

Nuts and Bolts of Abuse Cases

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The Weight of the Trial Court's Decision

We accord "great weight and deference to the court's determinations, including its drawing of inferences and assessment of credibility, and we will not disturb those determinations where, as here, they are supported by the record. *Matter of Dorika S.* 2023 N.Y. App. Div. LEXIS 6690 (4th Dep't)

The Family Court's findings with respect to credibility are entitled to great weight *Matter of Destiny R. (Rene G.)*, 212 AD3d 629, 630 (2nd Dept 2023)

In assessing whether petitioner has demonstrated permanent neglect, we accord great weight to the factual findings and credibility determinations of Family Court, and its findings will not be disturbed unless they lack a sound and substantial basis in the record. *Matter of Ryan J.* 2023 NY Slip Op 06567 (3rd Dep't 2023)
Matter of Joshua R. [Kimberly R.], 216 AD3d 1219(3rd Dept 2023)

While we ordinarily rely on the fact-finder's assessment of credibility and generally give it great deference, we are not bound to do so where, as here, the court failed to allow a full record to be developed, and to enforce directives which would have guarded the integrity of the record. *Matter of Fatima M.*, 16 AD3d 263, 273 (1st Dept 2005)





What is Abuse?

Inflicts or allows to be inflicted such physical injury

Creates or allows to be created substantial risk of physical injury


Commits or allows to be committed a sexual offense as defined in the penal code



Person Legally Responsible

“... includes the child’s custodian, guardian any other person responsible for the child’s care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child.”

Family Court Act 1012(g)



Matter of Marjorie P., 2023 NY Slip Op 07534 (2d Dept 11/15/23)

“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.... The 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 Yasim P. with commands or the promise of gifts.”

Nuts & Bolts PLR Cases

Matter of Trenasia J. [Frank J.], 25 NY3d at 1004 (Court of Appeals 2015)

"Determining whether a particular person has acted as the functional equivalent of a parent is a discretionary, fact-intensive inquiry which will vary according to the particular circumstances of each case. Factors such as the frequency and nature of the contact between the child and respondent, the nature and extent of the control exercised by the respondent over the child's environment, the duration of the respondent's contact with the child, and the respondent's relationship to the child's parent(s) are some of the variables which should be considered and weighed by a court"

In re Yolanda D., 88 NY2d 790, 792 (Court of Appeals 1996)

N.Y. Fam. Ct. Act § 1012 embody legislative recognition of the reality that parenting functions are not always performed by a parent, but may be discharged by other persons, including custodians, guardians and paramours, who perform care taking duties commonly associated with parents

Physical Abuse

Family Court Act 1012 (e) (i) and (ii)

What is Physical Abuse?

Physical injury by other than accidental means which would cause or is likely to cause:

Substantial risk of death

Serious or protracted disfigurement

Protracted impairment of physical or emotional health

Protracted loss or impairment of the function of any bodily organ

Examples of Inflicts or Allows to be Inflicted

Broken Bones

Burns

Blunt Force
Trauma

Cutting/Stabbing

Abusive Head
Trauma

Choking

Examples of Creates or Allows to be Created

- Munchausen by Proxy
- Attempting to kill the other parent when the child is nearby
- Inadequate Medical Care
- Sending child to rob a bank
- Holding child over balcony

Res Ipsa

“the thing speaks for itself”

“proof of the injuries sustained by a child or of the condition of a child of such a nature that would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person legally responsible for the care of such child shall be prima facie evidence of child abuse or neglect, as the case may be, of the parent or other person legally responsible...”

Family Court Act 1046(a)(ii)

The application of the statute....permits a finding of abuse or neglect based upon evidence of an injury to a child which would ordinarily not occur absent acts or omissions of the responsible caretaker.

*Nuts & Bolts Case: *In re Philip M.*, 82 NY2d 238, 244 (Court of Appeals 1993)

UNEXPLAINED INJURIES

plus

TIMELINE

=

the "Presumption of
Culpability"

How do you show
that at trial?

