appellate Division posted on the OCA website. There are some trial court level cases included at the end of the compilation.

Although I hope that I found all relevant cases, do not assume that this collection 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, except for the appearances of counsel.

Because this program covers cases reported up to December 31, 2023, and the program is given on January 25, 2024, the official citations have not been issued for some of the cases. If you need the official citation, please check the court website for those, or your legal research website (Westlaw, LEXIS, etc.)

# Evidentiary Rulings in Article 10 Proceedings

**Matter of Baby Girl G**., 220 AD3d 568 (1st Dept., 2023)

Order of disposition, Family Court, Bronx County (David J. Kaplan, J.), entered on or about March 2, 2022, which, to the extent it brings up for review an order, same court and Judge, entered on or about March 2, 2022, which granted petitioner agency's motion for summary judgement on its petition alleging that respondents had derivatively neglected the subject child, unanimously affirmed, without costs. Appeals from order granting summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Petitioner made a prima facie showing of derivative neglect as to the subject child, based on the prior findings of neglect against the parents with respect to their older children**,** the dispositional orders placing the older children in foster care, the permanency hearing order of May 27, 2021, and the order freeing the older children for adoption on July 29, 2021. The latter orders provided evidence that respondents had failed to ameliorate the conditions that led to those findings (*see Matter of A'Nyia P.G. [Qubilah C.T.G.]*, 176 AD3d 495, 496 [1st Dept 2019], *lv denied* 34 NY3d 908 [2020]). The Family Court properly took judicial notice of its own orders. The prior findings of neglect, the continued placement of the older children in foster care, the termination of their parental rights to the older children, and their noncompliance with court-ordered services all support the court's findings (*see Matter of Cheron B. [Vanessa G.]*, 157 AD3d 618, 618 [1st Dept 2018]). In opposition, the parents failed to present evidence sufficient to raise a triable issue of fact concerning the amelioration of the conditions that led to the original finding (*see Matter of Phoenix J. [Kodee J.]*, 129 AD3d 603, 604 [1st Dept 2015]).

On appeal, appellants object to the Family Court's consideration of the unsworn affidavits signed by the case workers from the foster care agency and the Administration for Children's Services. We reject this argument for two reasons. First, Family Court had sufficient evidence before it to support its determination without considering the unsworn affidavits. Second, since appellants failed to raise this objection before the Family Court, we decline to consider it on appeal (see *Shoshanah B. v Lela G*., 140 AD3d 603, 605 [1st Dept 2016]).

We have considered respondents' remaining arguments and find them unavailing.

**Matter of Marjorie P.**, 221 AD3d 818 (2nd Dept., 2023)

In related proceedings pursuant to Family Court Act article 10, the petitioner appeals from an order of the Family Court, Kings County (Alicea Elloras-Ally, J.), dated July 15, 2022. The order, after a fact-finding hearing, and upon a finding that the respondent was not a person legally responsible for the children Yasmin P., Hilary P., and Marjorie P., dismissed the petitions alleging that the respondent abused the children Yasmin P. and Hilary P. and derivatively abused the children Marjorie P. and Gerardo M. P., Jr.

ORDERED that the order is modified, on the law, on the facts, and in the exercise of discretion, (1) by deleting the provision thereof finding that the respondent was not a person legally responsible for the children Yasmin P. and Hilary P., and substituting therefor a provision finding that the respondent was a person legally responsible for the children Yasmin P. and Hilary P., and (2) by deleting the provision thereof dismissing those petitions alleging that the respondent abused the children Yasmin P. and Hilary P. and derivatively abused the child Gerardo M. P., Jr., and substituting therefor a provision finding that the respondent abused the children Yasmin P. and Hilary P. and derivatively abused the child Gerardo M. P., Jr.; as so modified, the order is affirmed, without costs or disbursements, those petitions alleging that the respondent abused the children Yasmin P. and Hilary P. and derivatively abused the child Gerardo M. P., Jr., are reinstated, and the matter is remitted to the Family Court, Kings County, for a dispositional hearing and dispositions thereafter.

The petitioner commenced these related proceedings pursuant to Family Court Act article 10, alleging that the respondent sexually abused the children Yasmin P. and Hilary P., and thereby derivatively abused the children Marjorie P. and Gerardo M. P., Jr. Yasmin P., Hilary P., and Marjorie P. are the respondent's biological nieces, and Gerardo M. P., Jr., is the respondent's son. Following a fact-finding hearing, the Family Court found that ACS failed to establish that the respondent was a person legally responsible for Yasmin P., Hilary P., or Marjorie P. The court further found, in effect, that because the petitioner had failed to establish that the respondent was a person legally responsible for Yasmin P. or Hilary P., the petitions alleging that Marjorie P. and Gerardo M. P., Jr., were derivatively abused must be denied. As a result, the court dismissed each of the petitions.

A person legally responsible is defined as "the child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time" (Family Ct Act § 1012[g]). A "[c]ustodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child" (*id.*). Thus, subdivision (g) of section 1012 "embod[ies] legislative recognition of the reality that parenting functions are not always performed by a parent but may be discharged by other persons, including custodians, guardians and

paramours, who perform caretaking duties commonly associated with parents" (*Matter of Yolanda D.*, 88 NY2d 790, 795; *see Matter of Trenasia J. [Frank J.]*, 25 NY3d 1001, 1004). "A person is a proper respondent in an article 10 proceeding as an other person legally responsible for the child's care if that person acts as the functional equivalent of a parent in a familial or household setting" (*Matter of Yolanda D.*, 88 NY2d at 796 [internal quotation marks omitted]).

"Determining whether a particular person has acted as the functional equivalent of a parent is a discretionary, fact-intensive inquiry which will vary according to the particular circumstances of each case. Factors such as the frequency and nature of the contact between the child and respondent, the nature and extent of the control exercised by the respondent over the child's environment, the duration of the respondent's contact with the child, and the respondent's relationship to the child's parent(s) are some of the variables which should be considered and weighed by a court" (*id*.; *see Matter of Trenasia J. [Frank J.]*, 25 NY3d at 1004). These factors are not exhaustive, "but merely illustrate some of the salient considerations in making an appropriate determination" (*Matter of Yolanda D.*, 88 NY2d at 796).

Here, the Family Court's finding that the respondent was not a person legally responsible for Yasmin P. and Hilary P. within the meaning of the Family Court Act is not supported by the record (*see generally Matter of Trenasia J. [Frank J.]*, 25 NY3d at 1004; *Matter of Yolanda D.*, 88 NY2d at 797; *Matter of Erica H.-J. [Tarel H.-Eric J.]*, 216 AD3d 954, 956; *Matter of Kevin D. [Quran S.S.]*, 169 AD3d 1034, 1035). Significantly, the respondent, the paternal uncle of Yasmin P. and Hilary P., continually resided in the same apartment with Yasmin P. and Hilary P. for approximately five years. In addition, the respondent's brother testified during the fact-finding hearing that the respondent told him that the respondent considered both the respondent's family and the respondent's brother's family, including Yasmin P. and Hilary P., to be one big family (*see* Family Ct Act § 1012[g]; *cf. Matter of Erica H.-J. [Tarel H.-Eric J.]*, 216 AD3d at 957).
The [*2]respondent also exercised control over Yasmin P.'s and Hilary P.'s environment during the relevant period by freely accessing their bedroom and the common areas of the apartment, including when Yasmin P. and Hilary P. were home and their parents were away at work or running errands, and by controlling Yasmin P. with commands or the promise of gifts. Accordingly, the evidence adduced at the fact-finding hearing established that the respondent was a person legally responsible for Yasmin P. and Hilary P.

By contrast, the Family Court properly found that the respondent was not a person legally responsible for Marjorie P. Marjorie P. lived in the same household as the respondent for only one month when she was a newborn, and no evidence was

presented regarding the nature of the respondent's relationship with Marjorie P. during the relevant period.

With respect to the respondent's conduct, the evidence adduced at the fact-finding hearing established by a preponderance of the evidence that the respondent sexually abused Yasmin P. and Hilary P. (*see Matter of Tarahji N. [Bryan N.-Divequa C.]*, 197 AD3d 1317, 1319). Moreover, the respondent does not contest on appeal that the evidence adduced at the hearing established that he sexually abused these children. Nonetheless, "a finding of sexual abuse of one child does not, by itself, establish that other children in the household have been derivatively abused or neglected" (*Matter of Mirianne A. [George A.]*, 214 AD3d 864, 865; *cf. Matter of Katherine L. [Adrian L.]*, 209 AD3d 737, 740). However, conduct which evinces a "fundamental defect" in the respondent's "understanding of his parental duties relating to the care of children" and impaired parental judgment is sufficient to support a finding of derivative abuse (*Matter of Angelica M. [Nugene A.]*, 107 AD3d 803, 804-805; *see Matter of Ciniya P. [Omar S.W.]*, 217 AD3d 954, 955; *Matter of Mirianne A. [George A.]*, 214 AD3d at 865).

Here, "[t]he nature of the direct abuse of" Yasmin P. and Hilary P., "its duration, and the circumstances of its commission, evidence fundamental flaws in" the respondent's "understanding of the duties of parenthood, which require a finding that" Gerardo M. P., Jr., has "been derivatively abused" (*Matter of Daniel W.*, 37 AD3d 842, 843). Notably, Gerardo M. P., Jr., was living in the same apartment as the respondent, Yasmin P., and Hilary P. when the abuse occurred (*see Matter of Ciniya P. [Omar S.W.]*, 217 AD3d at 956). Thus, a finding that the respondent derivatively abused Gerardo M. P., Jr., was warranted.

**Matter of Clarissa F.**, AD3d 2023 NY Slip Op 06680 (4th Dept., 2023)

Appeal from an order of the Family Court, Allegany County (Terrence M. Parker, J.), dated November 2, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, placed the subject children with their mother after granting petitioner's motion for summary judgment on the issue whether respondent had neglected the children.
It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the matter is remitted to Family Court, Allegany County, for further proceedings on the petition.

Memorandum: In this neglect proceeding pursuant to Family Court Act article 10, respondent appeals from an order of disposition, entered on respondent's consent, that, inter alia, placed the children in the custody of their mother and placed respondent

under petitioner's supervision for one year. Respondent and the mother are the biological parents of Ayla O. The mother is also the biological parent of Clarissa F., William F., and Elaina F. In October 2021, petitioner received a report from the State Central Register and information from a police investigator regarding allegations that respondent had inappropriately touched Clarissa, Elaina, and a friend of theirs. As a result of the allegations, respondent was arrested and charged with three counts of forcible touching. While the criminal matter was pending, petitioner commenced this neglect proceeding, alleging that respondent was a person legally responsible for the care of the children, had neglected Clarissa and Elaina, and had derivatively neglected William and Ayla. After respondent was convicted upon his guilty plea of one count of endangering the welfare of a child, petitioner moved for summary judgment on the petition based upon, inter alia, the plea and certificate of conviction in the criminal matter. In a fact-finding order, Family Court granted petitioner's motion and determined that respondent neglected the children. Respondent appeals from the subsequent dispositional order.

Initially, we note that the order of disposition brings up for our review the court's contested finding of neglect (*see Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1676 [4th Dept 2021]; *Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]) and we further note that respondent "is aggrieved by that finding despite [his] consent to the disposition" (*Matter of Vashti M. [Carolette M.]*, 214 AD3d 1335, 1335 [4th Dept 2023], *appeal dismissed* [*2]39 NY3d 1177 [2023]; *see Noah C.*, 192 AD3d at 1676-1677).

We agree with respondent that the court erred in granting petitioner's motion for summary judgment. "Family Court may grant summary judgment in a[ ] . . . neglect proceeding if no triable issue of fact exists" (*Matter of Kai G. [Amanda G.]*, 197 AD3d 817, 820 [3d Dept 2021]; *see* Family Ct Act § 165 [a]; *Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182 [1994]; *Matter of Celeste S. [Richard B.]*, 164 AD3d 1605, 1605 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]). As always, "[o]n a motion for summary judgment, the moving party bears the burden of establishing its prima facie entitlement to judgment as a matter of law" (*Kai G.*, 197 AD3d at 820; *see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Celeste S.*, 164 AD3d at 1605). Only if that burden is met does "the burden shift[ ] to the party opposing the motion to demonstrate the existence of a material issue of fact" (*Kai G.*, 197 AD3d at 820). "In resolving a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party" (*id.*).

"As relevant here, 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" (*Matter of Lilliana K. [Ronald K.]*, 174 AD3d 990, 990-991 [3d Dept 2019] [internal quotation marks omitted]). "It is well settled that [t]he party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination" (*Matter of Stephiana UU.*, 66 AD3d 1160, 1163 [3d Dept 2009] [internal quotation marks omitted]). "In order to find a defendant guilty of endangering the welfare of a child, it must be proven that '[the defendant] knowingly act[ed] in a manner likely to be injurious to the physical, mental or moral welfare of a child less than [17] years old' " (*Lilliana K.*, 174 AD3d at 991, quoting Penal Law § 260.10 [1]). "In turn, [t]o establish neglect, [a] petitioner must prove by a preponderance of the evidence that a child's physical, mental or emotional condition was harmed or is in imminent danger of harm as a result of a failure on the part of the parent to exercise a minimum degree of care" (*id.* [internal quotation marks omitted]; *see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]).

Here, the petition alleges that respondent engaged in the inappropriate touching on or about July 14, 2021 (Clarissa), October 13, 2021 (Elaina), and July 11, 2021 (the friend). The affidavit in support of the motion for summary judgment states that the offenses against all three children occurred on or about July 21, 2021. The certificate of conviction does not list the date or dates of the offense or the victim, and the minutes of respondent's plea allocution are not contained in the record on appeal. Thus, contrary to petitioner's assertion, it failed to establish the identity of the issues in the present litigation and the prior determination inasmuch as it is not clear whether the conviction related to the allegations with respect to Clarissa or Elaina—two of the children covered in the neglect petition and for whom respondent was a person legally responsible—or their friend—a child not named in the petition and for whom respondent was not legally responsible. "[I]t is not enough to merely establish the existence of the criminal conviction; the petitioner must prove a factual nexus between the conviction and the allegations made in the neglect petition" (*Matter of Jewelisbeth JJ. [Emmanuel KK.]*, 97 AD3d 887, 888 [3d Dept 2012]). Thus, on this record, we conclude that petitioner failed to meet its burden of establishing as a matter of law that respondent neglected Clarissa or Elaina (*cf. Matter of Blima M. [Samuel M.]*, 150 AD3d 1006, 1008 [2d Dept 2017]; *Matter of Doe*, 47 AD3d 283, 285 [3d Dept 2007], *lv denied* 10 NY3d 709 [2008]).

Inasmuch as petitioner failed to establish that respondent neglected Clarissa or Elaina, petitioner also failed to meet its burden of establishing as a matter of law respondent's derivative neglect of William and Ayla (*see Matter of David W. [Patricio W.]*, 191 AD3d 1349, 1351-1352 [4th Dept 2021]; *see generally* Family Ct Act § 1046 [a] [i]; *Matter of Sonja R. [Victor R.]*, 216 AD3d 1096, 1099 [2d Dept 2023]).

# NEGLECT

## General and Mixed Neglect

**Matter of Jada W.**, 219 AD3d 732 (2nd Dept., 2023)

In a proceeding pursuant to Family Court Act article 10, the petitioner appeals from an order of fact-finding of the Family Court, Kings County (Melody Glover, J.), dated April 27, 2022. The order of fact-finding, after a hearing, dismissed the petition. Justice Dowling has been substituted for Justice Zayas (*see* 22 NYCRR 1250.1[b]). ORDERED that the order of fact-finding is reversed, on the law and the facts, without costs or disbursements, the petition is reinstated, a finding is made that the mother neglected the subject child, the matter is remitted to the Family Court, Kings County, for a dispositional hearing and a determination thereafter, and a temporary order of protection dated March 10, 2022, is continued pending that hearing.

In November 2017, the Administration for Children's Services (hereinafter ACS) filed a petition against the mother alleging, inter alia, that she had neglected her then 7-year-old daughter (hereinafter the child) by failing to provide the child with proper supervision or guardianship in that she knew or should have known that her then 15-year-old son (hereinafter the son) with whom she left the child was sexually abusing the child.

ACS's theory of neglect, and the position which it propounded during the hearing, as set forth in the allegations in the petition—and as delineated by counsel for ACS on the second day of the hearing as well as at the conclusion of the hearing, which transpired over the course of more than a year—was that the mother neglected the child by leaving the child unattended in the supervision of the son even though the mother knew that the child had alleged that the son had sexually abused her. ACS argued that the mother neglected the child by allowing the son to be a caretaker of the child despite the concerns the mother had or should have had about the son's history of sexual inappropriateness **[FN1]**. Contrary to the position articulated by our dissenting colleague, the petition expressly set forth this theory of neglect:

[The child is] under eighteen years of age whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [her] mother . . . to exercise a minimum degree of care in that:

1. The respondent mother . . . fails to provide the subject [child] with proper supervision or guardianship in that she knew or should have known that the [son] was sexually abusing the subject child, *and/or by any other acts of a similarly serious nature requiring the aid of the court*, in that:

. . .

g. The respondent mother admitted that she leaves the subject child . . . alone with [the son] to hang out with her friends and work. The respondent admitted that she leaves the subject child . . . in the care of [the son] at least twice a week.

Based on the foregoing, the subject [child is] neglected or at risk of becoming neglected pursuant to Article Ten of the Family Court Act (emphasis added).

The petition also alleged, among other things, that the child informed school personnel at Brooklyn Community Services that the son masturbated in front of her on a regular basis and that he made her have sex with him, beginning when she was five years old. Specifically, the petition alleged, inter alia, that the child had told school personnel that the son made her take her underwear off, that he took off his underwear and had sex with her, and that the child depicted to school personnel a pumping motion with her hand to demonstrate what the son did with his penis when they were both naked from the waist down. The petition also alleged that the child told school personnel that the son "put his finger up her butt," that it occurred when the mother left them alone while she was at work, and that this "began when she was five (5) years old."

The hearing was commenced in March 2020; after ACS introduced certain records into evidence and an ACS caseworker (hereinafter the first caseworker) testified, the matter was adjourned to a new date. On the next hearing date, in May 2021, another ACS caseworker (hereinafter the second caseworker) testified that, after receiving a report, ACS arrived at the mother's home at approximately 3:00 a.m. on a date in November 2017 and the then seven-year-old child answered the door. The second caseworker testified that the child said that her mother was not at home but that her brother—who was then 15 years old—was home. The child was directed to get the son, who thereafter arrived at the door.

Approximately a half hour later, the mother, smelling of alcohol, arrived at the home. The second caseworker then spoke with the child and asked her if she knew her body parts and the child was able to identify them. The second caseworker then asked the child if anybody ever touched her private parts and the child said, "her, and her brother had sex." The second caseworker testified that she asked the child when was the last time and the child responded, "yesterday." The second caseworker then asked the child whether she knew what sex was, and the child responded, "you know what sex is, she shook her head, she said, you know what sex is." The child told the second caseworker

that "her mother told her to say that it was a lie, to tell us what she told the school was a lie." The second caseworker further testified that the child told her that "her mother had checked her down [there] and she pointed to her private area—and that everything was okay." The second caseworker testified that the mother's screaming reaction to the police, who had arrived in response to a call from the first caseworker, when the mother arrived at the house prevented her from continuing her conversation with the child.

The first caseworker, who testified on the first day of the hearing in March 2020, averred that she spoke with the son, who admitted that he watches pornography, said that he has his own account, and said that the child did observe him watching pornography.

The first caseworker testified that she later had a conversation with the mother about whether there were any concerns about the son acting out sexually, and the mother replied that it was a lie. The first caseworker testified that the mother then told her that the child's godmother had told the mother that the child told the godmother that the son had touched the child's private part underneath her panties. The mother said that she didn't want to believe one child over the other. The first caseworker testified that she had observed an interview of the child conducted by an employee of the Brooklyn Child Advocacy Center, and that during that interview the child told the interviewer that the son was watching something that the child called "polo," which the child described as "a man and a woman they don't have any clothes on and they put their private parts into each other and that the boy moves around and he carries the woman somewhere." The first caseworker testified that the interviewer then asked the child if anything had happened between her and the son, and the child said she did not want to talk about it further; she had talked about it already.

At the May 2021 hearing date, the second caseworker testified that she, too, asked the mother if there had been "any previous concerns with [the son] acting out sexually," and that the mother admitted to her that when the son was 10 years old, the mother's brother found the son with the mother's then 8-year-old nephew in a room where the son was "pulling—bending the nephew down—bending the nephew over and pulling down his under wears [sic]." The second caseworker testified that she asked the mother if the child had reported anything like that before and the mother responded that the child told her godmother that "[the son] had pulled her panties down." The [*2]second caseworker testified that the mother said this occurred when "[the child] was four and [the son] was 12 at the time." The mother told the second caseworker that she had taken the child to the hospital." The mother told the second caseworker that she had also taken the son to a psychologist a couple of times but stopped when the son no longer wanted to go. The mother told the second caseworker that the son "had apologized" about the incident with his cousin and said that he was "sorry for humping his cousin."

Also in evidence at the hearing were medical records regarding an examination of the child at Kings County Hospital Center where she was taken after the report of the incident to ACS. The medical records show that the child was evasive when questioned about the sexual abuse, and stated that "if she [said] anything, she [would] be 'taken away.'" The records indicate that the doctor noted that the child "seem[ed] to be playful and talkative," but became "very quiet when asked about any sexual encounter between her and [the son]."[FN2] Likewise, according to the testimony of the second caseworker, initially the child was talkative and answering questions until she heard her mother scream at police officers in another room, at which point the child stopped responding to the caseworker's questions.

The mother also testified at the hearing, and admitted that the morning that ACS came to her apartment in November 2017 was not the first time that someone had brought concerns to her attention about her son's sexually inappropriate behavior. The mother testified to the conversation she had with her brother wherein her brother "came to [her]," told her "your son is bending my son over," and told her to "handle [it]." The mother testified that she then spoke with her son and the cousin together and they told her that nothing had happened. Her son told her that they were "reacting to what they saw on Adult Swim," which she testified was an after hours cartoon network for adults that has "nudity, cartoons and stuff like that." The mother also testified that the son said that he was "bending his friend over and his friend was bending him over and they was pumping each other." When asked what she understood the son to mean by "pumping each other," the mother demonstrated by making a thrusting motion. The mother also acknowledged her statements to the first caseworker that there was another incident in which the child's godmother reported to the mother that the child told the godmother that the son had touched her. The mother testified that she confronted the son about the godmother's statement and the son told her that it did not happen. The mother testified that she also asked the child about the incident and that the child told her that the son did not touch her private part but only pulled her panties down to help her in the bathroom. The mother also testified that she asked the child if she knew what her private part was and that the child pointed to her chest. The mother testified that the child was not upset or crying but that she took her to the hospital to get checked out. According to the mother, after the doctor examined the child, she was given a prescription for a cream for eczema and cold medicine. The mother offered no [*3]documentation or medical records to support this contention.

The mother also admitted to the incident where the child told her that the son was watching "two naked people on the screen getting on top of each other" while the child was on the couch. However, the mother contended that she then took the son to a psychologist and that he attended every week once per week for three months. In contrast, the second caseworker testified that, with respect to services for the son, the

mother told her she took the son to a psychologist a couple of times and then stopped because the son didn't want to go.

The mother also testified that, based on the discussions with the psychologist and a review of her cable bill, she determined that her son was watching pornography and testified that she took his devices from him and had a talk with him. Although the mother contended that she took the son's devices from him, the first caseworker testified that the son told her that he has his own account and that he watches pornography and that the child had observed him doing so.

After the fact-finding hearing, the Family Court determined that the testimony of each of the two caseworkers was credible and, without specification, that the mother was "mostly credible." However, the court determined, in effect, that ACS was required to prove that the son was sexually abusing the child as a prerequisite to establishing that the mother neglected the child, and that the child's out-of-court statements to school personnel, the child's statements to the caseworker that the son has had sex with her, and the statements the child made to her godmother were uncorroborated, and thus dismissed the petition. ACS appeals. We reverse.

In a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of proving neglect by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]).

Here, the Family Court erred in determining, in effect, that proving sexual abuse was a prerequisite to proving neglect and that ACS had not proven that the mother neglected the child (*see Matter of Alexis C.*, 27 AD3d 646, 647-648; *Matter of Jasmine B. [Felisha B.]*, 4 AD3d 353, 353). A finding of neglect is warranted when a parent allows the child to be harmed or placed in substantial risk of harm (*see* Family Ct Act § 1012[f][i]). A parent, who, by willful omission, fails to protect a child, and as a consequence places the child at imminent risk of harm, demonstrates a fundamental defect in understanding the duties and obligations of parenthood and creates an atmosphere detrimental to the physical, mental, and emotion well-being of the child (*see Matter of Krystin M.*, 294 AD2d 577, 577; *see also Matter of Alexis C.*, 27 AD3d at 647). Here, ACS contended that the mother neglected the child because, despite her knowledge of the son's sexually inappropriate behavior, the mother failed to provide proper care and supervision for the child by leaving the child alone with the son.

The Family Court also erred in finding that the child's out-of-court statements about sexual abuse were uncorroborated **[FN3]**. To establish its burden of showing by a preponderance of the [*4]evidence that the mother neglected the child, a petitioner may rely upon prior out-of-court statements of the child, provided that they are properly corroborated (*see Matter of Alven V. [Ketly M.]*, 194 AD3d 725, 726). As noted by the

Court of Appeals in *Matter of Christina F.* (*Matter of Christina F.*, 74 NY2d 532, 535), "[s]ince [the] enactment of the Family Court Act, courts have struggled with the issue of corroboration," and it is especially troubling in cases of sexual abuse of children in family settings. "Such abuse typically occurs in secret with the child-victim as the only witness; the child may be reluctant or unable to testify; and erroneous dismissal of the petition can have disastrous consequences" (*id.* at 535). "In an effort to alleviate these problems, the Legislature, in 1969, enacted the Child Protective Procedures Act (Family Ct Act art 10)" (*Matter of Nicole V.*, 71 NY2d 112, 117). The proceedings are civil in nature and a finding of abuse or neglect need only be supported by a preponderance of the evidence (*see id.*). The Legislature has made "clear that the corroboration requirements of the criminal law are not applicable in article 10 proceedings" (*Matter of Christina F.*, 74 NY2d at 536). "Corroboration, for purposes of article 10 proceedings, is defined to mean '*[a]ny* other evidence tending to support the reliability of the previous statements, including, but not limited to the types of evidence defined in this subdivision'" (*Matter of Christina F.*, 74 NY2d at 536, quoting Family Ct Act § 1046[a][vi] [emphasis added]; *see Matter of Alven V. [Ketly M.]*, 194 AD3d at 726).

In *Matter of Nicole V.* (71 NY2d at 119), the Court of Appeals found sufficient the testimony of the child's caseworker, the child's therapist, and the child's mother—each of whom testified to out-of-court hearsay statements by the child describing incidents of sexual abuse by the respondent in that action. There, the Court found that other evidence in the proceeding—including testimony from an expert that the child's behavior was symptomatic of a sexually abused child—was sufficient to corroborate the child's out-of-court statements. The Court noted that the expert identified classic symptoms of child abuse such as a withdrawn demeanor—a typical avoidance mechanism adopted by persons suffering from posttraumatic stress—and the child's knowledge of sexual activity far beyond the norm for her young age (*see Matter of Nicole V.*, 71 NY2d at 121), and that the child's statements demonstrated specific knowledge of sexual activity (*see id.* at 122). The Court also found that the testimony of the mother that the child had developed a vaginal rash after a visit with the respondent corroborated the child's statements (*see id.*). Notably, the evidence here, like the evidence in *Matter of Nicole V.*, shows that the child had specific knowledge of sexual activity despite her young age and, when asked at the hospital about the sexual abuse, her demeanor changed and she became quiet.

Also notable in *Matter of Nicole V*. is the discussion by the Court of Appeals about cross-corroboration. The Court noted that, although the out-of-court statements of a child relating to allegations of abuse or neglect must be corroborated to make a finding of abuse or neglect, in certain circumstances, particularly in child abuse proceedings, where the interests of the child are paramount, independent statements requiring corroboration may corroborate each other (*see Matter of Nicole V.*, 71 NY2d at 124,

citing with approval *Matter of Cindy JJ.*, 105 AD2d 189 [admission of respondent father that he had sexual intercourse with his oldest daughter corroborates out-of-court statements by the three younger children of his sexual abuse against them despite respondent's denial of such sexual contact with those children]).

This Court has found that evidence of a change in the demeanor of a child, sexual references by a child which are not age appropriate, and detailed, consistent out-of-court statements of sexual abuse can be sufficient to corroborate a child's out-of-court statements of sexual abuse (*see Matter of Osher W. [Moshe W.]*, 198 AD3d 904, 907). For example, in *Matter of Osher W. (Moshe W.)* (198 AD3d 904), this Court determined that, '"[a]lthough the mere repetition of an accusation does not, by itself, provide sufficient corroboration, some degree of corroboration can be found in the consistency of the out-of-court repetitions'" (*id.* at 907, quoting *Matter of Lily BB. [Stephen BB.]*, 191 AD3d 1126, 1127). Here, the child's statements to school personnel, her godmother, and the caseworkers were consistent and detailed about the sexual activity that the son had engaged in with her. In addition, both the mother's acknowledgment at the hearing that the son admitted to her that he watched pornography in the child's presence and the son's admission to the first caseworker that he had his own pornography account directly corroborated the child's statements that the son watched pornography in her presence. The child's knowledge of sexual behavior despite her age—her depiction to school personnel of the son's pumping motion with his penis and her discussion of sex, which she called "polo" to the first caseworker, describing it as where "a man and a woman they don't have any clothes on and they put their private parts into each other," was further corroboration of her out-of-court statements about the son's sexual abuse of her. Moreover, the records submitted into evidence demonstrate that the child, who had been happy and talkative at the hospital, became withdrawn and quiet when asked about the sexual abuse.**[FN4]**

Accordingly, under these circumstances, the Family Court should have found that the child's out-of-court statements were sufficiently corroborated by the other evidence in the record that supported the reliability of the child's out-of-court statements that the son had sexually abused her (*see Matter of Michael B. [Samantha B.]*, 130 AD3d 619, 621; *Matter of Jada A. [Robert W.]*, 116 AD3d 769, 770).

Finally, contrary to the mother's contentions raised for the first time on appeal, the record does not demonstrate that ACS posited a new theory of the case—to wit, that the mother neglected the child by failing to provide proper supervision—not set forth in the petition. On the second day of the hearing, counsel for ACS argued to the Family Court that the issue was "not about whether or not [the] child was sexually abused. It's about [the mother's] capacity or her judgment in allowing [the son] to continue to supervise [the child] unattended." At that time, in connection with an objection made to certain

testimony elicited from the second caseworker, the court inquired of the attorney for the child (hereinafter the AFC), "[d]o you adopt the same position?" The AFC replied, "[a]bsolutely, Your Honor." The court then overruled the objection and counsel for the mother responded, "Okay." At the end of the hearing, counsel for ACS reiterated that its position [*5]was that it need not establish neglect on the basis that the child was abused, but rather that the mother left the child with the son, an inappropriate caregiver, notwithstanding concerns expressed to the mother that the son had been sexually inappropriate with the child.

Although our dissenting colleague emphasizes that the credibility findings of the Family Court are entitled to great weight, here, the Family Court determined, without qualification, that both caseworkers were credible, but indicated only that the mother was "mostly credible." The dissent ignores the caseworkers' credible testimony and relies primarily on the mother's testimony to find that the petition was properly dismissed. However, with respect to the mother's testimony, since the Family Court failed to specify what portion of the mother's testimony was "mostly credible" and what was not, we look to the record to ascertain whether there is any independent corroboration of the mother's testimony (*see Matter of Tazya B. [Curtis B.]*, 180 AD3d 1039, 1040; *Matter of Nah-Ki B. [Nakia B.]*, 143 AD3d 703, 706).

Our dissenting colleague finds that, to the extent that the son's behavior was sexually inappropriate, the mother's response to such behavior was appropriate. However, the mother's self-serving testimony about her purported responses to the allegations of sexual inappropriate behavior by the son has no independent corroboration in the record—and, in some instances, was flatly contradicted during the hearing by the testimony of the two caseworkers about what the mother said to them. The first caseworker averred that when she asked the mother whether there were any concerns about the son acting out sexually, the mother replied that it was a lie. It appears incredible that the mother would seek out treatment or punish the son or even speak to him about issues when she believed such concerns were a lie. Moreover, the mother's testimony that she took the son to a therapist—whose name and address the mother could not remember—regularly for a three month period stands in stark contrast to that of the first caseworker, who testified that the mother told her that she took the son to therapy a couple of times and then stopped because the son did not want to go. The mother also contended that she punished the son for watching pornography by taking away "his devices," which testimony is undermined by the son's statement to the first caseworker that he watches pornography and has his own account. The mother also contended that, in response to concerns that the son had touched the child under her panties, she took the child to the doctor who simply prescribed a cream for the child. The mother provided no support for this purported doctor's visit.

Contrary to the conclusion reached by our dissenting colleague, we find that the record demonstrates that, despite the mother's declaration to the contrary, she had or should have had concerns regarding the son's inappropriate sexual behavior and that, despite these concerns, she continued to leave the child alone with the son, thereby failing to provide proper supervision or guardianship (*see generally Matter of Melody H. [Dwayne H.]*, 121 AD3d 686, 687; *Matter of Sinclair P. [Arthur P.]*, 119 AD3d 587, 588).

Accordingly, we must reverse the order of fact-finding, reinstate the petition, make a finding that the mother neglected the child, remit the matter to the Family Court, Kings County, for a dispositional hearing and a determination thereafter, and continue a temporary order of protection dated March 10, 2022, pending that hearing.

DUFFY, J.P., CHRISTOPHER, and DOWLING, JJ., concur.

WAN, J., dissents, and votes to affirm the order of fact-finding dated April 27, 2022, with the [*6]following memorandum:

I respectfully disagree with the conclusion reached by my colleagues in the majority to reverse the order of fact-finding. In my view, the Family Court correctly found that the Administration for Children's Services (hereinafter ACS) failed to establish neglect by a preponderance of the evidence. Accordingly, I would affirm the order of fact-finding.

Initially, I respectfully disagree with the conclusion of my colleagues in the majority that the Family Court erred in finding that, based upon the allegations in the petition, ACS was required to prove that the mother's 15-year-old son (hereinafter the son) was sexually abusing the subject child (hereinafter the child) as a prerequisite to establishing that the mother neglected the child. In my view, the court simply found that ACS failed to prove what was alleged in the petition by a fair preponderance of the evidence.**[FN5]**

Here, paragraph (1) of the first addendum to the petition, dated November 15, 2017, expressly alleged that the mother "fails to provide [the child] with proper supervision or guardianship *in that she knew or should have known that [the son] was sexually abusing [the child]* and/or by acts of a similarly serious nature requiring the aid of the court" (emphasis added). Following this allegation, the first addendum to the petition sets forth five subparagraphs, (a) through (e), that relate to the son's alleged sexual abuse of the child. Subparagraph (f) sets forth that the mother had knowledge of two prior incidents of sexually inappropriate behavior that occurred more than three years before the November 2017 reports of abuse, and subparagraph (g) alleges that the mother admitted that she leaves the child home alone with the son at least twice a week.

The majority's characterization of ACS's theory of neglect, "that the mother neglected the child by leaving the child unattended in the supervision of the son even though the

mother knew that the child had alleged that the son had sexually abused her," is not supported by the text of the petition. The majority's selective citation only to the introductory statement in paragraph 1 of the first addendum to the petition, followed by subparagraph (g), ignores that subparagraphs (a)-(g), which contain the allegations of the alleged sexual abuse and the son's allegedly sexually inappropriate behavior, refer directly to ACS's allegation that the mother knew or should have known that the son was sexually abusing the child. Notably, neither ACS nor the attorney for the child have argued, either in the Family Court or on appeal, that subparagraph (g) sets forth or supports their alleged alternate theory of neglect. Given the content and context of subparagraphs (a)-(g), the use of the phrase "and/or by acts of a similarly serious nature requiring the aid of the court," a statutory catchall provision contained in Family Court Act § 1012(f)(i)(B), is insufficient to apprise the mother of an alternate theory of neglect. Moreover, there was no direct evidence presented at the hearing that highlighted *when* the mother knew or should have known that the son was sexually abusing the child.

Since ACS was required to prove, by a preponderance of the evidence, the allegations in its pleadings that the mother knew or should have known that the son was sexually abusing the [*7]child, this Court must first assess whether ACS has proven, by a fair preponderance, that the son was abusing the child **[FN6]**. I disagree with the majority's conclusion that there was sufficient corroboration for the child's out-of-court statements that the son was sexually abusing her. It is true that the corroboration requirements of the criminal law are not applicable in Family Court Act article 10 proceedings (*see Matter of Christina F.*, 74 NY2d 532, 536), and that pursuant to Family Court Act § 1046(a)(vi), "[a]ny other evidence tending to support the reliability of [a] child's [out-of-court] statements" relating to any allegations of abuse or neglect "shall be sufficient corroboration" (*Matter of Gerald W. [Anne R.]*, 129 AD3d 979, 980). However, "[t]here is a threshold of reliability that the evidence must meet" (*id.*). "Whether or not proffered corroborative testimony actually 'tend[s] to support the reliability of the previous statements' in a particular case is a fine judgment entrusted in the first instance to the Trial Judges who hear and see the witnesses" (*Matter of Christina F.*, 74 NY2d at 536, quoting Family Court Act § 1046[a][vi]). "In individual cases, 'Family Court Judges presented with the issue have considerable discretion to decide whether the child's out-of-court statements describing incidents of abuse or neglect have, in fact, been reliably corroborated and whether the record as a whole supports a finding of [neglect]'" (*Matter of Christina F.*, 74 NY2d at 536, quoting *Matter of Nicole V.*, 71 NY2d 112, 119).

Here, according to the petition, the child made two out-of-court statements alleging that the son was sexually abusing her. In the first out-of-court statement, made to school personnel on November 13, 2017, the child alleged that the son "masturbates in front of her on a regular basis," "put his finger up her butt," and that on November 12, 2017, the

son "makes her take her underwear off and he takes his underwear off and has sex with her." In her second out-of-court statement alleging sexual abuse, made to Child Protective Specialist Shaturka Wilson (hereinafter CPS Wilson) on November 14, 2017, the child "stated that she [and] her brother have sex and they recently had sex yesterday."

In determining that the child's out-of-court statements were sufficiently corroborated, my colleagues in the majority rely upon *Matter of Nicole V.* (71 NY2d 112), and *Matter of Osher W. (Moshe W.)* (198 AD3d 904). However, both cases are distinguishable, since the amount and quality of the corroborative evidence in those cases was significantly greater than that presented here. In *Nicole V.*, the evidence corroborating the child's out-of-court statements included validation testimony from the child's treating therapist, who was qualified as an expert, that the child had been sexually abused. The expert testified about the child's age-inappropriate sexual behavior, the child's regressive behavior and withdrawal, and displays of extreme anger and fearful behavior, all of which she opined were "symptomatic of an abused child" (*id.* at 122). Further, the child's out-of-court "statement was also corroborated by evidence that she suffered from vaginal rashes, depression and sleep disturbances, that blood was found in her vaginal area and by a certified medical report stating that she had no hymen" (*id.* at 122). Notably, here, there is a complete lack of any medical evidence, either physical or psychological, to corroborate the child's statements that she had been sexually abused.

Similarly, in *Osher W.*, corroboration included the child's use of age-inappropriate knowledge of sexual activity when describing the sexual abuse to his grandmother, the consistent nature of the child's out-of-court statements, certain changes in the child's behavior that [*8]corresponded with the timing of some of the abuse, and the father's acquiescence to a finding by a rabbinical court that limited his contact with the child for approximately a decade. Again, here, there is no evidence of any acquiescence or tacit acknowledgment that the child was being sexually abused. Instead, both the mother and the son denied that the son was abusing the child.

The majority highlights the child's knowledge of sex despite her young age as corroboration of her out-of-court statements that the son was sexually abusing her. However, age-inappropriate knowledge of sexual matters, standing alone, is insufficient to corroborate a child's out-of-court statements concerning sexual abuse (*see e.g. Matter of Zamir F. [Ricardo B.]*, 193 AD3d 932, 934-935; *Matter of Carmellah Z. [Casey V.]*, 177 AD3d 1364, 1367; *Matter of Kyle D. [Dwayne D.]*, 138 AD3d 835, 835-836; *Matter of Brittany K.*, 308 AD2d 585, 586; *Matter of Victoria H.*, 255 AD2d 442, 443; *Matter of Kelly F.*, 175 AD2d 803, 804).

I also disagree with the majority's conclusion that the child's statements to school personnel, her godmother, and the caseworkers were consistent and detailed about the

alleged abuse. Notably, no school personnel testified at the fact-finding hearing, and the caseworkers' testimony about the child's out-of-court statements concerning the alleged abuse was extremely limited. Additionally, the godmother's statement that the child had reported to her that the son had pulled down her panties and touched her private part was not admitted for the truth of the matter asserted. Moreover, this incident occurred approximately four years prior to the child's allegations of abuse. Further, the mother, who the Family Court found "mostly credible," testified that the child, who was three to four years old at the time, denied that the son touched her inappropriately, and further explained that the son had been assisting the child to use the bathroom. Moreover, the mother testified that, as a result of the godmother's statement, she took the child to Brookdale Hospital, where she was examined and where she received a prescription for cold medicine and eczema, a medical condition from which the child had suffered since birth. Based upon the admissible evidence presented at trial, the godmother's statement about an incident that occurred approximately four years prior to the child's allegations of abuse was insufficient to corroborate the child's out-of-court statements that the son was sexually abusing her (*see* Family Ct Act § 1046[a][vi]; *Matter of Christina F.*, 74 NY2d at 536).

Moreover, since "repetition of an accusation by a child does not corroborate the child's prior account of it" (*Matter of Nicole V.*, 71 NY2d at 124; *see Matter of Iyonte G. [Charles J.R.]*, 82 AD3d 765, 767; *Matter of Jaclyn L.*, 307 AD2d 294, 295), it is my opinion that the majority improperly relies upon the repetition of the child's statements to school personnel and CPS Wilson as corroboration for those same statements. Although this Court has held that "some degree of corroboration can be found in the consistency of the out-of-court repetitions" (*Matter of Osher W. [Moshe W.]*, 198 AD3d at 907 [internal quotation marks omitted]), such consistency, alone, is insufficient to satisfy the corroboration requirements of Family Court Act § 1046(a)(vi) (*see Matter of Osher W. [Moshe W.]*, 198 AD3d 907; *Matter of Tazya B. [Curtis B.]*, 180 AD3d 1039, 1040; *Matter of Kyle D. [Dwayne D.]*, 138 AD3d at 835-836 [child's out-of-court statements were primarily corroborated by testimony of the petitioner's expert witness, who was an expert in the field of child sexual abuse, "together with the testimony of the petitioner's caseworker and the mother," and were only "*further* corroborated" by their consistency *and* "the fact that [the child] had age-inappropriate knowledge of sexual matters"] [emphasis added]; *Matter of Alaysha E. [John R.E.]*, 94 AD3d 988, 988 [consistent out-of-court statements corroborated by "child's sworn in-court testimony"]; *Matter of Besthani M.*, 13 AD3d 452, 453 [child's consistent out-of-court statements "were corroborated by the child's unsworn in-camera testimony"]; *Matter of Bianca M.*, 282 AD2d [*9]536, 536-537 [child's consistent out-of-court descriptions of abuse corroborated by child's sworn in-court testimony]).

The majority also finds corroboration for the child's out-of-court statements contained in the child's medical records, since, according to the majority, those records established that the child had been happy and talkative at the hospital before turning withdrawn and quiet when questioned about the sexual abuse. However, these records do not provide such a clear story. Although the records indicate, at one point, that the child "seems to be playful and talkative in the ED," but "seems to keep very quiet when asked about any sexual encounter between her and her brother," they also indicate that the child "denies any inappropriate contact," and that she was "under the impression that if she says anything, she will be 'taken away.'" Moreover, for a child's change in demeanor to satisfy the corroboration requirements of Family Court Act § 1046(a)(vi), courts have generally relied upon more pronounced changes in personality (*see Matter of Osher W. [Moshe W.]*, 198 AD3d at 907; *Matter of Kimberly CC. v Gerry CC.*, 86 AD3d 728, 730 ["several witnesses testified that the child exhibited violent outbursts, self-abusive behavior and sexual behavior such as stimulating or rubbing herself, which appeared to coincide with the time frame in which the alleged incidents of sexual abuse occurred"]; *Matter of Tyson G.*, 144 AD2d 673, 674 [testimony from the child's mother that the child "experienced frequent nightmares and exhibited other behavioral changes immediately following the incident"]). Here, then, the child's momentary refusal to answer questions, without more, cannot serve to corroborate her out-of-court statements.

Finally, even assuming that there was sufficient corroboration of the child's out-of-court statement that the son was watching pornography, this corroboration did not serve to corroborate the child's out-of-court statements that the son was sexually abusing her (*see Matter of Jeshaun R. [Ean R.]*, 85 AD3d 798, 799). Therefore, it is my view that the extremely limited corroborative evidence failed to satisfy the requisite "threshold of reliability" (*Matter of Gerald W. [Anne R.]*, 129 AD3d at 980), and, thus, was insufficient to corroborate the child's out-of-court statements that the son was sexually abusing her (*cf. Matter of Nicole V.*, 71 NY2d at 122; *Matter of Osher W. [Moshe W.]*, 198 AD3d at 906-907).

It is also my view that the majority is finding neglect based on an independent theory of neglect, not stated in the petition, that "despite her knowledge of the son's sexually inappropriate behavior," the mother neglected the child by leaving her alone with the son **[FN7]**. However, this characterization of the relief sought appears to be based solely on subparagraph (f) of the first addendum to the petition, which alleges that:

"on or about November 14, 2017[,] the [mother] admitted that this is not the first time she has heard the aforementioned concerns. The [mother] stated that around 2014, her brother . . . told her that he observed the [son] with his penis out of pants and on the buttocks of [the brother's] son, . . . [who] was eight (8) years old at the time of the

incident. The [mother] also admitted that the [child] disclosed to her godmother . . . that [the son] pulled her panties down."

Given the context in which these allegations appear in the petition—as subparagraphs supporting [*10]the allegation that the mother knew or should have known that the son was sexually abusing the child—these allegations of the son's "sexually inappropriate behavior" were not alleged as an independent basis upon which the Family Court could enter a finding of neglect. Therefore, these allegations did not provide notice to the mother that they could form the basis for ACS's neglect proceeding.

I respectfully disagree with the majority's conclusion that counsel for ACS annunciated this independent theory of the case on both the second day and at the conclusion of the fact-finding hearing. On the second day of the hearing, during objections from the mother's counsel to the introduction of the hearsay statements relayed by the godmother and the mother's brother, counsel for ACS acknowledged that this testimony was "not being provided for the truth of the matter," but rather "for solely what [the mother] knew about [the son]'s or any concerns about [the son]'s past behavior." Counsel for ACS also contended that "this is about what [the mother] knew or should have known about [the son]'s behavior, as well as, if-what-what if anything [the child] had previously reported about concerns. It's not about whether or not this child was sexually abused. It's about [the mother]'s capacity or her judgment in allowing [the son] to continue to supervise [the child] unattended." The Family Court overruled the mother's objections, acknowledging that the statements were not being admitted for the truth of the matter, but as relevant to what the mother "may or may not have known at the time." This was the only time counsel for ACS alluded, in any way, to a potential alternate theory of neglect during the fact-finding hearing, which took place over five days of testimony spread out over approximately two years. Notably, ACS did not reiterate its alleged alternate theory of neglect on the record until *after* the hearing had ended and the court had issued its oral decision finding that ACS failed to prove the allegations in the petition by a preponderance of the evidence.**[FN8]**

ACS argues that the mother neglected the child by repeatedly entrusting the child to the son's care, that it is not bound to the facts as alleged in the petition, and that the Family Court can always conform the petition to the proof under Family Court Act § 1051(b). Section 1051(b) provides that "[i]f the proof does not conform to the specific allegations of the petition, the court may amend the allegations to conform to the proof; *provided however, that in such case the respondent shall be given reasonable time to prepare to answer the amended allegations*" ([emphasis added]; *see Matter of Amier H. [Shellyann C.H.]*, 106 AD3d 1086; *Matter of Crystal S. [Elaine S.]*, 74 AD3d 823).

Here, ACS never sought to amend the pleadings to conform to the proof to add their alternate theory of liability that the mother left the child with an inappropriate caretaker

(*see Matter of Amier H. [Shellyann C.H.]*, 106 AD3d at 1087 [vacating finding of neglect where "Family Court [*11]failed to amend the petition or give the mother time to prepare an answer to the new allegations"]; *Matter of Crystal S. [Elaine S.]*, 74 AD3d at 825 [same]). Moreover, the comments by counsel for ACS in response to an evidentiary objection did not put the mother on notice of this new theory of the case that is not alleged in the petition. The cases cited by ACS in support of this contention are distinguishable from the instant matter, since those cases involved situations where the parent was afforded sufficient opportunity to defend against the allegations that were not alleged in the petition (*see Matter of Jada W. [Ketanya B.]*, 104 AD3d 861, 861; *Matter of Carmen L.*, 37 AD3d 468, 468 [Family Court properly conformed pleadings to proof where "court properly stated that it would give the father time to prepare an answer to the amended allegations"]).

Moreover, the cases cited by the majority do not stand for the proposition that ACS was not required to prove that the son was sexually abusing the child. Rather, those cases stand for the proposition that "a parent has neglected his or her child where . . . by willful omission, [the parent] fail[s] to protect the child and as a consequence places the child in imminent danger of sexual abuse" (*Matter of Krystin M.*, 294 AD2d 577, 577; *see Matter of Sara X.*, 122 AD2d 795, 796). In this line of cases, the record generally contains evidence that, although the respondent was aware of an allegation of alleged abuse, he or she continued to allow the child to remain in the presence of the alleged abuser (*see Matter of Patricia B.*, 61 AD3d 861, 862 ["the mother was aware of a prior sexual assault committed by one of her sons against one of the children," but "allow[ed] that son to live in the family home with the children"]; *Matter of Selena J.*, 35 AD3d 610, 611 [evidence "established that after learning from an agency counselor in the fall of 2002 that Hewlit W. had touched her daughter's buttocks, the appellant refused to believe the child and continued to allow Hewlit W. access to the home"]; *Matter of Alexis C.*, 27 AD3d 646, 648 [evidence that the 9-year-old child informed her mother that the mother's fiancé had sexually abused her the previous day, and the mother "did not believe her daughter and allowed her fiancé to continue residing in the house"]; *Matter of Krystin M.*, 294 AD2d at 577-578 [neglect established where appellant "allow[ed] Lemuel A. to remain in the residence and have frequent unsupervised contact with the child despite her credible and ultimately proven complaints of his abuse"]). In other similar cases, there was evidence of objectively unreasonable behavior by the respondent (*see Matter of Christina P.*, 275 AD2d 783, 784 [evidence that "appellant mother provided inappropriate sleeping arrangements for her six-year-old daughter and the mother's paramour . . . whereby the daughter and the paramour slept together in a bedroom and in the same bed while the mother slept on a couch in the living room"]). This is the exact type of evidence that is utterly lacking in this matter.

Even assuming that the child's out-of-court statements were sufficiently corroborated to establish that the son sexually abused her in 2017, the three prior incidents testified to at the hearing were not sufficient to give the mother knowledge that the son would sexually abuse the child three to five years later, or that she could be placing the child in danger by leaving the son alone with her. As discussed above, not only was this theory of the case not alleged in the petition, but, even assuming that it was, none of the three incidents testified to at the hearing established that the mother knew or should have known that the son was sexually abusing the child, or that the mother failed to exercise the minimum degree of care required (*see* Family Ct Act § 1012[f][i]).

First, at the hearing, CPS Wilson testified that the mother had told her about an incident that occurred *five years prior* to the child's allegations of sexual abuse. CPS Wilson testified that the mother told her that, during that earlier incident, the son, who was then 10 years old, and the mother's nephew, who was then 8 years old, "were in a room, and that her uncle had caught [the son] pulling—bending the nephew down—bending the nephew over and pulling down his under [*12]wears." The mother testified that the day after she heard about the incident, she spoke to the boys, and the son indicated that the boys were "reacting to what they saw on Adult Swim," an "afterhours cartoon network for adults" with "nudity, cartoons, and stuff like that. Adult cartoons." According to the mother, the son said that the boys had watched "eyes robot or chicken robots," and as a result they were bending each other over and "pumping each other" while wearing their clothes. The mother testified that the boys "actually demonstrated for me," with the boys taking turns bending each other over and "pumping" each other. The mother testified that she "stopped it and . . . explained why that wasn't cool at all," and "[w]hy they shouldn't be doing that and why they shouldn't react [to] what they see on Adult Swim."

There is no evidence that this incident would have indicated to a reasonable parent that the child was in imminent danger of being sexually assaulted by the son.**[FN9]**

The second incident, discussed above, which concerned the allegation that the son pulled the child's panties down as relayed by the godmother to the mother, occurred approximately four years prior to the child's allegations of sexual abuse. In my view, the mother's response to these statements, which included directly addressing the issue with both children and taking the child to the hospital for an exam, was reasonable, and would not have indicated to a reasonable parent that the child was in imminent danger of sexual abuse by the son.

The third incident, which was not alleged in the petition, occurred in 2014—at least three years prior to the child's allegations—and concerned the child's statement to the mother that the son was watching pornography in her presence. Here, the mother testified that, according to the son, he was watching a pornographic video on the television when the child was asleep on the couch. The mother further testified that the

child told her that "she just woke up and she saw them on the screen," and that the child told the son that she was going to tell the mother, and the son turned it off. Again, the mother's response to this incident was reasonable and proportionate to the offending behavior. She confronted the son about what happened and took away his devices, including the cable box, the television, and the son's video game. The mother testified that she also brought the son to a psychologist, who the son saw once a week for three months, since she didn't "know what's going on with him as a boy," and "made sure [she] had a talk with him, asked him what's going on." More importantly, however, this incident, while inappropriate, would not indicate to a reasonable [*13]parent that the child was in imminent danger of being sexually abused by the son **[FN10]**. It is noteworthy, then, that the mother waited at least two years from this incident before asking the son to walk the child to school, since, according to the mother, the son had "show[n] growth" and "responsibility" over that time.

It bears emphasizing that "[t]he credibility findings of the Family Court should be accorded great deference, as it had direct access to the parties and was in the best position to evaluate their testimony, character, and sincerity" (*Matter of Destiny B. [Anthony R.]*, 203 AD3d 1042, 1042 [internal quotation marks omitted]). Here, given that ACS offered credible but limited testimony from two caseworkers, that the Family Court found the mother, who testified over the course of three days, "mostly credible," and where there is no occasion to disturb the court's credibility determination, it is my view that the record contains no evidence that the mother knew or should have known that she could be placing the child in danger by leaving her alone with the son.

Accordingly, in my view, the Family Court correctly determined that ACS failed to prove, by a preponderance of the evidence, that the son was sexually abusing the child, and the record is devoid of any corroboration of the child's out-of-court statements alleging abuse. Moreover, the three prior incidents concerning the son failed to establish that the mother knew or should have known about the alleged abuse, and did not give the mother notice that she was leaving the child with an inappropriate caretaker. Accordingly, I would affirm the order of fact-finding.

**Footnotes**

**Footnote 1:** Despite pointing with emphasis to the section of the hearing transcript wherein ACS articulated, on the second day of the hearing, that its theory of neglect was based upon, inter alia, the mother's actions in leaving the child with an inappropriate caregiver, our dissenting colleague disputes that the mother was on notice that ACS was, in fact, seeking to establish neglect on that basis. Not only is the allegation in the petition filed with the Family Court, the mother never objected on the ground now relied upon by our dissenting colleague when ACS articulated its position on this issue—either on that second day of the hearing or at the end of the proceeding

when ACS again argued this theory of neglect. Our dissenting colleague fails to address why this unpreserved issue should be reached for the first time on appeal.

**Footnote 2:** Without support in the record, our dissenting colleague mischaracterizes the medical records in evidence as "the child's momentary refusal to answer questions," contending that "without more" they do not corroborate the child's out-of-court statements. In fact, the medical records report that the child was evasive when questioned about the sexual abuse and that she stated that "if she [said] anything, she [would] be taken away." There is nothing to indicate that the behavior was momentary. Indeed, the child behaved in a similar way when questioned by the second caseworker, who testified that initially the child was talkative and answering questions until she heard her mother scream at police officers in another room, at which point, the child stopped responding to the caseworker's questions.

**Footnote 3:** Contrary to our dissenting colleague's contention as to a lack of medical evidence, medical records regarding an examination of the child were admitted as evidence, and those records indicate that, at the hospital, the child was playful and talkative until questioned about the sexual abuse, and then became evasive and stated that "if she [said] anything, she [would] be 'taken away.'" Together with other evidence in the record, these records support the reliability of the child's out-of-court statements of sexual abuse by the son.

**Footnote 4:** Our dissenting colleague discounts the evidence that corroborates the child's out-of-court statements—the child's change in demeanor at the hospital when asked about the sexual abuse; the mother's acknowledgment that in the past the son was caught humping his younger cousin and that he admitted to her that he engaged in that behavior; the mother's admission that the son watched pornography in the presence of the child; the child's knowledge, despite her young age, of sex; and the consistency of the child's out-of-court statements to others about the son's sexual behaviors—by parsing each piece with the repeated comment that such evidence, "standing alone," is insufficient to corroborate a child's out-of-court statements. However, as noted above, the evidence is not "standing alone," indeed, it is the totality of the corroborating evidence that establishes the reliability of the child's out-of-court statements.

**Footnote 5:** Specifically, the Family Court found that ACS "must prove by a preponderance of the evidence that [the mother] failed to provide [the child] with a minimum degree of care by failing to provide her with proper supervision or guardianship in that she knew or should have known that [the son] was sexually abusing [the child]."

**Footnote 6:** Notably, the petition originally alleged that the mother had neglected both the child *and the son*. However, the petition was withdrawn as to the son when he turned 18 years old.

**Footnote 7:** In its brief, ACS acknowledges that "[the son]'s admitted prior incidents of sexual misconduct may not have risen to the level of sexual abuse."

**Footnote 8:** The majority suggests that since the mother never objected to ACS's alleged articulation of its alternate theory of neglect on the second day of the hearing and at the end of the proceeding, the issue of whether ACS properly asserted its alleged alternate theory is unpreserved and improperly addressed for the first time on appeal. However, since ACS's alleged articulation of its alternate theory was insufficient to apprise the mother of any alleged alternate theory of neglect, the mother was not required to object to ACS's statement, which itself was made in opposition to the mother's objection to the introduction of certain hearsay testimony. Moreover, it is unclear why the mother would have had to object to the statement by counsel for ACS as to the alleged alternate theory of the case made *after* the Family Court had decided the case in the mother's favor.

**Footnote 9:** The majority indicates that the mother told Child Protective Specialist Marie Henry (hereinafter CPS Henry) that it was a lie that there were any concerns about the son acting out sexually. However, CPS Henry's complete testimony on this point provides necessary context:

"I did ask [the mother] if she knew of [the son] doing anything having any inappropriate sexual contact with anyone else. [The mother] said that that was a lie. She said that her brother made things up and that at the time [the son] was acting out something that he saw inappropriately on a TV show."

Given the context, CPS Henry's full testimony on this issue was consistent with the testimony of both CPS Wilson and the mother, and does not undermine the mother's testimony concerning her appropriate responses to the three incidents.

**Footnote 10:** In my view, contrary to the majority's contention, CPS Henry's testimony that the son continued to watch pornography does not undermine the mother's testimony about her response to this incident, since the inappropriate behavior specifically at issue here was not necessarily that the son had watched pornography, but that he had done so in the presence of the child.

**Matter of A.S**., 219 AD3d 1217 (1st Dept., 2023)

Order of disposition, Family Court, Bronx County (David J. Kaplan, J.), entered on or about June 25, 2019, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about July 11, 2019, which found that respondent grandmother neglected the child and derivatively neglected the child's younger sister, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition. The finding of neglect was supported by a preponderance of the evidence (*see* Family Court Act §1046[a][ii]; *Matter of Philip M.*, 82 NY2d 238, 243 [1993]). The evidence shows that in September 2018, while in the grandmother's care, the then-three-year-old child sustained a burn to her thigh in the same shape and pattern as the family's iron, which was used daily in the home by the grandmother's 12-year-old daughter, including on the day of the incident, and left to cool on the windowsill within the child's reach. Family Court correctly determined that petitioner established a prima facie case of neglect because this type of injury would not have occurred without the grandmother's acts or omissions (*see Matter of Michelle P. [Deja P.]*, 203 AD3d 632, 632 [1st Dept 2022]; *Matter of Amir L. [Chantal B.]*, 104 AD3d 505, 506 [1st Dept 2013]). The grandmother failed to rebut the presumption of culpability before the Family Court (*see Matter of Michelle P.*, 203 AD3d at 632). Indeed, she refused to acknowledge that the mark on the child's thigh was a burn, insisting that it was a bruise sustained while the child was at school (*see Matter of Benjamin L.*, 9 AD3d 153, 155 [1st Dept 2004]).

On appeal, the grandmother has abandoned any challenge to the determination that the mark on the child's thigh was a burn from the family's iron (*see Matter of Spencer Isaiah R. [Spencer R.]*, 78 AD3d 561, 561 [1st Dept 2010]). Instead, she argues, for the first time on appeal, that this single incident is insufficient to constitute neglect. However, even a single incident may constitute neglect where, as here, the grandmother should have been aware of the intrinsic danger of a hot iron being used by her 12-year-old child, unsupervised, in an area where a child with special needs was walking around and could reach the iron (*see Matter of Kayla W.*, 47 AD3d 571, 572 [1st Dept 2008]). Thus, the grandmother failed to exercise the minimum degree of care necessary to provide the child with proper supervision or guardianship (*see Matter of Ni' Kia C. [Dominique J.]*, 118 AD3d 515, 516 [1st Dept 2014]).

Based on the grandmother's failure to appreciate and safeguard against the risks to the children in her home, especially given the child's age and the severity of her injury, the grandmother's judgment was so impaired as to place the child's younger sister, an infant, at risk of harm (*see Matter of Daniela P.C. [Maria C.A]*, 166 AD3d 423, 424 [1st Dept 2018]).

We have considered the grandmother's [*2]remaining contentions and find them unavailing.

**Matter of C'D.**, 220 AD3d 418 (1st Dept., 2023)

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about March 30, 2022, to the extent it brings up for a review a fact-finding order, same court and Justice, entered on or about March 10, 2022, which found that respondents, the mother, and the father, neglected the three older subject children and derivatively neglected the youngest subject child, unanimously affirmed, without costs. Appeals from the fact-finding order, unanimously dismissed, without costs, as subsumed in the appeals from the order of disposition.
The findings of neglect against the mother and the father were supported by a preponderance of the evidence (Family Ct Act § 1046[b][i]). There is no basis to disturb the court's credibility determinations (*see Matter of Jared S. [Monet S.]*, 78 AD3d 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]). The credible evidence established that the mother and the father took no steps to protect C. and A'D. after being informed that the children's older brother, C'D., may have been touching them inappropriately (*see* Family Ct Act § 1012[f][i][B]; *Matter of Saaphire A.W. [Lakesha B.]*, 204 AD3d 488, 488 [1st Dept 2022]). The evidence shows the mother and the father continued to let C'D. sleep with C. and A'D. in the same bedroom, despite having discussed the implementation of a safety plan for the children with the police. C.'s and A'D.'s out-of-court statements to the ACS caseworker were sufficient to support the findings, as their statements were cross-corroborative (*see Matter of Nicole V.*, 71 NY2d 112, 124 [1987]; *Matter of Genesis F. [Xiomaris S.]*, 121 AD3d 526, 526 [1st Dept 2014]).

The court's finding that the mother had neglected A'D. by intentionally burning her face with a cigarette for "making noise" was also supported by a preponderance of the credible evidence (*see Matter of Chance R. [Andre W.]*, 168 AD3d 554, 555 [1st Dept 2019]; *Matter of Anthony C.*, 201 AD2d 342, 342-343 [1st Dept 1994]).

The foregoing findings of neglect warranted the finding of derivative neglect as to the youngest child, K. (*see* Family Ct Act § 1046[a][i]; *Matter of Samiyah H. [Sammie H.]*, 187 AD3d 540, 540 [1st Dept 2020]). The prior neglect and permanent neglect findings entered against the mother with respect to C'D. and an older sibling provided an additional basis for a derivative neglect finding against the mother, given that the mother has not ameliorated the conditions that led to those findings as of this proceeding (*see Matter of Cheron B. [Vanessa G.]*, 157 AD3d 618 [1st Dept 2018]; *Matter of Baby Girl L. [Mark Dunald B.]*, 147 AD3d 683, 684 [1st Dept 2017]).

**Matter of Bonnie FF**, 220 AD3d 1078 (3rd Dept., 2023)

Appeals from three orders of the Family Court of Chemung County (Richard W. Rich Jr., J.), entered January 24, 2022, March 22, 2022 and March 25, 2022, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected.

Respondent Harold W. (hereinafter the father) is the father of the three subject children (a son born in 2007 [hereinafter the older son], a daughter born in 2007 and a son born in 2010 [hereinafter the youngest child]). Respondent Marie VV. (hereinafter the mother) is the biological mother of the youngest child and the father's long-term paramour.[FN1] In 2019 the older son and the daughter, who were in the physical custody of their biological mother, unilaterally refused to participate in parenting time with the father. In 2020, the father filed an enforcement petition and a modification of custody petition, resulting in Family Court ordering petitioner to conduct a Family Ct Act § 1034 investigation as to the reasons for the older son's and the daughter's refusal to see the father. Following this investigation, petitioner filed an abuse and neglect petition against the father and the mother. Specifically, the petition alleged the use of excessive corporal punishment, exposure of the children to pornography and sexual acts of the father and the mother and domestic violence. Following a fact-finding hearing, Family Court adjudicated the subject children to be neglected. It then held a dispositional hearing, after which, as relevant here, the court determined that the youngest child would remain in the father and the mother's custody subject to certain conditions including, among others, that they complete mental health evaluations and participate in parenting education programs. The father and the mother appeal.

The father and the mother contend that Family Court's finding of neglect is not supported by a sound and substantial basis in the record. We disagree. "The party seeking to establish neglect is required to prove by a preponderance of the evidence that the children's physical, mental or emotional condition was impaired or was imminently in danger of becoming impaired and that the actual or threatened harm to the children was a consequence of the respondents' failure to exercise a minimum degree of care in providing the children with proper supervision or guardianship" (*Matter of Josiah P. [Peggy P.]*, 197 AD3d 1365, 1366 [3d Dept 2021] [internal quotation marks, brackets, ellipsis and citations omitted]; *see Matter of Ja'Sire FF. [Jalyssa GG.]*, 206 AD3d 1076, 1077 [3d Dept 2022], *lv denied* 38 NY3d 912 [2022]). "In determining whether . . . respondent[s] failed to exercise a minimum degree of care, the critical inquiry is whether a reasonable and prudent parent would have so acted, or failed to act, under the circumstances" (*Matter of Jaxxon WW. [Donald XX.]*, 200 AD3d 1522, 1523 [3d Dept 2021] [internal quotation marks and citations omitted]; s*ee Matter [*2]of Nina VV. [Wendy VV.]*, 216 AD3d 1215, 1216 [3d Dept 2023]). Additionally, a parent or

a person legally responsible for the children "may be held accountable for the neglectful acts of [another] if he or she knew or should reasonably have known that the child[ren] [were] in danger" (*Matter of Nina VV. [Wendy VV.]*, 216 AD3d at 1216 [internal quotation marks and citations omitted]; *see Matter of Y. SS. [E. SS.]*, 211 AD3d 1390, 1391 [3d Dept 2022]). "Family Court's factual findings and credibility determinations are afforded great weight and will not be disturbed so long as they are supported by a sound and substantial basis in the record" (*Matter of Kaelani KK. [Kenya LL.]*, 201 AD3d 1155, 1156 [3d Dept 2022] [internal quotation marks and citation omitted]; *see Matter of Joshua R. [Kimberly R.]*, 216 AD3d 1219, 1220 [3d Dept 2023]).

At the hearing, a certified forensic examiner testified that the father and the mother had a history with petitioner for over 10 years and described previous indicated reports. Additionally, she delineated how she conducted the interviews of the older son and the daughter.**[FN2]** In the video recording of the older son's interview, he provided details as to the excessive corporal punishment employed by the father, including recounting that the father struck him with a belt, struck him in the face, hit him with a two-by-four board, grabbed him by the throat and threw him to the ground and made him hold squats for hours. The older son further stated that he observed the father and the mother engaging in oral sex and that the father showed him pornography. Additionally, the older son disclosed that he heard what sounded like the father striking the mother and that she cried shortly thereafter.

In the video recording of the daughter's interview, she described that the father hit her with a belt and dragged her across the floor when she tried to run away. She also stated that she heard and observed the father and the mother engaging in oral sex and was disgusted by it. The daughter further recounted incidents of domestic violence, including seeing the mother and the father throw items at each other. Both children stated that the youngest child witnessed all of the above incidents, was disciplined in the same manner as they were, cried when he observed the father and the mother fighting, and imitated their sexual acts by thrusting his hips.

The caseworker testified that as part of her Family Ct Act § 1034 investigation she engaged in a conversation with the older son and the daughter and relayed their reasons for refusing to attend parenting time with the father.**[FN3]** She also described previous indicated reports involving the father and the mother. Lastly, she testified that the children reported that the youngest child witnessed the sexual contact between the father and the mother, acts of domestic violence between them, and was disciplined in the same manner as the older son and the daughter.

The biological mother of the older son [*3]and the daughter testified that for many years the children have reported that the father used severe corporal punishment on them. She described the incident that led to the cessation of parenting time as when the father

came to her residence to attempt to confront the older son for telling a third party that the father had physically struck him. Additionally, she stated that the daughter blamed her for forcing her to attend parenting time with the father. She further stated that the children have been negatively affected by their parenting time with the father, as the daughter does not trust people and the older son has temper issues and is very attached to her. Lastly, she testified that the children have struggled at school, and that the older son has refused to attend school at various times.

The mother testified by simply categorically denying all allegations. When the father took the stand, he largely confirmed the occurrences of corporal punishment; however, he claimed that these incidents occurred many years ago, and that more recently having the children perform "squats" is his preferred means of punishment as "[he] knew they hated it the most." The father confirmed that he attempted to confront the older son at his biological mother's house and stated, "he is my kid, I will beat his a**." He further confirmed that he views pornography online and on his cell phone via the application Chatterbait, averred that the application is password protected, and as such the pornography is not accessible to the children. Finally, when questioned on his desire to see his children and rebuild his relationship with them, the father averred that while he certainly loves his children, he was not going to "kiss anybody's b" or "jump through hoops" to achieve this.

There is ample evidence in the record to support the allegations of neglect by a preponderance of the evidence, including that the father engaged in excessive corporal punishment, that the father and the mother engaged in acts of domestic violence in the presence of the children, that they did not take appropriate steps to prevent the children from observing them engage in sexual relations nor prevent them from viewing the father's pornography. Moreover, the older son's and the daughter's failure to provide specific dates did not undermine their credibility or Family Court's finding of neglect (*see Matter of Chloe L. [Samantha L.]*, 200 AD3d 1234, 1236 [3d Dept 2021]; *Matter of Makayla I. [Caleb K.]*, 162 AD3d 1139, 1142 [3d Dept 2018]). Despite the father's contention, the children's statements were sufficiently corroborated based on the testimony of the social worker, the biological mother and the cross-corroboration of the older son and the daughter (*see Matter of Isabella I. [Ronald I.]*, 180 AD3d 1259, 1262 [3d Dept 2020]; *Matter of Jade F. [Ashley H.]*, 149 AD3d 1180, 1184 [3d Dept 2017]). We further reject the father's contention that the alleged neglectful acts are too remote in time to be [*4]relevant. Family Ct Act § 1046 does not place a time limit on the admissibility of prior findings and our courts have not established a bright-line temporal rule prohibiting the consideration of prior protective determinations (*see Matter of Evelyn B.*, 30 AD3d 913, 915 [3d Dept 2006], *lv denied* 7 NY3d 713 [2006]). Moreover, the children described the neglectful acts occurring in each of the residences that they lived in, thus establishing an ongoing, general pattern of continuing neglect resulting in

the children's physical, mental or emotional impairment and the threat of further impairment in the future (*see Matter of Nina VV. [Wendy VV.]*, 216 AD3d at 1217; *Matter of Evelyn B.*, 30 AD3d at 915).

Nor can we say that Family Court erred in discrediting the mother's testimony. Based on the evidence, confirmed in the record, the mother's failure to intervene and take measures to prevent the excessive corporal punishment employed by the father, and to prevent the children's observations of domestic violence and sexual relations, constituted neglect (*see Matter of Ja'Sire FF. [Jalyssa GG.]*, 206 AD3d at 1079; *Matter of Justin O.*, 28 AD3d 877, 879 [3d Dept 2006]). As such, there is a sound and substantial basis in the record to support the finding of neglect as to all three children (*see Matter of Joshua R. [Kimberly R.]*, 216 AD3d at 1222; *Matter of Kaelani KK. [Kenya LL.]*, 201 AD3d at 1157).**[FN4]**

Lastly, the father and the mother correctly argue that the order of disposition references testimony not admitted into evidence at the hearing. As such, the matter is remitted to Family Court to strike portions of the order containing the improper testimony. The father's and the mother's remaining contentions, to the extent that they are not expressly addressed herein, have been examined and found to be unavailing.

Garry, P.J., Lynch, Pritzker and Powers, JJ., concur.

ORDERED that the orders entered January 24, 2022 and March 22, 2022 are affirmed, without costs.

ORDERED that the order entered March 25, 2022 is reversed, on the facts, without costs, and matter remitted to the Family Court of Chemung County to strike portions thereof referencing testimony not admitted into evidence.

**Footnote 1:** Although the mother references that Family Court failed to find that she is a person legally responsible for the care of the father's older son and the daughter, the mother does not argue this contention in her brief. Moreover, the record is replete that she provided general care of the older son and the daughter including cooking, feeding, bathing, cleaning their clothes and disciplining them.

**Footnote 2:** The father failed to preserve his challenge to the forensic interviews as he did not object to their admission (*see Matter of Kaitlyn SS. [Antonio UU.]*, 184 AD3d 961, 966 n 3 [3d Dept 2020]).

**Footnote 3:** These reasons were the same allegations as the children later related to the forensic examiner.

**Footnote 4:** Although not determinative, we note that the attorney for the children

representing the older son and the daughter and the attorney for the child representing the youngest child advocate to affirm Family Court's finding of neglect.

**Matter of B. V.,** 220 AD3d 605 (1st Dept., 2023)

Order of fact-finding and disposition (one paper), Supreme Court, Bronx County (E. Grace Park, J.), entered on or about December 16, 2022, which to the extent appealed from as limited by the briefs, after a hearing, found that respondent mother and respondent Anthony M., a person legally responsible for the subject children, neglected the children, unanimously affirmed, without costs.
A preponderance of the evidence supports the Family Court's determination that the mother, and respondent Anthony M., who is in a relationship with the mother and a person legally responsible for the subject children, neglected A.V. (the child). The testimony of the mother and Anthony M., establish that the mother and Anthony M. repeatedly punished the child by isolating the child in the child's room, for extended periods of time, keeping the child from the child's siblings and family, resulting in the child having suicidal ideations. Anthony M. also subjected all four children to verbal abuse, threats of physical violence and physical abuse (*see Matter of Dyandria D.*, 303 AD2d 233 [1st Dept 2003], *lv dismissed* 1 NY3d 623 [2004], *cert denied sub nom. Dyandria M. v Administration for Children's Services*, 543 US 826 [2004]; *Matter of Alethia R. [Jaynie T.J.]*, 191 AD3d 615 [1st Dept 2021]; *Matter of Michele S. [Yi S.]*, 157 AD3d 551, 552 [1st Dept 2018]). The mother failed to intervene and protect the children from Anthony M.'s abuse (*see Matter of Anais G. [Lionell M.]*, 187 AD3d 439 [1st Dept 2020]). The children's consistent, cross-corroborating accounts reliably support the court's findings (*see Matter of Antonio S. [Antonio S., Sr.]*, 154 AD3d 420, 420-421 [1st Dept 2017]). The Child Protective Specialist also testified that he personally observed Anthony M.'s anger and disparagement of the child in the child's presence.

We have considered respondents' remaining arguments and find them unavailing.

**Matter of Jaylin B.**, 221 AD3d 1418 (4th Dept., 2023)
Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered March 1, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to article 10 of the Family Court Act, respondent mother appeals from an order that determined that she neglected the subject child, an infant, by, inter alia, exposing him to dangerous and unsanitary conditions in a hotel room where they had stayed for an extended period of time. When the mother was evicted from the room for failing to pay the bill, the hotel manager observed, among other things, more than 30 dirty diapers in the room, feces on the wall, sharp knives within the reach of a child and what looked like cocaine residue on a coffee table. The mother does not dispute that the conditions in the hotel room posed an imminent risk of harm to an infant, nor does she dispute that her infant son was in the room with her at some point during her month-long stay at the hotel. The mother contends, however, that the child went to visit his grandmother in Ohio approximately one week before the hotel manager entered the room and observed the dangerous conditions, and, as a result, petitioner failed to establish that the room was in a dangerous condition while the child was in the room with the mother. We reject that contention.

We note at the outset that the mother did not testify at the hearing, and Family Court thus properly drew the strongest possible negative inference against her (*see Matter of Grayson S. [Thomas S.]*, 209 AD3d 1309, 1313 [4th Dept 2022]; *Matter of Jack S. [Leah S.]*, 176 AD3d 1643, 1644 [4th Dept 2019]). Nor did the mother present the testimony of the grandmother who the child had allegedly visited in Ohio, or any other witnesses. The only evidence introduced at the hearing that would support the conclusion that the child visited the grandmother arose from hearsay statements in the caseworker's notes, which the mother contends should not have been admitted in evidence at the hearing. Those notes indicate that the mother refused to provide the grandmother's address to the authorities and that the grandmother, when reached by phone, refused to disclose her address as well. Such evidence raised questions of credibility concerning whether the child ever actually went to Ohio, as the mother alleged.

Additionally, the hotel manager testified that she observed the child at the hotel with the mother on several occasions, and there were many toys in the room when the mother was evicted, as well as soiled children's clothing and dirty baby bottles, suggesting that the child had recently been in the room. That evidence, together with the negative inference drawn against the mother [*2]based on her refusal to testify at the hearing, supports the court's finding that petitioner established by a preponderance of the evidence that the mother neglected the child by exposing him to the undisputedly dangerous conditions in the hotel room (*see Matter of Mollie W. [Corinne W.]*, 214 AD3d 1463, 1463-1464 [4th Dept 2023]; *Matter of Danaryee B. [Erica T.]*, 145 AD3d 1568, 1568 [4th Dept 2016]). The mother has raised no challenge to the court's other grounds for determining that the child was a neglected child, so we deem any challenge related to those grounds abandoned (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984,

984 [1994]). Thus, even if we were to agree with the mother that petitioner failed to establish that the child was in the hotel room while the room presented a danger, we would nevertheless affirm the court's neglect finding.

Contrary to the mother's further contention, she was not denied her right to due process when the court proceeded with the fact-finding hearing in her absence. "While due process of law applies in Family [Court] Act article 10 proceedings and includes the right of a parent to be present at every stage of the proceedings, that right is not absolute . . . The court is authorized to proceed despite a parent's absence, but must vacate any resulting order and permit a rehearing on motion of that parent, supported by affidavit, unless the court finds that the parent 'willfully refused to appear at the hearing' " (*Matter of Elizabeth T. [Leonard T.]*, 3 AD3d 751, 753 [3d Dept 2004], quoting Family Ct Act § 1042; *see Matter of Malachi S. [Michael W.]*, 195 AD3d 1445, 1446-1447 [4th Dept 2021], *lv dismissed* 37 NY3d 1081 [2021]). Inasmuch as the mother made a belated request for an in-person hearing and refused to attend the hearing virtually from the jail where she was incarcerated, we conclude that the mother willfully refused to appear at the fact-finding hearing and thus waived her right to be present (*see Malachi S.*, 195 AD3d at 1446-1447; *Matter of Ceirra L.*, 50 AD3d 1520, 1521 [4th Dept 2008]). We note that the court double-checked with a corrections officer at the jail to make sure that the mother refused to participate in the hearing.

