

CHILD WELFARE CASELAW REVIEW

Appellate Division cases

Reported From July- December, 2023

2024 NYPWA Winter Conference- January 25, 2024
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Introduction

These cases represent the appellate level child welfare related cases that I found between July 1, 2023 and December 31, 2023 from my review of the Slip Opinions posted on the OCA website. There are a few trial court level cases included at the end of the materials.

Introduction

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

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

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

Introduction

Because this program covers cases reported up to December 31, 2023, and the program is given on January 25, 2024, the official citations have not yet 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.)

CPLR 2106

CPLR §2106 Affirmation of truth of statement

Effective: January 1, 2024

The statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

I affirm this ____ day of _____, _____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

(Signature)

Evidentiary Rulings in Article 10 Proceedings

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

The order of Family Court, Bronx County which granted petitioner agency's motion for summary judgement on its petition alleging that respondents had derivatively neglected the subject child, was affirmed.

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. 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. 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.

Appellants raised 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 on appeal. The 1st Dept. rejected 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, it declined to consider it on appeal.

Evidentiary Rulings in Article 10 Proceedings

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

The order of Family Court, Kings County which found that the respondent was not a person legally responsible for the children Yasmin P., Hilary P., and Marjorie P., and 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. was modified by substituting a finding that the respondent was a person legally responsible for the children Yasmin P. and Hilary P., and making a finding that the respondent abused the children Yasmin P. and Hilary P. and derivatively abused the child 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.

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 was not supported by the record. 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. 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.

Respondent did not contest on appeal that the evidence adduced at the hearing established that he sexually abused these children.

The 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., had been derivatively abused. Notably, Gerardo M. P., Jr., was living in the same apartment as the respondent, Yasmin P., and Hilary P. when the abuse occurred, thus, a finding that the respondent derivatively abused Gerardo M. P., Jr., was warranted.

Evidentiary Rulings in Article 10 Proceedings

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

The order of Family Court, Allegany County, which placed the subject children with their mother after granting petitioner's motion for summary judgment on the issue whether respondent had neglected the children was reversed remitted to Family Court, Allegany County, for further proceedings on the petition.

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 two other children. 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.

Here, the petition alleged 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 did not list the date or dates of the offense or the victim, and the minutes of respondent's plea allocution were 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. It 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. Thus, on this record, the 4th Dept. concluded that petitioner failed to meet its burden of establishing as a matter of law that respondent neglected Clarissa or Elaina.

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 the other two children.

General and Mixed Neglect

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

The order of Family Court, Kings County which, after a hearing, dismissed the petition, was reversed, the petition reinstated, a finding was made that the mother neglected the subject child, the matter was remitted to the Family Court, Kings County, for a dispositional hearing.

ACS filed a petition against the mother alleging, inter alia, that she had neglected her then 7-year-old daughter by failing to provide her with proper supervision in that she knew or should have known that her then 15-year-old son with whom she left the child was sexually abusing the child.

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.

Also, contrary to the mother's contentions raised for the first time on appeal, the record did 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.

General and Mixed Neglect

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

The order of Family Court, Bronx County which found that respondent grandmother neglected the child and derivatively neglected the child's younger sister was affirmed.

The evidence showed 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.

The grandmother failed to rebut the presumption of culpability before the Family Court. 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. On appeal, the grandmother abandoned any challenge to the determination that the mark on the child's thigh was a burn from the family's iron. Instead, she argued that this single incident was insufficient to constitute neglect.

General and Mixed Neglect

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

The order of Family Court, Bronx County, which found that the mother, and the father neglected the three older subject children and derivatively neglected the youngest subject child, was affirmed.

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. The evidence showed 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.

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.

The foregoing findings of neglect warranted the finding of derivative neglect as to the youngest child, K. 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.

General and Mixed Neglect

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

The orders of the Family Court, Chemung County which granted petitioner's application, to adjudicate the subject children to be neglected was affirmed.

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.

There was 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

General and Mixed Neglect

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

The order of Supreme Court, Bronx County which, after a hearing, found that respondent mother and respondent Anthony M., a person legally responsible for the subject children, neglected the children.

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.

The mother failed to intervene and protect the children from Anthony M.'s abuse. The children's consistent, cross-corroborating accounts reliably support the court's findings. The Child Protective Specialist also testified that he personally observed Anthony M.'s anger and disparagement of the child in the child's presence.

General and Mixed Neglect

Matter of Jaylin B., 221 AD3d 1418 (4th Dept., 2023)

The order of Family Court, Onondaga County which adjudged that respondent had neglected the subject child was affirmed.

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 did not dispute that the conditions in the hotel room posed an imminent risk of harm to an infant, nor that her infant son was in the room with her at some point during her month-long stay at the hotel. The mother contended, 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.