Unexplained injuries by themselves can be prima facie evidence of abuse. *Tania J.* 147 AD 2d 252 (1st Dep't 1989)

Establish the respondent was the caretaker during the time the injury occurred. *Leonord P.*, 2023 NY Slip Op 06687

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

Matter of Johlyanne F., 2023 NY Slip Op 05905 (4th
Dept. 11/17/23)

“Family Court made the inference that the child had sustained the burn injuries earlier that day, when she was in the mother’s care.”

“We accord great weight and deference to the court’s determinations, ‘including its drawing of inferences and assessment of credibility.’”

Res Ipsa Defense

Common

Other People Present
Developmental Abilities
Fragility
Accidents

Does the evidence establish that during the time-period when the child was injured, the child was *not* in respondent's care?

Does the evidence establish there was an accident?

Philip M., 82 NY2d 238, 240 (Court of Appeals 1993)

Establish that the injuries took place when the child was in the *exclusive* care of someone other than herself

Matter of Davion E. 139 AD3d 944 (2nd Dept 2016)

Also See Matter of Erica H.-J. (Eric J.), 216 AD3d 951, 954 (2nd Dept 2023)

Respondent blamed a dog for a child's injury – court said that “even crediting” the testimony about the incident with the dog, there were other injuries.

Matter of Travis S. 203 AD3d 478 (1st Dept 2022)



ABUSE FINDING AGAINST ONE PARENT DOES NOT PRECLUDE FINDING AGAINST OTHER PARENT IN RES IPSA CASE

Matter of Adonis M.C.


212 AD3d 452 (1st Dept 2023)

“[T]he Family Court Act permits findings of parental culpability against more than one caretaker where, as here, multiple individuals had access to the child in the period when the injury occurred.”

Expert Testimony: CPLR 3101(d)

1. Experts.

(i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.



State of New Jersey v. Nieves, 2023 WL 5947996

"The evidence supports the finding that there is a real dispute in the larger medical and scientific community about the validity of shaking only SBS/AHT theory, despite its seeming acceptance in the pediatric medical community."

" In determining whether ABT/SBS is generally accepted within the medical and scientific community requires evaluation of two considerations: (1) whether the theory is generally accepted by the biomechanical community and supported by biomechanical testing and (2) whether the theory is generally accepted by the pediatric medical community and supported by clinical data connecting the constellation of symptoms with SBS/AHT."

What does New York think??

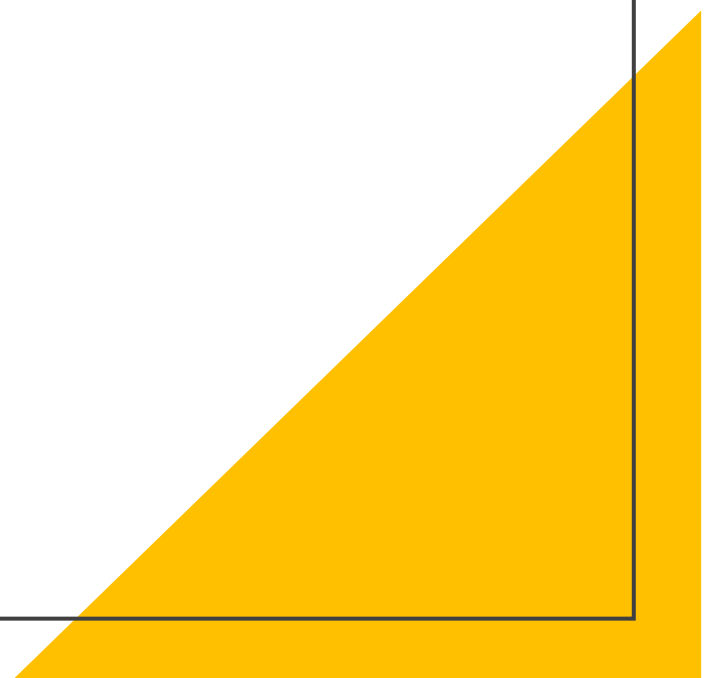
"The New York courts have specifically held that SBS/AHT is generally accepted in the scientific community. Additionally, SBS/AHT has been consistently recognized by New York courts as an accepted scientific theory, without explicit *Frye* analysis."