We also reject the mother's contention that the court abused its discretion in denying her two requests for an adjournment of the hearing. The first request for an adjournment was for the incarcerated mother to meet with her attorney, and the second request for an adjournment was for the mother to present two witnesses. " '[T]he determination whether to grant a request for an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*Matter of Logan P.G. [William G.]*, 208 AD3d 1643, 1643 [4th Dept 2022], *lv denied* 39 NY3d 909 [2023]; *see Matter of Nathan N. [Christopher R.N.]*, 203 AD3d 1667, 1669 [4th Dept 2022], *lv denied* 38 NY3d 909 [2022]).

Here, although the mother was incarcerated at the time of the hearing, that hearing was held over one year after the neglect petition was filed and the mother has not offered an explanation why she and her attorney could not have conferred at any other time during that one-year period. With respect to the second request, we note that, nearly six weeks before the hearing, the court informed the parties of the hearing date and specifically informed the attorneys that they needed to "make sure that the technology [wa]s there" for the witnesses to testify remotely via Microsoft Teams or in person. During the hearing, when it was time for the mother's attorney to call the mother's witnesses, he was granted a brief adjournment to secure their virtual appearances, but returned to the court, stating that he was unable to contact either witness despite having informed them

of the hearing date the week before. The court thereafter denied the request of the mother's attorney for an adjournment of the hearing to locate those witnesses. Where, as here, a party's inability to secure witnesses is due to a lack of diligence in preparing for the hearing, a court does not abuse its discretion in denying that party's request for an adjournment (*see Matter of Steven B.*, 6 NY3d 888, 889 [2006]; *Logan P.G.*, 208 AD3d at 1643; *Matter of John D., Jr. [John D.]*, 199 AD3d 1412, 1413 [4th Dept 2021], *lv denied* 38 NY3d 903 [2022]).

Contrary to the mother's additional contention, the court did not err in admitting in evidence petitioner's case file inasmuch as the contents thereof were admissible as business records (*see* CPLR 4518 [a]; *Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1626 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]; *see generally Matter of Leon RR*, 48 NY2d 117, 123 [1979]). Even assuming, arguendo, that the records contained hearsay that was not subject to the business records exception, we find any error in their wholesale admission "to be harmless . . . in light of the other evidence in admissible form that amply supports [the court's] determination" (*Matter of Zaiden P. [Ashley Q.]*, 211 AD3d 1348, 1355 n 5 [3d Dept 2022], *lv denied* 39 NY3d [*3]911 [2023]; *see Matter of Carmela H. [Danielle F.]*, 185 AD3d 1460, 1461 [4th Dept 2020], *lv denied* 35 NY3d 915 [2020]).

We have reviewed the mother's remaining contentions and conclude that none warrants modification or reversal of the order.

**Matter of Barry G., JR.**, 221 AD3d 1596 (4th Dept., 2023)

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), dated August 12, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, found that respondent had neglected the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order of fact-finding and disposition that, inter alia, adjudged that he neglected the subject child. We affirm.

Contrary to the father's contention, we conclude that there is a sound and substantial basis in the record to support Family Court's determination that the father neglected the child (*see generally Matter of Sean P. [Brandy P.]*, 156 AD3d 1339, 1339-1340 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]). A neglected child is defined, in relevant part, as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result

of the failure of [the child's] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof . . . or by any other acts of a similarly serious nature requiring the aid of the court" (Family Ct Act § 1012 [f] [i] [B]). "The statute thus imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence . . . First, there must be proof of actual (or imminent danger of) physical, emotional or mental impairment to the child . . . Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care . . . This is an objective test that asks whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances" (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011] [internal quotation marks omitted]; *see Matter of Gina R. [Christina R.]*, 211 AD3d 1483, 1484 [4th Dept 2022]).

Here, petitioner met its burden by establishing by a preponderance of the evidence that the father left the child unsupervised at a shelter and made no attempt to contact the shelter or the authorities about the well-being of the child or his own whereabouts for three days, thereby placing the child in imminent risk of harm (*see generally Matter of Leo A.G.-H.B. [Natalie G.]*, 181 AD3d 599, 600-601 [2d Dept 2020]; *Matter of Ashley B. [Lavern B.]*, 137 AD3d 1696, 1697 [4th Dept 2016]).

**Matter of Rosaliee HH.**, 221 AD3d 1299 (3rd Dept., 2023)

Appeal from an order of the Family Court of Delaware County (Richard D. Northrup Jr., J.), entered September 3, 2021, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject child to be neglected. Respondent (hereinafter the mother) is the parent of a child (born in March 2021). When the child was six days old and in the neonatal intensive care unit of the hospital weighing less than four pounds, petitioner commenced this Family Ct Act article 10 proceeding alleging that respondent had neglected the child by, among other things, using heroin, methamphetamines and marihuana during pregnancy, failing to attend prenatal appointments and insisting on residing with her father (hereinafter the grandfather), a convicted level two sex offender who was incarcerated for raping the mother when she was 14 years old. After a fact-finding hearing, Family Court adjudicated the child to be neglected. The mother appeals, arguing that petitioner failed to establish by a preponderance of the evidence that the child was neglected and that Family Court's finding of neglect lacks a sound and substantial basis in the record. We disagree.

At the outset, the mother claims that Family Court erred in admitting the child's medical records into evidence because petitioner failed to comply with the provisions of Family Ct Act § 1046 (a) (iv) insofar as the records were not accompanied by a certification by the head of the hospital as being a full and complete record made in the regular course of the hospital's business. Her argument, however, is unpreserved for our review owing to her failure to object, or join in the objection of the attorney for the child, to Family Court's ruling that the record would be kept open pending submission of a proper delegation by someone of authority to certify the records, which the Court received the following day (see CPLR 4017; 5501 [a] [3]).

As to the merits, in a child neglect proceeding, the petitioner must establish, by a preponderance of the evidence, that the child's "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care" due to, among other things, "misusing a drug or drugs" (Family Ct Act § 1012 [f] [i] [B]). Additionally, pursuant to Family Ct Act § 1046 (a) (iii), "proof that a person repeatedly misuses a drug or drugs

. . . , 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 . . . such person is a neglected child." Once the petitioner has proven drug abuse, thereby giving rise to a presumption of neglect, there is no required showing "of [*2]specific parental conduct vis-Á-vis the child and neither actual impairment nor specific risk of impairment need be established" (Matter of Paolo W., 56 AD3d 966, 967 [3d Dept 2008], lv dismissed 12 NY3d 747 [2009], quoting Matter of Stefanel Tyesha C., 157 AD2d 322, 328 [1st Dept 1990], appeal dismissed 76 NY2d 1006 [1990]).

Here, the evidence presented by petitioner includes the mother's testimony conceding that she used heroin, methamphetamines and marihuana while knowing she was pregnant and with a "general idea" of the harm these substances posed to the unborn child. She was not participating in, nor had she successfully completed, a drug rehabilitation treatment program and, in fact, tested positive, among other things, for fentanyl during the initial hearing in which petitioner sought to remove the child from her care (*compare Matter of Micah S. [Rogerio S.]*, 206 AD3d 1086, 1088 [3d Dept 2022]). Further, the mother testified to having "complete faith that my daughter is in no harm at my father's house" despite acknowledging that she was "not sure what would happen" if the child were left alone with the grandfather. Petitioner's caseworker testified that the mother frequently missed prenatal appointments despite her high-risk pregnancy, and declined preventive services including casework management, parent aide services,

drug counseling, assistance with applying for public assistance, transportation and counseling. The evidence further demonstrated that petitioner offered housing assistance to the mother, which she declined. Based upon the foregoing, we agree with the attorney for the child that the mother's insistence on residing with the grandfather "shows a substantial manifestation of irrationality."

In view of all these circumstances, we conclude that petitioner met its prima facie burden of proving that the mother neglected the subject child. Having offered no proof to rebut the presumption of neglect, the mother's remaining contentions do not warrant extended discussion and are determined to be without merit. Accordingly, we decline to disturb Family Court's finding adjudging the child to be a neglected child.

ORDERED that the order is affirmed, without costs.

**Matter of Timothy L.**, 221 AD3d 1006 (2nd Dept., 2023)

In related proceedings pursuant to Family Court Act article 10, the father appeals from an order of disposition of the Family Court, Orange County (Victoria B. Campbell, J.), dated September 12, 2022. The order of disposition, insofar as appealed from, upon a corrected order of fact-finding dated June 6, 2022, made after a fact-finding hearing, finding that the father neglected the subject children, and upon the father's consent, placed the children in the custody of the Commissioner of Social Services of Orange County until completion of the next permanency hearing, directed the Orange County Department of Social Services to have supervision over the father's home and the children for a period of 12 months, and directed the father to comply with certain conditions.

ORDERED that the appeal from so much of the order of disposition as, upon the father's consent, placed the children in the custody of the Commissioner of Social Services of Orange County until completion of the next permanency hearing, directed the Orange County Department of Social Services to have supervision over the father's home and the children for a period of 12 months, and directed the father to comply with certain conditions is dismissed, without costs or disbursements; and it is further,

ORDERED that the order of disposition is affirmed insofar as reviewed, without costs or disbursements.

The appeal from so much of the order of disposition as, upon the father's consent, placed the subject children in the custody of the Commissioner of Social Services of Orange County until completion of the next permanency hearing, directed the Orange County Department of Social Services to have supervision over the father's home and

the children for a period of 12 months, and directed the father to comply with certain conditions must be dismissed, as no appeal lies from an order entered upon the consent of the appealing party (*see Matter of Eunice D. [James F.D.]*, 111 AD3d 627, 628). However, contrary to the contention of the attorney for the children, the appeal from so much of the order of disposition as brings up for review the finding of neglect in the corrected fact-finding order dated June 6, 2022, is properly before this Court as the father's timely appeal from the order of disposition "brings up for review all non-final orders that affected the judgment" (*Matter of Aiden XX. [Jesse XX.]*, 104 AD3d 1094, 1095 n 3 [internal quotation marks omitted]; *see Matter of Kevon G. [Keith G.]*, 196 AD3d 572, 572-573).

In May 2021, the petitioner commenced these proceedings pursuant to Family Court Act article 10 alleging, inter alia, that the father neglected the children by failing to intervene even though he was aware that they were being neglected by the mother and her paramour, who both abused drugs and with whom the children resided. After a fact-finding hearing, the Family Court found, inter alia, that the father neglected the children. We affirm.

"At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing that the subject child[ren] ha[ve] been abused or neglected by 'a preponderance of [the] evidence'" (*Matter of Bibi H. v Administration for Children's Servs.-Queens*, 210 AD3d 771, 773, quoting Family Ct Act § 1046[b][i]). "Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of . . . witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor" (*Matter of Oliver A. [Oguis A.-D.]*, 167 AD3d 867, 868).

Contrary to the father's contention, a preponderance of the evidence supported a finding that the children's physical, mental, or emotional conditions were impaired or in imminent danger of impairment by, inter alia, the failure of the father to exercise a minimum degree of care in providing the children with proper supervision or guardianship (*see* Family Ct Act § 1012[f][i][B]; *Nicholson v Scoppetta*, 3 NY3d 357, 368; *Matter of Sadiq H. [Karl H.]*, 81 AD3d 647, 648).

**Matter of Gelani.**, AD3d 2023 NY Slip Op 06442 (1st Dept., 2023)

Order of disposition, Family Court, Bronx County (Ashley B. Black, J.), entered on or about August 9, 2022, which, insofar as appealed from as limited by the briefs, released

the subject child to the nonrespondent mother's custody and, among other things, ordered respondent father to complete parenting skills and other services, upon a fact-finding determination that the father neglected the subject child, unanimously affirmed, without costs. Appeal from order of fact-finding, same court and justice, entered on or about March 7, 2022, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

A preponderance of the evidence supports Family Court's determination that the father neglected the subject child (Family Ct Act § 1012[f][i][B]). A finding of neglect may be based on a single incident where the parent's judgment was strongly impaired and the child exposed to a risk of substantial harm (*see Matter of Allyera E. [Alando E.]*, 132 AD3d 472, 473 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]; *Matter of Madison M. [Nathan M.]*, 123 AD3d 616, 616 [1st Dept 2014])**.** Here the record reflects two such incidents.

The first incident occurred when the subject child was about 15 months old**.** On February 12, 2020, the father left the child unattended in the lobby of a friend's apartment building. A building resident called the police. The police arrived and waited for the father at the building lobby for 45 minutes. When the father did not appear, the police removed the child from the premises and contacted Administration for Children's Services. Family Court properly found this to constitute neglect by the father (*see Matter of Jesiel C.V. [Rosalie V.]*, 189 AD3d 568, 568 [1st Dept 2020], *lv denied* _NY3d_ 2021 NY Slip Op 63571 [2021]; *Matter of Malachi H*. *[Dequisa H.]*, 125 AD3d 478 [1st Dept 2015]).

The second incident occurred on November 9, 2020, when the father and a friend physically assaulted the mother's boyfriend, and threatened the boyfriend with a knife, while the mother, the boyfriend, and the child were waiting at a bus stop. The assault unfolded as the child was in his stroller 10-15 feet away. Family Court properly found these acts of violence in the child's presence to have constituted neglect on the father's part. (*Matter of M.D. [Mustapha D.]*, 217 AD3d 541, 541 [1st Dept 2023]; *Matter of O'Ryan Elizah H. [Kairo E.]*, 171 AD3d 429 [1st Dept 2019]).

The father's assertions on appeal are unavailing. With respect to the February 12, 2020, incident, the father avers that he left the child with a woman whom he knew to be a responsible caregiver, but his argument is unsupported by any evidence. As to the November 9, 2020, incident, he offers no support for his conclusory assertion that the child was "safely" in his stroller, or was somehow unaffected because the boyfriend was not his parent. There is no reason to disturb Family Court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777 [*2][1975]; *see also Matter of Destiny R. [Rene G.]*, 212 AD3d 629, 630 [2d Dept 2023]), and his claim that these incidents cannot evidence neglect because the child suffered no physical harm is also unavailing

(*see* Family Ct Act § 1012[f][i]; *Matter of O'Ryan Elizah H.*, 171 AD3d at 429; *Matter of Macin D. [Miguel D.]*, 148 AD3d 572, 573 [1st Dept 2017]).

Family Court properly drew a negative inference from the father's failure to testify (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]; *Matter of Daniela P.C. [Maria C.A.]*, 166 AD3d 423 [1st Dept 2018]; *Matter of Jeremy M. [Roque A.M.]*, 145 AD3d 637 [1st Dept 2016]). In any event, Family Court held it would have reached the same determinations as to disposition without the inference.

The father's arguments concerning Family Court's granting leave to ACS to amend the petition are not properly before us, as such leave was granted by order dated January 13, 2021, from which he did not appeal (*see e.g. Valley Natl. Bank v Gurba*, 149 AD3d 412, 413 [1st Dept 2017]). The arguments are, in any event, unavailing, as he was not prejudiced by the amendment.

The court "providently directed the father to participate in services addressing the issues that resulted in the neglect finding" (*Matter of Adam T. [Artur T.]*, 186 AD3d

1179, 1180 [1st Dept 2020]). He offers no support for his claim that the court should have released the child to both parents since they can co-parent safely.

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

**Matter of Hazelee DD.**, AD3d 2023 NY Slip Op 06571 (3rd Dept., 2023)

Appeal from an order of the Family Court of Greene County (Charles M. Tailleur, J.), entered January 14, 2022, which granted petitioner's applications, in two proceedings pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected. Respondent (hereinafter the father) is the father of a child (born in 2020; hereinafter the younger child) and a person legally responsible for the child's half sibling (born in 2007; hereinafter the older child), both of whom lived with the father and their mother in September 2020. Petitioner commenced these Family Ct Act article 10 proceedings against the father in February 2021, alleging that he had neglected each of the children. The petitions alleged that, on the evening of September 7, 2020, the father became embroiled in a domestic dispute with the mother of the children at their apartment. The mother and the older child fled to a neighbor's residence, where the police were called, while the father eventually walked off with the younger child. Responding officers located the father and the younger child sleeping outside around 1:00 a.m. on September 8, 2020 and had to tase the father, who was visibly intoxicated, after he became combative. After a fact-finding hearing on the petitions, Family Court issued an

order in which it found that the father had neglected the younger child and derivatively neglected the older child. The father appeals, and we affirm.

"Neglect is established when a preponderance of the evidence shows that the children's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and that the actual or threatened harm to the children results from the parent's failure to exercise a minimum degree of care in providing the children with proper supervision or guardianship" (*Matter of Aiden J. [Armando K.]*, 197 AD3d 798, 798-799 [3d Dept 2021] [internal quotation marks and citations omitted]; *see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *Matter of Joshua R. [Kimberly R.]*, 216 AD3d 1219, 1220 [3d Dept 2023], *lv denied* 40 NY3d 905 [2023]). To put it differently, neglect occurs when an individual behaves in a manner at odds with that of a reasonable and prudent parent under the circumstances (*see Matter of Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *Matter of Leah VV. [Theresa WW.]*, 157 AD3d 1066, 1066 [3d Dept 2018], *lv dismissed* 31 NY3d 1037 [2018]), and that behavior results in actual harm or an "imminent threat of danger to the children [that is] near or impending, not merely possible" (*Matter of Hakeem S. [Sarah U.]*, 206 AD3d 1537, 1538 [3d Dept 2022] [internal quotation marks and citation omitted], *lv denied* 39 NY3d 904 [2022]; *see Matter of Allylynn YY. [Dorian A.]*, 184 AD3d 972, 973 [3d Dept 2020]). Neglect must be demonstrated by "competent, material and relevant evidence" at the hearing (Family Ct Act § 1046 [b] [iii]; *accord Matter of Aiden J. [Armando K.]*, 197 AD3d at 799).

A state trooper testified at the [*2]hearing as to how he responded to a domestic incident call at approximately 11:30 p.m. on September 7, 2020 and found the mother of the children and the older child at their neighbor's residence. The mother told him that the father was intoxicated and "had pushed her down and taken the" younger child during a dispute. She and the older child then fled their apartment to seek assistance. The trooper described the mother as "very excited and hysterical" throughout the time that they spoke because of her fears for the safety of the younger child, who was only three weeks old at that point and in the hands of the drunken father. Family Court accordingly determined, and we agree, that the mother's out-of-court statements to the trooper were admissible under the excited utterance exception to the hearsay rule because they were made "under the stress and excitement of a startling event and [were] not the product of any reflection and possible fabrication" (*People v Haskins*, 121 AD3d 1181, 1184 [3d Dept 2014] [internal quotation marks and citation omitted], *lv denied* 24 NY3d 1120 [2015]; *see People v Cotto*, 92 NY2d 68, 79 [1998]; *People v Gilmore*, 200 AD3d 1184, 1190 [3d Dept 2021], *lv denied* 38 NY3d 927 [2022]; *People v Rivera*, 132 AD3d 530, 530 [1st Dept 2015], *lv denied* 27 NY3d 1074 [2016]; *cf. Matter of Aiden J. [Armando K.]*, 197 AD3d at 799). The trooper further described how he took the mother and the older child back to their apartment and how, after finding that it was empty, he radioed for assistance to search for the father and the younger child.

A sergeant from the Greene County Sheriff's office and two deputy sheriffs responded to that request for assistance, and the sergeant and one of the deputies also testified. The sergeant described how he was patrolling the area on what he described as a cold evening and how, at approximately 1:00 a.m., he pointed the spotlight of his vehicle into a field where noises had been heard earlier and spotted "a blanket underneath a tree" and what appeared to be the top of a man's head poking out of it. The sergeant radioed for backup and, when it arrived, he and one of the deputies approached a man who turned out to be the father. The father did not respond to their repeated directives to show his hands, but finally woke up when the sergeant and deputy removed the blanket and pulled him up into a sitting position, at which point the sergeant observed the younger child wrapped in another blanket "underneath [the father's] left shoulder area." The sergeant directed the second deputy to take the younger child, at which point the father became belligerent and eventually had to be tased. The sergeant further described how the father smelled of alcohol, had slurred speech and was found with a bottle of liquor that "was at least three quarters empty," and those observations, particularly given the sergeant's training in spotting signs of intoxication, allowed him to properly offer the opinion that the father was "highly [*3]intoxicated" (*see e.g. People v Cruz*, 48 NY2d 419, 428 [1979]; *Ryan v Big Z Corp.*, 210 AD2d 649, 651 [3d Dept 1994]). The second deputy largely corroborated the sergeant's account, including that the temperature was around 30 degrees and that she got the younger child out of harm's way while the sergeant and the other deputy dealt with the father. She also agreed with the sergeant that the father was "passed out" initially and appeared to be "very intoxicated," as well as that there was a "half" empty bottle of alcohol in the father's backpack that, in her estimation, originally contained 1.5 liters.

The father, who left Greene County a few hours after the incident and eventually moved to Florida, testified virtually and disputed the foregoing proof in various respects. He portrayed his disagreement with the mother as a verbal one triggered by her mental illness and denied that he had been drinking earlier in the evening. He further denied that he had fallen asleep in the field — although he admitted bringing a bottle of brandy with him when he went outside with the younger child to take a walk — and claimed that he was the victim of an unprovoked assault by the police. Family Court found the bulk of the father's testimony to be incredible, however, instead crediting the proof that he was intoxicated, took the younger child outside on a cold night and sat down under a tree in the dark, placing the younger child at imminent risk of harm given the likelihood that he would pass out and drop her onto the ground unattended or, worse, fall onto her. Family Court found that this constituted neglect and, moreover, that the father's failure to provide a minimal degree of supervision as to the younger child constituted derivative neglect of the older child.

According deference to Family Court's findings of fact and assessments of credibility, we are satisfied that a sound and substantial basis exists for its determination that the father neglected the younger child in that a reasonably prudent parent would not drink heavily, take a three-week-old child outside on a cold night and sit down for a prolonged period, thereby creating an imminent risk of harm to the child from, among other things, being crushed if he or she passed out or fell asleep on the child (*see e.g. Matter of Joshua R. [Kimberly R.]*, 216 AD3d at 1222-1223; *Matter of Nevaeh L. [Katherine L.]*, 177 AD3d 1400, 1402 [4th Dept 2019]; *Matter of Leah VV. [Theresa WW.]*, 157 AD3d at 1067). We are further satisfied that this behavior "reflected such fundamentally flawed parenting as to create a compelling concern for the safety of all children in the household" and, thus, warranted a finding of derivative neglect with regard to the older child (*Matter of Christina BB.*, 305 AD2d 735, 736-737 [3d Dept 2003]; *accord Matter of Bryce Y. [Clint Y.]*, 200 AD3d 1129, 1131 [3d Dept 2021], *lv dismissed* 38 NY3d 1019 [2022]).

The father's remaining contention, that Family Court exhibited bias against him and deprived [*4]him of a fair hearing, is unpreserved for our review (*see Matter of Ashlyn Q. [Talia R.]*, 130 AD3d 1166, 1169 [3d Dept 2015]; *Matter of Borggreen v Borggreen*, 13 AD3d 756, 757 [3d Dept 2004]). Our review of the record, in any event, shows that argument to be without merit (*see Matter of Gallo v Gallo*, 138 AD3d 1189, 1190 [3d Dept 2016]; *Matter of Borggreen v Borggreen*, 13 AD3d at 757).

**Matter of David P.S.** AD3d 2023 NY Slip Op 06608 (4th Dept., 2023)

Appeal from an amended order of the Family Court, Steuben County (Philip J. Roche, J.), entered January 26, 2022, in a proceeding pursuant to Family Court Act article 10. The amended order, inter alia, determined that respondent had neglected the subject children.
It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an amended order of fact-finding and disposition that, inter alia, adjudged the subject children to be neglected children. Initially, the mother did not appear at the fact-finding hearing and, although her attorney was present at the hearing, the attorney did not participate. Under the circumstances, we conclude that the mother's unexplained failure to appear constituted a default (*see Matter of Malachi S. [Michael W.]*, 195 AD3d 1445, 1446 [4th Dept 2021], *lv dismissed* 37 NY3d 1081 [2021]). " '[I]t is well settled that no appeal lies from an order that is entered upon the default of the appealing party' " (*Matter of Roache v Hughes-Roache*, 153 AD3d 1653, 1653 [4th Dept 2017]; *see Matter of Rottenberg v Clarke*, 144 AD3d 1627, 1627 [4th Dept 2016]).

Further, even assuming, arguendo, that the mother raised an issue that was contested below and is thus reviewable on this appeal despite her default (*see Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1403 [4th Dept 2016]), we take judicial notice of the entry of a subsequent order terminating the mother's parental rights with respect to the subject children and that the time for the mother to appeal from that order has now passed (*see* Family Ct Act § 1113; *see Matter of John D., Jr. [John D.]*, 199 AD3d 1412, 1414 [4th Dept 2021], *lv denied* 38 NY3d 903 [2022]). Inasmuch as the order terminating the mother's parental rights to the subject children is final, the disposition renders moot the appeal from the order entered in the neglect proceedings (*see John D., Jr.*, 199 AD3d at 1414).

**Matter of Shania R.**, AD3d 2023 NY Slip Op 06631 (4th Dept., 2023)

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 7, 2021, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order entered after a fact-finding hearing determining that she neglected the subject child.

Contrary to the mother's contention, we conclude that Family Court properly determined that she neglected the child. "[A] party seeking to establish neglect must show, by a preponderance of the evidence . . . , first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]). Here, the evidence adduced at the fact-finding hearing established neglect by a preponderance of the evidence. Petitioner presented evidence that the mother drove to the grandmother's house with the intent of engaging in a physical altercation and brought the child with her. Thus, the child was in the mother's car and witnessed the mother intentionally drive her vehicle into the grandmother after the grandmother stabbed one of the mother's friends during a physical altercation. The child informed a caseworker that she was "crying" for her grandmother and was scared. We conclude that the record demonstrated that the child's emotional and mental condition had been impaired, or was in imminent danger of becoming impaired, as a result of witnessing the mother run over the grandmother and

"that the actual or threatened harm to the child [was] a consequence of the failure of [the mother] to exercise a minimum degree of care in providing the child with proper supervision or guardianship," i.e., by engaging in an act in which a reasonable and prudent parent would not have engaged (*Nicholson*, 3 NY3d at 368; *see Matter of Richard T.*, 12 AD3d 986, 987-988 [3d Dept 2004]; *see also Matter of Kadyn J. [Kelly M.H.]*, 109 AD3d 1158, 1160 [4th Dept 2013]; *see generally Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011]).

**Matter of Ahren B.-N.**, AD3d 2023 NY Slip Op 06646 (4th Dept., 2023)

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered April 5, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, continued placement of the subject child with petitioner.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order of disposition that, inter alia, determined that he neglected the subject child. We affirm.

Contrary to the father's contention, Family Court did not err in determining that petitioner established that the father neglected the child. To establish neglect, petitioner was required to show, by a preponderance of the evidence, " 'first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship' " (*Matter of Jayla A. [Chelsea K.—Isaac C.]*, 151 AD3d 1791, 1792 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act § 1012 [f] [i]). The court's "findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter of Jeromy J. [Latanya J.]*, 122 AD3d 1398, 1398-1399 [4th Dept 2014], *lv denied* 25 NY3d 901 [2015] [internal quotation marks omitted]; *see Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401 [4th Dept 2013], *lv denied* 21 NY3d 862 [2013]; *Matter of Shaylee R.*, 13 AD3d 1106, 1106 [4th Dept 2004]).

We conclude that a sound and substantial basis in the record supports the court's finding that the child was "in imminent danger of impairment as a result of [the father's] failure to exercise a minimum degree of care" in providing the child with adequate food and medical care (*Jeromy J.*, 122 AD3d at 1399 [internal quotation marks omitted]; *see Matter of Nadjmaah S.B. [Aleshia R.M.]*, 140 AD3d 1058, 1058-1059 [2d Dept 2016], *lv*

*denied* 29 NY3d 901 [2017]). Petitioner's evidence established that the child was severely underweight and exhibited signs of malnutrition and that, despite their awareness of the child's condition, the father and respondent mother did not comply with medical instructions about feeding the child (*see Matter of Dustin B.*, 24 AD3d 1280, 1281 [4th Dept 2005]; *Matter of Rakim W.*, 17 AD3d 376, 377-378 [2d Dept 2005], *lv denied* 5 NY3d 703 [2005]). The court credited the testimony of petitioner's witnesses and properly drew

" 'the strongest possible negative inference' against the father after he failed to testify at the fact-finding hearing" (*Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1545 [4th Dept 2011], *lv denied* 18 NY3d 808 [2012]; *see Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1678 [4th Dept 2021]; *Matter of Brittany W. [Patrick W.]*, 103 AD3d 1217, 1218 [4th Dept 2013]). We reject the father's contention that the evidence did not establish that the child's malnourished state was attributable specifically to his actions. Petitioner established that the father "resided in the same household with the child[ ] and the[ ] mother," that he "was aware that the mother was unable to provide the child[ ] with adequate nutrition and that his assistance was critical to the health of his child[ ]," and that he "was reluctant, and sometimes unwilling, to offer his assistance in ensuring that his child[ ] received proper nourishment" (*Dustin B.*, 24 AD3d at 1281). Petitioner thereby established that the father "knew or should have known of circumstances requiring action to avoid harm or risk of harm to the child and failed to act accordingly" (*Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1278 [4th Dept 2014] [internal quotation marks omitted]).

# Parental Mental Health

**Matter of Kamaya S.**, 218 AD3d 590 (2nd Dept., 2023)

In a proceeding pursuant to Family Court Act article 10, the father appeals from (1) an order of fact-finding of the Family Court, Kings County (Diane Costanzo, J.), dated December 20, 2021, and (2) an order of disposition of the same court dated January 12, 2022. The order of fact-finding, after a hearing, found that the father neglected the subject child. The order of disposition, upon the order of fact-finding and upon the father's consent, placed the child in the custody of the Commissioner of Social Services of the City of New York to reside in kinship foster care upon certain terms and conditions.

ORDERED that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as that order was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

ORDERED that the appeal from so much of the order of disposition as, upon the father's consent, placed the child in the custody of the Commissioner of Social Services of the City of New York to reside in kinship foster care upon certain terms and conditions is dismissed, without costs or disbursements; and it is further,

ORDERED that the order of disposition is affirmed insofar as reviewed, without costs or disbursements.

In October 2020, the petitioner commenced this proceeding pursuant to Family Court [*2]Act article 10 alleging, inter alia, that the father had neglected the subject child due to mental illness. In an order of fact-finding dated December 20, 2021, the Family Court, after a hearing, found that the father neglected the child. In an order of disposition dated January 12, 2022, the court, upon the order of fact-finding and upon the father's consent, placed the child in the custody of the Commissioner of Social Services of the City of New York to reside in kinship foster care upon certain terms and conditions with the child's paternal grandmother. The father appeals from the order of fact-finding and the order of disposition.

The appeal from the order of fact-finding must be dismissed because the order of fact-finding was superseded by the order of disposition. The issues raised on the appeal from the order of fact-finding are brought up for review on the appeal from the order of disposition (*see Matter of Harmony H. [Welton H.]*, 148 AD3d 1019, 1019). Additionally, the appeal from so much of the order of disposition as placed the child, upon consent, in the custody of the Commissioner of Social Services of the City of New York to reside in kinship foster care upon certain terms and conditions must be dismissed, as no appeal lies from an order entered upon the consent of the appealing party (*see Matter of Chloe W. [Tara W.]*, 188 AD3d 707, 708).

"At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing that the subject child has been abused or neglected by 'a preponderance of the evidence'" (*Matter of Bibi H. v Administration for Children's Servs.-Queens*, 210 AD3d 771, 773, quoting Family Ct Act § 1046[b][i]). "'Even though evidence of a parent's mental illness, alone, is insufficient to support a finding of neglect of a child, such evidence may be part of a neglect determination when the proof further demonstrates that the parent's condition creates an imminent risk of physical, mental, or emotional harm to the child'" (*Matter of Khaleef M.S.-P. [Khaleeda M.S.]*, 203 AD3d 1160, 1161, quoting *Matter of Joseph L. [Cyanne W.]*, 168 AD3d 1055, 1056). "[T]he 'court is not required to wait until [the] child has

already been harmed before it enters a finding of neglect'" (*Matter of Joseph L. [Cyanne W.]*, 168 AD3d at 1056, quoting *Matter of Kiemiyah M. [Cassiah M.]*, 137 AD3d 1279, 1279).

Here, the petitioner established by a preponderance of the evidence that the father neglected the child. The evidence presented by the petitioner at the fact-finding hearing demonstrated a causal connection between the father's limited insight into his ongoing mental illness and the risk of imminent harm to the subject child (*see Matter of Bibi H. v Administration for Children's Servs.-Queens*, 210 AD3d at 773; *Matter of Joseph L. [Cyanne W.]*, 168 AD3d at 1056).

Accordingly, the Family Court properly found that the father neglected the child.

**Matter of Tremont N. F.**, AD3d 2023 NY Slip Op 06253 (2nd Dept., 2023)

In a proceeding pursuant to Family Court Act article 10, the petitioner appeals from an order of the Family Court, Kings County (Melody Glover, J.), dated August 26, 2022. The order, after a fact-finding hearing, dismissed the petition.

ORDERED that the order is affirmed, without costs or disbursements.

The Administration for Children's Services (hereinafter ACS) commenced this neglect proceeding against the mother, alleging, inter alia, that she suffered from a mental illness which impaired her ability to care for the subject child. After a fact-finding hearing, the Family Court determined that ACS failed to establish a causal connection between the mother's condition and any actual or potential harm to the child. Accordingly, the court dismissed the petition. ACS appeals.

In a neglect proceeding pursuant to Family Court Act article 10, the petitioner has the burden of proving by a preponderance of the evidence that the subject child was neglected (*see id.* § 1046[b][i]). A neglected child is a child less than 18 years old "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof" (*id.* § 1012[f][i][B]). "[P]roof of mental illness alone will not support a finding of neglect. The evidence must establish a causal connection between the parent's condition, and actual or potential harm to the child[ ]" (*Matter of Joseph A. [Fausat O.]*, 91 AD3d 638, 640 [citation omitted]; *see Matter of Anthony A.R. [Taicha P.]*, 188 AD3d 697, 698; *Matter of Geoffrey D. [Everton D.]*, 158 AD3d 758, 759).

The Family Court properly determined that ACS failed to establish that there was a causal connection between the mother's mental illness and any actual or potential harm to the child [*2](*see Matter of Geoffrey D. [Everton D.]*, 158 AD3d at 759; *Matter of Nialani T. [Elizabeth B.]*, 125 AD3d 672, 674). There was no evidence that the mother's mental illness placed the child in imminent danger or precluded her from caring for the child, and the evidence established that the child was observed to be well cared for (*see Matter of Geoffrey D. [Everton D.]*, 158 AD3d at 759; *Matter of Nialani T. [Elizabeth B.]*, 125 AD3d at 674; *Matter of Joseph A. [Fausat O.]*, 91 AD3d at 640). Since ACS failed to establish that the child's physical, mental, or emotional condition was impaired or was in imminent danger of becoming impaired as a result of the mother's actions, it failed to establish that the mother neglected the child (*see Matter of Zahir W. [Ebony W.]*, 169 AD3d 909, 910).

The contentions of the attorney for the child regarding alleged evidentiary errors are not properly before this Court.

Accordingly, the Family Court properly dismissed the petition.

**Matter of Ariel A.T.R.**, AD3d 2023 NY Slip Op 06602 (1ST Dept., 2023)

Order of disposition, Family Court, Bronx County (Karen M.C. Cortes, J.), entered on or about August 5, 2022, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about May 13, 2022, which, after a hearing, found that respondent father neglected his son and derivatively neglected his daughter, Ariel R., unanimously affirmed, without costs.

A preponderance of the evidence supports Family Court's finding that the physical, mental, or emotional condition of the father's son Timothy M.T.R. had been impaired or was in imminent danger of becoming impaired as a result of the father's history of mental illness and resistance to treatment, notwithstanding the absence of proof of a definitive diagnosis of mental illness (*see* Family Ct Act §§ 1046[b][i]; 1012[f][i][B]; *Matter of Derick L. [Catherine W.]*, 135 AD3d 499 [1st Dept 2016], *lv denied* 27 NY3d 903 [2016]; *Matter of Caress S.*, 250 AD2d 490 [1st Dept 1998]). The evidence adduced at the fact-finding hearing established that the father received a childhood diagnosis of bipolar disorder and depression, that he lacked insight into his illness and need for treatment, and that his mental condition interfered with his judgment and parenting abilities, thus placing his infant son at imminent risk of physical, mental, or emotional impairment (*see Matter of Ruth Joanna O.O. [Melissa O.]*, 149 AD3d 32, 39 [1st Dept 2017], *affd* 30 NY3d 985 [2017]; *Matter of Karma C. [Tenequa A.]*, 122 AD3d 415, 416 [1st Dept 2014]).

The father's undisputed out-of-court statements as testified by petitioner's witness at the fact-finding hearing established that the father was not regularly taking his prescribed medication because he did not believe that he needed it until he was "very stressed out," and that he would not agree to receiving mental health treatment before the petitions were filed against him despite his admitting that he had problems with his mental health since childhood (*see Matter of Jesiel C.V. [Rosalie V.]*, 189 AD3d 568, 568-569 [1st Dept 2020], *lv denied* 2021 NY Slip Op 63571 [1st Dept 2021]). Since the father did not testify, Family Court was entitled to draw a negative inference against him and properly inferred that he implicitly admitted that his out-of-court-statements were true (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79-80 [1995]; *Matter of Adonis H. [Enerfry H.]*, 198 AD3d 478, 479 [1st Dept 2021]). The father's claim that Family Court failed to explain that the court would take a negative inference against him should he not testify at the fact-finding hearing is belied by the record, as the transcript for that hearing establishes that his counsel reassured the court that he informed the father about the consequences of not testifying.

Furthermore, the record shows that the effects of the father's mental illness, together with his resistance to treatment and lack of insight into how his illness impacted upon his ability [*2]to care for his son, who was two years old at the time of the hearing, was such that if the child were released to his care, there was a substantial probability that the child would not be adequately cared for, placing him in imminent danger (*see Matter of Maxwell P. [Katherine S.]*, 196 AD3d 416, 417 [1st Dept 2021]; *Matter of Nylah E. [Noemi C.]*, 184 AD3d 467, 467-468 [1st Dept 2020]). Contrary to the father's contention, there is a causal connection between the basis for the petition and the circumstances that allegedly impaired Timothy M.T.R. or placed him in imminent danger of becoming impaired, because the father told petitioner's witness that he would get very depressed if he did not smoke marijuana and that he needed to smoke the drug in order to care for his son (*see Matter of Noah Jeremiah J. [Kimberly J.]*, 81 AD3d 37, 43 [1st Dept 2010]). There are no grounds for disturbing Family Court's credibility determinations (*see Matter of Nathaniel T.*, 67 NY2d 838, 842 [1986]; *Matter of Sade B. [Scott M.]*, 103 AD3d 519, 520 [1st Dept 2013]).

A preponderance of the evidence supports the finding that the father derivatively neglected his daughter (*see* Family Ct Act §§ 1012 [f]; 1046 [a][i], [b]; *Matter of Samiyah H. [Sammie H.]*, 187 AD3d 540, 540 [1st Dept 2020]). The record shows that the daughter was born about a month after the fact-finding as to the neglect petition against the father regarding his son commenced, which was sufficiently close in time to the period in which the conditions underlying the father's neglect existed that his daughter would have been a neglected child if placed in his care (*see Matter of Essence S. [Stephanie G.]*, 134 AD3d 415, 416 [1st Dept 2015]; *Matter of Nhyashanti A. [Evelyn B.]*, 102 AD3d 470 [1st Dept 2013]).

# Parental Substance Abuse

**Matter of Kameron R.**, AD3d 2023 NY Slip Op 06678 (4th Dept., 2023)

Appeal from an order of the Family Court, Oswego County (Thomas Benedetto, J.), entered April 25, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child and continued the custody of the subject child with the mother of respondent.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals in appeal No. 1 from an order of disposition that, inter alia, determined that she neglected the subject child. In appeal No. 2, the mother appeals from an order of protection issued in favor of the subject child. As an initial matter, we dismiss the appeal from the order in appeal No. 2 as moot inasmuch as the challenged order of protection expired by its terms on March 10, 2023 (*see Matter of Romeo M. [Nicole R.]*, 94 AD3d 1464, 1465 [4th Dept 2012], *lv denied* 19 NY3d 810 [2012]; *Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1491 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]; *Matter of Leah S.*, 61 AD3d 1402, 1402 [4th Dept 2009]). We further conclude that the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Contrary to the mother's contention in appeal No. 1, we conclude that Family Court properly admitted in evidence her medical records and the medical records of the subject child (*see Matter of Faith K. [Cindy R.]*, 194 AD3d 1402, 1403 [4th Dept 2021]; *Matter of Zackery S. [Stephanie S.]*, 170 AD3d 1594, 1594-1595 [4th Dept 2019]; *see generally* Family Ct Act § 1046 [a] [iv]). Even assuming, arguendo, that the court erred in admitting certain parts of those records, we conclude that any such error is harmless because, "even if those records are excluded from consideration, the finding of neglect is nonetheless supported by a preponderance of the credible evidence" (*Matter of Lyndon S. [Hillary S.]*, 163 AD3d 1432, 1433 [4th Dept 2018]; *see Matter of Brooklyn S. [Stafania Q.—Devin S.]*, 150 AD3d 1698, 1700 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]).

We further reject the mother's contention that the court erred in determining that petitioner established by a preponderance of the evidence that she neglected the child. Pursuant to Family Court Act § 1046 (a) (iii), "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 except that such drug or alcoholic beverage [*2]misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program." That statutory presumption " 'operates to eliminate a requirement of specific parental conduct vis-à-vis the child and neither actual impairment nor specific risk of impairment need be established' " (*Matter of Paolo W.*, 56 AD3d 966, 967 [3d Dept 2008], *lv dismissed* 12 NY3d 747 [2009]; *see Matter of Samaj B. [Towanda H.-B.—Wade B.]*, 98 AD3d 1312, 1313 [4th Dept 2012]).

Here, petitioner established that the mother admitted repeated drug use while pregnant. Indeed, petitioner established that, at the time of the child's birth, both the mother and the child tested positive for multiple drugs. Moreover, the evidence at the fact-finding hearing established that, following the child's birth, the mother relapsed into drug misuse several times during the relevant time frame and again tested positive for multiple drugs. Thus, the court's determination that petitioner established neglect by a preponderance of the evidence is supported by the requisite sound and substantial basis in the record (*see Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1677-1678 [4th Dept 2021]; *Matter of Jack S. [Leah S.]*, 176 AD3d 1643, 1644-1645 [4th Dept 2019]).

Additionally, we conclude, contrary to the mother's contention, that the court properly determined that petitioner met its burden of establishing by a preponderance of the evidence that the mother neglected the child on the basis that she "knew or should have known of circumstances requiring action to avoid harm or the risk of harm to the child and failed to act accordingly" (*Matter of Brian P. [April C.]*, 89 AD3d 1530, 1530 [4th Dept 2011]; *see generally* Family Ct Act §§ 1012 [f] [i] [b]; 1046 [a] [ii]). Specifically, the record supports the court's determination that, while the child was in the mother's care, at the age of approximately eight weeks, she dropped him and he landed on his head, causing him to sustain a skull fracture and hematoma. The mother did not tell anyone what had happened or take the child to the hospital until the next day when the child was feverish and was suffering seizures. In short, petitioner's evidence established that the child sustained injuries that "would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of [the] child" (Family Ct Act § 1046 [a] [ii]; *see Matter of Grayson R.V. [Jessica D.]*, 200 AD3d 1646, 1648 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022]; *see generally Matter of Philip M.*, 82 NY2d 238, 244 [1993]). Based on the child's age and size, the mother should have known that dropping the child with the result that he landed on his head "required action in order to avoid actual or potential impairment of the child" (*Matter of*

*Nathanael E. [Melodi F.]*, 160 AD3d 1075, 1079 [3d Dept 2018] [internal quotation marks omitted]).

We also note that the court's credibility determinations are entitled to great deference, and we will not disturb those determinations, where, as here, they are supported by the record (*see Matter of Jack S. [Franklin O.S.]*, 173 AD3d 1842, 1843-1844 [4th Dept 2019]; *Matter of Jeromy J. [Latanya J.]*, 122 AD3d 1398, 1398-1399 [4th Dept 2014], *lv denied* 25 NY3d 901 [2015]). Additionally, the court properly drew " 'the strongest possible negative inference' against [the mother] after [she] failed to testify at the fact-finding hearing" (*Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1545 [4th Dept 2011], *lv denied* 18 NY3d 808 [2012]; *see Noah C.*, 192 AD3d at 1678; *Matter of Brittany W. [Patrick W]*, 103 AD3d 1217, 1218 [4th Dept 2013]).

Finally, we have considered the mother's remaining contentions and conclude that none warrants reversal or modification of the order in appeal No. 1.

# Domestic Violence

**Matter of Kashai E.**, 218 AD3d 574 (2nd Dept., 2023)

In related proceedings pursuant to Family Court Act article 10, the father appeals from (1) an order of fact-finding of the Family Court, Kings County (Linda M. Capitti, J.), dated June 21, 2022, and (2) an order of disposition of the same court also dated June 21, 2022. The order of fact-finding, after a fact-finding hearing, found that the father neglected the subject children. The order of disposition, upon the order of fact-finding, inter alia, released the subject children to the custody of the nonrespondent mother with supervision.
ORDERED that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as that order was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

ORDERED that the order of disposition is reversed, on the law, without costs or disbursements, the order of fact-finding is vacated, the petitions are denied, and the proceedings are dismissed.

In February 2021, the petitioner commenced these proceedings against the father, alleging that the father neglected the subject children by committing acts of domestic violence against the mother in the children's presence. At a fact-finding hearing, the petitioner relied solely on hearsay statements of the children, and the father did not

testify. The Family Court found that the father neglected the children. The father appeals.

At a fact-finding hearing in a neglect proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing that the subject child has been neglected by a preponderance of evidence (*see* Family Ct Act § 1046[b][i]). As relevant here, Family Court Act § 1012(f)(i)(B) defines a neglected child as one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship" (*see Nicholson v Scoppetta*, 3 NY3d 357, 368).

"A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence" (*Matter of Divine K.M. [Andre G.]*, 211 AD3d 733, 734 [internal quotation marks omitted]). "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" (*id.* at 735; *see Matter of Nina P. [Giga P.]*, 180 AD3d 1047, 1047).

"A trier of fact may draw the strongest inference that the opposing evidence permits against a witness who fails to testify in a civil proceeding" (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79). "[P]revious statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect" (Family Ct Act § 1046[a][vi]). "The out-of-court statements of siblings may properly be used to cross-corroborate one another" (*Matter of Ashley G. [Eggar T.]*, 163 AD3d 963, 964 [alterations and internal quotation marks omitted]; *see Matter of Tristan R.*, 63 AD3d 1075, 1076). "However, such out-of-court statements must describe similar incidents in order to sufficiently corroborate the sibling's out-of-court allegations" (*Matter of Divine K.M. [Andre G.]*, 211 AD3d at 735; *see Matter of Nicole V.*, 71 NY2d 112, 124). "Family Court Judges presented with the issue have considerable discretion to decide whether the child's out-of-court statements describing incidents of abuse or neglect have, in fact, been reliably corroborated" (*Matter of Nicole V.*, 71 NY2d at 119; *see Matter of Divine K.M. [Andre G.]*, 211 AD3d at 735).

Here, the hearsay evidence presented by the petitioner at the fact-finding hearing was insufficient to permit a finding of neglect (*see* Family Ct Act § 1046[a][vi]; *Nicholson v Scoppetta*, 3 NY3d at 369). The hearsay statement of one child that she witnessed the father "attacking her mother in the bedroom" failed to provide any detail as to the alleged domestic violence and was not corroborated by any other evidence of domestic violence in the record (*see* Family Ct Act § 1046[a][vi]; *Matter of Divine K.M. [Andre G.]*,

211 AD3d at 735-736; *Matter of Ashley G. [Eggar T.]*, 163 AD3d at 965). The hearsay statements of the children describing an incident in which the father yelled outside the children's home and "reached for" or "grabbed at" one of the children on their way inside, which the children described as "uncomfortable," "weird," and "confus[ing]," causing one of them to be "a little anxious" and the other to "start[ ] to cry," without more, was insufficient to establish that the children's physical, mental, or emotional condition was impaired or in imminent danger of becoming impaired (*see Matter of Divine K.M. [Andre G.]*, 211 AD3d at 736; *Matter of Eustace B. [Shondella M.]*, 76 AD3d 428, 429). Furthermore, the children's knowledge that the father legally possessed a firearm in another state was insufficient to establish that the children's physical, mental, or emotional condition was impaired or in imminent danger of becoming impaired where there was no evidence that the father had threatened anyone with his firearm or otherwise connecting the firearm to the alleged incidents of neglect (*cf. Matter of Caleah C.M.S. [Calvin S.]*, 174 AD3d 457, 458; *Matter of Takoda G. [Juan T.]*, 161 AD3d 1574, 1574-1575).

The parties' remaining contentions are without merit.

**Matter of Anilya S.**, 218 AD3d 473 2023 (2nd Dept., 2023)

In related proceedings pursuant to Family Court Act article 10, the father appeals from an order of fact-finding and disposition of the Family Court, Kings County (Jacqueline D. Williams, J.), dated August 2, 2022. The order of fact-finding and disposition, insofar as appealed from, after fact-finding and dispositional hearings, found that the father neglected the subject children, and directed the issuance of a limited order of protection in favor of the subject children against the father.
ORDERED that the appeal from so much of the order of fact-finding and disposition as directed the issuance of a limited order of protection in favor of the subject children against the father is dismissed, without costs or disbursements; and it is further,

ORDERED that the order of fact-finding and disposition is affirmed insofar as reviewed, without costs or disbursements.

The father's appeal from so much of the order of fact-finding and disposition as directed the issuance of a limited order of protection in favor of the subject children against the [*2]father must be dismissed as academic, because that portion of the order of fact-finding and disposition has expired by its own terms (*see Matter of Titus P.E.*, 213 AD3d 929, 930-931; *Matter of Nicholas M.*, 211 AD3d 950, 951).

The Administration for Children's Services commenced this proceeding pursuant to Family Court Act article 10, alleging that the father neglected the children. After a fact-

finding hearing, the Family Court found that the father neglected the children by, among other things, perpetrating an act of domestic violence upon the mother within the hearing of the children. After a dispositional hearing, the court directed the issuance of a limited order of protection in favor of the children against the father to expire on May 2, 2023. The father appeals.

"'[A] party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship'" (*Matter of Jaylen S. [Richard S.]*, 214 AD3d 885, 885, quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368; *see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]; *Matter of Na'ima W. [Kenyatta W.]*, 192 AD3d 1127, 1128). "'[A] child's experience of domestic violence can cause these harms or put a child in imminent danger of them'" (*Matter of Jaylen S. [Richard S.]*, 214 AD3d at 885, quoting *Matter of Silveris P. [Meuris P.]*, 198 AD3d 787, 789). "'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'" (*Matter of Jaylen S. [Richard S.]*, 214 AD3d at 885-886, quoting *Matter of Jermaine T. [Jairam T.]*, 193 AD3d 943, 945).

Contrary to the father's contention, a preponderance of the admissible evidence 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 within the hearing of the children (*see Matter of Jaylen S. [Richard S.]*, 214 AD3d at 886). The children reported feeling afraid of the father (*see Matter of Kaylee S. [Kyle L.S.]*, 214 AD3d 423, 423). Further, the credible evidence reflects that the parents' arguments frequently turned physical, and that, on one occasion, one of the children attempted to physically separate the parents during a heated argument (*see Matter of Cerise M. [Michael M.]*, 177 AD3d 743, 744).

**Matter of Davasha T.**, 218 AD3d 475 (2nd Dept., 2023)

In related proceedings pursuant to Family Court Act article 10, David T. appeals from (1) an order of disposition of the Family Court, Richmond County (Alison M. Hamanjian, J.), dated January 28, 2022, and (2) an order of dismissal of the same court, also dated January 28, 2022. The order of disposition, insofar as appealed from, upon an order of fact-finding of the same court dated May 20, 2021, made after a fact-finding hearing, finding that David T. neglected the subject children Davasha T. and David T., Jr., and, after a dispositional hearing, placed David T. under the petitioner's supervision for a

period of nine months. The order of dismissal dismissed the petition as to the child Davasha T. pursuant to Family Court Act § 1051(c) on the ground that the aid of the court was not required.
ORDERED that the appeal from so much of the order of disposition as placed David T. under the supervision of the petitioner for a period of nine months is dismissed as academic, without costs or disbursements; and it is further,

ORDERED that the order of disposition is affirmed insofar as reviewed, without costs or disbursements; and it is further,

ORDERED that the appeal from the order of dismissal is dismissed, without costs or disbursements, as David T. is not aggrieved by that order.

The appellant, David T., is the father of the children Davasha T. and David T., Jr. (hereinafter together the subject children). The petitioner, the Administration for Children's Services, commenced these related proceedings pursuant to Family Court Act article 10, alleging, inter alia, that the appellant neglected the subject children, who were, respectively, 15 and 3 years old at the time of the incident, by perpetrating acts of domestic violence against the mother of David T., Jr., in their presence. After a fact-finding hearing, the Family Court found that the petitioner established, by a preponderance of the evidence, that the appellant had neglected the subject children.

After a dispositional hearing, the Family Court placed David T., Jr., in the custody of his mother and placed the appellant under the petitioner's supervision for a period of nine months. Pursuant to Family Court Act § 1051(c), the court dismissed the petition as to Davasha T., concluding that the aid of the court was not required with respect to that child.

The appeal from so much of the order of disposition as placed the appellant under the petitioner's supervision for a period of nine months has been rendered academic, since the period of supervision has expired by its own terms (*see Matter of Serenity R. [Truman C.]*, 215 AD3d 854, 855-856).

At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected (*see* Family Ct Act § 1046[b][i]; *Matter of Noah N. [Herold N.]*, 184 AD3d 733, 734). "Although 'exposing a child to domestic violence is not presumptively neglectful,' a finding of neglect based on an incident or incidents of domestic violence is proper where a preponderance of the evidence establishes that the child was actually or imminently harmed by reason of the parent or caretaker's failure to exercise a minimum degree of care" (*Matter of Aliyah T. [Jaivon T.]*, 174 AD3d 722, 724 [citation omitted], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 375).

Here, the evidence adduced at the fact-finding hearing was sufficient to prove, by a preponderance of the evidence, that the appellant neglected the subject children by committing acts of domestic violence against the mother of David T., Jr., in the presence of, or within the hearing of, the subject children (*seeMatter of Nina P. [Giga P.]*, 180 AD3d 1047, 1047-1048; *Matter of Aliyah T. [Jaivon T.]*, 174 AD3d at 724). Among other things, the evidence showed that the father punched the mother in the face several times, causing bruising, that Davasha T. attempted to intervene, and that David T., Jr., was in the living room of the apartment during the incident and was crying. Contrary to the appellant's contention, it was not necessary for the petitioner to establish a pattern of domestic violence, as "[e]ven a single act of domestic violence, either in the presence of a child or within the hearing of a child," may, as here, be sufficient for a neglect finding (*Matter of Nina P. [Giga P.]*, 180 AD3d 1047, 1047; *see Matter of Jaylen S. [Richard S.]*, 214 AD3d 885, 885-886).

Accordingly, we affirm the order of disposition insofar as reviewed.

**Matter of Cruz W.**, 218 AD3d 782 (2nd Dept., 2023)

In a proceeding pursuant to Family Court Act article 10, the father appeals from an order of disposition of the Family Court, Queens County (Emily Ruben, J.), dated October 4, 2022. The order of disposition, insofar as appealed from, upon an order of fact-finding of the same court dated October 7, 2021, made after a fact-finding hearing, determining that the father neglected the subject child, and after a dispositional hearing, directed the father to participate in individual counseling and classes in parenting, batterer's intervention, and anger management, and directed that his parental access with the child be supervised.

ORDERED that the order of disposition is affirmed insofar as appealed from, without costs or disbursements.

The petitioner commenced this proceeding pursuant to Family Court Act article 10, alleging that the father neglected the subject child by committing acts of domestic violence against the mother in the child's presence. After a fact-finding hearing, the Family Court determined that the father neglected the child. After the parties could not reach an agreement regarding parental access, the court held a dispositional hearing. In an order of disposition dated October 4, 2022, the court, inter alia, ordered the father to participate in individual counseling, to enroll in and complete classes in parenting, batterer's intervention, and anger management, and to have therapeutic supervised parental access with the child. The father appeals.

"Pursuant to Family Court Act § 1012(f), a neglected child is one 'whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care' in, inter alia, 'providing the child with proper supervision or guardianship'" (*Matter of Peter T. [Shay S.P.]*, 173 AD3d 1043, 1045, quoting Family Ct Act § 1012[f][i][B]; *see Nicholson v Scoppetta*, 3 NY3d 357, 368). "Courts must evaluate parental behavior objectively: would a reasonable and prudent parent have so acted, or failed to act, under the circumstances then and there existing" (*Nicholson v Scoppetta*, 3 NY3d at 370). "The standard takes into account the special vulnerabilities of the child, even where general physical health is not implicated" (*id.*).

"A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence" (*Matter of Divine K.M. [Andre G.]*, 211 AD3d 733, 734 [internal quotation marks omitted]). "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" (*Matter of Nina P. [Giga P.]*, 180 AD3d 1047, 1047).

Here, the petitioner established by a preponderance of the evidence that the father's acts of domestic violence against the mother in the presence of the child caused the child actual emotional harm and an imminent risk of physical harm (*see id.* at 1047; *Matter of Vivian M. [Melinda D.]*, 179 AD3d 692, 693; *Matter of Cerise M. [Michael M.]*, 177 AD3d 743, 744). Contrary to the father's contention that his actions did not harm the child, actual emotional harm to the child was established, inter alia, by testimony that the child was crying and afraid during and after a domestic violence incident.

"At a dispositional hearing, the court's disposition must be made 'solely on the basis of the best interests of the child,' with 'no presumption that such interests will be promoted by any particular disposition'" (*Matter of Eliora B. [Kennedy B.]*, 146 AD3d 772, 774, quoting Family Ct Act § 631). "'The factors to be considered in making the determination include the parent or caretaker's capacity to properly supervise the child, based on current information and the potential threat of future abuse and neglect'" (*Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d 952, 955, quoting *Matter of William S.L. [Julio A.L.]*, 195 AD3d 839, 843). Here, the evidence presented at the dispositional hearing supported the Family Court's conclusion that the father should be required to participate in individual counseling and classes in parenting, batterer's intervention, and anger management, and should be permitted only therapeutic supervised parental access with the child.

The father's remaining contentions are without merit.

**Matter of Saphire R.**, 219 AD3d 730 (2nd Dept., 2023)

In related proceedings pursuant to Family Court Act article 10, the father appeals from (1) an order of fact-finding of the Family Court, Kings County (Alicea Elloras-Ally, J.), dated May 23, 2019, and (2) an order of disposition of the same court dated March 12, 2020. The order of fact-finding, after a fact-finding hearing, found that the father neglected the child Saphire R. and derivatively neglected the children Keziah R., Josiah R., Xayanna G., and Xavier G. The order of disposition, upon the order of fact-finding and after a dispositional hearing, inter alia, released the children to the custody of the nonrespondent mother and placed the father under the supervision of the Administration for Children's Services until March 12, 2021.
ORDERED that the appeal from the order of disposition is dismissed as academic, without costs or disbursements, as that order was vacated by a subsequent order of the Family Court, Kings County (Alicea Elloras-Ally, J.), dated July 15, 2021; and it is further,

ORDERED that the order of fact-finding is affirmed, without costs or disbursements.

The Administration for Children's Services (hereinafter ACS) commenced these related proceedings pursuant to Family Court Act article 10, alleging, inter alia, that the father neglected the child Saphire R., and derivatively neglected the children Keziah R., Josiah R., Xayanna G., and Xavier G., by committing an act of domestic violence against the mother in the presence of Saphire R. Evidence was presented at the fact-finding hearing demonstrating that the father punched the mother in the breast causing her pain, wielded a knife at her, and took her keys and cell phone, while Saphire R. was present. In an order of fact-finding, the Family Court found that the father neglected Saphire R. and derivatively neglected Keziah R., Josiah R., Xayanna G., and Xavier G.

"'A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence'" (*Matter of Ariella S. [Krystal C.]*, 89 AD3d 1092, 1093, quoting *Matter of Kiara C. [David C.]*, 85 AD3d 1025, 1026). 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 (*see Matter of Na'ima W. [Kenyatta W.]*, 192 AD3d 1127, 1128; *Matter of Jihad H. [Fawaz H.]*, 151 AD3d 1063, 1064).

Here, Saphire R.'s out-of-court statements were admissible because they were sufficiently and reliably corroborated by the testimony of the police officers and an ACS caseworker, the mother's out-of-court statements, and the father's admissions to the

ACS caseworker (*see* Family Ct Act § 1046[a][vi]; *Matter of Kevin D. [Quran S.S.]*, 169 AD3d 1034, 1036). Contrary to the father's contention, a preponderance of admissible evidence supported a finding that Saphire R.'s physical, mental, or emotional condition was impaired or in imminent danger of impairment by the father's commission of an act of domestic violence against the mother in her presence (*see Matter of Jordan R. [Yon R.-W.]*, 162 AD3d 671, 672-673; *Matter of Jihad H. [Fawaz H.]*, 151 AD3d at 1064; *Matter of Andre K. [Jamahal G.]*, 142 AD3d 1171, 1173). Moreover, the father's commission of an act of domestic violence against the mother in the presence of Saphire R. evinced a fundamental defect in his understanding of the duties of parenthood, such that it supports a finding of derivative neglect with respect to Keziah R., Josiah R., Xayanna G., and Xavier G. (*see Matter of Madeleine B. [Peter B.]*, 198 AD3d 641, 643; *Matter of Briana F. [Oswaldo F.]*, 69 AD3d 718).

The father's remaining contentions are unpreserved for appellate review and, in any event, without merit.

**Matter of Y. H.**, 219 AD3d 1247 (1st Dept., 2023)

Order of disposition, Family Court, Bronx County (Lynn M. Leopold, J.), entered on or about August 15, 2022, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about June 13, 2022, which, after a hearing, determined that respondent father neglected the subject children by committing acts of domestic violence, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Family Court's finding that respondent father neglected the subject children by committing acts of domestic violence against the mother in the presence of the subject children was supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]). The mother testified that on or about November 24, 2020, the father pushed and choked her while they were in the family's apartment while in the presence of the subject children. According to the mother, she observed the older child crying and run to his bedroom. In an out-of-court statement, the older child stated that he observed the father hit the mother and that both children were present in the apartment at the time of the incident. The older child's out-of-court statement that the father hit the mother was supported by the mother's testimony (*see Matter of J.R.M.-C. [Antonio M.]*, 176 AD3d 623, 624 [1st Dept 2019]; *Matter of Jamya C. [Jermaine F.]*, 165 AD3d 410, 410 [1st Dept 2018]). Further, both the mother's testimony and the older child's out-of-court statement that both subject children were in the apartment during the incident were also supported by the father's testimony.

The mother further testified about an incident that took place in Ohio where the father became violent with her after drinking alcohol, hit, pushed, and grabbed her, causing bruises. The court correctly found that this incident also placed the children, who were upstairs in the house while the incident occurred, at imminent risk of emotional or mental harm even absent evidence that they were aware of or emotionally impacted by it (*Matter of Andru G. [Jasmine C.],* 156 AD3d 456 [1st Dept 2017]).

Although the father argues that the Family Court erred in concluding that the mother's testimony was more credible than his, there is no reason to disturb the court's

evaluation of the evidence, including its credibility findings (*see Matter of Heily A. [Flor F.-Gustavo A.]*, 165 AD3d 457, 457 [1st Dept 2018]).

We have considered the father's remaining contentions and find them unavailing.

**Matter of Melanie J.A.**, 221 AD3d 421 (1st Dept., 2023)

Order of fact-finding and disposition (one paper) of the Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about October 26, 2022, which, after a hearing, determined that respondent father neglected the subject child, unanimously affirmed, without costs.

The finding of neglect was proven by a preponderance of the evidence (*see* Family Court Act § 1046[b][i]). The testimony established that the child's emotional and mental condition was impaired or in imminent danger of being impaired by the child's exposure to repeated acts of domestic violence committed by the father against the mother (*see Matter of Terrence B.*, 171 AD3d 463, 463 [1st Dept 2019]). In each one of the incidents, the violence took place either in the child's presence or in close proximity to the child, thus creating a reasonable inference that the child was in imminent danger of physical impairment (*see Matter of Tyjaa E. [Kareem McC.]*, 157 AD3d 420, 420 [1st Dept 2018]; *Matter of Andru G. [Jasmine C.]*, 156 AD3d 456, 457 [1st Dept 2017]). Moreover, because the child was crying during one of the incidents, it is reasonable to infer that the child was aware of and emotionally impacted by the violence (*see Matter of Jermaine K.R. [Jermaine R.]*, 176 AD3d 648, 649 [1st Dept 2019]). The court properly credited the mother's testimony in making its findings, and there is no basis to disturb those credibility determinations (*see Matter of Heily A. [Flor F—Gustavo A.*, 165 AD3d 457, 457 [1st Dept 2018]).

In addition, the father's history of alcohol misuse, including at least one occasion where he brandished a knife in front of the mother and the child while intoxicated, constituted prima facie evidence of neglect (*see* Family Court Act § 1046[a][iii]; *Matter of Kimora D. [Joseph C.]*, 176 AD3d 638, 640 [1st Dept 2019]). The father never received treatment

for his alcohol misuse, and lack of actual harm to the child is not sufficient to rebut the prima facie case of neglect on this basis (*see id.*; *Matter of Chastity O.C. [Angie O.C.]*, 136 AD3d 407, 408 [1st Dept 2016]).

# Excessive Corporal Punishment

**Matter of Ariona P.**, 221 AD3d 1520 (4th Dept., 2023)

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered February 14, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this neglect proceeding pursuant to Family Court Act article 10, respondent father appeals from an order of fact-finding and disposition that, inter alia, adjudicated the child to be a neglected child. Initially, we note that the father contends that he has been denied adequate appellate review because the transcript of the testimony of several of petitioner's witnesses is missing due to the apparent failure to record the proceedings of that day. The father failed to seek a reconstruction hearing with respect to the missing parts of the record (*see Matter of Mikel B. [Carlos B.]*, 115 AD3d 1348, 1348 [4th Dept 2014]). Thus, the father's contention is not properly before us inasmuch as it is raised for the first time on appeal (*see generally Matter of Abigail H. [Daniel D.]*, 172 AD3d 1922, 1923 [4th Dept 2019], *lv denied* 34 NY3d 901 [2019]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). In any event, we conclude that "the record as submitted is sufficient for this Court to determine" the issues raised on appeal (*Matter of Stephen B.* [appeal No. 2], 195 AD2d 1065, 1065 [4th Dept 1993]).

The father further contends that petitioner failed to establish neglect by a preponderance of the evidence. We reject that contention. To establish neglect, the petitioner must establish, by a preponderance of the evidence, " 'first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship' " (*Matter of Jayla A. [Chelsea K.—Isaac C.]*, 151 AD3d 1791, 1792 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act §

1012 [f] [i]). Although a parent may use reasonable force to discipline their child and to promote the child's welfare (*see Matter of Balle S. [Tristian S.]*, 194 AD3d 1394, 1395 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021]; *Matter of Damone H., Jr. [Damone H., Sr.]* [appeal No. 2], 156 AD3d 1437, 1438 [4th Dept 2017]), the infliction of excessive corporal punishment constitutes neglect (*see* § 1012 [f] [i] [B]), and a single incident of excessive corporal punishment can be sufficient to support a finding of neglect (*see Matter of Ryanna H. [Monique H.]*, 214 AD3d 1308, 1309 [4th Dept 2023], *lv dismissed* 40 NY3d 964 [2023]; *Balle S.*, 194 AD3d at 1395; *Matter of Steven L.*, 28 AD3d 1093, 1093 [4th Dept 2006], *lv denied* 7 NY3d 706 [2006]).

Here, the evidence at the fact-finding hearing included the testimony of the nurse practitioner who examined the child two days after the incident and observed "wounds about the left eye," as well as "bruising and swelling." In addition, the nurse practitioner testified that the child reported having been kicked in the abdomen and "beaten with a broom." The child reported pain in the abdomen and head. The nurse practitioner testified that the child presented as anxious and restless. She referred the child to the emergency room for further treatment due to the pain in the child's abdomen. We therefore conclude that petitioner established by a preponderance of the evidence that the father neglected the child by inflicting excessive corporal punishment (*see Matter of Amarion M. [Faith W.]*, 214 AD3d 1457, 1458 [4th Dept 2023], *lv denied* 39 NY3d 915 [2023]; *Matter of Kayla K. [Emma P.-T.]* [appeal No. 1], 204 AD3d 1412, 1413 [4th Dept 2022]; *Balle S.*, 194 AD3d at 1395; *see generally* Family Ct Act § 1046 [a] [vi]*; Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]).

**Matter of Robann H**., 221 AD3d 502 (1st Dept., 2023)

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about January 10, 2023, which, after a fact-finding hearing, to the extent appealed from as limited by the briefs, determined that respondent mother neglected the subject child, unanimously affirmed, without costs.
A preponderance of the evidence supports the finding that the mother neglected the child by inflicting excessive corporal punishment on her. The child's out-of-court statement that the mother hit her in the mouth with a closed fist, causing her lower lip to bleed, was corroborated by the testimony of the Administration for Children's Services (ACS) caseworker (*see Matter of Empress B. [Henrietta L.]*, 204 AD3d 562, 563 [1st Dept 2022]). The caseworker also testified that the child had a photograph of the injury on her phone and showed it to the caseworker, who took a photograph of it with her own phone. The court properly admitted the photograph into evidence, as the caseworker's testimony laid the proper foundation that it "accurately represented" the

digital image that she had seen on the child's phone, and that the child was, in fact, the person shown in the photograph (*see People v Price*, 29 NY3d 472, 477 [2017]). The court was entitled to take a negative inference against the mother from her failure to testify (*see Matter of Nicole H.*, 12 AD3d 182 [1st Dept 2004]).

That the child's injuries resulted from only one incident does not preclude a finding of excessive corporal punishment (*see Matter of Empress B.*, 204 AD3d at 563). In addition, the evidence shows that the child was emotionally harmed by other instances of the mother's violent and erratic behavior, including hitting the child and causing her to fall down the stairs. Indeed, the child reported to the ACS caseworker that she no longer felt safe with the mother (*see e.g. Matter of Ibraheem K. [Jaqueline N.]*, 190 AD3d 643, 644 [1st Dept 2021]).

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

**Matter of L.H.R.**, AD3d 2023 NY Slip Op 06223 (1st Dept., 2023)

Order of fact-finding and disposition (one paper), Family Court, Bronx County (David J. Kaplan, J.), entered on or about December 8, 2022, which, to the extent appealed from as limited by the briefs, after a hearing, determined that respondent mother neglected the subject child, unanimously affirmed, without costs.
A preponderance of the evidence supports Family Court's finding that the mother neglected the child by inflicting excessive corporal punishment on her. The child's out-of-court statements that the mother became angry, grabbed the child by the hair, pulled her across the room, and choked her, causing cuts and bruises, and threatened her with scissors, were corroborated by the testimony of the Administration for Children's Services (ACS) caseworker that she observed and photographed the child's injuries to her arm, knee, elbow, and face (*see Matter of Empress B. [Henrietta L.]*, 204 AD3d 562, 563 [1st Dept 2022]). That the child's injuries resulted from only one incident does not preclude a finding of excessive corporal punishment (*id.* at 563).

Further, the court credited the caseworker's testimony and found the mother's testimony to be self-serving, and there is no basis for disturbing the court's credibility determinations (*see Matter of Syeda A. [Syed I.]*, 186 AD3d 1145, 1146 [1st Dept 2020]), which are entitled to great deference on appeal (*Matter of Any G. v Ayman H.*, 208 AD3d 1097, 1098 [1st Dept 2022]). Regardless of whether the mother had a valid reason for disciplining the child, her response went beyond any common-law right to use reasonable force to discipline her child (*see Matter of Desiree D. [Iris D.]*, 209 AD3d 547, 548 [1st Dept 2022]).

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

**Matter of Jaiyana S.**, AD3d 2023 NY Slip Op 06460 (1st Dept., 2023)

Order of disposition, Family Court, New York County (Valerie A. Pels, J.), entered on or about February 6, 2023, which, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about January 27, 2023, determining that respondent mother neglected the subject children, unanimously affirmed, without costs. A preponderance of the evidence supports the finding that the mother neglected the children by inflicting excessive corporal punishment on them. Petitioner agency's child protective specialist testified that the children told her that the mother routinely disciplined both of them by beating them with belts and pinching them, resulting in bruises and cuts that have bled in the past, and that the mother had hit Jaiyon with her hands and sandal, making him bleed, and scratched and pinched Jaiyana, causing scratches on her right arm (*see Matter of Michele S. [Yi S.]*, 157 AD3d 551, 552 [1st Dept 2018]). Not only did the children sustain injuries including a bloody nose and scratches, but they expressed to petitioner's child protective specialist that they were fearful of the mother and did not want to return home with her (*see Matter of Ibraheem K. [Jaqueline N.]*, 190 AD3d 643, 644 [1st Dept 2021]). These out-of-court statements by both children cross-corroborate each other and were further corroborated by the child protective specialist's observation of visible scratch marks on Jaiyana's arm (*see Matter of Nephra P.I. [Shanel N.]*, 139 AD3d 485 [1st Dept 2016]). The court providently credited the child protective specialist's testimony and found the mother's testimony to be self-serving and minimized her conduct, and there is no basis for disturbing the court's credibility determinations (*see Matter of Syeda A. [Syed I.]*, 186 AD3d 1145, 1146 [1st Dept 2020]), which are entitled to great deference on appeal (*see Matter of Any G. v Ayman H.*, 208 AD3d 1097 [1st Dept 2022]).

Contrary to the mother's argument, she is not entitled to a missing witness inference based on petitioner's failure to call the school social worker or the children's uncle as witnesses. At the hearing, the mother did not request an adverse inference, but rather sought the dismissal of any section of the petition based upon statements made by the missing witnesses. However, the mother failed to raise this issue until after petitioner had rested, depriving petitioner of the opportunity to explain whether the social worker was available and under its control (*see People v Silvestre*, 187 AD3d 552 [1st Dept 2020]). The record shows that the social worker was unavailable because she was attending to another student undergoing a mental health crisis**.** In any event, her intended testimony regarding the children's reports that the mother hit them with belts, pinched them, and acted bizarrely, and that they did not feel safe in her care, would be duplicative of the child protective specialist's testimony (*see People v Brunner*, 67 AD3d

464, 465 [1st Dept 2009[*2]]). We further note that the court dismissed portions of the petition, based upon statements made by the uncle, for lack of corroboration.

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

# ABUSE

## Sexual Abuse

**Matter of Kaleb LL.**, 218 AD3d 846 (3rd Dept., 2023)

Appeals from two orders of the Family Court of Tioga County (Gerald A. Keene, J.), entered July 2, 2021, which granted petitioner's applications, in two proceedings pursuant to Family Ct Act article 10, to adjudicate the subject children to be abused and/or neglected.

Respondent Valerie LL. (hereinafter the mother) is the mother of a son (born in 2008) and a daughter (born in 2016). In 2018, the mother and the children began residing with her boyfriend, respondent Bradley MM. (hereinafter the boyfriend). Beginning in June 2019, the daughter disclosed to various persons that the boyfriend "hurt her" while pointing to her vaginal area. In July 2019, following an incident wherein the daughter expressed pain when the grandfather's girlfriend attempted to bathe her, the grandfather brought her to the emergency room of a local hospital. After her initial examination by a physician raised concerns of possible abuse, the daughter was examined by a pediatric sexual assault nurse examiner (SANE) and vaginal and anal swabs were obtained. Thereafter, the hospital reported sexual abuse and an investigation ensued. As a result, Child Protective Services implemented a safety plan wherein the children were not to have contact with the boyfriend pending the completion of the investigation.

In November 2019, petitioner commenced these Family Ct Act article 10 proceedings alleging that the boyfriend abused the daughter and derivatively neglected the son, and that the mother neglected her children. Following a fact-finding hearing, Family Court determined, among other things, that the daughter's out-of-court statements regarding the alleged sexual abuse were sufficiently corroborated and found that the boyfriend abused the daughter pursuant to Penal Law § 130.65 and derivatively neglected the

son, and that the mother neglected both children. After a dispositional hearing, Family Court issued an order of protection barring the boyfriend from having contact with the children and requiring the boyfriend's participation in sex offender treatment. The boyfriend and the mother appeal.**[FN1]**

The boyfriend and the mother contend that the evidence presented at the fact-finding hearing is legally insufficient to support Family Court's findings of abuse, derivative neglect and neglect, arguing that the daughter's out-of-court statements were not sufficiently corroborated. We disagree. "To establish sexual abuse in a Family Ct Act article 10 proceeding, the petitioner is required to prove by a preponderance of the evidence that the respondent committed or allowed another to commit acts constituting crimes under Penal Law article 130" (*Matter of Makayla I. [Caleb K.]*, 162 AD3d 1139, 1140 [3d Dept 2018] [citation omitted]; *see* Family Ct Act §§ 1012 [e] [iii] [A]; 1046 [b] [i]). "A child's prior out-of-court allegations of abuse or neglect are admissible in evidence if such statements are sufficiently corroborated by other evidence tending to establish their reliability" (*Matter [*2]of Kylee R. [David R.]*, 154 AD3d 1089, 1089-1090 [3d Dept 2017] [citations omitted], *lv denied* 30 NY3d 911 [2018]; *see* Family Ct Act § 1046 [a] [vi]; *Matter of Olivia RR. [Paul RR.]*, 207 AD3d 822, 823 [3d Dept 2022]). "The corroboration requirement is not demanding and may be satisfied by any other evidence tending to support the reliability of the child's previous statements, *including medical indications of abuse*, expert validation testimony, cross-corroboration by another child's similar statements, marked changes in a child's behavior, and sexual behavior or knowledge beyond a child's years" (*Matter of Isabella I. [Ronald I.]*, 180 AD3d 1259, 1261 [3d Dept 2020] [internal quotation marks, brackets, ellipsis and citations omitted] [emphasis added]; *see Matter of Josiah P. [Peggy P.]*, 197 AD3d 1365, 1367 [3d Dept 2021]; *Matter of Lawson O. [Andrew O.]*, 176 AD3d 1320, 1321 [3d Dept 2019], *lv denied* 35 NY3d 902 [2020]). "Additionally, where a finding of abuse demonstrates a respondent's impaired level of parental judgment that puts any child in that person's care at risk, a derivative finding is appropriate" (*Matter of Cailynn O. [Vincenzo Q.]*, 192 AD3d 1408, 1409 [3d Dept 2021] [internal quotation marks and citations omitted]). "We accord great deference to Family Court's findings and credibility determinations and we will not disturb them, unless they are unsupported by a sound and substantial basis in the record" (*Matter of Annaleigh X. [Ashley Y.]*, 205 AD3d 1109, 1111 [3d Dept 2022] [internal quotation marks and citations omitted]; *see Matter of Y. SS. [E. SS.]*, 211 AD3d 1390, 1392 [3d Dept 2022]).

At the fact-finding hearing, the paternal grandfather, his girlfriend, and the girlfriend's neighbor testified that the child told them that the boyfriend hurt her and pointed to her genital area. Additionally, the emergency department physician and the SANE testified that the daughter's injuries were consistent with sexual abuse. The SANE further testified that she observed an abrasion at the posterior fourchette and a two-centimeter

tear in the daughter's interior labia minora area, and that said injuries were indicative of sexual abuse and not consistent with a fall, wiping or diaper rash. The SANE further testified that the redness appeared to be an abrasion and that this, along with the tear, most likely occurred 24 to 48 hours prior to the examination. DNA evidence extracted from an anal swab demonstrated the presence of male DNA, but was inconclusive for purposes of comparison to the boyfriend's DNA.

The boyfriend denied abusing the daughter, and further asserted that he took precautions to never be alone with her. He specifically testified that he was not alone with the daughter during the 24 to 48 hour period during which she suffered the abrasion and tear. He speculated that the grandfather was jealous of his business success and thus had a motive to cast aspersions against him. As to the daughter's out-of-court statements, he claimed that [*3]she commonly exaggerates. The boyfriend's mother testified that, as a rule, the boyfriend was not alone with the child. The mother testified that she "never" left her daughter alone with the boyfriend, unless she ran an errand to the store. Family Court found petitioner's witnesses credible, particularly the grandfather, and found the boyfriend's explanation concerning the allegations of sexual abuse incredible. The corroboration threshold was satisfied by the emergency room doctor's and the SANE's medical findings and expert opinions and the testimony of the various witnesses as to the daughter's consistent statements that the boyfriend hurt her (*see Matter of Lily BB. [Stephen BB.]*, 191 AD3d 1126, 1127 [3d Dept 2021], *lv dismissed* 37 NY3d 927 [2021]; *Matter of Isabella I. [Ronald I.]*, 180 AD3d at 1262). Deferring to Family Court's factual and credibility determinations, we find a sound and substantial basis in the record supporting Family Court's finding of sexual abuse against the boyfriend (*see Matter of Cailynn O. [Vincenzo Q.]*, 192 AD3d at 1412; *Matter of Makayla I. [Caleb K.]*, 162 AD3d at 1142; *Matter of Kristina S. [Michael S.]*, 160 AD3d 1057, 1058 [3d Dept 2018]; *Matter of Penny Y. [Roxanne Z.]*, 129 AD3d 1117, 1118 [3d Dept 2015]).

