SELECTED CHILD WELFARE DECISIONS

JANUARY 2025 – JUNE 2025

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Introduction

These cases represent the child welfare related cases that we found between January 1, 2025 and June 30, 2025 from our review of the Slip Opinions for the Court of Appeals and Appellate Division posted on the OCA website. There are some trial court level cases included at the end of the compilation.

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

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

The materials have the full cases as found in the NY Reports, except for the appearances of counsel.

Because this program covers cases reported up to June 30, and the program is given on July 22, 2025, the official citations have not been issued for some of the cases. If you need the official citation, please check the court website for those, or your legal research website (Westlaw, LEXIS, etc.)

Article 10 Temporary Orders

Matter of Destiny G., 234 AD3d 524 (1st Dept., 2025)

Order, Family Court, Bronx County (Cynthia Lopez, J.), entered on or about January 22, 2024, which, after a hearing under Family Court Act § 1028, denied respondent father's application to return the subject children to his care pending the fact-finding hearing, unanimously reversed, on the facts and in the exercise of discretion, without costs, and the application granted.

The record lacks a sound and substantial basis for concluding that the identified risks to the children of remaining in the father's care during the pendency of this proceeding could not be mitigated with reasonable efforts (Family Court Act § 1028[b]; *Nicholson v Scoppetta*, 3 NY3d 357, 378 [2004]). Although the lack of direct overnight supervision, even with family living in other apartments in the building, posed some risk for the then-10-year-old children, Family Court should have weighed the children's maturity level and the father's willingness to make arrangements for the children's overnight supervision in order for them to return to his care (*see Matter of Emmanuela B. [Jean E.B.]*, 147 AD3d 935, 935 [2d Dept 2017]). Respondent agency also did not establish the regularity or the severity of the father's use of a belt to warrant the children's continued removal, and did not identify any specific or recent incident to support the rejection of the father's testimony that he had never left a mark in disciplining the children. Nor did Family Court appear to weigh the father's willingness to stop using physical punishment so that the children could be returned to his care (*see Matter of Peter G.*, 6 AD3d 201, 203 [1st Dept 2004]).

With respect to the condition of the home, the Family Court acknowledged that the state of the apartment was improved, which showed the father was willing to eliminate or had eliminated the identified risks (*see Matter of Saad A.*, 167 AD3d 596, 598 [2d Dept 2018]).

Matter of Jurenny M.-J., 235 AD3d 980 (2nd Dept., 2025)

In related proceedings pursuant to Family Court Act article 10, the petitioner appeals from an order of the Family Court, Putnam County (Joseph J. Spofford, Jr., J.), dated April 5, 2024. The order, after a hearing, granted the mother's application pursuant to Family Court Act § 1028 for the return of the subject children to her custody. By decision

and order on motion dated May 24, 2024, this Court granted the petitioner's motion to stay enforcement of the order and continue the remand of the subject children to care and custody of the petitioner pending hearing and determination of the appeal.

ORDERED that the order is reversed, on the law and the facts, without costs or disbursements, and the mother's application pursuant to Family Court Act § 1028 for the return of the subject children to her custody is denied.

In November 2023, the subject children, Jacob R.-M. and Jurenny M.-J., were removed from the mother's custody after the petitioner received a report that the mother and the children were seen together with the father of Jurenny M.-J. in violation of an order of protection directing the father to stay away from the children. In February 2024, the children were returned to the mother's custody on the conditions that, inter alia, she enforce the order of protection against the father and comply with the petitioner's service requirements.

In March 2024, the petitioner commenced these proceedings pursuant to Family Court Act article 10, alleging that the mother neglected the children by, inter alia, allowing them to have contact with the father in violation of the order of protection, and the children were temporarily removed from the mother's custody. Thereafter, the mother made an application pursuant to Family [*2]Court Act § 1028 for the return of the children to her custody. After a hearing, the Family Court granted the mother's application. The petitioner appeals.

A parent's application pursuant to Family Court Act § 1028 for the return of a child who has been temporarily removed "shall" be granted unless the Family Court finds that "the return presents an imminent risk to the child's life or health" (*id.* § 1028[a]; *see Matter of Nyomi P. [Imeisha P.]*, 224 AD3d 906, 906; *Matter of Mikayla T. [Jyranda R.]*, 199 AD3d 1009, 1010). The court's determination will not be disturbed if it is supported by a sound and substantial basis in the record (*see Matter of Junny B. [Homere B.]*, 200 AD3d 687, 688; *Matter of Zaniyah R.-T. [Wanda R.]*, 196 AD3d 584, 585). In making its determination, the court "must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal" and "must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests" (*Nicholson v Scoppetta*, 3 NY3d 357, 378; *see Matter of Nyomi P. [Imeisha P.]*, 224 AD3d at 907). The child protective services agency bears the burden of establishing that the child would be at imminent risk and therefore should remain in its custody (*see Matter of Skkyy M.R. [Justin R.—Desanta C.]*, 206 AD3d 660, 661; *Matter of Chase P. [Maureen Q.]*, 199 AD3d 807, 809).

Here, the Family Court's determination granting the mother's application pursuant to Family Court Act § 1028 for the return of the children to her custody lacks a sound and substantial basis in the record (*see Matter of Audrey L. [Marina L.]*, 147 AD3d 838, 840). The petitioner demonstrated that the return of the children to the mother would present an imminent risk to the children. Testimony adduced at the hearing established that the mother failed to address or acknowledge the circumstances that led to the removal of the children, failed to prevent the father from having contact with the children despite the existence of an order of protection, was emotionally unstable, and failed to engage in mental health counseling and other preventative services (*see Matter of Treasure H. [Nicole H.]*, 195 AD3d 715, 716; *Matter of Julissia B. [Navasia J.]*, 128 AD3d 690, 691; *cf. Matter of Melody M. [Cierra B.]*, 176 AD3d 942, 943). The evidence further established that this risk could not be mitigated by reasonable efforts to avoid removal, as the mother has failed to comply with any order issued in an attempt to mitigate that risk (*see Matter of Amira C. [Amanda M.J.]*, 232 AD3d 599, 601; *Matter of Junny B. [Homere B.]*, 200 AD3d at 688).

Accordingly, the mother's application pursuant to Family Court Act § 1028 for the return of the children to her custody should have been denied.

Matter of Daniel P., 236 AD3d 796 (2nd Dept. 2025)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from an order of the Family Court, Queens County (Monica D. Shulman, J.), dated January 25, 2024. The order, insofar as appealed from, upon releasing the child Yehuda S. to the mother pending the determination of the proceedings, granted that branch of the petitioner's application which was to impose certain conditions upon the mother.

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

After removing the subject children from the mother on an emergency basis pursuant to Family Court Act § 1024, the petitioner commenced these related proceedings pursuant to Family Court Act article 10. The petitioner alleged, inter alia, that the mother neglected her older child, Daniel P., by failing to provide him with medical and mental health care and that she derivatively neglected her younger child, Yehuda S. (hereinafter the younger child). Thereafter, the petitioner made an application, among other things, to release the younger child to the mother pending the determination of the proceedings, with certain conditions, including requiring the mother to cooperate with

the petitioner by allowing announced and unannounced visits to her home and by executing HIPAA-compliant releases authorizing disclosure to the petitioner of certain medical records concerning the younger child. By order dated January 25, 2024, the Family Court, inter alia, granted that branch of the petitioner's application. The mother appeals, challenging the conditions the court imposed upon her.

"Where . . . the Family Court issue[s] an order temporarily releasing a child who is the subject of a neglect proceeding to a parent pending a final order of disposition, the order may include a direction for the parent to cooperate in making the child available for . . . visits by the child protective agency, including visits in the home," among other conditions that may serve the child's best interests (*Matter of Lexis B. [Natalia B.]*, 206 AD3d 725, 726 [citation, alteration, and internal quotation marks omitted]; *see Matter of Dazinee F. [Tashae T.]*, 223 AD3d 664, 664-665; *Matter of Baby Boy D. [Adanna C.]*, 127 AD3d 1079, 1080-1081). Contrary to the contentions of the mother and the attorney for the younger child, the Family Court, upon releasing the younger child to the mother pending the determination of the proceedings, providently exercised its discretion in imposing the challenged conditions upon the mother (*see Nicholson v Scoppetta*, 3 NY3d 357, 378; *Matter of Dazinee F. [Tashae T.]*, 223 AD3d at 664-665; *cf. Matter of E.E. [Dania R.]*, 225 AD3d 457, 457).

The contentions of the mother and the attorney for the younger child that the petitions failed to state a cause of action are unpreserved for appellate review, since they "failed to move to dismiss the petition[s] or" to otherwise "raise the matter with the Family Court" (*Matter of Deegan v Deegan*, 35 AD3d 736, 737; *see Matter of Christopher S. [Elizabeth S.]*, 155 AD3d 630, 631).

Evidentiary Rulings in Article 10 Proceedings

Matter of M.G., 234 AD3d 575 (1st Dept., 2025)

Order of fact-finding and disposition (one paper), Family Court, New York County (Valerie A. Pels, J.), entered on or about April 3, 2024, which, after a hearing, determined that appellant father neglected the subject child, unanimously affirmed, without costs.

The mother's fact-finding testimony, which Family Court credited, was sufficient to establish that the child was subject to actual or imminent danger of injury or impairment to his emotional and mental condition as a result of his exposure to domestic violence between the father and the mother (*see Matter of O'Ryan Elizah H. [Kairo E.]*, 171 AD3d 429 [1st Dept 2019]). The mother testified that during an incident in 2021, and on July 9, 2023, the father choked her while the child was present. The fact that the domestic violence occurred in close proximity to the child, who was approximately 10 feet away in a bedroom during the July 2023 incident, permits an inference of impairment or imminent danger of impairment even in the absence of evidence that he was aware of it or emotionally affected by it (*see Matter of Athena M. [Manuel M.T.]*, 190 AD3d 644, 644 [1st Dept 2021]; *Matter of Isabella S. [Robert T.]*, 154 AD3d 606, 606-607 [1st Dept 2017]).

The mother's testimony also demonstrated that the father engaged in a pattern of verbally abusing her while the child was present, which placed him in imminent risk of emotional and physical impairment (*see Matter of Angie G. [Jose D.G.]*, 111 AD3d 404, 404-405 [1st Dept 2013]; *Matter of Edward C.L.*, 292 AD2d 282, 283 [1st Dept 2002]). Contrary to the father's contention, the hearsay rule does not apply to the child's out-of-court statements telling him to "stop saying that." ACS did not offer those statements for their truth but for the legitimate, nonhearsay purpose of showing that the child understood and reacted to his father's demeaning comments to his mother (*see People v Becoats*, 17 NY3d 643, 655 [2011], *cert denied* 566 US 964 [2012]; *People v Cromwell*, 71 AD3d 414, 415 [1st Dept 2010], *lv denied* 15 NY3d 803 [2010]).

Family Court properly drew the strongest negative inference from the father's failure to testify at the fact-finding hearing (*see Matter of Zelda McM. [Patrick L.-O. McM.]*, 154 AD3d 573, 574 [1st Dept 2017]). The father's out-of-court statements, as testified to by the mother, were admissible as an admission against interest of a party, and the court properly inferred that he implicitly admitted that those statements were true (*see Matter of Adonis H. [Enerfry H.]*, 198 AD3d 478, 479 [1st Dept 2021]). There is no basis for disturbing the court's determination that the mother's testimony was credible (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of Elijah C.*, 49 AD3d 340 [1st Dept 2008]).

Matter of M. H., AD3d 2025 NY Slip Op 03280 (1st Dept., 2025)

Order of fact-finding, Family Court, Bronx County (E. Grace Park, J.), entered on or about March 15, 2024, which determined, after a hearing, that respondent mother and respondent Ricardo D., a person legally responsible, neglected the subject children, unanimously affirmed, without costs.

The findings of neglect are supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]) and there is no basis to disturb the court's credibility determinations. Family Court providently admitted the agency case notes into evidence under the business records exception to the hearsay rules (*see* CPLR 4518[a]), after the caseworker's supervisor, who was familiar with the agency's record-keeping practices, laid a proper foundation (*see Matter of K.M. [O.M.]*, 228 AD3d 406 [1st Dept 2024]). The court invited all counsel to make further inquiry, but they declined to do so.

The "children's consistent, cross-corroborating accounts" given separately to the caseworker were properly admitted and support the court's finding that the mother neglected them by using excessive corporal punishment (*Matter of B. V. [Jacquella W.]*, 220 AD3d 605, 606 [1st Dept 2023]; *see Matter of Antonio S. [Antonio S., Sr.],* 154 AD3d 420, 420 [1st Dept 2017]). Two of the children stated that the mother struck them with a belt, and two of the children stated that she "whooped" the four-year-old child with a spatula, which constitutes excessive corporal punishment (*see Matter of D.P. [L.C.]*, 227 AD3d 549, 550 [1st Dept 2024]; *Matter of Paige [Kodjo T.],* 189 AD3d 563, 564 [1st Dept 2020]).

Respondent Ricardo is a person legally responsible for the children. The children's cross-corroborating accounts showed that**,** after the mother picked them up for a visit, she brought them to Ricardo's car, where they saw he had a gun and called their father. The children reported that, when their father arrived, Ricardo punched him, leading to a fight, and scaring the children. This evidence that the children were in close proximity to violence directed against a family member supports the finding that Ricardo neglected the children (*see Matter of O'Ryan Elizah H. [Kairo E.]*, 171 AD3d 429, 429 [1st Dept 2019]).