People v. Flores-Estrada, 55 Misc.3d
1015 (Kings Cty Sup. Ct. 2017)

Additional NY cases

- *People v Yates*, 290 AD2d 888, 736 NYS2d 798 (3rd Dept 2002)
- *People v Sulayao*, 58 AD3d 769, 871 NYS2d 727 (2nd Dept 2009),
- *People v Thomas*, 46 Misc 3d 945, 998 NYS2d 590 (Westchester County Ct 2014)
- *People v Hershey*, 85 AD3d 1661, 925 NYS2d 314 (4th Dept 2011),
- *People v Kendall*, 254 AD2d 809, 678 NYS2d 182 (4th Dept 1998)
- *People v Van Norstrand*, 85 NY2d 131, 647 NE2d 1275, 623 NYS2d 767 (1995)
- *People v Wong*, 81 NY2d 600, 619 NE2d 377, 601 NYS2d 440 (1993);
- *Matter of Joaquin Enrique C. [Anna Julia F.]*, 79 AD3d 548, 912 NYS2d 219 (1st Dept 2010);
- *Matter of Lou R.*, 131 Misc 2d 138, 499 NYS2d 846 (Fam Ct, Onondaga County 1986)
- *Matter of Damien S.*, 45 AD3d 1384, 844 NYS2d 790 (4th Dept 2007)
- *Matter of Seamus K.*, 33 AD3d 1030, 822 NYS2d 168 (3d Dept 2006);
- *Matter of Antoine J.*, 185 AD2d 925, 587 NYS2d 13 (2nd Dept 1992)