Additionally, there is a sound and substantial basis in the record to conclude that the boyfriend's sexual abuse of the daughter, who was less than three years old at the time and entrusted to his care as a parental figure, demonstrates the requisite fundamental defect in the understanding of his duties, supporting Family Court's determination that the boyfriend derivatively neglected the son (*see Matter of Raelene B. [Alex D.]*, 179 AD3d 1315, 1318 [3d Dept 2020]; *Matter of Kaydence O. [Destene P.]*, 162 AD3d 1131, 1135-1136 [3d Dept 2018]; *Matter of Daniel XX. [Daniel F.]*,140 AD3d 1229, 1231 [3d Dept 2016]).

Turning to Family Court's finding of neglect by the mother, "to establish neglect, a petitioner must demonstrate, by a preponderance of the evidence, that the children's physical, mental or emotional condition has been impaired or is in imminent danger of

becoming impaired due to the failure of the parent . . . to exercise a minimum degree of care" (*Matter of Cailynn O. [Vincenzo Q.]*, 192 AD3d at 1409-1410 [internal quotation marks, brackets and citations omitted]; *see Matter of Jubilee S. [James S.]*, 149 AD3d 965, 966-967 [2d Dept 2017]). There is no evidence before us demonstrating that the mother knew or was informed that her child was sexually abused prior to the date the daughter was examined at the hospital. That said, the evidence shows that since being informed of it, and in fact confronted with medical evidence of same, she has refused to believe that her daughter was sexually abused. Moreover, after learning of the allegations of sexual abuse directed against her boyfriend, the mother has consistently behaved in a manner supporting him as opposed to her daughter. The record does confirm that [*4]initially after learning of the allegations, and at the behest of petitioner, the mother removed herself and her children from the boyfriend's home. However, upon learning that the DNA results were inconclusive, she and the children returned to the boyfriend's residence, thus prompting petitioner to obtain an order of protection to remove the children from the residence. During the pendency of the proceedings, the mother not only continued her relationship with the boyfriend, but became engaged to him, and sought to allow him to spend time with the children. Thus, although the record evinces that the mother cooperated with petitioner, allowed the daughter to be interviewed and followed the order of protection, she has steadfastly denied the possibility of sexual abuse and has minimized the evidence presented to her, including referring to the daughter's injuries as miniscule. Additionally, the mother has continually refused services, including counseling, for the daughter. As the mother has failed to meaningfully and appropriately respond upon learning of her daughter's sexual abuse, she has thereby failed to exercise a minimum degree of care in order to avoid physical, mental and emotional impairment to the daughter and potential impairment to the son. Accordingly, we find that there is a sound and substantial basis in the record to support Family Court's finding of neglect of both children (see Matter of Cheyenne Q. [Charles Q.], 196 AD3d 747, 749 [3d Dept 2021], lv denied 37 NY3d 915 [2021]; Matter of Derrick GG. [Jennifer GG.], 177 AD3d 1124, 1126 [3d Dept 2019], *lv denied* 35 NY3d 902 [2020]; *Matter of Telsa Z. [Denise Z.]*, 81 AD3d 1130, 1134 [3d Dept 2011]).

Lynch, J.P., Clark, Pritzker and Fisher, JJ., concur.

ORDERED that the orders are affirmed, without costs.

**Footnotes**

**Footnote 1:** While neither attorney for the child appealed the orders, and although not determinative, we note that the attorney for the child representing the son advocates to reverse the findings of neglect and derivative neglect. The attorney for the child on behalf of the daughter advocates to affirm Family Court's findings of abuse, derivative

neglect and neglect, and strongly reiterated this position at oral argument before this Court.

**Matter of Rosalynne AA.**, 219 AD3d 1024 (3rd Dept., 2023)

Appeals (1) from a corrected order of the Family Court of Delaware County (Gary A. Rosa, J.), entered July 19, 2019, which (a) granted petitioner's application, in proceeding No. 1 pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected and (b) dismissed petitioner's application, in proceeding No. 2 pursuant to Family Ct Act article 10, to adjudicate the subject children to be abused and neglected, and (2) from an order of said court, entered December 11, 2019, which placed the subject children with the nonrespondent parent.
Respondent Bridget AA. (hereinafter the mother) and Kenneth AA. (hereinafter the father) are the separated parents of two children (born in 2010 and 2011). After the mother and the father separated, the mother relocated from Florida to New York with the children, and they resided in a single-wide trailer with respondent Thomas BB. (hereinafter the boyfriend), with whom the mother had a relationship. Following a disclosure by the younger child that the boyfriend had inserted his fingers into her vagina, petitioner commenced proceeding No. 2 alleging neglect and sexual abuse by the boyfriend. Petitioner also commenced proceeding No. 1 alleging neglect by the mother based upon the allegations in proceeding No. 2, as well as allegations pertaining to the conditions of the home and the hygiene of the children. With the mother's consent, the children were then temporarily placed in the care of the father. A fact-finding hearing ensued, at the conclusion of which petitioner moved to conform the pleadings to the proof by adding an allegation of educational neglect. In a July 2019 corrected order, Family Court granted petitioner's motion and found, in proceeding No. 1, that the mother had neglected the children. The court, however, dismissed the entire petition in proceeding No. 2. In a December 2019 order entered after a dispositional hearing in proceeding No. 1, the court placed custody of the children with the father for a period of one year and permitted him to relocate the children to Florida. Petitioner, the mother and the father separately appeal from the July 2019 corrected order. The mother also appeals from the December 2019 order.

As an initial matter, the father's appeal from the July 2019 corrected order must be dismissed. Although the father participated in the fact-finding hearing and his status as an intervenor was not contested, he is still a nonrespondent parent. As a nonrespondent parent, the father "has a limited statutory role and narrow rights under Family Ct Act § 1035 (d) to: (1) pursue temporary custody of his . . . children during fact-finding, and (2) seek permanent custody during the dispositional phase" (*Matter of Tesla Z. [Rickey Z.—*

*Denise Z.]*, 71 AD3d 1246, 1250-1251 [3d Dept 2010]). In view of this limited role, which applies on appeal (*see Matter of Andreija N. [Michael N.—Tiffany O.]*, 206 AD3d 1081, 1083 [3d Dept 2022]), the father's arguments directed toward the dismissal [*2]of the petition in proceeding No. 2 and the finding of neglect against the mother will not be considered. Furthermore, given that the father appeals only from the July 2019 corrected order and was awarded temporary custody of the children prior to the fact-finding hearing, he is not aggrieved thereby (*see Matter of Jennie EE.*, 210 AD2d 744, 745 [3d Dept 1994]).

Petitioner contends that, in proceeding No. 2, Family Court erred in concluding that the younger child's out-of-court disclosure of inappropriate touching was not sufficiently corroborated. "[A]lthough the mere repetition of an accusation does not, by itself, provide sufficient corroboration, some degree of corroboration can be found in the consistency of the out-of-court repetitions" (*Matter of Isabella I. [Ronald I.]*, 180 AD3d 1259, 1262 [3d Dept 2020] [internal quotation marks and citations omitted]; *see Matter of Richard SS.*, 29 AD3d 1118, 1121 [3d Dept 2006]). The record discloses that the younger child's disclosure of the inappropriate touching was consistent. The record also reflects that the boyfriend, at night, would check on the children, who shared a bedroom, to make sure they were sleeping and that he would sometimes lie with the younger child and wrap himself around her to get her to sleep. Indeed, the mother acknowledged that the boyfriend did this. Additionally, there was testimony that, when the boyfriend did so, the younger child whimpered. In view of the foregoing, the low corroboration standard was satisfied to establish a prima facie case of sexual abuse (*see Matter of Lily BB. [Stephen BB.]*, 191 AD3d 1126, 1128 [3d Dept 2021], *lv dismissed* 37 NY3d 927 [2021]; *Matter of Branden P. [Corey P.]*, 90 AD3d 1186, 1189 [3d Dept 2011]; *Matter of Miranda HH. [Thomas HH.]*, 80 AD3d 896, 898-899 [3d Dept 2011]; *Matter of Nathaniel II.*, 18 AD3d 1038, 1040 [3d Dept 2005], *lv denied* 5 NY3d 707 [2005]).

It is true that Family Court made certain factual findings and credibility determinations. These findings and determinations, however, were made in the context of the court's analysis of whether the younger child's out-of-court statements met the required corroboration threshold. In this regard, the court credited testimony indicating that there was no inappropriate touching by the boyfriend but weighed this testimony solely against the younger child's out-of-court statements. Given our determination that the younger child's statements were sufficiently corroborated to establish a prima facie case of sexual abuse, a determination must now be made, based on all of the evidence from the fact-finding hearing, as to whether petitioner proved by a preponderance of the evidence that the boyfriend inappropriately touched the younger child. Remittal for this purpose is unnecessary considering that "we are empowered to independently assess the competing evidence and make alternative findings as part of our factual review"

(*Matter of Chloe L. [Samantha L.]*, 200 AD3d 1234, 1235 [3d Dept 2021] [internal [*3]quotation marks, brackets, ellipsis and citation omitted]) and doing so furthers judicial economy.

Upon such independent assessment, petitioner established by a preponderance of the evidence that the boyfriend committed acts against the younger child that constituted a crime under Penal Law article 130 (*see Matter of Kaleb LL. [Bradley MM.]*, ___ AD3d ___, ___, 2023 NY Slip Op 03729, *2-3 [3d Dept 2023]; *Matter of Lee-Ann W. [James U.]*, 151 AD3d 1288, 1290-1291 [3d Dept 2017], *lv denied* 31 NY3d 908 [2018]; *Matter of Heather J.*, 244 AD2d 762, 764 [3d Dept 1997]). In addition to the previously mentioned evidence, there was evidence that the younger child understood the difference between a good touch and a bad touch and that the younger child was hurt when touched by the boyfriend. The mother explained that the younger child had potty training issues and that she and the boyfriend would touch the outside of the younger child's pants to see if the younger child had wet herself. The younger child, however, was more argumentative when the boyfriend did so. The younger child also disclosed that the boyfriend had licked her face and told her that it was because she was "so good looking." Furthermore, although a nurse who conducted a sexual abuse examination of the younger child testified that the examination was normal, the nurse also testified that a normal examination does not necessarily indicate whether abuse has occurred. That said, the nurse opined that the examination was consistent with the younger child's disclosure of inappropriate touching. Accordingly, after viewing the evidence from the fact-finding hearing in its entirety, the petition in proceeding No. 2, to the extent that it alleged sexual abuse, should be granted.**[FN1]**

Turning to the allegations of neglect, the record reveals that the children sometimes presented to school smelling of cat urine and looking as though they had not bathed. There was also evidence that the younger child came to school wearing clothes that were dirty and did not fit properly and that she had lice. A caseworker with petitioner testified that the trailer was messy and that there was garbage on the floor, as well as overflowing cat litter boxes. The caseworker also stated that the house smelled of cat urine and feces and that the children's mattresses were "brown and soiled." Because Family Court's finding of neglect as to the mother is supported by a sound and substantial basis in the record, such finding in proceeding No. 1 will be sustained (*see Matter of Aerobella T. [Bartolomeo V.]*, 170 AD3d 1453, 1456 [3d Dept 2019]; *Matter of Emmanuel J. [Maximus L.]*, 149 AD3d 1292, 1295 [3d Dept 2017]; *Matter of Zackery D. [Tosha E.]*, 129 AD3d 1121, 1123 [3d Dept 2015]; *Matter of Alyson J. [Laurie J.]*, 88 AD3d 1201, 1203 [3d Dept 2011], *lv denied* 18 NY3d 803 [2012]).

Regarding the allegation of educational neglect,**[FN2]** a school counselor stated that the younger child had weekly counseling sessions and was classified as

learning [*4]disabled. The younger child got angry very easily, often had to be removed from class due to outbursts, crawled under desks and threw items. The counselor would leave phone messages for the mother, but the mother never checked on the younger child's progress or ensured if the younger child attended sessions. According to the counselor, there was not a lot of contact from the mother. A special education teacher for the younger child testified that the younger child was "academically delayed" and had maladaptive behaviors that affected her academic progress. The special education teacher sent paperwork about the younger child for the mother's completion, but the paperwork was never returned to the school. The special education teacher also contacted the mother by telephone on multiple occasions, but the mother responded only one time. A teacher for the older child testified that the older child had a hard time focusing during class and would sometimes crawl on the floor and act like a cat. This teacher also testified that the mother failed to respond to a request to have a parent-teacher conference. Based on the foregoing, Family Court's finding that the mother displayed a lack of attention to the children's educational needs is supported by a sound and substantial basis in the record (*see Matter of Jonathan M. [Gilda L.]*, 139 AD3d 438, 439 [1st Dept 2016]; *Matter of Tammie Z.*, 105 AD2d 463, 464-465 [3d Dept 1984], *affd* 66 NY2d 1 [1985]).

As to the alleged neglect by the boyfriend, the record reflects that he lived with the children, prepared food for them, disciplined them and got them ready for school and bed. The boyfriend described his interaction with the children and stated that "from time to time, [he had] strained issues with both of them, but that's typically how it goes with a stepparent and kids." Contrary to Family Court's finding, the evidence supports the conclusion that the boyfriend acted as the functional equivalent of a parent and, therefore, was a person legally responsible for the children's care (*see* Family Ct Act § 1012 [g]; *Matter of Tyler MM. [Stephanie NN.]*, 82 AD3d 1374, 1375 [3d Dept 2011], *lv denied* 17 NY3d 703 [2011]; *Matter of Rebecca X.*, 18 AD3d 896, 898 [3d Dept 2005], *lv denied* 5 NY3d 707 [2005]; *Matter of Nichole SS.*, 296 AD2d 618, 618 [3d Dept 2002]). In view of this status, our finding of sexual abuse and the evidence relative to the condition of the trailer, the children's hygiene and how the children presented to school, the petition in proceeding No. 2 should not have been dismissed to the extent that it alleged neglect and instead should have been granted to that extent (*see Matter of Joshua UU. [Jessica XX.—Eugene LL.]*, 81 AD3d 1096, 1099 [3d Dept 2011]).

Finally, the mother represents that, under a custody arrangement agreed to during the pendency of this appeal, she and the father share joint custody of the children, with the father having primary physical custody. Based on this custody arrangement, the [*5]mother does not raise any argument regarding the December 2019 order and, thus, has abandoned her appeal from such order (*see Matter of Aiden LL. [Tonia C.]*, 191 AD3d 1213, 1215 [3d Dept 2021]). Notwithstanding this, based on our finding of

neglect and sexual abuse by the boyfriend, the matter in proceeding No. 2 must be remitted for a dispositional hearing, which, under the circumstances of this case, should be before a different judge.

Egan Jr., J.P., Lynch, Fisher and McShan, JJ., concur.

ORDERED that the appeal by Kenneth AA. is dismissed, without costs.

ORDERED that the corrected order entered July 19, 2019 is modified, on the law and the facts, without costs, by reversing so much thereof as dismissed the petition in proceeding No. 2; petition granted in its entirety; matter remitted to the Family Court of Delaware County for a dispositional hearing in proceeding No. 2 before a different judge; and, as so modified, affirmed.

ORDERED that the order entered December 11, 2019 is affirmed, without costs.

**Footnote 1:** Some testimony by the mother and the boyfriend certainly supports a contrary conclusion. Because of the significant inconsistencies and discrepancies in their testimony, however, little weight is given thereto (*compare Matter of Nathaniel TT.*, 265 AD2d 611, 614 [3d Dept 1999], *lv denied* 94 NY2d 757 [1999]).

**Footnote 2:** Contrary to the mother's assertion, Family Court did not abuse its discretion in granting the motion to conform the pleadings to the proof to add an allegation of educational neglect (*see* Family Ct Act § 1051 [b]). The mother "was given time to address the new allegation[ ] and did not request any further adjournment to better prepare [her] defense" (*Matter of Kila DD.*, 28 AD3d 805, 806 [3d Dept 2006]). Nor is there any indication that the mother was prejudiced by the amendment of the pleadings (*see Matter of Nikole B.*, 263

**Matter of C.F.,** 220 AD3d 506 (1st Dept., 2023

Order of fact-finding and disposition (one paper) of the Family Court, Bronx County (Cynthia Lopez, J.), entered on or about November 7, 2022, insofar as it determined, after a hearing, that respondent father sexually abused the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports Family Court's finding that the father sexually abused the child (*see* Family Court Act §§ 1012[e][iii][A], 1046[b][1]; *Matter of Jani Faith B. [Craig S.]*, 104 AD3d 508, 509 [1st Dept 2013]). The child's sworn testimony at the fact-finding hearing constituted competent evidence that the father raped the child during their overnight visit at the paternal aunt's home when the child

was nine years old (*see Matter of Brittney B. [Marcelo B.]*,211 AD3d 426 [1st Dept 2022]). There is no basis for disturbing the Family Court's credibility determinations, including its evaluation of the child's testimony regarding the child's detailed description of the actions of the father and the child's reaction during and after the acts. The court's determination of the witnesses' credibility was based on observations of their demeanor and testimony, and the court rejected the father's blanket denial that he ever sexually abused the child, despite admitting that he did have an overnight visit with the child in December 2018 and determined that his testimony was not credible. We find no basis to overturn this credibility determination, which should be accorded deference on appeal (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of Brittney B. [Marcelo B.]*, 211 AD3d at 426).

The father argues that inconsistencies between allegations in the petition and the child's testimony undermine the finding of abuse. However, these statements, of which there is no proof and which the child, in fact, denied, at most consisted of hearsay accounts of the child's prior statements and are insufficient to impeach her testimony (*see Matter of Melissa P.*, 261 AD2d 141, 142 [1st Dept 1999]) and do not undermine the child's testimony in any event (*see Matter of Jeffrey A.*, 147 AD3d 660 [1st Dept 2017]).

The father argues that ACS failed to conform the pleadings to the proof. As a threshold matter, this argument is unpreserved and we decline to review it in the interest of justice (*see Matter of Anthony G. v Stephanie H.*, 189 AD3d 615, 616 [1st Dept 2020]). Even if this Court were to consider the father's argument, we would find it unavailing. Contrary to the father's argument, the manner in which the father penetrated the child is of no consequence relative to the alleged Penal Law violations, most of which encompass the unlawful sexual contact testified to by the child.

Furthermore, the father's argument that he received ineffective assistance of counsel is likewise unpreserved and unavailing (*see Matter of Judith L.C. v Lawrence Y.*, 179 AD3d 616, 617 [1st Dept 2020]). The father's counsel actively participated in the proceedings by cross-examining the child, conducting [*2]examinations of the father and his two witnesses, the paternal aunt and the father's ex-girlfriend, and making arguments and objections to the court (*see e.g. Matter of Devin M. [Margaret W.]*, 119 AD3d 435, 437 [1st Dept 2014]). The father's speculation that favorable evidence might have been offered on his behalf is not sufficient to demonstrate prejudice constituting ineffective assistance (*see Matter of Anthony G. v Stephanie H.*, 189 AD3d at 616).

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

**Matter of J.M.,** 220 AD3d 533 (1st Dept., 2023)

Order of fact-finding and disposition (one paper), Family Court, New York County (Valerie A. Pels, J.), entered on or about May 4, 2022, which, to the extent appealed from as limited by the briefs, after a hearing, found that respondent sexually abused the subject child and neglected her by engaging in acts of domestic violence against nonrespondent mother, unanimously affirmed, without costs.

Family Court's determination that respondent sexually abused his daughter is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[e][iii]; 1046[b]; *Matter of Jani Faith B. [Craig S.]*, 104 AD3d 508, 509 [1st Dept 2013]). The child's sworn testimony at the fact-finding hearing was competent evidence that respondent sexually abused her when she was approximately six years old; the fact that she did not have a physical injury does not require a different result (*see Matter of Alijah S. [Daniel S.]*, 133 AD3d 555, 556 [1st Dept 2015], *lv denied* 26 NY3d 917 [2016]; *Matter of Christina G. [Vladimir G.]*, 100 AD3d 454, 454 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]). Respondent's intent to gain sexual gratification from touching the child's genitals and breasts was properly inferred from the acts themselves and by the child's testimony that he was "moaning" when he would squeeze her chest (*see Matter of Maria S. [Angel A.]*, 185 AD3d 437 [1st Dept 2020]).

The Family Court's finding that respondent neglected the child by consuming alcoholic beverages to the extent that he lost self-control and committed acts of domestic violence in the child's presence, posing an imminent danger to her physical, mental or emotional well-being, is also supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i][B]; 1046[a][iii], [b][i]). The child testified that respondent drank alcohol daily and hit the mother in the child's presence "when he was drinking a lot;" testimony that was supported by the mother's and, to some extent, respondent's own testimony (*see Matter of EJ W. [Leroy E.W.]*, 212 AD3d 568, 568 [1st Dept 2023]).

This proof of impaired judgment and loss of self-control during respondent's repeated bouts of excessive alcohol consumption triggers the presumption of neglect under Family Court Act § 1046(a)(iii), which obviates the need to present proof of the child's physical, emotional, or mental impairment or an imminent risk thereof as a consequence of his behavior (*see Matter of Nasiim W. [Keala M.]*, 88 AD3d 452, 453 [1st Dept 2011]). In any event, impairment or imminent danger of impairment may be inferred here by the fact that the incidents of domestic violence occurred in the presence of the child, and that she was aware of and emotionally impacted by the violence she was witnessing as demonstrated by her crying when it happened (*see Matter of J.A.W. [Lance W.]*, 216 AD3d 480, 481 [1st Dept 2023]; *Matter of Khalif M. [Malik M.]*, 215 AD3d 559, 560 [1st Dept 2023]).

There is no basis for disturbing the Family Court's credibility [*2]determinations, which should be accorded deference on appeal, including its evaluation of the child's testimony regarding what acts of abuse and neglect respondent committed (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

**Matter of Zakiyyah T.**, 221 AD3d 1483 (4th Dept., 2023)

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), dated March 7, 2022, in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, determined that respondent abused the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent father appeals from two separate orders and respondent stepmother appeals from the second of those two orders. In appeal No. 1, the father appeals, as limited by his brief, from that part of an order adjudging that he abused one of his daughters (older child). In appeal No. 2, the father appeals, as limited by his brief, from that part of an order adjudging that he abused another daughter (younger child), and the stepmother appeals, as limited by her brief, from that part of the same order adjudging that she neglected the younger child.

Contrary to the father's contention in appeal Nos. 1 and 2, Family Court did not err in denying his motion to dismiss the petitions against him at the close of petitioner's proof inasmuch as petitioner established a prima facie case of sexual abuse in the first degree against him with respect to both children (*see* Penal Law § 130.65 [4]). Penal Law § 130.65 (4) is violated when the actor subjects another person to sexual contact when the actor is 21 years old or older and the victim is less than 13 years old (*id.*). " 'Sexual contact' means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed" (§ 130.00 [3]). Inasmuch as the term "intimate parts" has been interpreted very broadly, it has been "held that the thigh/upper leg is an intimate part" of the body (*People v Manning*, 81 AD3d 1181, 1182 [3d Dept 2011], *lv denied* 18 NY3d 959 [2012]; *see People v Gray*, 201 AD2d 961, 962 [4th Dept 1994], *lv denied* 83 NY2d 1003 [1994]; *see also People v Beecher*, 225 AD2d 943, 944-945 [3d Dept 1996]). Here, with respect to the element of sexual gratification, a determination that the father's "actions were for the purpose of gratifying his sexual desire . . . may be inferred from a totality of the circumstances" (*Matter of Jani Faith B. [Craig S.]*, 104 AD3d 508,

509 [1st Dept 2013]; *see Matter of Daniel R. [Lucille R.]*, 70 AD3d 839, 841 [2d Dept 2010]; *see generally People v Hatton*, 26 NY3d 364, 370 [2015]), including the "humiliation evoked" in the victims (*Hatton*, 26 NY3d at 371).

Both children told interviewers that the father committed acts of sexual contact against [*2]them. According to the older child, the father touched her vaginal area over clothing, while exposing his erect penis and asking her to perform a sexual act on him. She also stated that, on a separate occasion, the father touched one of her breasts over clothing. The younger child said that the father touched the upper, *inner* area of one of her thighs, while simultaneously attempting to remove her shirt. "The cross-corroborating accounts of the children with respect to the nature and progression of the sexual abuse '[gave] sufficient indicia of reliability to each [child's] out-of-court statements' " (*Matter of Janiece B. [James D.B.]*, 93 AD3d 1335, 1335 [4th Dept 2012], quoting *Matter of Nicole V.*, 71 NY2d 112, 124 [1987], *rearg denied* 71 NY2d 890 [1988]; *see Matter of Grayson S. [Thomas S.]*, 209 AD3d 1309, 1312-1313 [4th Dept 2022]).

The father further contends in both appeals that, in light of the evidence presented by him and the stepmother following the denial of their respective motions to dismiss the petitions against them at the close of petitioner's case, the court's ultimate determination that petitioner established his abuse of the children by a preponderance of the evidence is not supported by a sound and substantial basis in the record (*see generally* Family Ct Act § 1046 [b] [i]; *Matter of Mollie W. [Corinne W.]*, 214 AD3d 1463, 1463 [4th Dept 2023]). We disagree. Although the father denied the allegations of abuse, his " 'denial[s] of the[ ] allegations, along with other contrary evidence, merely presented a credibility issue for [the court] to resolve' " (*Matter of Lylly M.G. [Theodore T.]*, 121 AD3d 1586, 1587 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015]).

Based upon our review of the evidence, we conclude that the testimony of the father and the stepmother at the hearing also served to corroborate the allegations of abuse made by both girls. "We accord great weight and deference to [the court]'s determinations, 'including its drawing of inferences and assessment of credibility,' " and we will not disturb the court's credibility determinations with respect to the abuse allegations against the father inasmuch as those determinations are supported by the record (*Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401 [4th Dept 2013], *lv denied* 21 NY3d 862 [2013]; *see Lylly M.G.*, 121 AD3d at 1587-1588).

With respect to the stepmother's contentions in appeal No. 2, we conclude that, even assuming, arguendo, that the evidence presented by petitioner established a prima facie case of neglect against the stepmother based on the younger child's statements that she told the stepmother about the father's abuse of her and that the stepmother failed to take any steps to protect her, thus warranting the denial of the stepmother's

motion (*see generally Matter of Annastasia C. [Carol C.]*, 78 AD3d 1579, 1580 [4th Dept 2010], *lv denied* 16 NY3d 708 [2011]), the court's ultimate determination that petitioner established the stepmother's neglect of the younger child by a preponderance of the evidence is not supported by a sound and substantial basis in the record (*see generally* Family Ct Act § 1046 [b] [i]; *Mollie W.*, 214 AD3d at 1463).

Petitioner was required to establish by a preponderance of the evidence that the stepmother, as a parent or caretaker, "knew or should have known of circumstances which required action in order to avoid actual or potential impairment of the child and *failed to act accordingly*" (*Matter of Crystiana M. [Crystal M.-Pamela J.]*, 129 AD3d 1536, 1537 [4th Dept 2015] [internal quotation marks omitted and emphasis added]; *see Mollie W.*, 214 AD3d at 1464; *see generally* Family Ct Act § 1046 [b] [i]). The evidence presented at the hearing established that, upon being informed of the father's actions against the younger child, the stepmother acted to separate the child from the father and that no further improprieties took place. Thus, even if we were to credit the child's statements to the interviewer that she told the stepmother of the father's conduct, the record does not establish that the stepmother thereafter failed to protect her

We note that the record on appeal reflects that Erie County Child Protective Services has expunged the indicated report of maltreatment against the stepmother following a determination that the alleged maltreatment of the younger child was not proven by a fair preponderance of the evidence. Taking judicial notice of the subsequent court proceedings relevant to these appeals (*see generally HoganWillig*, *PLLC v Swormville Fire Co.*, *Inc*., 210 AD3d 1369, 1371 [4th Dept 2022]; *Matter of Clifford*, 204 AD3d 1397, 1397 [4th Dept 2022]), we further note that petitioner has since moved to vacate the order of fact-finding and disposition against the stepmother, indicating that it no longer wishes to pursue the matter against her. That motion was denied by the court. In light of the foregoing, we modify the order in appeal No. 2 by vacating the [*3]adjudication of neglect against the stepmother and dismissing the petition against her.

**Matter of Viktor T.**, 221 AD3d 1015 (2nd Dept., 2023)

In related proceedings pursuant to Family Court Act article 10, the father appeals from (1) an order of fact-finding of the Family Court, Kings County (Erik S. Pitchal, J.), dated April 1, 2022, and (2) an order of disposition of the same court dated May 9, 2022. The order of fact-finding, after a fact-finding hearing, found that the father sexually abused and neglected the child Vassilisa T. and derivatively abused and neglected the children Viktor T. and Armando T. The order of disposition, insofar as appealed from, upon the order of fact-finding and after a dispositional hearing, directed the father to complete a sex offender treatment program.

ORDERED that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as that order was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

ORDERED that the order of disposition is affirmed insofar as appealed from, without costs or disbursements.

The petitioner commenced these proceedings pursuant to Family Court Act article 10, alleging that the father sexually abused and neglected the child Vassilisa T. and derivatively abused and neglected her two brothers, the children Viktor T. and Armando T. After a fact-finding hearing, the Family Court found that the father sexually abused and neglected Vassilisa T. and derivatively abused and neglected her brothers.

The father waived his objection to the Family Court's consideration of Vassilisa T.'s medical records at the fact-finding hearing when he consented to their admission into evidence at the hearing (*see generally Matter of B. Mc. [Dawn Mc.]*, 99 AD3d 713, 713). In any event, the medical records were properly admitted into evidence pursuant to Family Court Act § 1046(a)(iv) (*see Matter of Christopher D.B. [Lorraine H.]*, 157 AD3d 944, 947). Those records, in conjunction with the other evidence adduced at the fact-finding hearing, which included DNA evidence and testimony from a Child Protective Specialist and an expert in forensic biology, DNA analysis, and statistics, established by a preponderance of the evidence that the father sexually abused and neglected Vassilisa T. (*see Matter of Jada W. [Fanatay W.]*, 219 AD3d 732, 739; *Matter of Taveon J. [Selina T.]*, 209 AD3d 417, 418; *Matter of Alven V. [Ketly M.]*, 194 AD3d 725, 726).

The derivative findings of abuse and neglect were also supported by the record, particularly given that Armando T. and Viktor T. were in the same two-bedroom apartment when the sexual abuse of Vassilisa T. was alleged to have occurred (*see Matter of Ciniya P. [Omar S.W.]*, 217 AD3d 954, 956; *Matter of Naphtali A. [Winifred A.]*, 165 AD3d 781, 784).

The father's remaining contentions are without merit.

**Matter of L.V.M.**, AD3d 2023 NY Slip Op 06597 (1st Dept., 2023)

Orders, Family Court, Bronx County (Robert Hettleman, J.), entered on or about November 21, 2022, to the extent they bring up for review a fact-finding order, same court and Judge, entered on or about November 18, 2022, which found that the subject children L.V.M. and M.D.M. are abused children, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeals from the November 21, 2022 orders.

The preponderance of the evidence supports the findings of abuse. Family Court properly found the children's out-of-court statements reliable and corroborated. Family Court Act § 1046(a)(vi) "states a broad flexible rule providing that out-of-court statements [of a child] may be corroborated by '[a]ny other evidence tending to support' their reliability. . . . Family Court Judges presented with the issue have considerable discretion to decide whether the child's out-of-court statements describing incidents of abuse or neglect have, in fact, been reliably corroborated" (*Matter of Nicole V.*, 71 NY2d 112, 118-119 [1987]). Each child described a similar pattern of sexual abuse by the stepfather, where he would touch their breasts and genitals with his hands, often after he had been drinking. They both described instances of abuse in their bedroom, and on the parents' bed where the family would gather. We find they cross-corroborate each other's accounts (*see e.g. Matter of M.J. [Felicia J.]*, 216 AD3d 601, 602 [1st Dept 2023]; *Matter of J.A.W. [Lance W.]*, 216 AD3d 480, 481 [1st Dept 2023]; *Matter of A'Keria A.H. [Kenneth Q.H.]*, 179 AD3d 482, 483 [1st Dept 2020]; *see also Matter of Astrid C.*, 43 AD3d 819, 820-821 [2d Dept 2007]). There are also adequately individualized aspects to each child's account to support Family Court's determination that their testimony was not scripted or coached (*see Matter of Kimberly C.C. v Gerry C.C.*, 86 AD3d 728, 730 [3d Dept 2011]).
The children's statements were also corroborated by other evidence. Both parents acknowledged the family would lie together in bed, and the mother stated she sometimes left to go shower, thereby leaving the stepfather and children alone together. This corroborates the children's description of abuse on the bed and M.'s account that, when the stepfather abused her when she was six, he did so while the mother showered and stopped when she returned (*see Matter of M.S. [Andrew S.]*, 198 AD3d 547, 548 [1st Dept 2021]; *Matter of A.P. [M.P.]*, 183 AD3d 535, 536 [1st Dept 2020]).

The stepfather and mother argue that absent from each child's statement was a description of having witnessed abuse of the other, even though the children reported that certain abuse occurred in the other's presence. However, the evidence reflects, at a minimum, that M. was aware of and reported that L. had been abused. Child Protective Specialist (CPS) Turner testified at fact-finding that M. told her that L. had told her that she had also been abused by the stepfather[*2], one night on which he had also abused M. in the girls' bedroom. Moreover, according to Family Court and ACS's descriptions of a July 14, 2021 forensic interview with the children, M. stated the stepfather had "touched both her and her sister."

The parents argue that the children had reason to lie because they opposed or were jealous of the mother's marriage to the stepfather. Family Court properly found that this alleged motive was "neither serious nor specific enough" for the children to have fabricated the severe misconduct alleged here. The mother also maintains the children's statements were unreliable since she never witnessed any abuse. However, that

ignores M.'s assertion that, during the incident when she was six, the stepfather stopped abusing her when the mother emerged from the shower.
The mother tries to discredit the children's statements of having reported the abuse to her by challenging the accuracy of the translation of the notes she wrote to L. during a July 12, 2021 video call. According to the court interpreter, such statements included "if you tell the worker about this . . . you will be in foster care," and "do not tell your godparents anything about this." Notably, the mother does not specify which words were incorrectly translated. Moreover, even if there were problems with the translation, the mother's argument ignores other evidence that she instructed the children not to disclose the abuse to others. CPS Turner testified that L. reported to her that, during the July 12, 2021 video call, the mother asked her to tell M. not to speak to ACS or her therapist about the allegations. Furthermore, in her brief to this Court, the mother acknowledges that, at fact-finding, she testified to having told L. to recant.

The parents argue Family Court improperly considered CPS Turner's statements concerning M.'s demeanor, averring Turner is not an expert equipped to testify whether such demeanor corroborated the reports of abuse. However, testimony by a nonexpert concerning a child's demeanor can be admissible (*see e.g. Matter of Jolieanna G. [Jennifer G.]*, 202 AD3d 622, 623 [1st Dept 2022]). Their remaining arguments as to the inadequacy of evidence are unavailing, as neither the mother nor the stepfather identify any element of ACS's case that was not proven due to these supposed inadequacies. Nor do they offer grounds to revisit Family Court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of AnnMarie S.W. [Raheem Sandford W.]*, 160 AD3d 548, 548 [1st Dept 2018]).

We have considered the remaining arguments and find them unavailing.

**Matter of Lynda M.**, AD3d 2023 NY Slip Op 06660 (4th Dept., 2023)

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered February 17, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Mark M. abused one of the subject children and derivatively abused the other two subject children.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent father appeals from an order of fact-finding and disposition determining, following a hearing, that he sexually abused his eldest daughter (daughter) and derivatively abused his two other children.

We reject the father's contention that Family Court's finding of sexual abuse is not supported by the requisite preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). " 'A child's out-of-court statements may form the basis for a finding of [abuse] . . . as long as they are sufficiently corroborated by [any] other evidence tending to support their reliability' " (*Matter of Crystal S. [Patrick P.]*, 193 AD3d 1353, 1354 [4th Dept 2021]; *see* § 1046 [a] [vi]). Here, the daughter's out-of-court statements were sufficiently corroborated by her "age-inappropriate knowledge of sexual conduct" (*Matter of William J.B. v Dayna L.S.*, 158 AD3d 1223, 1224 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of Skyler D. [Joseph D.]*, 185 AD3d 1515, 1516 [4th Dept 2020]). Moreover, the statements made to the police by the daughter's cousin also provided sufficient cross-corroboration inasmuch as the statements regarding his sexual abuse by the father "tend to support the statements of [the daughter] and, viewed together, give sufficient indicia of reliability to each [child's] out-of-court statements" (*Matter of Nicole V.*, 71 NY2d 112, 124 [1987]; *see Matter of Elizabeth G*., 255 AD2d 1010, 1012 [4th Dept 1998], *lv dismissed* 93 NY2d 848 [1999], *lv denied* 93 NY2d 814 [1999]). Additionally, the same cousin stated that he had observed the father abuse the daughter (*see generally Elizabeth G.*, 255 AD2d at 1012).

We agree with the father that the court erred in admitting in evidence that portion of the police report referring to some of the results of the father's polygraph examination and allowing a detective to testify regarding the same (*see Matter of Charles M.O. v Heather S.O.*, 52 AD3d 1279, 1279 [4th Dept 2008]; *Matter of Stephanie B.*, 245 AD2d 1062, 1063 [4th Dept 1997]). Nonetheless, we conclude that the error is harmless (*see Charles M.O.*, 52 AD3d at 1279; *Matter of Daniel R. v Noel R.*, 195 AD2d 704, 708 [3d Dept 1993]).

Finally, we have reviewed the father's remaining contentions and conclude that they lack merit.

**Matter of Dorika S.**, AD3d 2023 NY Slip Op 06690 (4th Dept., 2023)

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered June 16, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent abused the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In these proceedings pursuant to Family Court Act article 10, as limited by her brief, respondent mother appeals in appeal No. 1 from an order of fact-finding and disposition insofar as it determined that she abused her eldest child, and, in appeal Nos. 2 through 5, she appeals from orders of fact-finding and disposition insofar as they determined that she derivatively abused her other four children. Family Court's determination is based on findings that the mother failed to adequately respond when the eldest child, who was nine years old, reported that she was being sexually abused by her stepfather. We note that the mother does not challenge the stipulated dispositions with respect to the children, and that the mother's challenges in all five appeals to the findings of abuse and derivative abuse are properly before us inasmuch as the mother is "aggrieved by the court's findings of [abuse and derivative abuse]" despite her consent to the dispositions (*Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1677 [4th Dept 2021]; *see Matter of Vashti M. [Carolette M.]*, 214 AD3d 1335, 1335 [4th Dept 2023], *appeal dismissed* 39 NY3d 1177 [2023]). In all five appeals, we conclude that, contrary to the mother's contentions, the court's findings of abuse and derivative abuse are supported by a preponderance of the evidence.

We accord "great weight and deference to [the] [c]ourt's determinations, including its drawing of inferences and assessment of credibility, and we will not disturb those determinations where, as here, they are supported by the record" (*Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401 [4th Dept 2013], *lv denied* 21 NY3d 862 [2013] [internal citations omitted]). The evidence presented by petitioner at the fact-finding hearing on all five petitions included, inter alia, testimony that the mother did not remove the stepfather from the home after her eldest child reported that the stepfather was sexually abusing her, but, instead, merely instructed the child to "pretend to be asleep." In appeal No. 1, we conclude that the evidence, combined with the adverse inference that the court properly drew based upon the mother's failure to testify (*see Matter of Burke H. [Richard H.]*, 117 AD3d 1455, 1455 [4th Dept 2014]), provides a sound and substantial basis to support the finding that the mother abused the eldest child when she failed to sufficiently act to protect the eldest child when that child reported the sexual abuse (*see Matter of Michael B. [Samantha B.]*, 130 AD3d 619, 621 [2d Dept 2015], *lv denied* 26 NY3d 906 [2015]; *Matter of Alesha P. [Audrey B.]*, 112 AD3d 1369, 1369 [4th Dept 2013]). We further conclude [*2]in appeal Nos. 2 through 5 that the findings of derivative abuse with respect to the four other children are supported by a

preponderance of the evidence (*see Matter of Skyler D. [Joseph D.]*, 185 AD3d 1515, 1517 [4th Dept 2020]).

# Physical Abuse

**Matter of C. S.,** 220 AD3d 451 (1st Dept., 2023)

Order of disposition, Family Court, Bronx County (Cynthia Lopez, J.), entered on or about October 18, 2022, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about July 11, 2022, which, after a hearing, found that respondent parents derivatively severely abused and neglected the subject children C. and E., unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.
In light of the medical testimony that chronic starvation and malnutrition caused the death of the 23-month-old younger sibling of the subject children, petitioner established by clear and convincing evidence that the parents severely abused that child (*see Matter of Heaven C.E. [Tiara C.]*, 164 AD3d 1177, 1177 [1st Dept 2018]; *Matter of George S. [Hilton A.]*, 135 AD3d 563, 564 [1st Dept 2016]). A senior medical examiner at the Office of the Chief Medical Examiner conducted the autopsy of the child and testified that he weighed approximately 14 pounds — a level of emaciation that would have taken months to develop — lacked fat around his vital organs, suffered from rickets and scurvy, and had soft and osteopenic bones. Furthermore, the medical examiner stated, the child's condition affected his immune system and caused various infections, none of which had been treated by medical professionals. According to the medical examiner, the child's deteriorating condition would have been apparent, and indeed, the mother told the hospital that the child had been sick and lost approximately 10 pounds in a short period of time right before his death. The evidence showed that, during this time, the parents consistently refused to seek medical attention despite the clear severity of the child's condition. The parents failed to rebut the agency's showing of severe abuse, and the court properly drew the strongest inference against them for failing to testify or present evidence (*see Matter of Ashley M.V. [Victor V.]*, 106 AD3d 659, 660 [1st Dept 2013]).

Based upon the finding that the younger child was severely abused, Family Court correctly determined that the subject children were derivatively severely abused. The

parents' treatment of the younger sibling, in addition to the unrebutted evidence that the subject children had never received medical treatment, established that the subject children faced a severe risk of likewise being denied essential medical care (*see Matter of Prince G. [Liz C.]*, 188 AD3d 456, 457-458 [1st Dept 2020], *lv* denied 36 NY3d 908 [2021] [parent who "took [a child's] medical care into her own untrained hands . . . to the point that his life was endangered" derivatively abused that child's siblings], *lv denied* 36 NY3d 908 [2021]; *see also Matter of Marino S.*, 100 NY2d 361, 374 [2003] ["derivative findings of severe abuse may be predicated upon the common understanding that a parent whose judgment and impulse control are so defective [*2]as to harm one child in his or her care is likely to harm others as well"] [quotation marks omitted], *cert denied sub nom. Marino S. v Angel Guardian Children & Family Servs.*, 540 US 1059 [2003]; *Matter of Ashley M.V.*, 106 AD3d at 660 ["Respondent's actions showed a fundamental defect in understanding his parental obligations"]).

Petitioner also proved by a preponderance of the evidence that the parents neglected the older children by placing them in actual or imminent threat of emotional harm (Family Ct Act § 1012[f][i][B]). The record demonstrated that the subject children were living in the home with the younger child while he was slowly dying of starvation. Thus, the parents not only harmed the younger child, but also took no care to protect the older children from the emotional suffering that arose from witnessing the harm to their brother (*see Matter of Stephanie WW.*, 213 AD2d 818, 819 [3d Dept 1995] [finding neglect based on, among other things, death of a sibling while in respondent's exclusive care]).

Finally, the father's argument that ACS failed to establish which parent was ultimately responsible for their son's death is meritless. ACS established that the parents were the only caretakers of the child during the months when he was becoming emaciated, including the final two weeks of his life when his condition rapidly deteriorated, and neither parent sought treatment. Accordingly, ACS "was not required to establish whether the mother or the father actually inflicted the injuries, or whether they did so together" (*Matter of Nyheem E*. *[*Jamila G.*]*, 134 AD3d 517, 518 [1st Dept 2015]).

**Matter of Johlyanne F.**, 221 AD3d 1571 (4th Dept., 2023)

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered August 25, 2020, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Evangelista A. had abused the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order entered after a fact-finding hearing that, inter alia, adjudged that the child who is the subject of this proceeding was abused by the mother. As a preliminary matter, we exercise our discretion to treat the mother's notice of appeal from the order following the fact-finding hearing as a valid notice of appeal from the subsequently entered order of fact-finding and disposition (*see* CPLR 5520 [c]; *Matter of Ariana F.F. [Robert E.F.]*, 202 AD3d 1440, 1441 [4th Dept 2022]; *Matter of Hunter K. [Robin K.]*, 142 AD3d 1307, 1308 [4th Dept 2016]).

Contrary to the mother's contention, petitioner met its burden of establishing by a preponderance of the evidence that the mother abused the child (*see generally Matter of Philip M.*, 82 NY2d 238, 243-244 [1993]; *Matter of Mya N. [Reginald N.]*, 185 AD3d 1522, 1523-1524 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]). Petitioner presented the testimony of medical providers who examined the 20-month-old child on July 7, 2019 and found that the child had five circular-shaped burns to her legs that appeared to have been sustained at the same time, likely recently, and were in the early stage of healing. One provider testified that in her experience a child would cry out in pain when receiving those burns. The providers also noted that the child had multiple bruises, including bruising to her ear, which was highly suspicious for nonaccidental trauma. Petitioner presented testimony that the child had been with the mother the morning of July 5 until approximately 3:00 p.m., and thereafter the child had been in the presence of multiple relatives at a public park until the mother picked the child up around midnight. Several of the child's relatives noticed the burn marks on the child around 6:00 p.m., and the mother herself noticed the marks when she picked the child up that night. The other respondents testified at the hearing that, while at the park, the child never cried out in pain, and Family Court made the inference that the child had sustained the burn injuries earlier that day, when she was in the mother's care. The court also relied on the testimony of several members of the mother's family regarding the mother's explosive temper and numerous instances where she struck or screamed at the child. We accord great weight and deference to the court's determinations, "including its drawing of inferences and assessment of credibility," and we will not disturb those determinations where, as here, they are supported by the record (*Matter of Shaylee R.*, 13 AD3d 1106, 1106 [4th Dept 2004]).

We have considered the mother's remaining contention and conclude that it does not warrant reversal or modification of the order.

**Matter of Leonard P.**, AD3d 2023 NY Slip Op 06687 (4th Dept., 2023)

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 14, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent abused the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent mother appeals from orders determining that she abused the child who is the subject of appeal No. 1 (child) and derivatively abused the children who are the subject of appeal Nos. 2 and 3, i.e., the child's siblings. The orders were entered after a fact-finding hearing on abuse petitions filed against the mother and the children's father. We affirm.

We reject the mother's contention in all three appeals that Family Court's determinations lack a sound and substantial basis. Family Court Act § 1046 (a) (ii) "provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child which would ordinarily not occur absent an act or omission of [the] respondents, and (2) that [the] respondents were the caretakers of the child at the time the injury occurred" (*Matter of Philip M.*, 82 NY2d 238, 243 [1993]; *see Matter of Nancy B.*, 207 AD2d 956, 957 [4th Dept 1994]). Section 1046 (a) (ii) "authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur" (*Philip M.*, 82 NY2d at 244). Although the burden of establishing child abuse rests with the petitioner (*see id.*; *Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1493 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]), once the petitioner "has established a prima facie case, the burden of going forward shifts to [the] respondents to rebut the evidence of parental culpability" (*Philip M.*, 82 NY2d at 244; *see generally Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849 [4th Dept 2010]).

With respect to appeal No. 1, the court's finding of abuse of the child by the mother is supported by a preponderance of the evidence in the record (*see* Family Ct Act § 1046 [b] [i]; *Matter of Jezekiah R.-A. [Edwin R.-E.]*, 78 AD3d 1550, 1551 [4th Dept 2010]). Two physicians who treated the child testified that the child, who was two months old at the time, sustained a moderately-sized subdural hemorrhage and numerous hemorrhages in the retina of the right eye. They both testified that the injuries to the child were non-accidental and that this was a case of shaken baby syndrome. Thus, petitioner established that the child suffered injuries that "would ordinarily not occur absent an act or omission of [the mother and the father]" (*Philip M.*, 82 NY2d at 243; *see Matter of Damien S.*, 45 AD3d 1384, 1384 [4th Dept 2007], *lv denied* 10 NY3d 701 [2008]). Petitioner further established that the mother and the father "were the [*2]caretakers of the child at the time the injur[ies] occurred" (*Philip M.*, 82 NY2d at 243), and the "presumption of culpability extends" to both of them (*Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 74 [1st Dept 2012]). We conclude that the mother failed to

rebut the presumption of culpability (*see Matter of Tyree B. [Christina H.]*, 160 AD3d 1389, 1389 [4th Dept 2018]; *Damien S.*, 45 AD3d at 1384).

With respect to appeal Nos. 2 and 3, the court's finding of derivative abuse based on evidence that the mother abused the child is supported by a preponderance of the evidence in the record (*see* Family Ct Act § 1046 [a] [i]; [b] [i]; *Matter of Deseante L.R. [Femi R.]*, 159 AD3d 1534, 1536 [4th Dept 2018]). The abuse of the child "is so closely connected with the care [of his siblings] as to indicate that [those children are] equally at risk" (*Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]; *see Devre S.*, 74 AD3d at 1849). The abuse of the child further "demonstrates such an impaired level of judgment by the [mother] as to create a substantial risk of harm for any child in her care" (*Matter of Aaron McC.*, 65 AD3d 1149, 1150 [2d Dept 2009]; *see Matter of Wyquanza J. [Lisa J.]*, 93 AD3d 1360, 1361 [4th Dept 2012]).

The mother's further contention in all three appeals that she was denied meaningful representation by her attorney's failure to retain and call a medical witness to rebut the evidence establishing the cause of the child's injuries "is 'impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on [her] behalf' " (*Matter of Amodea D. [Jason D.]*, 112 AD3d 1367, 1368 [4th Dept 2013]). In particular, the mother failed to "demonstrate[ ] that there were 'relevant experts who would have been willing to testify in a manner helpful [and favorable] to [her] case[ ]' . . . , and her speculation that [her attorney] could have found an expert with a contrary, exculpatory medical opinion is insufficient to establish deficient representation" (*Matter of Julian P. [Colleen Q.]*, 129 AD3d 1222, 1224-1225 [3d Dept 2015]; *see Matter of Brooke T. [Justin T.]*, 156 AD3d 1410, 1412 [4th Dept 2017]). The record establishes that, " 'viewed in the totality of the proceedings, [the mother] received meaningful representation' " (*Matter of Bentleigh O. [Jacqueline O.]*, 125 AD3d 1402, 1404 [4th Dept 2015], *lv denied* 25 NY3d 907 [2015]).

# Disposition of Art. 10s

**Matter of Rihanna C.L.**, 221 AD3d 487 (1st Dept., 2023)

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about September 1, 2022, which, after a fact-finding hearing, to the extent appealed from as limited by the briefs, denied respondent father

visitation with the subject child and placed the child in foster care until the date of the next permanency hearing, unanimously affirmed, without costs.
The appeal is not moot because the order placed the child in foster care, and that placement may, in future proceedings, affect the father's status or parental rights (*see Matter of Alexis AA. [John AA.]*, 97 AD3d 927, 928-929 [3d Dept 2012]).

Family Court was empowered to commence a dispositional hearing immediately upon completion of the fact-finding hearing (Family Court Act § 1047[a]). Furthermore, the father has failed to preserve his argument that Family Court failed to conduct a proper dispositional hearing, as the record establishes that the father participated without objection in the informal dispositional proceeding (*see Matter of Kiera R. [Kinyetta R.]*, 99 AD3d 565, 566 [1st Dept 2012]; *Matter of Alyssa G. [Miguel P.]*, 94 AD3d 995, 996 [2d Dept 2012], *lv denied* 19 NY3d 808 [2012]). We further find that the father was not denied due process at the hearing, as he was offered an adequate opportunity to offer evidence (*see Matter of Katrina W.*, 171 AD2d 250, 257 [2d Dept 1991], *lv denied* 79 NY2d 976 [1992], *cert denied* 506 US 876 [1992]).

**Matter of Lillyana B.**, 221 AD3d 1522 (4th Dept., 2023)

Appeal from an order of the Family Court, Oswego County (Allison J. Nelson, J.), entered February 16, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child and placed the child with her maternal grandparents.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: The father of the child who is the subject of these proceedings, a nonparty in appeal No. 1 and the petitioner in appeal No. 2, appeals from an order of disposition in appeal No. 1 entered in a proceeding pursuant to Family Court Act article 10 that made a finding of neglect against respondent mother and placed the child with her maternal grandparents. In appeal No. 2, the father appeals from an order dismissing his petition for custody of the child. On both appeals, the father contends that he was denied his constitutional right to raise his child without first being proven to be unfit. We reject that contention.

Shortly before the child turned one year old, petitioner in appeal No. 1, the Oswego County Department of Social Services (DSS), filed a neglect petition against the mother. At the time, paternity for the child had not been established. The following day, the father signed and filed an acknowledgment of paternity for the child. The child was removed from the mother's care and placed with the maternal grandparents.

Approximately three months later, the father filed a petition for custody of the child. Family Court adjudicated the child a neglected child by the mother, and over the course of several months held a combined dispositional hearing on the article 10 proceeding and a hearing on the father's custody petition.

Where, as here, Family Court Act articles 6 and 10 proceedings are pending at the same time, the court "may jointly hear the hearing on the custody and visitation petition under [article 6] and the dispositional hearing on the petition under article [10] . . . ; provided, however, the court must determine the custody and visitation petition in accordance with the terms of . . . article [6]" (Family Ct Act § 651 [c-1]; *see* § 1055-b [a-1]; *Matter of Nevaeh MM. [Sheri MM.—Charles MM.]*, 158 AD3d 1001, 1002 [4th Dept 2018]). In an article 6 custody proceeding, it is well settled that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied absent a finding that the parent has relinquished that right because of "surrender, abandonment, unfitness, persisting neglect or other extraordinary [*2]circumstances" (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 548 [1976]; *see Matter of Michael J.M. v Lisa M.H.*, 192 AD3d 1470, 1471 [4th Dept 2021]; *Matter of Smith v Ballam*, 176 AD3d 1591, 1592 [4th Dept 2019]). If extraordinary circumstances are established, then the court may make an award of custody based on the best interests of the child (*see Bennett*, 40 NY2d at 548).

We agree with the court that extraordinary circumstances existed here based on the father's abandonment of the child (*see Matter of Nicole L. v David M.*, 195 AD3d 1058, 1061 [3d Dept 2021]; *Matter of Miner v Torres*, 179 AD3d 1490, 1491 [4th Dept 2020]; *Nevaeh MM.*, 158 AD3d at 1003). DSS's witnesses testified that the father had not visited with the child much, if at all, before the neglect petition was filed and, after the neglect petition was filed, the father visited the child only twice in the one-year period before the hearing concluded. Although the father testified that he visited with the child on many occasions before the neglect petition was filed, the court found his testimony not credible. We see "no reason to disturb the court's credibility determinations inasmuch as they are supported by the record" (*Matter of Aaren F. [Amber S.]*, 181 AD3d 1167, 1168 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]). In addition to failing to establish or maintain contact with the child, the father also did not provide financial support for the child or contact the grandparents or the DSS caseworker regarding the child's well being.

We have considered the father's remaining contention and conclude that it is without merit.

**Matter of Romeo C.**, AD3d 2023 NY Slip Op 06435 (1st Dept., 2023)

Order, Family Court, Bronx County (Ashley B. Black, J.), entered on or about June 14, 2023, which released the subject children to nonparty-respondent father with agency supervision and permitted respondent mother liberal unsupervised access with the children, including overnights at the father's home, unanimously modified, on the facts, to the extent of releasing the children to the nonparty-respondent father with agency supervision, conditioned on respondent mother being excluded from the home and her visitation with the children supervised, and otherwise affirmed, without costs.
The determination of Family Court with respect to the children's best interests lacked a sound and substantial basis in the record. A month prior to the challenged order, the court found that the mother neglected her daughter and derivatively neglected her son based on her opiate use during the pregnancy and the fact that the younger child had to be hospitalized for 44 days for neonatal abstinence syndrome. It further determined that the mother's explanation that she accidentally took methadone once several days before the child's birth to be incredible.

At the combined permanency/disposition hearing, there was little to no evidence that the mother had made any positive strides in overcoming the behavior that led to the neglect finding (*see Matter of Madison H. [Demezz J. H.]*, 173 AD3d 458, 459 [1st Dept 2019]). The mother testified that she engaged in some substance abuse counseling. Nevertheless, she continued to minimize and rationalize the neglect and insist that she took methadone "inadvertently" one time, something that the court already found to be implausible and posed a risk to the children in her care. Furthermore, the mother had poor compliance with ACS's recommendations and failed to complete any portions of her service plan. Although she contended that she had been close to completing drug counseling, the records from the provider indicated that she had been discharged from

the program several months prior for lack of attendance. Similarly, the mother missed 75% of the scheduled drug tests and had not submitted to any tests between March and June 2023.

Motion to modify stay order, denied.

# Permanency Hearings

**Matter of Tyler I.**, 219 AD3d 1097 (3rd Dept., 2023)

Appeals from a decision and an order of the Family Court of Schoharie County (Laura C. Deitz, Referee), entered March 15, 2022 and March 18, 2022, which, among other things, in two proceedings pursuant to Family Ct Act articles 10 and 10-A, modified the permanency plan of the subject children.

Respondent (hereinafter the father) and Bobbi J. (hereinafter the mother) are the parents of a daughter (born in 2017), and the father is also the parent of a son (born in 2004).[FN1] In 2018, the son was removed from the father's care following an altercation, and, in 2019, the daughter was removed from the mother's care based upon allegations that she permitted contact with inappropriate persons. In 2020, Family Court (Bartlett III, J.) adjudicated the son to be neglected by the father and the daughter to be neglected by the mother and placed the parents under the supervision of petitioner. Following a lengthy contested permanency hearing spanning from May 2021 through February 2022,[FN2] Family Court (Deitz, Referee) issued an exhaustive decision concluding that petitioner had made the requisite reasonable efforts to achieve the original permanency goal for the children of return to a parent, determined that the failure to achieve that goal was caused by the parents' conduct and unwillingness or inability to avail themselves of the myriad of resources and services offered to correct the problems that led to the children's removal and found that the best interests of the children supported modifying the permanency goal from return to parent to adoption. A permanency order was entered March 18, 2022 so modifying the permanency goal. The father appeals from both the decision and the order,[FN3] challenging the change in the permanency goal with regard to the daughter.[FN4]

Petitioner advised this Court, and this Court confirmed, that, subsequent to the March 18, 2022 entry of the permanency order, Family Court held a permanency hearing and issued a subsequent decision and permanency order entered on October 13, 2022 continuing the permanency goal of adoption. Petitioner argues that the issuance of the subsequent order rendered the father's appeal moot. "Although a subsequently issued permanency order effectively supersedes prior permanency orders, an appeal from a prior order is not moot if that prior order modified the permanency goal," as occurred here (*Matter of Jaylynn WW. [Justin WW.-Roxanne WW.]*, 202 AD3d 1394, 1396 [3d Dept 2022], *lv denied* 38 NY3d 907 [2022]; *see Matter of Victoria B. [Jonathan M.]*, 164 AD3d 578, 580 [2d Dept 2018]; *compare Matter of Mickia B. [Raheem B.]*, 216 AD3d 1218, 1218-1219 [3d Dept 2023]; *Matter of Jihad N. [Devine N.]*, 180 AD3d 1164, 1165 [3d Dept 2020]). However, Family Court's decision entered in conjunction with that subsequent permanency order reflects that respondent "consented to the proposed permanency goal of 'placement for adoption' for both children."[FN5] As the father consented to the change in the permanency goal of placement [*2]for adoption and has not appealed that order [FN6] or challenged the voluntariness of his consent, a decision from this Court on this appeal would not "result in immediate and practical

consequences to the [father]" (*Matter of Victoria B. [Jonathan M.]*, 164 AD3d at 580 [internal quotation marks and citation omitted]; *see Matter of Chloe Q. [Dawn Q.-Jason Q.]*, 68 AD3d 1370, 1370-1371 [3d Dept 2009]; *compare Matter of Damian D. [Patricia WW.]*, 126 AD3d 12, 15-16 [3d Dept 2015]). Accordingly, this appeal challenging the earlier change in the permanency goal to placement for adoption is now moot (*see Matter of Randi NN. [Randi MM.-Joseph MM.]*, 80 AD3d 1086, 1086-1087 [3d Dept 2011], *lv denied* 16 NY3d 712 [2011]; *Matter of Jacelyn TT. [Tonia TT.-Carlton TT.]*, 80 AD3d 1119, 1119-1120 [3d Dept 2011]; *Matter of Simeon F.*, 58 AD3d 1081, 1081-1082 [3d Dept 2009], *lv denied* 12 NY3d 709 [2009]; *compare Matter of Jamie J. [Michelle E.C.]*, 30 NY3d 275, 281-282 [2017]).[FN7] Under the circumstances that exist here, the exception to the mootness doctrine does not apply (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]; *Matter of Randi NN. [Randi MM.-Joseph MM.]*, 80 AD3d at 1087).

Egan Jr., Clark, Fisher and McShan, JJ., concur.

ORDERED that the appeals are dismissed, without costs.

**Footnote 1:** The son's mother, Melissa K., is listed as an interested party who appeared by counsel.

**Footnote 2:** The father, a level one sex offender, was reincarcerated on a probation violation from September 2021 through August 2022 based upon unapproved contact with an 11-year-old child. He participated in the permanency hearing and testified; the mother did not appear but was represented by counsel at the hearing. Due to the length of the hearing, which initially proceeded on an April 2021 permanency report, petitioner was permitted to file another permanency report in December 2021, which the parties were afforded an opportunity to address.

**Footnote 3:** As no appeal lies from Family Court's nondispositional, fact-finding decision (*see* Family Ct Act §§ 1112 [a]; 1089 [d]), the father's appeal from that decision must be dismissed. Nonetheless, his appeal from the subsequently issued permanency order, a dispositional order, brings up for review the issues raised in the fact-finding decision (*see* CPLR 5501 [a]).

**Footnote 4:** The father does not contest the permanency goal for the son, who turned 18 in 2022.

**Footnote 5:** Neither the father nor the attorney for the daughter address his subsequent consent to the permanency goal of adoption. Petitioner further states that there was another permanency hearing on January 6, 2023 at which the father failed to appear

and his counsel appeared and took no position.

**Footnote 6:** An order entered on consent is generally not appealable in that the consenting party is not aggrieved thereby (*see* CPLR 5511; *Matter of Gabrielle N.N. [Jacqueline N.T.]*, 171 AD3d 671, 672 [1st Dept 2019]).

**Footnote 7:** The permanency order entered October 13, 2022 authorized petitioner to file a termination of parental rights petition unless the father executed a surrender of parental rights. The attorney for the daughter indicates that counsel was informed by Family Court that a termination of parental rights petition is pending.

# Discontinuance of Article 10

**Matter of Lauren X.,** 218 AD3d 858 (3rd Dept., 2023)

Appeal from an order of the Family Court of Delaware County (Gary A. Rosa, J.), entered December 6, 2021, which, in a proceeding pursuant to Family Ct Act article 10, granted petitioner's motion to withdraw the petition.

Respondent and Duane Y. (hereinafter the father) are the parents of the subject child (born in 2005). Pursuant to a custody order, respondent exercised parenting time with the child in March 2021, after which time the child did not return to the father's home as planned. Then, in May 2021, petitioner filed the instant neglect petition alleging, among other things, that the child had been completely absent from school since the end of March 2021. During the pendency of the proceedings, petitioner sought to interview the child regarding the allegations made in the petition, as well as additional allegations that the child had made against the father and his girlfriend. Although the record reflects some difficulty in having respondent produce the child, it appears that petitioner interviewed the child in August 2021. Then, on December 6, 2021, petitioner transmitted a letter by email to Family Court, counsel for respondent, counsel for the father and the attorney for the child (hereinafter AFC) requesting to withdraw the petition without prejudice and to cancel the fact-finding hearing scheduled for December 14, 2021. That same day, the court issued an order granting petitioner's request and dismissing the neglect petition. The AFC appeals.**[FN1]**

Contrary to the AFC's arguments, Family Court was not required to make findings pursuant to Family Ct Act § 1051 (c), as the court's dismissal was not the result of a failure of proof following a hearing (*see Matter of Sheena B. [Rory F.]*, 83 AD3d 1056, 1057 [2d Dept 2011]). Rather, petitioner's email amounted to an application for voluntary discontinuance (*see* CPLR 3217 [b]; *Matter of Gabriel v Morse*, 145 AD3d 1401, 1401-1402 [3d Dept 2016]; *Matter of Sheena B. [Rory F.]*, 83 AD3d at 1057).[FN2] "[W]hether an application to discontinue an action pursuant to CPLR 3217 (b) should be granted lies within the sound exercise of the court's discretion, and such should be entered upon terms and conditions, as the court deems proper" (*Matter of Fiacco v Engler*, 79 AD3d 1206, 1207 [3d Dept 2010] [internal quotation marks and citations omitted]; *see Matter of Hersh v Cohen*, 171 AD3d 1062, 1064 [2d Dept 2019]).

We agree with the AFC that Family Court erred in granting petitioner's application to dismiss the neglect petition without allowing any time for objections to be raised. We are cognizant that, "ordinarily[,] a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted" (*Tucker v Tucker*, 55 NY2d 378, 383 [1982]; *see Hurrell-Harring v State of New York*, 112 AD3d 1213, 1215 [3d Dept 2013]). However, one should be given an opportunity to present any such special circumstances or any other arguments concerning the application, such as the effect upon a subject [*2]child's welfare (*see e.g. Matter of Sheena B. [Rory F.]*, 83 AD3d at 1057-1058; *Matter of Houck v Garraway*, 293 AD2d 782, 783 [3d Dept 2002]), whether prejudice should attach to the discontinuance (*see e.g. Matter of Hersh v Cohen*, 171 AD3d at 1064; *Matter of Fiacco v Engler*, 79 AD3d at 1207-1208) or whether another party should be permitted, in the court's discretion, to commence a neglect proceeding (*see* Family Ct Act § 1032 [b]; *see e.g. Matter of Abel XX. [Jennifer XX.]*, 182 AD3d 632, 633 [3d Dept 2020]; *Matter of Amber A. [Thomas E.]*, 108 AD3d 664, 665 [2d Dept 2013]; *Matter of Hannah U. [Dennis U.]*, 97 AD3d 908, 908 n 1 [3d Dept 2012]). Because Family Court dismissed the petition without allowing the parties — including the father as a nonrespondent parent — to present any arguments regarding petitioner's application for a discontinuance, we remit this matter to allow them the opportunity to do so.

The AFC's remaining contentions have been examined and, to the extent not expressly addressed herein, have been found to lack merit.

Lynch, J.P., Pritzker, Reynolds Fitzgerald and Fisher, JJ., concur.

ORDERED that the order is reversed, on the law, without costs, and matter remitted to the Family Court of Delaware County for further proceedings not inconsistent with this Court's decision.

**Footnote 1:** The father also appealed the order but later withdrew his appeal.

**Footnote 2:** The record is devoid of any objection to petitioner's use of email to circulate its application, and no challenge to service is posed on appeal.

# Modification of Placement

**Matter of Addison CC.,** 218 AD3d 856 (3rd Dept., 2023)

Appeal from a modified order of the Family Court of Delaware County (Gary A. Rosa, J.), entered November 10, 2021, which, among other things, in a proceeding pursuant to Family Ct Act article 10, sua sponte changed the child's placement.

Respondent is the mother of the subject child (born in 2019), as well as four other children. Several months after the child was born, petitioner commenced this proceeding alleging that respondent had neglected the child. Respondent consented to the child's temporary removal and direct placement with a suitable person (hereinafter the friend) and expressed a desire for a relative in Nevada (hereinafter the relative) to adopt the child. Following a hearing, Family Court found that respondent had neglected the child based upon her admissions and then, pursuant to the parties' consent, continued the child's direct placement with the friend. In a separate order, the court also determined that petitioner was not required to make reasonable efforts to reunify the child with respondent.

Petitioner then filed a petition to terminate respondent's parental rights. During this time, the friend announced a desire to adopt the child. Respondent did not agree with this disposition and expressed a desire for the child to be adopted by the relative. While petitioner was evaluating the relative, the child's maternal grandmother (hereinafter the grandmother), who is a resident of California and had custody of some of respondent's other children, filed a petition for custody of the child. During initial appearances on the termination petition and the grandmother's custody petition, Family Court questioned the "disturbing allegations" contained in the grandmother's custody petition, which appeared to be directed against the friend. After further discussion, respondent admitted that the allegations in the grandmother's custody petition were from her and not the grandmother, and that she now desired that the child go home with the grandmother to California at the end of the week. Upon hearing same, Family Court ordered that the

child's placement be changed from a direct placement with the friend to a placement with petitioner. The court reasoned, in part, that modifying the placement to foster care will allow investigation into the friend and the other parties who petitioned for custody — particularly those out of state. Petitioner placed a general objection on the record and subsequently moved via order to show cause for a stay and modification of such order, arguing that Family Court lacked the authority to sua sponte modify the placement of the child. The court granted a stay of the change of placement and afforded the parties an opportunity to submit legal memoranda and be heard on the change of placement. Ultimately, Family Court issued a modified order of fact-finding and disposition that placed the child in the care and custody of petitioner, based on its determination of such placement being in the best interests of the child[*2]. Petitioner appeals.

During the pendency of this appeal, respondent judicially surrendered her parental rights to the child and Family Court directed petitioner to place the child for adoption with the friend. In view of this, petitioner's appeal is moot (*see Matter of Daniel H. [Natasha G.]*, 212 AD3d 896, 897 [3d Dept 2023]).[FN1] Petitioner contends that this appeal presents a question that "is substantial, novel and likely to recur, yet evade review, so as to warrant invocation of the mootness exception" (*Matter of Marcus TT. [Markus TT.]*, 188 AD3d 1461, 1462 [3d Dept 2020]; *see Matter of Michael H. [Catherine I.]*, 214 AD3d 84, 86 [3d Dept 2023]; *Matter of Frank Q. [Laurie R.]*, 204 AD3d 1331, 1333 [3d Dept 2022]). However, we are not persuaded that this issue will evade review, particularly given the procedural devices available to a party such as those employed here,[FN2] and the availability of a special preference for appeals such as this one (*see Matter of Brenden O.*, 13 AD3d 779, 780 [3d Dept 2004], citing CPLR 5521 [b]; *see also* CPLR 5015). Nor do we find, based on our review of the record, that Family Court's sua sponte order modifying the child's placement is substantial and novel (*see* Family Ct Act § 1061; CPLR 4404 [b]; *Matter of Chendo O.*, 193 AD2d 1083, 1084 [4th Dept 1993]; *see generally Matter of Nila S. [Priscilla S.]*, 202 AD3d 695, 696 [2d Dept 2022]; *Matter of Tashia ZZ.*, 90 AD3d 1201, 1202 [3d Dept 2011]). Based on the foregoing, we find that the exception to the mootness doctrine does not apply and, accordingly, petitioner's appeal is dismissed.

ORDERED that the appeal is dismissed, as moot, without costs.

Footnote 1: The appellate attorney for the child agrees that this appeal is moot.

Footnote 2: We also note that, despite petitioner's caseworker not being present in the courthouse at the time of the initial order from the bench in July 2021, petitioner's counsel was able to place an objection on the record and then move via order to show cause to obtain a nearly four-month stay between Family Court's initial order and the

issuance of the modified order in November 2021. The child remained with the friend throughout the pendency of such application.

# Counsel

**Matter of Abigail M. A.**, AD3d 2023 NY Slip Op 06737 (2nd Dept., 2023)

In related proceedings pursuant to Family Court Act article 10, the father appeals from an order of fact-finding and disposition of the Family Court, Orange County (Victoria B. Campbell, J.), dated October 20, 2022. The order of fact-finding and disposition, after fact-finding and dispositional hearings, inter alia, found that the father neglected the child Abigail M. A. and, in effect, that the father derivatively neglected the child Hannah A. A., and placed the child Abigail M. A. in the custody of the Commissioner of Social Services of Orange County until the completion of the next permanency hearing. ORDERED that the order of fact-finding and disposition is modified, on the law and the facts, by deleting the provision thereof, in effect, finding that the father derivatively neglected the child Hannah A. A., and substituting therefor a provision denying that branch of the petition which alleged that the father neglected the child Hannah A. A. and dismissing that portion of the proceeding; as so modified, the order of fact-finding and disposition is affirmed, without costs or disbursements.

The father and the mother, who were previously married, have two children together, one born in 2007 and the other born in 2010. Following their divorce, they shared joint residential custody of the children. However, after the younger child raised concerns about the mother's mental health in May 2020, the parents agreed that the father would have residential custody of the younger child and the mother would have residential custody of the older child. Thereafter, in February 2021, [*2]the older child also became concerned with the mother's mental health as well as the resulting effect on the older child's own safety. A caseworker employed by the Orange County Department of Social Services (hereinafter DSS), upon learning of the older child's concerns, contacted the local police to conduct a welfare check. After doing so, the police brought the older child to a local police station. A relative ultimately picked her up from the police station, and the older child then began residing with that relative.

In March 2021, DSS commenced these related proceedings pursuant to Family Court Act article 10, alleging, inter alia, that the father neglected both children. The Family Court thereafter conducted a fact-finding hearing, receiving testimony over the course of three days between September 2021 and June 2022. By order of fact-finding and disposition dated October 20, 2022, the court, among other things, found that the father

neglected the older child and, in effect, that he derivatively neglected the younger child. The father appeals.

"At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing that the subject child has been abused or neglected by a preponderance of the evidence" (*Matter of Kamaya S. [Zephaniah S.]*, 218 AD3d 590, 592 [internal quotation marks omitted]). "To establish neglect of a child, the petitioner must demonstrate by a preponderance of the evidence, (1) that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Chloe. P.-M. [Martinique P.]*, 220 AD3d 783, 784 [internal quotation marks omitted]). "Courts must evaluate parental behavior objectively" by considering whether "a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances then and there existing" (*Matter of Cruz W. [Jacki W.]*, 218 AD3d 782, 783).

Here, the Family Court's finding that the father neglected the older child was supported by a preponderance of the evidence. The evidence adduced at the fact-finding hearing revealed, among other things, that the father refused to pick up the older child, then only 13 years old, from a police station after the child left the mother's home due to the child's concerns with the mother's mental health, even though the father admittedly knew that the child might be forced to sleep at a teen shelter without his assistance. His refusal to assist the older child was motivated in part by his "ang[er]" about purported lies she had told about him when she was merely 11 years old. By the time the father testified at the hearing in June 2022, he had not seen the older child in approximately two years and had made no efforts to visit her. He testified that he did not want her to live with him, nor did he have any interest in therapy to potentially repair the relationship. The evidence at the fact-finding hearing therefore demonstrated that the father willingly abdicated his parental obligations and neglected the older child (*see Matter of Marques B. [Eli B.]*, 133 AD3d 654, 654-655; *Matter of Nyia L. [Egipcia E.C.]*, 88 AD3d 882, 883).

Contrary to the father's contention, under the circumstances of this case, the Family Court's failure to ensure that the father validly waived his right to counsel on the first day of the fact-finding hearing does not warrant reversal. "A respondent in any proceeding under article 10 of the Family Court Act has both a constitutional and a statutory right to the assistance of counsel" (*Matter of Cecile D. [Kassia D.]*, 189 AD3d 1036, 1037 [internal quotation marks omitted]; *see Matter of Lherisson v Goffe*, 198 AD3d 965, 966). However, "[a] party may waive that right and proceed without counsel provided he

or she makes a knowing, voluntary, and intelligent waiver of the right to counsel. To determine whether a party has validly waived the right to counsel, a court must conduct a searching inquiry to ensure that the waiver has been made knowingly, voluntarily, and intelligently" (*Matter of Mercado v Arzola*, 212 AD3d 815, 816 [alterations, citations, and internal quotation marks omitted]). "While there is no rigid formula to be followed in such an inquiry, and the approach is flexible, the record must demonstrate that the party was aware of the dangers and disadvantages of proceeding without counsel. For example, the court may inquire about the litigant's age, education, occupation, previous exposure to legal procedures[,] and other relevant factors bearing on a competent, intelligent, voluntary waiver" (*Matter of Lherisson v Goffe*, 198 AD3d at 967 [citation and internal quotation marks omitted]). "The deprivation of a party's fundamental right [*3]to counsel in a custody or visitation proceeding is a denial of due process which requires reversal, regardless of the merits of the unrepresented party's position" (*Matter of Tarnai v Buchbinder*, 132 AD3d 884, 886 [internal quotation marks omitted]).

Here, the father was represented by retained counsel at multiple appearances before the Family Court prior to the fact-finding hearing. At a conference held on June 9, 2021, the father appeared pro se, informing the court and the other parties that he had discharged his attorney. Upon inquiry from the court, the father indicated that he did not "know how to prosecute a case," and the court advised him, among other things, "to get an attorney." Thereafter, on September 27, 2021, the parties appeared for the fact-finding hearing (hereinafter the September 2021 hearing date), and the father was again without counsel. The court began the hearing and received witness testimony. During the proceeding, the father indicated that he had contacted the Legal Aid Society for representation but was advised that he did not qualify for appointed counsel. On December 14, 2021, the next scheduled hearing date, the court appointed counsel to represent the father due to the court's concerns about the father potentially cross-examining the older child. The court then adjourned the hearing without receiving witness testimony to allow the father's counsel time to obtain the transcript from the prior hearing date and to then determine whether he wished to cross-examine DSS's social worker. For the remaining two days of the hearing, the father was represented by counsel.

As the father correctly contends, before beginning the hearing on the September 2021 hearing date, the Family Court "failed to conduct a searching inquiry to ensure" that his waiver of his right to counsel was "made knowingly, voluntarily, and intelligently" (*Matter of Mercado v Arzola*, 212 AD3d at 816 [internal quotation marks omitted]). Among other reasons, the court failed to sufficiently "warn [the father] of the risks of proceeding pro se or apprise him of the importance of a lawyer in the adversarial system" (*People v Baines*, 39 NY3d 1, 7; *see Matter of Cerquin v Visintin*, 118 AD3d 987, 989). Nonetheless, under the particular circumstances of this case, the court's error does not

warrant reversal and remittal (*see Matter of Tarnai v Buchbinder*, 132 AD3d at 887). Since the testimony offered in the period in which the father was represented by counsel was sufficient to establish that he neglected the older child, the court's failure to ensure that he validly waived his right to counsel at the September 2021 hearing date could not have affected the ultimate outcome of the proceeding relating to that child (*see People v Wardlaw*, 6 NY3d 556, 559-561; *People v Brooks*, 200 AD3d 904, 904-905). In any event, the court cured its error by appointing counsel for the father for the remainder of the hearing and affording his counsel the opportunity to cross-examine the DSS social worker who testified at the September 2021 hearing date (*see Canizio v New York*, 327 US 82, 86-87; *People v Sinclair*, 28 AD2d 183, 184).

Finally, as effectively conceded by the petitioner, the preponderance of the evidence did not support a finding that the father derivatively neglected the younger child (*see Matter of Katherine L. [Adrian L.]*, 209 AD3d 737, 740; *Matter of Nevetia M. [Tiara M.]*, 184 AD3d 836, 838).

# TERMINATION of PARENTAL RIGHTS

## General

**Matter of Y. SS.,** AD3d 2023 NY Slip Op 05296 (3rd Dept., 2023)

Appeal from an order of the Family Court of Tompkins County (Scott A. Miller, J.), entered May 20, 2022, which, in a proceeding pursuant to Family Ct Act article 10, granted petitioner's motion to be relieved of its obligation to make reasonable efforts to reunite respondent with the subject child.

Respondent (hereinafter the mother) is the mother of, among others, the subject child (born in 2013). This Court recently upheld a neglect adjudication involving the child and her continued placement with petitioner, which was premised upon the mother having photographed the child in a sexually explicit manner, disseminated those photographs and agreed to involve the child in her performance of sexual services for money (211 AD3d 1390, 1391-1393 [3d Dept 2022]). Following that adjudication, petitioner moved to

be relieved of its obligation to make reasonable efforts to reunite the mother with the child, citing the involuntary termination of the mother's parental rights to several of the child's siblings (*see* Family Ct Act § 1039-b [b] [6]). The attorney for the child supported the motion, the mother opposed and Family Court granted it without a hearing. The mother appeals.