The court providently exercised its discretion in declining to grant a missing witness charge or draw a negative inference as to a caseworker who was unavailable due to an ongoing confidential medical emergency and whose testimony otherwise would have been cumulative. The court reached the same conclusion as to the father, whose testimony concerning the fight with Ricardo likely would have been cumulative of the children's statements (*see Brown v Voda Realty LLC*, 228 AD3d 450, 451 [1st Dept 2024]).

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

Matter of Kyng T. B., 234 AD3d 682 (2nd Dept., 2025)

In a proceeding pursuant to Family Court Act article 10, the father appeals from (1) an order of fact-finding of the Family Court, Queens County (Joan L. Piccirillo, J.), dated June 12, 2023, and (2) an order of disposition of the same court dated September 19, 2023. The order of fact-finding, after a hearing, found that the father neglected the subject child. The order of disposition, insofar as appealed from, was entered upon the order of fact-finding.

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

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

The Administration for Children's Services commenced this proceeding pursuant to Family Court Act article 10, alleging, inter alia, that the father neglected the subject child by perpetrating acts of domestic violence against the mother in the presence of the child and while the mother was holding the child. After a fact-finding hearing, the Family Court found that the father neglected the child. The father appeals.

"In a child neglect proceeding under Family Court Act article 10, the petitioner has the burden of proving neglect by a preponderance of the evidence" (*Matter of Bryce J. [Alia F.]*, 214 AD3d 803, 804 [internal quotation marks omitted]; *see* Family Ct Act § 1046[b][i]). "A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence" (*Matter of Roland M. [Manuel M.]*, 224 AD3d 903, 904 [internal quotation marks omitted]; *see Matter of Nina P. [Giga P.]*, 180 AD3d 1047, 1047). "Even a single act of domestic violence, either in the presence of a [*2]child or within the hearing of a child, may be sufficient for a neglect finding" (*Matter of Roland M. [Manuel M.]*, 224 AD3d at 904-905 [internal quotation marks omitted]; *see Matter of Abdul R. [Abdul G.]*, 225 AD3d 881, 882). "The credibility findings of the Family Court should be accorded great deference, as it had direct access to the parties and was in the best position to evaluate their testimony, character, and sincerity" (*Matter of Jayce W. [Lucinda J.]*, 224 AD3d 916, 917 [internal quotation marks omitted]; *see Matter of Skyli V. [Jamol V.—Shaneka E.]*, 224 AD3d 913, 915).

Here, much of the evidence against the father consisted of out-of-court statements made by the mother to a police officer who responded to the mother's 911 call. Contrary to the father's contention, the mother's out-of-court statements were admissible under the excited utterance exception to the hearsay rule (*see Matter of Nina P. [Giga P.]*, 180 AD3d at 1048). The record reflects that the mother spoke to the police officer within minutes after the incident and that she was very upset, crying, and in distress. The record supports the conclusion that the mother was still under the stress of excitement when she made the statements, and the statements were not made under the impetus of studied reflection (*see People v Hernandez*, 28 NY3d 1056, 1057; *People v Gilliam*, 229 AD3d 565, 566; *People v Delacruz*, 207 AD3d 652, 653; *People v Ortiz*, 198 AD3d 924, 927).

Contrary to the father's contention, a preponderance of the credible evidence supported a finding that he neglected the child when he engaged in acts of domestic violence against the mother in the child's presence (*see Matter of Skyli V. [Jamol V.—Shaneka E.]*, 224 AD3d at 916; *Matter of Cacique R.O. [Alejandro O.]*, 196 AD3d 487, 488-489). Although the father denied the allegations, there is no basis for disturbing the Family Court's credibility determinations, which are entitled to deference and are supported by the record (*see Matter of Leah S. [Barnett V.]*, 228 AD3d 667, 669; *Matter of Abdul R. [Abdul G.]*, 225 AD3d at 882; *Matter of Shalom A. [Codjo A.]*, 215 AD3d 825, 827).

Matter of Jaslene P., 237 AD3d 942 (2nd Dept., 2025)

In related proceedings pursuant to Family Court Act article 10, the father appeals from three orders of fact-finding and disposition of the Family Court, Kings County (Ilana Gruebel, J.), all dated February 8, 2024. The first order of fact-finding and disposition, insofar as appealed from, upon a decision of the same court dated February 8, 2024, made after a fact-finding hearing, and after a dispositional hearing, found that the father abused the child Janelle P. and directed the father to comply with the terms of an order of protection. The second order of fact-finding and disposition, insofar as appealed from, upon the decision, and after the dispositional hearing, found that the father derivatively abused the child Jaslene P., and placed that child in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing. The third order of fact-finding and disposition, insofar as appealed from, upon the decision, and after the dispositional hearing, found that the father derivatively abused the child Janiece P., and placed that child in the custody of the Commissioner of Social Services of the City [*2]of New York until the completion of the next permanency hearing.

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

In August 2022, the petitioner filed three petitions, one as to each child, alleging, inter alia, that the father sexually abused the child Janelle P. and derivatively abused the children Jaslene P. and Janiece P. In three separate orders of fact-finding and disposition, all dated February 8, 2024, after fact-finding and dispositional hearings, the Family Court found that the father abused Janelle P. and derivatively abused Jaslene P. and Janiece P. The court, among other things, placed Jaslene P. and Janiece P. in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing. Because Janelle P. had reached the age of majority, the court directed the father to comply with an order of protection. The father appeals.

"At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected" (*Matter of Esther R.-M.D. [Carry Q.]*, 232 AD3d 738, 740 [internal quotation marks omitted]; *see Matter of Nyla S. [Jason B.]*, 224 AD3d 691, 692). "The Family Court's credibility findings are entitled to great weight" (*Matter of Nyla S. [Jason B.]*, 224 AD3d at 692; *see Matter of Esther R.-M.D. [Carry Q.]*, 232 AD3d at 740).

"In neglect proceedings, [u]nsworn out-of-court statements of the [children] may be received and, if properly corroborated, will support a finding of abuse or neglect" (*Matter of Jazlynn K. [Genesis S.]*, 231 AD3d 952, 954 [internal quotation marks omitted]; *see Matter of Logan P. [Kendell P.]*, 228 AD3d 867, 868). "Corroboration means any other evidence tending to support the reliability of the previous statements" (*Matter of Jazlynn K. [Genesis S.]*, 231 AD3d at 954 [internal quotation marks omitted]). "Siblings' out-of-court statements may cross-corroborate each other when they independently and consistently describe similar incidents of abuse or neglect" (*id.* [internal quotation marks omitted]; *see Matter of Alexander S. [Gabriel H.]*, 224 AD3d 907, 909).

Here, contrary to the father's contention, the Family Court properly determined that Janelle P.'s out-of-court statements alleging abuse were corroborated by, inter alia, the testimony of her adult sister alleging "similar incidents" of sexual abuse committed by the father against her in a prior, unrelated proceeding (*Matter of Alexander S. [Gabriel H.]*, 224 AD3d at 909). A preponderance of the evidence at the fact-finding hearing supported the court's finding of sexual abuse as to Janelle P. (*see Matter of Brianna M. [Corbert G.]*, 152 AD3d 600, 602). The father's abuse of Janelle P. supported the court's

finding of derivative abuse as to Jaslene P. and Janiece P. since it "evinced a flawed understanding of his duties as a person legally responsible for a child and impaired judgment sufficient to support a finding of derivative [abuse] as to the other children" (*Matter of Alexander S. [Gabriel H.]*, 224 AD3d at 911).

The father's remaining contentions are without merit.

Summary Judgment

Matter of Ibn I.-A., AD3d 2025 NY Slip Op 03931 (4th Dept., 2025)

Appeal from an order of the Family Court, Genesee County (Thomas D. Williams, J.), entered May 18, 2023, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order that, inter alia, granted petitioner's motion for summary judgment seeking a determination that the father neglected his two children. We affirm.

Summary judgment is, of course, an appropriate procedure in Family Court Act article 10 proceedings (*see Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182 [1994]; *Matter of Celeste S. [Richard B.]*, 164 AD3d 1605, 1605 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]; *see also* Family Ct Act § 165 [a]). To establish that the children were neglected, petitioner was required to show that the children's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of the father's failure to exercise a minimum degree of care in providing the children with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof (*see* Family Ct Act § 1012 [f] [i] [B]; *see generally Nicholson v Scoppetta*, 3 NY3d 357, 369-370 [2004]). Here, petitioner proffered in support of the summary judgment motion the criminal indictment charging the father with, inter alia, manslaughter in the second degree for recklessly causing the death of the children's mother. Petitioner also submitted the

certificate of conviction establishing that the father pleaded guilty to that count. We reject the father's contention that because his conviction was based on an *Alford* plea, petitioner failed to establish the factual nexus between the conviction and the allegations in the neglect petition. The conviction and incarceration of a parent for a crime in which the parent intentionally or recklessly caused the death of the other parent is prima facie evidence of neglect regardless of the underlying circumstances (*see generally Matter of Scott JJ.,* 280 AD2d 4, 7-8 [3d Dept 2001]). In any event, petitioner established the underlying factual circumstances of the actual impairment of the children's emotional welfare (*see generally Matter of Michael G.*, 300 AD2d 1144, 1144 [4th Dept 2002]) by submission of the certified police records containing the sworn statement of the older child concerning the incident and clearly connected the father's actions to the death of the mother in the presence of the children. While the father now contends that the reports are inadmissible hearsay and the child's statement is uncorroborated, those contentions are raised for the first time on appeal and are not properly before us (*see Bauman v Bauman*, 236 AD3d 1312, 1317 [4th Dept 2025]; *see also Robbins v Emery*, 268 AD2d 515, 515 [2d Dept 2000]; *see [*2]generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

In opposition, the father failed to submit sufficient admissible evidence to create a triable issue of fact regarding the neglect of the children (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Voluntary Discontinuance

Matter of J.M., 234 AD3d 492 (1st Dept., 2025)

Order, Family Court, New York County (Grace Oboma-Layat, J.), entered on or about September 13, 2023, which, to the extent appealed from as limited by the briefs, prior to a fact-finding hearing, granted the application of the Administration for Children's Services pursuant to CPLR 3217(b) for a voluntary discontinuance of the proceeding, and dismissed the neglect petition against respondent mother Antionette T. without prejudice, unanimously affirmed, without costs.

Unless a court states otherwise a voluntary discontinuance is without prejudice and within the court's discretion (*see* CPLR 3217[b]; *see also Matter of Reid v Brown*, 165 AD3d 949, 950 [2d Dept 2018]). Family Court's decision was grounded in a legitimate concern that the mother might regress, as she had in the past, once the case was no longer active, potentially putting the child at risk. This concern was particularly justified by the mother's failure to comply with substance abuse treatment and her refusal to participate in toxicology screenings following a positive test for marijuana and cocaine.

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

NEGLECT

General and Mixed Neglect

Matter of Rebecca F., 234 AD3d 435 (1st Dept., 2025)

Order of disposition, Family Court, Bronx County (E. Grace Park, J.), entered on or about April 4, 2022, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about March 14, 2022, which, after a hearing, found that respondent mother neglected the subject children, unanimously reversed, on the law and the facts, without costs, the finding of neglect vacated, the petitions dismissed, and the appeal from the dispositional portion of the order dismissed as academic. Appeal from the reminder of the fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The petition alleged neglect based on a single incident that occurred during the COVID-19 pandemic, when the mother, a single parent at home with three children, established a daily schedule that included an afternoon nap. While the mother was napping, the mother's then seven-year-old daughter accidentally caused her younger brother to be burned when she was playing with a candle or stick. The mother then called the daughter's counselor, who called the police. Later, when the mother was outside the building with the police, she became angry and had an argument with one of the officers when she was not allowed back into the apartment briefly to retrieve certain items, including a cell phone charger.

Petitioner failed to show by a preponderance of the evidence that a minor accident involving two of the children while the mother was napping constituted neglect. The agency's proof that the brother had a minor injury to his neck after an isolated incident did not establish that the child's mental or emotional condition was impaired or in imminent danger of being impaired as a result of the incident, or that the mother failed to exercise a minimum degree of care (*see Nicholson v Scoppetta*, 3 NY3d 357, 358 [2004]; *see also Matter of Alachi [Shelby J.]*, 215 AD3d 1014, 1015 [3d Dept 2023]). Indeed, the brother was without any visible injury shortly after the incident. Nor did the incident cause any impairment or imminent danger to the daughter or to the baby, who was asleep in the next room. Although an isolated accidental injury may constitute neglect if the parent was aware of an intrinsically dangerous situation (*see Matter of Silas W. [Natasha W.]*, 207 AD3d 1234, 1235 [4th Dept 2022]), there is no evidence that the mother's napping while the children were in close proximity and within earshot was intrinsically dangerous.

Similarly, Family Court's finding that the mother's interaction with the police in any respect rose to the level of neglect is not supported by a preponderance of the evidence. A verbal argument with a police officer did not pose any serious or potentially serious harm to the infant child, who was the only child with her at that time (*see Matter of Kingston T. [Diamond T.]*, 209 AD3d 743, 745 [2d Dept 2022]). Furthermore, contrary to the court's finding, there were no exigent circumstances [*2]preventing the mother from returning to the apartment to retrieve necessary items.

In view of the foregoing, the appeal from the dispositional order has been rendered academic (*see Matter of Shaun B.*, 55 AD3d 301, 302 [1st Dept 2008], *lv denied* 11 NY3d 715 [2009]). That portion of the appeal is also moot, as the order of disposition has expired and the children have been released to the mother (*see Matter of Adam T. [Artur T.]*, 186 AD3d 1179, 1180 [1st Dept 2020]).

Matter of C.J., 237 AD3d 467 (1st Dept., 2025)

Order of fact-finding, Family Court, New York County (Keith E. Brown, J.), entered on or about April 1, 2024, which, after a hearing, found that respondent, a person legally responsible for the subject child, neglected the child, unanimously affirmed, without costs.