Mother failed to testify, so a negative inference was drawn, and presented no other witnesses, as the two witnesses she offered failed to appear virtually, and the court did not grant a further adjournment to find them.

General and Mixed Neglect

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

The order of Family Court, Erie County which found that respondent had neglected the subject child was affirmed.

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.

General and Mixed Neglect

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

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

When the child was six days old and in the neonatal intensive care unit of the hospital weighing less than four pounds, Delaware County DSS commenced an 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 ("grandfather"), a convicted level two sex offender who had been incarcerated for raping the mother when she was 14 years old.

Mother claimed 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, was unpreserved for 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]).

Here, the evidence presented by petitioner included 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. 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. The 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 DSS offered housing assistance to the mother, which she declined. Based upon the foregoing, the 3rd Dept. agreed with the attorney for the child that the mother's insistence on residing with the grandfather "shows a substantial manifestation of irrationality."

General and Mixed Neglect

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

The order of disposition of Family Court, Orange County finding that the father neglected the subject children was affirmed.

In May 2021, Orange County DSS filed an article 10 alleging 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.

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.

General and Mixed Neglect

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

The order of Family Court, Bronx County, which, upon a fact-finding determination that the father neglected the subject child, was affirmed

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 ACS. The father claimed that he left the child with a woman whom he knew to be a responsible caregiver, but his argument was unsupported by any evidence.

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.

The father's claim that these incidents cannot evidence neglect because the child suffered no physical harm was also unavailing.

Family Court properly drew a negative inference from the father's failure to testify.

The father's arguments concerning Family Court's granting leave to ACS to amend the petition were not properly before the 1st Dept., as such leave was granted by an order from which he did not appeal. The arguments were, in any event, unavailing, as he was not prejudiced by the amendment.

General and Mixed Neglect

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

The order of Family Court, Greene County which granted petitioner's applications, in two proceedings pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected was affirmed.

Respondent is the father of a child (born in 2020) and a person legally responsible for the child's half sibling (born in 2007; both of whom lived with the father and their mother in September 2020). 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.

A state trooper testified at the 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 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" 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 intoxicated" 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.

The 3rd Dept found 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, and they were 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."

The father's remaining contention, that Family Court exhibited bias against him and deprived him of a fair hearing, is unpreserved for our review.

General and Mixed Neglect

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

The appeal of an amended order of Family Court, Steuben County, which determined that respondent had neglected the subject children was dismissed.

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, the mother's unexplained failure to appear constituted a default.

Further, even assuming, arguendo, that the mother raised an issue that was contested below and was thus reviewable on this appeal despite her default the 4th Dept. took 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 had passed.

Inasmuch as the order terminating the mother's parental rights to the subject children was final, the disposition rendered moot the appeal from the order entered in the neglect proceedings.

General and Mixed Neglect

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

The order of Family Court, Erie County, which adjudged that respondent had neglected the subject child was affirmed.

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. 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.

General and Mixed Neglect

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

The order of Family Court, Oneida County was affirmed.

There was a sound and substantial basis in the record to support 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. 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. The court properly drew the strongest possible negative inference against the father after he failed to testify at the fact-finding hearing.

The 4th Dept. rejected 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. 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.

Parental Mental Health

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

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

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.

Parental Mental Health

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

The order of the Family Court, Kings County which, after a fact-finding hearing, dismissed the petition, was affirmed.

ACS commenced this neglect proceeding against the mother, alleging 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 and dismissed the petition.

The Second Department held that 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. 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. 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.

The Second Department also held that the contentions of the attorney for the child regarding alleged evidentiary errors were not properly before the Court.

Parental Mental Health

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

The order of Family Court, Bronx County, which, after a hearing, found that respondent father neglected his son and derivatively neglected his daughter, Ariel R., was affirmed.

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. 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.

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. 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. 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 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. Contrary to the father's contention, there was 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.

The record showed 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.

Parental Substance Abuse

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

The order of Family Court, Oswego County, which adjudged that respondent had neglected the subject child and continued the custody of the subject child with the mother of respondent affirmed.

Family Court properly admitted in evidence her medical records and the medical records of the subject child. Even assuming, arguendo, that the court erred in admitting certain parts of those records, any such error was harmless.

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.

Additionally 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. Specifically, the record supported 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. 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.

Additionally, the court properly drew the strongest possible negative inference against the mother after she failed to testify at the fact-finding hearing.

Domestic Violence

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

The order of Family Court, Kings County which, found that the father neglected the subject children was reversed, on the law, the petitions were denied, and the proceedings were dismissed.

The petition alleged that the father neglected the subject children by committing acts of domestic violence against the mother in the children's presence. At the 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.

Here, the hearsay evidence presented by the petitioner at the fact-finding hearing was insufficient to permit a finding of neglect. 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. 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 "confusing," 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.

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.