Ordinarily, to establish permanent neglect, the petitioning agency will need to demonstrate, as relevant here, that it has made "diligent efforts to encourage and strengthen the parental relationship" (Family Ct Act § 614 [1] [c]; *see* Social Services Law § 384-b [7] [a]). However, an agency may move for an order finding that "reasonable efforts to return the child to his or her home are no longer required" in certain circumstances (Family Ct Act § 1039-b [a]). One such circumstance is where "the parental rights of the parent to a sibling of such child have been involuntarily terminated," unless the court further "determines that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future" (Family Ct Act § 1039-b [b] [6]). Although the Family Ct Act "does not require an evidentiary hearing on such a motion, courts have found that such a hearing is required by constitutional notions of due process 'when genuine issues of fact are created by the answering papers' " (*Matter of Harmony P. [Christopher Q.]*, 95 AD3d 1608, 1609 [3d Dept 2012], quoting *Matter of Damion D.*, 42 AD3d 715, 716 [3d Dept 2007]; *see Matter of Carlos R.*, 63 AD3d 1243, 1245 [3d Dept 2009], *lv denied* 13 NY3d 704 [2009]).

Petitioner's submissions detailed the mother's 30-year history of removals, neglect findings and terminations of her parental rights as a result of her failure to meaningfully address her mental health and her attendant issues with substance abuse, housing, employment and safe parenting generally. This history includes the involuntary termination of her parental rights with respect to four of the child's siblings.**[FN1]** Contrary to the mother's [*2]assertion, there is no temporal limitation on the terminations that may be considered on a motion pursuant to Family Ct Act § 1039-b (*see* Family Ct Act § 1039-b [b] [6]; *Matter of Carlos R.*, 63 AD3d at 1245; *Matter of Marino S.*, 293 AD2d 223, 229 [1st Dept 2002], *affd* 100 NY2d 361 [2003], *cert denied* 540 US 1059 [2003]; *see e.g. Matter of Dakota Y. [Robert Y.]*, 97 AD3d 858, 859 [3d Dept 2012], *lv denied* 20 NY3d 852 [2012]; *Matter of James U. [James OO.]*, 79 AD3d 1191, 1191-1192 [3d Dept 2010]). Thus, petitioner demonstrated prima facie entitlement to the relief requested in its motion (*see Matter of Skyler C. [Satima C.]*, 106 AD3d 816, 818 [2d Dept 2013]; *Matter of Harmony P. [Christopher Q.]*, 95 AD3d at 1609). Petitioner's submissions further alleged that, since Family Court's dispositional order, the mother repeatedly stated that she would not abide by the court's order and had no intent of working with petitioner toward the goal of return to parent, asserting that she had done nothing wrong with respect to the subject child. It was alleged that the mother evaded

substance abuse screenings, failed to maintain communication with petitioner and denied petitioner access to her home, all in contravention of the court's order. The mother also allegedly refused to participate in phone calls with the child if the calls were supervised, missed several visits with the child and would engage in verbally inappropriate conduct toward the child's foster parents and petitioner's caseworkers.

In view of petitioner's prima facie case, it was incumbent upon the mother to raise a genuine issue of fact as to whether continuing reasonable efforts would be in the best interests of the child, not contrary to her health and safety and likely to result in reunification (*see Matter of Skyler C. [Satima C.]*, 106 AD3d at 818; *Matter of Harmony P. [Christopher Q.]*, 95 AD3d at 1609). The mother claimed that she had complied with the conditions imposed upon her by obtaining subsidized housing, searching for employment and "seeking further engagement in mental health services." Family Court accepted these assertions as true. Nonetheless, the court was permitted to place greater weight on the mother's consistent history of failings than upon her recent and limited compliance with some court-ordered requirements, and no hearing was necessary to further develop this evidence (*see Matter of Harmony P. [Christopher Q.]*, 95 AD3d at 1609; *Matter of Carlos R.*, 63 AD3d at 1245; *see also Matter of Jayden QQ. [Christopher RR.]*, 105 AD3d 1274, 1277 [3d Dept 2013]). The mother further asserted that petitioner had been dealing with her in bad faith, citing petitioner's provision of some incorrect information to Family Court during the underlying neglect proceeding. However, those inaccuracies were timely brought to the court's attention by petitioner, and neither this nor the mother's other allegations of malintent created a genuine question as to whether petitioner was attempting to sabotage [*3]her efforts to regain custody of the child. Upon review, we find that Family Court soundly determined, without a hearing, that the exception in Family Ct Act § 1039-b did not apply (*see Matter of Harmony P. [Christopher Q.]*, 95 AD3d at 1609; *Matter of Carlos R.*, 63 AD3d at 1245).

Lynch, Pritzker, Reynolds Fitzgerald and Powers, JJ., concur.

ORDERED that the order is affirmed, without costs.

**Footnote 1:** The mother relinquished custody to three of the child's other siblings via a Family Ct Act article 6 dispositional settlement in an article 10 proceeding.

# Abandonment

**Matter of Richard JJ.**, 218 AD3d 875 (3rd Dept., 2023)

Appeal from an amended order of the Family Court of Albany County (Sherri Brooks-Morton, J.), entered March 16, 2022, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject children to be abandoned, and terminated respondent's parental rights.
Respondent is the mother of the subject children (born in 2005, 2012 and 2014). In 2016, the children were placed in petitioner's care and an abuse proceeding was commenced against respondent. Respondent thereafter consented to the continued placement of the oldest child with petitioner, with the two younger children being returned to her care. In May 2020, all three children were adjudicated to be neglected and Family Court ordered the removal of the two still in respondent's care. In October 2021, petitioner commenced this proceeding to terminate respondent's parental rights, alleging that the children were abandoned. Following a fact-finding hearing, Family Court determined that respondent had abandoned the children, and terminated her parental rights. Respondent appeals.**[FN1]**

We affirm. "To warrant a termination of parental rights on the ground of abandonment, the petitioning agency bears the burden of establishing by clear and convincing evidence that, during the six months preceding the petition's filing, the parent evinced an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the children and communicate with the children or agency, although able to do so and not prevented or discouraged from doing so by the agency" (*Matter of Joshua M. [Brittany N.]*, 167 AD3d 1268, 1269 [3d Dept 2018] [internal quotation marks, brackets and citation omitted]; *see* Social Services Law § 384-b [5] [a]). "A parent's ability to visit and/or communicate with his or her child[ren] is presumed, and once a failure to do so is established, the burden is upon the parent to prove an inability to maintain contact or that he or she was prevented or discouraged from doing so by the petitioning agency" (*Matter of Kihona U. [Britian MM.]*, 200 AD3d 1425, 1425-1426 [3d Dept 2021] [internal quotation marks and citations omitted]).

At the fact-finding hearing, petitioner presented the testimony of four caseworkers, the oldest child and the two younger children's foster parent. According to petitioner's proof, during the relevant time period of April 2021 to October 2021, respondent did not contact petitioner, or other service providers, to inquire about her children or to request visitation. Notably, during this time, caseworkers made several attempts to contact respondent through calls, letters and emails, with no response. The oldest child testified

that he had a single, brief and apparently chance encounter with respondent while he was working at a local department store. During this encounter, the two did not speak to each other but instead merely made eye contact. The younger children's foster parent testified [*2]that both she and the children had no contact with respondent during the subject time frame. Therefore, Family Court correctly concluded that petitioner presented clear and convincing evidence of respondent's failure to maintain contact with the children during the statutory period (*see Matter of Kihona U. [Britian MM.]*, 200 AD3d at 1426-1427; *Matter of Zakariya HH. [Ahmed II.]*, 192 AD3d 1361, 1363 [3d Dept 2021], *lv denied* 37 NY3d 905 [2021]).

The burden thus shifted to respondent to demonstrate that she maintained contact, was unable to do so or was prevented or discouraged from doing so by petitioner. Respondent pointed to text messages that she sent to the oldest child on his birthday, but the record indicates that this was limited to respondent sending a few brief messages and the child responding once, several days later. Respondent also testified that she had other text message communication with the oldest child and sent the children gifts, but these contacts largely occurred outside of the relevant statutory time period. While respondent further claimed that she provided the children with health insurance, no evidence was presented regarding the cost of the health insurance and she admitted that she otherwise offered no financial support to the children. In any event, "respondent's proof — if credited and at best — amounts to the sort of sporadic, infrequent and insubstantial contacts that this Court repeatedly has deemed to be insufficient to defeat a finding of abandonment" (*Matter of Isaiah OO. [Benjamin PP.]*, 149 AD3d 1188, 1191 [3d Dept 2017] [internal quotation marks and citations omitted], *lv denied* 29 NY3d 913 [2017]; *see Matter of David UU. [Jeanie UU.]*, 206 AD3d 1502, 1505-1506 [3d Dept 2022]; *Matter of Nicole L. v David M.*, 195 AD3d 1058, 1061 [3d Dept 2021]).

Respondent additionally contended that various caseworkers threatened and harassed her, violated her parental rights and informed her that she was forbidden from contacting her children. This was allegedly communicated to respondent via phone calls and letters, but respondent did not provide any such letters, nor any specific details about the purported calls. In addition, her testimony was contradicted by that of the caseworkers, who denied threatening respondent or curtailing her ability to contact her children. As such, Family Court was presented with a credibility issue, which it was entitled to resolve against respondent (*see Matter of Zakariya HH. [Ahmed II.]*, 192 AD3d at 1364). Further undermining respondent's position, she acknowledged receiving correspondence indicating that her compliance with a mental health evaluation would lead to increased visitation and possible reunification with the subject children. In view of all of the foregoing, we discern no basis upon which to disturb Family Court's

determination to terminate respondent's parental rights to the subject children on the ground of abandonment.[FN2]

ORDERED that the amended order is affirmed, without costs.

**Footnote 1:** We note that the oldest child turned 18 during the pendency of this appeal. To the extent that respondent challenges the termination of her parental rights with respect to this child, such contention is moot due to the child's age (*see* Social Services Law § 384-b [2] [a]; *Matter of Makayla NN. [Charles NN.]*, 203 AD3d 1489, 1492 n 3 [3d Dept 2022]). However, respondent's challenge to the finding of abandonment is not moot, given the "permanent and significant stigma that might indirectly affect [respondent's] status in future proceedings" (*Matter of Latisha T'Keyah J. [Monie J.]*, 117 AD3d 1051, 1052 [2d Dept 2014]; *see Matter of Makayla NN. [Charles NN.]*, 203 AD3d at 1492 n 3).

**Footnote 2:** Although not determinative, we note that the attorneys for the children support Family Court's decision terminating respondent's parental rights.

**Matter of Nina TT.,** 218 AD3d 873 (3rd Dept., 2023)

Appeal from an order of the Family Court of Sullivan County (Mark M. Meddaugh, J.), entered March 16, 2022, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject child to be abandoned, and terminated respondent's parental rights.
Respondent is the father of a child (born in 2017). In April 2018, in the context of a neglect proceeding against the mother, the child was temporarily removed from respondent's home and placed in a therapeutic foster home. In February 2021, petitioner commenced this abandonment proceeding against respondent seeking to terminate his parental rights, alleging that he had not had contact with the child or petitioner in over six months. Thereafter, proceedings were adjourned twice due to respondent's failure to appear or contact his counsel before an appearance. In August 2021, on the first day of the fact-finding hearing and after the close of petitioner's proof, respondent agreed to execute a conditional judicial surrender of the child. Once the judicial surrender documents were prepared and presented to him, respondent refused to sign them and advised that he desired to testify at a fact-finding hearing. Family Court scheduled the fact-finding hearing to continue in November 2021 and further advised respondent that his failure to appear would result in the matter proceeding in his

absence. Two days before such hearing, respondent was reminded by the court of his obligation to appear.

On the morning of the continued fact-finding hearing, respondent's counsel advised the court that she spoke that morning with respondent, who informed her that he was at his stepfather's funeral but that he would appear at the hearing. Ultimately, respondent did not appear at the hearing and Family Court declared the matter fully submitted. Family Court found that petitioner established by clear and convincing evidence that respondent had abandoned the child, and terminated his parental rights. Respondent appeals.

Respondent contends that, even though he did not request an adjournment, Family Court abused its discretion in failing to adjourn the fact-finding hearing on its own initiative to allow him to testify. We disagree. Family Court "may adjourn a fact-finding hearing . . . for good cause shown on its own motion," and such determination is a matter resting within the court's sound discretion (Family Ct Act § 626 [a]; *see Matter of Isaac YY. [Arielle YY.]*, 200 AD3d 1506, 1508 [3d Dept 2021]). Although this Court has recognized the significance of a parent's right to be present during proceedings to terminate parental rights, we have also stated that "[t]his right to be present . . . is not absolute and must be balanced with the child's right to a prompt and permanent adjudication" (*Matter of Eileen R. [Carmine S.]*, 79 AD3d 1482, 1483 [3d Dept 2010]; *accord Matter of Dakota W. [Kimberly X.]*, 189 AD3d 2004, 2005 [3d Dept 2020], *lv denied* 36 NY3d 911 [2021]).

Here, respondent [*2]failed to appear at the continued fact-finding hearing that had been scheduled for over a month, despite speaking with his counsel the morning of the hearing and advising her that he would be in attendance. Although he also told her that he was attending a funeral that morning, he did not request an adjournment or raise such claim at the dispositional hearing that he later attended. The continuation of the fact-finding hearing was pursuant to his request after he withdrew his intention to sign the prepared conditional judicial surrender documents. In scheduling the continuation, Family Court made it clear that the matter would proceed in his absence and reminded him of same two days before the hearing. More importantly, the child had been in foster care since before her first birthday and remained for over three years with a family that desired to adopt her. Respondent had not had contact with the child since November 2018 and the abandonment proceeding continued for nine months, wherein respondent failed to appear on two occasions and failed to contact his assigned counsel before a third appearance resulting in an adjournment. Under these circumstances, including our review of the record and the positions of the mother and the appellate attorney for the child, we cannot say that Family Court abused its discretion in failing to sua sponte grant an adjournment based on respondent's failure to appear and after balancing

respondent's interests against those of the child (*see Matter of Isaac YY. [Arielle YY.]*, 200 AD3d at 1509; *Matter of Dakota W. [Kimberly X.]*, 189 AD3d at 2005; *Matter of Jayden T. [Amy T.]*, 118 AD3d 1075, 1076 [3d Dept 2014]). We have considered the parties' remaining contentions and have found them to be without merit or rendered academic.

**Matter of Darius L.**, AD3d 2023 NY Slip Op 06581 (3rd Dept., 2023)

Appeal from an order of the Family Court of Ulster County (Keri E. Savona, J.), entered February 6, 2023, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject child to be abandoned, and terminated respondent's parental rights.

Respondent (hereinafter the father) is the father of the subject child (born in 2021). The father was incarcerated on the day the child was born, at which time the child was temporarily removed from the custody of his mother, on consent, after the child tested positive for THC and cocaine. The child has remained in petitioner's custody since that time. In May 2022, petitioner commenced this proceeding to terminate the father's parental rights based upon abandonment and commenced a separate proceeding against the mother on the same basis. At the ensuing fact-finding hearing encompassing both petitions, the father failed to appear, and his attorney advised that he had not had any contact with the father. The fact-finding hearing proceeded in the father's absence and Family Court ultimately determined, in relevant part, that the father had abandoned the child, and terminated his parental rights.**[FN1]** The father appeals.

We affirm. "A finding of abandonment is warranted when it is established by clear and convincing evidence that, during the six-month period immediately prior to the date of the filing of the petition, a parent evinces an intent to forego his or her parental rights as manifested by his or her failure to visit or communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by that agency. In this regard, a parent's ability to maintain contact with his or her child is presumed — including a parent who is incarcerated" (*Matter of Isaiah OO. [Benjamin PP.]*, 149 AD3d 1188, 1189 [3d Dept 2017] [internal quotation marks and citations omitted], *lv denied* 29 NY3d 913 [2017]; *see* Social Services Law § 384-b [5] [a]; *Matter of Joshua M. [Brittany N.]*, 167 AD3d 1268, 1269 [3d Dept 2018]). Once it is established that a parent has failed to maintain sufficient contact with a child for the statutory period, "the burden is upon the parent to prove an inability to maintain contact or that he or she was prevented or discouraged from doing so by the petitioning agency" (*Matter of Bradyen ZZ. [Robert A.]*, 216 AD3d 1229, 1230 [3d Dept 2023] [internal quotation marks and citations

omitted], *lv denied* 40 NY3d 905 [2023]; *see* Social Services Law § 384-b [5] [a]; *Matter of Kihona U. [Britian MM.]*, 200 AD3d 1425, 1425-1426 [3d Dept 2021]).

Petitioner's caseworker first contacted the father while he was incarcerated and provided the father with his contact information and advised him about the child's placement in a foster care program. The caseworker further advised the father that reunification with the child was the plan at that time. According to the caseworker, the father made an initial attempt to contact him in February [*2]2022 following his release from incarceration, but subsequent attempts to return the father's call were unsuccessful. The caseworker next heard from the father the following month and a visit with the child was scheduled. However, the caseworker's multiple attempts to confirm the father's scheduled visit went unanswered and the father ultimately cancelled the day of the scheduled visit, citing a work conflict. After multiple attempts to get in touch with the father to reschedule the visit, the caseworker next heard from the father once in April 2022 and once again in May 2022. All told, the caseworker testified that, prior to the abandonment petition being filed, the father had no contact with the child, having never sent a holiday card or gift, reached out to the foster parents to ask about the child or attended a doctor's appointment.

Upon our review, we find that the father's contact with petitioner in the six months preceding the petition "amounts to the sort of sporadic, infrequent and insubstantial contacts that this Court repeatedly has deemed to be insufficient to defeat a finding of abandonment" (*Matter of Isaiah OO. [Benjamin PP.]*, 149 AD3d at 1191 [internal quotation marks and citations omitted]; *see Matter of Joseph D. [Joseph PP.]*, 193 AD3d 1290, 1292 [3d Dept 2021]). The father offered no proof to rebut petitioner's case (*see Matter of Joshua M. [Brittany N.]*, 167 AD3d at 1271) and Family Court properly drew a negative inference on account of his failure to appear at the hearing (*see Matter of Dakota W. [Kimberly X.]*, 189 AD3d 2004, 2007 [3d Dept 2020], *lv denied* 36 NY3d 911 [2021]; *Matter of Kapreece SS. [Latasha SS.]*, 128 AD3d 1114, 1115-1116 [3d Dept 2015], *lv denied* 26 NY3d 903 [2015]). Accordingly, petitioner met its burden and Family Court properly determined that the father had abandoned the child (*see Matter of Micah L. [Rachel L.]*, 192 AD3d 1344, 1346 [3d Dept 2021]; *Matter of Jamal B. [Johnny B.]*, 95 AD3d 1614, 1615-1616 [3d Dept 2012], *lv denied* 19 NY3d 812 [2012]). Having failed to request a dispositional hearing, the father's contention that such a hearing was warranted is unpreserved and, in any event, without merit (*see Matter of Mahogany Z. [Wayne O.]*, 72 AD3d 1171, 1173 [3d Dept 2010], *lv denied* 14 NY3d 714 [2010]). The father's remaining contentions, to the extent not addressed herein, have been considered and found without merit.

# Permanent Neglect

**Matter of Donaisha B.**, 218 AD3d 565 (2nd Dept., 2023)

In related proceedings pursuant to Social Services Law § 384-b, the mother appeals from an order of disposition of the Family Court, Kings County (Ilana Gruebel, J.), dated August 24, 2022. The order of disposition, upon an order of fact-finding of the same court dated August 5, 2022, entered upon the mother's failure to appear at a fact-finding hearing, finding that the mother permanently neglected the subject children, and after a dispositional hearing, in effect, terminated the mother's parental rights and transferred guardianship and custody of the subject children to the petitioner for the purpose of adoption.
ORDERED that the appeal is dismissed, without costs or disbursements, except with respect to matters which were the subject of contest (*see* CPLR 5511; *Matter of Justyn H. [Laverne H.]*, 191 AD3d 876); and it is further,

ORDERED that the order of disposition is affirmed insofar as reviewed, without costs or disbursements.

The petitioner commenced these proceedings pursuant to Social Services Law § 384-b [*2]to terminate the mother's parental rights to the subject children on the ground of permanent neglect. The mother failed to appear at a fact-finding hearing and a continued fact-finding hearing, and her attorney did not participate after the Family Court denied his requests for an adjournment. After the fact-finding hearing, the court found that the petitioner had shown, by clear and convincing evidence, that the mother permanently neglected the children and noted that the court drew the strongest negative inference against the mother for her failure to appear at the fact-finding hearing. After a dispositional hearing, the court found that it was in the best interests of the children to free them for adoption. In an order of disposition dated August 24, 2022, the court, in effect, terminated the mother's parental rights and transferred guardianship and custody of the children to the petitioner for the purpose of adoption. The mother appeals.

The appeal from so much of the order of disposition as brings up for review the Family Court's finding of permanent neglect of the children by the mother must be dismissed. The mother failed to appear at the fact-finding hearing, and although her attorney was present at the hearing, he did not participate. Since no appeal lies from an order that is entered on the default of the appealing party, the finding of permanent neglect cannot be reviewed (*see* CPLR 5511; *Matter of Devon W. [Lavern D.]*, 127 AD3d 1098, 1099; *Matter of Alexandria M. [Mattie M.]*, 108 AD3d 548, 549).

Contrary to the mother's contention, the Family Court providently exercised its discretion in denying her attorney's requests for adjournments of the fact-finding hearing in light of the mother's failure to provide a reasonable explanation for her failure to attend, the merits of the proceedings, and the effect the adjournments would have on the children by prolonging the proceedings (*see Matter of Serenity C.W. [Antoinette W.]*, 158 AD3d 716, 717; *Matter of Demetrious L.K. [James K.]*, 157 AD3d 796, 797; *Matter of Sanaia L. [Corey W.]*, 75 AD3d 554, 555).

The Family Court properly found, by a preponderance of the evidence adduced at the dispositional hearing, at which the mother testified, that it was in the best interests of the children to free them for adoption, as the children had been in their respective foster homes for a prolonged period of time and had developed positive and nurturing relationships with their foster parents, they did not want to return to the mother's care or to have contact with the mother, and the mother had not seen the children for approximately two years prior to the dispositional hearing (*see Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d 952, 955; *Matter of Dariuss M.D.-B. [Darnell B.]*, 187 AD3d 904, 906-907).

The remaining contention of the attorney for the children is without merit.

**Matter of Aiden N. S. G.**, 218 AD3d 576 (2nd Dept., 2023)

In related proceedings pursuant to Social Services Law § 384-b to terminate parental rights on the ground of permanent neglect, the mother appeals from two orders of disposition of the Family Court, Richmond County (Alison Hamanjian, J.) (one as to each child), both dated August 10, 2022. The orders of disposition, insofar as appealed from, after fact-finding and dispositional hearings, and upon an order of fact-finding of the same court dated January 31, 2022, terminated the mother's parental rights and transferred guardianship and custody of the subject children to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption.
ORDERED that the orders of disposition are affirmed insofar as appealed from, without costs or disbursements.

The petitioner commenced these proceedings pursuant to Social Services Law § 384-b to terminate the mother's parental rights to the subject children on the ground of permanent neglect. After fact-finding and dispositional hearings, the Family Court found that the mother had permanently neglected the children, terminated her parental rights,

and transferred custody and guardianship of the children to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The mother appeals.

The Family Court properly found that the mother permanently neglected the children. The petitioner established, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the parental relationship by issuing numerous referrals for the mother to [*2]submit to drug testing, referring the mother to an inpatient drug treatment program, and repeatedly reminding her of the importance of complying with her service plan (*see id.* § 384-b[7][a]; *Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 429). Despite these efforts, the mother failed to plan for the children's future by failing to comply with the overwhelming majority of drug testing referrals and failing to enroll in inpatient treatment. Moreover, the mother tested positive for illegal drugs twice. She also failed to stay in regular contact with the designated caseworker, and to notify the petitioner of changes in her residence (*see Matter of Jacqueline E.S.B. [Daniel B.]*, 160 AD3d 828, 829; *Matter of Laura F.*, 48 AD3d 812, 812).

The Family Court also properly determined that it was in the best interests of the children to terminate the mother's parental rights and to free the children for adoption (*see* Family Ct Act § 631; *Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d at 430-431).

**Matter of Harlem H. H.**, 218 AD3d 579 (2nd Dept., 2023)

In a proceeding pursuant to Social Services Law § 384-b, the father appeals from (1) an order of fact-finding and disposition of the Family Court, Westchester County (Michelle I. Schauer, J.), dated January 28, 2022, and (2) an order of the same court dated March 29, 2022. The order of fact-finding and disposition, after fact-finding and dispositional hearings, and upon the father's failure to appear at the fact-finding hearing, found that the father permanently neglected the subject child, terminated the father's parental rights, and transferred guardianship and custody of the child to the petitioner for the purpose of adoption. The order dated March 29, 2022, denied the father's motion to vacate his default in appearing at the fact-finding hearing.
ORDERED that the appeal from so much of the order of fact-finding and disposition as found that the father permanently neglected the subject child is dismissed, without costs or disbursements; and it is further,

ORDERED that the order of fact-finding and disposition is affirmed insofar as reviewed, without costs or disbursements; and it is further,

ORDERED that the order dated March 29, 2022, is affirmed, without costs or disbursements.

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b to terminate the father's parental rights to the subject child on the ground of permanent neglect. The petition was based, in part, on the father's "fail[ure] to provide a viable plan for the future of the subject child including his failure to be an appropriate resource[ ] for the child based on his current state of incarceration for the next 23 years." The Family Court thereafter scheduled a fact-finding hearing and issued an order to have the father produced from prison. The father failed to appear at the fact-finding hearing, and his attorney remained mute at the hearing. After the fact-finding [*2]hearing, the court determined that the petitioner established, by clear and convincing evidence, that the father permanently neglected the child, and noted that the court drew a negative inference against the father for his failure to appear. At a dispositional hearing, the father appeared and testified, inter alia, that he did not wish for the child to be adopted. After the dispositional hearing, the court found that it was in the best interests of the child to terminate the father's parental rights. In an order of fact-finding and disposition dated January 28, 2022, the court found that the father permanently neglected the child, terminated the father's parental rights, and transferred guardianship and custody of the child to the petitioner for the purpose of adoption. Thereafter, the father moved to vacate his default in appearing at the fact-finding hearing. The court denied the motion. The father appeals from the order of fact-finding and disposition and from the order denying his motion to vacate.

The appeal from so much of the order of fact-finding and disposition as found that the father permanently neglected the child must be dismissed, since that portion of the order of fact-finding and disposition was issued upon the father's failure to appear at the fact-finding hearing, and no appeal lies from an order made on the default of the appealing party (*see* CPLR 5511; *Matter of Mercury A.F. [Stephanie T.F.]*, 215 AD3d 832, 832).

The determination of whether to relieve a party of a default is within the sound discretion of the Family Court (*see Matter of Caden Y.L. [Kathy L.]*, 198 AD3d 780, 781; *Matter of Brandon G. [Tiynia M.]*, 155 AD3d 626, 626). A parent seeking to vacate a default in a proceeding for the termination of parental rights must establish a reasonable excuse for the default and a potentially meritorious defense to the relief sought in the petition (*see* CPLR 5015[a][1]; *Matter of Caden Y.L. [Kathy L.]*, 198 AD3d at 781; *Matter of Kamiyah D.B.V. [Myron B.]*, 168 AD3d 752, 753). Here, the father failed to meet his burden of establishing a potentially meritorious defense to the relief sought at the fact-finding hearing. The father failed to demonstrate that the petitioner did not engage in diligent efforts to encourage and strengthen the parental relationship (*see* Social

Services Law § 384-b; *Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 430-431) and the father's proffered plan for the child, which amounted to the child remaining in foster care until the father's release from prison, was inadequate (*see Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d at 431; *Matter of Ricardo T., Jr. [Ricardo T., Sr.]*, 191 AD3d 890, 891; *Matter of Jenna K. [Jeremy K.]*, 132 AD3d 995, 996).

To the extent that the father contends that his due process rights were violated, this contention is without merit. Although "[a]bsent unusual justifiable circumstances, a parent's rights should not be terminated without his or her presence at the hearing" (*Matter of Brandon Robert LaC.*, 26 AD3d 211, 212), under the circumstances presented here, the Family Court did not improvidently exercise its discretion in conducting the fact-finding hearing in the father's absence (*see Matter of Jesse XX. v Danielle YY.*, 173 AD3d 1277, 1277-1279; *cf. Matter of Kendra M.*, 175 AD2d 657).

Accordingly, the Family Court providently exercised its discretion in denying the father's motion to vacate his default in appearing at the fact-finding hearing.

The father's remaining contentions are without merit.

**Matter of Willow K.,** 218 AD3d 851 (3rd Dept., 2023)

Appeal from an order of the Family Court of Chemung County (Mary M. Tarantelli, J.), entered September 29, 2021, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject child to be permanently neglected, and terminated respondent's parental rights.
Respondent is the mother of the subject child, who was removed from respondent's care upon her birth in October 2018 and placed in a kinship foster home with respondent's adoptive mother (hereinafter the grandmother) and older half sibling (hereinafter the older child; born in 2016). Pertinent in that regard, a neglect case against respondent regarding the older child had been terminated in March 2018 in conjunction with an order awarding custody of the older child to the grandmother on consent of the parties (*see* Family Ct Act § 1055-b). The older child has visitation with respondent pursuant to this arrangement. In April 2019, respondent consented to a neglect finding with respect to the subject child and a one-year order of supervision was entered upon various terms and conditions.

Petitioner commenced this permanent neglect proceeding seeking to terminate respondent's parental rights just 10 months after entry of the April 2019 consent order (*see* Social Services Law § 384-b [7] [a]).**[FN1]** The petition alleged, among other things, that despite petitioner's attempts to provide respondent with preventative services tailored to ameliorate the issues leading to removal, she had not been fully compliant,

had severe unresolved mental health issues, had missed several visits with the child, and had unstable housing. Following a fact-finding hearing, Family Court adjudged the child permanently neglected, finding that respondent failed to properly plan for the child's future despite petitioner's diligent efforts toward reunification.[FN2] After a dispositional hearing, respondent's parental rights were terminated and the child was freed for adoption. Respondent appeals.

Respondent — joined by the attorney for the child (hereinafter AFC) — argues that petitioner did not prove by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship. To that end, " '[a] permanently neglected child is one who is in the care of an authorized agency and whose parent has failed, for at least one year after the child came into the agency's care, to substantially and continuously or repeatedly plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship' " (*Matter of Issac Q. [Kimberly R.]*, 212 AD3d 1049, 1050 [3d Dept 2023], *lv denied* 39 NY3d 913 [2023], quoting Matter of Leon YY. [Christopher ZZ.], 206 AD3d 1093, 1094 [3d Dept 2022]; *accord* Social Services Law § 384-b [7] [a]). The threshold inquiry in a proceeding to terminate parental rights on the ground of permanent neglect is whether [*2]the petitioning agency made diligent efforts toward reunification (*see Matter of Rhiannon D. [Dari L.]*, 215 AD3d 964, 965 [2d Dept 2023]) — meaning "reasonable attempts . . . to assist, develop and encourage a meaningful relationship between the parent and child" (Social Services Law § 384-b [7] [f]).

The petitioning agency "bears the burden of proving . . . that such diligent efforts were made," and must do so by clear and convincing evidence (*Matter of Issac Q. [Kimberly R.]*, 212 AD3d at 1051; *see Matter of Jase M. [Holly N.]*, 190 AD3d 1238, 1240 [3d Dept 2021], *lvs denied* 37 NY3d 901 [2021]). To satisfy that burden, the agency "must develop a plan that is realistic and tailored to fit [the] respondent's individual situation" (*Matter of Jesus JJ.*, 232 AD2d 752, 753 [3d Dept 1996], *lv denied* 89 NY2d 809 [1997]; *see Matter of Sheila G.*, 61 NY2d 368, 385 [1984]), and "make affirmative, repeated, and meaningful efforts to assist the parent in overcoming these handicaps" (*Matter of Sheila G.*, 61 NY2d at 385). The petitioning agency "should mold its diligent efforts to fit the individual circumstances so as to allow the parent to provide for the child's future' " (*Matter of Austin A.,* 243 AD2d 895, 897 [3d Dept 1997] [internal quotation marks and citation omitted]).

Pertinent here, the April 2019 "terms and conditions" placed upon respondent required, among other things, that she "undergo a complete mental health evaluation by a licensed professional approved by [petitioner]"; engage in a domestic violence program; attend all of the child's medical appointments and all scheduled visitation; and

"successfully complete Family Services of Chemung County's Protective Parenting Program." We agree with respondent and the AFC that petitioner did not prove, by clear and convincing evidence, that it made diligent efforts to assist respondent in satisfying these conditions.

At the outset, we recognize that petitioner did make some efforts which, under different circumstances, might be considered "diligent" within the meaning of Social Services Law § 384-b (7) (f). The problem here, however, is that they were not sufficiently tailored to respondent's particular needs. The core issue in this case concerns respondent's mental health, which includes longstanding behavioral disorders as well as a cognitive disability due to a traumatic brain injury she suffered as a child. The record does establish that respondent received mental health counseling throughout the period preceding commencement of this permanent neglect proceeding, but petitioner failed, as a threshold matter, to have a "complete mental health evaluation" performed as directed by the terms and conditions. Instead, petitioner relied on a piecemeal approach that was not appropriate for respondent's circumstances. To that end, respondent received services from a mental health therapist between July 2018 and August 2019; a licensed master social worker (hereinafter LMSW) between October 2019 and February [*3]2020; and a licensed clinical social worker (hereinafter LCSW) who began counseling respondent in March 2020. Unfortunately, there was a lack of consensus among these providers as to respondent's mental health diagnoses, as well as conflicting evidence about the extent of her cognitive disability. Although these providers were aware of respondent's disability, the mental health therapist characterized it as "mild" based upon a "report . . . on her file." Other evidence — including the fact that respondent has worked with Adult Protective Services (hereinafter APS) since she was 18 years old,[FN3] has a representative payee, and was a recipient of Supplemental Security Income benefits — calls this characterization into question. In addition, the grandmother revealed that respondent has a "pervasive developmental disorder," which was explained as a "combination of autism spectrum disorder and intermittent explosive disorder." The point made is that there was conflicting evidence about the extent of respondent's cognitive disability, yet no evidence that petitioner took proactive steps to ascertain the severity of it and to determine whether her service providers were equipped to provide the level of care she needed (*see generally Matter of Xavier Blade Lee Billy Joe S. [Josefina S.]*, 187 AD3d 659, 660 [1st Dept 2020]).

Particularly concerning is the LMSW's testimony that, upon referral, he was not provided with "any type of a diagnosis," explaining that respondent "presented by herself." He further explained that, after working with respondent, he ultimately diagnosed her with "complex post traumatic stress disorder" (hereinafter CPTSD) — also commonly referred to as borderline personality disorder — and that his services "were trauma focused, primarily anger management services." Although counseling with

the LMSW ended shortly after a December 17, 2019 volatile session involving respondent and the caseworker, he did testify that respondent was aware of her limitations and "motivated to have her CPTSD addressed. She understood all of her symptoms." The LCSW, who had a different understanding of respondent's diagnoses, was also focused on anger management issues, and explained that, due to limited virtual sessions necessitated by the COVID-19 pandemic, respondent had yet to reach a point of "consistent stabilization" but was able to "use coping skills and calm herself back down." She further noted that she could focus on "individual cognitive behavioral issues" with respondent, but that respondent required further treatment that would have to be provided by others. In effect, the record reveals that respondent was cognizant of her behavioral issues and that, even with the piecemeal approach utilized, she was making progress. Had petitioner initiated a full mental health evaluation up front to determine the precise nature of respondent's mental health diagnoses and the severity of her cognitive disability, she may well have made further progress by the [*4]time of the hearing. That is particularly so given that respondent obtained secure housing by July 2019 and began a stable relationship with an individual whom she married in April 2021.

As for other efforts made in this case, the caseworker confirmed that the case plan utilized was "substantially similar or the same as the terms and conditions for the [older] child," yet there was no evidence that petitioner took any steps to reassess the appropriateness of such plan following the subject child's birth. With respect to visitation, petitioner at one point referred respondent to an organization called Pathways, Inc. to facilitate supervised visitation. However, there is evidence in the record that, between January 2021 and June 2021, respondent's visits — which were supposed to occur twice per week — were frequently canceled by the visitation coach through no fault of respondent, including a visit that was supposed to occur on respondent's wedding day. The record also contains evidence demonstrating that, during this time frame, the visitation coach was quick to deem respondent's visits forfeited if she did not confirm them within a strict 6:00 p.m. to 6:00 a.m. timeframe, including on one occasion when respondent confirmed her visit at 4:41 p.m. the day prior and then confirmed her visit again at 6:58 a.m. that morning. We also note that, when one of respondent's visitation coaches was asked whether she had engaged in "any discussion or any thought process [about] how to teach [parenting] skills [to respondent] in a way . . . [that she] [w]as able to understand given her disabilities," the visitation coach confirmed that she had not, explaining that she speaks to respondent "like [she] would speak to anybody" else. This is yet another example of petitioner's failure to take proactive steps to ensure that the service providers respondent was working with were equipped to handle her unique needs.

Petitioner also did not exercise diligent efforts to provide respondent with appropriate housing services. In that respect, the record does confirm that respondent was referred by APS to a facility called Bragg Towers — a complex for people with disabilities — in or around July 2019 and that she moved into a one-bedroom apartment there. However, Bragg Towers did not allow children to reside there and when respondent told her caseworker that she wanted to obtain alternative housing where her children could also reside, the caseworker did not make any efforts to assist her in this regard, instead taking the position that respondent was not "at the point where the children were going to return home."

The efforts made to enable respondent to participate in a protective parenting course offered by Family Services of Chemung County, as required by her terms and conditions, were similarly inadequate. It is clear from the record that one of the primary concerns regarding respondent's ability to care for the subject child was her ability to control her anger. [*5]Petitioner's initial caseworker made clear during the fact-finding hearing that completing a protective parenting program was crucial to enable respondent to gain necessary anger management skills, and that the caseworker expected the course to be completed at Family Services. Nevertheless, Family Services refused to accept respondent into the program and the caseworker did not refer her to an alternative program at that time, blaming her failure to do so on the fact that she "[could not] get that far because [respondent] was so angry at [her] all the time." That same caseworker, who left her employment in January 2020, testified that "we didn't get a chance to make the plan." As a result, respondent was unable to complete a key anger management program because the provider linked in the "terms and conditions" refused to allow her to participate. Compounding the problem, petitioner failed to implement an alternative plan through January 2020, but then filed the permanent neglect proceeding the next month. Such efforts cannot be characterized as diligent.

On this record, we conclude that petitioner did not satisfy its burden of proving, by clear and convincing evidence, that it made diligent efforts toward reunification that were sufficiently tailored to respondent's circumstances (*see Matter of Xavier Blade Lee Billy Joe S. [Josefina S.]*, 187 AD3d at 660; *Matter of Olivia L*., 41 AD3d 1226, 1227 [4th Dept 2007]; *Matter of Austin A.*, 243 AD2d at 898). Accordingly, the permanent neglect finding must be reversed and the matter remitted for further proceedings. On remittal, we encourage the parties to address the disparity between the subject child's case and the older child's case. It is difficult to comprehend why petitioner has not attempted to facilitate for the subject child the same Family Ct Act article 6 custody agreement that is in place for the older child, pursuant to which the older child has visitation with respondent. The failure to do so has created an untenable situation where the two children, who are bonded and live with the same custodian, are treated differently on essentially the same facts.

Clark, Pritzker, Reynolds Fitzgerald and Fisher, JJ., concur.

ORDERED that the order is reversed, without costs, and matter remitted to the Family Court of Chemung County for further proceedings not inconsistent with this Court's decision.

**Footnote 1:** The subject child's father had surrendered his parental rights by that time.

**Footnote 2:** We note that a section of the fact-finding order — which concludes that respondent failed to plan for the subject child's future — refers to three children who are not the subject of this proceeding.

**Footnote 3:** Respondent's APS caseworker noted that he had "never read a formal report" on respondent's disability.

**Matter of Jayson C.**, 219 AD3d 949 (2nd Dept., 2023)

In related proceedings pursuant to Social Services Law § 384-b, the mother appeals from an amended order of fact-finding of the Family Court, Kings County (Jacqueline B. Deane, J.), dated March 1, 2022, and an order of disposition of the same court, also dated March 1, 2022, and the father appeals from an order of fact-finding of the same court dated November 30, 2020, a separate order of disposition of the same court, also dated March 1, 2022, and two orders of disposition of the same court (one as to each child), both dated June 14, 2022. The amended order [*2]of fact-finding dated March 1, 2022, after a hearing, found that the mother permanently neglected the subject children. The first order of disposition dated March 1, 2022, upon the amended order of fact-finding dated March 1, 2022, after a hearing, terminated the mother's parental rights and transferred guardianship and custody of the subject children to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The order of fact-finding dated November 30, 2020, after a hearing, found that the father's consent to the adoption of the subject children was not required and, in the alternative, that the father abandoned and permanently neglected the subject children. The second order of disposition dated March 1, 2022, insofar as appealed from, upon the order of fact-finding dated November 30, 2020, after a hearing, terminated the mother's parental rights and transferred guardianship and custody of the subject children to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The orders of disposition dated June 14, 2022, inter alia, transferred custody of the subject children to

the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption.
ORDERED that on the Court's own motion, the mother's notice of appeal is deemed to be a premature notice of appeal from the orders of disposition dated June 14, 2022 (*see* CPLR 5520[a]); the mother's appeals from the orders of disposition dated June 14, 2022, shall be prosecuted under Appellate Division Docket Nos. 2022-05233 and 2023-05143, and not under Appellate Division Docket Nos. 2022-01571 and 2022-01573; and it is further,

ORDERED that the father's appeal from the order of fact-finding dated November 30, 2020, is dismissed, without costs or disbursements, as no appeal lies from a nondispositional order in a proceeding pursuant Social Services Law § 384-b (*see* Family Ct Act § 1112; *Matter of Sheldon D.G.*, 6 AD3d 613; *see also Matter of Alyssa L. [Deborah K.]*, 93 AD3d 1083, 1084-1085); and it is further,

ORDERED that the father's appeal from the second order of disposition dated March 1, 2022, is dismissed, without costs or disbursements, as that order was superseded by the orders of disposition dated June 14, 2022; and it is further,

ORDERED that the orders of disposition dated June 14, 2022, are affirmed, without costs or disbursements.

The appellants, Kimberly C. (hereinafter the mother) and Jayson C. (hereinafter the father), are the parents of the subject children, Jayson C., Jr., and Nathaniel C., born in 2009 and 2010, respectively. The father has been incarcerated since 2010. In 2012, a finding of neglect was entered against the mother based upon her failure to protect the children from abuse by her then-partner, and the children were removed from her care. The children subsequently were returned to the mother's care, but were again removed from her care in 2014 for failing to protect the children from abuse by a different partner. The children were placed together in foster care and have remained with the same foster parents since 2014.

In 2017, the petitioner commenced these proceedings, inter alia, to terminate parental rights, alleging, among other things, that the mother had permanently neglected the children and that the father's consent to the adoption of the children was not required, or, in the alternative, that the father had abandoned and permanently neglected the children.

Following a fact-finding hearing, the Family Court found that the father's consent to the adoption of the children was not required, and, in the alternative, that the father had abandoned and permanently neglected the children. After a separate fact-finding hearing, the court found that the mother permanently neglected the children. Upon those findings, and after a dispositional hearing, the court terminated the mother's

parental rights and transferred guardianship and custody of the subject children to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The father and the mother appeal.

Contrary to the mother's contention, the petitioner established, by clear and convincing evidence, that, despite its diligent efforts to encourage and strengthen the parental relationship between the mother and the children, the mother failed to adequately plan for the children's future (*see* Social Services Law § 384-b[7][a]; *Matter of Abbygail H.M.G. [Eddie G.]*, 205 AD3d 913, 914). "At a minimum, planning for the future of the [children] requires the parent to take steps to correct the conditions that led to the [children's] removal from the home" (*Matter of Frankie L. [Dustin L.]*, 141 AD3d 657, 658 [internal quotation marks omitted]). "A parent's efforts to remedy the conditions which resulted in . . . removal are clearly unsatisfactory when they consist of a mere denial of all culpability or responsibility for past conduct" (*Matter of Amy B.*, 37 AD3d 600, 601; *see Matter of Frankie L. [Dustin L.]*, 141 AD3d at 658). Here, the evidence at the fact-finding hearing showed that the mother failed to gain insight into the problems that caused the children's removal and that were preventing the children's return to her care (*see Matter of Frankie L. [Dustin L.]*, 141 AD3d at 658; *Matter of Shamika K.L.N. [Melvin S.L.]*, 101 AD3d 729, 731; *Matter of Dariana K.C. [Katherine M.]*, 99 AD3d 899, 901).

Further, the record supports the Family Court's determination that the best interests of the children would be served by terminating parental rights and freeing them for adoption by their foster parents, with whom they have bonded and resided over a prolonged period of time (*see Matter of Elizabeth M.G.C. [Maria L.G.C.]*, 190 AD3d 730, 732).

Contrary to the father's contention, viewed in totality, the record reflects that he received meaningful representation (*see Matter of Fatoumata A.C. [Amadou C.]*, 206 AD3d 991, 992). Further, he was not denied his right to counsel or deprived of due process. "A parent's right to be present for fact-finding and dispositional hearings in proceedings to terminate parental rights is not absolute" (*Matter of Sean P.H. [Rosemarie H.]*, 122 AD3d 850, 850-851; *see Matter of Lillian D.L.*, 29 AD3d 583, 584). "The child whose guardianship and custody is at stake also has a fundamental right to a prompt and permanent adjudication" (*Matter of Sean P.H. [Rosemarie H.]*, 122 AD3d at 851; *see Matter of Lillian D.L.*, 29 AD3d at 584). "Thus, when faced with the unavoidable absence of a parent, a court must balance the respective rights and interests of both the parent and the child in determining whether to proceed" (*Matter of Sean P.H. [Rosemarie H.]*, 122 AD3d at 851; *see Matter of Lillian D.L.*, 29 AD3d at 584). Here, the Family Court struck the appropriate balance between those competing rights and interests and took appropriate measures to protect the father's rights.

Accordingly, we affirm the orders of disposition dated June 14, 2022.

**Matter of Kamiah J. N. H.**, 220 AD3d 861 (2nd Dept., 2023)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from an order of fact-finding and disposition of the Family Court, Kings County (Ilana Gruebel, J.), dated May 6, 2022. The order of fact-finding and disposition, insofar as appealed from, upon a decision of the same court dated November 29, 2021, made after a fact-finding hearing, and upon a decision of the same court dated April 8, 2022, made after a dispositional hearing, found that the mother permanently neglected the subject child, terminated the mother's parental rights, and transferred custody and guardianship of the child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.
ORDERED that the order of fact-finding and disposition is affirmed insofar as appealed from, without costs or disbursements.

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b to terminate the mother's parental rights to the subject child on the ground of permanent neglect. After fact-finding and dispositional hearings, the Family Court found, inter alia, that the mother had permanently neglected the child, terminated her parental rights, and transferred custody and guardianship of the child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother appeals, arguing, in substance, that the court erred in determining that the petitioner met its burden at the fact-finding hearing to establish it fulfilled its statutory duty to make diligent efforts to encourage and strengthen the parent-child relationship between the mother and the child.

As an initial matter, contrary to the mother's contention, the Family Court applied the correct legal standard for determining whether the petitioner exercised diligent efforts to strengthen the parental relationship under Social Services Law § 384-b. "[B]efore terminating a parent's rights the State must first attempt to reunite the parent with [his or] her child. Thus, the threshold inquiry by the court in any neglect proceeding must be whether the agency exercised diligent efforts to strengthen the parental relationship" (*Matter of Star Leslie W.*, 63 NY2d 136, 142; *see Matter of Sheila G.*, 61 NY2d 368, 380-381; *Matter of Shimon G. [Batsheva G.]*, 206 AD3d 732, 733). "Those efforts must include counseling, making suitable arrangements for visitation, providing [*2]assistance to the parents to resolve or ameliorate the problems preventing discharge of the child to their care and advising the parent at appropriate intervals of the child's progress and development" (*Matter of Star Leslie W.*, 63 NY2d at 142; *see* Social Services Law § 384-b[7][f]; *Matter of Shimon G. [Batsheva G.]*, 206 AD3d at 733). "An agency must always determine the particular problems facing a parent with respect to the return of his or her child and make affirmative, repeated, and meaningful efforts to assist the parent in overcoming these handicaps" (*Matter of Sheila G.*, 61 NY2d at 385; *see*

*Matter of Gabriel B.S.-P. [Franklin S.]*, 136 AD3d 619, 622; *see also Matter of Xavier Blade Lee Billy Joe S. [Josefina S.]*, 187 AD3d 659, 660; *Matter of Michael E.*, 241 AD2d 635, 637).

Here, the petitioner established, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the relationship between the mother and the child. These efforts included, inter alia, scheduling twice-weekly parental access, referring the mother to services she needed in order to complete her service plan, helping her to obtain services through the Office of People with Developmental Disabilities, and reminding her regularly of the necessity to visit with the child and complete the services (*see Matter of Shimon G. [Batsheva G.]*, 206 AD3d at 733-34; *Matter of Marthina S.J.Z.H.-B.R. [Calvin R.]*, 198 AD3d 655, 657; *Matter of Dariuss M.D.-B. [Darnell B.]*, 187 AD3d 904, 906).

Despite these efforts, the record demonstrates that the mother failed to consistently attend her mental health therapy sessions and missed scheduled visits with the child without adequate explanation (*see Matter of Sheila G.*, 61 NY2d at 385). In sum, the Family Court did not err in determining, as a threshold matter, that the petitioner fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship (*see id.*).

Accordingly, we affirm the order of fact-finding and disposition insofar as appealed from.

**Nevaeh N.,** 220 AD3d 1070 (3rd Dept., 2023)

Appeal from an order of the Family Court of Cortland County (Julie A. Campbell, J.), entered December 28, 2021, which granted petitioner's applications, in two proceedings pursuant to Social Services Law § 384-b, to adjudicate the subject child to be permanently neglected, and terminated respondents' parental rights.
Respondent Heidi O. and respondent Cornelius N. (hereinafter the father) are the parents of a child (born in 2020). The child was removed from respondents' custody when the child was four days old because respondents were abusing drugs and had inappropriate housing. In 2021, petitioner commenced these proceedings seeking termination of respondents' parental rights on the basis of permanent neglect. Following fact-finding and dispositional hearings, Family Court found that the child was permanently neglected and terminated respondents' parental rights. This appeal ensued.

Regarding the adjudication of permanent neglect, petitioner bore the burden of proving by clear and convincing evidence that, first, it made diligent efforts to encourage and strengthen the relationship between respondents and the child and that, second,

respondents failed to adequately plan for the child's future despite being able to do so (*see Matter of Isaac Q. [Kimberly R.]*, 212 AD3d 1049, 1050-1051 [3d Dept 2023], *lv denied* 39 NY3d 913 [2023]; *Matter of Timothy GG. [Meriah GG.]*, 163 AD3d 1065, 1070 [3d Dept 2018], *lvs denied* 32 NY3d 908 [2018], 32 NY3d 908 [2018]). As to the initial evidentiary requirement, the fact-finding hearing testimony reflects that petitioner arranged visitation between the child and respondents through a third-party agency and that respondents were referred to parenting classes and counseling for mental health and substance abuse issues. A caseworker with petitioner testified that she kept apprised of respondents' progress from the relevant agencies, arranged progress meetings with respondents and communicated with them to keep them engaged with classes or counseling. The caseworker also testified that services were provided to respondents so that they could obtain suitable and safe housing and that she gave them bus passes or drove them herself to assist them with transportation. In view of the foregoing, petitioner met its threshold burden (*see Matter of Dawn M. [Michael M.]*, 174 AD3d 972, 973-974 [3d Dept 2019], *lv denied* 34 NY3d 907 [2020]; *Matter of Kapreece SS. [Latasha SS.]*, 128 AD3d 1114, 1115 [3d Dept 2015], *lv denied* 26 NY3d 903 [2015]).

Petitioner also established by clear and convincing evidence that respondents failed to adequately plan for the child's future despite being able to do so (*see Matter of Isabella H. [Richard I.],* 174 AD3d 977, 980-981 [3d Dept 2019]; *Matter of Kapreece SS. [Latasha SS.]*, 128 AD3d at 1115; *Matter of Aniya L. [Samantha L.]*, 124 AD3d 1001, 1005 [3d Dept 2015], *lv denied* 25 NY3d 904 [2015]). The record discloses that respondents missed at least half of the scheduled visitations with the child[*2]. Multiple times, respondents did not call the agency to advise it that they would not be coming in for a scheduled visitation and, on one occasion, respondents missed visitation because they overslept. During one visitation, the father was under the influence of an illicit substance and, during another one, the father only engaged sporadically with the child. Respondents also did not complete the offered substance abuse or mental health counseling and missed multiple parenting classes. Indeed, they were both unsuccessfully discharged from substance abuse counseling, and the father admitted that he "just didn't feel like doing it." The testimony from the fact-finding hearing also reflects that respondents failed to obtain suitable housing and did not attend some family team meetings. Accordingly, the determination that respondents permanently neglected the child is supported by a sound and substantial basis in the record (*see Matter of Isaac Q. [Kimberly R.]*, 212 AD3d at 1053; *Matter of Isabella H. [Richard I.]*. 174 AD3d at 981; *Matter of Summer G. [Amy F.]*, 93 AD3d 959, 961 [3d Dept 2012]).

The father's argument that Family Court erred in taking judicial notice of prior neglect proceedings and orders that involved him, as well as his prior criminal convictions, is unpreserved in the absence of a timely objection (*see Matter of Benjamin v Benjamin*,

48 AD3d 912, 914 [3d Dept 2008]). Regardless, even if preserved, any error by the court was harmless (*see Matter of Jase M. [Holly N.]*, 190 AD3d 1238, 1242 [3d Dept 2021], *lvs denied* 37 NY3d 901 [2021]; *Matter of Anjoulic J.*, 18 AD3d 984, 987 [3d Dept 2005]; *Matter of Justin EE.*, 153 AD2d 772, 774 [3d Dept 1989], *lv denied* 75 NY2d 704 [1990]). The father also argues that the court erred in admitting certain substance abuse treatment records because they lacked a certification required by Family Ct Act § 1046 (a) (iv). The certification requirement of that statute, however, does not apply to the instant proceedings, which seek the termination of parental rights under Social Services Law § 384-b (*see Matter of Shirley A.S. [David A.S.]*, 90 AD3d 1655, 1655 [4th Dept 2011], *lv denied* 18 NY3d 811 [2012]). Even if the court erred in admitting these records, it was harmless error.

"Following an adjudication of permanent neglect, the sole concern at a dispositional hearing is the best interests of the child, and there is no presumption that any particular disposition, including the return of a child to a parent, promotes such interests" (*Matter of Zaiden P. [Ashley Q.]*, 211 AD3d 1348, 1355 [3d Dept 2022] [internal quotation marks, brackets and citations omitted], *lv denied* 39 NY3d 911 [2023], *lv denied* 39 NY3d 911 [2023]). The caseworker testified at the dispositional hearing that respondents did not seem to understand why the child was removed from their care. The evidence further discloses that respondents did not consistently engage in substance abuse or mental health counseling, parenting classes or visitation [*3]with the child. Although respondents blamed the lack of transportation as an excuse for missing counseling classes or visitation with the child, the caseworker testified that she provided respondents with bus passes. Notably, Family Court did not credit respondents' excuse and found that respondents were no closer to being able to care for the child than they were when the child was removed from their custody. Meanwhile, at the time of the dispositional hearing, the child had resided with her foster parent for four months. The foster parent testified that the child had no issues transitioning into her care, was healthy and got along with the other children in the household. The foster parent also expressed a willingness to be an adoptive resource for the child, and the caseworker testified that she did not have any concerns about the foster parent's home or ability to meet the child's needs. Based on the foregoing, and deferring to the court's choice among dispositional options, the decision to terminate respondents' parental rights will not be disturbed (*see Matter of Jahvani Z. [Thomas V.-Mariah Z.]*, 168 AD3d 1146, 1151 [3d Dept 2019], *lv denied* 33 NY3d 902 [2019]; *Matter of Keadden W. [Hope Y.]*, 165 AD3d 1506, 1509 [3d Dept 2018], *lv denied* 32 NY3d 914 [2019]; *Matter of Zyrrius Q. [Nicole S.]*, 161 AD3d 1233, 1235 [3d Dept 2018], *lv denied* 32 NY3d 903 [2018]). The remaining contentions have been considered and are unavailing.

Lynch, J.P., Clark, Pritzker and Ceresia, JJ., concur.

ORDERED that the order is affirmed, without costs.

**Matter of Destiny F. S. J.**, 221 AD3d 602 (2nd Dept., 2023)

In related proceedings pursuant to Social Services Law § 384-b, the father appeals from three orders of fact-finding and disposition of the Family Court, Queens County (Monica Shulman, J.) (one as to each child), all dated October 13, 2022. The orders of fact-finding and disposition, after fact-finding and dispositional hearings, and upon the father's failure to appear at the continued fact-finding hearing and the dispositional hearing, found that he permanently neglected the subject children, terminated his parental rights, and transferred guardianship and custody of the subject children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.

ORDERED that the appeals are dismissed, without costs or disbursements, except insofar as they bring up for review the denial of the father's attorney's applications for [*2]adjournments of the fact-finding and dispositional hearings and the father's claims of ineffective assistance of counsel (*see* CPLR 5511; *Matter of Daija K.P. [Danielle P.]*, 129 AD3d 1087); and it is further,

ORDERED that the orders of fact-finding and disposition are affirmed insofar as reviewed, without costs or disbursements.

The petitioner commenced these related proceedings pursuant to Social Services Law § 384-b, inter alia, to terminate the father's parental rights to the subject children. On the third day of a fact-finding hearing, when the father was scheduled to continue his testimony, he failed to appear at the virtual hearing. The father was aware that the hearing was continuing on this date, as he was present when the Family Court set the date. Prior to the commencement of the continued hearing, the court gave the father's attorney an opportunity to reach out to the father, but the attorney advised the court that he left a message, as the father's phone went to voicemail. The father's attorney did not know the reason for his client's absence and made an application for an adjournment, but the court denied the application. The court also denied the father's attorney's application for an adjournment of the dispositional hearing, which was held on that same day. Although the father's attorney was present at the continued fact-finding hearing and the dispositional hearing, he did not participate. By orders of fact-finding and disposition, all dated October 13, 2022, the court, inter alia, terminated the father's parental rights and transferred custody and guardianship of the children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The father appeals.

A party may not appeal from an order entered upon his or her default (*see* CPLR 5511; *Matter of Donaisha B. [Lisa G.]*, 218 AD3d 565, 566; *Matter of Andrew J.U.M. [Jelaine E.M.]*, 154 AD3d 758, 759). The father failed to appear at the continued fact-finding hearing and the dispositional hearing, and although his attorney was present, he did not participate. Thus, since the orders of fact-finding and disposition appealed from were made upon the father's default, review is limited to matters which were the subject of contest in the Family Court (*see Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 960; *Matter of Andrew J.U.M. [Jelaine E.M.]*, 154 AD3d at 759).

The Family Court providently exercised its discretion in denying the applications of the father's attorney to adjourn the continued fact-finding hearing and the dispositional hearing in light of the father's absence and his failure to provide any explanation for his absence, the merits of the proceedings, and the effect the adjournment would have had on the children by prolonging the proceedings (*see Matter of Donaisha B. [Lisa G.]*, 218 AD3d at 566; *Matter of Serenity C.W. [Antoinette W.]*, 158 AD3d 716, 717).

The father's contention that he was deprived of the effective assistance of counsel is without merit (*see Matter of Shannon NN. v Tarrin OO.*, 194 AD3d 1138, 1139; *Matter of Geraldine Rose W.*, 196 AD2d 313, 318-319).

**Matter of Ani R. A. R.**, 221 AD3d 604 (2nd Dept., 2023)

In a proceeding pursuant to Social Services Law § 384-b, the father appeals from an order of fact-finding and disposition of the Family Court, Queens County (Monica D. Shulman, J.), dated March 2, 2022. The order of fact-finding and disposition, insofar as appealed from, after fact-finding and dispositional hearings, and upon the father's failure to appear at the hearings, found that the father permanently neglected the subject child, terminated his parental rights, and transferred guardianship and custody of the child to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption.
ORDERED that the appeal is dismissed, without costs or disbursements, except insofar as it brings up for review the denial of the father's attorney's applications for adjournments, and the father's claims of ineffective assistance of counsel (*see* CPLR 5511); and it is further,

ORDERED that the order of fact-finding and disposition is affirmed insofar as reviewed, without costs or disbursements.

Although the order of fact-finding and disposition was entered upon the father's default, the father may challenge the denial of his attorney's applications for adjournments since they were the subject of contest below (*see Matter of Daija K.P. [Danielle P.]*, 129 AD3d

1087; *Matter of Xiao-Lan Ma v Washington*, 127 AD3d 982; *Matter of Ca'leb R.D. [Mary D.S.]*, 121 AD3d 890).

Contrary to the father's contention, the Family Court providently exercised its discretion in denying his attorney's applications for adjournments. "The granting of an adjournment rests in the sound discretion of the hearing court upon a balanced consideration of all relevant factors" (*Matter of Sacks v Abraham*, 114 AD3d 799, 800; *see Matter of Angie N.W. [Melvin A.W.]*, 107 AD3d 907, 908). Here, in light of, inter alia, the failure of the father's attorney to offer any explanation for the father's absences, the court providently exercised its discretion in denying the applications for adjournments (*see Matter of Daniel K.L. [Shaquanna L.]*, 138 AD3d 743, 745; *Matter of Angie N.W. [Melvin A.W.]*, 107 AD3d at 908).

The father's contention that he was deprived of the effective assistance of counsel is without merit. "A respondent in a proceeding pursuant to Social Services Law § 384-b has the right to the assistance of counsel (*see* Family Ct Act § 262[a][iv]), which encompasses the right to the effective assistance of counsel" (*Matter of Deanna E.R. [Latisha M.]*, 169 AD3d 691, 692; *see Matter of Grace G. [Gloria G.]*, 194 AD3d 712, 714). "[T]he statutory right to counsel under Family Court Act § 262 affords protections equivalent to the constitutional standard of effective assistance of counsel afforded to defendants in criminal proceedings" (*Matter of Nassau County Dept. of Social Servs. v King*, 149 AD3d 942, 943). Here, the father failed to show that his attorney lacked legitimate, strategic reasons for standing mute at the fact-finding and dispositional hearings, at which the father failed to appear (*see Matter of Grace G. [Gloria G.]*, 194 AD3d 712, 714-715). In addition, counsel's "fail[ure] to make a motion or argument that ha[d] little or no chance of success" did not deprive the father of the effective assistance of counsel (*Matter of Assatta N.P. [Nelson L.]*, 92 AD3d 945, 945 [internal quotation marks omitted]).

Accordingly, we affirm the order of fact-finding and disposition insofar as reviewed.

**Matter of Aric D.B.**, 221 AD3d 1502 (4th Dept., 2023)

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered June 23, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject children.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6 and Social Services Law § 384-b, respondent mother appeals from an order that terminated her parental rights with respect to the subject children on the ground of permanent neglect.

Contrary to the mother's contention, we conclude that petitioner established that it made diligent efforts to encourage and strengthen the relationship between the mother and the children (*see* Social Services Law § 384-b [7] [a]; *Matter of Kemari W. [Jessica J.]*, 153 AD3d 1667, 1667-1668 [4th Dept 2017], *lv denied* 30 NY3d 909 [2018]). The record demonstrates that the mother received services to work on maintaining her home and other life skills. In addition, she received parenting counseling and a referral for counseling to address her mental health needs**.** We reject the mother's contention that petitioner failed to establish diligent efforts because it did not offer financial assistance to the mother. The services that petitioner arranged for the mother were tailored to address the problems that gave rise to the removal of the children from her care (*see generally Matter of Sheila G.*, 61 NY2d 368, 385 [1984]). Contrary to the mother's contention, despite the services that were offered and provided to her, the mother failed to plan for the future of the children or to progress meaningfully to overcome the issues that led to their removal from her care (*see Matter of Aubree R. [Natasha B.]*, 217 AD3d 1565, 1566 [4th Dept 2023], *lv denied* — NY3d — [2023]). Petitioner is not required to " 'guarantee that . . . parent[s] succeed in overcoming [their] predicaments' " (*Kemari W.*, 153 AD3d at 1668).

The mother further contends that Family Court erred in accepting opinion testimony from the testifying mental health counselor. The mother failed to preserve that contention inasmuch as she failed to object to the testimony that she now contends constitutes improper opinion testimony. In any event, to the extent that the court erred in admitting the testimony of the mental health counselor, we conclude that "[a]ny error in the admission of [that testimony] is harmless because the result reached herein would have been the same even had such [testimony] been excluded" (*Matter of Bryson M. [Victoria M.]*, 184 AD3d 1138, 1139 [4th Dept 2020] [internal quotation marks omitted]).

Finally, we reject the mother's contention that the court erred in terminating her parental rights. "Unlike a fact-finding hearing [that] resolves the issue of permanent neglect and in which the best interests of the child[ren] play no part in the court's determination, the court in the dispositional hearing must be concerned only with the best interests of the child[ren]" (*Matter of [*2]Star Leslie W.*, 63 NY2d 136, 147 [1984]; *see* Family Ct Act § 631; *Matter of Brendan S.*, 39 AD3d 1189, 1190 [4th Dept 2007]). We conclude that the record provides ample support for the court's determination that terminating the mother's parental rights is in the best interests of the children (*see Brendan S.*, 39 AD3d at 1190).

**Matter of King D. C.**, AD3d 2023 NY Slip Op 06363 (2nd Dept., 2023)

In related proceedings pursuant to Social Services Law § 384-b, the father appeals from an order of disposition of the Family Court, Suffolk County (Matthew G. Hughes, J.), dated June 30, 2022. The order of disposition, upon an order of fact-finding of the same court dated December 21, 2021, entered upon the father's failure to appear at a fact-finding hearing, finding that the father permanently neglected the subject children, and after a dispositional hearing, terminated the father's parental rights and transferred guardianship and custody of the subject children to the petitioner for the purpose of adoption.

ORDERED that the order of disposition is affirmed, without costs or disbursements.
The petitioner commenced these related proceedings pursuant to Social Services Law § 384-b to terminate the father's parental rights to the subject children on the ground of permanent neglect. In an order of fact-finding dated December 21, 2021, entered upon the father's failure to appear at a fact-finding hearing, the Family Court found, inter alia, that the father had permanently neglected the children. Subsequently, in an order of disposition dated June 30, 2022, made after a dispositional hearing at which the father appeared, the court terminated the father's parental rights and transferred guardianship and custody of the children to the petitioner for the purpose of adoption. The father appeals from the order of disposition.

First, although generally an appeal from an order of disposition brings up for review [*2]an order of fact-finding (*see* CPLR 5501[a][1]), here, the father is foreclosed from raising issues related to the fact-finding phase of the proceeding, since a party cannot appeal from an order entered upon default (*see id.* § 5511; *Matter of Joseph Kenneth B.*, 47 AD3d 809, 809; *Matter of Chavi S.*, 269 AD2d 454, 454; *see also Matter of Corey MM. [Cassandara LL]*, 177 AD3d 1119, 1120; *Matter of Adele T. [Kassandra T.]*, 143 AD3d 1202, 1203). However, since the father appeared at the dispositional hearing, this Court may review the issue of whether the Family Court properly terminated his parental rights and freed the children for adoption (*see Matter of Serenity C. W. [Antoinette W.]*, 158 AD3d 716, 717).

Here, the evidence adduced at the dispositional hearing supported the Family Court's determination that it was in the best interests of the children to terminate the father's parental rights and free the children for adoption (*see* Family Ct Act § 631; *Matter of Star Leslie W.*, 63 NY2d 136, 147; *Matter of Abbygail H.M.G. [Eddie G.]*, 205 AD3d 913, 914). Giving due deference to the court's credibility findings (*see Matter of Jason A. [Maritza L.G.]*, 177 AD3d 968, 969), the father lacked insight into his problems and failed to address the issues that led to the children's removal and the finding of

permanent neglect, and a suspended judgment would serve only to prolong the delay of stability and permanence in the children's lives (*see Matter of Abbygail H.M.G. [Eddie G.]*, 205 AD3d at 914-915; *Matter of Adam M.D. [Victoria M.C.]*, 170 AD3d 1006, 1007).

**Matter of Dustin D.**, AD3d 2023 NY Slip Op 06579 (3rd Dept., 2023)

Appeal from an order of the Family Court of Saratoga County (Paul Pelagalli, J.), entered November 30, 2022, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the child to be permanently neglected, and terminated respondent's parental rights.

Respondent (hereinafter the father) is the parent of a child (born in 2014). In 2017, the child was removed and placed into the care and custody of petitioner due to allegations that the father made the child touch his genitals. Petitioner thereafter commenced a Family Ct Act article 10 proceeding and Family Court entered a finding of neglect upon the father's consent. A criminal case was also brought, and the father pleaded guilty, resulting in County Court issuing an order of protection requiring the father to stay away from the child for a period of 10 years, until January 2029. The father was directed to, as relevant here, undergo substance abuse evaluations, a sex offender risk assessment evaluation and a domestic violence treatment program, follow all recommendations and apply for modification only after successful completion of substance abuse, sex offender and domestic violence treatment programs. The child remained in the care and custody of petitioner, and, in February 2021, petitioner commenced this proceeding seeking to adjudicate the child to be permanently neglected. Following a fact-finding hearing, Family Court determined that the father permanently neglected the child. After a dispositional hearing, the court concluded that the child's best interests would be served by terminating the father's parental rights and freeing the child for adoption. The father appeals.

As relevant here, a permanently neglected child is one "who is in the care of an authorized agency and whose parent . . . has failed for a period of either at least one year or [15] out of the most recent [22] months following the date such child came into the care of an authorized agency 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, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child" (Social Services Law § 384-b [7] [a]; *see Matter of Jason O. [Stephanie O.]*, 188 AD3d 1463, 1464 [3d Dept 2020], *lv denied* 36 NY3d 908 [2021]).

The father first argues that petitioner failed to demonstrate, by clear and convincing evidence, that it made diligent efforts to reunite the father with the child. Specifically, the father contends that, rather than arranging referrals to alternate sex offender treatment programs, petitioner encouraged him to return to a particular agency provider for the requisite sex offender risk assessment, which was contrary to his preference. Further, the father contends that, during the time he was incarcerated for a parole/[*2]probation violation, petitioner made little to no effort to assist him in moving off the "waiting list" to access treatment programs authorized to operate within the prisons. To satisfy its duty of diligent efforts, "petitioner must make practical and reasonable efforts to ameliorate the problems preventing reunification and strengthen the family relationship by such means as assisting the parent with visitation, providing information on the child's progress and development, and offering counseling and other appropriate educational and therapeutic programs and services" (*Matter of Carter A. [Courtney QQ.]*, 121 AD3d 1217, 1218 [3d Dept 2014]; *see Matter of Brielle UU. [Brandon UU.]*, 167 AD3d 1169, 1170-1171 [3d Dept 2018]).

Contrary to the father's contention, the record reveals that the father was advised by petitioner's caseworkers, as well as treatment providers, that he needed to acknowledge his sexual abuse of the child and that his unwillingness to do so impacted his ability to progress with sex offender treatment. The father was successful with inpatient substance abuse services to address his severe alcohol, opiates and cocaine disorders but, upon discharge, relapsed quickly and thereafter refused further services. Additionally, the father continued to deny that he was a "batterer" in need of domestic violence treatment services that petitioner offered to him. We find that the father did not progress in the services arranged for him by petitioner due to his own actions (*see Matter of Issac Q*. *[Kimberly R.]*, 212 AD3d 1049, 1051 [3d Dept 2023], *lv denied* 39 NY3d 913 [2023]). Based upon the foregoing, Family Court did not err in determining that petitioner satisfied its threshold burden of establishing that it exercised diligent efforts to encourage and strengthen the father's relationship with the child (*see Matter of Jase M. [Holly N.]*, 190 AD3d 1238, 1240-1241 [3d Dept 2021], *lv denied* 37 NY3d 901 [2021]; *Matter of Dawn M. [Michael M.]*, 174 AD3d 972, 973-974 [3d Dept 2019], *lv denied* 34 NY3d 907 [2020]; *Matter of Logan C. [John C.]*, 169 AD3d 1240, 1242-1243 [3d Dept 2019]).

We also conclude that petitioner satisfied its burden of proving by clear and convincing evidence that the father failed to substantially plan for the child's future. " 'To substantially plan, a parent must, at a minimum, take meaningful steps to correct the conditions that led to the child's initial removal. The parent's plan must be realistic and feasible, and his or her good faith effort, alone, is not enough' " (*Matter of Jase M. [Holly N.]*, 190 AD3d at 1241 [brackets omitted], quoting *Matter of Brielle UU. [Brandon UU.]*, 167 AD3d at 1172). "As relevant to whether a parent has so planned, the court may

consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent" (*Matter of Isabella H. [Richard I.]*, 174 AD3d 977, 980 [3d Dept 2019] [internal quotation [*3]marks and citations omitted]).

Here, the record supports Family Court's determination that the father failed to meaningfully plan for the child's future for a period of at least one year. The testimony at the hearing evinces that the father continued to use drugs and, in fact, was intoxicated during at least one substance abuse treatment program session during which he had to be escorted away by other attendees. Moreover, he refused to participate in domestic violence counseling, and he failed to complete any of the several sex offender programs offered to him. The hearing record further evinces that, even when the father attended sessions, his engagement was limited as he continued to deny that he had sexually abused the child and refused to acknowledge that he was in need of domestic violence counseling. He also knowingly disregarded workbook assignments he was expected to complete independently as part of treatment. The father also declined to reenter substance abuse treatment, as recommended by petitioner, following relapse with his addictions. It is evident that the father made little to no progress in ameliorating the problems which led to the child's removal, despite petitioner's efforts to work with him. The fact that he occasionally complied with some of petitioner's directives is insufficient as "a parent's ongoing refusal or inability to acknowledge and correct conditions that required the child[ ]'s removal in the first instance may be deemed to constitute a failure to plan for [his or her] future" (*Matter of Asianna NN. [Kansinya OO.]*, 119 AD3d 1243, 1247 [3d Dept 2014], *lv denied* 24 NY3d 907 [2014]; *see Matter of Lisa Z.*, 278 AD2d 674, 677 [3d Dept 2000]). Based on the foregoing, and according deference to Family Court's credibility assessments and factual determinations, we find a sound and substantial basis in the record supporting the court's determination that the father permanently neglected the child (*see Matter of Samuel DD. [Margaret DD.]*, 123 AD3d 1159, 1162 [3d Dept 2014], *lv denied* 24 NY3d 918 [2015]; *Matter of Havyn PP. [Morianna RR.]*, 94 AD3d 1359, 1361-1362 [3d Dept 2012]; *Matter of Angelina BB. [Miguel BB.]*, 90 AD3d 1196, 1197-1198 [3d Dept 2011]; *Matter of Sharon V. v Melanie T.*, 85 AD3d 1353, 1355 [3d Dept 2011]).

Lastly, we conclude that Family Court did not err in terminating the father's parental rights rather than imposing a suspended judgment. The disposition following a determination of permanent neglect must be based solely on the best interests of the child, with no presumption that a return to the parent promotes those interests (*see* Family Ct Act § 631; *Matter of James X.*, 37 AD3d 1003, 1007 [3d Dept 2007]; *Matter of Arianna OO.*, 29 AD3d 1117, 1117-1118 [3d Dept 2006]). Here, granting deference to Family Court's choice from among the dispositional alternatives, we find no basis to disturb the court's finding that the child's interests would be served

by terminating the father's parental rights (*see Matter [*4]of Joshua BB.*, 27 AD3d 867, 869 [3d Dept 2006]). The father had ample time and opportunities to address the problems which led to the child's removal. Notably, the father was reincarcerated and had no resources and no plan for the child. The father demonstrated no insight into the effect of his actions upon the child with whom he last had contact in 2017, and the order of protection remained in full force and effect barring such contact until 2029. Meanwhile, the child was improving in a foster/pre-adoptive home where he had stability and had overcome significant behavioral challenges (*see Matter of Jayde M.*, 36 AD3d 1168, 1169-1170 [3d Dept 2007], *lv denied* 8 NY3d 809 [2007]; *Matter of Raena O.*, 31 AD3d 946, 948 [3d Dept 2006]). Thus, suspending judgment was not in the child's best interests. Accordingly, termination of the father's parental rights and freeing the child for adoption was appropriate.

**Matter of Ryan J.**, AD3d 2023 NY Slip Op 06567 (3rd Dept., 2023)

Appeals (1) from an order of the Family Court of Essex County (Richard B. Meyer, J.), entered July 23, 2021, which, in proceeding No. 1 pursuant to Family Ct Act articles 10 and 10-A, continued the placement of the subject child, and (2) from an order of said court, entered March 24, 2022, which granted petitioner's application, in proceeding No. 2 pursuant to Social Services Law § 384-b, to adjudicate the subject child to be permanently neglected, and terminated respondent's parental rights.
Respondent (hereinafter the mother) is the mother of a child (born in 2018). The mother has an extensive substance abuse history, and both she and the child tested positive for cocaine at the time of his birth in March 2018. Petitioner commenced a neglect proceeding against the mother and, after the mother was discharged from a substance abuse treatment program and repeatedly tested positive for cocaine, the child was removed from her custody in July 2018 and placed in the care of his maternal great uncle and great aunt. The mother was found to have neglected the child in August 2018 and, in September 2018, Family Court determined that the child should remain in petitioner's custody. An order of filiation was subsequently entered against nonparty Joshua K. (hereinafter the father), but an investigation reflected that he was not an appropriate placement. The child accordingly stayed in the care of his great uncle and great aunt, where he has remained to date.

After concerns arose about both the mother's continued substance abuse and her parental judgment, she was restricted to supervised visitation with the child in December 2019, and the permanency goal was changed from return to parent to freeing the child for adoption in June 2020. Petitioner commenced proceeding No. 2 alleging permanent neglect in September 2020, then filed an amended petition in February 2021. Family Court conducted a combined permanency hearing and fact-finding hearing

on the permanent neglect petition and, prior to issuing an order of fact-finding, issued a permanency hearing order in July 2021 that continued the goal of freeing the child for adoption. Family Court then issued an order, entered in December 2021, in which it determined that the child was permanently neglected. Following a dispositional hearing, Family Court issued an order in March 2022 that rejected the mother's request for a suspended judgment and terminated her parental rights. The mother appeals, in relevant part, from the March 2022 dispositional order.[FN1]

We affirm. "A permanently neglected child is 'a child who is in the care of an authorized agency and whose parent . . . has failed for a period of either at least one year or [15] out of the most recent [22] months following the date such child came into the care of an authorized agency 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, notwithstanding the [*2]agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child' " (*Matter of Harmony F. [William F.]*, 212 AD3d 1028, 1029 [3d Dept 2023] [citations omitted], quoting Social Services Law § 384-b [7] [a]; *accord Matter of Desirea F. [Angela H.]*, 217 AD3d 1064, 1065-1066 [3d Dept 2023], *lv denied* ___ NY3d ___ [Dec. 14, 2023]). In assessing whether petitioner has demonstrated permanent neglect, we accord great weight to the factual findings and credibility determinations of Family Court, and its findings will not be disturbed unless they lack a sound and substantial basis in the record (*see Matter of Joshua R. [Kimberly R.]*, 216 AD3d 1219, 1220 [3d Dept 2023], *lv denied* 40 NY3d 905 [2023]; *Matter of Issac Q. [Kimberly R.]*, 212 AD3d 1049, 1053 [3d Dept 2023], *lv denied* 39 NY3d 913 [2023]).

With regard to whether petitioner made "diligent efforts to encourage and strengthen the relationship between [the mother] and the child" (*Matter of Carter A. [Courtney QQ.]*, 121 AD3d 1217, 1217-1218 [3d Dept 2014]; *see Matter of Neveah N. [Heidi O.]*, 220 AD3d 1070, 1070 [3d Dept 2023]), the testimony at the fact-finding hearing reflected that petitioner ensured that the mother was engaging in court-ordered mental health and substance abuse treatment, including by consulting with her treatment providers regarding her progress and coordinating some of her drug testing. The proof also reflected that petitioner arranged for visitation between the child and the mother through an outside agency — and later facilitated virtual visits with the child during the period that COVID-19 restrictions prevented in-person visits — and made sure that the mother was invited to the child's health care appointments and service plan reviews. Petitioner additionally came forward with evidence that it assisted the mother with transportation to and from various appointments and her visitation with the child, helped her to receive temporary housing assistance after she became homeless, and offered her resources to find permanent housing. We are satisfied that the foregoing constitutes clear and convincing evidence of diligent efforts (*see Matter of Nevaeh N. [Heidi O.]*, 220 AD3d at

1070-1071; *Matter of Dawn M. [Michael M.]*, 174 AD3d 972, 973-974 [3d Dept 2019], *lv denied* 34 NY3d 907 [2020]).