Family Court properly determined that respondent is a person legally responsible for the child because he acted as the "functional equivalent of a parent in a familial or household setting" (*Matter of Yolanda D.,* 88 NY2d 790, 796 [1996]). The evidence shows that at all relevant times, he and the child's nonrespondent mother were involved

in a romantic relationship. Respondent testified that he was present at the hospital when the child was born. In addition, they share the same last name and respondent referred to the child as his son when he initially spoke to the caseworker from the Administration for Children's Services. Respondent also testified that when he spent time with the mother, the child was present 80% of the time. On the night of the incident the child and his mother were staying overnight at respondent's apartment (*see id.* at 797; *Matter of Adam C. [Charles R.]*, 167 AD3d 487, 488 [1st Dept 2018]).

The finding of neglect is supported by a preponderance of the evidence, including medical records from after the incident, that respondent engaged in acts of domestic violence against the child's mother while the child was in the home (*see* Family Court Act §§ 1012[f][i][B], 1046[b][i]; *see also Matter of Amelia A. [Saul A.]*, 223 AD3d 401, 401-402 [1st Dept 2024]; *Matter of O'Ryan Elizah H. [Kairo E.],* 171 AD3d 429, 429 [1st Dept 2019]). Respondent further neglected the child by locking himself in his apartment with the child while repeatedly denying police officers' requests to enter, necessitating the assistance of emergency services to access the apartment and return the nine-month-old child to his mother (*see Matter of Jared S. [Monet S.]*, 78 AD3d 536, 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]).

The court properly admitted the mother's statements to the responding police officer as an excited utterance (*see Matter of Omar G.*, 212 AD3d 615, 616-617 [2d Dept 2023]). There is no basis to otherwise disturb the court's credibility determinations (*see Matter of Tyjaa E. [Kareen McC.]*, 157 AD3d 420, 421 [1st Dept 2018]).

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

Matter of Jahzara J.S., 237 AD3d 578 (1st Dept., 2025)

Order, Family Court, Bronx County (E. Grace Park, J.), entered on or about March 8, 2024, which, after a hearing, found that respondent father neglected the subject child, unanimously affirmed, without costs.

The finding of neglect was proven by a preponderance of the evidence (*see* Family Court Act § 1046[b][i]). The child's out-of-court statements regarding the father's alleged maltreatment were sufficiently corroborated to support a finding of neglect (*see Matter of Nicole V.*, 71 NY2d 112, 118 [1987]; Family Court Act § 1046[a][vi]). The child disclosed the alleged misconduct multiple times to different people, including staff at the child's daycare and ACS's child protective specialist (*see e.g. Matter of Emily S. [Jorge S.]*, 146 AD3d 599, 600 [1st Dept 2017]). The daycare workers also testified to

observing noticeable changes in the child's demeanor after an alleged incident and the child exhibiting age-inappropriate behavior (*see Matter of Anahys V. [John V.]*, 68 AD3d 485 [1st Dept 2009], *lv denied* 14 NY3d 705 [2010]; *Matter of Jada W. [Fanatay W.]*, 219 AD3d 732, 739-740 [2d Dept 2023]; *see also Matter of Cerenity F. [Jennifer W.]*, 160 AD3d 540, 541 [1st Dept 2018]; *Matter of Dawn H.*, 221 AD2d 235 [1st Dept 1995]). Despite some inconsistencies, Family Court did not err in finding that the child's statements were sufficiently corroborated by other evidence (*see e.g. Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556, 557 [1st Dept 2012]).

Matter of David J., 236 AD3d 786 (2nd Dept., 2025)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from (1) an order of fact-finding of the Family Court, Queens County (Margaret Morgan, J.), dated February 9, 2024, and (2) an order of disposition of the same court dated February 13, 2024. The order of fact-finding, after a fact-finding hearing, found that the mother neglected the subject children. The order of disposition, upon the order of fact-finding and after a dispositional hearing, inter alia, placed the subject children in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing.

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

ORDERED that the order of disposition is modified, on the law and the facts, by deleting the provision thereof, upon the order of fact-finding, determining that the mother neglected the subject children by failing to provide them with appropriate medical care; as so modified, the order of disposition is affirmed, without costs or disbursements, and the order of fact-finding is modified accordingly.

The petitioner, Administration for Children's Services (hereinafter ACS), commenced these related proceedings pursuant to Family Court Act article 10, alleging that the mother neglected [*2]the subject children, inter alia, by failing to provide them with an adequate education and appropriate medical and dental care, and by failing to provide them with proper supervision or guardianship in that the mother had a mental illness that impaired her ability to care for the children. After a fact-finding hearing, in an order of fact-finding dated February 9, 2024, the Family Court found that the mother neglected

the children. In an order of disposition dated February 13, 2024, the court, among other things, placed the children in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing. The mother appeals.

"At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing by a preponderance of evidence that the subject child has been abused or neglected" (*Matter of Khaleef M.S.-P. [Khaleeda M.S.]*, 203 AD3d 1160, 1161). "A party seeking to establish neglect must show, by a preponderance of the evidence, that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired and that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with adequate care or proper supervision or guardianship" (*Matter of Nicholas M. [Robert M.]*, 224 AD3d 689, 691; *see* Family Ct Act §§ 1012[f][i]; 1046[b][i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368). "Courts must evaluate parental behavior objectively by considering whether a reasonable and prudent parent would have so acted, or failed to act, under the circumstances then and there existing" (*Matter of Kaira K. [Karam S.]*, 226 AD3d 900, 902 [internal quotation marks omitted]). Moreover, "[t]he requirement of actual or imminent danger of impairment as a prerequisite to a finding of neglect . . . ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior" (*Matter of Jefferson C.-A. [Carlos T.-F.]*, 227 AD3d 894, 895 [alterations and internal quotation marks omitted]). "In order for danger to be 'imminent,' it must be 'near or impending, not merely possible'" (*Matter of Serina M. [Edward M.]*, 179 AD3d 925, 927, quoting *Nicholson v Scoppetta*, 3 NY3d at 369). "Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor" (*Matter of Nicholas M. [Robert M.]*, 224 AD3d at 691 [internal quotation marks omitted]).

Contrary to the mother's contention, the Family Court's finding that she neglected the children by failing to provide them with appropriate dental care was supported by a preponderance of the evidence adduced at the fact-finding hearing (*see id.*; *Matter of Antonio T. [Franklin T.]*, 169 AD3d 699, 701). Similarly, a preponderance of the evidence supported the court's finding that the mother neglected the children by failing to provide them with an adequate education, as ACS submitted unrebutted evidence establishing that the mother admitted that she was not in compliance with the requirements of the

New York City Department of Education in homeschooling the children (*see Matter of Isaac V.D.L.R. [Maria D.L.R.]*, 174 AD3d 622, 623; *Matter of Joyitha M. [Reshmi M.]*, 121 AD3d 900, 901).

Moreover, "[w]hile parental neglect may be based on mental illness, proof of a parent's mental illness alone will not support a finding of neglect" (*Matter of Geoffrey D. [Everton D.]*, 158 AD3d 758, 759). Instead, "[t]he evidence must establish a causal connection between the parent's condition, and actual or potential harm to the child" (*Matter of Tremont N.F. [Angela N.]*, 222 AD3d 651, 651 [internal quotation marks omitted]; *see* Family Ct Act § 1012[f][i][B]). Here, the Family Court's finding that the mother had a largely untreated mental illness was supported by the record. The evidence also demonstrated, inter alia, that the mother had difficulty interacting with others in person due to her anxiety, which caused her to isolate the children in a shelter room, placing the children at an imminent risk of impairment (*see Matter of Precise M. [Tawana M.]*, 215 AD3d 680, 681; *Matter of Skye C. [Monica S.]*, 127 AD3d 603, 604).

However, ACS did not prove by a preponderance of the evidence that the mother medically neglected the children. "To find medical neglect, there must be a determination that the parent did not seek or accept medical care, and that such failure placed the child in imminent danger of becoming impaired" (*Matter of Autumn O. [Noah O.]*, 158 AD3d 696, 697 [internal quotation marks omitted]). "The most significant factor in determining whether a child is being deprived of [*3]adequate medical care . . . is whether the parent has provided an acceptable course of medical treatment for his or her child in light of all the surrounding circumstances" (*Matter of Adina B. [Alexander B.]*, 210 AD3d 981, 982 [alterations and internal quotation marks omitted]). Here, ACS did not allege that the mother's failure to seek preventative care caused actual impairment to the children or present evidence at the fact-finding hearing that the failure to seek such care placed the children in imminent danger of becoming impaired. Further, the evidence demonstrated that, when one of the children presented symptoms of near syncope, the mother promptly called 911 and sought medical care. Under these circumstances, the Family Court should not have found that the mother medically neglected the children (*see Matter of Jahzir Barbee M. [Racine B.]*, 171 AD3d 1181, 1183; *Matter of Alanie H.*, 83 AD3d 1066, 1068).

The parties' remaining contentions either are unpreserved for appellate review, are without merit, or need not be reached in light of our determination.

Matter of Malik M., 236 AD3d 1024 (2nd Dept., 2025)

In related proceedings pursuant to Family Court Act article 10, the mother appeals [*2]from (1) an order of fact-finding of the Family Court, Queens County (Elenor Reid-Cherry, J.), dated December 22, 2023, and (2) an amended order of fact-finding of the same court dated February 29, 2024. The amended order of fact-finding, insofar as appealed from, after a fact-finding hearing, upon a finding that the respondent Gary H. sexually abused the child Jamyah M., found that the mother neglected the children Jamyah M. and Malik M., and derivatively neglected the children Clarity H. M. and Kira M. H.

ORDERED that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as that order was superseded by the amended order of-fact-finding; and it is further,

ORDERED that the amended order of fact-finding is affirmed insofar as appealed from, without costs or disbursements.

The Administration for Children's Services (hereinafter ACS) commenced these related proceedings pursuant to Family Court Act article 10, alleging, inter alia, that the mother neglected the subject children by failing to provide proper supervision or guardianship "by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof" (*id.* § 1012[f][1][b]). ACS alleged, among other things, that the mother was aware that the respondent Gary H., the biological father of two of the children, had sexually abused the child Jamyah M. and that the mother failed to protect that child; that the mother knew that Gary H. was inflicting excessive corporal punishment on Jamyah M. and the child Malik M., yet the mother failed to take any steps to protect those children; and that the mother was aware that the children knew of repeated domestic violence against her by Gary H., yet allowed him to return to her home several times. In an amended order of fact-finding dated February 29, 2024, the Family Court, after a fact-finding hearing, found, inter alia, that Gary H. sexually abused Jamyah M., that the mother neglected Jamyah M. and Malik M., and that the mother derivatively neglected the children Clarity H. M. and Kira M. H. The mother appeals.

"In a child neglect proceeding pursuant to Family Court Act article 10, the petitioner must establish by a preponderance of the evidence that the subject child is neglected" (*Matter of Shayla G. [Lakisha C.]*, 233 AD3d 682, 684; *see* Family Ct Act § 1046[b][i]; *Matter of Andrew M. [Brenda M.]*, 225 AD3d 764, 765). "'To establish neglect of a child, the petitioner must demonstrate, by a preponderance of the evidence, (1) that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is a

consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship'" (*Matter of Shayla G. [Lakisha C.]*, 233 AD3d at 684 [internal quotation marks omitted], quoting *Matter of Veronica M. [Ana M.]*, 229 AD3d 626, 627; *see Matter of Andrew M. [Brenda M.]*, 225 AD3d at 765; *Matter of Chloe P.-M. [Martinique P.]*, 220 AD3d 783, 784).

"A parent has neglected his or her child where that parent . . . , by willful omission, fail[s] to protect the child and as a consequence places the child in imminent danger of sexual abuse" (*Matter of Patricia B.*, 61 AD3d 861, 862 [internal quotation marks omitted]; *see Matter of Sama A. [Safaa S.]*, 224 AD3d 677, 679; *Matter of Jose E. [Jose M.]*, 176 AD3d 1201, 1203). Moreover, "neglect might be found where a record establishes that . . . the mother acknowledged that the children knew of repeated domestic violence by her paramour and had reason to be afraid of him, yet nonetheless allowed him several times to return to her home, and lacked awareness of any impact of the violence on the children" (*Nicholson v Scoppetta*, 3 NY3d 357, 371; *see Matter of Bronx S. [Denzel J.]*, 217 AD3d 956, 957; *Matter of Christopher D.B. [Lorraine H.]*, 157 AD3d 944, 948). Further, "[a]lthough parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the use of excessive corporal punishment constitutes neglect" (*Matter of Veronica M. [Ana M.]*, 229 AD3d at 627; *see Matter of Sama A. [Safaa S.]*, 224 AD3d at 679; *Matter of Raveena B. [Khrisend R.]*, 209 AD3d 640, 641). "Proof that a respondent neglected one child is admissible on the issue of neglect of any other child of the respondent" (*Matter of Veronica M. [Ana M.]*, 229 AD3d at 627; *see* Family Ct Act § 1046[a][i]).