Domestic Violence

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

The order of Family Court, Kings County which 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. Was affirmed.

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. The children reported feeling afraid of the father. 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 .

Domestic Violence

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

The order of Family Court, Richmond County which found that the father had neglected the subject children Davasha T. and David T., Jr., was affirmed.

ACS commenced these related proceedings alleging that the father 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 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.

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. 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 even 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.

Domestic Violence

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

The order of Family Court, Queens County determining that the father neglected the subject child was affirmed.

Contrary to the father's contention that his actions did not harm the child, actual emotional harm to the child was established by testimony that the child was crying and afraid during and after a domestic violence incident.

Domestic Violence

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

The order of Family Court, Kings County which found that the father neglected the child Sapphire R. and derivatively neglected the children Keziah R., Josiah R., Xayanna G., and Xavier G. was affirmed.

Here, Sapphire 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.

The father's commission of an act of domestic violence against the mother in the presence of Sapphire 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.

Domestic Violence

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

The order of Family Court, Bronx County which, after a hearing, determined that respondent father neglected the subject children by committing acts of domestic violence, was affirmed.

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. 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.

Domestic Violence

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

The order of Family Court, Bronx County which, after a hearing, determined that respondent father neglected the subject child, was affirmed.

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. 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. 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. The court properly credited the mother's testimony in making its findings, and there was no basis to disturb those credibility determinations.

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. 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.

Excessive Corporal Punishment

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

The order of Family Court, Erie County which determined that respondent had neglected the subject child was affirmed.

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.

Also of note is that the father contended that he was been denied adequate appellate review because the transcript of the testimony of several of petitioner's witnesses was 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, thus his contention was not properly before the 4th Dept., which conclude that the record as submitted was sufficient for the Court to determine the issues raised on appeal.

Excessive Corporal Punishment

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

The order of Family Court, Bronx County, which, after a fact-finding hearing, determined that respondent mother neglected the subject child, was affirmed.

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 ACS caseworker. 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. The court was entitled to take a negative inference against the mother from her failure to testify.

That the child's injuries resulted from only one incident did not preclude a finding of excessive corporal punishment. In addition, the evidence showed 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.

Excessive Corporal Punishment

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

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

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 ACS caseworker that she observed and photographed the child's injuries to her arm, knee, elbow, and face. That the child's injuries resulted from only one incident does not preclude a finding of excessive corporal punishment.

Further, the court credited the caseworker's testimony and found the mother's testimony to be self-serving, and there was no basis for disturbing the court's credibility determinations.

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.

Excessive Corporal Punishment

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

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

ACS'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. 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. 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. 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 was no basis for disturbing the court's credibility determinations.

Contrary to the mother's argument, she was 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. 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. The 1st Dept. further noted that Family Court dismissed portions of the petition based upon statements made by the uncle for lack of corroboration.

Sexual Abuse

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

The orders of Family Court, Tioga County which adjudicated the subject children to be abused and/or neglected were affirmed.

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 sexual assault nurse examiner (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 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.

Sexual Abuse

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

The order of Family Court, Delaware County which dismissed the petition which alleged the subject children to be abused and neglected was reversed.

- Family Court erred in concluding that the younger child's out-of-court disclosure of inappropriate touching was not sufficiently corroborated, and that he was a person legally responsible.
- Upon the 3rd Dept's independent assessment, petitioner established by a preponderance of the evidence that the boyfriend sexually abused the younger child
- The 3rd Dept. also upheld the finding that the mother had neglected the children and that Family Court had appropriately conformed the pleadings to the proof regarding educational neglect.

Sexual Abuse

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

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

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. There was 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.

The father argued that inconsistencies between allegations in the petition and the child's testimony undermined 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 were insufficient to impeach her testimony.

The father argued that ACS failed to conform the pleadings to the proof. That argument was unpreserved and the 1st Dept. declined to review it, however, even if it had considered the father's argument, it would find it unavailing. Contrary to the father's argument, the manner in which the father penetrated the child was of no consequence relative to the alleged Penal Law violations, most of which encompass the unlawful sexual contact testified to by the child.

Sexual Abuse

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

The order of Family Court, New York County which 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.

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. 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.

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. 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.

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. 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.

Sexual Abuse

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

The order of Family Court, Erie County which determined that respondent abused the subject child was affirmed.

Contrary to the father's contention 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, including the humiliation evoked in the victims.

Both children told interviewers that the father committed acts of sexual contact against 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.

The 4th Dept. did find that Family Court's ultimate determination that petitioner established the stepmother's neglect of the younger child by a preponderance of the evidence was not supported by a sound and substantial basis in the record and noted that Erie County CPS had 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.

Sexual Abuse

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

The order of Family Court, Kings County which found that the father sexually abused and neglected the child Vassilisa T. and derivatively abused and neglected the children Viktor T. and Armando T. was affirmed.