The question accordingly turns to whether the proof showed that the mother "failed to substantially plan for the child's future" for the requisite period (*Matter of Issac Q. [Kimberly R.]*, 212 AD3d at 1051 [internal quotation marks, brackets and citations omitted]; *see* Social Services Law § 384-b [7] [a]), meaning a failure "to take such steps as may be necessary to provide an adequate, stable home and parental care for the child" (Social Services Law § 384-b [7] [c]; *accord Matter of Issac Q. [Kimberly R.]*, 212 AD3d at 1051). The evidence here reflected that, after a prolonged series of struggles, the mother [*3]did successfully complete a substance abuse treatment program in July 2019. That said, the owner of the property where the mother had been living found, among other things, "a whole bunch of syringes," crack pipes and a baggie containing a white powdery substance in the mother's apartment shortly after the mother moved out in December 2019, and the owner turned those items over to law enforcement.**[FN2]** A sheriff's deputy further testified to an encounter he had with the mother at her workplace in June 2020 when she had a visible head injury and appeared to be under the influence and, notably, the proof showed that the mother tested positive for cocaine three days after that encounter. Later that month, the mother was arrested after crack cocaine was found in a vehicle in which she was a passenger during a traffic stop. Thereafter, the mother reengaged with substance abuse treatment in September 2020, although that treatment program involved virtual attendance and did not involve drug testing. Her struggles with drugs were apparently continuing, however, as a family specialist at the outside agency where the mother had visits with the child testified to seeing needle marks on the mother's hand in March 2021.**[FN3]**

In short, even accepting that the mother was making progress toward sobriety around the time that she successfully completed substance abuse treatment in July 2019, the foregoing proof reflected that she resumed using illegal drugs soon afterwards and continued to use them throughout 2020 and into 2021. The evidence also reflected that, after petitioner was alerted to the December 2019 incident and notified the mother that her visits with the child were going to be supervised for the time being, her already poor relationship with caseworkers and other service providers became even more hostile and her engagement with the child withered. For example, the proof showed that the mother refused multiple offers of visitation with the child between December 2019 and March 2020 because petitioner's caseworker would not agree to her demands that the visits be unsupervised or supervised by unsuitable individuals.**[FN4]** The mother thereafter had spotty virtual visits with the child when the COVID-19 pandemic prevented in-person visits beginning in March 2020 and, after in-person visits resumed in June 2020, she only attended approximately half of the scheduled visits. The proof further reflected that the mother did not answer the door and let petitioner's caseworker

into her home for home visits during the winter and spring of 2021 — notwithstanding the caseworker's observations that people appeared to be there — and that the mother refused to contact the caseworker to discuss home visits, the need for drug testing after she was observed with needle marks in March 2021 or, for that matter, anything else, despite repeated letters and phone calls during that period.

The mother, to be sure, produced evidence that she was doing well in her mental health treatment and [*4]disputed much of petitioner's proof in her testimony, claiming that petitioners' witnesses were lying about her and eventually stating her belief that petitioner and its witnesses were engaged in a conspiracy against her because they were "getting money [for the child] to be in the system." Family Court nevertheless credited the testimony of petitioner's witnesses and, according deference to that assessment, we are satisfied that petitioner provided clear and convincing proof that the mother had failed to substantially plan for the child's future (*see Matter of Chloe B. [Sareena B.]*, 189 AD3d 2011, 2013-2014 [3d Dept 2020]; *Matter of Brielle UU. [Brandon UU.]*, 167 AD3d 1169, 1172-1173 [3d Dept 2018]; *Matter of Angelo AA. [Tashina DD.]*, 123 AD3d 1247, 1249 [3d Dept 2014]).

Finally, we do not agree with the mother that Family Court should have issued a suspended judgment instead of terminating the mother's parental rights. "[T]he sole concern at a dispositional hearing is the best interests of the child and there is no presumption that any particular disposition, including the return of a child to a parent, promotes such interests" (*Matter of Isabella M. [Kristine N.]*, 168 AD3d 1234, 1235 [3d Dept 2019] [internal quotation marks and citations omitted]). The child has lived in foster care since he was three months old and has been well cared for by, and developed a loving relationship with, his maternal great uncle, great aunt and others in his foster family. Meanwhile, the mother's continued lack of cooperation with petitioner's caseworkers and other service providers gave no reason to believe that the circumstances that led to the child's removal from her care would be corrected. Thus, in the absence of any "indication that a brief grace period would lead to the necessary improved parenting and a safe reunification or that it would be in the child's best interests," a sound and substantial basis exists in the record for Family Court's finding that termination of the mother's parental rights, rather than a suspended judgment, was in the best interests of the child (*Matter of Isabella H. [Richard I.]*, 174 AD3d 977, 982 [3d Dept 2019] [internal quotation marks, ellipses, brackets and citation omitted]; *see Matter of Brielle UU. [Brandon UU.]*, 167 AD3d at 1174).

Garry, P.J., Aarons, Pritzker and Reynolds Fitzgerald, JJ., concur.

ORDERED that the appeal from the order entered July 23, 2021 is dismissed, as moot, without costs.

ORDERED that the order entered March 24, 2022 is affirmed, without costs.

**Footnotes**

**Footnote 1:** The mother and the father also appealed from the July 2021 permanency order. The father withdrew his appeal from the July 2021 order (*Matter of Ryan J. [Taylor J.-Joshua K.]*, 2022 NY Slip Op 69240[U] [3d Dept 2022]). To the extent that the mother continues to pursue her appeal from that order, it has been rendered moot by the termination of her parental rights (*see Matter of Noelia F. [Noel G.]*, 204 AD3d 1122, 1123 [3d Dept 2022]).

**Footnote 2:** Although the mother underwent urine screenings in December 2019 and February 2020 and tested negative, there is no indication that those tests were observed, and the record reflects that the mother had previously been found with items used to beat drug tests and that a container holding what looked and smelled like urine was found in her residence in 2018. Petitioner's caseworker who was handling the mother's case during that period acknowledged in her testimony, in fact, that she should have requested that the mother undergo a hair follicle test.

**Footnote 3:** The mother points out, with the support of the father, that where a parent "is voluntarily and regularly participating in a rehabilitative program," his or her drug use does not establish neglect in a Family Ct Act article 10 proceeding absent proof "that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired" (Family Ct Act § 1012 [f] [i] [B]; *see* Family Ct Act § 1046 [a] [iii]; *Matter of Keira O.*, 44 AD3d 668, 670 [2d Dept 2007]). The mother has *already* been found to have neglected the child in a Family Ct Act article 10 proceeding, which resulted in the child's removal from her care; the question is therefore whether she has "failed to substantially plan for the child's future by taking meaningful steps to correct the conditions that led to the child's removal," and the degree to which she has addressed her longstanding substance abuse problem is key to answering that question (*Matter of Harmony F. [William F.]*, 212 AD3d at 1031 [internal quotation marks, brackets and citation omitted]).

**Footnote 4:** Although the timeline is unclear, petitioner also presented evidence reflecting that the mother intermittently attended service plan reviews involving the child and only rarely attended his medical appointments despite being advised of such and having transportation made available to her.

**Matter of Zander W.**, AD3d 2023 NY Slip Op 06637 (4th Dept., 2023)

Appeal from an order of the Family Court, Orleans County (Sanford A. Church, J.), entered June 27, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law

§ 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner. We affirm.

We reject the mother's contention that petitioner failed to establish that it exercised diligent efforts to encourage and strengthen the parent-child relationship, as required by Social Services Law § 384-b (7) (a). "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parent[ ] to overcome problems that prevent the discharge of the child into their care, and informing the parent[ ] of [the] child's progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901 [4th Dept 1997]; *see* § 384-b [7] [f]). Petitioner is not required, however, to "guarantee that the parent succeed in overcoming his or her predicaments" (*Matter of Sheila G.*, 61 NY2d 368, 385 [1984]; *see Matter of Jamie M.*, 63 NY2d 388, 393 [1984]). Rather, the parent must "assume a measure of initiative and responsibility" (*Jamie M.*, 63 NY2d at 393). Here, petitioner established by clear and convincing evidence (*see* § 384-b [3] [g] [i]) that it exercised diligent efforts to encourage and strengthen the mother's relationship with the child (*see Matter of Janette G. [Julie G.]*, 181 AD3d 1308, 1308-1309 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020]). Petitioner provided appropriate referrals to the mother for mental health counseling and parenting classes. In addition, petitioner scheduled regular visitation between the mother and the child, during which petitioner provided several different therapists to give medically necessary services to the child and, at the same time, educate the mother as to the child's needs (*see Matter of Briana S.-S. [Emily S.]* [appeal No. 2], 210 AD3d 1390, 1392 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023]; *Matter of Dagan B. [Calla B.]* [appeal No. 3], 192 AD3d 1458, 1459 [4th Dept 2021], *appeal dismissed* 37 NY3d 977 [2021]; *Matter of Asianna NN. [Kansinya OO.]*, 119 AD3d 1243, 1245 [3d Dept 2014], *lv denied* 24 NY3d 907 [2014]).

Contrary to the further contention of the mother, we conclude that, despite petitioner's diligent efforts, the mother failed to plan for the child's future. " '[T]o plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate,

stable home and parental care for the child" (Social Services Law § 384-b [7] [c]). Here, "there is no evidence [*2]that [the mother] had a realistic plan to provide an adequate and stable home for the child[ ]" (*Matter of Giohna R. [John R.]*, 179 AD3d 1508, 1509 [4th Dept 2020], *lv dismissed in part & denied in part* 35 NY3d 1003 [2020] [internal quotation marks omitted]).

Finally, the mother failed to preserve for our review her contention that Family Court should have granted a suspended judgment (*see Matter of John D., Jr. [John D.]*, 199 AD3d 1412, 1414 [4th Dept 2021], *lv denied* 38 NY3d 903 [2022]; *Matter of Atreyu G. [Jana M.]*, 91 AD3d 1342, 1343 [4th Dept 2012], *lv denied* 19 NY3d 801 [2012]). In any event, a suspended judgment was not warranted under the circumstances "inasmuch as any progress made by the [mother] prior to the dispositional determination was insufficient to warrant any further prolongation of the [child's] unsettled familial status" (*Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1628 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018] [internal quotation marks omitted]).

# TPR Mental Illness

**Matter of Steven M.**, 221 AD3d 1518 (4th Dept., 2023)

Appeal from an order of the Family Court, Oswego County (Thomas Benedetto, J.), entered February 24, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights over the subject child to petitioner.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent appeals from an order terminating his parental rights pursuant to Social Services Law § 384-b (4) (c) on the ground of mental illness. We affirm. We conclude that petitioner established by clear and convincing evidence that respondent is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [his] child" (*id*.; *see Matter of Michael S. [Rebecca S.]*, 165 AD3d 1633, 1633 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]). Petitioner presented the testimony of a licensed psychologist, several caseworkers assigned to respondent, mental health staff who interacted with respondent, and two former foster parents of the child, along with the psychologist's

written report and respondent's records from mental health and substance abuse providers. The evidence established that respondent suffers from antisocial personality disorder, "which is characterized by a lack of empathy, the failure to adhere to social norms, aggression, impulsiveness, and a failure to plan" (*Michael S.*, 165 AD3d at 1633; *see Matter of Neveah G. [Jahkeya A.]*, 156 AD3d 1340, 1341 [4th Dept 2017], *lv denied* 31 NY3d 907 [2018]), and that the child "would be in danger of being neglected if [he was] returned to [respondent's] care at the present time or in the foreseeable future" (*Matter of Jason B. [Phyllis B.]*, 160 AD3d 1433, 1434 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]; *see Michael S.*, 165 AD3d at 1633).

We also reject respondent's related contention that Family Court's determination did not have a sound and substantial basis in the record inasmuch as it was not supported by sufficient admissible evidence. The psychologist who testified that, as a result of respondent's antisocial personality disorder, the child would be placed in immediate jeopardy of neglect or harm if he was returned to respondent's care, was qualified as an expert in the field of psychology, including the administration of psychiatric assessments, without objection. The fact that the court later noted that the psychologist was not qualified as "a psychiatrist or a mental health expert" is irrelevant because the statute expressly provides that a determination to terminate parental rights may be based upon the testimony of either a psychiatrist or psychologist (*see* Social Services Law § 384-b [6] [c]; *see e.g. Matter of Jason B. [Gerald B.]*, 155 AD3d 1575, 1575 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018]). Likewise, the fact that the psychologist diagnosed respondent with a personality disorder, and not a mental illness, is irrelevant inasmuch as personality disorders, such as antisocial personality disorder, are "mental condition[s]" as that term is used in the definition of "mental illness" in Social Services Law § 384-b (6) (a) and may provide a sound and substantial basis to support a determination terminating parental rights (*see e.g. Michael S.*, 165 AD3d at 1633; *Neveah G.*, 156 AD3d at 1341). Additionally, respondent's counsel [*2]stipulated to the admission of respondent's medical records, without objection. Thus, to the extent respondent challenges the court's reliance on those records in reaching its determination, his challenge is waived (*see Matter of Byler v Byler*, 207 AD3d 1072, 1073 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022]; *Lahren v Boehmer Transp. Corp.*, 49 AD3d 1186, 1187 [4th Dept 2008]).

Respondent's contention that the court erred in failing to order an independent psychiatric or psychological examination of him pursuant to Social Services Law § 384-b (6) (e) is not preserved for our review (*see Matter of Jasmine F.*, 298 AD2d 997, 997 [4th Dept 2002], *lv denied* 99 NY2d 506 [2003]; *cf*. *Matter of Rahsaan I. [Simone J.]*, 180 AD3d 1162, 1164 [3d Dept 2020]).

We reject respondent's contention that the court abused its discretion in denying his request for an adjournment. "The grant or denial of a motion for an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Dixon v Crow*, 192 AD3d 1467, 1467 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021] [internal quotation marks omitted]; *see Matter of Nathan N. [Christopher R.N.]*, 203 AD3d 1667, 1669 [4th Dept 2022], *lv denied* 38 NY3d 909 [2022]), and we conclude that the court did not abuse its discretion.

Finally, we have reviewed respondent's remaining contention and conclude that it does not warrant modification or reversal of the order.

**Matter of Lil' Brian J.Z.**, 221 AD3d 1580 (4th Dept., 2023)

Appeal from an order of the Family Court, Orleans County (Sanford A. Church, J.), entered June 14, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law

§ 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of mental illness. We affirm.

We note at the outset that the mother contends that Family Court erred in relying on the testimony of the forensic psychologist who conducted virtual examinations of her because his opinion "was conclusory and lacked necessary information." The mother failed to object to the testimony of the psychologist on that ground, however, and thus failed to preserve her contention for our review (*see Matter of Amyn C. [Chelsea K.]*, 159 AD3d 1421, 1421 [4th Dept 2018], *lv denied* 31 NY3d 911 [2018]; *Matter of Jamiah Sharang C. [Kamila N.]*, 85 AD3d 453, 453 [1st Dept 2011], *lv denied* 17 NY3d 709 [2011]; *see also Matter of Nadya S. [Brauna S.]*, 133 AD3d 1243, 1244 [4th Dept 2015], *lv denied* 26 NY3d 919 [2016]).

Contrary to the mother's further contention, we conclude that petitioner established " 'by clear and convincing evidence that [the mother], by reason of mental illness, is presently and for the foreseeable future unable to provide proper and adequate care for [the] child[ ]' " (*Matter of Jason B. [Phyllis B.]*, 160 AD3d 1433, 1434 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]; *see Matter of Jason B. [Gerald B.]*, 155 AD3d 1575, 1575

[4th Dept 2017], *lv denied* 31 NY3d 901 [2018]). Testimony from the forensic psychologist established that the child "would be in danger of being neglected if [he] were returned to [the mother's] care at the present time or in the foreseeable future" (*Jason B*., 160 AD3d at 1434).

Finally, with respect to the mother's contention that the court should have granted her a suspended judgment, we note that " '[t]here is no statutory provision providing for a suspended judgment when parental rights are terminated based on mental illness' " (*Matter of Matilda B. [Gerald B.]*, 187 AD3d 1677, 1679 [4th Dept 2020], *lv denied* 36 NY3d 905 [2021]; *see Matter of Jackalyne WW. [Kevin VV.]*, 195 AD3d 1092, 1096 [3d Dept 2021]; *Matter of Ernesto Thomas A*., 5 AD3d 380, 381 [2d Dept 2004]).

**Matter of J.C.**, 221 AD3d 561 (1st Dept., 2023)

Order, Family Court, Bronx County (Cynthia Lopez, J.), entered on or about March 6, 2023, which, upon finding that respondent mother has an intellectual disability as defined in Social Services Law § 384-b(6)(b), terminated her parental rights to the subject children and transferred custody of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The court's finding that the mother's intellectual disability left her unable to care for the children properly and adequately, presently and for the foreseeable future, was supported by clear and convincing evidence (*see* Social Services Law § 384-b[4][c]; *Matter of Noel R. [LaQueenia S.]*, 167 AD3d 553 [1st Dept 2018]; *Matter of Genesis S. [Irene Elizabeth S.]*, 70 AD3d 570 [1st Dept 2010]). The court appointed psychologist who evaluated the mother concluded that her intellectual functioning was within the extremely low range, and that her adaptive functioning abilities were in a subaverage range. Although the mother possessed adequate adaptive abilities in certain areas, her intellectual disability significantly impacted her ability to provide proper care for the children, both of whom have severe mental and physical health issues. Moreover, the services and interventions the mother had received failed to improve her parenting abilities (*see Noel R.*, 167 AD3d at 553).

The court's finding that the mother was unable to care for the children presently or in the foreseeable future as a result of intellectual disability is not against the weight of the evidence. The court properly weighed the competing expert and fact testimony in reaching its conclusion, and that conclusion is supported by the record. Although the court appointed psychologist did not conduct a parent-child observation, his interviews with the mother, meetings with the children, interview with a collateral source, and

review of multiple years' worth of records and evaluations were sufficient to buttress his conclusions with a reasonable degree of professional certainty.

Additionally, the court's refusal to qualify the mother's witness as an expert in Office of People With Developmental Disabilities (OPWDD) matters has a substantial and adequate basis in the record. The determination of whether a witness may testify as an expert rests in the sound discretion of the court. Here, given that the witness was never employed at OPWDD, never made any determinations of eligibility for OPWDD services, and had not assisted anyone in getting OPWDD services in the prior seven years, there is no basis to disturb the court's ruling (*see Matter of Django K.[Carl K.]*, 149 AD3d 405, 405-406 [1st Dept 2017]).

Moreover, the court providently exercised its discretion in drawing a negative inference against the mother because she did not testify at the hearing (*see Matter of ALaura C.N. [Ivonna P.]*, 214 AD3d 539, 540 [1st Dept 2023]). The court explained that none of the [*2]testimony provided by the mother's witnesses clarified the mother's understanding of the children's developmental and medical needs, how she planned to care for them, and what she had gained from the past services and interventions.

**Matter of Edward E. M., IV**, AD3d 2023 NY Slip Op 06482 (1st Dept., 2023)

Order of fact-finding and disposition (one paper), Family Court, New York County (Valerie A. Pels, J.), entered on or about November 4, 2022, which, after a hearing, determined that respondent father suffers from mental illness and intellectual disability as defined in Social Services Law § 384-b, terminated his parental rights to the subject child, and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Petitioner presented uncontroverted expert testimony from a psychologist that the father suffers from, among other things, a combination of longstanding, chronic moderate bipolar disorder, and incurable mild intellectual disability**.** The evidence further showed that he does not understand the extent of his mental illness, and, at present and for the foreseeable future, that he has a limited ability to understand and execute the steps necessary to provide proper and adequate care for the child (*see* Social Services Law § 384-b[4][c], [6][b]; *Matter of Genesis S. [Irene Elizabeth S.]*, 70 AD3d 570 [1st Dept 2010]; *Matter of Erica D. [Maria D.]*, 80 AD3d 423, 424 [1st Dept 2011], *lv denied* 16 NY3d 708 [2011]).

Contrary to the father's argument, raised for the first time on appeal, the psychologist's evaluation, which took place approximately two years prior to commencement of testimony, was not stale, and the father failed to show that more updated information would warrant a different outcome (*see Matter of Brianna K.R. [Bernard R.]*, 199 AD3d 500, 501-502 [1st Dept 2021], *lv denied* 38 NY3d 901 [2022]).

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

**Matter of Landin F.**, AD3d 2023 NY Slip Op 06647 (4th Dept., 2023)

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered August 23, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of mental illness. We affirm.

Contrary to the mother's contention, we conclude that petitioner met its burden of demonstrating by clear and convincing evidence that the mother is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [the] child" (Social Services Law § 384-b [4] [c]; *see Matter of Zachary R. [Duane R.]*, 118 AD3d 1479, 1480 [4th Dept 2014]; *Matter of Vincent E.D.G. [Rozzie M.G.]*, 81 AD3d 1285, 1285 [4th Dept 2011], *lv denied* 17 NY3d 703 [2011]; *see generally Matter of Joyce T.*, 65 NY2d 39, 48 [1985]). The testimony of petitioner's expert psychologist established that the mother suffers from delusional disorder and that "the child[ ] would be in danger of being neglected if [he was] returned to her care at the present time or in the foreseeable future" (*Matter of Jason B. [Phyllis B.]*, 160 AD3d 1433, 1434 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]; *see Zachary R.*, 118 AD3d at 1480).

The mother further contends that she was denied meaningful representation by, inter alia, her attorney's failure to retain and call an expert psychologist to rebut the evidence of petitioner's expert psychologist. We reject that contention. The mother failed to demonstrate that there were relevant experts who would have been willing to testify in a manner helpful and favorable to her case, and her speculation that her attorney could have found an expert with a contrary medical opinion is insufficient to establish deficient representation (*see Matter of Michael S. [Brittany R.]*, 159 AD3d 1502, 1504 [4th Dept

2018], *lv denied* 31 NY3d 909 [2018]). Further, the record establishes that, " 'viewed in the totality of the proceedings, [the mother] received meaningful representation' " (*Matter of Bentleigh O. [Jacqueline O.]*, 125 AD3d 1402, 1404 [4th Dept 2015], *lv denied* 25 NY3d 907 [2015]; *see Matter of Demariah A. [Rebecca B.]*, 71 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 15 NY3d 701 [2010]).

Finally, we reject the mother's contention that Family Court abused its discretion in declining to hold a dispositional hearing (*see Matter of Michael S. [Rebecca S.]*, 165 AD3d 1633, 1633-1634 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]; *Matter of Alberto C. [Tibet H.]*, 96 AD3d 1487, 1488 [4th Dept 2012], *lv denied* 19 NY3d 813 [2012]; *see generally Joyce T.*, 65 NY2d at 49-50).

**Matter of Layla S.**, AD3d 2023 NY Slip Op 06743 (2nd Dept., 2023)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from an order of fact-finding and disposition of the Family Court, Orange County (Christine P. Krahulik, J.), dated November 29, 2022. The order of fact-finding and disposition, after a hearing, found that the mother was presently and for the foreseeable future unable, by reason of mental illness and intellectual disability, to provide proper and adequate care for the subject child, terminated her parental rights to the subject child, and transferred guardianship and custody of the subject child to the petitioner for the purpose of adoption.
ORDERED that the order of fact-finding and disposition is affirmed, without costs or disbursements.

In February 2022, the petitioner commenced this proceeding pursuant to Social Services Law § 384-b to terminate the mother's parental rights to the subject child on the grounds of mental illness and intellectual disability. Following a hearing, the Family Court found that the mother was presently and for the foreseeable future unable, by reason of mental illness and intellectual disability, to provide proper and adequate care for the child, terminated the mother's parental rights to the child, and transferred guardianship and custody of the child to the petitioner for the purpose of adoption. The mother appeals.

The mother's contention that the Family Court erred in allowing the petitioner's expert in forensic psychiatry to testify about and rely upon out-of-court statements from collateral sources in forming his opinion is largely unpreserved for appellate review (*see Matter of Sebastian Y. [Alice Y.]*, 214 AD3d 893, 894; *Matter of Skylar P.J. [Kerry M.T.]*, 186 AD3d 1687, 1688). Although the court improperly overruled the sole objection to that expert's testimony, which was lodged by the mother's attorney in response to a specific question asked by the attorney for the child during her cross-examination, that error was

harmless (*see Matter of Bruce P.*, 138 AD3d 864, 865-866; *see also Matter of Omar B.*, 175 AD2d 834, 834). Under the circumstances, the evidence presented at the hearing established, by clear and convincing evidence, that the mother was presently [*2]and for the foreseeable future unable, by reason of mental illness and intellectual disability, to provide proper and adequate care for the child (*see* Social Services Law § 384-b[4][c]; *Matter of Sebastian Y. [Alice Y.]*, 214 AD3d at 894; *Matter of Bruce P.*, 138 AD3d at 866).

# TPR Severe Abuse

**Matter of Latoria B.**, AD3d 2023 NY Slip Op 06697 (4th Dept., 2023)

Appeals from an order of the Family Court, Oswego County (Thomas Benedetto, J.), entered January 9, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondents' guardianship and custody rights with respect to the subject children to petitioner.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother and respondent father appeal from an order that terminated their parental rights with respect to their five children on the grounds that respondents severely abused two of the children and derivatively severely abused the other three children. Family Court's findings of severe abuse and derivative severe abuse were based on, inter alia, orders entered on the admissions and consent of respondents in a Family Court Act article 10 proceeding. We affirm.

Respondents both contend that the court erred in terminating their parental rights because the orders of fact-finding issued in the underlying Family Court Act article 10 proceeding were insufficient to establish severe abuse. Respondents' contentions are not preserved for appellate review inasmuch as respondents did not move to vacate the orders of fact-finding or to withdraw their admissions of severe abuse (*see Matter of Abigail H. [Daniel D.]*, 172 AD3d 1922, 1923 [4th Dept 2019], *lv denied* 34 NY3d 901 [2019]; *Matter of Megan L.G.H. [Theresa G.H.]*, 102 AD3d 869, 869-870 [2d Dept 2013]). In any event, in making its determination to terminate respondents' parental rights on the ground that the children were severely abused and derivatively severely abused, the court did not rely solely on respondents' admissions of severe abuse. The

court also relied on respondents' criminal convictions arising from their conduct towards the children, which establish that they severely abused and derivatively severely abused the children (*see* Social Services Law § 384-b [4] [e]; [8] [a] [iii] [C]).

Contrary to the further contentions of the mother, the court did not abuse its discretion in refusing to issue a suspended judgment. The record supports the court's determination that a suspended judgment was not in the children's best interests (*see generally Matter of Shadazia W.*, 52 AD3d 1330, 1331 [4th Dept 2008], *lv denied* 11 NY3d 706 [2008]; *Matter of [*2]Da'Nasjeion T.*, 32 AD3d 1242, 1242 [4th Dept 2006]).

We have considered the remaining contentions of respondents and conclude that they do not warrant reversal or modification of the order.

# TPR DISPOSITIONS

**Matter of Anastasia N. A.**, 218 AD3d 563 (2nd Dept., 2023)

In related proceedings pursuant to Social Services Law § 384-b, the mother appeals from an order of the Family Court, Westchester County (Nilda Morales-Horowitz, J.), dated August 22, 2022. The order, insofar as appealed from, upon the mother's failure to appear at a hearing, revoked an order of suspended judgment of the same court dated March 8, 2022, terminated the mother's parental rights to the subject children, and freed the children for adoption.
ORDERED that the appeal is dismissed, without costs or disbursements, except insofar as it brings up for review the denial of the application of the mother's attorney for an adjournment (*see* CPLR 5511; *Matter of Zowa D.P. [Jenia W.]*, 190 AD3d 744, 744); and it is further,

ORDERED that the order is affirmed insofar as reviewed, without costs or disbursements.

In 2020, the petitioner commenced these proceedings to terminate the mother's parental rights to the subject children on the ground of permanent neglect. The mother consented to a finding of permanent neglect, and an order of suspended judgment dated March 8, 2022, was issued upon certain conditions. After the mother allegedly

violated the terms and conditions of the suspended judgment, the petitioner moved to revoke the order of suspended judgment and terminate the mother's parental rights.

On July 7, 2022, the mother failed to appear at a violation hearing, and her attorney made an application for an adjournment. The Family Court denied the application and proceeded [*2]with the hearing. The mother's attorney did not participate in the hearing in the mother's absence. After the hearing, the court issued an order, inter alia, revoking the order of suspended judgment, terminating the mother's parental rights, and freeing the children for adoption. The mother appeals.

The mother's failure to appear at the hearing constituted a default. Although the mother's attorney was present, after the Family Court denied the attorney's application to adjourn the hearing, the attorney made it clear that he was no longer participating in the hearing (*see Matter of Zowa D.P. [Jenia W.]*, 190 AD3d at 744; *Matter of Jeremiah G.F. [Gideon F.]*, 160 AD3d 731, 732). Since the order appealed from was made upon the mother's default, "review is limited to matters which were the subject of contest in the Family Court" (*Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 960; *see* CPLR 5511; *Matter of Vallencia P. [Valdissa R.]*, 215 AD3d 850, 851).

The denial of the application of the mother's attorney to adjourn the hearing can be reviewed on appeal because that request was the subject of contest in the Family Court (*see Matter of Zowa D.P. [Jenia W.]*, 190 AD3d at 745; *Matter of Demetrious L.K. [James K.]*, 157 AD3d 796, 796). In light of, inter alia, the untimely application for an adjournment, the lack of a reasonable explanation for the mother's absence, the mother's history of missing court dates, and the merits of the proceedings, the Family Court providently exercised its discretion in denying the mother's attorney's application for an adjournment (*see Matter of Zowa D.P. [Jenia W.]*, 190 AD3d at 745; *Matter of Demetrious L.K. [James K.]*, 157 AD3d at 797; *Matter of Sanaia L. [Corey W.]*, 75 AD3d 554, 554-555).

**Matter of Joel K. S.**, 218 AD3d 589 (2nd Dept., 2023)

In a proceeding pursuant to Social Services Law § 384-b, the father appeals from an order of the Family Court, Nassau County (Robin M. Kent, J.), dated September 27, 2021. The order, insofar as appealed from, after a hearing, found that the father violated the terms and conditions of a suspended judgment dated October 17, 2019, revoked the suspended judgment, and terminated the father's parental rights.
ORDERED that the order is affirmed insofar as appealed from, without costs or disbursements.

The subject child was born prematurely in 2017, and has been in the same kinship foster home since his release from the neonatal intensive care unit four months later.

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b to, inter alia, terminate the father's parental rights to the child on the ground of permanent neglect. On October 17, 2019, a suspended judgment was entered with certain terms and conditions, including that the father consistently visit the child and attend all of the child's medical appointments and school meetings.

The petitioner subsequently alleged that the father failed to comply with certain terms and conditions of the suspended judgment. After a hearing, the Family Court, among other things, found that the father failed to comply with the terms and conditions of the suspended judgment, terminated his parental rights, and transferred custody and guardianship of the child to the Commissioner of Social Services of Nassau County for the purpose of adoption. The father appeals.

"The Family Court may revoke a suspended judgment after a violation hearing if it finds, upon a preponderance of the evidence, that the parent failed to comply with one or more of its conditions" (*Matter of Jahshanty L.C. [Ann-Marie N.M.]*, 179 AD3d 672, 672). "When determining compliance with a suspended judgment, it is the parent's obligation to demonstrate that [*2]progress has been made to overcome the specific problems which led to the removal" of the child" (*Matter of Marish G. [Maria E.G.]*, 215 AD3d 966, 966). "[A] parent's attempt to comply with the literal provisions of the suspended judgment is not enough" (*Matter of Deysanni H. [Deysanna H.]*, 156 AD3d 699, 700). "The parent must also have gained insight into the problems that were preventing the child['s] return to his or her care" (*Matter of Marish G. [Maria E.G.]*, 215 AD3d at 966). "An order of disposition shall be made . . . solely on the basis of the best interest of the child, and there shall be no presumption that such interests will be promoted by any particular disposition" (Family Ct Act § 631). "The best interests of the child remain relevant at all stages of a proceeding to terminate parental rights on the ground of permanent neglect, including proceedings for the revocation of a suspended judgment" (*Matter of Ashantewa P.W.L. [Doris L.]*, 174 AD3d 714, 714).

Here, a preponderance of the evidence established that the father failed to comply with the conditions of the suspended judgment during its one-year term and that he failed to demonstrate that he had made progress to overcome the specific problems which led to the removal of the child (*see Matter of Davon K.W. [Lissette N.C.]*, 187 AD3d 766, 768; *Matter of Gabriel M.I. [Steven M.I.]*, 160 AD3d 858, 859). Thus, the Family Court properly revoked the suspended judgment.

Furthermore, the best interests of the child would be served by terminating the father's parental rights and freeing the child for adoption (*see Matter of Daniel J.L. [Sayid L.]*, 213 AD3d 939, 940; *Matter of Hope J. [Fatima M.]*, 191 AD3d 673, 674). The child's foster mother has cared for the child since he was four months old and has provided him with a stable and loving home, which is the only home he has ever known (*see*

*Matter of Daniel J.L. [Sayid L.]*, 213 AD3d at 940; *Matter of Vincent N.B. [Gregory B.]*, 173 AD3d 855, 856).

The father's remaining contention is without merit.

**Matter of Serina C.,** 219 AD3d 1215 (1st Dept., 2023)
Order of disposition, Family Court, Bronx County (David J. Kaplan, J.), entered on or about April 27, 2022, which, upon a finding that respondent father had violated the terms of a suspended judgment, terminated his parental rights to the subject child and committed the child's guardianship and custody to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's finding that the father violated the terms of the suspended judgment. There is no basis to disturb the court's credibility determinations (*see Matter of Patrice H.W. [Marcia M.]*, 209 AD3d 554, 555 [1st Dept 2022]). The credible evidence established that the father failed to attend mental health services, submit to random drug tests, visit with the child regularly, or prohibit contact between the child and the mother during visits. Further, to the extent the father complied with the suspended judgment, he had not made progress as to the very issues that led to the child's removal at the outset, including his anger management problem and violent relationship with the mother. In view of the foregoing, the court properly determined that revocation of the suspended judgment and termination of the father's parental rights to free the child for adoption by the foster parents, with whom the child had lived with since birth and had bonded, were in the child's best interests (*see* Family Ct Act § 633[f]; *Matter of Sjuqwan Anthony Zion Perry M. [Charnise Anotonia M.]*, 111 AD3d 473 474 [1st Dept 2013], *lv denied* 22 NY3d 864 [2014]; *Matter of Christian Anthony Y.T. [Donna Marie T.]*, 78 AD3d 410 [1st Dept 2010]).

**Matter of Carter B.**, 219 AD3d 1700 (4th Dept., 2023)

Appeal from an order of the Family Court, Monroe County (James A. Vazzana, J.), entered February 22, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent had violated the terms and conditions of the suspended judgment and transferred her guardianship and custody rights with respect to the subject child to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent mother appeals from an order by which Family Court, inter alia, revoked a suspended judgment entered upon her admission that she had permanently neglected the subject child and terminated her parental rights with respect to that child. We affirm. There is a sound and substantial basis in the record to support the court's determination that the mother failed to comply with the terms of the suspended judgment and that the child's interests were best served by terminating the mother's parental rights (*see Matter of Jerimiah H. [Kiarra M.]*, 213 AD3d 1298, 1298-1299 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]; *Matter of Terry L.G.*, 6 AD3d 1144, 1145 [4th Dept 2004]; *see generally Matter of Michael S. [Charle S.]*, 182 AD3d 1053, 1054 [4th Dept 2020], *lv denied* 35 NY3d 911 [2020]). The mother's contention that her due process rights were violated is unpreserved for our review and in any event is without merit (*see Matter of Giovanni K. [Dawn K.]*, 68 AD3d 1766, 1767 [4th Dept 2009], *lv denied* 14 NY3d 707 [2010]; *see generally Matter of Jessica J.*, 44 AD3d 1132, 1133 [3d Dept 2007]).

**Matter of Elaysia GG.,** 221 AD3d 1338 (3rd Dept., 2023)

Appeal from an order of the Family Court of Chenango County (Frank B. Revoir Jr., J.), entered October 20, 2022, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to revoke a suspended judgment, and terminated respondents' parental rights.
Respondent Amber HH. (hereinafter the mother) and respondent Andrew GG. (hereinafter the father) are the parents of a child (born in 2018). Upon the parents' consent, the child was removed and placed in the custody of petitioner in July 2019. Ultimately, in April 2021, the parents consented to an adjudication of permanent neglect with a disposition of a suspended judgment for a period of 12 months. In March 2022, petitioner sought revocation of the suspended judgment based on the parents' noncompliance with its terms and conditions. Although the mother appeared telephonically with counsel for the initial appearance, she did not appear for the next settlement conference, but had previously communicated with her attorney that she sought return of the child to her. At the October 2022 fact-finding hearing, the mother failed to appear, Family Court found the mother in default and then proceeded with the hearing — without an objection or request for an adjournment by the mother's attorney. At the conclusion of the fact-finding hearing, Family Court, among other things, determined that the mother failed to comply with the terms of the suspended judgment, revoked the suspended judgment and terminated her parental rights. The mother appeals.

Initially, contrary to the contention by petitioner and the attorney for the child, the October 2022 order was not entered on default against the mother and she was free to appeal from it (*see Matter of Amanda I. v Michael I.*, 185 AD3d 1252, 1253-1254 [3d Dept 2020]). After offering Family Court a thin explanation for the mother's nonappearance and whereabouts, the mother's attorney confirmed that he had made numerous attempts to contact her and had heard from her since the initial appearance and the settlement conference (*see Matter of Jerry VV. v Jessica WW.*, 186 AD3d 1799, 1800 [3d Dept 2020]; *Matter of Linger v Linger*, 150 AD3d 1444, 1445 [3d Dept 2017]). Although the mother had questionable attendance since the child had been removed, she had previously appeared several times during the neglect proceeding, attended the initial appearance on the petition to revoke the suspended judgment and, even though she missed the next settlement conference, she later communicated to her attorney that the terms of petitioner's offer for a conditional surrender were "insufficient" (*see Matter of Patrick UU. v Frances VV.*, 200 AD3d 1156, 1158 [3d Dept 2021]).Despite the fact that the mother's attorney did not seek an adjournment or object to Family Court's sua sponte finding of default against the mother, the attorney actively participated in the hearing by stipulating certain exhibits into evidence, interposing a successful objection, effectively [*2]cross-examining the only witness and by delivering a cognizant closing statement seeking return of the child to the mother. Based on the foregoing, we conclude that the order was not entered on default against the mother and is appealable (*see Matter of Amanda I. v Michael I.*, 185 AD3d at 1253-1254; *see also Matter of Jerry VV. v Jessica WW.*, 186 AD3d at 1800; *Matter of Leighann W. v Thomas X.*, 141 AD3d 876, 877 [3d Dept 2016]; *compare Matter of Myasia QQ. [Mahalia QQ.]*, 133 AD3d 1055, 1056 [3d Dept 2015]).

Turning to the merits, we find no basis upon which to disturb Family Court's determination to revoke the suspended judgment and to terminate the mother's parental rights. "A suspended judgment provides a parent who has been found to have permanently neglected his or her child with a brief opportunity to become a fit parent with whom the child can be safely reunited" (*Matter of Jeremiah RR. [Bonnie RR.]*, 192 AD3d 1338, 1339 [3d Dept 2021] [internal quotation marks and citations omitted], *lv denied* 37 NY3d 905 [2021]). During this opportunity, "the parent must comply with terms and conditions meant to ameliorate the difficulty that led to the suspended judgment" (*Matter of Brandon N. [Joseph O.]*, 165 AD3d 1520, 1522 [3d Dept 2018] [internal quotation marks and citation omitted]). However, literal compliance with such terms and conditions is not enough to prevent a finding of a violation, as "[a] parent must also show that progress has been made to overcome the specific problems which led to the removal of the child[ ]" (*Matter of Nahlaya MM. [Zaianna LL.]*, 193 AD3d 1294, 1296 [3d Dept 2021] [internal quotation marks, brackets and citations omitted], *lvs denied* 37 NY3d 905 [2021], 37 NY3d 905 [2021]). "Where a parent's noncompliance

with the terms and conditions of the suspended judgment is established by a preponderance of the evidence, Family Court may revoke the suspended judgment and, if in the child's best interests, terminate parental rights" (*Matter of Max HH. [Kara FF.]*, 170 AD3d 1456, 1458 [3d Dept 2019] [citations omitted]). "Great deference is accorded to Family Court's factual findings, and they will not be disturbed if supported by a sound and substantial basis in the record" (*Matter of Jeremiah RR. [Bonnie RR.]*, 192 AD3d at 1340 [citations omitted]).

The evidence at the fact-finding hearing demonstrated that the mother had failed to comply with most, if not all, of the terms and conditions of her suspended judgment. Specifically, testimony from petitioner's witness, a foster care supervisor, established that the mother had failed to complete outpatient services, obtain suitable housing, keep petitioner informed as to where she was residing or obtain sufficient employment. This was corroborated by certain documentary evidence, wherein the mother reported that she was unemployed and was not looking for work. Additionally, the supervisor testified that the mother had failed to complete the required parenting classes and mental health [*3]evaluations and had only minimal, sporadic visitation with several cancellations and no efforts to reschedule them — including both in-person and virtual visits. On cross-examination by the mother's attorney, the supervisor acknowledged that her testimony was limited to what she learned from conferences with the caseworkers and the case record.**[FN1]** Given the overwhelming evidence in the record demonstrating the mother's noncompliance with the various terms and conditions imposed upon her by the suspended judgment, Family Court properly concluded that the mother had violated the suspended judgment and revoked same (*see Matter of Max HH. [Kara FF.]*, 170 AD3d at 1458; *Matter of Brandon N. [Joseph O.]*, 165 AD3d at 1523).

Contrary to the mother's contention, a separate dispositional hearing was not required before revoking a suspended judgment and terminating her parental rights where the record demonstrates that it was in the child's best interests (*see* Family Ct. Act § 633 [f]; *Matter of Marish G. [Maria E.G.]*, 215 AD3d 966, 967 [2d Dept 2023]; *Matter of Jerimiah H. [Kiarra M.]*, 213 AD3d 1298, 1299 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]; *Matter of Nahlaya MM. [Zaianna LL.]*, 193 AD3d at 1298; *compare Matter of Harmony F. [William F.]*, 212 AD3d 1028, 1033 [3d Dept 2023]). To that end, although "a parent's failure to comply with the [terms and] conditions of a suspended judgment does not automatically compel termination of parental rights, that noncompliance constitutes strong evidence that termination is, in fact, in the best interests of the child" (*Matter of Maykayla FF. [Eugene FF.]*, 141 AD3d 898, 900 [3d Dept 2016] [internal quotation marks and citations omitted]). Indeed, Family Court heard testimony from the supervisor regarding the mother's noncompliance with the terms and conditions of the suspended judgment that directly impacted the child, including her failure to attend the recommended parenting classes or any of the service planning meetings. Even though

the court heard testimony that the mother — when she did attend visitation — had "a lot of affection" for the child, the court also heard testimony that the child had been with a pre-adoptive family since just before the child's first birthday, is doing "exceptionally well" in that home and has "definitely" bonded with the family. Additionally, the supervisor testified that, although the child had some initial delays in socialization and behavior, the child has "progressed remarkably well" with the pre-adoptive family. As highlighted by the appellate attorney for the child, who supports Family Court's determination, the court was "intimately familiar" with the parties and the child, including the child's relationship with the foster family since the child's removal. Considering this evidence and the prior admissions made by the mother in obtaining the suspended judgment on consent, we decline to disturb Family Court's determination that termination of the mother's parental rights was in [*4]the best interests of the child (*see Matter of Brandon N. [Joseph O.]*, 165 AD3d at 1523-1524; *Matter of Maykayla FF. [Eugene FF.]*, 141 AD3d at 901; *Matter of Jason H. [Lisa K.]*, 118 AD3d 1066, 1068 [3d Dept 2014]). We have examined the remaining contentions of the parties and have found them to be without merit or rendered academic.

ORDERED that the order is affirmed, without costs.

**Footnotes**

**Footnote 1:** Since there was no objection to the supervisor's testimony during the hearing and certain exhibits were stipulated into evidence, the mother's hearsay argument, which is being raised for the first time on appeal, is unpreserved for our review (*see Matter of Britiny U. [Tara S.]*, 124 AD3d 964, 965 [3d Dept 2015]; *see also Matter of Adorno v Vaillant*, 177 AD3d 1275, 1276 [4th Dept 2019]).

**Matter of Edrick PP.**, 221 AD3d 1307 (3RD Dept., 2023)

Appeals from a decision and an order of the Family Court of Tompkins County (John C. Rowley, J.), entered May 4, 2022 and May 20, 2022, which, among other things, granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject child to be permanently neglected, and terminated respondent's parental rights.

In January 2019, the subject child (born in 2015) was removed from the care of respondent (hereinafter the mother) and placed with the maternal grandmother. One year later, the child was removed from the grandmother's care and placed in a foster home, where he remained throughout these proceedings. In December 2020, petitioner filed the instant petition, alleging that the mother had permanently neglected the child and seeking to terminate her parental rights. The mother consented to a finding of

permanent neglect in May 2021, and the dispositional hearing was adjourned to allow the mother an opportunity to engage in services in a more meaningful and continuous way. Following the dispositional hearing in March 2022, Family Court issued a written decision finding that the best interests of the child would not be served by a suspended judgment but, rather, by terminating the mother's parental rights and freeing the child for adoption. A conforming dispositional order was thereafter entered.[FN1] The mother appeals from the decision and the order.[FN2]

Initially, to the extent that the mother appears to challenge the permanent neglect finding, such finding was entered upon her consent and, in the absence of a motion to vacate her admission, is not properly before us on this appeal (*see Matter of Brandon N. [Joseph O.]*, 165 AD3d 1520, 1521-1522 [3d Dept 2018]; *Matter of Abbigail EE. [Elizabeth EE.]*, 106 AD3d 1205, 1206-1207 [3d Dept 2013]). The mother's primary contention is that Family Court erred in terminating her parental rights and, instead, should have issued a suspended judgment. We disagree. "Following an adjudication of permanent neglect, the sole concern at a dispositional hearing is the best interests of the child and there is no presumption that any particular disposition, including the return of a child to a parent, promotes such interests" (*Matter of Issac Q. [Kimberly R.]*, 212 AD3d 1049, 1054 [3d Dept 2023] [internal quotation marks and citations omitted], *lv denied* 39 NY3d 913 [2023]; *see Matter of Makayla I. [Sheena K.]*, 201 AD3d 1145, 1151 [3d Dept 2022], *lvs denied* 38 NY3d 903 [2022], 38 NY3d 903 [2022]). A suspended judgment is appropriate where a parent has demonstrated that, given a finite period of time, he or she is capable of becoming a fit parent with whom the child can be safely reunited, and that a delay in permanency would not be contrary to the best interests of the child (*see* Family Ct Act § 633; *Matter of Jason O. [Stephanie O.]*, 188 AD3d 1463, 1467-1468 [3d Dept 2020], *lv denied* 36 NY3d 908 [2021]; *Matter of Isabella H. [Richard I.]*, 174 AD3d 977, 981-982 [3d Dept 2019]).

In arguing that Family Court should have granted her request for a suspended judgment, the mother hyperfixates on her successful completion of a 30-day inpatient substance abuse treatment program at French Creek Recovery Center in late November 2021. While the completion of such inpatient treatment program is a laudable first step, the mother failed to demonstrate that a short grace period would allow her to become a fit parent. Indeed, the mother testified that she entered French Creek because she "got tired of being accused of using and . . . needed a break," and the record demonstrates that while she was there she minimally engaged in treating her substance abuse issues. Prior to going to French Creek, the mother largely failed to attend Family Treatment Court (hereinafter FTC) or to check in with her FTC coordinator, and she tested positive for fentanyl in September 2021 and for cocaine in October 2021. Upon her discharge from French Creek, the mother began regularly attending a sober support group, but she did not follow French Creek's

recommendations to attend FTC, had not engaged in further substance abuse treatment and had not submitted to any drug screens. The mother also failed to meaningfully engage in mental health treatment. In the six months before she went to French Creek, the mother attended only two counseling sessions; after leaving French Creek in December 2021, and despite the recommendation that she engage in mental health treatment, the mother attended only a single counseling session, which occurred the week before the dispositional hearing.

The mother and the caseworkers agreed that the mother's visits with the child were generally positive, and that the child was happy to spend time with the mother. Prior to going to French Creek, the mother had biweekly supervised visits and attended most of them. However, after her discharge from French Creek, the mother did not see the child in person, and only had one phone call with him.**[FN3]** The caseworkers explained that they had made numerous attempts to meet with the mother to, among other things, set a parenting time schedule, but the mother either rescheduled or failed to appear.

The mother also failed to take advantage of opportunities to familiarize herself with the needs of the child, who is autistic. Although aware that the school held monthly meetings to discuss the child's services and progress, the mother would not attend, opting instead to do her own reading on autism. In contrast, the foster parents, who have two other children with special needs, attended those meetings, followed the child's specific progress and were ready and able to adopt the child and meet his needs. During his placement with the foster parents, the child went from being nonverbal to being able to communicate in full sentences. As of the dispositional hearing, the child had been with the foster parents for over two years, and he had spent approximately half of his life out of the mother's care. While [*2]we acknowledge the mother's successful completion of an inpatient treatment program, her engagement in mental health and substance abuse treatment had continued to be sporadic, at best, and a suspended judgment would have simply continued to delay the child's permanency. Under these circumstances, and deferring to Family Court's credibility determinations, a sound and substantial basis in the record exists for the conclusion that terminating the mother's parental rights is in the best interests of the child (*see Matter of Zaiden P. [Ashley Q.]*, 211 AD3d 1348, 1355-1356 [3d Dept 2022], *lvs denied* 39 NY3d 911 [2023], 39 NY3d 911 [2023]; *Matter of Isabella H. [Richard I.]*, 174 AD3d at 982; *Matter of Keadden W. [Hope Y.]*, 165 AD3d 1506, 1509 [3d Dept 2018], *lv denied* 32 NY3d 914 [2019]).

The mother's remaining contentions, to the extent not expressly addressed herein, have been examined and are either unpreserved or lacking in merit.

ORDERED that the appeal from the decision is dismissed, without costs.

ORDERED that the order is affirmed, without costs.

**Footnotes**

**Footnote 1:** Petitioner also filed a permanent neglect petition against the child's father which, after a fact-finding hearing, resulted in a finding of permanent neglect against him. That proceeding was heard alongside the mother's at the same dispositional hearing, and the decision and the order on appeal also terminated the father's parental rights. However, the father did not file an appeal or participate in the mother's appeal.

**Matter of Mariah C. P.**, AD3d 2023 NY Slip Op 06485 (1st Dept., 2023)

Order of disposition, Family Court, New York County (Keith Brown, J.), entered on or about September 16, 2022, which, after a hearing, to the extent appealed from, upon a finding that respondent father had violated the terms of a suspended judgment, revoked the suspended judgment, terminated the father's parental rights to the subject child, and committed guardianship and custody of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supports Family Court's finding that the father failed to comply with the terms of the suspended judgment (*see Matter of Naethael Makai A. [Adwoa A.]*, 135 AD3d 438, 438 [1st Dept 2016]). Notwithstanding the father's efforts to comply with some of the terms of the judgment, the credible evidence adduced at the hearing established that he failed to visit the child regularly, submit to random toxicology screenings, attend the child's medical and educational appointments, stay in contact with the service providers, or prohibit unsupervised contact between the child and the mother during visits. In light of this evidence, Family Court properly determined that revocation of the suspended judgment and termination of the father's parenting rights to free the child for adoption by the foster mother were in the child's best interests, particularly given the length of time that the child has been in foster care (*see Matter of Davontay Peter H. [Makeba H.]*, 127 AD3d 405, 405 [1st Dept 2015], *lv denied* 25 NY3d 911 [2015]).

A separate dispositional hearing was not required before terminating the father's parental rights. Family Court presided over the case for nearly 10 years, was very well acquainted with the parties, and had sufficient information to make an informed determination regarding the child's best interests (*see Matter of Reyaldo M. v Violet F.*, 88 AD3d 531, 531 [1st Dept 2011]). The child had lived with the same foster parent for most of her life, had bonded with the parent, and wished to be adopted.

We find no basis to disturb the court's credibility determinations (*see Matter of Patrice H.W. [Marcia M.]*, 209 AD3d 554, 555 [1st Dept 2022]).

**Matter of Alexis X.**, AD3d 2023 NY Slip Op 06568 (3rd Dept., 2023)

Appeal from an order of the Family Court of St. Lawrence County (Cecily L. Morris, J.), entered April 19, 2021, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to revoke a suspended judgment, and terminated respondent's parental rights.

Respondent (hereinafter the mother) is the mother of two children (born in 2006 and 2009). In July 2019, the mother admitted to permanently neglecting the children and consented to an adjudication of permanent neglect with the disposition of a suspended judgment for a period of six months.[FN1] In December 2019, a petition was filed seeking to extend the suspended judgment for another six-month period and the parties consented, resulting in an extension of the suspended judgment until July 2020. In January 2020, petitioner filed a petition alleging that the mother violated the terms and conditions of the suspended judgment. A fact-finding hearing was scheduled for July 2020 and the mother defaulted in appearance. Upon learning that the mother's counsel had spoken to her on the previous evening and explained the consequences of default and that the mother had been equivocal about appearing, the court held the hearing in her absence. Thereafter, Family Court determined that the mother failed to comply with the terms of the suspended judgment and scheduled a dispositional hearing for February 2021. At the hearing, the mother responded to the allegations that she had not complied with the order, offering explanations for missing her parenting time and appointments with her case planner and for failing her drug tests. The mother also attempted to call the maternal grandmother as a witness, as she was allegedly willing to serve as a relative resource for placement of both children, but the court denied her request. At the conclusion of the hearing, Family Court revoked the suspended judgment and terminated the mother's parental rights. The mother appeals.

"The purpose of a suspended judgment is to provide a parent who has been found to have permanently neglected his or her child[ren] with a brief period [of time] within which to become a fit parent with whom the child[ren] can be safely reunited" (*Matter of Dominique VV. [Kelly VV.]*, 145 AD3d 1124, 1125 [3d Dept 2016] [internal quotation marks and citations omitted], *lv denied* 29 NY3d 901 [2017]; *see Matter of Brandon N. [Joseph O.]*, 165 AD3d 1520, 1522 [3d Dept 2018]). "This opportunity is limited in time, during which the parent must comply with terms and conditions meant to ameliorate the difficulty that led to the suspended judgment" (*Matter of Max HH. [Kara FF.]*, 170 AD3d 1456, 1457-1458 [3d Dept 2019] [internal quotation marks, brackets and citations

omitted]). "Where a parent's noncompliance with the terms and conditions of the suspended judgment is established by a preponderance of the evidence, Family Court may revoke the suspended judgment and, if in the child[ren]'s best interests, terminate that party's parental [*2]rights" (*Matter of Jeremiah RR. [Bonnie RR.]*, 192 AD3d 1338, 1339 [3d Dept 2021] [internal quotation marks, brackets and citations omitted], *lv denied* 37 NY3d 905 [2021]; *see Matter of Alexsander N. [Lena N.]*, 146 AD3d 1047, 1048 [3d Dept 2017], *lv denied* 29 NY3d 903 [2017]). "While a parent's failure to comply with the conditions of a suspended judgment does not automatically compel termination of parental rights, that noncompliance constitutes strong evidence that termination is, in fact, in the best interests of the children" (*Matter of Nahlaya MM. [Zaianna LL.]*, 193 AD3d 1294, 1298 [3d Dept 2021] [internal quotation marks, brackets and citations omitted], *lvs denied* 37 NY3d 905 [2021], 37 NY3d 905 [2021]; *see Matter of Jasnia Y. [Alease Y.]*, 162 AD3d 1148, 1149-1150 [3d Dept 2018], *lv denied* 32 NY3d 901 [2018]). "Great deference is accorded to Family Court's factual findings, and they will not be disturbed if supported by a sound and substantial basis in the record" (*Matter of Jerhia EE. [Benjamin EE.]*, 157 AD3d 1017, 1018 [3d Dept 2018] [citation omitted]; *see Matter of Dominique VV. [Kelly VV.]*, 145 AD3d at 1125).

The mother argues that as the maternal grandmother was an available resource to accept both children, Family Court erred in terminating her rights and freeing the children for adoption into separate homes. We disagree. At the time of the dispositional hearing, the children had been residing in foster care for approximately 4½ years. The mother confirmed that she was aware of the terms and conditions of the suspended judgment and continued to violate the terms and conditions by missing visits, using drugs and failing to engage in services. Moreover, the mother's testimony primarily focused on her difficulties and her emotions, and she displayed a general lack of awareness and concern for the children.

With regard to the maternal grandmother, the record demonstrates that Family Court appropriately took judicial notice of the fact that the maternal grandmother had previously failed to be approved as a placement resource for the children and, as such, she was not an appropriate placement for the children. Moreover, "[a]lthough siblings should generally be kept together, the rule is not absolute and may be overcome by a showing that the best interests of the children are served by separating them" (*Matter of Joshua E.R. [Yolaine R.]*, 123 AD3d 723, 726 [2d Dept 2014] [internal quotation marks and citation omitted]). We note that while the children had resided in the same foster home for a significant period of time, several weeks prior to the hearing there was an incident involving the younger child which raised safety concerns and resulted in the children being separated and relocated to different homes. The evidence establishes that petitioner consulted with the children's counselor, who recommended separating the children based on safety concerns. Given these circumstances, it would not, in our

view, be in the children's best interests [*3]for them to be placed in the same preadoptive foster home, even if any subsequent adoptions would result in the children living separately (*see id.*; *Matter of James WW. [Tara XX.],* 100 AD3d 1276, 1279 [3d Dept 2012], *lv denied* 20 NY3d 1057 [2013]; *Matter of Alyssa M.*, 55 AD3d 505, 506 [1st Dept 2008]). Based on the foregoing,a sound and substantial basis exists in the record to support Family Court's determination that termination of the mother's parental rights was in the best interests of the children (*see Matter of Nahlaya MM. [Zaianna LL.]*, 193 AD3d at 1298; *Matter of Jeremiah RR. [Bonnie RR.]*, 192 AD3d at 1341; *Matter of Maykayla FF. [Eugene FF.]*, 141 AD3d 898, 901 [3d Dept 2016]).

**Footnote 1:** At this hearing, the father of the children voluntarily surrendered his parental rights.

**Matter of Amelia D.**, AD3d 2023 NY Slip Op 06695 (4th Dept., 2023)

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered February 24, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child. It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law 384-b, respondent father appeals from an order that revoked a suspended judgment that had previously been entered against him and terminated his parental rights with respect to the subject child. The order was entered following an evidentiary hearing at which petitioner established that the father failed to comply with various terms and conditions of the suspended judgment.

Although the father concedes that he failed to comply with the suspended judgment, which had been in effect for six months, he contends that, instead of terminating his parental rights, Family Court should have extended the suspended judgment and afforded him another opportunity to comply with its terms. We reject that contention. The evidence at the hearing established that the father violated the suspended judgment by, among other things, missing the vast majority of scheduled visits with the child, failing to attend appointments for substance abuse treatment and being unsuccessfully discharged from the treatment program, failing to obtain a mental health evaluation despite a history of mental illness, attending only 2 out of 27 classes for domestic violence prevention, failing to complete a parent training program, failing to maintain stable housing, and failing to provide evidence of stable income. The evidence

also established that the father was homeless at times during the period of the suspended judgment and was incarcerated twice. In fact, the father was in jail at the time of the hearing. Under the circumstances, we conclude that the court's determination that it is in the child's best interests to terminate the father's parental rights is supported by a preponderance of the evidence (*see Matter of Jerimiah H. [Kiarra M.]*, 213 AD3d 1298, 1299 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]; *see generally Matter of Malachi S. [Michael W.]*, 195 AD3d 1445, 1447 [4th Dept 2021], *lv denied* 37 NY3d 1081 [2021]).

# SURRENDERS and ADOPTIONS

**Matter of J.**, 218 AD3d 583 (2nd Dept., 2023)

In an adoption proceeding, the father appeals from an order of the Family Court, Suffolk County (Matthew Hughes, J.), dated January 5, 2022. The order, after a hearing, found that the father abandoned the subject child and that his consent to the adoption of the child was not required.
ORDERED that on the Court's own motion, the notice of appeal is deemed to be an application for leave to appeal, and leave to appeal is granted (*see* Family Ct Act § 1112[a]); and it is further,

ORDERED that the order is affirmed, without costs or disbursements.

In April 2011, the subject child was born, while his parents were married. In June 2016, the child's father was arrested and incarcerated. In 2017, the father was convicted and sentenced to an indeterminate term of imprisonment of 6 to 18 years. The child's mother and father divorced in August 2016. The mother subsequently remarried.

In August 2020, the mother and her current husband filed a petition seeking to have the current husband adopt the child, alleging, inter alia, that, pursuant to Domestic Relations Law § 111(2)(a), the father's consent to adoption was not required. After a hearing, the Family Court determined that the father had abandoned the child and that his consent to the adoption of the child was not required. The father appeals.

The petitioners met their burden of establishing, by clear and convincing evidence, that the father abandoned the child, and that his consent to the adoption was not required (*see Matter of Ryan [Jessica D.-Timothy A.]*, 215 AD3d 857; *Matter of Liliana [Kristal L.L.-Jamie L.J.]*, 213 AD3d 665, 665-666). Pursuant to Domestic Relations Law § 111(2)(a), consent to adoption is not required of a parent who evinces an intent to forego his or her parental rights and obligations by his or her failure for a period of six months to contact or communicate with the child or the person [*2]having legal custody of the child although able to do so (*see Matter of Ryan [Jessica D.-Timothy A.]*, 215 AD3d 857; *Matter of Jahnya [Cozbi C.-Camesha B.]*, 189 AD3d 824, 826). Here, the evidence at the hearing established that the father had no contact with the child since 2016. The father's incarceration did not absolve him of the responsibility to maintain contact with the child (*see Matter of Ryan [Jessica D.-Timothy A.]*, 215 AD3d 857; *Matter of Prinzivalli v Kaelin*, 200 AD3d 781, 782-783). In addition, the evidence established that between 2016 and 2021, when the hearing occurred, the father did not send any letters or gifts to the child or provide any financial support (*see Matter of Ryan [Jessica D.-Timothy A.]*, 215 AD3d 857; *Matter of Adrianna [Dominick I.-Jessica F.]*, 144 AD3d 1145, 1146).

Accordingly, the Family Court properly found that the father abandoned the child and that his consent to the adoption of the child was not required.

**Matter of Samuel S**., AD3d 2023 NY Slip Op 03728 (3rd Dept., 2023)

Appeal from an order of the Family Court of Tompkins County (John C. Rowley, J.), entered May 28, 2021, which, in a proceeding pursuant to Domestic Relations Law article 7, granted a motion by the attorney for the children to dismiss the petition.

In 2019, petitioner surrendered her rights to her two sons (born in 2014 and 2016) and executed a judicial consent to their adoption. In conjunction with the surrender, Family Court approved a postadoption contact agreement allowing petitioner to have monthly visits with the children, access to the adoptive parents' telephone number and address, the ability to send cards and gifts to the children and to be provided with short reports on the health, education and activities of the children, among other things. In June 2020, petitioner, pro se, filed a petition for enforcement of the contact agreement as to the older child, later amended to include both children, alleging that the pre-adoptive parents were in violation of the contact agreement by, among other things, failing to provide petitioner with their current phone number and address, obstructing all visitation and contact and failing to provide reports on the health, education and activities of the children. Based on petitioner's failure to appear for some of the hearing dates, Family Court dismissed the petition, with prejudice.

Petitioner then filed a second petition in March 2021, asking Family Court to revoke both the contact agreement and the judicial consent as to both of the children based on the pre-adoptive parents' violation of the agreement. The allegations set forth in the second petition were identical to those that gave rise to the first petition, but the relief sought was different inasmuch as petitioner sought to revoke the contact agreement and the judicial surrender, rather than just enforcement of the contact agreement. Family Court granted a motion by the attorney for the children to dismiss the second petition, finding that it was barred by res judicata and that it failed to state a cause of action inasmuch as Family Ct Act § 1055-a does not authorize the court to terminate or revoke a postadoption contact agreement, only to enforce it. Petitioner appeals from this order.

Initially, this appeal has been rendered moot as to the older child given that, in January 2023, Family Court vacated petitioner's judicial consent for adoption of this child. As such, the associated contact agreement no longer applies and the instant proceeding is moot as to the older child (see Matter of Audra Z. v Lina Y., 135 AD3d 1197, 1198 [3d Dept 2016]), and the exception to the mootness doctrine does not apply (see Matter of Giuseppa T. v Anthony U., 214 AD3d 1239, 1240 [3d Dept 2023]). Given that the judicial consent to the adoption of the younger child remains in effect, as well as the contact agreement, we address the appeal on the merits as to the younger child.

We turn first to the issue of whether the second petition is barred by res judicata[*2]. "The doctrine of res judicata gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein" (Matter of Weaver v Weaver, 198 AD3d 1168, 1169 [3d Dept 2021] [internal quotation marks and citations omitted]; see Matter of Stephen N. v Amanda O., 140 AD3d 1223, 1224-1225 [3d Dept 2016]). Significantly, in April 2022, while this appeal was pending, Family Court granted a motion by petitioner to set aside the prior order dismissing the first petition and restored the matter to the court's calendar. As of the date of this decision, it appears that the first petition is still pending. Given the foregoing, it cannot be said that the first petition has been decided, thus, res judicata does not bar the second petition. This does not, however, require that this Court reverse Family Court's determination.

We turn now to petitioner's contention that Family Court erred in determining that petitioner failed to state a cause of action given that Family Ct Act § 1055-a does not authorize the court to terminate or revoke a postadoption contact agreement, only to enforce it. As relevant here, Family Ct Act § 1055-a (b) provides that, if a child who is the subject of a postadoption contact agreement has not yet been adopted, any party to the agreement can file a petition seeking enforcement. Although Family Ct Act § 1055-a (b) provides for the enforcement of postadoption contact agreements, it does not

provide a mechanism for the revocation of said agreements, as sought in the second petition (see Matter of Mia T. [Emilio T.], 88 AD3d 730, 731 [2d Dept 2011]). Moreover, as to petitioner's contention that the judicial consent to adoption should be revoked based upon the pre-adoptive parents' failure to abide by the terms of the contact agreement, failure to abide by such an agreement "shall not be grounds for . . . revocation of written consent to an adoption after that consent has been approved by the court" (Domestic Relations Law § 112-b [3]). As such, Family Court did not err in dismissing petitioner's second petition on the basis of failure to state a cause of action. To the extent that petitioner's remaining contentions are properly before this Court, they are found to be without merit.

**Matter of Liam M. A.**, 221 AD3d 1481 (4th Dept., 2023)

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), dated May 25, 2021, in a proceeding pursuant to Social Services Law section 383-c. The order denied respondent's motion to vacate a prior conditional judicial surrender order with respect to the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In these proceedings pursuant to Social Services Law § 383-c, respondent father appeals in appeal Nos. 1, 2, and 3 from an order and two corrected orders denying his motions seeking to vacate the conditional judicial surrenders that he executed with respect to the three subject children. Initially, with respect to appeal No. 1, Family Court denied the motion at issue in that appeal as moot on the ground that the child who is the subject of that motion has been adopted (*see generally Matter of Jaxon S. [Jason S.]*, 170 AD3d 1687, 1688 [4th Dept 2019]). Inasmuch as the father does not raise any issue in his brief with respect to that dispositive determination, he is deemed to have abandoned any contention with respect to the propriety thereof (*see Liberty Maintenance*, *Inc. v Alliant Ins. Servs.*, *Inc.*, 215 AD3d 1248, 1248 [4th Dept 2023]; *see generally Matter of Rohrback v Monaco*, 173 AD3d 1774, 1774 [4th Dept 2019]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). In light of our determination, we do not address defendant's contentions with respect to appeal No. 1 (*see Liberty Maintenance*, *Inc.*, 215 AD3d at 1248). With respect to appeal Nos. 2 and 3, we conclude that defendant's contentions are either unpreserved or lack merit for the reasons that follow.

The father's contention that the surrenders should be vacated because the court did not inform him of certain consequences of the surrenders pursuant to Social Services Law § 383-c (3) (b) is not preserved for our review inasmuch as the father did not raise that

ground in support of his motions (*see Matter of Omia M. [Tykia B.]*, 144 AD3d 1637, 1637 [4th Dept 2016]).

Contrary to the father's further contention, the court properly denied the motions without a hearing because the motions "lacked a legal basis upon which [the c]ourt may have rescinded the judicial surrenders" (*Matter of Brittany R. [Annemarie R.]*, 130 AD3d 1271, 1272 [3d Dept 2015], *lv dismissed* 26 NY3d 996 [2015]). "It is well settled that, in the absence of 'fraud, duress or coercion in the execution or inducement of a surrender[,] [n]o action or proceeding may be maintained by the surrendering parent . . . to revoke or annul such surrender' " (*Omia M.*, 144 AD3d at 1637, quoting Social Services Law § 383-c [6] [d]; *see Brittany R.*, 130 AD3d at 1271). In his motions, the father alleged that certain relatives of the subject children were threatened by a foster parent that they would not see the subject children again if they testified on the father's [*2]behalf at a hearing that had been scheduled on petitions seeking the termination of his parental rights with respect to those and other children. However, the father was not aware of those alleged threats at the time he executed the surrenders and they therefore cannot be a valid basis for his contention that he was coerced into signing the surrenders. The father's further allegation that petitioner's caseworker told the father that he faced having his parental rights terminated at the conclusion of the scheduled termination of parental rights hearing was also not a valid basis for vacatur of the surrenders. " '[I]nforming a parent of an accurate, albeit unpleasant, event is not coercion' " (*Matter of Jenny A. v Cayuga County Dept. of Health & Human Servs.*, 50 AD3d 1583, 1583 [4th Dept 2008], *lv dismissed* 11 NY3d 809 [2008]). Moreover, the father indicated during the colloquy with respect to the surrenders that no one was forcing him or threatening him to sign the surrenders (*see Matter of Jason F.A. [Francisco A.]*, 151 AD3d 958, 959 [2d Dept 2017]).

The father's primary allegation in support of the motions was that petitioner failed to meet a material condition of the surrenders with respect to visitation. The court properly noted, however, that the father's remedy with respect to that allegation was to file a petition or petitions pursuant to Family Court Act § 1055-a for enforcement of the surrenders' terms, not to file motions to vacate the surrenders (*see Matter of Sabrina H.*, 245 AD2d 1134, 1134-1135 [4th Dept 1997]). We reject the father's alternative contention that the court should have sua sponte treated his motions as ones for enforcement.

# CUSTODY

**Matter of Lashawn K. v Administration for Children's Services**, 221 AD3d 431 (1st Dept., 2023)

Order, Family Court, New York County (Jessica Brenes, Ref.), entered on or about December 14, 2021, which, after a hearing, dismissed Lashawn K.'s petition for custody and visitation of the subject child with prejudice for lack of standing, unanimously reversed, on the law, without costs, and petitioner's custody and visitation petitions remanded for a further hearing on extraordinary circumstances.
As a prerequisite to seeking custody or visitation with a child, a party must establish standing. The party may establish standing (1) as a parent pursuant to Domestic Relations Law § 70; (2) as a sibling for visitation pursuant to Domestic Relations Law § 71; (3) as a grandparent for visitation or custody pursuant to Domestic Relations Law § 72; or (4) by showing extraordinary circumstances pursuant to *Matter of Bennett v Jeffreys* (40 NY2d 543 [1976]) (*see Matter of Tomeka N.H. v Jesus R.*, 183 AD3d 106 [4th Dept 2020], *lv denied* 36 NY3d 909 [2021]).

In *Matter of Brooke S.B. v Elizabeth A.C.C.* (28 NY3d 1 [2016]), the Court of Appeals expanded the definition of the word "parent" to include a nonbiological, nonadoptive parent who has demonstrated by clear and convincing evidence that "the parties agreed to conceive a child and to raise the child together" (*id.* at 14). Family Court determined after a hearing that petitioner failed to establish the existence of an enforceable pre-conception agreement to conceive and co-parent the subject child with the child's biological mother. The child's biological mother unexpectedly died only months after the child was born and before she and petitioner were to be married.

However, Family Court erred in dismissing petitioner's custody and visitation petitions without permitting petitioner the opportunity to present evidence supporting her argument that she had standing based on extraordinary circumstances. Indeed, the Referee stated on the record during the hearing that she agreed with the biological father's position that petitioner could only present extraordinary circumstances evidence after she established that she had standing. This is an error of law, as extraordinary circumstances is one of several bases for standing to seek custody and visitation.

Extraordinary circumstances may be found where there has been "a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child" (*Matter of Bennett v Jeffreys*, 40

NY2d at 549; *see also Matter of Bisoh C. v Valentine S.*, 185 AD3d 409 [1st Dept 2020]; *Matter of Virgilio M. v Jasmin R.*, 172 AD3d 430 [1st Dept 2019]; *Matter of Kathy C. v Alonzo E.*, 157 AD3d 503 [1st Dept 2018]; *Matter of Jamal S. v Kenneth S*., 143 AD3d 555 [1st Dept 2016]).

We therefore reverse and remand the case to Family Court for a further hearing on whether petitioner can establish standing based on extraordinary [*2]circumstances.

***M-3850 - Lashawn K. Amanda T., et al.***

Motion for leave to file amicus brief, granted.

# FAIR HEARINGS

**Matter of Kristen DD. V New York State Central Register of Child Abuse and Maltreatment, Respondent, et al., Respondent.**, 220 AD3d 1129 (3rd Dept., 2023)

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of the Office of Children and Family Services denying petitioner's application to have a report maintained by respondent Central Register of Child Abuse and Maltreatment amended to be unfounded and expunged.

In March 2019, respondent Central Register of Child Abuse and Maltreatment received a report alleging that petitioner — the mother of the subject child (born in 2012) — was abusing alcohol in the child's presence such that she was unable to provide a minimal degree of parental care. During an investigation by respondent Rockland County Department of Social Services (hereinafter DSS), additional information came to light regarding an incident of domestic violence between petitioner and the child's father, which was allegedly initiated by petitioner and occurred in front of the child. Following the investigation, the report was marked as indicated against petitioner for maltreatment of the child.**[FN1]** The report was forwarded to the Office of Children and Family Services, which declined petitioner's request to have the report amended to unfounded and sealed. A hearing was held before an Administrative Law Judge (hereinafter ALJ), who determined that DSS had demonstrated maltreatment on petitioner's part and that the indicated report was "relevant and reasonably related" to any future childcare employment, adoption or foster care decisions regarding petitioner (Social Services Law § 422 [8] [c] [ii]) such that it should be disclosed to inquiring agencies. Petitioner thereafter commenced this CPLR article 78 proceeding in Supreme Court seeking

annulment of the ALJ's determinations and expungement of the report. The proceeding was subsequently transferred to this Court pursuant to CPLR 7804 (g).

We conclude that the ALJ's findings that petitioner maltreated the child and that this information should be disclosed to inquiring agencies are supported by substantial evidence. "In order to establish maltreatment, DSS was obliged to demonstrate, by a preponderance of the evidence, that the physical, mental or emotional condition of the child[ ] either had been or would be in imminent danger of being impaired because petitioner[ ] had failed to exercise a minimum degree of care in providing [the child] with appropriate supervision or guardianship" (*Matter of Destiny Q. v Poole*, 214 AD3d 1183, 1185 [3d Dept 2023] [citations omitted]; *see* 18 NYCRR 432.1 [b] [1] [ii]). Inadequate supervision or guardianship includes "misusing alcoholic beverages to the extent that [the offending parent] loses self-control" (18 NYCRR 432.1 [b] [1] [ii]), as well as engaging in domestic violence in the child's presence (*see Matter of Christopher JJ. v Spencer*, 204 AD3d 1193, 1194 [3d Dept 2022]). The disclosure of an indicated report to inquiring agencies may be made upon proof "that the maltreatment is relevant and reasonably related [*2]to any future child care employment, adoption or foster care decisions regarding petitioner[ ]" (*Matter of Destiny Q. v Poole*, 214 AD3d at 1186 [internal quotation marks and citation omitted]; *see* Social Services Law § 422 [8] [c] [ii]).

"Our review of the ALJ's determination[s] [in this respect] is limited to assessing whether [they are] supported by substantial evidence, a minimal standard requiring only such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*Matter of Destiny Q. v Poole*, 214 AD3d at 1185 [internal quotation marks and citations omitted]). "[H]earsay is admissible in expungement hearings and, if sufficiently relevant and probative, may constitute substantial evidence to support the underlying determination" (*id.* [internal quotation marks and citations omitted]). In determining whether the ALJ's findings are supported by substantial evidence, this Court will not "weigh conflicting testimony or substitute its own judgment for that of the administrative finder of fact, even if a contrary result is viable" (*Matter of Christopher JJ. v Spencer*, 204 AD3d at 1194 [internal quotation marks and citations omitted]).

When deferring to the ALJ's credibility determinations, we conclude that there is substantial evidence in the record to support the maltreatment finding against petitioner. There was proof that petitioner had excessively consumed alcohol in the child's presence "to the extent that [she had] los[t] self-control" (18 NYCRR 432.1 [b] [1] [ii]), drove the child in a car shortly after consuming alcohol (*see Matter of Elizabeth W. v Broome County Dept. of Social Servs.*, 200 AD3d 1153, 1155 [3d Dept 2021]; *Matter of Christine Y. v Carrion*, 75 AD3d 831, 832 [3d Dept 2010]) and, one day later, was observed by law enforcement to be so intoxicated that she was unable to care for the child. Although petitioner claimed otherwise, there was also testimony that she was the

party who initiated the physical altercation with the father in front of the child (*see Matter of Jeffrey O. v New York State Off. of Children & Family Servs.*, 207 AD3d 900, 903-904 [3d Dept 2022]). Such proof constitutes substantial evidence to support the finding that the child's physical, mental or emotional condition was impaired or was in imminent danger of so becoming as a result of petitioner's failure to exercise a minimum degree of care "in providing the child with proper supervision or guardianship" (18 NYCRR 432.1 [b] [1] [ii]). Accordingly, the maltreatment finding will not be disturbed.

To the extent petitioner also challenges the finding that her maltreatment of the child was relevant and reasonably related to employment, licensure or certification regarding childcare, thereby warranting disclosure of the indicated report to inquiring agencies (*see* Social Services Law § 424-a), such finding is also supported by substantial evidence. We recognize that petitioner had made substantial progress by the time of [*3]the hearing, having completed an outpatient substance abuse program and maintained sobriety for approximately one year. Petitioner was also in a stable relationship with the father by the time of the hearing, who confirmed that she was doing well, was seeing a therapist, and that he had no concerns about her current ability to care for the child. Notwithstanding this commendable progress, given petitioner's past parenting decisions while intoxicated, her prior relapses and the relatively short amount of time she had maintained her sobriety, we conclude that there is substantial evidence to support the ALJ's determination that disclosure of the report to inquiring agencies was warranted (*see Matter of Destiny Q. v Poole*, 214 AD3d at 1186; Matter of Jeffrey O. v New York State Off. of Children & Family Servs., 207 AD3d at 904).

Clark, Aarons, Pritzker and Ceresia, JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

**Footnote 1:** The record indicates that a criminal case was commenced against the father with respect to the domestic violence incident, but was resolved by an adjournment in contemplation of dismissal.

**Robles v. New York State Office of Children and Family Services,** 220 AD3d 798 (2023)

Proceeding pursuant to CPLR article 78 to review a determination of the New York State Office of Children and Family Services dated July 10, 2018. The determination, after a fair hearing pursuant to Social Services Law § 422(8), denied the petitioner’s application to amend an indicated report maintained by the New York State Central Register of Child Abuse and Maltreatment.

ADJUDGED that the determination is confirmed, the petition is denied, and the proceeding is dismissed on the merits, with one bill of costs to the respondents appearing separately and filing separate briefs.

The petitioner commenced this proceeding pursuant to CPLR article 78 to review the denial, after a fair hearing, by the New York New York State Office of Children and Family Services (hereinafter OCFS) of his application to amend an indicated report maintained by the New York State Central Register of Child Abuse and Maltreatment regarding the petitioner's maltreatment of his two children. The report was based on an incident in which the petitioner was alleged to have taken his children to a religious ritual at which they were blindfolded and cut with a ritual blade. The Supreme Court transferred the proceeding to this Court pursuant to CPLR 7804(g).