"'In a child protective proceeding, a child's prior out-of-court statements relating to [*3]the alleged neglect may serve as the basis for a finding of neglect provided that these hearsay statements are corroborated, so as to ensure their reliability'" (*Matter of Veronica M. [Ana M.]*, 229 AD3d at 628 [internal quotation marks omitted], quoting *Matter of David B. [Stacy T.]*, 171 AD3d 1041, 1042; *see Matter of Tazya B. [Curtis B.]*, 180 AD3d 1039, 1040; *Matter of Alexis S. [Edward S.]*, 115 AD3d 866, 866). "The rule requiring corroboration is flexible, and any other evidence tending to support the reliability of the child's statements may be sufficient corroboration" (*Matter of Veronica M. [Ana M.]*, 229 AD3d at 628; *see Matter of David B. [Stacy T.]*, 171 AD3d at 1042; *Matter of Alexis S. [Edward S.]*, 115 AD3d at 866). "Validation testimony from an expert that the child's psychological and behavioral characteristics lead the expert to conclude that the child was sexually abused may supply the corroboration of the child's out-of-court statements necessary to make out a prima facie case of sexual abuse" (*Matter of Alexis S. [Edward S.]*, 115 AD3d at 867; *see Matter of Zamir F. [Ricardo B.]*,

193 AD3d 932, 933; *Matter of Tazya B. [Curtis B.]*, 180 AD3d at 1040). "The Family Court has considerable discretion in deciding whether a child's out-of-court statements alleging incidents of abuse have been reliably corroborated" (*Matter of Zamir F. [Ricardo B.]*, 193 AD3d at 933 [internal quotation marks omitted]; *see Matter of Tazya B. [Curtis B.]*, 180 AD3d at 1040; *Matter of Alexis S. [Edward S.]*, 115 AD3d at 867). "'Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor'" (*Matter of Shayla G. [Lakisha C.]*, 233 AD3d at 684 [internal quotation marks omitted], quoting *Matter of Ashlyn M. [Robert J.]*, 228 AD3d 939, 941; *see Matter of Alexis S. [Edward S.]*, 115 AD3d at 867).

Here, the testimony of ACS's validating expert witness (*see Matter of Alexis S. [Edward S.]*, 115 AD3d at 866; *Matter of Emani W. [Owana E.]*, 107 AD3d 815, 816) provided sufficient corroboration of Jamyah M.'s numerous and consistent out-of-court statements regarding Gary H.'s sexual abuse of her. Those statements, together with the testimony of ACS's caseworker, established by a preponderance of the evidence that Gary H. sexually abused Jamyah M. (*see* Family Ct Act § 1046[a][vi]; *Matter of Zamir F. [Ricardo B.]*, 193 AD3d at 933; *Matter of Tazya B. [Curtis B.]*, 180 AD3d at 1040).

Moreover, the Family Court properly found that the mother neglected Jamyah M. based on inadequate supervision or guardianship. The testimony of ACS's expert, along with the testimony of ACS's caseworker, established that, after Jamyah M. reported to the mother that she was sexually abused by Gary H., the mother told Jamyah M. that she would call the police but did not do so and allowed Gary H. to continue residing in the home with Jamyah M. As such, the mother failed to protect Jamyah M. and placed Jamyah M. at substantial risk of harm (*see Matter of Sama A. [Safaa S.]*, 224 AD3d at 679; *Matter of Jose E. [Jose M.]*, 176 AD3d at 1203; *Matter of Patricia B.*, 61 AD3d at 862).

The Family Court also properly found that ACS established by a preponderance of the evidence that the mother neglected Jamyah M. and Malik M. by failing to provide them with proper supervision or guardianship and that, as a result, Jamyah M.'s and Malik M.'s physical, mental, or emotional conditions were impaired or were in imminent danger of becoming impaired by the acts of domestic violence perpetrated in their presence (*see Nicholson v Scoppetta*, 3 NY3d at 371; *Matter of Bronx S. [Denzel J.]*, 217 AD3d at 957). Contrary to the mother's contention, her status as a victim of domestic violence did not preclude a finding of neglect against her (*see Nicholson v*

Scoppetta, 3 NY3d at 371; *Matter of Bronx S. [Denzel J.]*, 217 AD3d at 957; *see e.g. Matter of Christopher D.B. [Lorraine H.]*, 157 AD3d at 948; *Matter of Angelique L.*, 42 AD3d 569, 572). The record established that the mother acknowledged that Jamyah M. and Malik M. knew of repeated domestic violence by Gary H. as well as the mother's former boyfriend against her and had reason to be afraid of them, yet the mother nonetheless allowed the men to return to her home several times and lacked awareness of any impact of the violence on those children (*see Nicholson v Scoppetta*, 3 NY3d at 371; *Matter of Bronx S. [Denzel J.]*, 217 AD3d at 957; *Matter of Christopher D.B. [Lorraine H.]*, 157 AD3d at 948).

Further, ACS established by a preponderance of the evidence that the mother neglected Jamyah M. and Malik M. in that she knew that Gary H. was inflicting excessive corporal punishment on those children, yet she failed to take any steps to protect those children (*see Matter [*4]of Z'naya D.J. [Vanessa J.]*, 141 AD3d 652, 654; *Matter of Ishaq B. [Lea B.]*, 121 AD3d 889, 890; *Matter of Iouke H. [Terrence H.]*, 94 AD3d 889, 891).

Furthermore, the mother's neglect of Jamyah M. and Malik M. envinced a flawed understanding of her duties as a person legally responsible for a child and impaired judgment sufficient to support a finding of derivative neglect as to Clarity H. M. and Kira M. H. (*see Matter of Shayla G. [Lakisha C.]*, 233 AD3d at 682; *Matter of Iouke H. [Terrence H.]*, 94 AD3d at 891; *Matter of Alanna S. [Regina A.]*, 92 AD3d 787, 788).

Matter of Moshae L., 237 AD3d 821 (2nd Dept., 2025)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from an order of fact-finding and disposition of the Family Court, Westchester County (Arlene A. Gordon-Oliver, J.), dated August 8, 2023. The order of fact-finding and disposition, upon a decision of the same court dated April 5, 2023, made after a fact-finding hearing, and after a dispositional hearing, inter alia, found that the mother neglected the child Moshae L. and neglected and, in effect, derivatively neglected the child Sephira L., and directed that the children remain in the custody of the Commissioner of Social Services of Westchester County.

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

The subject children, Sephira L. and Moshae L., were born in 2015 and 2017, respectively. The petitioner, Westchester County Department of Social Services (hereinafter DSS), commenced these related proceedings pursuant to Family Court Act

article 10, alleging that the mother neglected Moshae L. and Sephira L. Evidence was presented at a fact-finding hearing that the mother struck Moshae L. across his face, in the presence of Sephira L., because he was being loud, wanted to play, and did not want to go to sleep. Further evidence was presented that the mother, who suffers from mental health issues including depression, post-traumatic stress disorder, and anxiety, failed to comply with prescribed medication management and treatment plans. Evidence was also presented that Moshae L.'s doctor advised the mother that the child may have attention deficit disorder and the mother expressed concerns that he may also have autism, but the mother failed to have him evaluated by a medical professional. After fact-finding and dispositional hearings, the Family Court, inter alia, found that the mother neglected Moshae L. and neglected and, in effect, derivatively neglected the child Sephira L., and directed that the children remain in the [*2]custody of the Commissioner of Social Services of Westchester County. The mother appeals.

"'In a child neglect proceeding pursuant to Family Court Act article 10, the petitioner must establish by a preponderance of the evidence that the subject child is neglected'" (*Matter of Shayla G. [Lakisha C.]*, 233 AD3d 682, 684, quoting *Matter of Andrew M. [Brenda M.]*, 225 AD3d 764, 765; *see* Family Ct Act § 1046[b][i]). "'To establish neglect of a child, the petitioner must demonstrate, by a preponderance of the evidence, (1) that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship'" (*Matter of Veronica M. [Ana M.]*, 229 AD3d 626, 627, quoting *Matter of Chloe P.-M. [Martinique P.]*, 220 AD3d 783, 784; *see Matter of Shayla G. [Lakisha C.]*, 233 AD3d at 684). "'Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor'" (*Matter of Ashlyn M. [Robert J.]*, 228 AD3d 939, 941, quoting *Matter of Amberlyn H.P. [Jose H.C.]*, 187 AD3d 920, 920; *see Matter of Shayla G. [Lakisha C.]*, 233 AD3d at 684; *Matter of Oliver A. [Oguis A.-D.]*, 167 AD3d 867, 868). "Where . . . 'the hearing court is presented with sharply conflicting accounts regarding the subject events, and chooses to credit the testimony of certain witnesses over that of others, its determination will not be disturbed unless clearly unsupported by the record'" (*Matter of Skyli V. [Jamol V.—Shaneka E.]*, 224 AD3d 913, 915, quoting *Matter of Shalom A. [Codjo A.]*, 215 AD3d 825, 827).

"'Although parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the use of excessive corporal

punishment constitutes neglect'" (*Matter of Raveena B. [Khrisend R.]*, 209 AD3d 640, 641, quoting *Matter of Kaylarose J.H. [Rena R.D.]*, 160 AD3d 953, 955; *see Matter of Paul M. [Tina H.]*, 146 AD3d 961, 962). "Even a single incident of excessive corporal punishment may suffice to sustain a finding of neglect" (*Matter of Joshua T. [Kenisha T.]*, 196 AD3d 491, 492).

Here, DSS established, by a preponderance of the evidence, that the mother neglected Moshae L. by inflicting excessive corporal punishment upon him. The mother's use of corporal punishment rose to the level of neglect since she struck Moshae L., in Sephira L.'s presence, with such force that a red mark remained visible on Moshae L.'s face for more than 15 hours from his arrival at day care (*see Matter of Veronica M. [Ana M.],* 229 AD3d at 627; *Matter of Alexander S. [Gabriel H.]*, 224 AD3d 907, 911). The mother also failed to take accountability, denied striking Moshae L., and exhibited a pattern of using excessive corporal punishment. Deferring to the Family Court's credibility findings, we conclude that the court properly determined that the mother's use of corporal punishment was excessive.

Moreover, "'[a] neglect finding is proper upon proof of the causal connection between a parent's mental illness and requisite potential harm to the child'" (*Matter of Bethany R. [Bethmarie R.]*, 202 AD3d 690, 692, quoting *Matter of Kiemiyah M. [Cassiah M.]*, 137 AD3d 1279, 1280; *see Matter of Nialani T. [Elizabeth B.]*, 164 AD3d 1245, 1246). "'Even though evidence of a parent's mental illness, alone, is insufficient to support a finding of neglect of a child, such evidence may be part of a neglect determination when the proof further demonstrates that the parent's condition creates an imminent risk of physical, mental, or emotional harm to the child'" (*Matter of Precise M. [Tawana M.]*, 215 AD3d 680, 681, quoting *Matter of Maurice M. [Suzanne H.]*, 158 AD3d 689, 690-691). "Proof of a parent's 'ongoing mental illness and the failure to follow through with aftercare medication is a sufficient basis for a finding of neglect where such failure results in a parent's inability to care for [his or] her child in the foreseeable future'" (*id.*, quoting *Matter of Bella S. [Sarah S.]*, 158 AD3d 703, 704; *see Matter of Bibi H. v Administration of Children's Servs.-Queens*, 210 AD3d 771, 773). In addition, "[a] neglected child includes a child whose parent has failed to provide 'the child with adequate . . . medical . . . care'" (*Matter of Mia G. [William B.]*, 146 AD3d 882, 883, quoting Family Ct Act § 1012 [f][i][A]). "'To find medical neglect, there must be a determination that the parent did not seek or accept medical care, and that such failure placed the child in imminent danger of becoming impaired'" (*id.*, quoting *Matter of Shawndel M.*, 33 AD3d 1006, 1006). "A parent's unwillingness to follow a recommended course of psychiatric treatment which results in the impairment of a child's emotional

health may support a finding of neglect" (*Matter of Jaelin L. [Kimrenee C.]*, 126 AD3d 795, 796).

Here, DSS established by a preponderance of the evidence that the mother neglected the children since she lacked insight into her ongoing mental health issues. The mother's failure to comply with prescribed medication management and treatment plans placed the children at imminent risk of harm (*see Matter of Precise M. [Tawana M.]*, 215 AD3d at 681; *Matter of Bibi H. v Administration of Children's Servs.-Queens*, 210 AD3d at 773). In addition, DSS established, by a preponderance of the evidence, that the mother failed to provide an acceptable course of treatment in light of the advice she received to have Moshae L. evaluated for autism, placing him in imminent danger of physical, mental, or emotional harm (*see Matter of Jaelin L. [Kimrenee C.]*, 126 AD3d at 797).

The mother's remaining contentions are either without merit or academic in light of our determination.

Matter of Jasmine F. R., 237 AD3d 829 (2nd Dept., 2025)

In a proceeding pursuant to Family Court Act article 10, the father appeals from (1) an order of fact-finding of the Family Court, Kings County (Jacqueline B. Deane, J.), dated October 24, 2023, and (2) an order of disposition of the same court dated January 29, 2024. The order of fact-finding, after a fact-finding hearing, denied the father's application pursuant to Family Court Act § 1051(c) to dismiss the petition and found that the father neglected the subject child. The order of disposition, insofar as appealed from, was entered upon the order of fact-finding.

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

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

In March 2020, the Administration for Children's Services (hereinafter ACS) commenced a neglect proceeding against the father of the subject child, who was born in October 2004. During that proceeding, the Family Court advised the father that the neglect petition would be dismissed, and ACS was offering a voluntary placement agreement (*see* Social Services Law § 384-a) so that the child could be placed in foster care. After

the court dismissed that neglect petition, the father refused to execute the voluntary placement agreement, despite several attempts by ACS to obtain his signature.

In June 2022, ACS commenced the instant neglect proceeding, alleging that the father had neglected the child by failing to execute the voluntary placement agreement. During a fact-finding hearing, the father made an application to dismiss the petition on the ground that further aid of the court was not required (*see* Family Ct Act § 1051[c]). After the hearing, the Family Court denied the father's application and found that the father neglected the child. The father appeals.