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. In any event, the medical records were properly admitted into evidence pursuant to Family Court Act §1046(a)(iv). 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.

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.

Sexual Abuse

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

The order of Family Court, Bronx County, which found that the subject children L.V.M. and M.D.M. are abused children, was affirmed.

Family Court properly found the children's out-of-court statements reliable and corroborated. 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. The 1st Dept. found they cross-corroborated each other's accounts. There were also adequately individualized aspects to each child's account to support Family Court's determination that their testimony was not scripted or coached.

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 corroborated 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.

The stepfather and mother argued 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 reflected, at a minimum, that M. was aware of and reported that L. had been abused. A CPS Specialist testified at fact-finding that M. told her that L. had told her that she had also been abused by the stepfather, 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 also argued 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 maintained the children's statements were unreliable since she never witnessed any abuse. However, that ignored 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 also tried 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 did not specify which words were incorrectly translated. Moreover, even if there were problems with the translation, the mother's argument ignored other evidence that she instructed the children not to disclose the abuse to others. The CPS Specialist 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 acknowledged that, at fact-finding, she testified to having told L. to recant.

The parents argued Family Court improperly considered the CPS Specialist's statements concerning M.'s demeanor, averring that she was 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.

Sexual Abuse

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

The order of Family Court, Onondaga County, which adjudged that respondent Mark M. abused one of the subject children and derivatively abused the other two subject children was affirmed.

Here, the daughter's out-of-court statements were sufficiently corroborated by her "age-inappropriate knowledge of sexual conduct. 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 tended to support the statements of the daughter and, viewed together, gave sufficient indicia of reliability to each child's out-of-court statements. Additionally, the same cousin stated that he had observed the father abuse the daughter.

The 4th Dept. did 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. Nonetheless, the 4th Dept. concluded that the error was harmless.

Sexual Abuse

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

The order of Family Court, Erie County, which adjudged that respondent abused the subject child and derivatively abused her four other children was affirmed..

The evidence presented by petitioner at the fact-finding hearing on all five petitions included, 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." The evidence, combined with the adverse inference that the court properly drew based upon the mother's failure to testify provided 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.

The findings of derivative abuse with respect to the four other children were supported by a preponderance of the evidence.

Physical Abuse

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

The order of Family Court, Bronx County which, after a hearing, found that respondent parents derivatively severely abused and neglected the subject children was affirmed.

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, ACS established by clear and convincing evidence that the parents severely abused that child . 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.

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 un rebutted 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.

ACS 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. 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.

Finally, the father's argument that ACS failed to establish which parent was ultimately responsible for their son's death was 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.

Physical Abuse

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

The order of Family Court, Erie County which adjudged that respondent Evangelista A. had abused the subject child was affirmed.

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.

Physical Abuse

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

The order of Family Court, Erie County, which adjudged that respondent abused the subject child and derivatively abused two other children were affirmed.

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. Petitioner further established that the mother and the father were the caretakers of the child at the time the injuries occurred.

The court's finding of derivative abuse based on evidence that the mother abused the child was supported by a preponderance of the evidence in the record. 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. . 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.

The mother's further contention 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 was based on speculation that favorable evidence could and should have been offered on her behalf. 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 was insufficient to establish deficient representation.

Dispositions of Art. 10's

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

The order of Family Court, Bronx County 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, was affirmed.

The appeal was 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.

Family Court was empowered to commence a dispositional hearing immediately upon completion of the fact-finding hearing. Furthermore, the father failed to preserve his argument that Family Court failed to conduct a proper dispositional hearing, as the record established that the father participated without objection in the informal dispositional proceeding. The father was not denied due process at the hearing, as he was offered an adequate opportunity to offer evidence.

Dispositions of Art. 10's

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

The order of Family Court, Oswego County which adjudged that respondent had neglected the subject child and placed the child with her maternal grandparents was affirmed.

The father of the child who is the subject of these proceedings, appeals from an order of disposition entered in a proceeding pursuant to FCA article 10 that made a finding of neglect against respondent mother and placed the child with her maternal grandparents. The father also appealed from an order dismissing his petition for custody of the child. On both appeals, the father contended that he was denied his constitutional right to raise his child without first being proven to be unfit.

Shortly before the child turned one year old, Oswego County 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 FCA 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. In an article 6 custody proceeding, 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 circumstances. If extraordinary circumstances are established, then the court may make an award of custody based on the best interests of the child.

Extraordinary circumstances existed here based on the father's abandonment of the child. 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. 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.

Dispositions of Art. 10's

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

The order of Family Court, Bronx County 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 was 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. 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.

Permanency Hearings

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

The appeals of the father from the orders of Family Court, Schoharie County which, among other things, modified the permanency plan of the subject children were dismissed as moot.