"Social Services Law § 422(8)(a)(ii) provides that when the subject of an indicated report petitions for an amendment of the report, OCFS must review the evidence and determine whether the report is supported by a fair preponderance of the evidence" (*Matter of Doe v. New York State Off. of Children & Family Servs.,* 173 A.D.3d 1020, 1021, 105 N.Y.S.3d 454; *see Matter of Nichols v. New York State Cent. Register of Child Abuse & Maltreatment,* 137 A.D.3d 790, 791, 26 N.Y.S.3d 331). "Judicial review of a determination that a report of child maltreatment has been substantiated is limited to whether the determination is supported by substantial evidence in the record" (*Matter of Peng v. Poole,* 191 A.D.3d 886, 887, 138 N.Y.S.3d 903; *see* ***576** *Matter of Doe v. New York State Off. of Children & Family Servs.,* 173 A.D.3d at 1021, 105 N.Y.S.3d 454). "Substantial evidence is less than a preponderance of the evidence and demands only that a given inference is reasonable and plausible, not necessarily the most probable" (*Matter of Peng v. Poole,* 191 A.D.3d at 887, 138 N.Y.S.3d 903 [internal quotation marks omitted]; *see Matter of Marine Holdings, LLC v. New York City Commn. on Human Rights,* 31 N.Y.3d 1045, 1047, 76 N.Y.S.3d 510, 100 N.E.3d 849). "Where substantial evidence exists, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently" (*Matter of Peng v. Poole,* 191 A.D.3d at 887, 138 N.Y.S.3d 903 [internal quotation marks omitted]; *see Matter of Phelps v. State of N.Y.-Unified Ct. Sys.,* 208 A.D.3d 880, 881, 173 N.Y.S.3d 657). "It is the function of the administrative agency, not the reviewing court, to weigh the evidence or assess the credibility of the witnesses" (*Matter of Phelps v. State of N.Y.-Unified Ct. Sys.,* 208 A.D.3d at 881, 173 N.Y.S.3d 657 [internal quotation marks omitted]; *see Matter of Peng v. Poole,* 191 A.D.3d at 887, 138 N.Y.S.3d 903).

Here, the determination of OCFS that a fair preponderance of the evidence established that the children's physical, mental, or emotional condition was impaired or in imminent

danger of being impaired as a result of the religious ritual is supported by substantial evidence in the record, which included the hearing testimony of the petitioner and the agency case worker, as well as the documents and photographs admitted into evidence (*see Matter of Irving v. Carrion,* 120 A.D.3d 500, 991 N.Y.S.2d 96; *Matter of Archer v. Carrion,* 117 A.D.3d 733, 734, 985 N.Y.S.2d 620).

"[U]pon any finding, after a hearing, that there is credible evidence to support the indicated report ... that the petitioner committed the maltreatment that was alleged, a determination must be made as to whether the acts that formed the basis of the indicated report are currently relevant and reasonably related to employment as a childcare provider" (*Matter of Doe v. New York State Off. of Children & Family Servs.,* 173 A.D.3d at 1021, 105 N.Y.S.3d 454 [internal quotation marks omitted]; *see Matter of Lauren v. New York State Off. of Children & Family Servs.,* 147 A.D.3d 1322, 47 N.Y.S.3d 537). Judicial review of a determination that the alleged acts of maltreatment are relevant and reasonably related to employment as a childcare provider "is limited to whether the determination is supported by substantial evidence" (*Matter of Doe v. New York State Off. of Children & Family Servs.,* 173 A.D.3d at 1022, 105 N.Y.S.3d 454).

Contrary to the petitioner's contention, there is substantial evidence in the record that the acts which formed the basis of the indicated report against the petitioner are relevant and reasonably related to his employment as a childcare provider (*see* Social Services Law §§ 422[8][a][iv]; 424–a[1][e][iv]; *Matter of Doe v. New York State Off. of Children & Family Servs.,* 173 A.D.3d at 1021, 105 N.Y.S.3d 454; *Matter of Lauren v. New York State Off. of Children & Family Servs.,* 147 A.D.3d at 1322, 47 N.Y.S.3d 537).

The petitioner's remaining contentions are without merit.

**Matter of McCoy v New York State Office of Children and Family Services**, 2023 NY Slip Op 06252 AD3d (2nd Dept., 2023)

Proceeding pursuant to CPLR article 78 to review a determination of the New York State Office of Children and Family Services dated May 28, 2019, and appeal by the petitioner from an order of the Supreme Court, Richmond County (Catherine M. DiDomenico, J.), dated November 24, 2021. The determination, after a fair hearing pursuant to Social Services Law § 422(8), denied the petitioner's application to amend and seal two indicated reports maintained by the New York State Central Register of Child Abuse and Maltreatment. The order denied the petitioner's motion for leave to renew the petition.

ORDERED that the appeal is dismissed, as no appeal lies as of right from an order entered in a proceeding pursuant to CPLR article 78 (*see id.* § 5701[b][1]), and we decline to grant leave to appeal; and it is further,

ADJUDGED that the proceeding is dismissed; and it is further,

ORDERED that one bill of costs is awarded to the respondents appearing separately and filing separate briefs.

The petitioner commenced this proceeding pursuant to CPLR article 78 to review a determination of the New York State Office of Children and Family Services (hereinafter the OCFS) dated May 28, 2019, denying her application to amend and seal two indicated reports made to the New York State Central Register of Child Abuse and Maltreatment (hereinafter the Central Register). In their answer, OCFS and the Central Register (hereinafter together the State [*2]respondents) asserted that the Supreme Court lacked personal jurisdiction over them, since the petitioner failed to timely serve them with the petition. The court transferred the proceeding to this Court pursuant to CPLR 7804(g) without addressing the jurisdictional issue.

Although the Supreme Court should have disposed of the jurisdictional issue prior to transferring the proceeding to this Court, we may reach the issue in the interest of judicial economy (*see Matter of Ortiz v State of N.Y. Off. of Children & Family Servs.*, 66 AD3d 1026, 1027).

In a proceeding "where the applicable statute of limitations is four months or less, service [of the petition with a notice of petition or order to show cause] shall be made not later than fifteen days after the date on which the applicable statute of limitations expires" (CPLR 306-b). "If service is not made upon a [respondent] within the time provided in this section, the court, upon motion, shall dismiss the [proceeding] without prejudice as to that [respondent], or upon good cause shown or in the interest of justice, extend the time for service" (*id.*).

Here, the State respondents correctly contend that the Court lacks personal jurisdiction over them. It is undisputed that the petitioner did not serve the State respondents within 15 days of the expiration of the 4-month statute of limitations (*see id.* §§ 217[1]; 306-b). Further, the petitioner did not demonstrate that there was good cause to warrant granting her an extension of time to serve the State respondents, or that an extension was warranted in the interest of justice (*see id.* § 306-b; *Matter of Nelson v New York State Dept. of Motor Vehs.*, 188 AD3d 692, 693). Accordingly, the proceeding must be dismissed insofar as asserted against the State respondents for lack of personal jurisdiction.

The proceeding also must be dismissed insofar as asserted against the New York City Administration for Children's Services, as it is not a proper party to this proceeding (*see Matter of Barnes v New York State Off. of Children & Family Servs.*, 67 AD3d 787, 787-788; *Matter of Wittie v State of N.Y. Off. of Children & Family Servs.*, 55 AD3d 842, 842-843).

In light of the foregoing, we need not reach the parties' remaining contentions.

# INEFFECTIVE ASSISTANCE OF COUNSEL

**Matter of Josaph M.**, 221 AD3d 1458 (4th Dept., 2023)

Appeal from an order of the Family Court, Monroe County (Fatimat O. Reid, J.), entered July 30, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent had neglected the subject child.
It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent Wanda A. claims that she received ineffective assistance of counsel during the hearing to determine whether to reappoint a guardian ad litem, and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent appeals in appeal No. 1 from an order that appointed a guardian ad litem for her pursuant to CPLR 1202. In appeal No. 2, respondent appeals from an order granting petitioner's application for a subpoena duces tecum with respect to respondent's medical and mental health treatment records. In appeal No. 3, respondent appeals from an order of fact-finding and disposition that, inter alia, adjudged the subject child to be neglected.

As a preliminary matter, we note that, shortly after issuing the order in appeal No. 1, Family Court terminated the representation by the guardian ad litem, and we therefore dismiss the appeal from the order in appeal No. 1 as moot (*see Chase Natl. Bank of City of N.Y. v von Kageneck*, 260 App Div 941, 941 [2d Dept 1940]; *cf. Matter of Elliot Z. [Joseph Z.]*, 165 AD3d 682, 683 [2d Dept 2018]; *see generally Matter of Wellman v Surles*, 185 AD2d 464, 465 [3d Dept 1992]).

We further note that respondent does not raise any issues with respect to the order in appeal No. 2 and has therefore abandoned any contentions with respect thereto (*see*

*Matter of Michael S. [Rebecca S.]*, 165 AD3d 1633, 1634 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]; *Matter of Jaquish v Town Bd. of Town of German Flatts*, 160 AD3d 1372, 1372-1373 [4th Dept 2018]; *Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011]). We thus dismiss the appeal from the order in appeal No. 2.

Contrary to respondent's contention in appeal No. 3, because she failed to appear at the fact-finding hearing and because her attorney, although present, did not participate in the hearing, the order of fact-finding and disposition was entered upon respondent's default (*see Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]; *Matter of Shawn A. [Milisa C.B.]*, 85 AD3d 1598, 1598-1599 [4th Dept 2011], *lv denied* 17 NY3d 713 [2011]). No appeal lies from an order entered upon the default of the appealing party (*see* CPLR 5511; *Matter of [*2]Rottenberg v Clarke*, 144 AD3d 1627, 1627 [4th Dept 2016]). Nevertheless, respondent's appeal from the order brings up for review "matters which were the subject of contest" before the court (*James v Powell*, 19 NY2d 249, 256 n 3 [1967], *rearg denied* 19 NY2d 862 [1967]), i.e., respondent's claim that she was denied effective assistance of counsel at the hearing to determine whether to reappoint a guardian ad litem (*see generally Matter of Buljeta v Fuchs*, 209 AD3d 730, 732 [2d Dept 2022]; *Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1080-1081 [4th Dept 2019]).

Respondent contends that she was denied effective assistance of counsel based on counsel's statements to the court at that hearing that counsel was unable to communicate with respondent and that respondent was not cooperating with her. We reject that contention**.** "[C]ourts cannot shut their eyes to the special need of protection of a litigant actually incompetent but not yet judicially declared such. There is a duty on the courts to protect such litigants" (*Matter of Jesten J.F. [Ruth P.S.]*, 167 AD3d 1527, 1528 [4th Dept 2018] [internal quotation marks omitted]). Thus, the court, on its own initiative or upon the motion of "any other party to the action," may appoint a guardian ad litem (CPLR 1202 [a] [3]) to appear on behalf of "an adult incapable of adequately prosecuting or defending [their] rights" (CPLR 1201). When an attorney becomes "aware of their client's apparent incompetence, it [is] incumbent upon . . . counsel to move, pursuant to CPLR 1202 (a) (3), for appointment of a guardian ad litem to protect [their client's] interests" (*Brewster v John Hancock Mut. Life Ins. Co.*, 280 AD2d 300, 300 [1st Dept 2001]; *see e.g. Jesten J.F.*, 167 AD3d at 1528; *Matter of Anastasia E.M. [Niasia F.]*, 146 AD3d 887, 888 [2d Dept 2017]). Inasmuch as counsel's comments were relevant to the court's determination whether to appoint a guardian ad litem, we conclude that respondent failed to demonstrate the absence of a strategic or other legitimate explanation for counsel's alleged shortcomings (*see Matter of Bryleigh E.N. [Derek G.]*, 187 AD3d 1685, 1687 [4th Dept 2020]; *see also People v Boodrow*, 205 AD3d 1134, 1137 [3d Dept 2022]; *People v Ellis*, 169 AD2d 838, 839 [2d Dept 1991], *lv denied* 77 NY2d 960 [1991]).

# Adjournment

**Matter of Aniyah J.**, 221 AD3d 1472 (4th Dept., 2023)

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered June 28, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law

§ 384-b, respondent mother appeals from an order terminating her parental rights with respect to the subject child based upon a finding of permanent neglect**.** We reject the mother's contention that Family Court erred in refusing to adjourn the fact-finding and dispositional hearing. "The grant or denial of a [request] for an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Steven B.*, 6 NY3d 888, 889 [2006] [internal quotation marks omitted])**.** Here, the mother had failed to appear on a prior date, appeared late on the day of the hearing, and when she ultimately appeared for the hearing spoke to her counsel only briefly before leaving the courthouse. Under these circumstances, we perceive no abuse of discretion in the court's refusal to adjourn the hearing (*see Matter of Wilson v McCray*, 125 AD3d 1512, 1513 [4th Dept 2015], *lv denied* 25 NY3d 908 [2015]).

The mother failed to preserve for our review her further contention that the court erred in disqualifying her initial assigned counsel upon finding a conflict of interest in the attorney's continued representation (*see generally Matter of Sean W. [Brittany W.]*, 87 AD3d 1318, 1320 [4th Dept 2011], *lv denied* 18 NY3d 802 [2011]). Although the mother's initial assigned counsel filed her own motion to be reinstated, the record does not reflect that the mother joined in that motion, that she made her own motion seeking to reinstate her initial assigned counsel, or that she otherwise raised the issues now raised on appeal. Moreover, to the extent that the contention is based on matters outside the record, the contention cannot be reviewed on this appeal in any event (*see Matter of Baron C. [Dominique C.]*, 101 AD3d 1622, 1622-1623 [4th Dept 2012]; *see generally Killian v Captain Spicer's Gallery, LLC*, 170 AD3d 1587, 1589 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019]).

# MISCELLANEOUS TRIAL LEVEL CASES

## 1017 HEARINGS

**Matter of J.D.E.**, 80 Misc3d 1237(A) (Family Court, Bronx County, 2023)

David Kaplan, J.

Respondent Mother L.E. ("Respondent") moves by Order to Show Cause requesting that the Court "schedule an expeditious evidentiary hearing, at which parties will present evidence and arguments regarding [Respondent's] application to place the children with the Children's maternal uncle . . . pursuant to Section 1017 of the Family Court Act." Both New York City Administration for Children's Services ("ACS") and the Attorney for the Children have filed papers in opposition to the motion and Respondent has submitted an affirmation in reply. The Order to Show Cause is denied for the reasons stated herein.

### PROCEDURAL POSTURE

On May 30, 2023, ACS filed the underlying petition alleging, *inter alia*, that Respondent Mother derivatively severely abused and neglected the Subject Children J.D.E. (DOB XX/XX/2014) and J.M.E (DOB XX/XX/2020) based on the circumstances surrounding their sibling J.I.E's (DOB XX/XX/2017) death on XX/XX/2023. The petition alleges that J.I.E. was found with bruising all over her body and ligature marks on her wrist and that New York Police Department ("NYPD") officers found a mechanism to bind the child in her closet. The petition further includes claims that J.D.E. was found to be malnourished with scars on his body and that he disclosed that Respondent has bound him and J.I.E. in the closet. J.D.E. further reported that Respondent slaps J.M.E. when she cries and that he was left alone to care and cook for his siblings at times. According to the allegations in the petition, the home was also observed to be in deplorable condition and J.D.E. and J.I.E. would sleep on piles of clothes.

Upon the filing of the petition, the Court granted ACS's application to remand J.D.E. and J.M.E. to its care and issued temporary full stay away orders of protection on behalf of the children against Respondent and directed ACS to serve the petition on her and explore kinship resources for the children who remained under observation at the hospital at the time. On June 7, 2023, Respondent appeared in Court and was assigned an attorney who answered the petition on her behalf by asserting a general denial. ACS reported to the Court that day that the children had been placed together in a non-kinship therapeutic foster home after the last court appearance. Respondent, at that

time, requested that ACS explore her mother and brother as possible placement resources for the children resulting in the Court formally directing ACS to conduct an investigation into the proposed resources as well as any other family and family-like members pursuant to Family Court Act § 1017.

On June 14, 2023, ACS filed with the court a "1017 Report" prepared by Child Protective Specialist T.C. ("CPS T.C."). As relevant here, CPS T.C. reported that the children are comfortable in their therapeutic foster home and in need of trauma-based mental health [*2]services which were scheduled to commence that day.[FN1] As to the maternal uncle ("M.U.") of the children proposed by Respondent as a potential resource, ACS reported that he does not have child welfare history but that there had been one domestic incident report with the NYPD involving "his daughter taking things to school." The report further detailed that he lives with his wife and their two teenage daughters in a three-bedroom home that has adequate provisions. The investigating caseworker indicated that when she visited the home of J.E., she observed marijuana left out in his room which M.U. stated he uses for recreational purposes outside the presence of his children. The caseworker also observed a bearded dragon in a closet.

The 1017 Report detailed ACS's concerns regarding placement with M.U. as follows:

"CPS Team has concerns around this placement as [M.U.] reported several occasions in which [J.D.E.] was at risk of harm. [M.U.] explained that he was with his nephew [J.D.E.] two weeks ago. [M.U.] explained that his mother called him two weeks ago telling him to go pick up [J.D.E.] from the 42 Prescient [*sic*]. More specifically, on May 4th, 2023, According to [M.U.] [J.D.E.] was roaming the streets and flagged down the police. The police took [J.D.E.] to the police station. Several calls have been made to [Respondent] who did not respond. The police then called [M.U.]'s mother [MGM] who was unable to pick up [J.D.E.] so she called [M.U.]. [M.U.] explained he picked up [J.D.E.] and kept him in her house until his mother came the next morning to get him. When his mother came to get him [M.U.] and [MGM] explained [J.D.E.] was hysterically crying and fearful, asking to stay with him. [J.D.E.] did not wish to go home. [M.U.] stated he did not know what to do because that was his mother."

Thereafter, on July 24, 2023, Respondent moved by Order to Show Cause for the Subject Children to be directly placed with M.U. pursuant to Family Court Act § 1017. The matter was initially heard the next day on July 25, 2023. At that time, ACS orally opposed the motion by making reference to the concerns noted in the June 14, 2023 1017 Report that called into question his protective capacity as well as noted concerns that marijuana was left out in the open in M.U.'s home. The Attorney for the Children also orally opposed the motion stating that J.D.E. has made allegations against M.U. that she was not yet authorized to disclose and further that he expressed he did not want to see anyone from the maternal side of his family. As M.U. was not present that

day in Court, and in light of the concerns raised by opposing counsel as well as representations that the children were showing extensive signs of trauma and in a vulnerable state, the Court adjourned the motion to August 10, 2023.

On August 10, 2023, the parties again appeared in Court and reiterated their positions on the application by Respondent to have the children moved to M.U., including that the Attorney for the Children asserting "[a]nd as I stated, all I can share on the last date is that J.D.E. does not wish to be with anyone in the maternal family or have contact with anyone in the maternal family because of what he's experienced." Respondent then expressly requested a further evidentiary hearing on the matter, to which the Court then stated that based on the positions of the parties, and the review of the 1017 Report and foster agency reports, that it had sufficient information to rule on the matter and that it would be denying Respondent's motion to move the [*3]children to M.U. without prejudice to renewal of the application once the children are in a more stable position. Specifically, the Court noted that:

"In addition to [M.U.]'s suitability being called into question in that he is alleged to have not appropriately responded to the children being in distress, additional circumstances render it an inappropriate time to change the placement of the children at this time. Notably, the children are in a therapeutic home where their needs are being addressed and the child J.D.E. has strongly stated that he does not want to be placed with [M.U.] or anyone from his mother's side of the family. The Court further notes that the children are exhibiting signs of extensive exposure of trauma, as reflected in the June 15, 2023 and August 9, 2023 [Foster Agency] Reports, which has in part manifested itself in a fear of adults. Until such time the children are stabilized, it is premature to contemplate moving them against their wishes as it would be contrary to their best interests."

On September 13, 2023, Respondent filed a new Order to Show Cause, at issue here, asking again for an evidentiary hearing on her prior application to place the children with M.U.. In support of her motion, Respondent includes a statement by M.U. as to his ability to care for the children and willingness to comply with court orders. M.U., in his affidavit, further details his prior relationship with the children, accompanied by photographs, and states that he did not sense anything odd when he returned J.D.E. to his mother in May 2023 after the child was found wandering the streets. As noted previously, both the Attorney for the Children and ACS opposed the motion in writing.

## LEGAL ANALYSIS

As a threshold matter, Respondent's motion is procedurally flawed as it is in actuality a motion to reargue and/or renew which under CPLR 2221 (d)(i) and (e)(i) "shall be identified specifically as such." Respondent had expressly asked for a further formal

evidentiary hearing when the matter was heard on August 10, 2023, which the Court denied, and she is now again requesting the same relief herein. Nowhere in the motion does Respondent identify the basis for the motion or the applicable rules of law pertaining to CPLR 2221. However, despite Respondent's failure to comply with the CPLR, the Court will ignore the mislabeling and treat the request under the "proper umbrella" (*see* Patrick M. Conners, Practice Commentaries McKinney's Cons Laws of NY, CPLR C2221:7 [noting "Most courts facing the problem have ignored a mislabeling of a motion for reargument or renewal and simply treated the motion under the proper umbrella"]; *cf. Weiss v Deloitte & Touche*, LLP, 63 AD3d 1045, 1047 [2d Dept 2009] [treating motion denominated as leave to renew and reargue as "in actuality, one for leave to reargue"]).

The Appellate Division set forth the standard for evaluating motions to reargue in *Foley v. Roche* (68 AD2d 558 [1st Dept]). "A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (*id.* at 567). Here, Respondent essentially argues that the Court erred in the manner it rendered its August 10, 2023 decision on her July 24, 2023 Order to Show Cause asking for the children to be placed in her brother's care pursuant to Family Court Act § 1017 stating that "the Court must hold an evidentiary hearing before making a determination that there is no parent, relative, or suitable person with whom the children may appropriately reside."

Family Court Act § 1017, entitled "Placement of Children" sets out procedures that the court and local commissioner of social services must take after a determination has been made [*4]that a child must be removed from his or her home. The statute provides that "the court shall direct the local commissioner of social services to conduct an immediate investigation to locate any non-respondent parent of the child and any relatives of the child, including all of the child's grandparents, all relatives or suitable persons identified by any respondent parent or any non-respondent parent and any relative identified by a child over the age of five as a relative who plays or has played a significant positive role in his or her life" (Family Court Act § 1017 [1][a]). As applicable to "suitable" non-parents, the commissioner must inform them that they can seek to become foster parents, or to provide free care under the statute, or may seek guardianship (*id.*). The commissioner is further obligated to provide the results of its investigation to the court and counsel for the parties (*id.*).

The statute then requires the court to determine "(i) whether there is a non-respondent parent, relative or suitable person with whom such child may appropriately reside; and (ii) in the case of a relative or suitable person, whether such individual seeks approval as a foster parent pursuant to the social services law for the purposes of providing care

for such child, or wishes to provide free care for the child during the pendency of any orders pursuant to this article" (Family Court Act § 1017 [1][c]). Upon receipt of the 1017 Report, the court is to determine whether "the child may appropriately reside with a non-respondent parent or other relative or suitable person" (Family Court Act § 1017 [2]).

The purpose of Family Court Act § 1017, on its face, is a clear direction by the legislature that the commissioner of the local services take affirmative steps to identify and explore kinship and kinship-like resources for a child who is removed from a parent's care. Respondent argues that under the statute, this Court was mandated to hold an evidentiary hearing to assess whether the children can "appropriately reside" with her proposed kinship resource — M.U.. Further, Respondent contends that only if no suitable person exists, may the court consider another placement. The Court finds both of these arguments misconstrue the law.

At the onset, when interpreting a statute, "[a]s a general rule, unambiguous language of a statute is alone determinative" of the legislative intent (*Riley v County of* Broome, 95 NY2d 455, 463 [2000]). The statute "must be construed as a whole and that its various sections must be considered together and with reference to each other" (*People v Mobil Oil Corp.*, 48 NY2d 192, 199 [1979]). "[W]here a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (*Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs*., 5 NY3d 36, 43 [2000] [citations omitted]). As relevant here, article 10 of the Family Court Act is replete with provisions where the legislature explicitly requires the court to conduct hearings at various stages of the proceeding (*see* Family Court Act § 1027 [requiring hearing where child has been removed without court order]; Family Court Act § 1028 [requiring hearing where parent or person legally responsible for the care of a child that has been removed requests return of the child]; Family Court Act § 1039 [d] [requiring hearing on allegations of a violation of an Adjournment in Contemplation of Dismissal]; Family Court Act § 1044 [defining fact-finding hearing]; Family Court Act § 1045 [defining dispositional hearing]; Family Court Act § 1071 [requiring hearing where violation of suspended judgment is alleged]; Family Court Act § 1072 [requiring hearing where violation of conditions of supervision is alleged]; and Family Court Act § 1089 [defining procedure for permanency hearings]). Clearly, if the legislature saw it fit to mandate an evidentiary hearing under Family Court Act § 1017, it would have specified. Rather, nothing in the plain language of Family Court Act § 1017 requires that [*5]the court conduct such a hearing (*see Matter of Seth Z.*, 45 AD3d 1208, 1210 [3d Dept 2007] [noting that the commissioner fulfilled its obligation under the statute by conducting the investigation and that "no provision of this statute required a hearing"]).

As Family Court Act § 1017 does not mandate an evidentiary hearing as a matter of right, the inquiry turns to whether it is otherwise required as a matter of due process. Courts have repeatedly held that the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner and that a full evidentiary hearing is not necessarily required (*see Mathews v Eldridge*, 424 US 319 [1976] [holding that an evidentiary hearing is not required before termination of disability benefits where an administrative procedure is in place]; *cf. Matter of Edgar V.L.*, 214 AD3d 501, 513[1st Dept 2023] [holding that an evidentiary hearing was not required when the court determined that a guardian should be removed as the motion was fully briefed and the court had sufficient knowledge of the salient facts which were largely not in dispute]). "All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard'" (*id.* at 349 quoting *Goldberg v Kelly*, 397 US 254, 268-69 [1970]).

The Court does recognize that there are scenarios in which a more thorough evidentiary hearing may be warranted (*see e.g. Matter of Jesse M. [Cynthia L.]*, 73 AD3d 780 [2d Dept 2010] [holding that lower court erred when it temporarily granted custody of the children to father without a hearing despite ACS raising issues of fact as to the suitability of the resource]). However, where the court has sufficient information to formulate a decision based on reports and the positions of the parties (*see* Family Court Act § 1046 [c] [with the exception of a fact-finding hearing, the Court may give consideration to any material and relevant evidence including hearsay]), it is within the discretion of the Court to not conduct an unnecessary evidentiary hearing (*see* Uniform Rules for Fam Ct [22 NYCRR § 205.11 (d)] ["Hearings on motions shall be held when required by statute or ordered by the assigned judge in the judge's discretion]; *cf. Matter of Horn v Zullo*, 6 AD3d 536 [2d Dept 2004] [holding in the context of a custody modification proceeding, a "hearing will not be necessary where the court possesses adequate relevant information to enable it to make an informed and provident determination as to the child's best interest"]).

In the case at hand, Respondent is essentially seeking to dictate where the children reside during the course of the proceeding which, as noted above, runs counter to the intent of the statute and in this instance is diametrically opposed to their best interest.**[FN2]** Family Court Act § [*6]1017 is not intended or designed to render a right to respondent rather it reflects that kinship resources must be explored and are generally preferrable as placements for a removed child as "[p]lacement with a suitable relative can help the child by maintaining family ties and reducing the trauma of removal" (*Matter of Harriet U. v Sullivan County Dept. of Social Servs.* (224 AD2d 910, 911 [3d 1996]). The purpose of the statute thus is to benefit the child, not to convey a right to a respondent (see *Matter of Gabriel James Mc.*, 60 AD3d 1066, 1067 [2d Dept 2009] [noting that Family Court Act § 1017 was previously amended by the legislature to

"overrule prior case law, which imbued a parent charged with abuse and/or neglect with veto power over the placement of the child with the noncustodial parent or other relative"]), and thus the due process right is primary that of the children and not movant. To the extent that Respondent has an interest in where her children are placed, she has been given an ample opportunity to be heard in her motion papers and through the advocacy and arguments of her attorney when the motion was heard. Absent a substantive issue of fact in dispute, which as detailed below did not exist in this instance in light of the undisputed evidence that the children were in a vulnerable state and that they did not wish to have contact with maternal family, any due process right movant had was satisfied protected by the procedure delineated by the statute and followed by the Court.

Turning to the Court's underlying decision to deny Respondent's initial Order to Show Cause, Family Court Act § 1017 requires that the court consider both the suitability of the proposed resource *and* whether the child can appropriately reside with that person. As noted in *Matter of Harriet U.* (224 AD2d at 911], "[o]ne purpose of Family Court Act § 1017 is to help safeguard the infant's physical, mental and emotional well-being ... In making a determination of placement Family Court must consider not only the custodian's ability to provide adequate shelter*, but all the facts and circumstances relevant to the child's best interest*" (emphasis added). Thus, even assuming arguendo that M.U. is a "suitable person" despite the child protective concerns noted in the investigative report, the Court must still consider whether the children can appropriately reside with him.

As expressly stated in the August 10, 2023 decision, both prongs were considered in the Court's determination when it denied the application to move the children to M.U.'s care in which the Court noted both the child protective concerns as well as the vulnerable mental health of the children along with J.D.E.'s steadfast expressed wishes to have no contact with the maternal side of the family which is not in dispute (*cf. Matter of God McQ.*, 196 AD3d 406 [1st Dept 2021] [holding court appropriately considered the expressed wishes of the children to remain in foster home as a factor in denying a parent's Family Court Act § 1028 hearing]).**[FN3]**

The reports that the Court gave consideration to in its August 10, 2023 decision, offer a vivid portrayal of highly traumatized children that are in desperate need of therapeutic intervention which is in the early stages of implementation in their foster placement. In the foster agency's June 15, 2023 report, the caseworker notes that the children arrived at the foster [*7]home scared and guarded but have been observed to be opening up and becoming more comfortable. The three-year-old child J.M.E. was observed to hide her unfinished bottles of milk under her pillow to save for the next day. J.D.E. reported that his mother made him eat rotten food and that he would only have good food when it

was a lucky day. J.D.E. also disclosed that the scars on his arm were from when his mom would get mad and poke him with a knife and that a scar on his head was from when his mom hit him with an object on a belt. The children reportedly did not sleep initially upon arrival at the foster home and J.D.E. voiced confusion when the foster parent set up a bed for him stating he sleeps on a pile of clothes at home. J.D.E. also expressed that he was scared to meet new people and it was reported that he has to be reassured that his providers will not hurt him when he goes to his appointments. According to the psychiatrist who evaluated J.D.E. on June 14, 2023, the child "showed signs of being very traumatized, full of rage and fear."

In the August 9, 2023 foster agency report, J.D.E., who had been psychiatrically hospitalized between court dates, expressed that he was extremely happy "to be back home with his sister." J.M.E. was reported to be "affectionate and receptive to [the foster parent's] physical proximity suggesting that [the foster parent] has become a source of comfort and protection for the child." The foster parent conveyed though that J.M.E. continues to wake up screaming "no . . . no" at night and sometimes looks for food in the trash. The report notes that according to the child's psychological evaluation she "is perceived as a traumatized and emotionally fragile preschooler who generally and initially resists adult's physical proximity and social engagement. Based on clinical presentation and family history, J.M.E. exhibits a fear-response demonstrated by distress and opposition toward adults and hypervigilance which interferes with child's developmental progress."**[FN4]**

Based on the above evidence which was properly before the Court at the time of the August 10, 2023 appearance, the Court found that a further evidentiary hearing was not necessary. Any testimony from M.U. regarding his home, background and understanding of the children's needs would have been superfluous in light of the overwhelming evidence contained in the report of the raw trauma the children were exhibiting. Further, any testimony regarding agency case planners' accounts of their observations and conversations would not have shed [*8]further light on the appropriateness of M.U. as a resource for the children at this time when weighed against the steadfast position set forth by their attorney when coupled with the clear signs of trauma that the children are exhibiting. While Family Court Act § 1017 expresses a strong preference for children to placed with family members, it does not require it when it is inconsistent with the child's best interests as it is here (*cf. Matter of Harriet U.* 224 AD2d at 911] [holding that "suitability" requires a best interests determination]). To require the children to be uprooted to the home of a maternal family member against their steadfast wishes when they are in a highly vulnerable state as reflected by the statements of their psychologist and psychiatrist contained in the foster agency reports, at the urging of their mother who is alleged to have caused the death of their sibling, could only further traumatize the children at this time. Additionally, such a

further unnecessary hearing would have only taken away from the need to focus on the myriad of other issues surrounding the family that was pending before the Court at the time — including multiple issues of paternity, visitation and implementation of needed services — and would run contrary to the underlying intention of Family Court Act § 1017 which is not to give veto rights to a parent on placement of a removed child but to reduce further trauma to child. Under these circumstances, the Court had more than ample evidence before it that showed that the children could not appropriately reside with the M.U. against their wishes when it exercised its discretion in denying a further hearing on the matter in its underlying decision. However, as noted in its August 10, 2023, the Court is receptive to revisiting this issue in the future when the children stabilize and when it has a clearer understanding of the prospects of long-term planning for the children. Accordingly, Respondent's application for leave to reargue is denied.

To the extent that the motion can be construed as a motion to renew in light of new information annexed to it in the form of an affidavit and photographs, leave to renew is also denied. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion (CPLR 2221 [e][2] and [3]). As the new facts alleged were otherwise readily available at the time of the first application and would not otherwise change the prior determination, the Court denies the motion.

**CONCLUSION**

Accordingly, the Court construes the present order to show cause as one seeking leave to reargue and renew the Court's August 10, 2023 determination on Respondent's request for an evidentiary hearing on her Family Court Act § 1017 application that the Subject Children be moved to the care of M.U. and upon review of said motion, the Court denies Respondent's application for leave to do so.

**Footnotes**

**Footnote 1:** The report also includes information regarding Maternal Grandmother ("MGM"), putative Paternal Grandmother T.C., and R.B. who has subsequently been determined to be the legal father of J.D.E.

**Footnote 2:** During the course of the proceeding, paternity was established by R.B. as the lawful father of J.D.E.. The child has expressed a desire to live with his father and the foster agency has been actively planning with R.B. to educate him on the child's needs in anticipation that the child will be moved to his care at an appropriate time. Respondent remains opposed to the child moving to his father's care and is, in part,

using this motion to interfere with that possible plan, as evidenced by M.U. including numerous allegations and attacks as to R.B.'s fitness as a parent in his affidavit. That issue is not yet ripe for determination nor is it appropriate for movant to include such information in a motion to reargue (*see* CPLR 2221 [d][2] [a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion"]).

**Footnote 3:** The Court recognizes that in certain instances it may be appropriate to conduct an *in camera* interview of a child in making this assessment however the Court does not find it appropriate here in light of the unequivocal representation expressed by the Attorney for the Children of their position as well as the information in the foster agency reports that the children have expressed a fear of strangers which the Court is concerned could lead to further exposure to trauma for the children.

**Footnote 4:** While not given consideration at the time of the Court's initial decision on this matter on August 10, 2023, the Court received a written report from the foster agency on September 14, 2023 that further supports its decision. In addition to noting that J.D.E. reported that the foster mom "is the best mom he has ever had", the child reported nightmares that his mother is coming to get him from his home. J.D.E. further disclosed that his sister J.I.E. would cry when she had to use the bathroom after her mother tied her up and that if she could not hold it in, her mother would make her lick her pee. J.D.E. further disclosed that his mother choked him one time causing him to fall asleep and that if he had to return to his mother, he would kill himself and that his mother "should be dead or in prison." In the most recent foster agency report, dated October 18, 2023, J.M.E. is noted to be doing very well and that the foster parent has been utilizing skills learned from the child's therapist. The report further indicates that J.D.E. was observed acting very aggressively one day and when the foster parent calmed him down, he said he had to speak to the case worker "because he knows how his sister died and he needed to share it."

## ADOPTION CONSENT

**Matter of Wyatt JJ.**, 79 Misc3d 1243(A) (Family Court, Warren County, 2023)

Michael J. Hartnett, J.

**WHEREAS**, Petitioners having filed adoption petitions, seeking to adopt the minor children, to wit: Serenity JJ. and Wyatt JJ., the biological minor children of Petitioner Respondent Michael UU.; and

**WHEREAS**, Respondent Michael UU. having objected to the adoption petitions filed by the Petitioners and asserting that his consent to the adoptions is required pursuant to New York Domestic Relations Law §111 (hereinafter "DRL"); and

**WHEREAS**, the Court having conducted a Fact-Finding on April 17, 2023 on the issue of whether Respondent Michael UU.'s consent to the adoption is required under DRL §111; and

**WHEREAS**, the Court having considered the sworn testimony of Petitioner M.S. and Respondent Michael UU. Petitioner R.S. was not called to offer any testimony in this proceeding. The Court further considered the following exhibits: Petitioners Exhibit 2; Respondent's Exhibits E and F; and Attorney for the Child's Exhibit "I".

***NOW THEREFORE***, after due consideration, the Court finds:

**TESTIMONY & FACTUAL FINDINGS:**

Testimony

**1. M.S.**

M.S. (hereinafter "Petitioner or Mother") testified through direct and cross examination. The mother testified that she is the biological mother of the subject children of this adoption proceeding, Serenity JJ. and Wyatt JJ. (ages 10 and 6 respectively). Petitioner Mother testified that Michael UU. is the biological father of the subject children. Petitioner Mother testified that she and Michael UU. were divorced in 2019 through a Judgment of Divorce. Petitioner Mother subsequently married co-petitioner, R.S., with whom she currently resides along with the subject minor children, Serenity and Wyatt.

Petitioner Mother testified that during the relevant six (6) month period for this proceeding, August 17, 2021 through February 17, 2022, Respondent Michael UU. never saw either child, never requested visitation with the children, never had any phone calls or video calls with the children, never called, texted, or contacted her in any other way regarding the children, and never sent any cards, gifts, or correspondence to the children. Petitioner Mother further testified that she believes Michael UU. knows her address and phone number, and that she never blocked him in any way from communicating with her. Petitioner Mother further testified that there were no Orders of Protection prohibiting Michael UU. from contact with her. Petitioner Mother additionally testified that she never told Michael UU. that he could not email her.

Judicial notice was taken of the custody petition filed by Michael UU. on December 9, 2021 **[FN1]** , which only included the child Serenity. Petitioner Mother testified that other than the Custody petition, she "never heard anything else" from Michael UU. Petitioner Mother further testified that Michael UU. was not incarcerated during the six months

preceding the adoption petitioners being filed. Additionally, Petitioner Mother testified that she pays for all expenses related to the children, and that Michael UU. has never provided any financial assistance for the minor children since their divorce.

On cross examination, judicial notice was taken of the parties Judgment of Divorce. Petitioner Mother testified that the Judgment of Divorce dealt with the issue of child support and her agreement to not receive any child support from Michael UU. Petitioner Mother further testified that she did sell some of Michael UU.'s property to pay for her lawyer's fees in the divorce, but never sold anything during the six (6) months prior to the adoption petitions being filed.

Petitioner Mother also testified that she does not want Michael UU. to have anything to do with either child, but also testified that she did not restrict any contact between Michael UU. and the children.

Petitioner Mother was questioned by Respondent's counsel regarding Amended Adoption Petitions that she and co-respondent, R.S., had filed. The Amended Adoption Petitions were filed with the Warren County Family Court on April 14, 2023, but were withdrawn on the day of the hearing. Petitioner Mother admitted that the Amended petitions removed any reference to [*2]criminal history relating to her, as well as criminal history regarding co-petitioner. Petitioner Mother acknowledged that the original petitions did have reference to criminal history, to which they both responded that they had no criminal history. Petitioner Mother testified that she did have a criminal history, and that co-petitioner also has a criminal conviction outside of the State of New York, although Petitioner Mother testified that the questions on paperwork she filled out asked about felony convictions and she did not have a felony conviction.

During examination by the Attorney for the Children, Petitioner Mother testified that during the relevant six (6) month period prior to the filing of the adoption petitions, she would not have encouraged visits between Michael UU. and the children. Petitioner Mother testified that she does not discourage visitation, but with regard to the younger child, Wyatt, he only knows co-petitioner as "Dad". Regarding Serenity, Michael UU. has not seen her in years, and Serenity really only knows R.S. as her father. Petitioner Mother testified that during the relevant six (6) month period, she did not speak about the adoption with Wyatt, but she did speak some with Serenity as she knows Michael UU. and R.S., and she [Serenity] has her own opinions. Petitioner Mother further testified that at the time of the Judgment of Divorce, Michael UU. had no visitation and nothing has changed since that time.

Petitioner Mother was called to testify on rebuttal by her counsel following Michael UU.'s testimony. Petitioner Mother testified that the parties' Separation Agreement that was part of their Judgment of Divorce had Michael UU. paying no child support at that time,

which was at Michael UU.'s request. Petitioner Mother further testified that the basis for her agreeing to accept no child support at that time was because Michael UU. was jobless. Petitioner Mother testified that there was nothing in the agreement that stated Michael UU. would never pay child support.

Petitioner Mother testified that during the relevant six (6) months period in this matter, she never blocked Michael UU.'s mail. Petitioner Mother further testified that Michael UU. never had any contact with her or the children through a third-party, (i.e. Michael UU.'s family or friends).

The Court finds that while Petitioner Mother's testimony was somewhat evasive and self-serving, she was a generally credible witness.

**2. Michael UU.**

Michael UU., the children's biological father, testified at the hearing. Michael UU. testified that during the relevant six (6) month time period he did not have any contact with the subject children or with Petitioner Mother. Michael UU. testified that he was prevented from contacting the children because he was "not allowed" to due to his parole conditions. Michael UU. testified that his parole terminated in January 2023.

Michael UU. testified that he was released from incarceration in August of 2020. Michael UU. testified that he was barred from contact with the subject children by his parole officer and the terms of his parole (parole conditions). Michael UU. testified that as result of his restrictive parole conditions, that he had to go through his mother to contact Petitioner Mother regarding visitation with Serenity and Wyatt. Michael UU. testified that his mother reported to him that Petitioner Mother said that Michael UU. was in sum and substance 'never going to see' the children.

Michael UU. also testified as to the parties' Judgment of Divorce. Michael UU. testified that the divorce was settled by agreement, with custody being covered by a Family Court Order, that provided Petitioner Mother with sole legal and physical custody of the children, and with [*3]Michael UU. having parenting time, weekly letters, and phone calls. Michael UU. testified he was not allowed to exercise his parenting time and visitation during the relevant six (6) month period prior to the adoption petitions being filed.

Michael UU. testified that with regard to child support, that he did not pay any direct child support for Serenity and Wyatt during the six months prior to the adoption petitions being filed. Michael UU. testified that he did not pay any child support for Serenity and Wyatt because of an agreement between himself and Petitioner Mother, through their separation agreement, where Michael UU. would not be required to pay support. Michael UU. testified that the agreement between the parties regarding support was a

result of a circumstance where Petitioner Mother had sold numerous cars and property that belonged to Michael UU., and thereafter Michael UU. agreed to not pursue property distribution on these matters in exchange for no child support to be paid by him.

On cross examination, Michael UU. reaffirmed that during the relevant six (6) month period, he did not have any contact with the subject children and that he did not send any gifts or correspondence to the children. Michael UU. testified that as to his belief that his mail was blocked from being delivered to the subject children. Michael UU. testified that while he was incarcerated, he used to send the subject children homemade cards; however, they would come back marked 'return to sender.' Michael UU. further confirmed that during the relevant six (6) month period, he did not send any financial support to Petitioner Mother for the subject children. Michael UU. further testified that he was aware of Petitioner Mother's residence address. Michael UU. testified that Petitioner Mother had changed her telephone number five (5) times before he was released from incarceration.

When asked about contact with Petitioner Mother during the relevant six (6) month period, Michael UU. again testified that his parole conditions prevented him from having any contact with Petitioner Mother. Michael UU. stated that the copy of his parole conditions given to him on release from incarceration stated, "no contact with [Petitioner Mother]" and that this was stated "clearly" and "in big bold sharpie lettering".

Michael UU. confirmed that there were no active Order(s) of Protection against him relating to Petitioner Mother. Michael UU. further testified that he was not aware of any parole condition that prevented him from providing any indirect support for the subject children.

On cross examination from the Attorney for the Children, Michael UU. was questioned about the 2018 Warren County Custody Order, and he testified that he and Petitioner Mother were acting under the terms of that order after their Judgment of Divorce and Agreement was entered. Michael UU. stated that he was led to believe that the prior 2018 custody order controlled as the parties' separation agreement stated that his visitation will be determined by Family Court.

Concerning his parole conditions, Michael UU. testified again that those conditions prevented him from contact with Petitioner Mother, as well as any contact with anyone under the age of eighteen (18), including his own children, without a court order that would approve such contact. Michael UU. stated that these conditions would have included the relevant six (6) month period prior to the adoption petitions being filed.

The Court finds that Michael UU.'s testimony was generally credible. Although Michael UU.'s understanding of certain terms and conditions provided in collateral documents (e.g., the Judgment of Divorce and his Parole Conditions) may have been inaccurate,

his testimony was generally responsive to the questions posed and overall Michael UU. presented as a credible [*4]witness.

Documentary Evidence

The Court considered the following documentary evidence;

**Petitioners' Exhibits**

• Exhibit 2 - Judgment of Divorce of Petitioner Mother and Michael UU. entered on xx/xx/xxxx, which incorporated, but did not merge, the parties Separation Agreement dated xx/xx/xxxx (Judicial notice was also taken without objection)

**Respondent's Exhibits**

• Exhibit E - Amended Adoption Petition for minor child Wyatt filed with the Clerk of the Court on xx/xx/xxxx and withdrawn on xx/xx/xxxx prior to the commencement of any testimony (admitted for the limited purpose of impeachment over the objection of Petitioners);

• Exhibit F - Amended Adoption Petition for minor child Serenity filed with the Clerk of the Court on xx/xx/xxxx and withdrawn on xx/xx/xxxx prior to the commencement of any testimony (admitted for the limited purpose of impeachment over the objection of Petitioners);

**Attorney For the Children's Exhibit**

• Parole Conditions of Respondent Michael UU. (Attorney For the Children's Exhibit "I".

The Court took judicial notice of the following without objection:

• Adoption Petition filed by the Petitioners for minor child Serenity;

• Adoption Petition filed by the Petitioners for minor child Wyatt;

• Custody modification petition filed by Respondent Michael UU. on December 9, 2021.

Attorney for the Child's Position

The Attorney for the Child took no specific position on this consent proceeding other than the Court must decide the issue of consent to "guide the next steps for all parties in this case."

**LAW & ANALYSIS**

In this adoption proceeding, whether or not consent is required from a parent (in this case Respondent-Father Michael UU.) is guided by DRL §111. More specifically, because biological mother and the biological father were married at the time of the birth of the subject children to be adopted, DRL § 111(1)(b) requires consent to adoption "[o]f the parents or surviving parent, whether adult or infant, of a child conceived or born in wedlock." However, that consent is also "[s]ubject to the limitations hereinafter set forth" (DRL §111(1)) which limitations, as relevant to these proceedings, are set forth in DRL §111(2)(a) and (6). More specifically, those provisions state as follows:

2. The consent shall not be required of a parent or of any other person having custody of the child:

(a) Who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so; (DRL §111(2)(a))

and-

6. For the purposes of paragraph (a) of subdivision two:

(a) In the absence of evidence to the contrary, the ability to visit and communicate with a child or person having custody of the child shall be presumed.

(b) Evidence of insubstantial or infrequent visits or communication by the parent or other person having custody of the child shall not, of itself, be sufficient as a matter of law to preclude a finding that the consent of such parent or person to the child's adoption shall not be required.

(c) The subject intent of the parent or other person having custody of the child, whether expressed or otherwise, unsupported by evidence of acts specified in paragraph (a) of subdivision two manifesting such intent, shall not preclude a determination that the consent of such parent or other person to the child's adoption shall not be required.

(d) Payment by a parent toward the support of the child of a fair and reasonable sum, according to the parent's means, shall be deemed a substantial communication by such parent with the child or person having legal custody of the child. (DRL §111(6)).

Based upon the testimony of Petitioner Mother and Respondent Michael UU., the Court finds that Petitioner Mother and Michael UU. were married and subsequently divorced in 2019. The Court further finds that the subject children Serenity and Wyatt, are the biological children of Petitioner Mother and Respondent Michael UU. and were born during their marriage to each other. The Court further finds, based upon the testimony of Petitioner Mother and Respondent Michael UU., that there is no dispute that during the

relevant six (6) month period from August 17, 2021 through February 17, 2022, Respondent Michael UU. did not have any visitation, contact, or communication with the subject children or Petitioner Mother, nor did Michael UU. provide any financial support in any manner for the subject children during that relevant six (6) month period.

The only attempt by Michael UU. seeking contact or access during the relevant six (6) month period is his petition for modification of custody filed on December 9, 2021. The Court would be remiss to not point out that this one custody petition filed by Michael UU. - filed a year and four months after Michael UU. was released from incarceration - was only for visitation of one of the subject children, Serenity. The custody petition filed by Michael UU., albeit filed during the relevant six (6) month period, based upon the totality of the circumstances in this matter, is insufficient to establish meaningful efforts at visitation or contact with the subject children or their legal custodian, Petitioner Mother, where there was no other proof submitted by Michael UU. showing any other efforts in that regard. *See Matter of Kira OO.*, 45 AD3d 933, 936 (3rd Dep't. 2007). *See also Kaitlyn D. v. Patricia D.*, 184 Misc 2d 150 (NY Fam. Ct. 2000) (finding that the father's filing of a visitation petition was not more than an inconsequential "flicker of interest" that would not defeat a claim of abandonment where no other contact had been shown for over two years).

Notwithstanding the above, Michael UU.'s consent to the adoption would still be required if it were shown by Michael UU. that he provided financial support for the subject children, of a fair and reasonable sum, according to his means, as such would be "deemed a substantial communication by such parent with the child or person having legal custody of the child." DRL §111(6)(d). For the reasons set forth hereafter, the Court finds that Michael UU. did not provide for the financial support of the children during the relevant six (6) months immediately preceding the filing of the adoption petitions herein.

The testimony of both Petitioner Mother and Respondent Michael UU. is that Michael UU. has never paid any direct child support to Petitioner Mother for the support of the subject minor children. Both parties testified that their Judgment of Divorce/Separation Agreement contained the terms of child support for the subject children. However, there was conflicting [*5]testimony as to what the actual terms of the child support provisions were understood to mean, as well as the basis for the agreement set forth in the Separation Agreement. Petitioner Mother testified that the agreement did state that because Michael UU. was jobless at that time, that he would not pay any child support. Petitioner Mother further testified that the agreement does not state that Michael UU. would never pay child support. Michael UU. testified that he and Petitioner Mother agreed that he would not pay child support in exchange for him agreeing to not seek property distribution, which Michael UU. testified he was seeking because Petitioner Mother sold numerous cars and property of his without his consent.

The Court must be clear that the terms of the parties' child support provisions are set forth in a duly executed and notarized Separation Agreement, a contract. That agreement was thereafter incorporated, but not merged into the parties entered Judgment of Divorce, an enforceable order. As the agreement is a contract, "[t]o interpret a contract, the reviewing court must confine itself to the four corners of the document and only consider extrinsic proof if the contract is ambiguous; if the contract is not ambiguous, it must be enforced according to the plain meaning of its terms." *Mid-State Indus. Ltd v. State of New York*, 117 AD3d 1255, 1256 (3rd Dep't. 2014) *citing* Brad H. v City of New York, 17 NY3d 180, 185-186 (2011); Matter of Warner v Board of Educ., Cobleskill-Richmondville Cent. Sch. Dist., 108 AD3d 835, 836 (3rd Dep't. 2013), *lv denied* 22 NY3d 859 (2014). The Court finds that the parties' Separation Agreement (contract) is not ambiguous on the issue of child support. The Court further finds that Michael UU.'s assertion that there was a waiver of child support because he agreed to forego property distribution, which he was seeking due to Petitioner Mother's sale of cars and property of Michael UU., is not contained anywhere in the parties' separation agreement and would therefore be extrinsic proof that the Court cannot consider.

The parties' Separation Agreement under the "CHILD SUPPORT" provision sets for the income and child support obligations of Petitioner Mother and Michael UU. The agreement states in bold "Husband's income is below the poverty income guideline. The calculation of the Husband's presumptive obligation is, therefore, provided for in DRL sec. 240(1-b)(d)." It goes on to state "Husband's Child Support for two children under DRL sec. 240 (1-b)(d). $25.00 per month." (See page 3 of Separation Agreement). Paragraph "E" of the child support provision states: [t]he parties agree that given that the Husband is currently jobless no child support will be paid by the Husband." *Id*. Paragraph "F" then states that while neither party is seeking the services of the child support enforcement unit, either party may seek such services for collection of child support "without first needing permission or consent from the other party and without first seeking any further order of the court." *Id*. at pp. 3-4.

The distribution of marital property between Petitioner Mother and Michael UU. in their separation agreement is contained on pages 9 and 10 of their Agreement. That provision sets forth the factors considered for equitable distribution, and as to the actual distribution of property, the parties have three sections: "HOUSEHOLD POSSESSIONS", "BANK ACCOUNTS" AND "BUSINESS". *Id*. at p. 10. As to the latter two sections, Bank Accounts and Business, the parties agreed to retain sole and exclusive ownership of any individual accounts and split evenly any joint accounts; and that they did not jointly own a business together. As to household possessions, the parties stated as follows: "[t]he parties expressly acknowledge and agree that the wife will return any items she has left of the husbands within 45 days of the signed date of

this agreement." *Id*. Notably, the agreement is devoid of any reference to previously sold property that would be used in 'exchange' for a waiver of child [*6]support for the subject children. Stated otherwise, the express terms of the agreement at best do not corroborate, and at worst explicitly contradict, the assertions of Michael UU. regarding his stated justification for non-payment of child support.

Additionally, on page 12 of the parties Separation Agreement, under the heading "ENTIRE AGREEMENT" it states the following: "[t]his agreement contains the entire understanding of the parties and there are no promises, terms, conditions, warranties, undertakings, or representations by either party to the other, except as expressly set forth in this agreement." Therefore, given the foregoing, and that there is nothing ambiguous about the terms of the parties Separation Agreement, the Court is confined to the four corners of that contract. As such, the Court cannot, and will not, consider any extrinsic proof as requested and offered by Respondent Michael UU., with respect to the issue of child support. The Court finds that while the parties Separation Agreement states that there will be no child support paid by Michael UU., the Agreement clearly stated that was because Michael UU. was "jobless". Further, the Agreement actually sets forth that pursuant to DRL §240 (1-b)(d) Michael UU. is required to pay $25.00 per month for the support of both children. Additionally, nowhere in the agreement is there any language "opting out" of the application of the Child Support Standards Act, a provision that would be necessary in any agreement to accomplish a permanent waiver of child support as insinuated by Respondent Michael UU.

In light of the above, the Court finds that while there is no dispute that at the time of the execution of the parties Separation Agreement, Michael UU. was not required to pay child support, that was not a permanent waiver of child support. It is clear to the Court from a review of the parties Separation Agreement that the non-payment of child support was due to Michael UU. not having a job at the time the agreement was executed. The Court further finds, as noted above, that it is undisputed that Michael UU. has never provided any child support or financial support to the subject children since the parties Separation Agreement and divorce in 2019, which includes the relevant six (6) month period applicable to this proceeding. It was Michael UU.'s burden to provide proof of financial assistance according to his means, in this case no support, and in that regard, Michael UU. failed to provide any proof at all for the Court to consider. The only proof submitted by Michael UU. was his assertion that he was not required to provide any support or financial assistance for the subject children pursuant to the parties Separation Agreement in 2019. There was no testimony about Michael UU.'s current employment status, or financial circumstances and obligations. As such, the Court's only consideration on the issue of child/financial support for the subject children is the terms of the parties Separation Agreement, which analysis and determination are set forth above.

Based upon the foregoing, the Court finds that Petitioners have shown by clear and convincing evidence that Michael UU. evinced an intent to forego his parental/custodial rights by failing for a period of six (6) month to visit the subject children and communicate with them or their legal custodian, Petitioner Mother, although able to do so. Once that showing was made, the burden then shifted to Michael UU. "to demonstrate sufficient contact or an inability to engage in such contact." *Matter of Lori QQ. v. Jason OO.*, 118 AD3d 1084 (3d Dept. 2014); see also *Matter of Nathon O.*, 55 AD3d 995, 996 (3d Dept. 2008), *lv denied*, 11 NY3d 714 (2008). The Court finds for the reasons set forth herein that Michael UU. failed to demonstrate sufficient contact or his inability to engage in such contact.

While Michael UU. testified that he was prevented from having any contact with the subject children or Petitioner Mother because of his parole conditions, the evidence presented in [*7]this hearing does not reflect such prohibition. With respect to Michael UU.'s testimony that his parole conditions prevented him from having contact with the subject minor children, the Court's review of the parole conditions would appear to show that testimony as accurate. For instance, on the first page of those parole conditions at lines 10-11, the condition states "I WILL HAVE NO CONTACT WITH ANY PERSON UNDER THE AGE OF EIGHTEEN WITHOUT WRITTEN PERMISSION OF THE P.O." See trial Exhibit "I". The Court did not find any reference in the parole conditions that would exempt the subject children from this condition. The only reference in the parole conditions to any children of Michael UU.'s is found on page three (3) of the parole conditions in the section regarding Michael UU.'s use of the internet in which it states: "I WILL NOT USE THE INTERNET TO COMMUNICATE WITH A PERSON UNDER THE AGE OF EIGTHEEN UNLESS I RECEIVE WRITTEN PERMISSION FROM THE BOARD OF PAROLE TO USE THE INTERNET TO COMMUNICATE WITH A MINOR CHILD UNDER EIGTHEEN YEARS OF AGE WHO I AM THE PARENT OF AND WHO I AM NOT OTHERWISE PROHIBITED FROM COMMUNICATING WITH."

However, of critical importance, a review of Michael UU.'s parole conditions that were admitted into evidence as Exhibit "I" by the Attorney for the Children shows that there was no prohibition stated therein that Michael UU. could not have any contact with Petitioner Mother. Even crediting Michael UU.'s testimony that his parole conditions prevented him from having visitation with and/or communicating with the subject children, there is no proof, other than Michael UU.'s own testimony, that Michael UU. was prevented from communicating with Petitioner Mother, the legal custodian of the subject children. While Michael UU. stated that such a prohibition was clearly indicated in bold sharpie lettering, the certified parole conditions received into evidence contain no such condition. Further, based upon both Petitioner Mother and Michael UU.'s testimony that there were no Orders of Protection against Michael UU. preventing him from having contact with Petitioner Mother, the Court finds that there was nothing

preventing Michael UU. from contact with Petitioner Mother regarding the subject children, particularly during the relevant six (6) month period. Other than his own testimony, Michael UU. did not offer any other evidence to support his belief that his parole conditions prevented such contact, i.e. no testimony from his former parole officer(s).

Additionally, no proof was submitted about any attempts by Michael UU. to obtain permission from his parole officer or the Board of Parole to have visitation or communication with the subject children. While Michael UU. testified that his parole officer required a court order to approve him having visitation and/or communication with the subject children, there was no testimony or proof as to when such discussions occurred, nor was the parole officer called as a witness to corroborate Michael UU.'s testimony. Notably, there was no proof submitted to this Court that there was any prohibition on a third party making such contact on behalf of Michael UU. to at least inquire as to how the children are doing and to establish some means of contact with either the subject children and/or Petitioner Mother. In fact, Michael UU. did testify that he had his mother reach out to Petitioner Mother about visitation with the subject children, although there was no direct testimony as to when his mother allegedly reached out to Petitioner Mother. In rebuttal to that testimony, Petitioner Mother's testified that no contact by Michael UU.'s family or friends was had with her or any of her family or friends during the relevant six (6) month period regarding the subject children. Despite that, if this contact by Michael UU.'s mother occurred with Petitioner Mother (which appears to have only been one time), such contact, even at the direction of Michael UU., would not provide Michael UU. the [*8]ability to object to the adoption. See *Matter of Seasia D.*, 10 NY3d 879, 890 (2008) (noting that "assuming without deciding that actions taken by a biological father's family may be attributed to him for purposes of establishing his status as a consent father, the family's gestures in this case (an offer to take the birth mother shopping for maternity clothes and certain telephone calls) were insubstantial.")

As noted above, DRL §111(2)(a) states that consent to an adoption is not required of a parent "[w]ho evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and **communicate with the child or person having legal custody of the child, although able to do so**". (emphasis added). Based upon the evidence and corroborated testimony at the hearing of this matter, the Court finds that Michael UU. was able to, at a minimum, maintain contact with the subject children's legal custodian, Petitioner Mother, during the relevant six (6) month period, but did not do so.

Based upon the foregoing, the Court finds that Petitioners have shown by clear and convincing evidence that Michael UU. evinced an intent to forego his parental/custodial

rights by failing for a period of six (6) month to visit the subject children and communicate with them or their legal custodian, Petitioner Mother, although able to do so. Once that showing was made, the burden then shifted to Michael UU. "to demonstrate sufficient contact or an inability to engage in such contact." *Matter of Lori QQ. v. Jason OO.*, 118 AD3d 1084 (3d Dept. 2014); see also *Matter of Nathon O.*, 55 AD3d 995, 996 (3d Dept. 2008), *lv denied*, 11 NY3d 714 (2008). The Court finds for the reasons set forth herein that Michael UU. failed to demonstrate sufficient contact or his inability to engage in such contact.

Additionally, the Court finds that Respondent Michael UU. failed to demonstrate through competent proof that he should still be considered a consent father because of application of DRL §111(6)(d). This section of the DRL was the only other provision that could have supported a finding of "substantial communication" by Michael UU. thereby requiring his consent to any adoption. Unfortunately, in light of the uncontroverted proof and testimony of the parties in this case regarding no contact or communication or payment of child/financial support with regard to the subject children by Michael UU. during the relevant six (6) month period, the Court has no proof to make such a finding in this case.

**ORDER**

Based upon the foregoing it is;

**ORDERED** and **ADJUDGED**, that pursuant to DRL §111, Respondent Michael UU.'s consent to the adoption of the subject children is not required as Petitioners have satisfied their burden of proof on that issue, and Respondent Michael UU. failed to satisfy his burden of proof to the contrary; and it is further

**ORDERED** and **ADJUDGED**, that the Clerk's Office shall schedule a best interest hearing relative to the Adoption Petitions filed by the Petitioners; and it is further

**ORDERED** and **ADJUDGED**, that Respondent Michael UU. shall be considered an interested party in the adoption proceeding and shall be permitted to offer testimony and proof at the hearing on the issue of whether the proposed adoption would serve the best interest of the subject children; and it is further

**ORDERED** and **ADJUDGED**, that the Custody Modification Petition filed by Respondent UU. on December 9, 2019, shall continue to be held in abeyance until a determination is made by this Court regarding the Adoption Petitions filed by the Petitioners, [*9]and if it is determined that the adoption of the subject children by the Petitioners is not in the subject children's best interest, the Court will schedule a further proceeding on that Custody Modification petition at that time; and it is further

Service and Right to Appeal

**ORDERED**, that the Clerk's Office is directed to serve a copy of this Order upon counsel of record for the parties and the Attorney for the Child by electronic mail, same to be considered good and sufficient service pursuant to FCA §1113; and it is further

**ORDERED, all parties shall take notice that: pursuant to section 1113 of the Family Court Act, an appeal must be taken within thirty days of receipt of the order by appellant in court, thirty-five days from the mailing of the order to the appellant by the clerk of the court, or thirty days after service by a party or Attorney for the Child upon the appellant, whichever is earliest.**

**It is so Ordered.**

Signed and Dated: Ballston Spa, New York
July 31, 2023
E N T E R:
Hon. Michael J. Hartnett
Family Court Judge

**Footnote 1:** Michael UU. having represented, through counsel, that he continues to assert that he is a "consent" father for both children, despite having filed a Custody Petition only seeking parenting time with Serenity.

## ARTICLE 10 DISPOSITION

**Matter of Camden J.**, 81 Misc3d 1202(A) (Family Court, Monroe County, 2023)

Dandrea L. Ruhlmann, J.

**DECISION AND ORDER**
On March 3, 2023, the Monroe County Department of Human Services, Division of Social Services (MCDHS) moved for summary judgment against Respondent, Parent Substitute, Nakiyah S. (Respondent S.). Based upon Respondent S.' conviction for Assault in the Second Degree in Monroe County Court, this Court found both that there was no triable issue of fact and that Rai'Anna B. (DOB:XX/XX/2019) is a child who was severely abused.

On January 26, 2022, the child Rai'Anna, almost 3 years old, while in the care of Respondent S. was scalded with hot water in a bathtub after she soiled the bed.

Rai'Anna sustained second degree burns to the bottom of her buttocks and to her genital area to the extent that her skin was peeling. Rai'Anna also had other pre-existing wounds and scars. The Court made a finding of derivative neglect as to Respondent S. as to the child Camden J. (DOB: XX/XX/2018).

The Court held a dispositional hearing for the sole purpose of determining whether to grant Petitioner MCDHS' application for an Order of Protection, pursuant to Family Court Act § 1056(4), prohibiting any and all contact between Respondent S. and the subject children until [*2]each child's respective eighteenth birthday. The Court finds MCDHS met its burden and proved by a preponderance of the evidence that all contact between Respondent S. and the subject children shall be prohibited until each child's respective eighteenth birthday.

The dispositional hearing was held over four days and concluded on August 1, 2023. The Court heard the testimony of five witnesses, MCDHS Caseworker Shanetra T.; Court Appointed Special Advocate, Leah H.; Omeka M. (Respondent S.' Mother); Respondent S.; and Jennie A. (the children's foster mother). The Court received into evidence: Petitioner's Exhibit 1 (7 pages), REACH program records for Rai'Anna B. for care provided between January 26, 2022 and February 3, 2022, including correspondence from physician Elizabeth M., DO to MCDHS stating the burn pattern on Rai'Anna B. is most consistent with a "dunking event" and evaluation of both Rai'Anna and her brother Camden J. found both children to have loop marks on their bodies consistent with being hit with a belt or cord; Petitioner's Exhibit 2 (23 pages including 6 pictures of loop marks on Camden J.'s body), REACH program records and pictures related to Camden J. for care provided between January 26, 2022 and February 3, 2022; Petitioner's Exhibit 3 (38 pages including 4 pictures of the dunking event injuries to Rai'Anna B.), Rochester General Hospital records for Rai'Anna B. for care provided between January 26, 2022 and February 3, 2022; Petitioner's Exhibit 4 (33 pages), records of the Rochester Police Department relating to Camarin B., Nakiyah S., Camden J., and Rai'Anna B. and the property located at XXX Goodman Street, Rochester, New York for events occurring between January 26, 2022 and February 3, 2022; Petitioner's Exhibit 5 (Verisma CD and redrope filled with hard copy of Verisma CD), Strong Memorial Hospital records for Rai'Anna B. for care provided between January 26, 2022 and February 3, 2022; Petitioner's Exhibit 6 (30 pages), photographs of Camden J. and his injuries, Petitioner's Exhibit 7 (17 pages), photographs of the child Rai'Anna B. and her injuries; Petitioner's Exhibit 8 (1 page), MCDHS' proposed dispositional plan dated December 13, 2022; and Petitioner's Exhibit 9 (20 pages), certified copy of transcript of the plea of Camarin B. on July 8, 2022 before the Hon. Caroline Morrison, Monroe County Court Judge. The Court granted Respondent S.' request to submit closings in writing on or before September 12, 2023.

The Court found the testimony of Caseworker Shanetra T. and Jennie A. (the children's foster mother) to be credible. The Court has afforded Court Appointed Special Advocate Leah H.'s testimony appropriate weight since she testified that she had few interactions with Respondent S. At trial Respondent S.' Mother, Omeka M. acknowledged her own memory problems due to a traumatic brain injury. Further Ms. M.'s testimony was rebutted by the testimony of foster parent Jennie A. Most significant, Respondent S.' own testimony belied her request for access to the children. Respondent S. did not take full responsibility for her actions, claiming at times that she used excessive corporal punishment to save the children from future harm. Still the Court was able to discern what role Respondent S. played in providing guardianship to the subject children (*see Matter of Louise E.S. v W. Stephen S*., 64 NY2d 946, 947 [1985] [respect is to be accorded the trial judge's advantage in observing the demeanor of witnesses]; *see also Hendrickson v Hendrickson*, 147 AD3d 1522 [4th Dept 2017]; *and see Matter of Chyreck v Swift*, 144 AD3d 1517 [4th Dept 2016]).

Respondent S. testified that she only pled guilty to a class D felony offense of Assault in the Second Degree against the child Rai'Anna B. to end the criminal proceedings. She lacked remorse for her actions and appeared dismissive of the injuries the child sustained. She denied [*3]wrongdoing for hitting both children with a belt to "keep the children safe from themselves." Respondent S. also failed to obey an existing no contact order of protection by recording her voice on a bear given to Rai'Anna B. purchased from "Build-A-Bear" in violation of that criminal court order of protection.

Respondent S. testified that she is no longer a member of the children's household, is not related by blood or marriage to the children, or to any member of the children's household and that she has not seen the children since January 2022.

Both Attorneys for the Children strongly support MCDHS' application for an order of protection, pursuant to Family Court Act § 1056(4), prohibiting any and all contact between Respondent S. and the subject children until each child's respective eighteenth birthday. The purpose of an attorney for the children is "to help protect [a child's] interests" *(see Matter of McDermott v Bale,* 94 AD3d 1542, 1543 [4th Dept 2012]).

THE COURT HAVING SEARCHED THE STATEWIDE REGISTRY OF ORDERS OF PROTECTION, THE SEX OFFENDER REGISTRY AND THE FAMILY COURT CHILD PROTECTIVE RECORDS, AND HAVING NOTIFIED THE PARTIES AND THE ATTORNEYS OF THE RESULTS OF THESE SEARCHES AND THE COURT HAVING CONSIDERED AND RELIED UPON THE SAME:

NOW, THEREFORE, based on all of the evidence presented, it is hereby

ORDERED, that it is in the children's best interests that the Court enter an order of protection against Respondent S., pursuant to Family Court Act § 1056(4), until each child's respective eighteenth birthday.

## Article 10- Visitation

**Matter of Liam V.**, Misc3d 2023 NY Slip Op 23387 (Family Court, Kings County, 2023)

Erik S. Pitchal, J.

By order to show cause (# 3) dated September 28, 2023, petitioner moves for an order [*2]suspending the respondents' visitation with Liam, following the death of his sister, Ella.[FN1] In consideration of the motion, the Court has reviewed the supporting papers of the attorney for the child, dated October 20, 2023; the opposition papers of respondent Lafeyette B., dated October 20, 2023; the opposition papers of respondent Johnson V., dated October 20, 2023; and movant's reply, dated October 27, 2023. The Court also considered supplemental reports by HeartShare-St. Vincent's Services foster care agency, dated November 1, 2023, and by ACS, dated November 2, 2023. There being no disputed issues of fact in connection with the motion requiring an evidentiary hearing, the motion appearance of November 3, 2023, was for oral argument only, following which the Court reserved decision. For the following reasons, the motion is granted in full.

**CASE HISTORY**

*The August 16, 2022, Petition*

The case began on August 16, 2022, when ACS filed a petition against Ms. B. and Mr. V. charging them with abuse and neglect of their children Liam (then 11 months old) and Ella (then 3 weeks old). Specifically, ACS alleged that the parents brought both children to Maimonides Medical Center (hereinafter "Maimonides") on August 11, 2022, saying that Liam had hit his head on the wall when Ms. B. threw objects at and pushed Mr. V., who was holding Liam at the time. The hospital examined both children and found Liam had no injuries. However, Ella had leg and skull fractures, as well as a small hemorrhage on the left side of her brain, injuries that were said to be consistent with non-accidental trauma. The parents were said to have no credible explanation for her injuries. The petition also charged Ms. B. with perpetrating acts of domestic violence against Mr. V. in the children's presence, noting the above-referenced incident. (Petition — Abuse Case, dockets NA-15241-42/22, dated Aug. 16, 2022, at Addendum I.)

On August 16, 2022, the parties were arraigned on the allegations in the petitions, and the Court assigned counsel to each parent and heard preliminary applications. Petitioner sought a remand of the children to foster care, indicating that their paternal grandmother, Elsa S., had been identified as a kinship resource and had received agency approval. The attorney for the children (hereinafter, "the AFC") supported the remand application. The parents did not contest the remand request, which was granted by the Court. The parents asked that the remand be restricted to Ms. S.'s home, which the Court granted, meaning that moving the children to a different foster home would require Court approval, absent an emergency (in which case the children could be moved first, with a report filed with the Court thereafter). (Remand Order dated Aug. 16, 2022, at ¶ 3(a).) ACS asked that all visits be supervised by the agency.[FN2] The parents asked for visits to be supervised by any [*3]available family member or friend who passed an ACS background check and assessment.[FN3] The AFC asked for approved resource visits to be "strongly considered." ACS indicated that it would support an order which left discretion up to the agency to determine whether to utilize approved resources, without further Court order. After hearing argument on the visitation matter, the Court ordered as follows:

The parents shall have 4 agency supervised visits. If there is no documented safety concern, then visits shall be supervised by any agency-approved resources.

(Remand Order dated Aug. 16, 2022, at ¶ 5.)

*The September 12, 2022, Stipulation*

On September 12, 2022, the parties presented a signed stipulation to the Court. The agreement provided that henceforth, Mr. V. would have agency supervised visits only, but that the agency would have discretion to expand his visits. The Court so-ordered the stipulation. (Order on Consent dated Sept. 12, 2022.)

*The November 9, 2022, Conference*

The matter proceeded to a preliminary conference, which was conducted off-the-record by the assigned judge's court attorney on November 9, 2022. The parties reviewed the state of pre-trial discovery; the parents' service plans; the children's placement and medical conditions and care; and parent-child visitation. The foster care agency at the time, Lutheran Social Services of New York (hereinafter "LSS"), filed a written report.

The agency described the service plan it was offering to the parents in light of the allegations in the petition. Mr. V. was being asked to complete a parenting skills course; an anger management course; and an abusive partner intervention program. The agency informed the Court and the parties that he had enrolled on September 8, 2022, at Brooklyn Community Services's "Fatherhood Program," which covered all three

identified service requirements, and he was on track to complete the program the next day, November 10, 2022. Ms. B. was being asked to submit to a mental health [*4]evaluation and engage in any clinically reasonable treatment recommendations; to engage in domestic violence counseling; and to complete a parenting skills course. As of November 9, 2022, she was already underway with the first two items, at Kings County Hospital and the Jewish Board, respectively.

The November 9, 2022, conference was the first time the Court learned that the children had been moved from Ms. S.'s home to a different kinship foster home, that of their maternal grandmother, Loretta B.. This was prompted by "[a]n incident which led to an injury to Ella while Mr. V. was visiting" at Ms. S.'s home. (LSS report dated Nov. 3, 2022, at 3.) Elsewhere in the report, reference was made to Ella having had tongue surgery, and an issue with the stitches leading to the need for a second operation. (Id. at 2.) No other details were provided concerning the "incident" or how Ella's tongue was injured.

The agency also reported that Liam was being followed by a cardiologist for an irregular heartbeat. He was being referred to Early Intervention to address developmental delays and to the Attachment Behavioral Catchup ("ABC") program. In addition to the tongue surgery, Ella was being followed by a neurologist for seizures, and a gastroenterologist for being underweight.

Regarding visits, Ms. B. had been visiting the children, supervised, on a regular basis in Ms. S.'s foster home (on a separate schedule from Mr. V.) and, since they had been moved to her own mother's home, she visited every weekend, supervised by the children's maternal grandmother or other maternal relatives who had been approved. In accordance with the September 12, 2022, stipulation, Mr. V. was offered agency supervised visits, but according to the agency, he had declined these due to his work schedule. Ella had been in the hospital due to the tongue surgery, and the parties discussed how he might be able to see her while there, considering that he was about to finish his services the next day. He indicated that he had left his job and would now be available to come to the agency, and a schedule was set up. (LSS report dated Nov. 3, 2022, at 3.)

Additionally, petitioner's counsel was reminded that the Court had restricted the children's remand to Ms. S., and that any change required a subsequent order, with information being provided to the assigned judge as to why the children had to be moved.

*The November 30, 2022, Conference*

The court attorney convened a follow-up preliminary conference on November 30, 2022. Regarding discovery, the Court had signed all proposed subpoenas the day they were

presented, November 14, 2022. Regarding services, Ms. B. was attending mental health treatment at Services for the Underserved ("SUS") with a counselor who had been provided the petition in the case, and she was attending domestic violence services at the Jewish Board. Mr. V. had completed the BCS Fatherhood Program and had signed a release allowing the agency to speak to the provider, but the agency stated that it had not spoken to the provider since October 21 and was trying to confirm his completion.

The children were said to be doing well with their maternal grandmother, and the court attorney again reminded petitioner's counsel that he needed to file something with the Court to address the placement issue, in light of the restrictive remand order from August 16, 2022. The parents reported difficulties with visitation, as it appeared there was tension between them and the maternal relatives and there were disagreements about the schedule. The agency agreed it would inform the parents of all the children's medical appointments and invite them to attend.

The court attorney scheduled the case for trial, to commence March 17, 2023.

*[*5]Mr. V.'s Request for a 1028 Hearing*

On December 29, 2022, Mr. V. filed a request for the return of the children to his care, pursuant to Family Court Act § 1028. The assigned judge was on vacation, and the covering judge put the matter on the calendar for January 4, 2023. Given that some of the medical records had not been obtained, and that expert witnesses were likely required but not available to testify right away, all parties agreed that instead of an immediate evidentiary hearing, the January 4 appearance would be a conference with the Court.

During the January 4, 2023, conference the parties agreed that the fact-finding hearing should be combined with the 1028 hearing. ACS indicated the exhibits it intended to offer at the hearing. The parents at that point had evidence for the 1028 portion, including Mr. V.'s certificates of completion for all his services at BCS, copies of which were provided to the agency in court that day; however, the parents were not ready for fact-finding as they were still reviewing extensive medical discovery and considering options for potential expert witnesses.

The rest of the January 4, 2023, conference focused on significant disputes between the parents and the maternal relatives regarding visitation. Questions were also raised about the service plan and whether, given the children's ongoing specialized medical needs, LSS had the appropriate level of expertise to manage the case. The agency reported on disputes between the maternal aunt Mr. V. at the visits and observed that Ella sometimes cried while her father held her. The attorney for the child suggested that

the family be referred for clinical visitation, so that the parents could work on forming a positive attachment with the children by a properly-trained early childhood professional.

Finally, petitioner's counsel made a specific request to the Court to vacate the restrictive remand order of August 16, 2022; however, no party requested the Court to enter a new order restricting the remand to the maternal grandmother's.

At the end of the conference, the Court entered the following order:

1) ACS is directed to explore a change of foster care agency. In particular, the Court determines that New Alternatives for Children may be a better fit for this case based on its need for:

a. More accurate service planning and referrals for appropriate services;

b. Monitoring the children's specialized medical care;

c. Specialized clinical visitation services.

2) Each parent shall be entitled to visit the children at least three times per week.

a. Ms. B. may continue to visit supervised by her family members in the foster home, but if she requests it, the agency shall provide agency supervised visits and/or arrange for visits supervised by another approved resource.

b. At least one visit per week shall be for both parents visiting together.

c. To the extent practicable, agency-supervised visits shall take place in the community so that the parent(s) and child(ren) can engage in activities together.

d. To the extent practicable, visits shall be scheduled during the children's non-napping, awake hours.

3) Both parents shall be invited to attend all medical appointments, with one week's notice absent emergency/urgent care.

4) Paragraph 3(a) of the Remand Order dated August 16, 2022, is hereby vacated.

(Order on Motion dated Jan. 4, 2023.) The matter was adjourned to January 19, 2023, for a [*6]subsequent conference, to see if there would be a resolution to the litigation and to follow up on the issues identified on January 4.

*Additional Pre-Trial Proceedings*

At the January 19, 2023, conference, Ms. B.'s counsel announced that she would join Mr. V.'s request for the return of the children.**[FN4]** The parties agreed to use the previously-selected fact-finding date of March 17, 2023, to commence the combined

fact-finding/1028 hearing. The rest of the conference was devoted to exploration of visitation and service plan issues. LSS was still on the case because a formal request for agency transfer had not yet been submitted to the relevant office at ACS that assigns foster care agencies.