Contrary to the father's contention, the Family Court did not improvidently exercise its discretion in denying his application to dismiss the petition pursuant to Family Court Act § 1051(c), as he failed to demonstrate that the aid of the court was not required (*see id.*; *Matter of Vernice B. [Patton]*, 129 AD3d 714, 715). Although the child attained the age of 18 during the pendency of the proceeding, she consented to the extension of her placement, and the court retained jurisdiction to adjudicate the neglect proceeding (*see* Family Ct Act §§ 1013[c]; 1055[e]; *Matter of Sayeh R.*, 91 NY2d 306, 310 n 1; *Matter of Vernice B. [Patton]*, 129 AD3d at 715).

To the extent the father contends that his application to dismiss the petition should have been granted since the child was receiving services from ACS as a result of a neglect proceeding commenced against her as a parent, this contention is unpreserved for appellate review, as it was not raised before the Family Court (*see Matter of Lea E.P. [Jason J.P.]*, 176 AD3d 715, 716; *Matter of Kleevuort C. [Fredlyn V.]*, 84 AD3d 1371), and, in any event, without merit (*see Matter of Sheena B. [Rory F.]*, 83 AD3d 1056, 1058).

Matter of Kingston V., 234 AD3d 1056 (3rd Dept., 2025)

Appeal from an order of the Family Court of Clinton County (Keith M. Bruno, J.), entered December 19, 2022, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject child to be neglected.

Respondent (hereinafter the father)[FN1] and Kristin M. (hereinafter the mother) are the parents of the subject child (born in 2020). The mother and the father each have older children with different parentage, and each parent has a prior finding of neglect pertaining to his or her own separate children. The two met while the father was on parole and the mother was on probation. Despite a condition of the mother's probation requiring that she stay away from the father, the two engaged in a romantic relationship and the mother became pregnant with the subject child. In February 2021, petitioner

commenced a neglect petition against the mother and temporary orders were entered requiring her to keep the subject child away from the father, among other conditions. The child remained in the mother's care until August 5, 2021, when she was arrested for violating the terms of her probation. Pursuant to a safety plan, the mother and petitioner agreed to place the child in the care of the paternal grandmother, who was directed to keep the father away from the subject child. On August 27, 2021, upon learning that the father had taken the child from the grandmother's care, petitioner sought to remove the child; Family Court granted said application and placed the child in petitioner's care. The father refused to return the child, requiring the intervention of the State Police to safely recover the child. Petitioner brought the instant neglect petition against the father in October 2021. The petitions against the mother and the father proceeded to a lengthy combined fact-finding hearing, after which Family Court found that both parents had neglected the subject child and continued the child's placement in foster care with petitioner. The father appeals.

"A party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Raquel ZZ. [Angel ZZ.]*, 216 AD3d 1242, 1243-1244 [3d Dept 2023] [internal quotation marks and citations omitted]; *see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]). Notably, "[a] finding of neglect requires only an imminent threat of injury or impairment, not actual injury or impairment, and such threat may be established through a single incident or circumstance" (*Matter of Emmanuel J. [Maximus L.]*, 149 AD3d 1292, 1294 [3d Dept 2017]; *see Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]; *Matter of Thomas XX. [Thomas YY.]*, 180 AD3d 1175[*2], 1176 [3d Dept 2020]). "In determining whether [a parent] failed to exercise a minimum degree of care, the critical inquiry is whether a reasonable and prudent parent would have so acted, or failed to act, under the circumstances" (*Matter of Joseph GG. [Chrystal FF.]*, 227 AD3d 1238, 1239 [3d Dept 2024] [internal quotation marks and citations omitted]; *see Matter of Paul U.*, 12 AD3d 969, 971 [3d Dept 2004]). "Family Court's factual findings and credibility determinations are accorded great weight in such a proceeding and will not be disturbed on appeal unless they lack a sound and substantial basis in the record" (*Matter of Nathanael E. [Melodi F.]*, 160 AD3d 1075, 1076 [3d Dept 2018] [citations omitted]; *see Matter of Annaleigh X. [Ashley Y.]*, 205 AD3d 1109, 1111 [3d Dept 2022]).

Here, the record reflects that the father had a prior finding of neglect stemming from a 2007 incident where he went to retrieve his infant daughter from the care of her maternal grandparents. Due to their observations of the father on that day, the grandparents became concerned that the daughter would be unsafe in his care and

declined to turn her over. In response, the father used a metal shovel to hit the grandfather in the head and took the daughter. The grandfather suffered a skull fracture as a result of the father's conduct and was hospitalized. The order finding neglect, which was entered upon the father's default, noted that attempts to locate the father had been unsuccessful, that a warrant had been issued for his arrest and that he had "unaddressed anger issues[and] unaddressed mental health issues." As a result of that same 2007 incident, the father faced criminal charges and, following a jury trial, was convicted of assault in the second degree and criminal possession of a weapon. The father was sentenced to five years in prison for the former and to an indeterminate prison term between 2 and 6 years for the latter, to be followed by three years of postrelease supervision. In 2016, the father was charged and convicted on two counts of criminal sale of a controlled substance in the fourth degree and sentenced to concurrent prison terms of four years, to be followed by three years of postrelease supervision. The father was released from prison in late 2019, and his parole officer testified that the father was required to complete programming to address his domestic violence and anger management issues due to the 2007 assault of a family member. The parole officer further testified that although he had encountered a lot of angry people in his line of work, the father was by far the angriest person he had ever met. Yet, the father refused to complete such programs as he believed he had no need for them. The record is replete with evidence that belies the father's belief.

One instance of the father's untreated anger issues occurred when the child was four days old and one of petitioner's caseworkers met with the mother at her home. The father was present and very [*3]confrontational, so the mother and the caseworker went outside to speak. As they spoke, the father kept opening the door to verbally assault the caseworker and to insist that the mother not cooperate. At one point, the father stood by the doorway, holding the subject child precariously against his body with one hand and using his other hand to record the caseworker on his phone. The caseworker observed that the father was extremely agitated, and she grew concerned that he was more focused on insulting, intimidating and filming her [FN2] than on safely holding the child. As a result, she asked the father to hold the newborn child with more care, but the father disregarded said request. The caseworker also noted that the child was not dressed appropriately to be outside, as it was a very cold day.

The father also demonstrated his inability to control his anger after the mother was imprisoned for a violation of probation in August 2021. At that time, the mother and petitioner agreed to place the child with the paternal grandmother, so long as the grandmother agreed to keep the child away from the father. Although he was aware of that requirement, and without any legal right to do so, the father opted to take the child from the grandmother's care; he then left the child in the care of an unfamiliar individual. The father refused to return the child, requiring petitioner to enlist the help of the State

Police and Parole; with their assistance, the child was safely retrieved from another county the following day. In addition, the record includes a plethora of recorded phone calls between the father and the mother. In some of those calls, the two discussed plans for the father to abscond with the child to another state.[FN3] Throughout the recorded calls, the father displayed many outbursts of anger and aggression, made numerous threats to hurt and kill the mother's family and petitioner's caseworkers, among others, used despicable and hateful language to refer to the mother's other children and angrily yelled at the family pets, who could be heard in the background of some of the calls.[FN4] Further, despite his later denials at the hearing, one of those recorded conversations involved the father acknowledging that there was domestic violence between him and the mother, though he blamed the mother for such incidents becoming physical.

Having reviewed the record, we disagree with the father's contention that Family Court's finding of neglect was based on the court's distaste for the father's courtroom conduct. Rather, the record reflects that the father failed to behave as a reasonably prudent parent when he prioritized his own anger at the caseworker above ensuring that the newborn child was held securely or dressed for the cold weather, and again when he took the child from the grandmother's care and planned to abscond out of state. The 2007 neglect finding — which may serve as evidence of neglect of the subject child (*see* Family Ct Act § 1046 [a] [i]) — further [*4]makes clear that the father's anger has long been out of control and untreated. Indeed, despite the effect that the father's behavior has had on his relationship with his older children,[FN5] the father continued to deny and minimize his conduct, and he refused to engage in the recommended treatment (*see Matter of Baylee F. [Jeanette E.]*, 231 AD3d 1318, 1321-1322 [3d Dept 2024]). Under these circumstances, and deferring to Family Court's credibility determinations, we are satisfied that a sound and substantial basis exists in the record to support the finding that the father failed to exercise a minimum degree of care and that such failure placed the subject child at imminent risk of harm (*see Matter of Ja'Sire FF. [Jalyssa GG.]*, 206 AD3d 1076, 1078-1079 [3d Dept 2022], *lv denied* 38 NY3d 912 [2022]; *Matter of Kaelani KK. [Kenya LL.]*, 201 AD3d 1155, 1156-1157 [3d Dept 2022]; *Matter of Kathleen NN. [Dennis NN.]*, 154 AD3d 1105, 1107-1108 [3d Dept 2017]). The father's remaining contentions, to the extent not addressed herein, have been considered and lack merit.

ORDERED that the order is affirmed, without costs.

Footnote 1: As the mother was married to another individual at the time of the child's birth, the mother's husband was the child's presumptive legal father (*see* Family Ct Act § 532 [a]). The father commenced a proceeding in May 2021 seeking to rebut that presumption and establish his own paternity. That matter remained pending until May

2022, when an order of filiation established him as the child's legal father.

Footnote 2: The father posted the video to social media.

Footnote 3: These phone calls were recorded by the county jail where the mother was housed, and the mother went as far as using a different incarcerated individual's phone account in an attempt to conceal their plans.

Footnote 4: The father denied that he ever engaged in such behavior.

Footnote 5: The father has not seen his older children since they were infants.

Matter of Maliah B., 236 AD3d 1352 (4th Dept., 2025)

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 11, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject children.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, in appeal Nos. 1 through 3, respondent mother appeals from orders that, inter alia, determined that she neglected the respective subject children.

Contrary to the mother's contentions in all three appeals, petitioner met its respective burdens of establishing by a preponderance of the evidence that the children were neglected (*see* Family Ct Act § 1046 [b] [i]). A neglected child is a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent or other person legally responsible for [the child's] care to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship" (§ 1012 [f] [i] [B]). "It is well established that 'a finding of neglect may be appropriate even when a child has not been actually impaired, in order to protect that child and prevent impairment' " (*Matter of Lavountae A.*, 57 AD3d 1382, 1382 [4th Dept 2008], *affd* 12 NY3d 832 [2009], quoting *Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]), and that "[a] single incident 'where the parent's judgment was strongly impaired and the child exposed to a risk of substantial harm' can sustain a finding of neglect" (*Matter of Kayla W.*, 47 AD3d 571, 572 [1st Dept 2008]; *see Matter of*

Ashanti R., 66 AD3d 1031, 1031 [2d Dept 2009]). Here, petitioner established that the four children, then aged eight, seven, four and three years old, were in imminent danger of becoming impaired when the mother left them unattended at home for at least one hour, only partially clothed and in a dirty and disheveled state, in a dirty house (*see generally Matter of Mollie W. [Corinne W.]*, 214 AD3d 1463, 1463-1464 [4th Dept 2023]; *Matter of Samuel D.-C.*, 40 AD3d 853, 853-854 [2d Dept 2007]).

Matter of Dennimnicole H.-C., 237 AD3d 157 (4th Dept., 2025)

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered October 6, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

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

After an acquaintance drove the mother and her then two-year-old child to a grocery store in a car without a car seat, the mother left the child in the car with the acquaintance while she attempted to shoplift approximately $700 worth of groceries. The mother, who had outstanding warrants, was detained by police officers but was released on an appearance ticket as the officers were unable to run a warrant check. The mother did not have any identification, money, or debit or credit cards on her person at the time she was detained by police.

A neglected child is defined, in relevant part, as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof . . ." (Family Ct Act § 1012 [f] [i] [B]). "The statute thus imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence" (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011]; *see* Family Ct Act § 1046 [b] [i])**.** "First, there must be 'proof of actual (or imminent danger of) physical, emotional or mental impairment to the child' " and "[s]econd, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree

of parental care" (*Afton C.*, 17 NY3d at 9, quoting *Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]; *see* Family Ct Act § 1012 [f] [i]).

"In order for danger [of impairment to the child] to be 'imminent,' it must be 'near or impending, not merely possible' . . . Further, there must be a 'causal connection between the basis for the neglect petition and the circumstances that allegedly produce the . . . imminent danger of impairment' . . . This requirement is intended to 'focus [neglect proceedings] on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior' " (*Afton C.*, 17 NY3d at 9, quoting *Nicholson*, 3 NY3d at 369; *see [*2]Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1277-1278 [4th Dept 2014]). Further, "[i]n reviewing a determination of neglect, we must accord great weight and deference to the determination of Family Court, including its drawing of inferences and assessment of credibility, and we should not disturb its determination unless clearly unsupported by the record" (*Matter of Shaylee R.*, 13 AD3d 1106, 1106 [4th Dept 2004]).

Here, contrary to the mother's contention, petitioner established by a preponderance of the evidence that the physical, mental, or emotional condition of the child was in imminent danger of becoming impaired as a result of the mother's failure to exercise a minimum degree of care in providing the child with proper supervision or guardianship (*see* Family Ct Act § 1012 [f] [i] [B]). The mother transported the child to a grocery store, without a car seat, even though she had outstanding warrants for her arrest and, while shoplifting at the store, she left the child in the care of a relative stranger, whose address she did not know. That the mother was not arrested, potentially leaving the child stranded with a relative stranger, was solely the result of the inability of the police officers to run a warrant check.

To the extent that the mother contends that the child was not at imminent risk of harm because the child was not present for the actual act of shoplifting or the mother's detention and was not screaming, crying, or otherwise acting out, we reject that contention. Indeed, "it is well established that the statutory requirement of imminent danger . . . does not require proof of actual injury . . . , and that [a] single incident where the parent's judgment was strongly impaired and the child exposed to a risk of substantial harm can sustain a finding of neglect" (*Raven B.*, 115 AD3d at 1278 [internal quotation marks omitted]).