The 3rd Dept. found that while generally the appeal from a permanency order that changes the permanency goal is not made moot by a subsequent order, here the father's consent to a subsequent permanency order that reflected that respondent consented to the proposed permanency goal of placement for adoption for both children did make the appeal of the prior orders moot. The father consented to the change in the permanency goal and did not appeal that order or challenge the voluntariness of his consent.

Discontinuance of Article 10

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

The order of Family Court, Delaware County which, in a proceeding pursuant to Family Ct Act article 10, granted petitioner's motion to withdraw the petition.

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. 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 appealed.

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. Rather, petitioner's email amounted to an application for voluntary discontinuance. Whether 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.

However, Family Court erred in granting petitioner's application to dismiss the neglect petition without allowing any time for objections to be raised. 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, the 3rd Dept. remitted this matter to allow them the opportunity to do so.

Change of Placement

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

The appeal of an order of Family Court, Delaware County which, among other things, sua sponte changed the child's placement was dismissed as moot.

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 (the "friend") and expressed a desire for a relative in Nevada (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.

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 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. 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, the 3rd Dept. held that petitioner's appeal was moot, and dismissed the appeal.

Counsel

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

The order of Family Court, Orange County, which 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 was modified by deleting the provision thereof, in effect, finding that the father derivatively neglected the child Hannah A. A.

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 did 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. 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. 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. The deprivation of a party's fundamental right 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.

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, 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. 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. Nonetheless, under the particular circumstances of this case, the court's error does not warrant reversal and remittal. 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. 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.

TPR'S... AND MORE

POST TPR Visitation

VETOED

“VETO MESSAGE - No. 107

Senate Bill Number 6720, entitled:

‘ AN ACT to amend the family court act and the social services law, in relation to establishing procedures regarding orders of post-termination visitation and/or contact between a child and such child's parent’

This bill would amend the family court act and social services law to authorize the family court to order contact or visitation between a child and the child's birth parent(s) after the parental rights of such parent(s) have been involuntarily terminated. Notably, the bill would authorize such orders to be issued over the objection of an adoptive parent in some circumstances. A version of this bill was vetoed in 2021.

The decision to terminate parental rights is not undertaken lightly by the family court. In most cases, it follows prolonged efforts to reunite the child with the birth parent(s). When such efforts are ultimately unsuccessful, it is imperative that the child integrate into the adoptive home without continued interference by the court. Adoptive parents are in the best position to determine if and to what extent their child continue to have contact with their birth parents. This bill would inappropriately substitute the judgement of adoptive parents with that of the court.”

Reasonable Efforts

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

The order of Family Court, Tompkins County which, granted petitioner's motion to be relieved of its obligation to make reasonable efforts to reunite respondent with the subject child was affirmed.

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.

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 included the involuntary termination of her parental rights with respect to four of the child's siblings. Contrary to the mother's assertion, there is no temporal limitation on the terminations that may be considered on a motion pursuant to Family Ct Act § 1039-b. 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.

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. 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 her efforts to regain custody of the child.

Abandonment

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

The order of Family Court, Albany County which found the subject children to be abandoned, and terminated respondent's parental right was affirmed.

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 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.

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 the 3rd Dept. repeatedly has deemed to be insufficient to defeat a finding of abandonment.

Abandonment

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

The order of Family Court, Sullivan County which adjudicated the subject child to be abandoned, and terminated respondent's parental rights was affirmed.

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. The 3rd Dept. disagreed

Respondent 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.

Abandonment

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

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

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.

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 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.

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." . The father offered no proof to rebut petitioner's case and Family Court properly drew a negative inference on account of his failure to appear at the hearing.

Permanent Neglect

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

The order of Family Court, Kings County , 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 terminated the mother's parental rights and transferred guardianship and custody of the subject children to the petitioner for the purpose of adoption was affirmed.

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.

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.

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.

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.

Permanent Neglect

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

The orders of Family Court, Richmond County which terminated the mother's parental rights and transferred guardianship and custody of the subject children to the petitioner and ACS were affirmed.

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 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. 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.

Permanent Neglect

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

The order of Family Court, Westchester County which 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 was affirmed.

The father failed to appear at the fact-finding hearing, and his attorney remained mute at the hearing. After the fact-finding 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, 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.

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.

The determination of whether to relieve a party of a default is within the sound discretion of the Family Court. 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, 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.

To the extent that the father contended that his due process rights were violated, this contention was without merit. Although absent unusual justifiable circumstances, a parent's rights should not be terminated without his or her presence at the hearing, 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.

Permanent Neglect

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

The order of Family Court, Chemung County which granted petitioner's application to adjudicate the subject child to be permanently neglected, and terminated respondent's parental rights was reversed and remanded to Family Court for further proceedings.