Regarding services, in its report to the Court dated January 18, 2023, LSS noted that it had confirmed Ms. B.'s engagement in mental health services and parenting skills development. A separate letter from the Jewish Board submitted to the Court summarized the parenting skills curriculum and stated:

Ms. B. has been engaged and participatory as we explore these concepts. She has demonstrated an ability to reflect on her own experiences and has shared insights about her personal life with the group. Her reflections have demonstrated her deep love for her children and her desire for her relationship with her children to be safe, secure, and nurturing.

(Juliana Stevenson letter, The Jewish Board, dated Jan. 16, 2023 at 2.) Regarding Mr. V., LSS stated that it had been unable to obtain his certificates of completion from BCS, without acknowledging that the certificates had been provided in the courtroom two weeks prior. In the discussion on the record, it was confirmed that LSS was not asking Mr. V. to engage in any additional services, however.

LSS also reported on the many ongoing tensions between the parents and the maternal relatives around visitation which was occurring at the Brooklyn Public Library, supervised by agency staff. (Additional visits were still being supervised in the foster home by the maternal relatives.) The report noted the foster parent's repeated late arrivals, unsolicited advice to the parents, and general interference in the visits. Mr. V. seemed inattentive at times. LSS also observed that both parents "displayed love and affection" towards both children (LSS Report dated Jan. 18, 2023, at 4); the parents praised Liam as he showed off his new walking skills (id. at 5); the parents made sure the children's "physical, emotional, and recreational needs were met" (id. at 6); and Mr. V. was able to calm Liam when the child was crying. (Id. at 5.)

At the close of the January 19, 2023, conference, the parents asked for an order permitting them to have brief periods of unsupervised visits.[FN5] Ms. B.'s counsel argued that she had been [*7]making progress in her services. Mr. V.'s counsel noted that he had completed all mandated services, and that the agency, even when asked, did not ask him to do anything else. The attorney for the child supported the application but reiterated her request that the agency put clinical visitation services in place. ACS opposed. The Court denied the request for unsupervised visits, citing among other things the seriousness of Ella's injuries and the pre-trial posture of the case.

The parties reconvened before the Court on February 15, 2023, for a settlement conference. The status was much the same as it had been a month prior. Ms. B.'s service providers submitted positive reports about her progress. LSS was still on the case [FN6] and still claimed it did not have certificates proving that Mr. V. had completed his services (even though these had been provided in court on January 4). The children were still seeing medical specialists. Visitation continued with the same basic observations as before — the parents did well with the children but were easily frustrated; they blamed the foster parents for spoiling the children and criticized Liam as "lazy" when he did not walk. The attorney for the child inquired as to efforts by the agency to refer the family to clinical visitation services, but LSS said they were waiting for the new agency to pick up the case and take care of that. The parents renewed their request for "sandwich" visits, with the AFC again supporting and ACS opposing. The Court denied the request.

On March 6 and 15, 2023, the assigned judge's court attorney conducted pre-trial conferences limited to the topic of trial preparation. Extensive discussions were had concerning the identity of expert witnesses and their availability to testify; the nature of the medical evidence and the manner in which it would be presented; and issues relating to the order of witnesses. All efforts were made to ensure that the matter was trial-ready, and that once the hearing began, it would proceed smoothly.

*Combined Fact-Finding and 1028 Hearing*

All parties and counsel were present in Court on the previously-selected date of March 17, 2023, for the combined fact-finding and 1028 hearing. By this time, HeartShare St. Vincent's Services ("HSVS") had taken over as the foster care agency, and it reported that the first visit their staff had supervised had gone well. HSVS also noted that the parents attended a pediatric appointment with the children, but Mr. V. became angry when the maternal grandmother offered unwanted advice; the agency followed up with both of them. HSVS understood that Mr. V. had already completed his services and there was no indication that they were asking him to do anything further. HSVS was aware that Ms. B. had previously completed a parenting skills program and was actively engaged in domestic violence counseling and mental health treatment. HSVS reported that the children's pediatrician had referred them to Early Intervention, and the agency was attempting to refer the parents to the ABC program.

In anticipation of the hearing going forward, ACS counsel prepared and circulated trial [*8]exhibits.[FN7] These consisted of:

1) Certified and delegated records from Maimonides concerning Liam;

2) Certified and delegated records from Kings County Hospital, concerning Ms. B.;

3) Certified and delegated FDNY/EMS records;

4) The curriculum vitae of Dr. Ingrid Walker-Descartes;

5) Domestic Incident Reports dated April 12, August 11, and December 30, 2022; and

6) NYPD Body-Worn Camera footage from August 11, 2022.

However, when the case was called on the record on March 17, 2023, the exhibits were not taken into evidence and no witnesses testified, because in lieu of a hearing the parties presented the terms of a negotiated settlement. The agreement consisted of four parts:

1) The parents admitted to neglecting the children in full satisfaction of the pending charges.

In this case, all parties, including ACS and the AFC, agreed that it would be a satisfactory outcome if the parents admitted to neglecting the children instead of having a trial on the question of whether they abused them. In layperson's terms, one could say that ACS and the AFC agreed to let the parents plead guilty to neglect in exchange for the abuse charge being dropped. The parents admitted in open court to neglecting the children in the following manner:

*"On or about August 11, 2022 the child Ella, who was in the sole care of the respondent parents, was found to have injuries in various stages of healing, including fractures in her legs and skull, injuries that can be indicative of non-accidental trauma, and neither parent were able to provide an explanation for these injuries. As a result of the injuries to Ella, the subject child, Liam, is a neglected child or in danger of becoming a neglected child."*

2) All parties, including ACS and the AFC, agreed to immediately commence sandwich visits.

The visits would occur two or three times per week, and the unsupervised portions of the visits would total a maximum of six hours per week, spread over however many visits occurred. The visits would begin and end at the agency. The parties agreed that if the agency in its discretion determined that the parents could safely have more than six hours of unsupervised time per week, no further Court order would be required, provided that the AFC was notified and had a reasonable opportunity to object prior to the expansion.

3) All parties agreed to adjourn the matter for a dispositional hearing.

4) All parties, including ACS and the AFC, agreed that the standard of proof the Court would apply at the dispositional hearing would be the "imminent risk" standard used in 1028 [*9]hearings, and not the "best interests of the child" standard used in dispositional hearings.

The genesis of this agreement was that the parents had been entitled to litigate the 1028 hearing, but were settling the fact-finding *without* a judge ruling on the 1028 application; the 1028 request was withdrawn in consideration for the dispositional determination being made with the 1028 standard.**[FN8]**

In addition to the June 15 date for disposition, the Court also set a date with the court attorney for a conference, to aid the parties in either settling (or narrowing the contested issues for) the disposition, or to identify the witnesses and exhibits for any contested hearing.

*The Pre-Disposition Conferences*

The parties gathered for two off-the-record conferences with the court attorney in between the parents' plea in March and the subsequent dispositional hearing in June. HSVS submitted written reports for each conference, both of which were reviewed by the Court at the time of submission. In its April 24, 2023, report, submitted for a conference of the same day, HSVS provided information about a neurology appointment for Ella on March 14, 2023, which was attended by the parents as well as the maternal aunt (who also lives in the foster home with the maternal grandmother and cared for the children when the grandmother was at work):

During the appointment with the Neurologist on 3/14/2023, Case Planner received a text message from [maternal aunt] that the parents were withholding Ella's bottle and that Mr. V. (BF **[FN9]**) was "terrorizing" Ella. Case Planner video called during said appointment and observed Mr. V. was walking Ella through the hallways to help calm her down and that Ella would stop crying when she was being carried by Mr. V. (BF). Case Planner inquired and as per Mr. V. (BF) who [sic] shared that he didn't give Ella the bottle while she was crying because he did not want her to choke on the bottle. Case Planner did observe him give Ella the bottle when she stopped crying.

(HSVS report dated April 24, 2023 at 2.) The agency also reported on the sandwich visits that had been taking place since the parties' agreement and Court order of March 17:

During the supervised portions of the visits, Case Planner has observed that Ms. B. (BM) and Mr. V. (BF) interact appropriately with the children; providing them with their

food/bottles, changing diapers as needed and remaining engaged with the children. Case Planner has observed that Ella often cries and will only calm down if she is picked up and the parents [*10]have shared that they are concerned about Ella's lack of self-soothing skills. Case Planner also observed at times that Ella would refuse to finish her formula bottles, but typically finishes her pureed baby food. Liam eats well during the visits and always appears happy and ready to play when Case Planner observes him with his parents. When the weather permits, the parents take the children to the Cadman Plaza Park and Columbus Park for Liam to play in the grassy areas. Both parks are a short walking distance from the agency. During the final supervised portion of the visits, Case Planner observes the children for any potential bruising, marks, injuries, or potential distress. There have been no concerns at this time. During drop-off and pick-up times, Case Planner often must step in due to tension between the [maternal aunt] and the parents. For example, the [maternal aunt] has attempted to ask that the parents not be allowed to have the children in the sun for any amount of time, and not be allowed to be with the children without facial masks. The [maternal aunt] has also attempted to say that the children were withheld from her after a visit had ended, although Case Planner observed that the parents were waiting with the children until the taxi arrived to take the children home and when the taxi arrived, the parents immediately left the premises and did not withhold or prevent the children from going home.

(Id. at 2-3.) The agency also reported that both parents had completed all requested services, with Ms. B. still engaged in counseling, and that both parents had attended all of the children's medical appointments, except for one which they had forgotten.

Based on the above information, ACS and the AFC agreed to expand the parents' visitation with the children. As the Court's order of March 17, 2023, had given ACS the discretion to expand without further specific Court authorization where the AFC was not objecting, no written order was issued following the conference. All parties came to an understanding that the parents would begin having unsupervised visits from 10am to 5pm, two days per week. Ms. B.'s attorney asked if the Court could also provide discretion to ACS to commence overnight visits without further Court order.**[FN10]** It was explained that the Court would not enter an order giving ACS that discretion, but that if ACS and the AFC did later agree to start overnights, the parties could submit a stipulation with a report and the Court would consider so-ordering it. The rest of the conference was spent discussing the likely evidence each party would proffer at the upcoming dispositional hearing.

At counsel's request, a second off-the-record, pre-dispositional conference with the court attorney was held on May 30, 2023. The agency's report dated the same day

provided information about the ongoing sandwich visits occurring twice per week with seven hours of unsupervised time, some of which took place at the family's residence:

Both parents are always early for the visits. The children are typically dropped of[f] 30-60 minutes late to all visits. Since the last hearing [sic] on April 24th, the parents have attended all visits except 5/16/23 and 5/18/23. The visit on 5/16/23 was canceled due to Ella's ER visit and parents were made aware of the situation. On 5/17/23 CP **[FN11]**checked in with the [*11][maternal aunt] about Ella and it was reported that she was gaining her appetite back although still lethargic. Ella did not need to return to the ER but the [maternal grandmother and maternal aunt] did not show up to the visit on 5/18/23 with the children and did not notify the CP. The CP shared with the parents and [maternal grandmother] that make-up visits could be accommodated on 5/22/23 and 5/24/23, and there were no objections to these dates at that time. The [maternal aunt] texted the CP on 5/21/23 that the children would not be at the visit on 5/22/23, and did not state a reason. CP reached out on 5/22/23 to ask if Ella was doing alright and received no response. During the supervised portions of visits, CP has observed that Ms. B. (BM) and Mr. V. (BF) interact appropriately with the children; providing them with their food/bottles, changing diapers as needed and remaining engaged with the children. CP has observed that Ella often cries much less often [sic] during visits, although due to her teething she will get fussy if she doesn't have something to chew on. CP has observed that Ella typically drinks two and a half bottles during her visits, and typically finishes her pureed baby food. CP has observed that Liam normally eats most of the snacks that are packed for him and will eat some of a full meal that is packed for him. The parents keep baby food and regular food for the children at their own home as well. When the children arrive back at the agency for the final portion of the supervised visits, CP observes the parents offer them more snacks/bottles and observed the children ignore these offerings. The [maternal aunt] has said the parents are not feeding the children, and the CP has shared the observations of the children being offered food and not appearing hungry when they return to the agency. The parents are authorized to take the children to their apartment during their unsupervised portions of the visit. The home has safe sleep arrangements for both children. The parents have shared that the children, especially Ella, seem to sleep quite a lot during visits and are concerned they aren't sleeping well at the foster home. CP did discuss this with the [maternal aunt], who is with the children most of the time, and they shared that Ella seems to have "nightmares" that affect her sleep at the foster home. During the final supervised portion of the visits, Case Planner observes the children for any potential bruising, marks, injuries, or potential distress. There have been no concerns at this time. On 5/5/23 the [maternal grandmother] called the CP regarding a visit that took place on 5/4/23. The [maternal grandmother] stated that the kids had smelled of marijuana when they returned home the day prior. CP had held both children the day

prior while assisting the family into the agency building when they returned from their unsupervised visit and had not smelled any marijuana on the children or parents. The CP and family are in a small visit room during supervised portions and CP has never smelled marijuana at any visits.

(HSVS report dated May 30, 2023, at 2-3.) The Court also received a report from Ms. B.'s therapist stating that she was fully engaged, and the therapist had a copy of the petition.

Based on this information, the parties discussed expanding visits to include overnights. ACS agreed to begin overnights, one day per week, with pickup and drop-off to take place at the agency. However, the AFC opposed commencing overnights until the agency referred the family for dyadic therapy.[FN12] The agency promised to make a referral for this service, and the parties planned to submit [*12]a stipulation to the Court to be so-ordered when they had a full agreement to commence overnight visits. The rest of the conference was spent discussing the upcoming dispositional hearing.

On June 12, 2023, just two days before the dispositional hearing, the parties did submit a stipulation agreeing to the start of overnight visits. The agreement, which the Court so-ordered the next day, provided that the parents would pick up the children at the agency weekly on Tuesday, have them overnight at their home, and return them to the agency on Wednesday.

*The Dispositional Hearing*

The parties gathered for the dispositional hearing on June 15, 2023. In advance, all parties conveyed that they would submit exhibits but not call any witnesses. As noted above, by agreement the Court made its determination based on the "imminent risk" standard set forth in FCA § 1028.

In reaching its determination, the Court in this case had before it the finding of parental wrongdoing, and the following exhibits were entered into evidence:

ACS

Petitioner's 1 — Oral Report Transmittal dated September 10, 2022

Petitioner's 2 — Marked ACS Case Notes (Event Date September 12, 2022; Entry Dates October 4 and 7, 2022)

Petitioner's 3 — Letter from Ms. B.'s therapist dated June 14, 2023

Petitioner's 4 — Psychiatric evaluation of Ms. B. dated October 15, 2022

Petitioner's 5 — HSVS Court Report dated June 15, 2023

Mr. V.

RF Ex A — Brooklyn Community Services, certificate of completion of "anger management program, based on anger management for substance abuse and mental health clients curriculum," dated November 10, 2022

RF Ex B — Brooklyn Community Services, certificate of completion of "domestic violence workshop, based on the Duluth curriculum," dated November 10, 2022.

RF Ex C- Brooklyn Community Services, certificate of completion of "parenting program, based on the 24/7 Dad Curriculum," dated November 10, 2022

RF Ex D- HSVS Court report dated May 30, 2023

RF Ex E — HSVS Court report dated April 24, 2023

Ms. B.

RM Ex F- Harlem Child Development Center, certificate of completion of "Circle of Security Parenting Program," dated January 27, 2023

RM Ex G — Jewish Board/Harlem Child Development Center, letter dated January 16, 2023

The AFC did not present any exhibits, and all parties waived any cross-examination of the makers of the various reports in evidence.

In Exhibit 5, the agency noted that it had made referrals for Early Intervention and dyadic therapy. The agency also noted that the children were well, and that there had been no issues reported in the parents' day-long sandwich visits. The agency reported that the maternal grandmother had asked the case planner to conduct full-body checks of the children for injuries upon their return to the agency after each unsupervised visit, but that both the case planner and the [*13]children's pediatrician determined this to be unwarranted.

Based on the record, ACS argued that at disposition, the Court should place the children with the commissioner of ACS pursuant to FCA § 1055. Consistent with the stipulation it had signed on June 12, ACS supported the parents having unsupervised overnight visits with the children.

For their part, the parents asked the Court to release the children to the parents' custody pursuant to FCA § 1057, or, in the alternative, to place them in ACS custody but order an immediate trial discharge of the children to their physical care.

Regarding the issue of placement, release, or trial discharge, the AFC stated as follows:

So, this is hard. I know the standard is imminent risk and under the standard of imminent risk, there have no — been no new concerns. However, I was not aware (inaudible) did not know about some of the history of this case.[FN13]I, I don't want this return of the children to fail. I did ask for dyadic therapy, I believe this winter before this case was transferred to HeartShare when it was still Lutheran. Since my clients are babies and yes, there is a contentious relationship with the foster parents and the parents, it is very difficult for me, because I hear very opposing information about how the kids are doing and what is happening on visits. So, I am apprehensive about returning the children, based on the information that I have without dyadic therapy being in place. On that note, I understand the legal standard presented today and if Your Honor does return the children, I would ask that it be a trial discharge, so continuing support and services can be provided. And I, I know the referral for dyadic therapy was only made in May and I wish it had been made a lot earlier, because from the very start of this case that would have helped me have a better sense of my — how my clients are doing with their parents and concerns that have been raised by the [sic] parents. So, it's a very — I have — I am in a very difficult position here, Your Honor and I apologize for that.

(6/15/23 Tr. at 17.)

The other contested issue at the dispositional hearing related to the parents' service plan and whether the Court should order them to submit to mental health evaluations. Counsel for ACS stated that its exhibit 4, an evaluation Ms. B. had completed on October 15, 2022, was insufficient, and that Mr. V. had never done an evaluation at all, and that ACS was asking the Court to refer the parents to the Health + Hospitals Corporation's Family Court Mental Health Services clinic for such evaluations. (Id. at 7.) Mr. V.'s counsel noted that in multiple conversations about this case, including on the record before the Court, clarification was sought and the agency repeatedly confirmed that Mr. V. did not need to engage in any further services beyond the array of programs he had already completed. (Id. at 6.)

Upon inquiry by the Court during the dispositional hearing, the HSVS case planner once again confirmed the service plan:

THE COURT: "[I]n February you took over the case. Was it your understanding that a mental health — comprehensive mental health evaluation was part of the service plan?

[THE CASE PLANNER]: For Mr. V., it was not. For Ms. B., it was. Lutheran told me they had completed one. I only got access to it yesterday.

(Id. at 8.)

In consideration of the record before it and the standard of imminent risk, the Court entered the following dispositional order:

1) Pursuant to Family Court Act section 1055, the children are placed with the commissioner of ACS until completion of the next permanency hearing.

a. Over agency objection, the agency is directed to commence a trial discharge of the children to their parents no later than June 16, 2023. The trial discharge shall not be failed absent Court order. In the event of an emergency, the agency may remove the children but must file an order to show cause the next court day.

2) During the period of placement/trial discharge, the parents are directed to:

a. Cooperate with agency supervision, including announced and unannounced home visits; signing releases to permit the agency to monitor their engagement in services and the children's well-being; and keeping the agency apprised of any changes in their contact information.

b. Engage in dyadic therapy as may be referred by the foster care agency or a preventive services agency.

c. Provide consent for the children to receive necessary services.

d. Cooperate with the reasonable requests of the attorney for the children.

3) During the period of placement/trial discharge, Ms. B. is directed to remain engaged in clinically recommended mental health services unless/until her provider successfully discharges her.

(Dispositional Order 6/15/2023 at 2.) The Court allocuted the parents on each provision to confirm their understanding and consent. (6/15/23 Tr. at 23-26.) ACS did not appeal the Court's dispositional order or seek an emergency stay of the Court's decision to send the children home.

*The September 14, 2023, Permanency Hearing*

At the permanency hearing, the Court considered all of the reports that had been submitted since February, including an updated permanency hearing report, which noted the children appeared well during home visits conducted by HSVS staff. The agency's case planner conducted two home visits per month, and a nurse visited one additional time per month.**[FN14]** The agency also reported that Mr. V. had completed all of his services, and that it had been unable to reach Ms. B.'s therapist (despite Ms. B. having signed a release) to confirm her continued engagement. The agency reported on

its efforts to refer the family for dyadic therapy, noting that no response had been received from the provider since the agency had sent the referral in May.

The agency also indicated that the parents had declined to consent to Early Intervention services for the children. In her testimony at the hearing, HSVS Director of Foster Care Rosalyn Chernofsky explained that an Early Intervention assessment was recommended by the children's [*14]pediatrician based on their medical history. Should the assessment reveal any developmental delays, the children could be provided services to enable them to catch up before beginning school. (9/14/23 Tr. at 11-12.)

The permanency hearing report also noted that the parents had missed several medical appointments for the children since the trial discharge had commenced. These included neurology, ENT, audiology, and gastroenterology appointments for Ella. In her testimony, Ms. Chernofsky stated that the agency raised the issue of missed appointments with the parents at a meeting held on August 8. She explained, "Mr. V. did ask if these medical appointments were mandated. They are not mandated, but they are required in order for continuity of care and also in order to transfer medical care to a facility that is closer and more convenient to them." (Id. at 9.)

The parents and the AFC did not have any exhibits at the permanency hearing, and all parties were given the opportunity to cross-examine Ms. Chernofsky. The parents did not testify about any of the issues raised on the record.

In her summation, counsel for ACS argued as follows:

Your Honor, at this time, we ask that the placement of the children continue with ACS until the next permanency hearing. We are asking that the goal of return to parent is approved and that [the Court find] that reasonable efforts have been made towards that goal. The agency is asking that the trial discharge continue, but we are asking that the parents comply with the medical appointments that are scheduled and comply with the early intervention evaluation.

(Id. at 14; emphasis added.) The AFC joined in these applications. (Id.) The parents' attorneys indicated that their clients consented to the ACS applications as well, but noted that according to the parents, they had declined Early Intervention assessments as they found in-home services to be too disruptive to the children and their attachment process.

The Court entered the findings and orders on consent. After criticizing the parents for failing to testify themselves about their reasons for not cooperating with Early Intervention assessments, and for their failure to adhere to their prior agreement and the Court's order that they consent to all necessary services, of which Early Intervention was one, the Court re-allocuted Mr. V. and Ms. B. as to their obligations under the

dispositional order, which included providing their consent for all necessary services for the children. (Id. at 17.)

After the parties and the Court selected the next appearance dates, counsel for ACS asked, "[D]oes the agency have authority to do a final discharge?"[FN15] The application was granted without objection. (Id. at 33.)

## ELLA'S DEATH AND THE INSTANT MOTION

By order to show cause (# 2) dated September 18, 2023, ACS moved for an order failing the trial discharge of the children, stating that on September 15, the day after the parties were in court for the permanency hearing, Ella was brought to the hospital for cardiac arrest and difficulties breathing. Upon examination, she was found to have skull fractures and brain injuries, which were suspicious for non-accidental trauma according to medical personnel who examined her. She was [*15]reported to be on a ventilator and undergoing tests to determine if she was brain dead. According to ACS, Ms. B. claimed that Ella had choked on milk, and Mr. V. blamed vigorous chest compressions by EMT's for her injuries. Liam was unharmed and had been returned, on an emergency basis, to foster care placement with his maternal grandmother.

The AFC supported the trial discharge being failed, and the parents did not contest that relief, which was granted. As to visitation, ACS and the AFC asked to suspend all visits, but the parents asked to continue contact with the children. Regarding Ella, the Court allowed the parents to visit her bedside in the hospital, if supervised by ACS, but suspended their contact with Liam. However, the Court directed ACS to file a motion by October 2, 2023, should it seek a continued suspension past that date, to give the parties an opportunity to brief the issue and for the Court to issue a comprehensive ruling.

On September 20, 2023, Ella was pronounced dead.

On September 28, 2023, ACS filed this motion, along with a new petition regarding Liam alleging derivative severe abuse. The petition recited the findings of the Court from the 2022 docket, as memorialized in the determination of neglect pursuant to the parties' agreement on March 17, 2023. For the first time, ACS made factual allegations in a child protective petition concerning Ella's tongue laceration from September 2022, and attached a report from the Maimonides Hospital Child Advocacy-Like Model ("C.A.L.M.") Team which was evidently prepared one year prior but not previously submitted to the Court either as a report or included as an exhibit for any hearing.[FN16] This report stated that "a sharp object" necessarily caused the injury to Ella's tongue earlier that month and assessed that Mr. V. presented an imminent danger to his children. (Petitioner's

Exhibit J at 10).[FN17] And, in addition to the preliminary facts stated in the September 18 order to show cause, the new petition alleged:

After being transferred [from Kings County Hospital] to Maimonides Hospital and undergone a physical exam and several other exams, Ella was found to have the following: bruising on her forehead, firm hematoma over the left side of her skull with overlying bruising, swelling over her left eyelid, 2 linear lacerations on the left scalp, 2 patterned bruises consistent with bite marks on her left lateral/posterior thigh, bilateral frontal lobe subdural hematomas along with more subdural blood tracking along the falx and tentorium, swollen spinal cord and petechial hemorrhage around the spine. Ella was also found to have a midline fracture of her jaw, old, healed femur fractures and bilateral fresh pre-retinal, intraretinal, subretinal retinal hemorrhages. According to Dr Ingrid Walker-Descartes, these injuries are consistent with child physical abuse and abusive head trauma. . . According to [*16]Dr. Walker Descartes, the only explanation provided by the parents for this injury was that Ella was choking on milk. According to Dr. Walker-Descartes, this explanation was not consistent with the nature of the injury.

(9/28/23 Severe Abuse Petition, docket NA-19991/23, dated Sept. 28, 2023, at Addendum I, ¶ 1(a), (b).)

No criminal charges have been filed concerning Ella's death.

In its papers in support of continued suspension of visits, ACS asserts that even supervised visits could not keep Liam safe from harm perpetrated by the parents, in light of the multiple alleged incidents of serious harm done to Ella while in their exclusive care, despite their having engaged in services. ACS and the AFC both point to significant post-traumatic stress reactions Liam has displayed since being returned to care, including head banging and placing his hands over his ears and shaking his head side to side. The AFC argues that healing from the exposure to the trauma of his sister's death will require significant time and that re-exposure to the source of the trauma can extend its impact.

In response, counsel for Mr. V. recites details from the many positive visits that he had with the children prior to the trial discharge, noting the lack of violence or uncontrolled anger on his part. Counsel also observes that ACS favored overnight visits at the time of disposition, a position based on the lack of any reported safety concerns as of June 2023. Finally, counsel argues that the only factual finding against Mr. V. is for neglect, and that under the law, even as applied to this case, ACS remains legally obligated to try to reunify Liam with his parents, despite the serious nature of the allegations, and that separation from his parents without visitation is itself a form of trauma to the child.

Ms. B.'s attorney makes similar arguments, adding that the sudden separation of Liam from his parents is an example of "ambiguous loss" which can generate feelings of

helplessness, depression, and anxiety. She further argues that contact with Liam should continue, such as in a therapeutic setting, and that visits should be suspended only if it appears from the sessions that Liam is being harmed by being with his mother even in those controlled settings.

In reply papers, ACS argues that Ms. B.'s plea for therapeutically-supervised contact with Liam rings hollow considering her continued refusal to consent to therapeutic assessments or services for the child.

On the return date of this motion, November 3, 2023, the parties gathered before the Court and waived oral argument on the visitation issue. The Court also conducted a pre-trial conference on the record, discussing matters related to discovery, expert witnesses, and overall trial planning.

During the pre-trial conference, the Court was presented with and reviewed a report from ACS dated November 2, 2023, which stated that Liam has been observed to be happy in his maternal grandmother's home. ACS also noted its recommendations that Liam engage in trauma-focused therapy and an Early Intervention assessment. The Court also reviewed a report from HSVS, dated November 1, 2023, in which the foster care agency observed that while Liam is doing well overall in the foster home, he "has been observed displaying self-injurious and frustrated behaviors since his return to care following his sister's death." The agency noted that his grandmother has been advocating for him to receive appropriate therapeutic services, and that she "continues to ensure the safety and well-being of the child. [She] is up to date with all foster parent training and her home is in good standing with the agency." Nevertheless, HSVS reported that both parents recently requested that Liam be removed from his grandmother's home and be transferred to a maternal [*17]cousin's home in Florida. The parents claim that Liam is "unhappy" though they could not state how they knew this.

Additionally, the parties discussed the issue of parental consent for the Early Intervention assessment and play therapy. The agency argued that the child's pediatrician had expressed concerns about a speech delay and had opined that Liam should have an Early Intervention assessment. In light of his sister's death and Liam's return to foster care, the agency felt strongly that he also needed therapeutic services. Noting the parents' refusal as of that point to agree to any of these programs, ACS asked for the Court to authorize it or HSVS to consent in the parents' stead, a position supported by the AFC. Ms. B.'s counsel clarified that her client was not opposed to play therapy, just that she wanted to be involved in it herself. (11/3/23 Tr. at 23.) Mr. V. spoke for himself on the record, saying he wants someone of his choosing to be involved in the therapy, such as his mother, even if he himself is not present. (Id. at 26.) Because ACS had not provided prior notice to the parties that it would be seeking this

relief, and because the application affected the parents' intact legal rights, the Court allowed the parents the opportunity to respond in writing and set forth a briefing schedule.[FN18]

Regarding Liam's placement, the Court declined the parents' request that it direct ACS to explore the cousin in Florida and, to the contrary, entered an order prohibiting ACS from moving the child from the maternal grandmother's foster home.

The Court reserved decision on the visitation motion, and this Decision and Order follows.

## ANALYSIS

The law of New York provides that when the state initiates a child protective case and obtains a court order to remove children from their parents' care, the state is nevertheless obligated to work towards reunifying the family, absent specific findings made by the court following litigation. This is true even in cases of child abuse, whether physical or sexual. "[W]hen a child has been removed from the home based on alleged abuse or neglect the social services official responsible for the child must attempt to reunite the child with the birth parent; this includes efforts at rehabilitation so as to render the parent capable for caring for the child." *See In re Marino S.*, 100 NY2d 361, 368-9 (2003). This is based on the long-standing public policy of New York to keep families together and to "require foster care agencies to exercise diligent efforts to reunite abused and neglected children with their birth parents, once rehabilitated." *Id.* at 372.

[I]t is generally desirable for the child to remain with or be returned to the birth parent because the child's need for a normal family life will usually best be met in the home of its birth parent, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered. [T]he state's first obligation is to help the family with services to prevent break-up or to reunite it if the child has already left home.

Social Services Law § 384-b(1)(a)(ii)-(iii).

In New York, absent a termination of parental rights, there is only one exception to the [*18]requirement that agencies make efforts to reunify parents and their children in foster care. Family Court Act § 1039-b provides that "in conjunction with, or at any time subsequent to the filing of a[n abuse or neglect] petition , the [presentment agency] may file a motion upon notice requesting a finding that reasonable efforts to return the child to his or her home are no longer required." *Matter of Dashawn W.*, 21 NY3d 36, 50 (2013). Such an application must be made in writing. *See In re Lindsey BB.*, 72 AD3d

1162, 1164 (3d Dept. 2010). Absent an evidentiary hearing that results in a finding of severe abuse or a showing of "aggravated circumstances," the child protective agency is not relieved of its duty to make reasonable efforts to reunify a family. *See In re Leon*, 83 AD3d 1069, 1071 (2d Dept. 2011). ACS did not plead this case as "severe abuse" when it filed the August 16, 2022, petition. The petition was written as an abuse, but not a severe abuse, case.**[FN19]** Nor has ACS filed a § 1039-b motion to accompany the present severe abuse petition.

With respect to the instant application to suspend the parent's visitation with Liam, there is minimal case law governing parent-child visitation during the pendency of a child protective case. As noted above, absent a determination by the Court pursuant to Family Court Act § 1039-b that relieves the agency of the obligation to assist in reunification, ACS and its foster care agencies must always make reasonable efforts to do so. Visitation is often the central service offered to maintain and strengthen the parent-child relationship. From the outset of the case in August 2022, visitation was offered while the parents engaged in services. Visitation was slowly expanded as the parent-child interaction improved and as the parents completed those services which ACS and the foster care agency determined would rehabilitate them. At times, as on January 19 and February 15, 2023, the Court declined to order an expansion of visits, concurring with ACS that unsupervised contact was not appropriate. By late April 2023, the agency was exercising its discretion to permit the parents unsupervised visits from 10am to 5pm, twice per week. When the reports of these visits were positive, ACS and the AFC consented to overnights, which the Court ordered.

Several months later, circumstances have quite obviously changed in a tragic way. Suspension of a respondent parent's visitation with a child is a "drastic remedy." *Matter of Shaun X.*, 300 AD2d 772 (3d Dep't. 2002). To make the case for suspension, petitioner must demonstrate 1) compelling reasons with 2) substantial evidence that indicates 3) harm to the child from continued visits, even visits that are strictly supervised at the agency. *Matter of Telsa Z.*, 84 AD3d at 1603. All parents have a right to visitation absent a finding "that the child's life or health would be endangered." FCA § 1030(c). The harm element may be established by reference to emotional distress. *Walker v. Sterkowicz-Walker*, 203 AD3d 1167 (2d. Dep't. 2022).

The standard for restricting visitation after the Court has found parental neglect or abuse and placed the child in foster care should be somewhat more relaxed than pre-fact-finding — even if the permanency goal remains return-to-parent and even in the absence of a § 1039-b finding. Respondents' reliance in this case on § 1030, which exclusively governs pre-fact-finding visitation, is misplaced, because there has already been a determination of neglect and a placement of the surviving child in foster care as a result of that neglect.

By its own terms, § 1030 only applies to matters in which the child is in the "*temporary* custody" of ACS. FCA § 1030(a) (emphasis added). Not only is the meaning of this text plain, its placement in the Family Court Act under Part 2 of Article 10 ("Temporary Removal and Preliminary Orders") makes clear which aspects of a child protective case are covered by its terms. In contrast, once a child is placed with ACS at disposition, the Court has far greater latitude in determining whether to impose the drastic remedy of visitation suspension. Pursuant to FCA § 1055 (which is located in Part 5 of Article 10, covering post-fact-finding orders), the Court is obligated merely to set forth in the dispositional order "a description of the visitation plan," without any specific guidance other than to determine the overall best interests of the child. FCA § 1055(b)(i)(A). Similar language appears in the permanency hearing provisions, which govern this case in its current posture. FCA § 1089(d)(vii)(A). This Court holds, then, that while ACS must still establish harm to the child in order to justify suspension of visits post-disposition, the manner and extent of the evidence of harm need not be as exacting as pre-fact-finding.

Here, it is uncontroverted that Liam's sister Ella is dead at the age of 13 months, after suffering unimaginable injuries to her brain, spinal cord, skull, face, and leg — including a bite mark. The agency asserts that Liam was present when these injuries occurred. *See* Petitioner's Motion # 3, Exhibit M (HSVS report dated Oct. 25, 2023, at 5). Each parent had the opportunity to contest this fact; neither did so. Not only is it a fair inference that Liam, who had just turned two, was home at the time, it is also reasonable to conclude that he witnessed the entirety of what happened to Ella.

That there were prior positive visits is of little relevance now that Liam has witnessed his sister's death. Those positive visits, which led to a steady expansion of parenting time and ultimately a trial discharge, came in the context of parents who were cooperative with the agency and who had made progress in their rehabilitation. Mr. V. commenced all services the agency asked him to after Ella's tongue injury, and he completed them in November 2022. Ms. B. completed domestic violence counseling and was consistently engaged in mental health services with a provider who had a copy of the petition against her and was using it in therapy sessions. The parents had taken responsibility for their actions by admitting to neglect of the children.

Now, however, everything has changed, and Ms. B.'s reliance on the theory of "ambiguous loss" is unconvincing. While it is true there is no way to know the source of Liam's trauma responses, reasonable inferences can be made based on the history of the case detailed above. His recent behaviors, including banging his head and putting his hands to his ears while shaking his head "no," are very likely signs of an acute post-traumatic stress reaction. The Court finds that this [*19]extreme reaction is more likely to be based on witnessing his sister die than simply from being separated from his

parents, as respondents' counsel argues. While the child's age prevents us from having absolute certainty as to the cause of his trauma — and allowing for the possibility that it has multiple sources — the reality is that his parents have been given the opportunity to demonstrate care and concern for him in the period following his replacement into care and have failed to do so.

For their part, the parents are no longer cooperative or acting with their children's best interests at heart. Mr. V.'s and Ms. B.'s refusal to consent to an Early Intervention assessment, their insistence that they or persons of their choosing be present for any play therapy he might engage in, and their demand that he be removed from his maternal grandmother's home are all contrary to the child's best interests, especially given all that Liam has recently endured. The lack of empathy demonstrated by the parents in the last several weeks suggests the likelihood of emotional harm that would befall Liam to have any contact with them at present.

Liam has a strong attachment to his maternal grandmother, who served as his foster parent for at least nine months prior to his return to his parents. In his short, but trauma-filled, life, nine months is a significant period of time. The agency observes Liam to be happy with his grandmother and states that he has easily adjusted well to living with her again. Putting his hands to his head and shaking his head "no" in his current context does not signify a lack of attachment to a substitute caretaker or an adverse reaction to a new environment of strangers, because his grandmother's home is a known, loving environment. When he first moved there in September 2022, the agency reported no struggles in his adjustment.

Moreover, Ms. B.'s own application to have Liam moved to another home undercuts her assertion that the child is currently experiencing ambiguous loss, or at the very least represents a profound lack of empathy if that is in fact what he is experiencing. In the request to send Liam to live with her cousin in Florida, Ms. B. made no representation that the child has a positive attachment with the cousin or even knows who she is. Moving the child there would only exacerbate the child's feelings of loss, as he would then be taken away from a positive attachment figure and placed with a stranger. As both parents advocated for Liam to be moved from the maternal grandmother's home, the Court finds that they both lack understanding for the child's emotional state.

Liam is trying to adjust to life without his sister; that project would be threatened by the high risk of emotional harm to resume contact with his parents. Liam's presence in the home when Ella died, his trauma responses, and the fact that he has been returned to care on an abuse case following a finding of neglect, taken together, necessitate further therapeutic intervention prior to the resumption of visitation.

The parent-child relationship can recover from a temporary suspension of contact in the event the legal case ends in the parents' favor and/or if the parents engage in rehabilitative and restorative services along the way. However, the Court finds compelling evidence that at this time, Liam's contact with his parents will cause him harm and that it is in his best interests for the Court to suspend visitation.

**CONCLUSION**

For the foregoing reasons, IT IS HEREBY ORDERED that Motion # 3 is GRANTED and the parents' visits with Liam are hereby SUSPENDED. There shall be no contact of any kind, and the order of protection (full-stay-away) entered November 3, 2023, shall be continued and extended until further order of the Court.

The Court will reconsider this order regarding each parent individually upon his or her filing of a motion demonstrating the following changes in circumstances. The parent must show:

1) The parent has submitted to a comprehensive forensic mental health evaluation conducted by the Health + Hospital Corporation's Family Court Mental Health Services clinic ("MHS"). If the parent wishes to have such an evaluation, which can only be done pursuant to Court referral, counsel should contact the court attorney and arrangements will be made.

2) The parent must begin engaging in all services recommended by the MHS evaluation and sign a release to allow the agency and the provider(s) to communicate. The agency is hereby authorized and directed to give the provider a) the MHS evaluation; b) the C.A.L.M. report (Ex. J to this motion); and this Decision and Order. The provider must report, either directly to the Court or indirectly though the agency, regarding the parent's development of insight and empathy as to Liam's condition.

3) The parent must consent to any and all clinically reasonable services the agency may determine Liam needs and/or which the Court orders the agency to arrange.

Dated: Brooklyn, NY
December 12, 2023
ENTER
Hon. Erik S. Pitchal

**Footnote 1:** Visitation with Liam has been temporarily suspended by Court order since September 18, 2023, when the Court failed the trial discharge. See infra at 17. At that time, the Court directed petitioner to file a motion no later than October 2, 2023, in the event ACS wished to keep the suspension in place. When ACS did so by filing the instant order to show cause, the Court granted interim relief, directing that visits remain suspended pending final disposition of this motion.

**Footnote 2:** ACS contracts with non-profit foster care agencies to train, certify, and supervise foster homes, and to provide services to parents and their children who are placed in foster care. When children are initially placed in foster care, it can take 30 days or more for ACS to transfer the case to a specific foster care agency; in the meantime, ACS continues to manage the case. In Family Court cases, the term "agency," as in "agency supervised visitation," is understood to include both ACS and the foster care agency, depending on which entity is actively managing the case at any given time.

**Footnote 3:** Individuals who are cleared by ACS for the purpose of supervising parent-child visitation are referred to as "approved resources." The Court understands that the process of approving resources involves a criminal background check, and a check of the State Central Registry of child maltreatment. Additionally, agency staff meet with the proposed resource to instruct them on what is expected of a visitation supervisor, and to determine if the person is suitable and appropriate to supervise the specific case, given what is known about the children, their ages, and any special circumstances. When the Court permits visits to be supervised by approved resources, it typically allows for more flexible and frequent visitation. Visits that are "agency supervised" typically occur at an ACS or foster care agency office, in a less child-friendly environment. Space, staff, and logistical constraints usually mean that agency supervised visits only occur twice per week.

**Footnote 4:**By this time, it was known to all parties that the parents still lived together and wished to plan, together, for the children to be returned to them. With the agency's approval, and pursuant to the Court's order of January 4, 2023, they had been visiting the children together.

**Footnote 5:**Specifically, the parents asked for what is known in Family Court parlance as "sandwich visits," meaning a period of unsupervised time — usually no more than an hour or two — sandwiched between periods of supervised time, immediately preceding and following the unsupervised time. In this instance, the request was for the unsupervised time to be as brief as 15 to 30 minutes.

**Footnote 6:**Petitioner's counsel informed the Court that HeartShare-St. Vincent's Services had agreed to take the case, but the transfer was not final yet.

**Footnote 7:**ACS counsel had provided a version of the proposed trial exhibits to respondents' counsel and the AFC previously, and the parents' attorneys filed written objections to portions. The Court adjudicated these evidentiary matters and issued a

written decision and order dated March 16, 2023, granting some of the objections and denying others. The Court understands that the final version of the exhibits submitted by petitioner conformed to the Court's rulings.

**Footnote 8:**In a dispositional hearing, the standard for all decisions is the best interests of the child. *Matter of Telsa Z.*, 84 AD3d 1599 (3d Dep't. 2011). In a 1028 hearing, ACS has the burden of proving that the children would be at imminent risk of harm if returned home, that no orders of protection short of continued removal can adequately mitigate that risk, and that the risk of returning home outweighs the harm of continued separation from their parents. *See Nicholson v. Scopetta*, 3 NY3d 357 (2004).

**Footnote 9:**Foster care agencies commonly abbreviate "birth father" as "BF" and "birth mother" as "BM" when writing reports.

**Footnote 10:**The wording of the Court's March 17, 2023, visitation order gave ACS discretion to expand the parents' unsupervised time from the Court-set floor of six hours per week but did not give ACS discretion to commence overnight visits.

**Footnote 11:**"CP" refers to case planner, the front-line employee for a foster care agency charged with managing most aspects of a case, including writing court reports.

**Footnote 12:**"Dyadic therapy" is a generic term referring to any clinical intervention involving parents and children simultaneously. See National Center for Children in Poverty, "Dyadic Treatment," available at https://www.nccp.org/dyadic-treatment/.

**Footnote 13:**The same attorney was the AFC from the outset of the case when it was filed in August 2022.

**Footnote 14:**According to a report from HSVS dated September 25, 2023, after Ella's death, the agency conducted its final home visit on September 13, 2023, the day before the permanency hearing. The children were free of marks and bruises at that time.

**Footnote 15:**In issuing a permanency hearing order, the Court may grant ACS authority to "finally discharge" a child in foster care to the respondent(s), without the need for further permanency hearings or court orders. FCA § 1089(d)(2)(viii)(C).

**Footnote 16:**The C.A.L.M report attached to this motion contains information from four different time periods: A report concerning the team's encounter with the children August 11-16, 2022; a report dated September 21, 2022, concerning Ella's tongue injury that month; an "Interim History" note dated March 1, 2023; and a report concerning

Ella's injuries in September 2023. The first time any of these reports were provided to the Court was on September 28, 2023, as Exhibit J to petitioner's motion to suspend the respondents' visits with Liam.

**Footnote 17:**The C.A.L.M. team's March 1, 2023, "Interim History" note concluded that both Ella and Liam would be at "great risk for child maltreatment" in the care of their parents. (Ex. J at 11.) ACS consented to unsupervised visits on March 17, 2023. See supra at 9.

**Footnote 18:**The matter was subsequently briefed, and by separate Decision and Order dated December 4, 2023, the Court granted ACS's applications, enabling it to move forward with an Early Intervention assessment and play therapy for Liam, over the parents' objection.

**Footnote 19:**An "abused child" is one whose parent "inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ," or commits a delineated sex offense. Family Court Act § 1012(e). In contrast, "severe abuse" requires three findings by the Court: 1) that the child has been abused, as defined in § 1012(e); 2) that the child's abuse is "a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life, which result in serious physical injury" as defined in the Penal Law, or the parent committed a felony sex act on the child, or the parent has been convicted of murder or manslaughter of the child's sibling; and 3) that "the agency has made diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate [the parent], when such efforts will not be detrimental to the best interests of the child, and such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future." Social Services Law § 384-b(8)(a).

## AUTHORITY OF AFC TO FILE ARTICLE 10 PETITION

**Matter of Jeremyah P. (J.R.)**, 79 Misc3d 1232(A) (Family Court, Orange County, 2023)

Timothy P. McElduff, Jr., J.

### Background

The above-captioned matters proceeded to a fact-finding hearing on July 11, 2023 to determine whether the child was neglected within the definition of Family Court Act Article 10. At the opening of the hearing, Petitioner Orange County Department of Social Services ("DSS") rested without offering any evidence of the previously alleged neglect. Upon the close of DSS' case at the hearing, the Respondents moved to dismiss the above-captioned neglect proceedings. The Respondents' motion to dismiss was not opposed; however, the Children's Rights Society ("CRS"), as attorney for the child, additionally moved for permission to originate new neglect proceedings against the Respondents following the imminent dismissal of the pending neglect [*2]proceedings. The Court reserved decision on the motions and adjourned the proceedings pending decision.

### Analysis

#### A. Respondents' motion to dismiss following the close of the Petitioner's case.

By failing to offer any evidence of the alleged neglect at the fact-finding hearing in these matters, Petitioner DSS failed to establish facts sufficient to sustain their Article 10 neglect petitions. Accordingly, the Respondents' motion to dismiss must be granted and the petitions herein must be dismissed pursuant to FCA § 1051(c).

#### B. Children's Rights Society's motion for permission to file new neglect proceedings.

Family Court Act § 1032(b) provides that "a person on the court's direction" may originate a neglect proceeding. *See* FCA § 1032(b). The attorney for the child qualifies as a "person" who may seek court permission to originate a neglect proceeding pursuant to FCA § 1032(b). *In re Jalesa P.*, 75 AD3d 730, 730 (3d Dept. 2010).

Whether or not to grant permission to file a neglect proceeding pursuant to FCA § 1032(b) is a matter of discretion for the trial judge. *In re Amber A.*, 108 AD3d 664, 665 (2d Dept. 2013); *see, e.g., Hamm-Jones v. Jones*, 14 AD3d 956 (3d Dept. 2005) (finding that the trial judge properly exercised discretion to deny an FCA § 1032[b]

motion where the subject proceeding had been dismissed after a fact-finding hearing which yielded no evidence that the respondent mistreated either child).

Here, similar to *Hamm-Jones*, no evidence of neglect was adduced at the fact-finding hearing. This Court cannot reasonably justify endorsing a second round of neglect proceedings after the first round, though vigorously pursued and debated throughout its months-long pendency, ultimately failed to produce evidence of the alleged neglect at the trial stage. Thus, the Court exercises its discretion to deny CRS' 1032(b) motion as to any allegations of neglect previously raised in these proceedings.

Beyond the matter of the Court's discretion, this Court further finds that it is required to deny CRS' 1032(b) motion pursuant to the doctrine of res judicata. The doctrine of res judicata or the claim preclusion effect applies to Article 10 neglect proceedings that have been determined on the merits. *See In re Alfonzo T.,* 79 AD3d 1724 (4d Dept. 2010); *In re Yan Ping Z.,* 190 Misc 2d 151 (Fam. Ct. 2001). To allow successive proceedings alleging the same theory or transactions of neglect until the desired result is obtained would undermine fundamental rules of fairness that must be afforded to the accused after a determination on the merits. *See In re Alfonzo T.,* 79 AD3d at 1725; *In re Yan Ping Z.,* 190 Misc 2d at 155.

Here, the above-captioned neglect proceedings were dismissed upon the Petitioner's failure of proof at the trial stage. Thus, the allegations of neglect against the Respondents may not be re-litigated in new, successive proceedings. Nevertheless, previously unrelated and uncharged allegations of neglect (which could not have been discovered during the previous proceedings) or subsequently occurring events of alleged neglect could avoid the operation of res judicata and be prosecuted anew. *See*, *In re Yan Ping Z.,* 190 Misc 2d at 155. Thus, CRS will be given leave to commence neglect proceedings only as to any previously unrelated and uncharged allegations of neglect (which could not have been discovered during the previous proceedings) or subsequently occurring events of alleged neglect.

**Conclusion**

For the above-stated reasons, it is hereby

ORDERED that Respondents' motion to dismiss the proceedings pursuant to FCA § 1051(c) is granted and the within petitions are dismissed with prejudice; and it is further

ORDERED that The Children's Rights Society's motion pursuant to FCA § 1032(b) is granted only as to any previously unrelated and uncharged allegations of neglect (which could not have been discovered during the previous proceedings) or subsequently occurring events of alleged neglect, and is otherwise denied.

This constitutes the Decision and Order of the Court.

## EXCESSIVE CORPORAL PUNISHMENT

**Matter of Loudemya SJ (Jacqueline SJ)**, 80 Misc3d 1219(A) (Family Court, Kings County, 2023)

Jacqueline B. Deane, J.

[*2]Procedural History
This proceeding involves a neglect petition filed on February 15, 2022 against the Respondent father, Mr. SJ, pursuant to Article 10 of the Family Court Act, alleging that he used excessive corporal punishment on the subject child, Jackson, then 5 years old, by hitting him with a belt. Cuts and bruises were allegedly observed on Jackson's body at various times, and a bruise and cut were allegedly observed on his older sister, Loudemya, age 4, as well.

This fact-finding hearing commenced on September 12, 2022, and continued over the following dates: November 30, 2022; January 25, 2023; February 2, 2023; March 16, 2023; and, May 11, 2023, the date on which the fact-finding concluded. Petitioner Administration for Children's Services ("Petitioner" or "ACS") called Caseworker Eubanks and Caseworker Cadet, both of whom testified about statements made by the children regarding the allegations. The Respondent called his wife and the children's stepmother, Ms. Vierg SJ, and he also testified on his own behalf. The Attorney for the Children ("AFC") did not introduce any evidence and supported a finding against the father. Counsel then made their summations, and this Court reserved decision.

Evidence

Caseworker Eubanks testified that the subject children came to live with the Respondent father after ACS removed them from their mother's care in August of 2021 and they remained there until February of 2022 when this petition was filed.[FN1] The father lived in New Jersey with his wife, Ms. SJ, and their five children, and they had no child protective history.

At the end of a visit between the children and their mother on February 14, 2022, the subject child Jackson reported to Caseworker Cadet that his father had beaten him with a belt. Ms. Eubanks spoke to Loudemya that same day, and she reported that Jackson gets a "whipping", which she explained meant getting hit with a belt, by both the father and stepmother, and the last time she had seen it happen was that same morning. Loudemya did not describe any details of the "beating," such as where on Jackson's body he was hit or how many times, or the frequency at which this occurred. Ms.

Eubanks did not examine Jackson's body that day, but she had on numerous prior occasions when the children came to the office for visits with their mother. During the one-month period from January to February 2022, Caseworker Eubanks testified that she would see marks or bruises in various places on Jackson's body and that there was never a point that Jackson did not have marks. The marks would be on his arms, legs, back or face and, on direct examination, were not described in any detail as to shape, color, or stage of healing.

On cross-examination, Ms. Eubanks was asked about a circular scab that she observed on Jackson's back on October 12, 2021. Jackson told the caseworker that he sustained the injury on his bed. Ms. Eubanks directed the stepmother to take the child to Brooklyn Hospital and no further action was needed. When Jackson was questioned about discipline in his father's home, Jackson initially stated that he was not subject to any physical discipline but then, at one point, said his father used a belt, after which Jackson laughed. When the caseworker followed up by [*3]asking Jackson if that was the truth, Jackson laughed again, did not answer, and then said he wanted to go back to live with his mother. On November 9th, Jackson reported that he had an injury on his chest, which the caseworker described as a circular mark, and Jackson said he was scratched by a cat. Jackson had some other marks on his leg which he said he got playing with friends, and he also injured his foot in a door. The caseworker took Jackson to Brooklyn Hospital with his parents to be examined. No child protective report was made because of that visit, and the children remained living with their father. On February 10, 2022, Ms. Eubanks had a virtual visit with the children where she observed a scratch on Loudemya's hand, and Loudemya said she got the scratch fighting with her younger sister over a "scrunchie." The caseworker asked Loudemya if there was any physical discipline in the father's home. The child denied any and said she felt safe there. On February 11th, Jackson confirmed that his sister had a fight with a sibling, that there was no physical discipline in the home, and he felt safe there. The children were again brought to Brooklyn Hospital to be examined and again no child protective concerns were raised. Only three days later, the children returned to the field office for a visit with their mother and the report of corporal punishment with a belt was made. On that date, the mother had a visit where she picked the children up from the agency office and had unsupervised time with them outside, after which she returned them to the office. Ms. Eubanks stated that the mother would speak Creole to the children as well as English, but that she did not understand Creole. The children made the statements about the use of the belt after being returned to the agency by their mother. When Ms. Eubanks made the report to the agency, she acknowledged stating that Jackson reported being hit with a belt on either February 9th or 12th and that Loudemya said Jackson was hit on the same morning of the visit, February 14th, which was the day the report was filed.

The caseworker did not remember whether the children were taken to the hospital for an examination that day, but they were later removed from their father's care.

Caseworker Cadet testified that he was at the field office on February 14, 2022 when the subject children returned from their unsupervised time with their mother. As the visit was ending and the family was leaving, Mr. Cadet was following Jackson around as he is "very active" and decided to "pull Jackson to the side" away from his mother and sister and "asked him if his father hits him." Jackson responded that his father does hit him and when the caseworker inquired further, Jackson stated that he was hit with a belt and the last time was the day before and he was hit five times. Jackson did not say where on his body he was hit. Mr. Cadet then examined Jackson and did not see any marks or bruises on him. Mr. Cadet did not ask Jackson if he had ever been hit before but did ask if his sister was hit. Jackson said yes, also the day before, but would not elaborate on how she was hit. According to Caseworker Cadet, Jackson continued to be very active during the interview "rolling on the floor, things like that . It would take more than one person to kind of pick him up and get him to behave and other things."

Caseworker Cadet was recalled as the Respondent father's witness to testify to an injury he observed to Jackson's right eyebrow on January 12, 2022. The caseworker observed some swelling and asked Jackson about it. Since the caseworker did not remember the details of the conversation, the Respondent put his case note into evidence as Respondent's Ex. A. In the note, Jackson said he was taking a bath with his brother who commented on his eyebrow being thick, so Jackson cut it.

The Brooklyn Hospital records were admitted into evidence as Petitioner's exhibits 1 and 2. Exhibit 1 documents Loudemya's various visits to the hospital for body checks requested by ACS on January 25, 2022, when an old scar was found on her arm, and on February 11, 2022, [*4]for a scratch on her wrist. In both cases, Loudemya was found to be in normal, good physical condition and returned to her father's care without any child protective concerns raised. Exhibit 2 documents Jackson's various visits to the hospital for body checks requested by ACS on November 9, 2021, when he had various scratch marks and a few bruises on his body of different sizes and shapes. All these injuries had healed and were "without abnormal findings," and Jackson denied being hit by anyone at home. Pet's Ex. 2 p. 5. On January 25, 2022, Jackson was again seen at ACS's request for various marks and scabs which again were "without abnormal findings," and Jackson again denied being touched or hurt in any way he did not like at home. *Id.* at p. 16. Finally, on February 11, 2022, Jackson was seen because Loudemya's scratch was being examined, and Jackson confirmed that she received it fighting with a sibling over hair accessories. Jackson was found in good physical condition, with no marks noted, and he "denied any physical abuse by mother or father." *Id*. at p. 25, 27. On all occasions, Jackson was returned to his father's care

without any child protective concerns raised. There are no medical records in evidence for on or after February 14, 2022.

Mr. SJ testified in an open and honest manner. The Respondent testified that, prior to the subject children coming to stay with him, he lived with his wife and her 5 children ages 13, 10, 7, 3 and an infant, the youngest two of whom they have in common, and this was apparently his first involvement with ACS. The Respondent stated that his wife works at Newark airport from 4am to 12pm noon and he stays home to care for the children. When the subject children were brought to his home by ACS, he found that Jackson was very high energy and would often climb and jump from places in the home, including a bunk bed. Mr. SJ described talking to Jackson about his behavior and the fact that he could get injured, and his son would listen, but once his father left the room, Jackson would resume the behavior. Sometimes, if one of his children did not listen, the father would put the children on their knees for a little while and then try to talk to them again. Mr. SJ emphatically denied ever using corporeal punishment to discipline Jackson or any of the other children in his home. He also stated that Loudemya never really misbehaved. The Respondent father acknowledged seeing occasional marks on Jackson's body when he would scratch himself or get cut while jumping and that he took Jackson to the hospital on several occasions when requested by the agency.

Ms. SJ testified that when Jackson came to live with them, he was "hyper" in that he was "always jumping, always running." To address his behavior, Ms. SJ would call his father to talk to him, take his tablet away, or have him face the wall for ten minutes and then talk to him. She also adamantly denied ever hitting Jackson with a belt or any hard object. Ms. SJ testified that she would see her husband discipline Jackson by putting him on his knees for a couple of minutes and then talking to him. She denied ever seeing Mr. SJ hit Jackson with anything. Ms. SJ remembers the time on October 12, 2021, when Jackson had a scrape on his back which he got from hitting his back on a drawer while getting down from the bunk bed. Ms. SJ said she took Jackson to the hospital as requested by the agency. She also recalled Loudemya having a scratch on her hand from fighting with a younger sibling over a "spongy," and again she took the child to the hospital as requested by the agency. Ms. SJ was cross-examined about her awareness of the father's care of the children while she was at work, and she testified that she would call home frequently during her breaks and other times. Although Petitioner attempted to undermine her credibility based on the timing and frequency of her breaks, the Court did not find this significant at all to her credibility. The Court found Ms. SJ, like her husband, to be open and honest and clear in their efforts to appropriately care for the two subject children and respond to [*5]the requests of the agency. Overall, she described the two children, especially Loudemya, as getting along well with all the children in the home other than the usual sibling fights. There was no

evidence whatsoever of any antagonism by Ms. SJ towards these two young children despite the children being from her husband's prior relationship.

Legal Analysis

In order to make a neglect finding based on excessive corporal punishment, ACS must prove by a preponderance of the evidence that (1) that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the subject child with proper supervision or guardianship. *See* Family Ct. Act § § 1012(f)(i)(B), 1046(b)(1); *Matter of Afton C.*, 17 NY3d 1 (2011); *In re Kiana M.-M.*, 123 AD3d 720, 721 [2d Dept 2014]. To satisfy this burden, the Petitioner may rely upon prior out-of-court statements of the subject children, provided that they are sufficiently corroborated. See Family Ct Act § 1046 (a)(vi); *Matter of Nicole V.,* 71 NY2d 112, 117—118 [1987];*Matter of Michael B. [Samantha B.],* 130 AD3d 619 [2d Dept 2015]; *Matter of Mateo S. [Robin Marie Y]* 118 AD3d 89 [2d Dept 2014]. "Any other evidence tending to support the reliability of the previous statements, including, but not limited to the types of evidence defined in this subdivision shall be sufficient corroboration." Family Ct Act § 1046[a][vi]. This includes the out-of-court statements of siblings, which may properly be used to cross-corroborate one another. *See Matter of Ashley G.*, 163 AD3d 963, 964 [2d Dept 2018]. However, in order for a sibling's out-of-court statements to provide sufficient corroboration of the out-of-court statements of another sibling, they must be "independent, consistent, detailed, and explicit." *In re Tristan R*, 63 AD3d 1075, 1077 [2d Dept 2009].

The Court has reviewed the Brooklyn Hospital records of Jackson's marks placed in evidence as Petitioner's Exhibits 1 and 2, and the Court has considered the credibility of the two witnesses called by the Petitioner and weighed that against the evidence presented by the Respondent and his wife. The Court cannot find, by a preponderance of the evidence, that the Respondent father neglected the subject children as defined by Family Court Act ("FCA") § 1012.

The Petitioner's case at trial consisted entirely of out-of-court statements allegedly made by these two young subject children, ages 5 and 4 at the time, to the ACS caseworkers that they were hit with a belt. These statements were not corroborated by any of the past marks actually observed on the children on various occasions over a several month period, as each of the prior marks had different explanations which were accepted by the caseworkers and medical personnel who examined the children. The hospital records in evidence corroborate that those prior marks existed, but do not show any evidence of marks that were, or could be, attributed to children being hit with a belt.

Moreover, on the prior occasions, the children repeatedly denied both to hospital personnel and to ACS that they were being hit. Significantly, there are no hospital records from on or about February 14th when the children claimed they were hit with a belt either that day or the day before, when fresh belt marks would be expected to be visible. Additionally, Caseworker Cadet who examined Jackson that same day did not observe any marks whatsoever. This is not consistent with Jackson's statement that he was hit with a belt FIVE times or with his sister's statement that Jackson got a "whipping" with a belt. Also of note is that Jackson said the beating happened earlier that morning while his sister said it happened the day before. While children this young may not be accurate in timing, the difference of an event occurring the [*6]SAME day, or a day or two in the past, IS significant.

While statements of two different children can be enough legally to corroborate one another, in this case the statements do not contain sufficient detail and are not consistent enough to form that corroboration. *See Matter of Ashley G*., 163 AD3d at 965 (insufficient corroboration where statements did not contain a detailed description of the alleged excessive corporeal punishment); *Matter of Gerald W., Jr*., 129 AD3d 979, 980 [2d Dept 2015] (dismissal of petition affirmed noting that "The Family Court has considerable discretion to decide whether the child's out-of-court statements have in fact been reliably corroborated).

In addition to the differences in timing of the beating claimed by each child, there is a lack of specificity as to where either child was hit with the belt, how often or on how many occasions. Additionally, the Court must consider the circumstances in which these statements were made. These two young children were removed from their mother who had been their primary and largely sole caretaker for most of their lives. They expressed their desire to return to their mother's home throughout their removal. The first time Jackson made a statement about being hit with a belt, in November of 2021, he did so after first denying any physical punishment, he then laughed when asked if this was the truth, and then went on to say he wanted to return to his mother. In February 2022, Jackson made the statement about having just been hit with a belt that same morning immediately after returning from unsupervised time with his mother, knowing that he would be going back to his father's home. The same is true for Loudemya's statement that day, which was the only time she reported physical punishment of either child. Additionally, the Court has concerns about the way the caseworker chose to interview the child Jackson on February 14th. Jackson was described as running around the field office while being followed by the caseworker, who then decided to start asking him about things in his father's home, while the child was still in motion, and followed up with the leading question, "does your father hit you?" This is not the proper way to conduct an interview of this nature with a young child, and in the Court's view, was not enough of a basis to even bring this petition given the lack of accompanying physical evidence.

These are parents who apparently have successfully been raising five children, one of whom is a teenager, without any child protective concerns. They took in the father's two young children when asked by ACS, one of whom everyone acknowledges is extremely active. In a home with 7 young children and an energetic 5-year-old, one can expect a normal share of childhood cuts, scrapes, and bruises. Even Loudemya, who the father and stepmother testified got along with everyone, had a scratch or two from typical sibling fights.

The Court found both the Respondent and his wife to be highly credible witnesses and does not believe they use corporal punishment on any of the children, much less any excessive corporal punishment. The SJs described numerous other forms of discipline they had used over the years with their shared biological children and there is no basis to believe they varied these parenting practices with Jackson and Loudemya.

After having reviewed this evidence as well as having had the unique opportunity to assess the credibility of the Respondent father, the Court holds that the proof is insufficient to make a finding of neglect by a preponderance of the evidence.

Date: June 14, 2023
ENTER:
Jacqueline B. Deane, JFC

**Footnotes**

**Footnote 1:**The first neglect petition was filed against the mother, Ms. D, on August 5, 2021, based on mental illness allegations that placed the subject children at risk of harm. The mother completed all her court-ordered services on that case and the children were returned to her care and her finding of neglect was vacated on January 25, 2023.

## FAIR HEARING

**Matter of Kenneth W. v. Miles-Gustave**, Misc3d 2023 NY Slip Op 34021(U) (Supreme Court, New York County, 2023)

Upon the foregoing documents, the court denies Petitioner Kenneth W.' s Verified Petition and dismisses it as against Respondents Suzanne Miles-Gustave ("Miles-Gustave"), in her capacity as Acting Commissioner of the New York State Office of Children and Family Services ("OCFS"), and Jess Dannhauser ("Dannhauser"), in his capacity as Commissioner of the New York City Administration for Children's Services ("ACS") ( collectively, "Respondents").

Petitioner brought this Article 78 proceeding against Respondents seeking an order vacating and annulling Respondent Miles-Gustave's determination, dated February 16, 2023, that denied Petitioner's request to amend his record from indicated to unfounded, directing her to amend and seal Petitioner's record in the Statewide Central Register of Child Abuse and Maltreatment ("SCR") and directing Respondent Dannhauser to similarly amend the records of the report maintained by ACS.

The main issue in this proceeding is whether the amendment to Social Services Law ("SSL")§ 422(8)(b)(ii)(B), which became effective as of January 1, 2022, requiring OCFS to amend an SCR report from indicated to unfounded when a Family Court Act ("FCA") Article 10 petition is dismissed, applies to Petitioner's administrative appeal of his indicated SCR report, filed prior to the enactment date, when his FCA Article 10 petition was dismissed prior to the enactment date, but his administrative hearing and the determination both took place after the enactment date.

The court determines that the statutory amendment's irrebuttable presumption does not apply to Petitioner's case since he filed his request for the amendment of his SCR report to unfounded, which initiated his administrative appeal, prior to the enactment date of the statutory amendment. Therefore, OCFS's determination denying Petitioner's request to amend his SCR report and to seal it was not arbitrary and capricious, nor affected by an error of law.

In a previous decision and order, dated August 18, 2023, filed as NYSCEF Doc. No. 34, the court granted Petitioner's request for a permanent anonymous caption and directed the parties to redact any personally identifying information contained in the records filed with the court which could identify Petitioner, his family, or any other cases related to the allegations contained in the indicated report.

On November 25, 2020, a report was filed with SCR alleging maltreatment by Petitioner of his child, K.W. The report alleged in substance that Petitioner was intoxicated while he was the sole caregiver of K.W. during a trip to Pennsylvania. Petitioner was found to be impaired by alcohol and while he was packing the car to return home, the car rolled back and pinned K.W. between the car's door and body. Petitioner was arrested and charged with driving under the influence and endangering the welfare of a child. In February 2022, Petitioner pled guilty to both charges and was sentenced to 24 months of probation.

ACS investigated the report and indicated the report for inadequate guardianship and drug/alcohol misuse based on its finding that the report was substantiated by some

credible evidence. By letter, dated August 5, 2021, Petitioner requested an administrative review of the indicated report. OCFS determined that the allegations of maltreatment were supported by a fair preponderance of the evidence, that the allegations were relevant and reasonably related to childcare and on October 27, 2021, OCFS issued notice that it decided to retain the indicated report.

On December 1, 2020, a FCA Article 10 neglect petition was filed against Petitioner in Queens County Family Court. Over the next several months, Petitioner completed 12 weeks of an alcohol education program, 12 weeks of a parenting skills program and another parenting skills course. On July 29, 2021, the Family Court granted Petitioner an adjournment in contemplation of dismissal ("ACD"), without a hearing, on the condition that Petitioner cooperate with ACS supervision and visits, refrain from being under the influence of intoxicants in K.W.'s presence, cooperate with reasonable referrals for services and sign authorizations so ACS can monitor Petitioner's compliance with such services. Petitioner complied with the conditions and on August 27, 2021, the Family Court dismissed the Article 10 petition.

Following the enactment of the statutory amendment, an administrative fair hearing was conducted on May 23, 2022, where evidence was presented and Petitioner was represented by counsel. Petitioner argued in substance that the irrebuttable presumption applied and that OCFS was required to amend the SCR report to unfounded under SSL § 422(8)(b )(ii).

OCFS issued its Determination After Hearing, dated February 16, 2023, and found that ACS demonstrated by a fair preponderance of the evidence that Petitioner committed maltreatment. However, it found that the maltreatment was not relevant and reasonably related to childcare, primarily because of the courses Petitioner completed and the efforts that he made to address his issues subsequent to his arrest. Therefore, OCFS denied Petitioner's request to amend and seal his SCR report, but it precluded disclosure of the report to provider and licensing agencies under SSL§ 424-a.
In his Article 78 Verified Petition, Petitioner alleges in substance that the determination is arbitrary and capricious and affected by an error of law. Petitioner argues in substance that the amendment to the Social Services Law § 422(8)(b )(ii)(B), which was in effect at the time of the hearing and decision, requires OCFS to amend an "indicated" report to "unfounded" when a family court petition containing the same allegations is dismissed. Petitioner further argues in substance that OCFS' s administrative directive that stated in substance that it will only apply the new law to administrative appeals which begin after the legislation went into effect, incorrectly determines that the administrative appeal begins on the date when the subject requests an amendment of

his or her SCR report and does not begin on the date that the hearing takes place, or when the decision is rendered.

Respondents oppose the Petition and argues in substance that the determination was not arbitrary and capricious and not an error in law. Respondents argue in substance that the determination was rationally based and consistent with the applicable law in effect at the time the administrative appeal began. Respondents further argue that OCFS did not err by declining to apply the irrebuttable presumption to Petitioner's administrative appeal because it was commenced before the statutory amendment's effective date.

Prior to January 1, 2022, reports received by the SCR were "indicated" by the appropriate CPS agency when an investigation determines that "some credible evidence of the alleged abuse or maltreatment exists" (Social Services Law§ 412[7]). After January 1, 2022, the standard changed and reports were "indicated" if the investigation determines that there was "a fair preponderance of the evidence" (id.). Respondents explained that the amendments imposed additional obligations on OCFS and the CPS agency where there has been a petition filed in New York State Family Court against the subject of the report, pursuant to FCA Article 10 alleging abuse or neglect on the basis of the same conduct.

Respondents further argue in substance that OCFS interpreted the statutory amendments to the SCR administrative appeal process, which includes the application of the irrebuttable presumption in SSL§ 422(8)(b )(ii)(B), to apply prospectively to appeals commenced on or after January 1, 2022, the effective date of the amendments. Respondents argue that an appeal of an indicated report is commenced when the subject requests that the report be amended to unfounded and sealed. Respondents further argue that since Petitioner filed his request for the administrative appeal prior to the enactment date, he is not entitled to the irrebuttable presumption and OCFS correctly applied the current law and denied Petitioner's request to amend his report to unfounded.

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law (see CPLR § 7803[3]; Matter of Pell v Board of Educ., 34 NY2d 222,230 [1974]; and Scherbyn v BOCES, 77 N.Y.2d 753, 757-758 [1991]). In reviewing an administrative agency's determination, courts must ascertain whether there is a rational basis for the agency's action or whether it is arbitrary and capricious in that it was without sound basis in reason or regard to the facts (Matter of Stahl York Ave. Co., LLC v City of New

York, 162 AD3d 103, 109 [!81 Dept 2018]; Matter of Pell, 34 NY2d at 231). Where the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference (Testwell, Inc. v New York City Dept. of Bldgs., 80 AD3d 266,276 [1 st Dept 2010]). When a court reviews an agency's determination it may not substitute its judgment for that of the agency and the court must confine itself to deciding whether the agency's determination was rationally based (Matter of Medical Malpractice Ins. Assn. v Superintendent of Ins. Of State of NY., 72NY2d 753,763 [I81 Dept 1988]).

Furthermore, an agency is to be afforded wide deference in the interpretation of its regulations and, to a lesser extent, in its construction of the governing statutory law, however an agency cannot engraft additional requirements or assume additional powers not contained in the enabling legislation (see Vink v New York State Div. of Haus. and Community Renewal, 285 AD2d 203,210 [!81 Dept 2001]).

Here, the court agrees with Respondents that OCFS' s interpretation of the application of the statutory amendment is reasonable, rationally based, and consistent with the statute, intent of the legislators and controlling legal authority. It is not arbitrary and capricious, nor an error in law. Therefore, the court defers to OCFS' s determination in this matter.

It is clear that the entire process was overhauled and the enactment date was significantly delayed. Therefore, it is reasonable that the legislators intended for all steps in the administrative appeal process to be initiated subsequent to the statutory enactment date for the irrebuttable presumption to apply. In cases where the request for the amendment was made prior to the enactment date, the administrative appeal process is deemed to have begun as of this date and the irrebuttable presumption does not apply.

Petitioner relies upon Jeter v. Poole, in support of his argument that the statutory amendment and irrebuttable presumption applies as of the date of the fair hearing or the OCFS determination (Jeter v Poole, 206 AD3d 556 [1st Dept 2022]). However, since the request for the amendment, the fair hearing and the OCFS determination all occurred prior to the enactment date, the court did not determine the exact date when the administrative appeal actually began. Additionally, leave to appeal the decision was granted. However, as noted in Jeter v Poole, "[a] statute is presumed to apply only prospectively and will not be given retroactive effect unless the language expressly or by necessary implication requires it" (id. at 558 [internal citations and quotations omitted]).

The court agrees with the decisions relied upon by Respondents, Woodley v. Poole, and Portocarrero v. Poole, where this court denied petitioners' requests to amend their SCR reports from indicated to unfounded and for them to be sealed because their initial administrative appeals were filed prior to the enactment of the statutory amendments, even though their fair hearings were conducted subsequent to the enactment of the statutory amendment (Woodley v Poole, Sup Ct, NY County, March 20, 2023, Engoron, J., index No. 452183/2022; and Portocarrero v Poole, Sup Ct., NY County, April 14, 2023, Kelley, J., index No. 452958/2022).

The court finds that if it were to require OCFS to apply the statutory amendment's irrebuttable presumption in Petitioner's favor, then it would be improperly requiring OCFS to apply the statutory amendment retroactively, which would be a dangerous precedent.

The court is not persuaded by Petitioner's arguments to the contrary.

Therefore, the court denies Petitioner's Verified Petition and dismisses it.
The court has considered all additional arguments raised by the parties which were not specifically discussed herein, and the court denies any additional requests for relief not expressly granted herein.

As such, it is

ORDERED and ADJUDGED that the court denies Petitioner Kenneth W.'s Verified Petition and dismisses it as against Respondents Suzanne Miles-Gustave, in her capacity as Acting Commissioner of the New York State Office of Children and Family Services, and Jess Dannhauser, in his capacity as Commissioner of the New York City Administration for Children's Services.

This constitutes the decision and order of the court.

## PERMANENCY HEARING

**Matter of Hayden N. (Huguette K.)**, 81 Misc3d 1207(A) (Family Court, Monroe County, 2023)

Dandrea L. Ruhlmann, J.
**DECISION AND ORDER**

This case has a protracted procedural history. On December 3, 2021 Hon. James Walsh signed a removal order, upon the consent of Respondent-Mother Huguette K. ("Respondent-Mother"), which, among other things, ordered a permanency hearing to be held on July 19, 2022, for the child, Hayden N. (DOB: XX/XX/2021). On January 1, 2022 the case was transferred to Hon. Julie Hahn. The case was then transferred to Hon. Fatimat O. Reid, who held an initial court appearance on August 1, 2022. On September 16, 2022, Hon. Reid recused herself and the case was transferred, including pending motions, to this Court for oral argument on September 28, 2022. This Court denied both Respondent-Mother's application to change venue and her application to move the child to a foster family in Erie County. The Court found in part, that the child should remain in Monroe County where he had lived his entire life, including at the time of the alleged neglect.[FN1] On September 28, 2022, the July 2022 permanency hearing was still pending. Respondent-Mother did not consent to a finding that the Petitioner Monroe County Department of Human Services (DHS) engaged in reasonable efforts. The reasonable efforts hearing began on October 3, 2022. After several days of trial, this Court rendered an oral decision on August 18, 2023.

The Court finds that DHS failed to exercise reasonable efforts in effectuating the child's permanency goal of return to parent for the period of time from December 3, 2021 through August 3, 2022. The Court finds that the child shall remain in foster care in Monroe County, New York in accordance with the best interests and safety of the child. The Court approves the goal of return to parent for permanency planning.

### Background

Respondent-Mother attended high school in Rochester, New York at the age of seventeen (17). She was a refugee from the Democratic Republic of the Congo, who was accompanied by her mother and brother into the United States. Respondent-Mother is now 24 years old (DOB: XX/XX/1999).

DHS sought and the Court granted removal of Hayden from Respondent-Mother finding there was imminent risk of harm because law enforcement found Respondent-Mother,

the sole care provider of Hayden (then age 3 months) to be highly intoxicated. Respondent-Mother was mental hygiene arrested at the Motel 6 where she and the child were residing and transported to URMC-Strong Memorial Hospital where she was charged with Endangering the Welfare of a Child. Respondent-Mother had an extremely high and potentially fatal blood alcohol content of .406. While at Strong Hospital, Respondent-Mother vocalized suicidal ideations and underwent a psychological evaluation.

Hayden's foster care mother and her paramour are both attorneys who have worked in the Department of Law, Children Services Unit of the Monroe County Department of Human Services.[FN2] DHS appointed a special prosecutor, Alison Carling, Esq. who the Court later relieved (for personal reasons). A subsequent special prosecutor, Margaret McMullen Reston, Esq. prosecuted the case.[FN3] Foster mother and her paramour filed a motion to intervene on May 17, 2023, pursuant to Social Services Law § 383 (3) and CPLR 1012 (a) (1). DHS filed a termination of parental rights petition against Respondent-Mother on September 26, 2022 and withdrew it on October 12, 2022. DHS filed a second termination of parental rights petition against Respondent-Mother on February 22, 2023 which is pending before the Court.

**Findings of Fact**

Respondent-Mother consented to the child's removal. Respondent-Mother's first language is Swahili. She requires a Swahili interpreter. Although Respondent-Mother lived in the Rochester area for approximately 7 years she was unable or unwilling to use the bus as public transportation. When discharged from the hospital after her mental hygiene arrest and removal of her child in December 2022, she was no longer able to return to her emergency housing placement at the Motel 6. She then resided at the Sanctuary House but was asked to leave due to [*2]her ongoing intoxication and aggressive behaviors against other persons living at the shelter. Next she lived at the YWCA. DHS' witness, Monroe County Caseworker Bridget Bishop, testified she did not know why Respondent-Mother left the YWCA. Respondent-Mother then resided at the House of Mercy conditioned on her completing both a chemical dependency and mental health evaluation.

Caseworker Bishop admitted Respondent-Mother's first supervised visit was hamstrung because of poor communication between the two DHS assigned caseworkers and Respondent-Mother. Respondent-Mother indicated that she did not know how to use the bus to get to the visitation center. Since Respondent-Mother requested help with transportation, DHS imposed an additional requirement that she call in advance to confirm her visit. Caseworker Bishop also admitted that such a "call to confirm" requirement was unusual, and typically reserved for a parent who has missed three

consecutive visits. Still, the "call to confirm" prerequisite made sense to Caseworker Bishop because it ensured that the child was not unnecessarily transported to the visitation center.

One DHS caseworker arranged to drive Respondent-Mother to the visit, while another caseworker waited for Respondent-Mother to confirm. At 9:00 a.m., Respondent-Mother called the caseworker responsible for transporting her, but not the caseworker awaiting her confirmation. The caseworkers failed to communicate with each other.

The caseworker who was to transport Respondent-Mother told her that she was heading to the designated pick up location at 9:00 a.m. When there was no sign of the caseworker by 10:30 a.m., Respondent-Mother called the transporting caseworker again. Anxious she might miss the visit, Respondent-Mother explained to the caseworker that Kaszimeri M.[FN4] had driven her to the visitation center.

Upon arriving at the visitation center Respondent-Mother was informed her visit was cancelled because she failed to confirm, as required. Caseworker Bishop testified she did not know whether either of the caseworkers used a Language Line interpreter to communicate with Respondent-Mother. After the failed initial visit, Respondent-Mother had two successful supervised visits; where her interactions were appropriate with baby Hayden.