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

Matter of Dream B., AD3d 2025 NY Slip Op 03928 (4th Dept., 2025)
Appeals from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered May 8, 2025, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondents had neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father and respondent paternal grandmother each appeal from an order, entered after a fact-finding hearing, determining that they neglected the subject child. As a preliminary matter, we exercise our discretion to treat respondents' notices of appeal from the order as valid notices of appeal from the subsequently entered order of disposition (*see* CPLR 5520 [c]; *Matter of Adrian L. [Keetoyia B.]*, 225 AD3d 1166, 1166 [4th Dept 2024], *lv denied* 42 NY3d 903 [2024]).

Contrary to respondents' contentions, Family Court did not err in determining that petitioner established that they neglected the subject child. To establish neglect, petitioner was required to show, by a preponderance of the evidence, " 'first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship' " (*Matter of Jayla A. [Chelsea K.—Isaac C.]*, 151 AD3d 1791, 1792 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]; *see* Family Ct Act §§ 1012 [f] [i]; 1046 [b] [i]). The court's " 'findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record' " (*Matter of Jeromy J. [Latanya J.]*, 122 AD3d 1398, 1398-1399 [4th Dept 2014], *lv denied* 25 NY3d 901 [2015]).

Here, the record establishes that respondents, who were legally responsible for the child's care (*see generally* Family Ct Act § 1012 [a], [g]), left the child at the maternal grandmother's home, and when the maternal grandmother was no longer able to care for the child, respondents failed to make an alternative plan. The record further establishes that respondents failed to address the child's mental health issues and multiple absences from school. We therefore conclude that "there is a sound and substantial basis to support [the court's] finding that the child [was] in imminent danger of impairment as a result of [respondents'] failure to exercise a minimum degree of care" (*Matter of Landen S. [Timothy S.]*, 227 AD3d 1465, 1466 [4th Dept [*2]2024] [internal quotation marks omitted]).

Parental Mental Health

Matter of Rayvin G., 237 AD3d 933 (2nd Dept., 2025)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an order of fact-finding and disposition of the Family Court, Kings County (Robert D. Hettleman, J.), dated August 29, 2023. The order of fact-finding and disposition, after a fact-finding and dispositional hearing, found that the mother neglected the subject child and directed that the subject child remain in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing.

ORDERED that the appeal from so much of the order of fact-finding and disposition as directed that the child remain in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing is dismissed as academic, without costs or disbursements; and it is further,

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

On June 7, 2022, the Administration for Children's Services (hereinafter ACS) conducted an emergency removal of the subject child due to a domestic violence incident between the mother and her adult son that resulted in the child being injured. On June 9, 2022, ACS commenced this proceeding pursuant to Family Court Act article 10, alleging, inter alia, that the mother suffered from a mental illness which impaired her ability to care for the child.

After a fact-finding and dispositional hearing, in an order of fact-finding and disposition dated August 29, 2023, the Family Court found that the mother neglected the child and directed that the child remain in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing. The mother appeals.

The appeal from so much of the order as directed that the child remain in the custody [*2]of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing must be dismissed as academic, as that portion of the order has expired by its own terms (*see Matter of Luna O. [Eneudis T.O.]*,

232 AD3d 799, 800; *Matter of Rivka A.P. [Dana P.]*, 226 AD3d 907, 908; *Matter of Peter T. [Shay S.P.]*, 173 AD3d 1043, 1045).

"A party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Jayce W. [Lucinda J.]*, 224 AD3d 916, 916 [alteration and internal quotation marks omitted]; *see* Family Ct Act §§ 1012[f][i]; 1046[b][i]). Although "evidence of a parent's mental illness, alone, is insufficient to support a finding of neglect of a child, such evidence may be part of a neglect determination when the proof further demonstrates that the parent's condition creates an imminent risk of physical, mental, or emotional harm to the child" (*Matter of Joseph L. [Cyanne W.]*, 168 AD3d 1055, 1056 [internal quotation marks omitted]). "Proof of a parent's ongoing mental illness and the failure to follow through with aftercare medication is a sufficient basis for a finding of neglect where such failure results in a parent's inability to care for [his or] her child in the foreseeable future" (*Matter of Khaleef M.S.-P. [Khaleeda M.S.]*, 203 AD3d 1160, 1161 [internal quotation marks omitted]). Furthermore, while "exposing a child to domestic violence is not presumptively neglectful" (*Nicholson v Scoppetta*, 3 NY3d 357, 375 [emphasis omitted]), "a finding of neglect based on an incident or incidents of domestic violence is proper where a preponderance of the evidence establishes that the child was actually placed in imminent danger or harm by reason of the failure of the parent or caretaker to exercise a minimal degree of care" (*Matter of Meeya P. [Anthony C.]*, 167 AD3d 1018, 1019). "The credibility findings of the Family Court should be accorded great deference, as it had direct access to the parties and was in the best position to evaluate their testimony, character, and sincerity" (*Matter of Jayce C. [Lucinda J.]*, 224 AD3d at 917 [internal quotation marks omitted]).

Here, ACS established by a preponderance of the evidence that the mother neglected the child. ACS showed that the mother's largely untreated mental illness caused the child to be placed at imminent risk of harm because, among other things, while in the presence of the child, the mother had violent and inappropriate arguments with individuals who were not actually present (*see Matter of Khaleef M.S.-P. [Khaleeda M.S.]*, 203 AD3d at 1161; *Matter of Joseph L. [Cyanne W.]*, 168 AD3d at 1056). The evidence further demonstrated that the mother placed the child at imminent risk of harm when she instigated a domestic violence incident with her adult son that resulted in the child being injured (*Matter of Meeya P. [Anthony C.]*, 167 AD3d at 1019).

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

The mother's remaining contentions are either without merit or not properly before this Court.

Matter of Tiffany N., AD3d 2025 NY Slip Op 03068 (2nd Dept., 2025)

In a proceeding pursuant to Family Court Act article 10, the petitioner appeals from an order of fact-finding of the Family Court, Kings County (Melody Glover, J.), dated July 3, 2024. The order of fact-finding, after a hearing, dismissed the petition.

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

After removing the subject child from the mother on an emergency basis pursuant to Family Court Act § 1024, the Administration for Children's Services (hereinafter ACS) commenced this proceeding pursuant to Family Court Act article 10. ACS alleged that the mother neglected the child by failing to provide adequate guardianship and supervision. ACS alleged, inter alia, that the mother had been diagnosed with a mild intellectual disability, was aggressive, and failed to participate in certain programs without which she was unable to independently care for the child. In an order of fact-finding dated July 3, 2024, the Family Court, after a fact-finding hearing, found that the petitioner failed to establish, by a preponderance of the evidence, sufficient facts to sustain the allegations in the petition and dismissed the petition with prejudice. ACS appeals.

"At a fact-finding hearing in a proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing, by a preponderance of the evidence, that the child has been abused or neglected" (*Matter of Ester K. [Marina U.]*, 233 AD3d 868, 869; *see* Family Ct Act § 1046[b][i]; *Matter of Tammie Z.*, 66 NY2d 1, 3; *Matter of Nash D. [Daniel D.]*, 224 AD3d 749, 750). "A parent neglects a child when he or she fails to 'exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship' that results in impairment or 'imminent danger' of impairment to the child's 'physical, mental or emotional condition'" (*Matter of Zahir W. [Ebony W.]*, 169 AD3d 909, 909, quoting Family Ct Act § 1012[f][i][B]). "Actual or imminent danger of impairment is a 'prerequisite to a finding of neglect [which] ensures that the Family Court, [*2]in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior'" (*id.* at 909-910, quoting *Nicholson v Scoppetta*, 3 NY3d 357, 369; *see Matter of Milagros A.W. [John R.]*, 128 AD3d 1079, 1080). "In order for danger to be 'imminent,' it must be 'near

or impending, not merely possible'" (*Matter of Zahir W. [Ebony W.]*, 169 AD3d at 910, quoting *Nicholson v Scoppetta*, 3 NY3d at 369).

The Family Court correctly found that ACS did not prove by a preponderance of the evidence that the mother neglected the child. Evidence of a parent's mental illness or intellectual disabilities, alone, will not support a finding of neglect. However, said disabilities may properly form the basis of such a finding when the evidence establishes a causal connection between the parent's condition and actual or potential harm to the child (*see Matter of Baylee F. [Jeanette E.]*, 231 AD3d 1318, 1319; *Matter of Peter T. [Shay S.P.],* 173 AD3d 1043, 1046; *Matter of Bella S. [Sarah S.]*, 158 AD3d 703, 704). Here, ACS failed to establish a causal connection between the mother's intellectual disability and actual or imminent harm to the child (*see Matter of Bella S. [Sarah S.]*, 158 AD3d at 705). Similarly, while the mother's outbursts at foster care agency staff, in the presence of the child, were inappropriate, ACS failed to establish a nexus between the outbursts and actual or imminent harm to the child (*see generally Matter of Divine K.M. [Andre G.]*, 211 AD3d 733, 736; *Matter of Malachi M. [Mark M.]*, 164 AD3d 794, 796; *Matter of Milagros A.W. [John R.]*, 128 AD3d at 1080-1081). The evidence adduced at the fact-finding hearing established that the mother interacted with the child appropriately in the hospital following her birth and, during supervised visitation, properly fed and diapered the child, expressed affection toward her, and comforted her when she cried or was fussy.

Additionally, despite ACS's allegations to the contrary, the evidence reflected that the mother utilized supportive services, including one-on-one parenting coaching, dyadic therapy with the child, and individual therapy to address her anger issues. ACS did not present any evidence that these services were inadequate (*see Matter of Bella S. [Sarah S.]*, 158 AD3d at 705). The evidence likewise established, contrary to ACS's contentions, that the mother had adequate provisions for the child.

Finally, ACS's contention that the Family Court erred in excluding portions of a report documenting a psychiatric consultation performed on the mother is without merit. The evidence established that the report was written subsequent to the mother's discharge from the hospital and that the hearsay statements contained therein did not relate to the diagnosis and treatment of the mother. Accordingly, as the report did not relate to the mother's diagnosis, prognosis, or treatment, it did not fall within the business records exception to the hearsay rule (*see* Family Ct Act § 1046[a][iv]; *People v Ortega*, 15 NY3d 610, 617; *Grechko v Maimonides Med. Ctr.*, 188 AD3d 832, 833-834).

Matter of Kamani K. L., AD3d 2025 NY Slip Op 03810 (2nd Dept., 2025)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an order of fact-finding and disposition of the Family Court, Kings County (Robert D. Hettleman, J.), dated March 27, 2024. The order of fact-finding and disposition, insofar as appealed from, after a fact-finding hearing, found that the mother neglected the subject child.

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

The petitioner, Administration for Children's Services (hereinafter ACS), commenced this proceeding pursuant to Family Court Act article 10, alleging that the mother neglected the subject child by failing to provide him with proper supervision or guardianship in that the mother had a mental illness that impaired her ability to care for the child. Following a fact-finding hearing, the Family Court, inter alia, found that the mother neglected the child. The mother appeals.

"At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing by a preponderance of evidence that the subject child has been abused or neglected" (*Matter of Khaleef M.S.-P. [Khaleeda M.S.]*, 203 AD3d 1160, 1161; *see* Family Ct Act §§ 1012[f][i]; 1046[b][i]). "Even though evidence of a parent's mental illness, alone, is insufficient to support a finding of neglect of a child, such evidence may be part of a neglect determination when the proof further demonstrates that the parent's condition creates an imminent risk of physical, mental, or emotional harm to the child" (*Matter of Caia N. [Terri N.]*, 231 AD3d 1033, 1034; *see Matter of Wynter V. [Felitta V.]*, 230 AD3d 505, 506).

Here, ACS established by a preponderance of the evidence that the mother neglected the child. ACS's evidence demonstrated that the mother's largely untreated mental illness caused [*2]the child to be placed at imminent risk of harm, as the mother threatened another shelter resident with a knife while leaving the child, who had been diagnosed with autism and required close supervision, unattended in their shelter unit for at least 40 minutes. The episode resulted in a two-week involuntary hospitalization of the mother, during which she continued to display paranoid behavior and a lack of insight into her mental illness (*see Matter of Wynter V. [Felitta V.]*, 230 AD3d at 506; *Matter of Khaleef M.S.-P. [Khaleeda M.S.]*, 203 AD3d at 1161; *Matter of Joseph L. [Cyanne W.]*, 168 AD3d 1055, 1056).

Contrary to the mother's contention, the shelter director's testimony as to what an unpreserved surveillance video showed did not violate the best evidence rule (*see People v Jackson*, 192 AD3d 15, 17-19; *People v Wright*, 160 AD3d 667, 669; *see generally Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643-645). Moreover, the shelter director's testimony regarding her observations of the video did not implicate the hearsay rule (*see People v Finch*, 160 AD3d 1212, 1214; *see also People v Clark*, 203 AD2d 935, 936).

The mother's remaining contentions are either without merit or not properly before this Court.

Matter of Justin Noah O., AD3d 2025 NY Slip Op 03812 (2nd Dept., 2025)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an order of fact-finding and disposition of the Family Court, Kings County (Jacqueline D. Williams, J.), dated November 8, 2023. The order of fact-finding and disposition, insofar as appealed from, after fact-finding and dispositional hearings, found that the mother neglected the subject child.

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

In November 2020, the Administration for Children's Services (hereinafter ACS) commenced this neglect proceeding pursuant to Family Court Act article 10. ACS alleged that the mother had neglected the subject child in that she failed to provide the child with proper supervision or guardianship by exhibiting certain "bizarre and outrageous behavior." After a fact-finding hearing, the Family Court found that the mother neglected the child as alleged in the petition.