The 3rd Dept. felt that that DSS did not make diligent efforts to reunify the mother and the child, and that on remand, the parties should explore the possibility of making a custody arrangement similar to that made concerning the mother's older child.

Permanent Neglect

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

The orders of Family Court, Kings County were affirmed.

In 2017, the petitioner commenced proceedings 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.

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. The record supported 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 with over a prolonged period of time.

The father was not denied his right to counsel or deprived of due process due to not being in court for the hearings due to his incarceration- "The child whose guardianship and custody is at stake also has a fundamental right to a prompt and permanent adjudication"

Permanent Neglect

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

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

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.

Despite these efforts, the record demonstrated that the mother failed to consistently attend her mental health therapy sessions and missed scheduled visits with the child without adequate explanation.

Permanent Neglect

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

The order of Family Court, Cortland County which granted petitioner's applications to adjudicate the subject child to be permanently neglected and terminated respondents' parental rights were affirmed.

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

The record disclosed that respondents missed at least half of the scheduled visitations with the child. 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.

The father also argued 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. Even if the court erred in admitting these records, it was harmless error.

Permanent Neglect

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

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

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.

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.

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.

Permanent Neglect

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

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

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.

Contrary to the father's contention, the Family Court providently exercised its discretion in denying his attorney's applications for adjournments. In light of 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.

The father's contention that he was deprived of the effective assistance of counsel was without merit. 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. In addition, counsel's failure to make a motion or argument that had little or no chance of success did not deprive the father of the effective assistance of counsel.

Permanent Neglect

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

The order of Family Court, Jefferson County which terminated the parental rights of respondent with respect to the subject children was affirmed.

Petitioner established that it made diligent efforts to encourage and strengthen the relationship between the mother and the children. The record demonstrated 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. The 4th Dept. rejected 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. 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.

The mother also contended 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. In any event, to the extent that the court erred in admitting the testimony of the mental health counselor, any error in the admission of that testimony was harmless because the result reached would have been the same even had such testimony been excluded.

Finally, the record provided ample support for the court's determination that terminating the mother's parental rights was in the best interests of the children.

Permanent Neglect

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

The order of disposition of the Family Court, Suffolk County which found 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 was affirmed.

Although generally an appeal from an order of disposition brings up for review an order of fact-finding, here, the father was foreclosed from raising issues related to the fact-finding phase of the proceeding, since a party cannot appeal from an order entered upon default. 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.

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. Giving due deference to the court's credibility findings, 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.

Permanent Neglect

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

The order of Family Court, Saratoga County 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 was affirmed.

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 of sexual abuse and the father eventually consented to a finding of neglect. 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 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 father first argued that petitioner failed to demonstrate that it made diligent efforts to reunite the father with the child. Specifically, the father contended 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 contended that, during the time he was incarcerated for a parole/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.

Contrary to the father's contention, the record revealed 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. The father did not progress in the services arranged for him by petitioner due to his own actions.

The record also supported 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 evinced 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 evinced 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 was 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.

Family Court did not err in terminating the father's parental rights rather than imposing a suspended judgment. Here, granting deference to Family Court's choice from among the dispositional alternatives, there was no basis to disturb the court's finding that the child's interests would be served by terminating the father's parental rights. 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. Thus, suspending judgment was not in the child's best interests.

Permanent Neglect

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

The order of Family Court, Essex County which adjudicated the subject child to be permanently neglected, and terminated respondent's parental rights was affirmed.

Respondent 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.

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.

Even accepting that the mother was making progress toward sobriety around the time that she successfully completed substance abuse treatment in July 2019, the 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. 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 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."

The child had 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 a suspended judgment would not have been appropriate.

Permanent Neglect

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

The order of Family Court, Orleans County, which terminated respondent's parental rights with respect to the subject child was affirmed.

Petitioner established by clear and convincing evidence that it exercised diligent efforts to encourage and strengthen the mother's relationship with the child. 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.

Despite petitioner's diligent efforts, the mother failed to plan for the child's future. There was no evidence that the mother had a realistic plan to provide an adequate and stable home for the child.

The mother failed to preserve for review her contention that Family Court should have granted a suspended judgment. 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.

TPR Mental Illness

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

The order of Family Court, Oswego County which transferred respondent's guardianship and custody rights over the subject child to petitioner was affirmed.

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, 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.

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" was 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. 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 conditions" 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. Additionally, respondent's counsel 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 was waived.

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) was not preserved for review.

Finally, the court didn't abuse its discretion in denying a request for an adjournment.

TPR Mental Illness

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

The order of Family Court, Orleans County which terminated the parental rights of respondent with respect to the subject child was affirmed.

Mother contended 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 review.

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.

Finally, with respect to the mother's contention that the court should have granted her a suspended judgment, there is no statutory provision providing for a suspended judgment when parental rights are terminated based on mental illness.