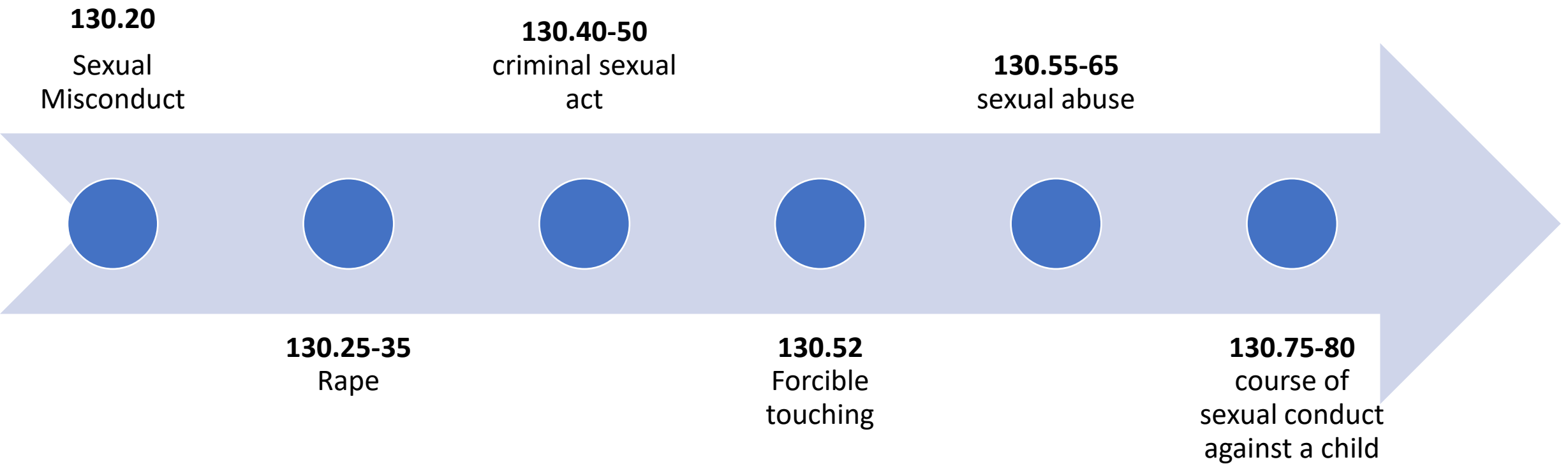
Sex Abuse



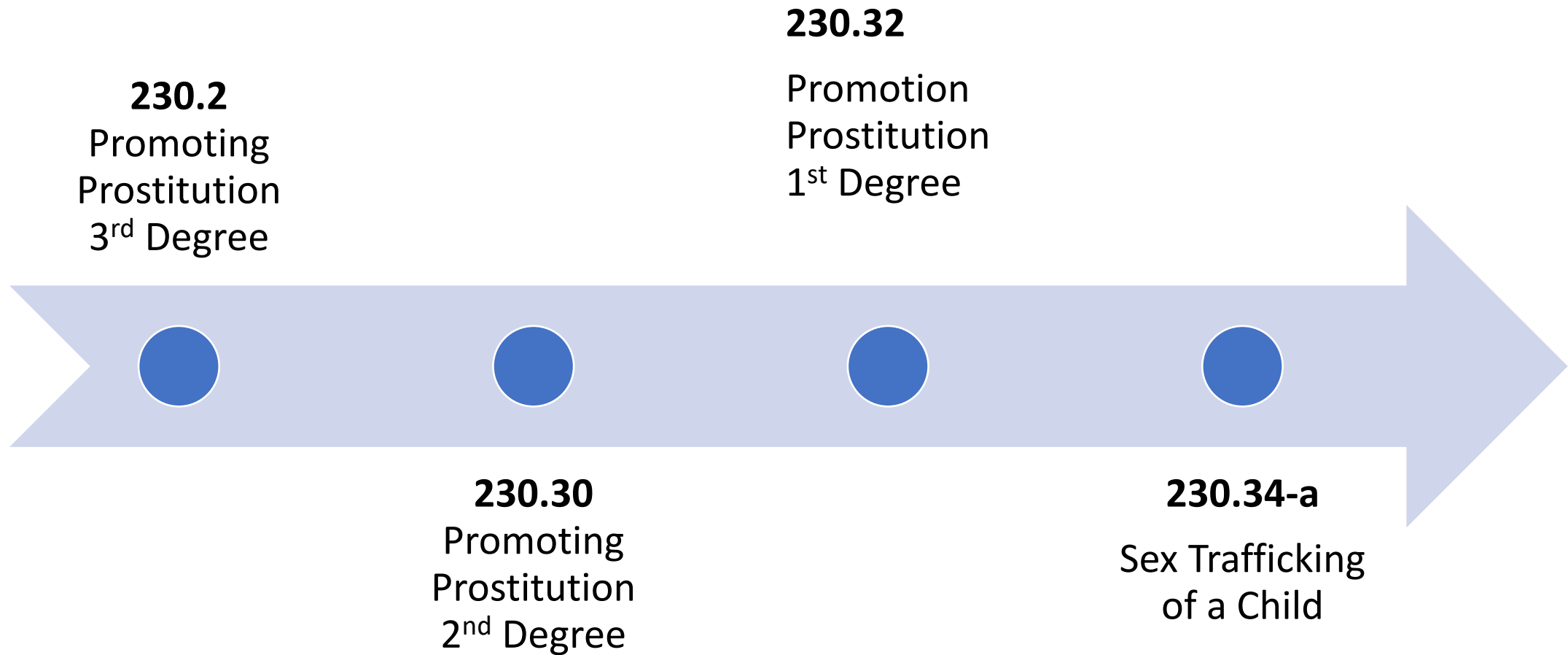
Family Court Act 1012(e)(iii)

- (A) commits or allows to be committed an offense against such child defined in Article 130 of the Penal Code;
- (B) allows, permits or encourages such child to engage in any act described in sections 230.25, 230.30, 230.32, 230.34-a of the penal law;
- (C) commits any of the acts described in sections 255.25, 255.26 and 255.27 of the penal law;
- (D) allows such child to engage in acts or conduct described in article two hundred sixty-three of the penal law; or
- (E) permits or encourages such child to engage in any act or commits or allows in any act or commits or allows to be committed against such child any offense that would render such child either the victim of sex trafficking...