"In a child neglect proceeding under Family Court Act article 10, the petitioner has the burden of proving neglect by a preponderance of the evidence" (*Matter of Bryce J. [Alia F.]*, 214 AD3d 803, 804 [internal quotation marks omitted]; *see Matter of Mia S. [Michelle C.]*, 212 AD3d 17, 19). "Even though evidence of a parent's mental illness, alone, is insufficient to support a finding of neglect of a child, such evidence may be part of a neglect determination when the proof further demonstrates that the parent's condition creates an imminent risk of physical, mental, or emotional harm to the child" (*Matter of Precise M. [Tawana M.]*, 215 AD3d 680, 681 [internal quotation marks omitted]; *see Matter of Joseph L. [Cyanne W.]*, 168 AD3d 1055, 1056). "[A] neglect finding is proper upon proof of the causal connection between a parent's mental illness and requisite

potential harm to the child" (*Matter of Madison G. [Lynn T.]*, 181 AD3d 597, 599 [internal quotation marks omitted]; *see Matter of Kiemiyah M. [Cassiah M.]*, 137 AD3d 1279, 1280). "The credibility findings of the Family Court should be accorded great deference, as it had direct access to the parties and was in the best position to evaluate their testimony, character, and sincerity" [*2](*Matter of Jayce W. [Lucinda J.]*, 224 AD3d 916, 917 [internal quotation marks omitted]; *see Matter of Skyli V. [Jamol V.—Shaneka E.]*, 224 AD3d 913, 915).

Here, contrary to the mother's contention, the Family Court's finding of neglect was supported by a preponderance of the evidence. ACS established that there was a causal connection between the mother's mental health condition and the risk of potential and imminent harm to the child (*see Matter of Kamaya S. [Zephaniah S.]*, 218 AD3d 590, 592; *Matter of Chloe W. [Tara W.]*, 188 AD3d 707, 709; *Matter of Joseph L. [Cyanne W.]*, 168 AD3d at 1056).

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

Matter of Maxine L., AD3d 2025 NY Slip Op 03397 (4th Dept., 2025)
Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered June 1, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, continued the placement of the subject children with petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of disposition that, inter alia, continued the subject children's placement with petitioner. The mother's appeal brings up for review the propriety of an earlier order of fact-finding, following a hearing, that, inter alia, adjudged that she neglected Ishmael L. (*see* CPLR 5501 [a] [1]; Family Ct Act § 1118; *Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1402-1403 [4th Dept 2016]). We affirm. Petitioner established by a preponderance of the evidence that the mental or emotional condition of Ishmael L. was in imminent danger of becoming impaired as a result of the mother's failure to exercise a minimum degree of care (*see* Family Ct Act §§ 1012 [f] [i]; 1046 [b] [i]). "An imminent danger to the child may result from a respondent's long-standing history of mental illness and noncompliance with treatment" (*Matter of Lyndon S. [Hillary S.]*, 163 AD3d 1432, 1433 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of Jesse DD.*, 223 AD2d 929, 931-932 [3d Dept 1996], *lv denied* 88 NY2d 803 [1996]).

"The evidence must establish a causal connection between the parent's condition, and actual or potential harm to the child[ ]" (*Matter of Jesus M. [Jamie M.]*, 118 AD3d 1436, 1437 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]). "In reviewing a determination of neglect, [this Court] must accord great weight and deference to the determination of Family Court, including its drawing of inferences and assessment of credibility, and . . . should not disturb its determination unless clearly unsupported by the record" (*Matter of Shaylee R.*, 13 AD3d 1106, 1106 [4th Dept 2004]; *see Matter of Bryan O. [Zabiullah O.]*, 153 AD3d 1641, 1642 [4th Dept 2017]; *Matter of Emily W. [Michael S.—Rebecca S.]*, 150 AD3d 1707, 1709 [4th Dept 2017]).

Here, the evidence at the hearing established that the mother had a history of suicidal thoughts that led to her being admitted to the hospital several times, had a history of failing to follow through on her treatment, and resisted taking her prescribed medication for depression and impulse control disorder (*see Matter of Jahkai S. [Shirley S.]*, 216 AD3d 1432, 1432 [4th Dept 2023]; *Matter of Majerae T. [Crystal T.]*, 74 AD3d 1784, 1785 [4th Dept 2010]). We further note that the evidence of the mother's cognitive disability, when coupled with other aspects of her mental health condition, supports the determination that the mother neglected Ishmael L. (*see Matter of Faith K. [Cindy R.]*, 194 AD3d 1402, 1403 [4th Dept 2021]; *Matter of Joseph MM. [Clifford MM.]*, 91 AD3d 1077, 1079 [3d Dept 2012], *lv denied* 18 NY3d 809 [2012]; *see generally Matter of Anthony TT. [Philip TT.]*, 80 AD3d 901, 902 [3d Dept 2011], *lv denied* 17 NY3d 704 [2011]). We do, however, agree with the mother that petitioner failed to establish by [*2]a preponderance of the evidence that Ishmael L.'s "physical, mental or emotional condition ha[d] been impaired or [was] in imminent danger of becoming impaired" as a result of the alleged incidents of domestic violence between his parents (*Nicholson v Scoppetta*, 3 NY3d 359, 368 [2004]).

Parental Substance Abuse

Matter of Sariyah T.. AD3d 2025 NY Slip Op 02637 (3rd Dept., 2025)

Appeals (1) from an order of the Family Court of Ulster County (Kerri Savona, J.) entered April 17, 2024, which, among other things, granted petitioner's application, in

proceeding No. 1 pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected, and (2) from an order of said court, entered April 17, 2024, which granted petitioner's application, in proceeding No. 2 pursuant to Family Ct Act article 10, to hold respondent in willful violation of an order of protection, and committed respondent to jail for six months.

Respondent (hereinafter the mother) is the mother of the two subject children (born in 2016 and 2018). She allegedly overdosed in her home in October 2022 while the younger child was in her sole care. Both children were removed from the mother's care thereafter pursuant to Family Ct Act § 1024 and placed with relatives. The subject neglect proceeding was then commenced and a Family Ct Act § 1027 hearing was held, after which Family Court ordered the continued removal of the children. Family Court later issued a temporary order of protection against the mother requiring, as relevant here, the mother to stay away from the children, except for visitation at petitioner's discretion, as well as their respective residences, without exception. Petitioner subsequently filed a petition against the mother for her alleged violation of that order in visiting the younger child's residence. Following a combined fact-finding hearing on both petitions, Family Court made several neglect and derivative neglect findings with respect to the children and determined that the mother willfully violated the order of protection. Following a combined dispositional hearing, the court continued the placement of the children, imposed various terms of supervision upon the mother and committed her to jail for 180 days, authorizing her release to an inpatient treatment facility if appropriate placement was found. The mother appeals.**[FN1]**

"Neglect is established when a preponderance of the evidence shows that the children's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and that the actual or threatened harm to the children results from the parent's failure to exercise a minimum degree of care in providing the children with proper supervision or guardianship" (*Matter of Damiek TT. [Damiek UU.]*, 232 AD3d 1157, 1157 [3d Dept 2024] [internal quotation marks and citations omitted]; *see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]). Although not specifically defined in the Family Ct Act, "derivative neglect" may be found "where the evidence demonstrates an impairment of parental judgment to the point that it creates a substantial risk of harm for any child left in that parent's care" (*Matter of Jade F. [Ashley H.]*, 149 AD3d 1180, 1181-1182 [3d Dept 2017] [internal quotation marks, brackets and citations omitted]; *see Matter of Hazelee DD. [Nicholas EE.]*, 222 AD3d 1223, 1227 [3d Dept 2023[*2]]).

On the date in question, a self-described friend of the mother called 911 to report that she was found unconscious on the floor of her apartment and that her lips were turning

blue. The caller declined to identify himself before providing a false name and stated, "I think she's overdosing" and "I know that she does drugs." He specified, "there's Xanax everywhere" and "I know she does heroin." When asked if there was a needle by her, he added, "I think she sniffs." Prior to calling 911, the caller had already administered Narcan, which he had found in the mother's drawer, notably offering that he "could only find one" dose. Law enforcement later identified the caller, referred to herein as Elijah.

Paramedics arrived to discover the mother cyanotic, unawake and breathing very slightly. Several feet away was the visibly upset younger child, in a high chair pushed up to a dining room table. On that table, and within the younger's child's reach, was a pill grinder, a piece of notebook paper with a crease in it and a short red straw on the paper, each of which had a white powdery substance on it. Several prescription medication bottles were present on other surfaces in the apartment; to the extent the labels can be read, the medications were prescribed to the mother and appear to be antidepressants. Unused hypodermic needles were observed on the kitchen counter and in one open upper cabinet. A head-to-toe scan of the mother revealed no obvious injuries to explain her unresponsiveness. Her airway was partially obstructed by her tongue, a common occurrence in overdoses, according to the paramedic who testified at the hearing. The paramedic also recalled that the mother had "pinpoint pupils" — a "textbook sign of some sort of narcotic overdose." Those signs, in addition to the mother's decreased respirations and unresponsive mental state, led the paramedic to believe that this was a narcotic overdose and to administer two additional rounds of Narcan, one intranasally and then one through an IV with saline. After a couple of minutes following the IV, the mother regained consciousness and was breathing normally. Although there were inconsistencies between the paramedic's testimony and his incident report, Family Court fully credited his testimony. That paramedic, who had responded to hundreds of overdoses, testified that he could say with certainty that the mother had used opiates and overdosed.

About an hour after arriving at the hospital, the mother reported to law enforcement that Elijah had injected her with an unknown substance, causing her to lose consciousness. She recanted that statement by the end of her interview. The hospital records admitted into evidence do not include a toxicology report, and they seem to reflect that her drug screen was canceled after she left the hospital against medical advice.[FN2] The testimony at the hearing was internally inconsistent regarding the testing performed on the white powdery substance found in the mother's [*3]apartment, including whether the substance was tested for fentanyl only or for both fentanyl and heroin and whether an inadequate sample quantity would return a "negative" result or an "inconclusive" one.

In the days following the incident, the mother reported to a caseworker that she had simply fallen and hit her head. That caseworker spoke with the older child on two separate occasions following the incident, who offered that Elijah would get needles from Rite Aid and use them to give himself medicine in his arm, demonstrating a plunger motion, because he had a "boo boo" that he could not fix. When asked if Elijah gave medication to the mother in that way, the older child stated that Elijah gave her medicine "like you would take Tylenol," but "it didn't make her better, . . . it makes her throw up." The older child also relayed that the mother and Elijah would go into the apartment bathroom for long periods of time and that she and the younger child would be told to stay in their room. The mother generally denied any drug use or knowledge of the drug paraphernalia in her apartment when questioned by law enforcement and her caseworker. However, she did not testify or present any witnesses at the hearing, and Family Court accordingly granted petitioner's application to draw a negative inference against her.

Family Court determined that the mother's actions, in abusing opiates in the presence of the younger child and in placing him in close proximity to the opiates, placed him at imminent risk of harm, constituting neglect as to the younger child, and evidenced such impaired parental judgment as to warrant a finding of derivative neglect as to the older child. The court also concluded that the mother neglected both children by exposing them to illicit drug use on other occasions and by leaving them unattended for periods of time while she and her acquaintance abused same. Although the hearing evidence was not without inconsistencies, where, as here, a respondent parent chooses not to testify, Family Court is empowered to draw the strongest negative inference against that parent as the opposing evidence allows (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]; *Matter of Kylee R. [David R.]*, 154 AD3d 1089, 1090 [3d Dept 2017], *lv denied* 30 NY3d 911 [2018]). According deference to the court's factual findings and credibility determinations regarding the presence and abuse of opiates (*see Matter of Joshua R. [Kimberly R.]*, 216 AD3d 1219, 1220 [3d Dept 2023], *lv denied* 40 NY3d 905 [2023]), and noting that the relatively low corroboration requirement with respect to the older child's out-of-court statements was satisfied (*see* Family Ct Act § 1046 [a] [vi]; *Matter of Lawson O. [Andrew O.]*, 176 AD3d 1320, 1321 [3d Dept 2019], *lv denied* 35 NY3d 902 [2020]), a sound and substantial basis exists in the record to support Family Court's findings of neglect and derivative neglect (*see Matter of Hazelee DD. [Nicholas EE.]*, [*4]222 AD3d at 1226-1227; *Matter of Alexander P. [Jillian P.]*, 216 AD3d 1455, 1456 [4th Dept 2023]; *Matter of Grace F. [Nicole F.]*, 144 AD3d 680, 680-681 [2d Dept 2016]; *Matter of Jaielly R.H. [Kimberly V.]*,

132 AD3d 993, 993 [2d Dept 2015]; *Matter of Brandon R. [James U.]*, 114 AD3d 1028, 1028-1029 [3d Dept 2014]).

As for the violation petition, Family Court took judicial notice of the operative temporary order of protection, which imposed a clear and unequivocal mandate upon the mother to stay away from the children's respective residences. The hearing evidence demonstrated that, after petitioner, citing the order of protection, denied the mother's request to attend the younger child's birthday party at his residence, the mother nonetheless went to the younger child's home during the party, "hollering" and "screaming" until permitted to see him. The maternal grandmother reported the violation to petitioner, and the mother admitted to her conduct when later questioned by a permanency caseworker. This evidence constitutes the requisite clear and convincing evidence of willfulness (*see generally Matter of Cori XX. [Michael XX.-Katherine XX.]*, 155 AD3d 113, 115 [3d Dept 2017).

Egan Jr., Reynolds Fitzgerald, McShan and Mackey, JJ., concur.