TPR Mental Illness

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

The order of Family Court, Bronx County, 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 for the purpose of adoption, was affirmed.

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.

The court properly weighed the competing expert and fact testimony in reaching its conclusion, and that conclusion was 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 OPWDD matters had 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.

Moreover, the court providently exercised its discretion in drawing a negative inference against the mother because she did not testify at the hearing. The court explained that none of the 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.

TPR Mental Illness

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

The order of Family Court, New York County, 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, was affirmed.

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.

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.

TPR Mental Illness

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

The order of Family Court, Erie County, which terminated respondent's parental rights with respect to the subject child was affirmed.

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.

The mother contended that she was denied meaningful representation by her attorney's failure to retain and call an expert psychologist to rebut the evidence of petitioner's expert psychologist. However, 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 was insufficient to establish deficient representation.

The 4th Dept. also rejected the mother's contention that Family Court abused its discretion in declining to hold a dispositional hearing.

TPR Mental Illness

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

The order of Family Court, Orange County, which 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 was affirmed.

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 was largely unpreserved for appellate review. 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. Under the circumstances, the evidence presented at the hearing established, by clear and convincing evidence, 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.

TPR Severe Abuse

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

The order of Family Court, Oswego County, which transferred respondents' guardianship and custody rights with respect to the subject children to petitioner was affirmed.

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 contended 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 were 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. 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 established that they severely abused and derivatively severely abused the children.

Family Court did not abuse its discretion in refusing to issue a suspended judgment. The record supported the court's determination that a suspended judgment was not in the children's best interests.

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TPR Dispositions

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

The order of Family Court, Westchester County which, upon the mother's failure to appear at a hearing, revoked an order of suspended judgment, terminated the mother's parental rights to the subject children, and freed the children for adoption was affirmed.

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 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 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. 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.

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. In light of 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.

TPR Dispositions

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

The order Family Court, Nassau County which, after a hearing, found that the father violated the terms and conditions of a suspended judgment, revoked the suspended judgment, and terminated the father's parental rights was affirmed.

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.

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 .

Furthermore, the best interests of the child would be served by terminating the father's parental rights and freeing the child for adoption. 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.

TPR Dispositions

Matter of Serina C., 219 AD3d 1215 (1st Dept., 2023)

The order of Family Court, Bronx County, 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 ACS was affirmed.

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.

TPR Dispositions

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

The order of Family Court, Monroe County which 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 was affirmed.

There was 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. The mother's contention that her due process rights were violated was unpreserved for review and in any event was without merit.

TPR Dispositions

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

The order of Family Court, Chenango County, which granted petitioner's application to revoke a suspended judgment and terminated respondents' parental rights was affirmed.

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.

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. 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. 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." 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 cross-examining the only witness and by delivering a cognizant closing statement seeking return of the child to the mother. Based on the foregoing, the 3rd Dept. concluded that the order was not entered on default against the mother and was appealable.

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 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. 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 was raised for the first time on appeal, was unpreserved for review.

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. 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.

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 supported 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.

TPR Dispositions

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

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

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.

To the extent that the mother appeared to challenge the permanent neglect finding, such finding was entered upon her consent and, in the absence of a motion to vacate her admission, was not properly before the 3rd Dept.

In arguing that Family Court should have granted her request for a suspended judgment, the mother hyperfixated on her successful completion of a 30-day inpatient substance abuse treatment program in late November 2021. While the completion of such inpatient treatment program was 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 inpatient treatment because she "got tired of being accused of using and . . . needed a break," and the record demonstrated that while she was there she minimally engaged in treating her substance abuse issues. Prior to going inpatient, the mother largely failed to attend Family Treatment Court (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 inpatient, the mother began regularly attending a sober support group, but she did not follow 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 inpatient, the mother attended only two counseling sessions; after leaving 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 inpatient, the mother had biweekly supervised visits and attended most of them. However, after her discharge from inpatient, the mother did not see the child in person, and only had one phone call with him. 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 acknowledging 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.

TPR Dispositions

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

The order of Family Court, New York County, which, after a hearing, 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, was affirmed.

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.

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. The child had lived with the same foster parent for most of her life, had bonded with the parent, and wished to be adopted.

TPR Dispositions

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

The order of Family Court, St. Lawrence County 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 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. 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 mother argued 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. The 3rd Dept. found that 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 demonstrated 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, although 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. 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 established that petitioner consulted with the children's counselor, who recommended separating the children based on safety concerns. Given these circumstances, it would not be in the children's best interests for them to be placed in the same pre-adoptive foster home, even if any subsequent adoptions would result in the children living separately.

TPR Dispositions

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

The order of Family Court, Erie County, which revoked a suspended judgment and terminated the parental rights of respondent with respect to the subject child was affirmed.