Criminal Law Sections: Sex Abuse



Criminal Law Sections: Sex Abuse



Criminal Law Sections: Sex Abuse

255.25

Incest in the Third
Degree

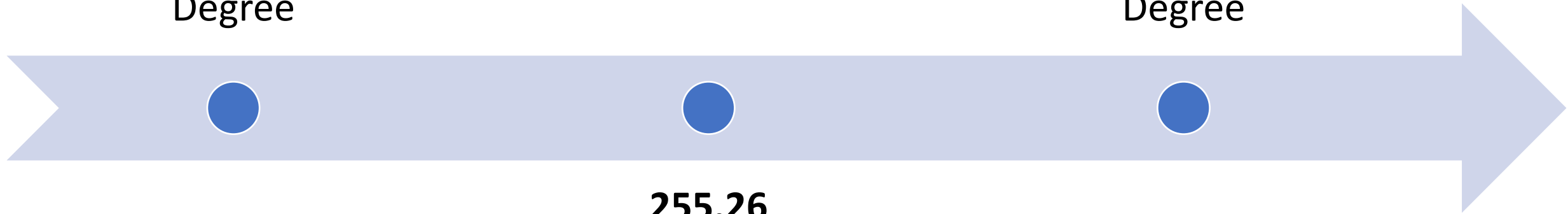


255.26

Incest in the Second
Degree

255.27

Incest in the First
Degree



Criminal Law Sections: Sex Abuse

263.05

Use of a child
in a sexual
performance

263.11

Possessing an
obscene
sexual
performance
by a child

263.16

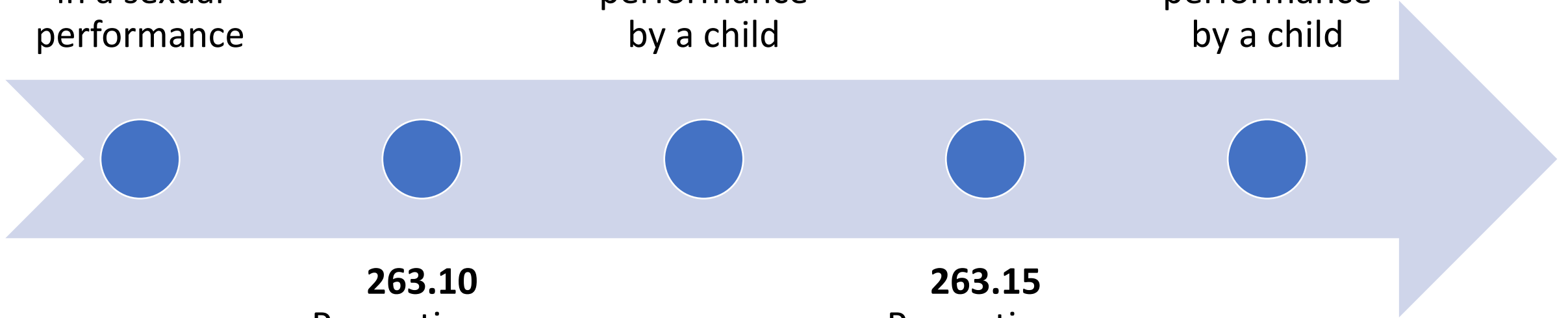
Possessing a
sexual
performance
by a child


263.10

Promotion an
obscene
sexual
performance
by a child

263.15

Promoting a
sexual
performance
by a child





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

"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'... provides a sound and substantial basis to support the finding that the mother abused the eldest child when she failed to sufficiently act to protect the eldest child when that child reported the sexual abuse."

Sexual gratification

What do you need to prove?

What is a defense?


Yoshi S.

205 A.D.3d 1028 (2nd Dep't 2022)

- Intent to receive sexual gratification "may be inferred from the nature of the acts committed and the circumstances in which they occurred"
- In this case the defense included testimony from religious expert about whether the respondent's touching of the child's genital area was "an expression of love" rather than for "sexual gratification". The trial court found that DSS did prove gratification by a preponderance.

Corroboration





Matter of Nicole V., 71 N.Y.2d 112 (1987)

**Nuts & Bolts Case for Using Experts to Corroborate Sexual Abuse*

Expert testimony by the child's therapist indicating that the child's behavior was symptomatic of a sexually abused child is sufficient to corroborate the child's out-of-court statements.