After she completed those two successful in person supervised visits,[FN5] Respondent-Mother left Rochester. She did not notify DHS of her move. DHS caseworkers tried to find her, calling the Rochester Center for Refugee Health (RCRH) and learned Respondent-Mother had not attended RCRH for a couple of weeks. DHS later learned that Respondent-Mother had relocated to the City of Buffalo, Erie County, New York, where she was living with her own Mother.

On January 5, 2022, Caseworker Bishop used the Language Line to speak with Respondent-Mother, who confirmed she was living in Buffalo and that she planned to visit her child once a week in Rochester. A second DHS caseworker spoke with Respondent-Mother on [*3]January 10, 2022, using the Language Line interpreter. Respondent-Mother advised she would not be visiting her child in Rochester that day. The caseworker told Respondent-Mother that in addition to in person visits, virtual visits could be established. Respondent-Mother agreed.

On January 12, 2022, Caseworker Bishop called Respondent-Mother in Buffalo, using the Language Line interpreter and told her due to COVID-19 restrictions she could only offer Respondent-Mother one in person visit a week requiring Respondent-Mother to travel to Rochester. Respondent-Mother again agreed. Caseworker Bishop, however, testified she was unsure whether DHS had approved the use of the Language Line to translate during virtual visits.

On January 21, 2022, the child was transported to the visitation center by Medical Motors for a virtual visit with Respondent-Mother. The visit did not occur because Respondent-Mother had difficulty logging in via Zoom.

On January 24, 2022, Respondent-Mother did not attend her court appearance. On January 28, 2022, Respondent-Mother missed a virtual visit via Zoom. On February 3, 2022, Respondent-Mother did not answer a telephone call by DHS and did not participate in the child's Service Plan Review (SPR). On February 8, 2022, Caseworker Bishop tried to call Respondent-Mother but was unsuccessful.

On February 15, 2022, the Erie County Department of Human Services assigned a secondary Caseworker, Miranda Shattuck-Hall, to assist DHS. Caseworker Shattuck-Hall and Caseworker Bishop agreed that Caseworker Shattuck-Hall was to assist Respondent-Mother in obtaining services. Erie County would not pay for the cost of any services rather, Respondent-Mother's Medicaid would pay. Caseworker Shattuck-Hall's responsibilities included a once a month home visit with Respondent-Mother.

On February 17, 2022, Respondent-Mother left Caseworker Bishop a message stating she had a new telephone number. The next day, February 18, 2022, unannounced, Caseworker Shattuck-Hall met in person with Respondent-Mother, at Respondent-Mother's home, using a Language Line interpreter. She explained that Respondent-Mother needed to have a mental health evaluation and a chemical dependency evaluation. Respondent-Mother told Caseworker Shattuck-Hall she had Medicaid but she needed help to apply for temporary assistance. Respondent-Mother told the caseworker she had no means to travel to Rochester. Caseworker Shattuck-Hall asked Respondent-Mother if she had relatives who would assist her and she asked if Respondent-Mother knew how to use the bus. She did not offer Respondent-Mother a bus pass. By practice, Erie County DHS does not provide bus passes to parents under their supervision.**[FN6]** Respondent-Mother did not attend the virtual visit via Zoom with her child that day.

On February 22, 2022, Caseworker Shattuck-Hall and Respondent-Mother met again as scheduled. The caseworker brought a Temporary Assistance application, written in English, service providers telephone numbers and some language access information. An email **[FN7]** [*4]exchange between Caseworker Shattuck-Hall and Caseworker Bishop reveals additional information including that Caseworker Shattuck-Hall used a Language Line interpreter and gave Respondent-Mother a "menu" which was translated into Swahili. The email communication reflects that Caseworker Shattuck-Hall also gave Respondent-Mother the name of a provider, Endeavor Help Services, an agency that undertakes both substance abuse as well as mental health evaluations, which was within walking distance to Respondent-Mother's home. Respondent-Mother told Caseworker Shattuck-Hall that she did not know how to complete the Temporary

Assistance application, nor obtain a substance abuse and, or a mental health evaluation. Caseworker Shattuck-Hall planned to schedule another home visit to assist Respondent-Mother.

On February 25, 2022, Respondent-Mother did not attend the virtual visit via Zoom. On February 28, 2022, Respondent-Mother left a voice mail message for Caseworker Shattuck-Hall seeking assistance to complete the Temporary Assistance application.

In early March 2022, both Caseworkers Bishop and Shattuck-Hall considered transporting the child to Buffalo and providing supervision for visits with Respondent-Mother. Caseworker Bishop testified DHS rejected this plan because it had not been done before where a parent lived in the City of Buffalo. By email Caseworker Shattuck-Hall also confirmed she had not yet completed a full assessment of Respondent-Mother's home.

On March 4, 2022, Respondent-Mother did not attend a visit.[FN8] On March 7, 2022, Caseworker Shattuck-Hall contacted Hope Refugee Drop In Center in Erie County to try to get someone to help Respondent-Mother complete the Temporary Assistance application and to connect her with other services. Caseworker Shattuck-Hall also sent a referral to the Jewish Community Center for a parenting education program. The Jewish Community Center did not connect with Respondent-Mother.

On March 11, 2022, Respondent-Mother missed her scheduled visit.[FN9] On March 17, 2022, Caseworker Shattuck-Hall made an unannounced home visit. No one answered the door. Caseworker Bishop testified that there are no notes in the DHS case note system reflecting that Caseworker Shattuck-Hall called or wrote to Respondent-Mother, prior to that unannounced visit. Caseworker Shattuck-Hall left her business card and information about how Respondent-Mother could access the Language Line, but only a portion of the language access sheet was in Respondent-Mother's primary language, Swahili. Caseworker Shattuck-Hall also dropped off information in English about the evaluations which Respondent-Mother needed to undertake.

On March 25, 2022, and on April 1, 2022 respectively, Respondent-Mother missed her scheduled visits.[FN10] On April 5, 2022, Caseworker Bridget Bishop telephoned Respondent-[*5]Mother. She told Respondent-Mother that Kaszimeri M. was not Hayden's father, and Respondent-Mother suggested another putative father, Steve B.[FN11]

On April 8, 2022, Erie County Caseworker Shattuck-Hall emailed the Jewish Community Center to see if Respondent-Mother was in compliance with parenting classes. There was also a visit scheduled. Respondent-Mother missed her scheduled visit.[FN12] On April 12, 2022, Respondent-Mother missed a court appearance.

Between April 15, 2022 and May 6, 2022 Respondent-Mother missed four consecutive scheduled weekly visits.[FN13]

On May 16, 2022, Respondent-Mother answered the phone and participated in the child's SPR with the Language Line providing interpretation in Swahili. Respondent-Mother's disposition plan and the Adoption and Safe Families Act, were reviewed. Caseworker Shattuck-Hall, did not attend, testifying that typically she participates in the SPR, but had not done so.

A plan was established for Respondent-Mother to attend the next court date on June 15, 2022 in Rochester. DHS did take steps to facilitate Respondent-Mother's in person visit with her child, but DHS failed to send timely Respondent-Mother the bus tickets to Rochester. The tickets arrived two days after the court date frustrating Respondent-Mother's ability to visit. Respondent-Mother missed both her in person visit and the court appearance.

On May 27, 2022, and June 3, 2022 respectively, Respondent-Mother missed her scheduled visit.[FN14] On June 21, 2022 Caseworker Bishop emailed Caseworker Shattuck-Hall checking to see if Caseworker Shattuck-Hall had any contact with Respondent-Mother since April. Caseworker Shattuck-Hall responded, "No, sorry I have not" and explained she would "swing by" Respondent-Mother's house unannounced later that day. An email on June 22, 2022 from Caseworker Shattuck-Hall reflects she went to Respondent-Mother's home on June 21, 2022, unannounced and spoke to maternal grandmother who was home. Maternal grandmother thought Respondent-Mother was at the store and did not know when she would return. When Caseworker Shattuck-Hall returned to her office, she had three telephone messages from Respondent-Mother. Caseworker Shattuck-Hall did not return Respondent-Mother's calls that day. Instead she planned to connect with Respondent-Mother the next day.

Inexplicably, both caseworkers testified that on June 21, 2022 Caseworker Shattuck-Hall visited Respondent-Mother "at home using the language line." Still Caseworker Shattuck-Hall maintains Respondent-Mother became upset and hung up on the interpreter, telling Caseworker Shattuck-Hall she knew how to speak English. Caseworker Shattuck-Hall admits she did not bring the public assistance application to that visit. More troubling, while both in person visitation and virtual visits were discussed, neither Respondent-Mother nor Caseworker Shattuck-Hall knew the visitation schedule. Respondent-Mother did emphasize she still did not [*6]know how to use Zoom for virtual visits. Caseworker Bishop testified that Caseworker Shattuck-Hall offered to show Respondent-Mother how to use Zoom. Yet Caseworker Shattuck-Hall's own testimony is opposite, testifying she made no such offer. Both Caseworkers agree that Respondent-Mother insisted on seeing her child in person, and did not want virtual

visits. Frustrated, Respondent-Mother said she did not want to go to court unless she would get her baby back at court.

On June 28, 2022, Caseworker Bishop communicated with Caseworker Shattuck-Hall who was unaware of the day to day details of the case. Caseworker Shattuck-Hall testified that she consistently emailed Caseworker Bishop, but such communications were not documented in DHS' case note system.

On July 8, 2022, the two caseworkers communicated. Respondent-Mother was not engaged in services and Respondent-Mother did not want virtual visits. Caseworker Shattuck-Hall reported that she had mapped the route from Respondent-Mother's home to the service provider, Endeavor Help Services, including a picture of the front of the building so Respondent-Mother would be able to recognize the building. Caseworker Shattuck-Hall reported that she offered to assist Respondent-Mother with the Temporary Assistance application but found the application was already submitted and Respondent-Mother was receiving some assistance. Caseworker Bishop asked Caseworker Shattuck-Hall to obtain an email address for Respondent-Mother so she could send bus tickets for the next court appearance in a timely fashion. Caseworker Bishop was also still trying to locate the second named putative father.

On July 15, 2022, Caseworker Bishop sent Respondent-Mother a letter reminding her to participate in visitation and SPRs and providing information about the Adoption and Safe Families Act. No evidence showed this letter was translated into Swahili.

On July 29, 2022, Caseworker Shattuck-Hall made another unsuccessful, unannounced visit to Respondent-Mother's home. She left her business card and information about service providers, including Endeavor Help Services and the Hope Refugee Drop In Center. No evidence showed this information was translated into Swahili.

On August 1, 2022, Respondent-Mother attended a court appearance before Hon. Fatima Reid via telephone, using an interpreter. Respondent-Mother's attorney made an application for DHS to provide Respondent-Mother with a cell phone. DHS agreed to investigate whether a phone could be provided with limited minutes, under their comprehensive service plan.

DHS did not provide a cell phone. Instead, the child's maternal grandmother purchased a cell phone but kept the cell phone with her during the day while she worked. Neither Caseworker Bishop nor Caseworker Shattuck-Hall attempted to call Respondent-Mother after 5:00 p.m. when grandmother returned home from work.

**Statement of Law**

Family Court has continuous jurisdiction from the day a child is placed in foster care until the date that permanency is achieved (Family Court Act § 1088). When a child continues in an out-of-home placement, Article 10-A of the Family Court Act "provides for an initial permanency hearing within 8 months of a child's removal from home, and subsequent permanency hearing(s) every six months thereafter" (*Matter of Lacee L. [Stephanie L.] ,* 32 NY3d 219, 226 [2018], *and see* Family Court Act § 1089 [a] [3]). One purpose of a permanency hearing is to audit, under a preponderance of the evidence standard, whether an agency is [*7]meeting its legal obligations and to review a parent's compliance with the approved service plan (*Matter of the St. Vincent's Services*, 17 Misc 3d 443, [Fam Ct., Kings County 2007], citing *Matter of Belinda B*., 114 AD2d 70 [4th Dept 1986]).

When a child is not returned to his parent, the Court must find whether the permanency goal for the child should be approved or modified and the anticipated date for achieving the goal. The Court must determine whether reasonable efforts have been made to effectuate the child's permanency plan (Family Court Act § 1089 [d] [2] [iii]; *see Matter of Lafvorne B*., 44 AD3d 653 [2d Dept 2007]). In the case of a child whose permanency goal is return to parent, the Court must inquire whether DHS has made reasonable efforts both to eliminate the need for placement and to enable the child to return safely home (Family Court Act §1089 [d] [2] [iii] [A]).

After each permanency hearing, a court shall, upon the proof adduced, which includes age-appropriate consultation with the child, if applicable, and in accordance with the best interests and safety of the child, determine and issue its findings including the permanency goal and determining whether reasonable efforts have been made to effectuate the child's permanency plan (Family Court Act § 1089 [d] [2] [iii]). Where a child has been freed for adoption, the permanency order may also direct that such child be placed for adoption in the foster family home where he or she resides or has resided or with any other suitable person or persons (Family Court Act § 1089 [d] [2] [viii] [B] [I]).

In *Matter of Taylor EE* (80 AD3d 822 [3d Dept 2011]) the Appellate Court affirmed Family Court's findings of no reasonable efforts where the Petitioner did not find a permanency resource for a child placed in residential care. There, although the child's three siblings were adopted by one family, petitioner did not inquire of the adoptive mother whether she would consider to be a permanency resource for the child until the day of the hearing (*compare Matter of Michael WW.*, 45 AD3d 1227, 1228-1229 [3d Dept 2007] [efforts reasonable to achieve permanency goal of adoption were found where petitioner listed child in photo-list; maintained contact with a former foster parent and current foster parent for child's brother and kept Family Court informed of its placement progress through biweekly written reports]; *Matter of Bianca QQ*, 80 AD3d 809 [3d Dept 2011] [efforts reasonable to achieve permanency goal of return to parent

were found despite that petitioner should have provided more specificity in its permanency reports regarding dates services were provided]).

The Court's "determinations following a permanency hearing must be made in accordance with the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if returned to the parent" (*Matter of Leila I.*, 191 AD3d 878,887 [2d Dept 2021] [internal quotations omitted])

"Great deference is accorded the Family Court, which saw and heard the witnesses, and its findings will not be disturbed unless they lack a substantial basis in the record" (*Matter of Rosaliyahh C*., 200 AD3d 1036 [2d Dept 2021], citing *Matter of Darlene L*., 38 AD3d 552, 554 [2d Dept 2007]). The Court found the witnesses to be credible, despite their lack of proficient record keeping.

The Court takes a negative inference because Respondent-Mother failed to testify at this permanency hearing (*see Matter of Raymond D*., 45 AD3d 1415 [4th Dept 2007]).

**Conclusion**

Viewing the evidence in a light most favorable to DHS, the Court finds that DHS failed [*8]to exercise reasonable efforts effectuating the child's permanency goal of return to parent for the period from December 3, 2021 until August 3, 2022. DHS did little to assist Respondent-Mother in obtaining services in her primary language of Swahili. In part, the history of this case highlights the difficulties that DHS has in providing services to a non-English speaking mother. Respondent-Mother's proposed dispositional plan was written in both English and Swahili but she was not consistently given information in Swahili affording Respondent-Mother the tools needed to access services; including, a chemical dependency evaluation, a mental health evaluation and parenting training. Respondent-Mother was never connected with an in-person Swahili interpreter to help her navigate such services. Further, DHS failed to present adequate evidence of whether written information given to Respondent-Mother was translated into Swahili.

Respondent Mother was unreasonably denied minimal visits with her child. DHS tried to help Respondent-Mother by providing a caseworker to transport Respondent-Mother to her first in-person visit with Hayden. Respondent-Mother's visit was cancelled because Respondent-Mother confirmed her visit with the transporting caseworker, not the confirming caseworker, and the two caseworkers failed to communicate with each other.

A plan was established for Respondent-Mother to attend a later court date on June 15, 2022 in Rochester. DHS did take steps to facilitate Respondent-Mother's in person visit with her child (on the same day), but DHS failed to send timely Respondent-Mother the

bus tickets to Rochester. The tickets arrived two days after the court date frustrating Respondent-Mother's ability to visit. Respondent-Mother missed both her in person visit and the court appearance.

Over a five and one-half month timeframe, (from January 21, 2022 to August 3, 2022) caseworkers failed to instruct Respondent-Mother how to use Zoom to ensure she had the capability to visit virtually with her child; nor was a cell phone provided to Respondent-Mother. DHS caseworkers also did not attempt to call Respondent-Mother after 5:00 p.m. when Respondent-Mother's own mother returned home from work, with the family's only cell phone.

Although Respondent-Mother moved to Buffalo without informing DHS, DHS connected with her on January 5, 2022. A secondary Erie County DHS assignment was on made on February 18, 2022. The Erie County caseworker was to have a monthly home visit with Respondent-Mother. The Erie County caseworker failed to meet monthly with Respondent-Mother, visiting twice in February, at some point in June, and again in July 2022. DHS did not provide evidence of any other home visit.

Finally, as early as February 2022, DHS caseworkers documented Respondent-Mother's repeated request for help in completing a Temporary Assistance application. Respondent-Mother sought such help not once, but three times. Only sometime in July 2022 did Caseworker Shattuck-Hall note that Respondent-Mother was receiving some of her entitled temporary assistance, which Respondent-Mother obtained without DHS assistance.

At this time, Respondent-Mother clearly has not completed any of the required services and she has missed numerous visits and court appearances. The child, who has special needs, is thriving in the home of his foster parents, where he has lived for approximately 18 months. They are an adoptive resource. All of the child's specialized services are in Rochester, New York.

The Court finds that DHS' reasonable efforts to support a return to parent goal (from the date of this Order) would require all of DHS' communications with Respondent-Mother, whether [*9]written or verbal be conveyed in Swahili.

Respondent-Mother, at times, has appeared to subvert DHS' efforts, such as not complying with services while in Monroe County, moving out of Monroe County away from her child, and failing to notify DHS of her move. Respondent-Mother must remedy her shortcomings with full engagement in services, visitation and court appearances.

NOW, THEREFORE, it is hereby

ADJUDGED that Monroe County Department of Human Services did not engage in reasonable efforts to effectuate Hayden N.'s permanency goal of return to parent for the period of time from December 3, 2021 through August 3, 2022; and it is further

ORDERED that the child shall remain in foster care in Monroe County, New York in accordance with the best interests and safety of the child; and it is further

ORDERED that the permanency goal for Hayden N. for the period of this permanency hearing (December 3, 2021 through August 3, 2022) is return to parent.

Dated this 25th day of September, 2023 at Rochester, New York.

HON. DANDREA L. RUHLMANN
FAMILY COURT JUDGE

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

**Footnotes**

**Footnote 1:** Respondent-Mother consented to neglect on January 24, 2023 pursuant to Family Court Act §1051 (a) and the Court entered a finding of neglect against her.

**Footnote 2:** Hon. Reid recused herself, for reasons unrelated to the foster mother being employed as an attorney in the Department of Law, Children Services Unit of the Monroe County Department of Human Services.

**Footnote 3:** Compare County Law § 701(1) [appointment of a special district attorney and *People v Adams* (20 NY3d 608 [2013] [in rare situations a court may appoint a special attorney if there is even an appearance of impropriety to encourage public confidence in our government and our system of law].

**Footnote 4:** Hon. Walsh's Removal Order included an Order of Protection that Respondent-Mother was to have no contact with Kaszimeri M. a/ka Cashmere M., originally thought to be the putative father but who was excluded by DNA results .

**Footnote 5:** Respondent-Mother made two out of the five initial visits.

**Footnote 6:** Monroe County DHS does provide bus passes. Hope Refugee Center

Drop In Center (Buffalo, New York) apparently gives clients bus passes if they are engaged in counseling.

**Footnote 7:** Petitioner's Exhibit 2, received into evidence on June16, 2023 contains email communications some of which were entered into DHS' official case note system, others of which were not, and some of the emails appear to contradict the testimony of Caseworker Bishop and/or Caseworker Shattuck-Hall, and range in date from February 18, 2022 until August 26, 2022, however, for the purpose of this first permanency hearing the Court 's review ends on August 3, 2022.

**Footnote 8:** Caseworker Bishop did not testify as to whether the visit was virtual or in-person.

**Footnote 9:** Caseworker Bishop did not specify whether the visit was virtual or in-person.

**Footnote 10:** Caseworker Bishop did not specify whether the visits were virtual or in-person.

**Footnote 11:** He is not located to date.

**Footnote 12:** Caseworker Bishop did not specify whether the visit was virtual or in-person.

**Footnote 13:** Caseworker Bishop did not specify whether such visits were virtual or in-person.

**Footnote 14:** Caseworker Bishop did not specify whether the visits were virtual or in-person.

## RES IPSA LOQUITOR

**Matter of J.b. S. (J.S.)**, 81 Misc3d 456 (Family Court, Bronx County, 2023)

Ronna H. Gordon-Galchus, J.
On August 10, 2022, the Administration for Children's Services (hereinafter "ACS") filed a neglect petition against J.S, the respondent father (hereinafter "RF"). The petition

alleged RF neglected the subject children in that the child J.b. S. tested positive for fentanyl and was hospitalized while in the care of RF. A fact-finding hearing was held on December 19, 2022; February 27, 2023; March 16, 2023; April 18, 2023; May 22, 2023; and July 26, 2023. On July 27, 2023, counsel agreed to written summations and the case was adjourned to September 20, 2023 for decision. The RF presented no independent witnesses or evidence, having testified on ACS' direct case. The attorney for the children presented no witnesses or evidence and did not support a finding of neglect.

**Witness Testimony**

*CPS K.A.*

CPS A. testified on December 19, 2022. He testified that he was assigned the case on July 25, 2022. He testified that he spoke to RF, who indicated that on the date of the incident he arrived at the home of the non-respondent mother, Ms. I.F.H. (hereinafter "NRM") to care for the children while she went to work. CPS A. testified that RF informed him that he regularly cares for the children when NRM goes to work. CPS A. testified that RF informed him that he arrived at NRM's home around 7 or 8 a.m. CPS A. testified that RF reported that he laid down with SC J.b. S. and around 10:30am, J.b. S. left the bedroom and went to the living room. RF reported that approximately five minutes later, the maternal grandfather came into the room and said something was wrong with J.b. S.. CPS A. reported that RF said J.b. S. seemed very tired and he eventually called 911. RF reported to CPS A. that he had a dental procedure the day before and was prescribed medication, but only brought "amoxicillin when he went to care for the children." (12.19.22, p. 13, 24-25). In a subsequent conversation on July 27, 2022, RF reported to CPS A. that he had been treated with fentanyl and another drug during his dental procedure. (*Id*. p. 14, 24). RF told CPS A. that his only explanation for J.b. S. testing positive for fentanyl is that "could have kissed the child and that's how the child possibly could have tested positive for fentanyl." (*Id*. p. 17, 23-24). CPS A. testified that RF went to the dentist on July 21, 2022 and RF cared for the children on July 22, 2022 (*Id.* p.15, 15-18).

On cross examination, CPS A. testified that RF told him that when he arrived at the home, J.b. S. was acting normally and he had just been fed. (*Id.* p. 19, 5-8). He testified that he observed the home and that the living room is close to the only bedroom in the apartment, "maybe less than 10 feet." (*Id.* p. 29, 6-7). CPS A. testified that he asked RF, NRM, and the maternal grandfather to submit to drug screens. He indicated that NRM and the grandfather submitted, but the RF waited one week before submitting to a test. On re-direct, CPS A. reported that RF revised his original comments about whether the

amoxicillin was within reach of the children in a subsequent conversation, saying that "now that I think about it, his amoxicillin was open and there was a pill next to his bottle." (*Id.* p. 33, 10-17). The bottle was on a nightstand, within reach of the child. (*Id.*).

*RF J.S.*

ACS called RF to testify on its direct case on February 27 and March 16, 2023. RF [*2]testified that he is the father of both children, J.b. S. and J.e. S., aged two and four. RF testified that he went to the home of the NRM at about 8:30 am on July 22, 2022. He testified that he, the maternal grandfather, and the two children were in the home and that the NRM left at about 9:00 am. RF testified that he was sleeping, and the grandfather came and woke him up about two hours later. (02.27.23, p. 18, 16-18). He denied telling anyone that J.b. S. had woken up around 10:30 am and then later clarified that "it was like 10 in the morning." (*Id.* p. 19, 3). RF testified that he was taking antibiotics when he went to care for J.b. S. on July 22, 2022 and that he brought it to the NRM's home on that date. (03.16.23, p. 12, 1-7). He testified he put that medication on a shelf, about four and a half feet high. (*Id.* at 13, 9-11). He confirmed that he did see the pill bottle was open. (*Id*. 21-22). When asked what other substances he brought to the home that day, he stated "that one because I don't use anything else." (*Id.* at 15, 3). RF testified that he received fentanyl as part of a dental procedure intravenously but did not take any home. He denied knowing how J.b. S. encountered fentanyl. He testified that J.b. S. spent two weeks in the hospital and that he visited daily but denied speaking to the doctors independently. (*Id*. p. 21-22, 3-2).

On cross examination, RF testified that during the summer of 2022, he generally went to NRM's apartment to watch the children while she went to work. RF testified that both SCs were asleep when he arrived at NRM's home on the date of the incident and he observed that J.b. S. appeared normal. RF testified that at some point, J.b. S. woke up and he helped J.b. S. get off the bed. J.b. S. still appeared normal at that time. RF testified that J.b. S. often went to play with the maternal grandfather when he woke up. He testified that he believed he was asleep for about another two hours, but was not sure, as he did not look at the clock. (*Id.* p. 30-31). He testified that the MGF came and woke him up, he went out to check on J.b. S., did not see anything wrong, and went back into the room. He testified that after some more time, he went back out and saw that SC did not look well and that was when he made several calls, culminating in calling 911. RF testified that he was not ill that day physically, but he was very scared for the child. (*Id.* p. 40, 15-19). He denied ever using opiates in his life, outside of the dental appointment. (*Id.* p. 42, 18-20).

*NRM I.F.H.*

NRM I.F.H. testified on March 16 and April 18, 2023. She testified that she and RF have two children together and that he is the father of J.b. S. and J.e. S. NRM testified that RF arrived at her home around 9:00 am on July 22, 2022. She testified that SC J.b. S. usually wakes up, drinks milk, and then goes back to sleep. (*Id.* p. 51, 23-25). She testified that he followed that routine on July 22, 2022 and that he was acting normal that morning. J.b. S. was already asleep when RF got to the home on July 22, 2022. (*Id*. p. 53, 9-17). NRM denied having any drugs in her home, saying "I don't use drugs. And in my home there has never been any kind of drugs." (*Id*. p. 54, 3-4). NRM testified that the maternal grandfather was residing with her at the time, and he had been there for about a year at the time this incident occurred. She denied that the maternal grandfather uses drugs, including over the counter medication, and testified that she only has over the counter drugs in the home. She denied knowing what fentanyl was, saying she only learned after what happened to J.b. S.. (*Id.* p. 56, 13-17). She testified that she arrived at work at 10:00 am that day and that RF called her around an hour later via FaceTime and told her that J.b. S. was not well. NRM testified that she observed that J.b. S. "was scared" and that she could see J.b. S. "closing and opening his eyes, and he was touching the boy's body to see if he would react." (*Id.* p. 58, p. 2-5). NRM testified that she left work and went home, where she saw [*3]EMS treating J.b. S.. She testified that "he didn't look good" he looked "far away. He didn't respond." (04.18.23, p. 10, 7-10).

On cross examination, NRM testified that she resides in a one-bedroom apartment and the children sleep in her room. The maternal grandfather sleeps in the living room, which is divided into the bedroom and living room. The children have been observed to go into the maternal grandfather's room. NRM denied that RF uses drugs. She denied that RF appeared under the influence when he arrived at the home and denied that he keeps any personal possessions in the home. She testified that when she arrived at the home, RF was upset and crying, but he did not appear under the influence. NRM testified that sometimes the maternal grandfather would take J.b. S. for walks around the building and that she has observed that people in the building use drugs. She testified that the super or handyman put out poison for the roaches on July 22, 2022, but she doesn't remember what time they came. She indicated that she told CPS A. that she had Percocet, but upon further review, she had thrown it away prior to July 22, 2022.

*Maternal Grandfather Mr. F.G. (hereinafter "MGF")*

MGF testified on May 22, 2023. He testified that he lives with NRM and the SCs and has been residing with them for one year. He testified that he does not recall July 22, 2022 very well but admits that he saw J.b. S. that morning. He testified "I went to give

him his milk, and I saw he was a little sick. So, I called his father, then he came to take care of him." (05.22.23, p. 13, 19-21). MGF testified that J.b. S. looked sick after RF arrived (*Id*. p. 14, 8-15). He denied giving J.b. S. anything to eat or drink that day. He denied that J.b. S. left the apartment that morning as far as he was aware. He denied taking any medication and denies knowing what happened to J.b. S.. MGF testified that "when he (J.b. S.) came towards where I (MGF) was, and I went to give him the milk and I saw him trembling, and I called the father right away." (*Id.* p. 17, 1-3).

On cross examination, MGF confirmed NRM's description of the home. He denied that the children play in his bedroom. He denied knowledge of RF using opiates or drugs or prescription medication. He denied seeing RF under the influence. He testified that he woke up at 8:30 am and that NRM had already left. MGF testified that when he woke up, he observed J.b. S. playing and was concerned that he was trembling. He testified that it was not unusual for J.b. S. to be playing in the living room while RF was sleeping. He denied taking J.b. S. for walks around the apartment building. MGF denied seeing needles, rolling papers, or pills in the building, but also admitted he does not often go out. (*Id.* p. 29, 10-18). He denied that the superintendent or repairman came to the apartment on July 22, 2022. He denied using medication or pills, saying he does not like them.

*Dr. N.R.*

Dr. N.R. testified on July 26, 2023. On consent, Dr. N.R. was qualified as an expert in pediatric medicine. Dr. N.R. testified that he is board certified in pediatric hospital medicine, which means that he is a "pediatrician that specializes in the care of hospitalized children, from newborn period to age 21 years of age." (07.26.23, p. 7, 6-8). He testified that he was the pediatric attending at J.b. S.i Hospital in charge of the child J.b. S.'s care when he was transferred to general pediatric inpatient floor. Dr. N.R. testified that J.b. S.'s symptoms were [*4]consistent with opioid overdose, so he was "given a dose of naloxone" and subsequent "continuous intravenous dose of the naloxone for twenty-four hours." (*Id*. p. 8-9, 19-5). Dr. N.R. testified that receipt of the naloxone was "a lifesaving treatment for him because it reversed the effects of the potential opioid ingestion." (*Id*. p. 9, 21-24). He testified that "if J.b. S. had not received naloxone, there was a potential for him going into cardiorespiratory arrest it was potentially a lifesaving treatment." (*Id.* p. 10, 3-9). He testified that the lab test confirmed that J.b. S. tested positive for fentanyl. Although Dr. N.R. could not quantify the amount of fentanyl J.b. S. imbibed, he did opine that J.b. S. was "give a dose that was well above [what was] indicated for his age and weight." (*Id.* p. 12, 1-2).

Dr. N.R. indicated that based on the quick-acting nature of fentanyl, the drug would have to have been imbibed within the prior 3.7 hours to cause the symptoms seen by

J.b. S.i n the hospital at 12:42 pm. (*Id*. p. 13, 1-7). He clarified that "in all likelihood it had been less than that because it is a very fact acting "analgesic and sedative." (*Id*. at 12-14). Dr. N.R. denied that fentanyl could have been passed to J.b. S. by someone kissing him. Dr. N.R. testified that fentanyl would only be given to children in a controlled substance, in a situation where they are receiving surgery. He testified that the administration of fentanyl needs to be monitored closely as it is a "very potent analgesic and sedative."

On cross examination, Dr. N.R. testified that fentanyl can be ingested and inhaled but cannot really be absorbed through skin contact. (*Id.* p. 18-19). He confirmed that he was aware that the RF, NRM, and MGF were all in the home with J.b. S. that morning, based on conversations with the NRM. Dr. N.R. confirmed that he cannot confirm who introduced fentanyl to J.b. S..

**Documentary Evidence**

Petitioner's 1 is the Oral Report Transmittal (hereinafter "ORT"). It was admitted into evidence on December 19, 2022.

Petitioner's 2 are SC J.b. S.'s certified and delegated medical records from J.b. S.i Hospital and were admitted into evidence on December 19, 2022. The records indicate that J.b. S. arrived on July 22, 2022 at 1:12 pm and discharged on July 27, 2022. The initial diagnosis was "ingestion of an unknown drug." The records note that SC had "respiratory distress" and "poor respiratory effort required frequent stimulation, coarse breath sounds throughout." Pet. 2, p. 17. He was described as "very drowsy appearing, minimally responsive to stimulation, with poor respiratory effect with significant amount of oral secretion/gurgling sounds." *Id.* Narcan was administered, and it was noted that "patient is more alert and responsive after Narcan, breathing efforts improved, remains on cardiac monitor." *Id*. p. 19. Blood and urine were both taken from J.b. S. and drug tested; he tested positive for fentanyl. *Id*. p. 122.

Petitioner's 3 are the certified and delegated EMS FDNY Records for SC J.b. S.. They were admitted into evidence on December 19, 2022. Per the records, the 911 call was received at 12:44pm on July 22, 2022. EMS arrived on scene at 12:49 pm and made contact with J.b. S. about 20 seconds later at 12:50 pm. They left the scene at 1:01pm for the hospital. The suspected reason was "cardiac arrest" and "altered mental state." Pet. 3, p. 6. The records describe SC as "hot to the touch had a fixated eye gaze to the right side and was only responsive to painful stimuli." *Id*. at 7.

Petitioner's 4 is a 911 tape, that was admitted into evidence on consent on March 16, 2023. It was played on the record. The call documents RF calling 911, saying "the baby don't [*5]want to wake up."

Petitioner's 5 is the certified and delegated records from Poison Control for the subject child, J.b. S.. They were admitted into evidence on April 18, 2023. RF raised an objection through his counsel about the time between the timing of the certification and delegation, arguing that it should go to the weight the Court gives the records.

Petitioner's 6 is Dr. N.R.'s Curriculum Vitae (hereinafter "CV").

**Legal Analysis**

As a preliminary matter, the Court finds by a preponderance of the evidence that the children are minors under the age of eighteen and that RF is the father of both children. This was testified to by both RF and NRM and no jurisdictional concerns were raised during the hearing.

Pursuant to FCA 1012(f), a neglected child is a child less than eighteen years of age "whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care." Under that section, the presenting agency can sustain a finding of neglect for misusing drugs or alcohol when there is proof that the parent or person legally responsible loses self-control of their actions unless there is evidence that a parent is voluntarily and regularly participating in a rehabilitation program. It is thus clear that the legislature takes the substance misuse of a parent seriously. It stands to reason then that a child testing positive for such a substance would also be of serious concern to the legislature.

Courts have consistently held that positive toxicology in children, combined with other factors in the record are consistent to sustain a finding of neglect. *Nassau County Dep't of Social Servs. ex rel. Dante M. v. Denise J.*, 87 NY2d 73 (1995). The positive toxicology is often paired with a showing that the child suffered harm, such as withdrawal or a hospital stay to recover from the effects of the drug, which is sufficient to establish neglect against the parent or caretaker. *Matter of Thamel J. (Deryck T.J.)*, 162 AD3d 507 (1st Dept. 2018). Furthermore, case law is clear that a finding of neglect is appropriate when there is a "failure to properly supervise by unreasonably allowing harm to be inflicted upon a child." *Matter of Erica B. v. Quentin B.*, 79 AD3d 415 (1st Dept. 2010); *In re Arlena O.*, 220 AD2d 358 (1st Dept. 1995); *In re Kayla PP.*, 204 AD2d 769 (1st Dept. 1994). Here, J.b. S. tested positive for fentanyl and required hospitalization. Dr. N.R. testified about the lethal consequences which fentanyl causes and the record is abundantly clear that J.b. S. required lifesaving treatment to reverse the effects from the fentanyl ingestion. This clearly is a harm sufficient to sustain neglect. Thus, as RF and AFC argue, there must be a showing that this was caused by

the failure of his parent or person legally responsible to exercise a minimum degree of care.

Res Ipsa Loquitar is Latin for "the thing speaks for itself."

The Family Court Act has incorporated the res ipsa loquitar definition into its definition of child abuse and neglect. Pursuant to FCA 1046(a)(ii) the petitioner has met a prima facie case of child abuse or neglect by demonstrating that (1) an injury occurred to a child which would ordinarily not occur absent an act or omission of the respondents and (2) that the respondents were the caretakers of the child at the time the injury occurred.

When analyzing the rationale for applying the res ipsa doctrine to child abuse and neglect cases, it should be noted that the purpose of Article 10 is to protect children, as many of these cases are [*6]secretive in nature and the only witness may be the child. See *In re Nicole V*., 71 NY2d 112 (1987). As held in *Nicole V*., the Child Protective Procedure's Act (Article 10), "purpose is to protect children from injury or mistreatment while ensuring that the State's intervention on behalf of the child, against the wishes of a parent, comports with the parent's due process rights." *Nicole* at 117. This Court also notes that when ACS files a petition under the theory of res ipsa, there is nothing specifically pleaded in the petition to state that they are proceeding on such a theory.

*In Re Philip M*. 82 NY2d 238 (1993) is the seminal authority when applying the doctrine of "res ipsa" to Article 10 cases. In *Philip M*., the Court did not relieve the Petitioner from meeting its burden of proof by a preponderance of the evidence. However, "as in negligence cases tried on the theory of res ipsa loquitor, once the petitioner puts forth a prima facie case, "the burden of going forward shifts to respondents to rebut the evidence of parental culpability." *Philip M.* at 244. The Court of Appeals specifically held that the respondent could rest without rebutting the case and permit the court to decide the case on the strength of petitioner's evidence. However, if respondent does rebut the prima facie case, they may do so by 1) establishing that the child was not in their care at the time of the incident, 2) demonstrating that the injury could reasonably have occurred accidentally, without the acts or omissions of the respondent or 3) countering the evidence that the child had the condition which was the basis for the finding of the injury. See *Philip M*. at 244-45. The Court in *Philip M*. upheld the finding and rejected the respondent's testimony which it held as "conjecture" and without an explanation for how the injury occurred. The Court held that the parents failed to prove that one of the children's injuries had another source. The testimony proffered by the respondents was implausible and the Court properly rejected their explanation.

The very nature of FCA 1046(a)(ii) acknowledges that courts may not know who caused injuries to a child, and thereby multiple caretakers who had access to the child may be responsible. See *Matter of Adonis M.C. (Breanna V.M.)*, 212 AD3d 452 (1st Dept.

2023); *Matter of Nyheem E. (Jamila G.)*, 134 AD3d 517 (1st Dept. 2015). If respondents are unable to narrow the timeline or rebut that they were a caretaker for the child during the relevant time, even if the timeline is broad, then findings are appropriate. *Matter of Nabel C.*, 134 AD3d 504 (1st Dept. 2015); *Matter of Davion E., supra*. In *Matter of Nabel C*, the Court upheld a finding of abuse where the child suffered from an opiate overdose and the exact time of the overdose could not be established. The respondents were not able to show that that the exposure occurred when the child was not in their care and thus the finding of abuse was appropriate.

In addition, a finding against one parent does not preclude a finding against another parent. In *Adonis M*., supra, a four-month-old child had multiple non-accidental fractures. Although the Court had previously entered an abuse finding against the father, this did not prevent the mother from also being responsible. "The Family Court Act permits findings of parental culpability against more than one caretaker where, as here, multiple individuals had access to the child in the period when the injury occurred." *Adonis M*. at 453.

When reviewing evidence and evaluating witnesses, Courts are required to make credibility determinations. Credibility determinations are within the sole discretion of the trial court, as the jurist who observes the demeanor of the witnesses is in the best position to determine their credibility. Specifically, the Court of Appeals has noted "in a matter which turns almost entirely on assessments of the credibility of the witnesses and particularly on the assessment of the character and temperament of the parent, the findings of the nisi prius court [*7]must be accorded the greatest respect." *In re Irene O.*, 38 NY2d 776 (1975). See also *Matter of Elissa A. v. Samuel B*., 123 AD3d 638 (1st Dept. 2014); *Matter of Oscar S. v Joyesha J*., 149 AD3d 439 (1st Dept. 2017). A Court's credibility determination must be supported by the evidence. *Matter of Gargano v. New York State Office of Children and Family Services*, 133 AD3d 556 (1st Dept. 2015).

The Court had the opportunity to review all the documentary evidence in this matter and observe the demeanor of the witnesses during their testimony. Here, the Court credits the testimony of CPS A. and Dr. N.R. These witnesses were both impartial and informed the Court when they did not remember something. The RF, NRM, and MGF were all partially credible, but their testimony was also self-serving. While they all provided information to this Court, the Court also found inconsistencies in all their testimony and even after all the testimony and evidence, does not have a complete timeline as to the movements of each adult on the morning of July 22, 2022.

Here, the agency has made a prima facie case of neglect as described in *Phillip M* and a prima facie case that the child's physical, mental, and emotional condition were impaired. The subject child tested positive for fentanyl, which is an injury that would not ordinarily occur. Dr. N.R. testified that this was a potentially life-threatening injury and

would have been fatal if he had not received the naloxone. The records demonstrate that J.b. S. was hospitalized for five days because of his exposure to fentanyl. There was no evidence or argument proffered to rebut these facts as established by ACS.

The testimony clearly establishes that the RF was a caretaker for J.b. S. at the time that he encountered the fentanyl. The RF specifically went to NRM's to care for the children, a routine he frequently exercised. RF did not go the NRM's home to find another location to sleep, but rather to be a caretaker for his children. Dr. N.R. set a timeline of 3.7 hours before 12.42 pm, which has the timeline starting approximately at 9:00 am on July 22, 2022, when the RF either arrived in the home or was already in the home.[FN1] However, Dr. N.R. did stress that the exposure was likely later than that, given J.b. S.'s presentation at J.b. S.i Hospital. Therefore, this Court makes a prima facie finding that RF was a caretaker at the time J.b. S. was exposed. With this presumption, now it falls to the RF to rebut that presumption.

RF argues that J.b. S. was in the care of MGF during the time he was exposed to the fentanyl and further argues that he had no control over the environment in which J.b. S. was exposed, which implicates the NRM. As noted above, despite all the evidence and testimony presented, the movements and actions of the three adults throughout that morning are not clear. It is not clear when J.b. S. was exposed and what room he was in when he was exposed. This Court notes that RF attempted to directly point the finger at MGF with his testimony about being [*8]awoken by the MGF due to concerns, seeing the child fine, going back to sleep and then waking up later to check again. However, this stands in contrast to his statements to CPS A. and the testimony of MGF. Furthermore, it is clear to this Court that RF loves J.b. S. This Court simply does not credit that RF would have been informed that J.b. S. was in distress, taken a brief look at the child, and gone back to sleep for an indeterminate amount of time, based on his other statements during this trial. It is also clear that it is routine for RF to be in the home. Despite the testimony that he does not live there, his daily visits to the home for a prolonged period while a caretaker for the children, do in fact give him some control over the home. This record is exceedingly clear that RF went to the NRM's home for the purpose of caring for the children. The children were in his care that day, and to suggest otherwise belies the evidence brought out at this trial. Therefore, the Court does not find those arguments persuasive. The Court also notes that it is concerning that RF was comfortable leaving the children in the possible care of the MGF, when there is a consensus that he has health issues, which could impact his ability to care for young children.

Thus, the totality of the evidence presented does not exclude the RF as a possible caretaker for the child at the time that J.b. S. ingested the fentanyl. RF did not offer an

expert to narrow down the timeline further than the 3.7 hours proffered by Dr. N.R.. Therefore, this Court finds that the presumption was not rebutted.

The AFC did not support a finding and argued that "the record contains no specific facts supporting an inference that J.b. S. was harmed or placed at imminent risk of harm as a result of RF's conduct." The AFC fails to reference the doctrine of res ipsa and Family Court Act 1046(a)(ii) but rather speculates that J.b. S. may have ingested fentanyl when unattended in the living room. However, the AFC does support the decision in *In re Nobel C.*, 134 AD3d 504 (1st Dept. 2015), a case where a finding was upheld and where the facts were quite similar to the instant matter.

Moreover, the RF's argument that any theory under FCA 1046(a)(ii) may not be advanced because the petitioner would have had to file against all the parties who were present at the time the injuries were sustained is not persuasive. No case law is cited to support that proposition, and the Court did not find any in its own research. Furthermore, the Court believes that such a holding would be counterintuitive and would only serve to undercut the purpose of res ipsa. Should the Court truly not extend its protective arm around a child(ren) who were allegedly harmed because there may exist another individual who had access to the child? Should the existence of such an individual (say someone who was present, but could not be proven to be a person legally responsible) automatically exculpate the parents and persons legally responsible? Res ipsa serves to protect children. The law provides defenses to res ipsa, as discussed above, but this Court finds that those defenses were not successfully presented in this instance.

Clearly both RF and AFC are quite concerned that ACS did not file against the NRM or the maternal grandfather. However, this Court is constrained by what ACS has filed, wherein the father was the only named respondent. Therefore, this Court does not reach a determination as to whether the NRM or the MGF were caretakers at the time and whether findings of neglect would be appropriate. As cited above, the existence of other caretakers, without narrowing down the timeline sufficiently to exclude himself as a caretaker, allows for the finding of neglect to be made against the father.

At the time of the incident, J.b. S. was about 19 months old and had no protective [*9]capacity of his own. He suffered from a fentanyl overdose which could have resulted in his death if not for the medical intervention he received. The respondent offered no evidence to rebut the petitioner's prima facie case.

Although this was not specifically pleaded, the Court finds that the child J.e. S. is a neglected child based on the actions of RF. J.e. S. was in the same circumstances as her brother when he absorbed the fentanyl, placing her at direct risk and the same parental flaw that justifies the finding of neglect for J.b. S. justifies a finding for J.e. S.

**Conclusion**

WHEREFORE, the Court finds that Petitioner has established by a preponderance of the evidence that the respondent is the father of the children, that the child has injuries of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent, and that RF was a caretaker for SC when the injury may have occurred. RF failed to rebut the Petitioner's presumption of neglect. Therefore, under FCA 1046(a)(ii) and *Matter of Philip M.* 82 NY2d 238 (1993), the subject children are neglected children as defined in section 1012(f) of the Family Court Act. Accordingly, a finding of neglect is entered against the respondent father pursuant to section 1012 of the Family Court Act.

Dated: Bronx, New York
September 20, 2023

**Footnotes**

**Footnote 1:**

This Court notes that RF seemingly argues that the timeline should begin at 10:00am, approximately 3.7 hours prior to his hospital admission. *See* Respondent Summation, pg. 10. However, on direct examination, ACS specifically asked the doctor for the timeline pursuant to the 911 call being made, setting that time at approximately 12:41pm. Although Dr. N.R. reiterated that timeline later in his testimony when asked about exposure pursuant to his arrival at the hospital, this Court sets the timeline from the 911 call. Clearly the child was exposed to the fentanyl prior to the RF calling 911 and the original range was set by the doctor when asked about symptoms being present at the time EMS was called.

## SEXUAL ABUSE

**Matter of A.G.**, 80 Misc3d 1233(A) (Family Court, Erie County, 2023)
Brenda M. Freedman, J.

Petitioner Erie County Department of Social Services filed a Family Court Act ["FCA"] Article 10 proceeding on October 6, 2021 on behalf of the children, C. G. (DOB 05/2007); A. G. (DOB 09/2008) and D. G. (DOB 06/2010) against the Respondents, R. K. ["Respondent-Mother"] and D. G. ["Respondent-Father"].

The Petitions alleged, *inter alia*, that Respondent-Father had been sexually abusing A.G. since she was four (4) years old, beginning with forcibly touching and fondling her; that as she got older, the abuse progressed to inserting his finger into her vagina, performing oral sex on her, having her perform oral sex on him and later, engaging in sexual intercourse. The Petitions further alleged that Respondent-Mother had instructed A.G. to blame the sexual abuse on her Uncle Mark rather than on Respondent-Father, including at her forensic interview, and threatened that she would be put into foster care and the family would lose their house if she did not; that the parties allowed A.G. to have telephone contact with her Uncle Mark, a known pedophile and registered sex offender; and that although Respondent-Mother had agreed pre-petition to prevent contact between A.G. and Respondent-Father, she put A.G. on the phone with him and instructed A.G. to pretend she missed him.

On October 6, 2021, a Temporary Order of Protection was entered in favor of the three children against Respondent-Father. The children were released to Respondent-Mother under a Temporary Order of Supervision with an affirmative obligation to enforce the Temporary Order of Protection.

The Order of Protection was modified on November 30, 2021 to allow agency-supervised access for Respondent-Father with C.G. and D.G..

Amended Petitions were thereafter filed on January 11, 2022. They alleged, *inter alia*, that since entry of the Temporary Order of Supervision and Temporary Order of Protection, Respondent-Mother caused a deterioration in A.G.'s mental health including by calling A.G. a liar, repeatedly asking A.G. if she wanted her father back in the home, pressuring her to recant, telling A.G. she had fabricated the sexual abuse as a result of a cyst on her brain which caused her to hallucinate, and telling A.G. it was her fault that Respondent-Father was absent from the home. It is further alleged that Respondent-Mother failed to prevent an adult sibling from blaming A.G. for their father being absent from the home and from putting Respondent-Father on speaker phone in A.G.'s presence. On that date, A.G. was remanded to the care of her paternal aunt. Respondent-Mother, C.G. and D.G. were granted therapeutic supervised access with A.G..

On June 2, 2022, it was alleged that the Temporary Order of Protection was repeatedly violated in that the children had visited with Respondent-Father outside of the designated agency, that Respondent-Father had been placed on speaker phone in the

presence of the children. It was also alleged that C.G. was yelling at A.G. in school and the school had to create different schedules to keep them separated.

On July 2, 2022 it was alleged that A.G.'s mental health had continued to deteriorate, that she had gone to a Respite site but had used up all the allotted time there. It was further alleged that Respondent-Mother and Mason accosted A.G. on her way to school and tried to get her to recant. On consent of all parties, A.G.'s placement was modified to foster care. A.G. has [*2]remained in foster care to date.

On September 9, 2022 DSS's motion to approve the Qualified Residential Treatment Placement based on the mandated assessment was approved without objection.

Trial was scheduled for September 9, 2022. On that date, neither Respondent appeared and Trial proceeded in their absence. It was adjourned for the production of certain documents. After a series of mishaps with securing the documents, Trial concluded on August 29, 2023. The Court heard from Amber Love, a Department of Social Services Caseworker and Helena Mulawka, a New York State Police Investigator and Forensic Interviewer. Child Advocacy Records were received into evidence, including a video recording of the forensic interview. The parties made oral summations.

Now, upon all the pleadings and proceedings held herein and upon the Court's unique opportunity to observe and evaluate each witness, to review the pertinent statutes and case law and apply it to the evidence adduced at Trial, I render the following Findings of Fact and Conclusions of Law, Decision and Order:

**Findings of Fact:**

The parties are the parents of the children C.G., A.G. and D.G.. Until October 6, 2021 when the Temporary Order of Protection was entered, the children resided with both Respondents.

Ms. Amber Love, a Senior Caseworker for the Department of Social Services ["DSS"] testified. She is on the sexual abuse, serious injury and fatality team and has had several years of experience and specialized training. She testified that multiple reports were received regarding the subject children, C.G., A.G. and D.G. including at the end of September, 2021 when a report was made regarding Respondent-Father sexually abusing A.G.. Both Respondents denied the allegations.

Ms. Love put in a safety plan, asking Respondent-Father to leave the home and to have no contact with the children. She testified that both Respondents agreed to follow the plan. However, she testified, the safety plan was violated. Respondent Mother allowed Respondent-Father to call the children, including allowing him to speak with A.G.. At that point, Ms. Love filed a Petition pursuant to FCA Art. 10 seeking *inter alia* an Order of Protection against Respondent-Father to keep him out of the home.

A Forensic interview was held with A.G. at the Children's Advocacy Center ["CAC"] on October 1, 2021 and February 14, 2022. Ms. Helena Mulawka conducted the interview and Ms. Love was present via live streaming. Ms. Mulawka is a forensic interviewer and a New York State Police investigator stationed at the CAC where she has been for the past 10 years. Both Ms. Mulawka and Ms. Love testified about the interview and were consistent in their observations and reports. Their testimony was also consistent with the Court's observation of the video recording of the interview. This Court finds both testimonies to be credible.

At the interview, A.G. disclosed that her father had been sexually abusing her from the time she was four (4) or five (5) years old until she was 12 years old, when he was removed from the home. It started with him rubbing her tummy and progressed to finger penetration, oral sex and intercourse. A.G. was able to provide specific incidents of abuse including locations, times, circumstances and detailed descriptions of acts. A.G. spoke about the abuse at both interviews. Her statements were consistent across both interviews and she never contradicted herself. She described the acts in detail, for example she said her father kissed her breasts, licked her vagina, made her "suck his dick" on multiple occasions, that her father put his finger into her vagina more than once, and put his penis into her vagina more than once. A.G. said these things [*3]happened a lot, approximately twice per month. A.G. described various locations in the home this would occur including the bedroom, bathroom and living room. She said it started when she used to go downstairs and watch TV with her father. Later, A.G. said, Respondent-Father came into her room in the middle of the night and into the bathroom during shower time, that it would often happen at night and during shower time. She identified where other household members were when this was happening, including that her brother would be sleeping or playing video games, that sometimes C.G. would be in the room but would then leave, that the other family members would be downstairs. A.G. described Respondent-Father making her watch pornography while the sexual abuse was occurring on more than one occasion.

At the interview, A.G. said her father instructed her not to tell anyone or something bad would happen.

When Respondent-Father was questioned by Ms. Love, he denied the allegations. Although he admitted that he had gone into A.G.'s bedroom at 3:00am, he said that his purpose was to take away a computer tablet she was using.

Respondent-Mother also denied the allegations.

Ms. Love spoke with Mason, an adult sibling who resided in the home. He denied the allegations. He reported that he saw Respondent-Father go into A.G.'s bedroom but it was for the purpose of removing a computer tablet from her.

A.G. had reported that Respondent-Father often came into the bathroom while she was showering. Both Respondent-Father and Mason admitted that Respondent-Father had done that, and Mason admitted he held the door open for Respondent-Father, but they both said A.G. needed help with the water.

Ms. Love testified that A.G. disclosed to others, including her mental health counselor and to school personnel, that Respondent-Father had commented about her body, such as that her breasts looked good.

During the forensic interview, A.G. admitted that she had been coached by her mother in anticipation of the interview, that her mother instructed her not to tell anyone that Respondent-Father had done anything to her, but to instead say it was Uncle Mark who did these things. Respondent-Mother threatened A.G. that if she said it was Respondent-Father, she would end up in foster care.

A.G. reported that after her father was removed from the home, Respondent-Mother was crying all the time and blamed A.G. for him being taken out of the home. A.G. said that Respondent-Mother did not believe her statements about the abuse, and said to her "Don't you miss him?" and "Don't you want him back at home?" Respondent-Mother told A.G. she had a cyst on her brain that made her say this happened. Ms. Love testified there was no medical evidence of a cyst on A.G.'s brain.

Ms. Love has spoken to A.G. multiple times. A.G. has never recanted.

At the Forensic Interview, A.G. also disclosed that Uncle Mark is a pedophile, that she spoke on the phone with him often and some of the calls lasted for an hour, longer than her siblings. These calls were on Respondents' home phone. A.G. said that both of her parents knew that Uncle Mark was a sex offender and that he was calling and speaking with A.G. for long periods of time on the house phone. Uncle Mark told A.G. that when they got together he would kiss her, cuddle her, sleep in her bed with her and have sex with her.

A.G. believes Respondent-Father may have also sexually abused C.G..

Ms. Love testified that initially, Respondent-Mother refused to allow C.G. and D.G. to be [*4]forensically interviewed, but that she eventually relented. C.G. and D.G. were interviewed but made no disclosures about sexual abuse.

After the initial reports, two additional reports were made that were similar in nature. Ms. Love spoke with Respondent-Mother, but Respondent-Mother said she did not believe A.G.'s allegations. Respondent-Mother continued to coach A.G. to recant and continued to blame A.G. for Respondent-Father's absence from the home. Both reports were substantiated.

Initially, A.G. was removed to the home of her paternal aunt. However, she lived near the Respondent's home, a few apartments down on the same street. For A.G. to get to school, she had to walk by her mother's home. Ms. Love credibly testified that at times, Respondent-Mother and Mason would confront her saying things like "Are you telling stories about father?" and "Are you telling stories to the police?" Mason told A.G. to call her attorney and say she wanted to return home.

Ms. Love credibly testified that there were also concerns about C.G.'s treatment of A.G.. Even though A.G. was residing at her aunt's home, they attended the same school. C.G. also blamed A.G. for their father being out of the home and would yell at A.G. at school.

During the time A.G. resided with her aunt, A.G.'s mental health began to deteriorate, Ms. Love testified. A.G. was treating for an eating disorder and was taken to CPEP a couple of times for suicidal ideation. A.G. reported being mad and frustrated with her mother because Respondent-Mother blamed A.G. for her father being removed from the home and was trying to coerce her to recant, including accosting her on the street on her way to school. DSS therefore requested, and was granted, a removal to foster care. A.G.'s school placement was also changed as a result of the move so that she was no longer attending the same school as C.G..

Ms. Love testified that A.G. has been a lot happier since being placed in foster care. Every time Ms. Love has spoken with A.G., A.G. has expressed a desire to remain in foster care and not return home. A.G.'s mental health is much improved, she is no longer exhibiting the symptoms that led to her earlier CPEP admissions. Ms. Love would have concerns about A.G.'s mental health if she were returned to her mother's care and would have concerns for her physical safety if returned to her father's care.

The Department of Social Services seeks a finding of Severe Abuse. The Attorney for the Child, A.G., supports a finding of Severe Abuse against Respondent-Father and a finding of Abuse against Respondent-Mother. The Attorneys for the Children representing C.G. and D.G. argue that there should be no findings of Neglect or Abuse relative to their clients.

**Conclusions of Law:**

Family Court Act 1012 (c) defines "abused child" as follows:

"Abused child" means a child less than eighteen years of age whose parent or other person legally responsible for his care

(iii) commits, or allows to be committed an offense against such child defined in article one hundred thirty of the penal law; allows, permits or encourages such child to engage in any act described in sections 230.25, 230.30 and 230.32 and 230.34-a of the penal law; commits any of the acts described in sections 255.25, 255.26, and 255.27 of the

penal law; or allows such child to engage in acts or conduct described in article two hundred sixty-three of the penal law

provided, however, that (a) the corroboration requirements contained in the penal law and (b) the age requirement for the application of article two hundred sixty-three of such law shall not apply to proceedings under this article.

Pursuant to Family Court Act 1046 (b)(1), the burden of proof for abuse is a preponderance of the evidence, and the burden of proof for severe or repeated abuse is clear and convincing evidence.

The evidence against both Respondents consists almost entirely of out of court statements by A.G., relayed through the witnesses along with documentary and video evidence. A child's out-of-court statements relating to the abuse or neglect alleged may be introduced at trial, and if sufficiently corroborated, will support a finding of abuse or neglect. Family Court Act 1046 (a) (vi). The statute broadly provides that "[a]ny other evidence tending to support the reliability of the previous statements shall be sufficient corroboration". Family Court is vested with considerable discretion to determine whether a child's statements have been sufficiently corroborated. *Matter of D.G. C.,* 162 AD3d 1648 (4th Dept., 2018). Here, A.G.'s respective statements were found credible by the witnesses, *In re Nicholas J.R*, 83 AD3d 1490 (4th Dept., 2011); were consistently reported to more than one witness on more than one occasion, *In re Nicholas J.R.*, *supra; In re Breanna R*., 61 AD3d 1338 (4th Dept., 2009); and were detailed descriptions of events, *William J.B., Jr. v Dayna L.S.*, 158 AD3d 1223 (4th Dept., 2018). *See* also, *Matter of Bryleigh E.N.*, 187 AD3d 1685, (4th Dept, 2020). Further, this Court observed A.G.'s forensic interview and found her to be credible. A.G. also made disclosures to school personnel and mental health professionals consistent with the statements she made at the forensic interview. It should be noted that "corroboration refers to the quantum of proof, and the amount of corroboration required in child protection proceedings is less than that applicable in criminal proceedings." *In re Donna K*, 132 AD2d 1004 (4th Dept., 1987). The Legislature has expressed a clear "intent that a relatively low degree of corroborative evidence is sufficient in abuse proceedings". *Matter of Jessica N.*, 234 AD2d 790 (4th Dept., 1996), *appeal dism'd* 90 NY2d 1008 (1997). This Court finds that A.G.'s statements have been satisfactorily corroborated.

The testimony of the DSS witnesses was not controverted in any manner. Neither Respondent appeared for Trial. Their failure to testify or present any proof can and should be held against them and supports the strongest possible inference against them that the opposing evidence permits. *Matter* of Ariana F.F., 202 AD3d 1440, N.Y.S.3d 661, 663 (4th Dept, 2022); Matter *of Noah C*, 192 AD3d 1676 (4th Dept., 2021); In *re Raven B.,* 115 AD3d 1276 (4th Dept., 2014); *Matter of Asianna NN*. 119 AD3d 1243 (3rd

Dept., 2014); *Matter of Jayden B. [Erica R.]*, 91 AD3d 1344 (2012). There is ample evidence that Respondent-Father sexually abused A.G. to support this strong inference.

The trial court is in the best position to determine whether the record as a whole supports a finding of abuse. *Matter of D.G. C., supra*. As a result of the foregoing, this Court finds that the Department of Social Services proved by clear and convincing evidence, that Respondent-Father committed against his daughter the crimes of rape in the first and second degrees (Penal Law 130.35 and 130.30), criminal sexual act in the first degree (Penal Law 130.50), sexual abuse in the first degree (Penal Law 130.65) and incest in the first degree (Penal Law 255.25), and thereby established that A.G. was severely abused by him. FCA 1012; FCA 1046; Social Services Law 384-b(8)(d). *See also, Matter* of Ariana F.F., *supra*; Matter of Bryleigh E.N., *supra.*

Although neither C.G. nor D.G. disclosed any type of abuse by their father, pursuant to [*5]Family Court Act 1046 (a)(i), " proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent." Where the evidence with respect to one child who is found to be abused or neglected demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for another child in the parent's care, a derivative finding may be made. *Matter of D.G. C.*, 162 AD3d 1648 (4th Dept., 2018); *Matter of A.G.ica M.*, 107 AD3d 803 (2d Dept., 2013). Here, Respondent-Father's sexual abuse of A.G. establishes that there are such fundamental flaws in his understanding and execution of the duties of parenthood to justify a finding that he derivatively abused C.G. and D.G. as well. *See, Matter of A.G. L.H.*, 85 AD3d 1637 (4th Dept., 2011), *lv den.*, 17 NY3d 711 (2011).

It is not alleged that Respondent-Mother knew the sexual misconduct was occurring before DSS became involved and her conduct does not meet the criteria of abuse. However, Respondent-Mother failed to meaningfully and appropriately address A.G.'s disclosures of sexual abuse.

Pursuant to Family Court Act 1012(f)(i)(B), a neglected child is a child less than 18 years old whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his/her parent or other person legally responsible for his/her care to exercise a minimum degree of care in providing the child with proper supervision or guardianship, or by unreasonably inflicting, or allowing to be inflicted, harm or a substantial risk thereof. The statute imposes two requirements for a finding of neglect which must be established by a preponderance of the evidence. First, there must be proof of actual or imminent danger of physical, emotional or mental impairment to the child. Second, any such impairment must be a consequence of a failure to exercise a minimum degree of parental care by the parent or person legally responsible for the child. This is an objective test that asks

whether a reasonable and prudent parent would have so acted, or failed to act, under the circumstances. *Matter of Afton C. [James C.]* 17 NY3d 1 (2011); *Matter of Kayla V.* 175 AD3d 1840 (4th Dept., 2019).

Where a reasonably prudent parent would have taken steps to protect her child from harm, *see, e.g., In re Alexis C,* 27 AD3d 646 (2d Dept., 2006), Respondent-Mother allowed A.G. to speak to Respondent-Father in violation of the safety plan, she allowed A.G. to speak to Uncle Mark for protracted periods of time knowing he was a pedophile, she coached A.G. to lie to interviewers to shield Respondent-Father from repercussions rather than support her daughter, she fabricated a story about a cyst on A.G.'s brain which would cause her to lie about these matters, she blamed A.G. for Respondent-Father being out of the home and repeatedly told her so, and even after A.G. was removed from the home, Respondent-Mother went out of her way to accost her on her way to school to try to convince her to recant or lie. The result of this conduct was a deterioration of A.G.'s mental health including suicidal ideation and multiple mental health hospitalizations. DSS has proven by at least a preponderance of the evidence that Respondent-Mother failed to exercise a minimum degree of care and therefore neglected the needs of A.G.. *See, e.g., In re Derrick C*, 52 AD3d 1325 (4th Dept. 2008), *lv den.,* 11 NY3d 705 (2008); *Matter of Kaleb LL*, 218 AD3d 846 (3d Dept., 2023); *In re Alexis*, 27 AD3d 646 (2d Dept., 2006).

Respondent-Mother's conduct also established a fundamental defect in her understanding of the duties and obligations of parenthood, creating an atmosphere detrimental to the physical, mental and emotional well-being of A.G.. These flaws are so profound as to place any child in [*6]her care at substantial risk of harm. Respondent-Mother has therefore also derivatively neglected C.G. and D.G.. *See, e.g., In re Derrick C*, *supra*; *Matter of Charles Q.,* 182 AD3d 639 (3d Dept., 2020); *Matter of Kaylene S.*, 101 AD3d 1648 (4th Dept., 2012); *In re Alexis, supra.*

**NOW, THEREFORE,** it is hereby

**ORDERED**, that A.G. is determined to be a severely and repeatedly abused child in accordance with the provisions of Family Court Act Article 10 by Respondent-Father, D.G.; and it is further

**ORDERED,** that C.G. and D.G. are determined to be derivatively abused children by Respondent-Father, D.G. by virtue of the acts committed against their sibling, in accordance with the provisions of Family Court Act Article 10; and it is further

**ORDERED**, that A.G. is determined to be a neglected child in accordance with the provisions of Family Court Act Article 10 by Respondent-Mother, R.K.; and it is further

**ORDERED**, that C.G. and D.G. are determined to be derivatively neglected children by Respondent-Mother, R.K. by virtue of the acts committed against their sibling, in accordance with the provisions of Family Court Act Article 10; and it is further

**ORDERED**, that all prior temporary Orders are hereby continued; and it is further

**ORDERED,** that this matter shall be scheduled for disposition on December 14, 2023 at 2:30pm in Part 6, Erie County Family Court.

## TPR DISPOSITION

**Matter of Y. SS. (E. SS.)**, 80 Misc3d 1212(A) (Family Court, Tompkins County, 2023)

Scott A. Miller, J.

Respondent E. SS. (hereinafter "the mother" or "the Respondent") is the mother of the subject child Y. SS. (date of birth: XX/XX/13). The paternity of the child has never been legally established. On September 4, 2020, the Tompkins County Department of Social Services (hereinafter "the Department" or "the Petitioner") filed a Petition by Order to Show Cause pursuant to Family Court Act Article 10 alleging abuse and neglect of the child by the mother. The Court ordered the temporary removal of the child from the Respondent and placed the child in the care and custody of the Department pending resolution of the proceedings.

A Fact-Finding Hearing was conducted by the Court on February 4, 2021, March 19, 2021, April 2, 2021, and April 27, 2021. The Department was represented by Attorney Arthur [*2]Stever. The mother was represented by Attorney Kristine Shaw. Attorney Angelica Parado-Abaya of Citizens Concerned for Children, Inc., appeared as the Attorney for the Child. On June 7, 2021, this Court issued a Decision and Order in which it determined that the child is a "neglected child" within the meaning of FCA § 1012(f)(i)(B) and that the Respondent mother engaged in conduct and demonstrated a lack of judgment which created an imminent danger of impairment to her daughter. The Court's Decision and Order entered June 7, 2021, is incorporated by reference as if fully set forth herein.

On October 13, 2021, a Dispositional Hearing was held. The Department was represented by Attorney Arthur Stever. The mother was represented by Attorney Francisco Berry. Attorney Angelica Parado-Abaya of Citizens Concerned for Children, Inc., appeared as the Attorney for the Child. On November 10, 2021, the Court issued a Fact-Finding Decision and Dispositional Order in which it determined that the Petitioner

had established by a preponderance of the evidence that presently the Respondent lacks the fitness to regain custody of her daughter and that her complete lack of insight into her neglectful conduct would place the child at a very real and imminent risk of harm should the child be returned to the Respondent. The Court determined that it was in the child's best interests to remain in the care and custody of the Department, placed with her current foster family. The Court placed the Respondent under the supervision of the Department pursuant to FCA § 1057 and imposed a number of orders and conditions on her. The Court's Fact-Finding Decision and Dispositional Order entered November 10, 2021, is incorporated by reference as if fully set forth herein. The Third Department upheld this Court's finding of neglect and dispositional order. (Matter of Y. SS., 211 AD3d 1390 (3rd Dept. 2022).

On January 6, 2022, the Department filed a motion pursuant to FCA § 1039-b(b)(6) requesting a finding that reasonable efforts to return the child to the Respondent mother's home are no longer required. On March 11, 2022, Respondent filed an Affirmation in Opposition. This Court, by Decision and Order entered May 20, 2022, ruled that the Department shall not be required to engage in or prove reasonable efforts to return the child to the Respondent's home. The Court's Decision and Order entered May 20, 2022, is incorporated by reference as if fully set forth herein.

On June 15, 2022, the Department filed a Petition for Permanent Neglect alleging that the Respondent had permanently neglected her daughter. A Fact-Finding Hearing was held on March 17, 2023, March 29, 2023, and April 3, 2023. The Department was represented by Attorney Arthur Stever. The mother was represented by Attorney Francisco Berry. Attorney Angelica Parado-Abaya of Citizens Concerned for Children, Inc., appeared as the Attorney for the Child. This Court, by Decision and Order entered June 6, 2023, ruled that the Respondent failed substantially and continuously or repeatedly to plan for the future of the child although physically and financial able to do so, and as a result, permanently neglected her child. The Court's Decision and Order entered June 6, 2023, is incorporated by reference as if fully set forth herein.
On July 7, 2023, and July 12, 2023, a Dispositional Hearing was held. The Department was represented by Attorney Arthur Stever. The mother was represented by Attorney Francisco Berry. Attorney Angelica Parado-Abaya of Citizens Concerned for Children, Inc., appeared as the Attorney for the Child. The court heard testimony from the foster mother, a Tompkins County DSS Family Worker, a Chemung County DSS Case Worker, a Tompkins County DSS Case Worker, a friend of the Respondent, and the Respondent. Petitioner's Exhibits 1 through 9 [*3]and Respondent's Exhibits 1, 2, 3, 4, and 7 were received into evidence. The Court heard oral summations by counsel on July 12, 2023.

FINDINGS OF FACT

In its Decision and Order entered June 6, 2023, this Court made detailed findings of fact and conclusions of law that from the date of the child's placement on September 4, 2020, through the filing of the permanent neglect petition on June 15, 2022, the Respondent, although physically and financially able to do so, failed to substantially and continuously or repeatedly plan for the future of the child, that she failed to make any meaningful progress towards any of the mandates contained in this Court's Fact-Finding Decision and Dispositional Order entered November 10, 2021 (or any other alternative plan), and that, consequently, the Respondent had permanently neglected her child. The credible testimony and other evidence received at the Dispositional Hearing established that from June 15, 2022, until present, the Respondent has continued to fail to make any meaningful progress towards the mandates of this Court.
The Respondent continues to reside in the same mice-infested home she testified about several months ago during the permanent neglect fact-finding, although this time she claimed the mice have been gone since the old tenants moved out "last year." The Respondent was not credible. The residence remains unsafe, unclean, hazardous, and unfit for a child.

The Respondent, by her own admission, has never provided the Department or the Court with any documentation of legal sources of income aside from several exhibits that were received into evidence at the hearing. The exhibits and credible testimony merely established that: (1) the Respondent contacted Castle Services of Ithaca and received a brief reply; (2) the Respondent earned a total of $219.24 from January 1, 2023, through July 12, 2023, from People Ready Inc.; and (3) the Respondent is currently enrolled in the Hospitality Employment Training Program at the Greater Ithaca Activities Center. These efforts at legal employment are minimal and sporadic at best and certainly do not constitute meaningful progress towards the mandate of the Court. The Respondent is currently engaged in substance abuse treatment at CASA Trinity. While this involvement is certainly positive, the Court must view this temporary progress through the proper lens of the Respondent's long-term history of substance abuse including numerous relapses after failed attempts at sobriety. It is also imperative to note that over the course of the child's placement, the Respondent regularly evaded unannounced drug screenings, attempted to manipulate at least two screens, tested positive for cocaine on at least two occasions, and tested positive for alcohol on at least one occasion. In this context, the Respondent's current strides do not constitute consistent, meaningful, long-term progress towards the Court mandate.

After attending two counseling sessions at Field of Dreams, the Respondent determined that she wasn't "enjoying" the services there, and she switched to Clinical Social Work

and Counseling Services of the Finger Lakes where she has thus far completed a total of three sessions. Given that the Respondent was ordered to obtain a mental health assessment and follow through with all recommended treatment on November 10, 2021, this limited participation in mental health counseling does not constitute meaningful progress towards addressing the issues that led to the child's removal. The Respondent has had numerous contacts with law enforcement during the child's [*4]placement including an arrest for driving while intoxicated and numerous tickets for operating a motor vehicle with an open container of an alcoholic beverage. The Respondent continues to drive even though her driver's license is suspended for failure to pay numerous traffic tickets. The Respondent has failed to abide by the order of this Court to "refrain from any illegal activity which poses a risk of safety of the child."

The Respondent has missed or been late to a staggering number of in-person visits and telephone calls with the child. During the in-person visits that have taken place, the Respondent has repeatedly told the child she would be coming home soon, causing great distress to the child when the Respondent's promises failed to materialize. Due to these issues, the Respondent has failed to progress beyond one hour of supervised visitation with the child per week. In addition, the Respondent has failed to participate in coached visitation as offered to her by the Department. As such, the Respondent has failed to participate and engage with a parenting skills education program and demonstrate the "ability to protectively parent and put the wellbeing and needs of the child before the desires and needs of Respondent" as ordered.

While the Respondent finally acknowledged to the Court — for the first time — that she did in fact neglect her child, this revelation was too little too late, coming nearly three years after the Respondent committed the acts that placed her child at grave risk of harm. Even as the Respondent attempted to acknowledge her neglect of the child, her testimony was replete with qualifications and excuses such as, "I didn't initiate it. I'm just responding to what he's asking me," and "I didn't know he was a pedophile but then I knew when he asked me that." It is also important to note that the Respondent's credibility has suffered greatly after repeatedly testifying dishonestly to this Court.

The child suffered serious and lasting harm from the time she spent in her mother's care. After her placement, the child displayed sexualized behavior wholly inappropriate for her age. The child inquired about pornography when she first came to her foster home. She would engage in doll play that was too sexual and violent for her age. While the child was at first hesitant to bathe in her new home, once the foster parents were able to get her into the bath or shower, the child asked whether they wanted to

photograph her, connoting that this was something she had been exposed to regularly in her mother's home. The child also disclosed that she had walked in on the Respondent engaging in sexual intercourse.

By contrast, the child is now in a safe, happy, and healthy home. She has been placed continuously with her certified foster parents since the date of her removal on September 4, 2020. The child is growing and thriving in their care. The child has a strong bond with them. The foster parents are committed to adopting the child if that becomes a legal possibility. Both foster parents are gainfully employed and are in good health. They live in a farmhouse in a rural area of the county. They have a cat, a hamster, and ten chickens that the child enjoys playing with. The child participates in numerous activities including dance classes, piano lessons, bike riding, and hiking. The child has been continuously enrolled in counseling since soon after her placement. The foster parents have been helping the child to maintain a relationship with all seven of her biological siblings. They plan to continue to do so if they become permitted to adopt the child.

CONCLUSIONS OF LAW

"'Following an adjudication of permanent neglect, the sole concern at the dispositional [*5]hearing is the best interests of the child and there is no presumption that any particular disposition, including a return of a child to a parent, promotes such interests' [internal citations omitted]. 'Where appropriate, Family Court may issue a suspended judgment to afford the parent a finite period of time within which to become a fit parent with whom the child can be safely reunited' [internal citations omitted]. However, a suspended judgment is warranted 'only when "the parent, under the facts presented, has clearly demonstrated that he or she deserves another opportunity to show that he or she has the ability to be a fit parent"' [internal citations omitted]." Matter of Issac Q., 212 AD3d 1049, 1054 (3rd Dept. 2023). "Indeed, no parent is automatically entitled to such 'a grace period' [internal citations omitted], nor is there any presumption for a suspended judgment in a parent's favor [internal citations omitted]; the sole criterion for a suspended judgment is the best interests of the child [internal citations omitted]." In re Carlos R., 63 AD3d 1243, 1246 (3rd Dept. 2009).

It is clear that the only disposition that is in the child's best interests is termination of the Respondent's parental rights. Over the course of the child's nearly three-year removal, the Respondent has failed to obtain safe and appropriate housing. She has failed to

obtain stable and sufficient legal employment. She has failed to demonstrate long-term, meaningful compliance with both substance abuse treatment and mental health treatment. She has failed to refrain from illegal activity. She has failed to take timely, full, and sincere responsibility for neglecting her child. She has failed to progress beyond one hour of supervised visitation per week due to numerous missed and late visits and telephone calls, as well as inappropriate behavior during visits. She has failed to adequately address the issues leading to the child's removal.

In In re Carlos, Id., the Third Department found that the Family Court appropriately refused to issue a suspended judgment where " as of the time of the dispositional hearing, the mother was only six weeks into a seven-month drug rehabilitation program after her release from jail. She testified to a number of previous failed attempts to overcome her addiction to crack cocaine, and admitted failing to complete some of the treatment programs and relapsing on cocaine even after completing other programs." This is the exact situation here. Though the Respondent is currently engaged in substance abuse treatment, this limited, temporary progress must be viewed through the proper lens of her long-term history of multiple relapses following failed attempts at sobriety, consistent evasion of testing, and repeated manipulations of testing.

In Matter of Leon YY., 206 AD3d 1093, 1096 (3rd Dept. 2022), the Third Department held that there was a sound and substantial basis in the record to support the Family Court's finding that termination of the father's parental rights was in the child's best interests where the father "failed to obtain suitable housing" and where his "failure to consistently appear for scheduled visits and parent education sessions and his refusal of other services hindered any ability to progress to unsupervised visits or to demonstrate the capacity to provide appropriate parental care for the child." The Court held, "In short, the father failed to take meaningful steps to correct the conditions that led to the child's removal." Id. This is directly analogous to the case at bar.

Finally, in Matter of Issac Q., supra at 1054, the Third Department upheld the Family Court's termination of the respondent's parental rights where " the child had made significant progress since being removed from the home in April 2018 and was doing well in his current foster care placement. The foster parents were an adoptive resource for the child and were willing to facilitate visitation with his siblings if he remained in their care." Here, as in Matter of Issac Q., the subject child is growing and thriving in the care of her foster parents with whom [*6]she has been placed continuously for nearly three years. She is closely bonded to them. They provide fully for her and meet all of her needs. They have helped the child to maintain a relationship with all seven of her biological siblings and will continue to do so. They are committed to adopting her if

permitted. There is no question that it is in the child's best interests to achieve permanency with her loving and supportive foster parents. As such it is hereby:

ORDERED that the Respondent's parental rights to the subject child are hereby terminated; and it is further

ORDERED that the guardianship and custody of the child is transferred to the Tompkins County Department of Social Services, an authorized agency, and such guardianship and custody of the child are committed to the authorized agency upon the following terms and conditions: The Tompkins County Department of Social Services will continue placement of the child with her current foster parents and will assist with the goal of adoption by the foster family; and it is further

ORDERED that the Tompkins County Department of Social Services is authorized and empowered to consent to the adoption of the child subject to the order of a Court of competent jurisdiction to which a petition for adoption is submitted without the consent of or further notice to the Respondent, the biological mother to the child; and it is further

ORDERED that the Petitioner herein shall forthwith advise the pre-adoptive foster parents of their right to file an adoption petition in a court of competent jurisdiction and further advise the pre-adoptive foster parents as to all necessary supporting documents; and it is further

ORDERED that a certified copy of this order be filed for recording at the Office of the County Clerk in accordance with the provisions of Section 384-b of the Social Services Law; and it is further

ORDERED that a Permanency Planning Hearing will be held on August 16, 2023, at 9:30 a.m.; and it is further

ORDERED that the Department shall transmit notice of the hearing and a permanency report no later than 14 days in advance of the above date certain to all parties (not including the Respondent whose parental rights have been terminated), attorneys, the Attorney for the Child, and the pre-adoptive parents providing care to the child.