Although the father conceded that he failed to comply with the suspended judgment, which had been in effect for six months, he contended 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.

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.

Surrenders and Adoptions

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

The order of Family Court, Suffolk County which after a hearing, found that the father abandoned the subject child and that his consent to the adoption of the child was not required was affirmed.

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.

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. 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.

Surrenders and Adoptions

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

The appeal of the order of Family Court, Tompkins County which, in a proceeding pursuant to Domestic Relations Law article 7, granted a motion by the attorney for the children to dismiss the petition was affirmed.

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. 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 (see Domestic Relations Law § 112-b [3]).

Surrenders and Adoptions

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

The order of Family Court, Erie County which order denied respondent's motion to vacate a prior conditional judicial surrender order with respect to the subject child was affirmed.

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

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) was not preserved for our review inasmuch as the father did not raise that ground in support of his motions.

In his motion, 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 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 as informing a parent of an accurate, albeit unpleasant, event is not coercion. 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.

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.

Custody

Matter of Lashawn K. v Administration for Children's Services, 221 AD3d 431 (1st Dept., 2023)

The order of Family Court, New York County which, after a hearing, dismissed Lashawn K.'s petition for custody and visitation of the subject child with prejudice for lack of standing, was reversed, on the law 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]).

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." 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.

The 1st Dept. reversed and remanded the case to Family Court for a further hearing on whether petitioner can establish standing based on extraordinary circumstances.

MISCELLANEOUS
APPELLATE
DECISIONS

Fair Hearing

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)

The determination of OCFS denying petitioner's application to have a report maintained by the SCR amended to be unfounded and expunged was affirmed.

In March 2019, The SCR 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 Rockland County 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.

The 3rd Dept. concluded that the ALJ's findings that petitioner maltreated the child should be confirmed and that this information should be disclosed to inquiring agencies are supported by substantial evidence.

There was proof that petitioner had excessively consumed alcohol in the child's presence "to the extent that she had lost self-control," drove the child in a car shortly after consuming alcohol 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

Fair Hearing

Robles v. New York State Office of Children and Family Services, 220 AD3d 798 (2023)

The determination of OCFS, after a fair hearing, which denied the petitioner's application to amend an indicated report maintained by the State Central Register was confirmed.

The CPS 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.

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.

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.

Fair Hearing

Matter of McCoy v New York State Office of Children and Family Services, 2023 NY Slip Op 06252 AD3d (2nd Dept., 2023)

The appeal by the petitioner from an order of the Supreme Court, Richmond County was dismissed, as no appeal lies as of right from an order entered in a proceeding pursuant to CPLR article 78 and the Second Department declined to grant leave to appeal.

The petitioner had commenced a CPLR article 78 proceeding to review a determination of OCFS dated May 28, 2019, denying her application to amend and seal two indicated reports made to the SCR. In their answer, OCFS 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, the 2nd Dept. reviewed the issue in the interest of judicial economy.

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"

Here, OCFS correctly contended that the Court lacked personal jurisdiction over them. It is undisputed that the petitioner did not serve OCFS within 15 days of the expiration of the 4-month statute of limitations. 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. Accordingly, the proceeding must be dismissed insofar as asserted against OCFS for lack of personal jurisdiction.

The proceeding was dismissed insofar as asserted against ACS, as it was not a proper party to the Article 78 proceeding.

Ineffective Assistance of Counsel

Matter of Josaph M., 221 AD3d 1458 (4th Dept., 2023)

The order of Family Court, Monroe County which adjudged that respondent had neglected the subject child was affirmed.

Respondent appealed from an order that appointed a guardian ad litem for her pursuant to CPLR 1202. The 4th Dept. noted that shortly after issuing the order appointing the guardian ad litem, Family Court terminated the representation by the guardian ad litem, and therefore dismissed the appeal of that issue as moot.

Respondent contended 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. The 4th Dept. rejected that contention stating that Courts 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. Thus, the court, on its own initiative or upon the motion of any other party to the action, may appoint a guardian ad litem to appear on behalf of an adult incapable of adequately prosecuting or defending their rights. 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. Inasmuch as counsel's comments were relevant to the court's determination whether to appoint a guardian ad litem, respondent failed to demonstrate the absence of a strategic or other legitimate explanation for counsel's alleged shortcomings.

Adjournment

Matter of Aniyah J., 221 AD3d 1472 (4th Dept., 2023)

The order of Family Court, Onondaga County which terminated respondent's parental rights with respect to the subject child was affirmed.

The 4th Dept. rejected the mother's contention that Family Court erred in refusing to adjourn the fact-finding and dispositional hearing. 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, there was no abuse of discretion in the court's refusal to adjourn the hearing.

The mother failed to preserve for 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. Although the mother's initial assigned counsel filed her own motion to be reinstated, the record did 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.

The End

Thank You!