The expert's relationship to the child does not disqualify her from giving opinion evidence and any bias could be addressed on cross examination.

Corroboration, derivative finding on sex abuse

Matter of Anthony M.-B.

208 A.D. 3d 1327 (2nd Dept 9/28/22)

Court found child's statements were sufficiently corroborated by mother's testimony "confirming certain events" AND makes a derivative finding of sex abuse based on "such an impaired level of parental judgment as to create a substantial risk of harm for any child in the father's care".

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

"Here, the daughter's out-of-court statements were sufficiently corroborated by her 'age-inappropriate knowledge of sexual conduct."

Evidence: Validation/Repetition

Matter of Brianna E. (Jeremiah H.), 200 AD3d 1735 (4th Dep't 2021)

Headline: Repetition. Use of a psychologist to validate out of court statements.

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Here, the out-of-court statements of the child were sufficiently corroborated by, inter alia, the testimony of petitioner's validation expert, a psychologist who evaluated the child and opined that the child's consistent statements made to the psychologist, an investigator, and a therapist were credible and consistent with those of a child who has been abused.

Repetition is not enough for corroboration, but consistence of the child's out of court statements describing conduct enhances reliability of the out of court statements.

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


Children's statements cross-corroborated each other as they each described a similar pattern of sexual abuse by the stepfather, they both described instances of abuse in their bedroom and on the parents' bed where the family would gather.

Matter of Nyasia C., 137 A.D.3d 781 (2d Dept. 2016)

"[T]he testimony of Christine J.-L. regarding her observations of Eddy G. and Nyasia C. in bed together was sufficient to corroborate the child's statements regarding the acts of abuse."


"Contrary to the Family Court's determination, the inconsistencies in Christine J.-L.'s accounts of her observations did not render her testimony unworthy of belief."

Severe or Repeated Abuse




SSL 384-b (8)(a) - Severe Abuse

1. Abuse as a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life; or
 2. Abuse under section 1012(e)(iii), specifically penal sections 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65, 130.67, 130.75, 130.80, 130.95, 130.96; or
 3. Parent has been convicted of murder in the 1st, 2nd, manslaughter in 1st, 2nd, or has been convicted of attempt of any of these crimes ; parent has been convicted of criminal solicitation, conspiracy or criminal facilitation; convicted of assault in the 1st, 2nd, or aggravated assault of a person less than 11 years old. Victim or intended victim of these crimes was a child or another parent of the child; and
 4. Agency has made diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate the respondent, when not detrimental to the best interests of the child, and such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future.
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SSL 384-b (8)(b) Repeated abuse

1. Child found to be abused under FCA section 1012(e)(i) or 1012(e)(iii) provided they committed or knowingly allowed to be committed a felony sex offense defined in Article 130 of the Penal Law; AND
 2. Child or another child had been previously found to be an abused child of the parent or PLR within the five years immediately preceding the initiation of proceeding where abuse is found under 1012(i) or (iii); AND
 3. Agency has made diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate the respondent, when not detrimental to the best interests of the child, and such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future.
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FCA 1039 (b) - Termination of Reasonable Efforts

Reasonable efforts to return a child safely to his or her home shall not be required when:

1. Parent has subjected the child to aggravated circumstances;
 2. Parent has been convicted of murder in the 1st or 2nd degree or manslaughter in the 1st or 2nd degree and the victim was another child or parent;
 3. Parent has been convicted of attempting the above crimes or has been convicted of criminal solicitation, conspiracy or criminal facilitation;
 4. Parent has been convicted of assault in the 1st or 2nd degree, or aggravated assault upon a person less than 11 years old resulting in serious physical injury to the child or another child of the parent;
 5. Parental rights of the parent to a sibling of such child have been involuntarily terminated.
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In re Marino S., 100 N.Y.2d 361 (2003)
dispense with reasonable efforts

“The effect of a finding of aggravated circumstances under the Family Court Act – like the effect of a finding of severe abuse under the Social Services Law (severe abuse itself constitutes an aggravated circumstance) – is to dispense with the requirement that an agency responsible for having placed the children in foster care or seeking to terminate parental rights exercise diligent or reasonable efforts to reunite the respondent with the children.”



In re Marino S., 100 N.Y.2d 361 (2003)

Nuts & Bolts Cases for Derivative Severe Abuse

“Derivative findings of severe abuse may be ‘predicated upon the common understanding that a parent whose judgment and impulse control are so defective as to harm one child in his or her care is likely to harm others as well.’”

“It would be unthinkable to interpret the Social Services Law so that a derivative finding can be made when a parent assaults a sibling, but not when the parent rapes a sibling or seriously injures her under circumstances evincing a depraved indifference to her life.”

Derivative

- Afton C.
- Matter of C.S., 2023 NY Slip Op 05048 – derivative severe abuse and neglect (emotional harm)

Matter of Afton C., 17 N.Y.3d 1 (2011)


"Even where, as here, the offenders' crimes involve victims younger than 18, that alone does not demonstrate that his actions 'inflicted harm, or a substantial risk thereof' to his children, or that the children's 'physical, mental or emotional condition...[was] in imminent danger of becoming impaired' (Family Court Act 1012 (f)(l)(B))."

Compare to

- *Matter of Cashmere S. (Rinell S.)*, 125 A.D.3d 543 (1st Dep't) The father's failure to accept responsibility for his sex offenses poses an imminent risk to the subject child. father failed to demonstrate that his proclivity for abusing children has changed
- *Matter of Iris G. (Angel G.)*, 144 AD3d 908 (2nd Dept 2016)
- *Matter of Lillian SS. (Brian SS.)*, 146 AD3d 1088 (3d Dept 2017)

Matter of Isabella E., 195 A.D.3d 1096 (3d
Dept 2021)

“The evidence establishes that the abuse of his friends’ children was repeated, there were multiple victims, there were other children in the house when the abuse occurred, he lured one of the children into the basement using kittens, and he stated to one of the victims that they could ‘play [] mommy and daddy’ – all of which demonstrates an impaired level of parental judgment as to create a substantial risk of harm to his child.”



Matter of C.S., 2023 NY Slip Op 05048
(1st Dept. 10/5/23)

“The parents’ treatment of the younger sibling, in addition to the unrebutted evidence that the subject children had never received medical treatment, established that the subject children faced a severe risk of likewise being denied essential medical care.”

FUNDAMENTAL DEFECTS

Matter of Raven B. (Calvin B.), 185 AD3d 583 (2nd Dept 2020) “the absence of an abuse finding of a target child based on a finding that a Respondent is not a PLR does not preclude the court from a finding of derivative abuse as to the Respondent’s own children.”

Matter of Isabella E. 195 AD3d 1096 (3rd Dept 2021). “the abuse of his friends’ children was repeated, there were multiple victims, there were other children in the house when the abuse occurred, he lured one of the children into the basement using kittens, and he stated to one of the victims that they could ‘play[]mommy and daddy’ – all of which demonstrates an impaired level of parental judgment as to create a substantial risk of harm to his child.”

Matter of Khadjiah S. 186 A.D.3d 1223 (2nd Dep’t 2020) – “The overwhelming evidence that the mother knew of and failed to protect 2 of her now adult daughters from years of sexual abuse at the hands of their stepfather beginning when they were in their early teens and lasting until their adulthood demonstrated ‘a fundamental defect in the [mother’s] understanding of the duties of parenthood.’”

In re Carrie R., 156 A.D.2d 756 (3rd Dep’t 1989): Appropriate test in deciding whether parent allowed child to be abused within meaning of CLS Family Ct Act § 1012(e)(i) is whether reasonable and prudent parent would have acted, or not acted, under circumstances.

Dispositional Issues



Matter of Tina Marie C., 66 A.D.3d 1011 (2nd Dept 2009)

“Considering, among other things, the fact that the Family Court may extend the period of supervision of the father for a second time if he did not successfully complete the sex offenders treatment program by September 20, 2009, the Family Court properly decided to extend that period only until that date.”