ORDERED that the orders are affirmed, without costs.

Footnotes

Footnote 1: We exercise our discretion to overlook the various defects in the mother's premature notice of appeal and deem her appeal to be validly taken from the above orders (*see* CPLR 5520 [c]).

Footnote 2: The records admitted into evidence include information concerning the hospital's treatment of the mother on prior occasions. It appears that, in 2017, the mother self-reported daily recreational drug use, including of benzodiazepines (depressants) and oxycodone (an opioid).

Domestic Violence

Matter of J.V., 234 AD3d 464 (1st Dept., 2025)

Orders of disposition, Family Court, Bronx County (Alicea Elloras-Ally, J.), entered on or about February 20, 2024, which, to the extent they bring up for review amended fact-finding orders, same court and Judge, entered on or about February 20, 2024, which found that respondent neglected the subject children by committing an act of domestic violence against the children's mother in their presence, by violating an order of

protection, and by failing to provide them with adequate shelter, unanimously modified, on the law and the facts, to the extent of vacating the finding that respondent neglected the children by failing to provide them with adequate shelter, vacating the finding that respondent neglected J.V., and otherwise affirmed, without costs. Appeal from amended fact-finding orders, unanimously dismissed, without costs as subsumed in the appeal from the orders of disposition. Order of protection, same court and judge, entered on or about February 20, 2024, unanimously affirmed, without costs.

A preponderance of the evidence established that respondent neglected A.H. by committing an act of domestic violence against the mother on February 26, 2019 in A.H.'s presence that resulted in physical, mental, or emotional impairment or imminent danger to A.H. (*see* Family Ct Act §§ 1012[f][i]; 1046[b][i]; *Matter of Terrence B. [Terrence J.B.]*, 171 AD3d 463, 463 [1st Dept 2019]). The evidence demonstrated that respondent attacked the mother at night and got on top of her. In the meantime, A.H. remained nearby, and at one point tried to intercede and told respondent to leave the mother alone. Under these circumstances, Family Court properly concluded that A.H.'s emotional condition was impaired, and that A.H. was exposed to a risk of substantial harm (*see Matter of J.R.J.-C. [Antonio M.]*, 176 AD3d 623, 624 [1st Dept 2019]). A.H.'s out-of-court statements to petitioner agency's caseworker were corroborated by the mother's statements to the caseworker (*see Matter of Cristalyn G. [Elvis S.]*, 158 AD3d 563, 564 [1st Dept 2018]). Furthermore, there is no reason to disturb the court's credibility findings (*see Matter of Syeda A. [Syed I.]*, 186 AD3d 1145, 1146 [1st Dept 2020]), and a negative inference was properly drawn for respondent's failure to testify (*see Matter of Berllin B.O. [Shakira O.]*, 215 AD3d 581, 582 [1st Dept 2023]). The record, however, does not reflect that J.V. was present at the time of the incident on February 26, 2019.

Contrary to respondent's contention, the evidence that A.H. stated that they were sad after the February 26, 2019 incident was sufficient to establish neglect, particularly given A.H.'s close physical proximity to the altercation, which involved screaming and physical violence (*see Matter of Serenity G. v Modi K.*, 171 AD3d 588, 588 [1st Dept 2019]; *Matter of Jeaniya W. [Jean W.]*, 96 AD3d 622, 623 [1st Dept 2012]).

However, Family Court erred in finding neglect against respondent for failure to provide adequate shelter ([*2]*see Matter of Puah B. [Autumn B.]*, 173 AD3d 422, 423 [1st Dept 2019], *lv dismissed* 33 NY3d 1117 [2019]). The record demonstrates that the conditions of the home improved over time (*see Matter of Iyanah D.*, 65 AD3d 927, 927-928 [1st Dept 2009]), and there was no evidence that the children were in danger or imminent danger of impairment due to the condition of the apartment (*see Matter of Angelica M. [Joe M.]*, 187 AD3d 508, 509 [1st Dept 2020]). In fact, Administration for Children's

Services never sought to remove the children from the parents' care as a result of the allegedly unsanitary conditions in the home. The strong inference drawn by the court against respondent for failure to testify is insufficient by itself to provide the necessary link between the conditions of the apartment and any imminent harm to the children (*see Matter of Jayvien E. [Marisol T.]*, 70 AD3d 430, 436 [1st Dept 2010]).

Matter of N.C.M., AD3d 2025 NY Slip Op 03527 (1st Dept., 2025)

Order of fact-finding, Family Court, New York County (Maria Arias, J.), entered on or about April 10, 2024, which, after a hearing, determined that respondent neglected the subject children, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). The mother credibly testified that the respondent broke the lock to her apartment and proceeded to assault her while two of the children were in an adjacent room. Her account has ample support in the record both from the caseworker's regarding her observation of the broken lock in the mother's apartment, and the interview she conducted of the middle child. The out-of-court statements of the middle child that the respondent broke into the home, and struck the mother with an open hand was corroborated by the testimonial evidence of both the mother and the caseworker (*see Matter of Ymani C.D. [Peter J.D.]*, 217 AD3d 562, 563 [1st Dept 2023]; *Matter of Jamya C. [Jermaine F.]*, 165 AD3d 410, 410 [1st Dept 2018]) and thus properly considered. The fact that the domestic violence occurred in close proximity to the two younger children permits an inference of impairment or imminent danger of impairment, even in the absence of evidence that the children were aware of it or emotionally affected by it (*see Matter of J.A. [Jermaine M.]*, 233 AD3d 428, 428 [1st Dept 2024]; *Matter of Athena M. [Manuel M.T.]*, 190 AD3d 644, 644 [1st Dept 2021]). There is no basis for disturbing the court's credibility determination (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of Elijah C.*, 49 AD3d 340 [1st Dept 2008]). Because respondent did not testify, Family Court was entitled to draw the strongest negative inference against him as the opposing evidence would allow (*see Matter of B.C. [Bernadette C.]*, 215 AD3d 584, 585 [1st Dept 2023]).

A preponderance of the evidence also supports the finding that respondent derivatively neglected the oldest child, though not at home at the time of the incident (*see Matter of Iscela G. [Lorenzo T.]*, 193 AD3d 521, 522 [1st Dept 2021]; *Matter of Autumn P. [Brandy P.]*, 121 AD3d 454, 455 [1st Dept 2014]).

Matter of Remi R. C. G., 237 AD3d 701 (2nd Dept., 2025)

In related proceedings pursuant to Family Court Act article 10, Michael M. appeals from an order of fact-finding of the Family Court, Kings County (Melody Glover, J.), dated November 9, 2023. The order of fact-finding, after a fact-finding hearing, found that Michael M. neglected the child Remi R. C. G. and derivatively neglected the child Myasia C. M.

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

The petitioner commenced these proceedings pursuant to Family Court Act article 10, alleging, inter alia, that Michael M. (hereinafter the appellant), a person legally responsible for the child Remi R. C. G. and the father of the child Myasia C. M., neglected Remi R. C. G. and derivatively neglected Myasia C. M. After a fact-finding hearing, in an order of fact-finding dated November 9, 2023, the Family Court found that the appellant neglected Remi R. C. G. and derivatively neglected Myasia C. M. This appeal ensued.

"In a child neglect proceeding pursuant to Family Court Act article 10, the petitioner must establish by a preponderance of the evidence that the subject child is neglected" (*Matter of Andrew M. [Brenda M.]*, 225 AD3d 764, 765; *see* Family Ct Act § 1046[b][i]). "'To establish neglect of a child, the petitioner must demonstrate, by a preponderance of the evidence, (1) that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship'" (*Matter of Veronica M. [Ana M.]*, 229 AD3d 626, 627, quoting *Matter of Chloe P.-M. [Martinique P.]*, 220 AD3d 783, 784). "The focus of the inquiry with respect [*2]to derivative findings is whether the evidence of abuse or neglect of another child or children demonstrates such an impaired level of parental judgment so as to create a substantial risk of harm for the other child or children in the parent's care" (*Matter of Katherine L. [Adrian L.]*, 209 AD3d 737, 739-740 [internal quotation marks omitted]). "'Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor'" (*Matter of Ashlyn M. [Robert J.]*, 228 AD3d 939, 941, quoting *Matter of Amberlyn H.P. [Jose H.C.]*, 187 AD3d 920, 920).

Contrary to the appellant's contentions, the Family Court properly found that the petitioner established by a preponderance of the evidence that the appellant neglected

Remi R. C. G. and derivatively neglected Myasia C. M. by engaging in acts of domestic violence against the mother in Remi R. C. G.'s presence while the mother was pregnant with Myasia C. M. (*see Matter of Davena A. [Christopher A.]*, 232 AD3d 595, 597; *Matter of Dalia G. [Frank B.]*, 128 AD3d 821, 823). Moreover, there is no basis for disturbing the court's credibility determinations, which are entitled to great deference (*see Matter of Leah S. [Barnett V.]*, 228 AD3d 667, 669).

The appellant's contention that the Family Court should have appointed a separate attorney to represent each of the children is unpreserved for appellate review (*see Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1494) and, in any event, without merit (*see Matter of Child Welfare Admin. [Louis G.]*, 270 AD2d 259, 260).

Accordingly, the Family Court properly found that the appellant neglected Remi R. C. G. and derivatively neglected Myasia C. M.

Matter of Tibor I., AD3d 2025 NY Slip Op 03371 (3rd Dept., 2025)

Appeal from an order of the Family Court of Tioga County (Adam Schumacher, J.), entered May 22, 2024, which granted petitioner's applications, in two proceedings pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected.

Respondent (hereinafter the father) and Stacy H. (hereinafter the mother) are the parents of the subject children (twins born in 2015). The mother also has two adult children from a previous relationship (hereinafter the stepdaughters or, individually, the older stepdaughter and the younger stepdaughter). During the relevant time period, the mother, the father, the stepdaughters and the subject children all resided in a home together. In September 2023, petitioner filed separate but identical neglect petitions against the father and the mother, alleging that they neglected the subject children by engaging in domestic violence incidents in front of them and inflicting physical injuries, among other things. Following a fact-finding hearing, Family Court issued separate orders of fact-finding and disposition for each parent, finding that the father and the mother had neglected the children. As far as the disposition, both parents consented to 12-month orders of supervision. The father appeals.**[FN1]**

The father contends that the evidence is insufficient to support a finding of neglect. "A party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a

minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Raquel ZZ. [Angel ZZ.]*, 216 AD3d 1242, 1243-1244 [3d Dept 2023] [internal quotation marks and citations omitted]; *see* Family Ct Act § 1012 [f] [i]). "In determining whether a respondent failed to exercise a minimum degree of care, the critical inquiry is whether a reasonable and prudent parent would have so acted, or failed to act, under the circumstances" (*Matter of Jaxxon WW. [Donald XX.]*, 200 AD3d 1522, 1523 [3d Dept 2021] [internal quotation marks, brackets and citations omitted]; *see Matter of Raquel ZZ. [Angel ZZ.]*, 216 AD3d at 1244). "[A] single act of domestic violence may be sufficient to establish neglect if the child is present for such violence and is visibly upset and frightened by it" (*Matter of Kaitlyn SS. [Antonio UU.],* 184 AD3d 961, 963 [internal quotation marks, brackets and citation omitted] [3d Dept 2020]; *accord Matter of R.E. [S.F.],* 212 AD3d 1009, 1010 [3d Dept 2023]). Finally, a parent "may be held accountable for the neglectful acts of another if he or she knew or should reasonably have known that the children were in danger" (*Matter of Bonnie FF. [Marie VV.]*,220 AD3d 1078, 1080 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]).

At the fact-[*2]finding hearing, petitioner presented the testimony of the younger stepdaughter, a deputy sheriff from Tioga County Sheriff's Department and three of petitioner's caseworkers who were involved with the family during the relevant time period. This testimony established, as to the allegations of domestic violence in the petition, that there was frequent fighting between the adults in the home and the police had to be called on a staggering number of occasions. Both children told caseworkers that they witnessed incidents of domestic violence between the adults in the home, including the father, and that it negatively impacted them. For instance, one of the children told a caseworker that he did not feel safe in the home when the adults are fighting. The father also testified regarding ongoing domestic violence between the adults in the home. While he attempted to downplay these incidents and/or minimize his and the mother's involvement in them, Family Court clearly rejected this testimony as not being credible, which is a determination to which we defer (*see Matter of Kaitlyn SS. [Antonio UU.]*, 184 AD3d at 966; *Matter of Johnathan Q. [James Q.]*, 166 AD3d 1417, 1419 [3d Dept 2018]). Accordingly, the record reflects that the children suffered an impairment from frequent exposure to domestic violence by the parents, including the father (*see Matter of R.E. [S.F.],* 212 AD3d at 1011; *Matter of Kaitlyn SS. [Antonio UU.],* 184 AD3d at 966). Further, the testimony and exhibits established that both children received physical injuries either directly at the hands of the father or while the father was present and failed to intervene to prevent an injury (*see Matter of Jade F. [Ashley H.],* 149 AD3d 1180, 1183 [3d Dept 2017]; *Matter of Justin O.,* 28 AD3d 877, 879 [3d Dept 2006]).**[FN2]** Therefore, in our view, "Family Court's finding that [petitioner]

established neglect by a preponderance of the evidence is supported by a sound and substantial basis in the record" (*Matter of Kaitlyn SS. [Antonio UU.]*, 184 AD3d at 966 [citation omitted]; *see Matter of Nina VV. [Wendy VV.]*, 216 AD3d 1215, 1217 [3d Dept 2023]). We have reviewed the father's remaining contentions and, to the extent not specifically addressed herein, find them to be without merit.

Footnote 1: The father's notice of appeal incorrectly indicates that the order appealed from was entered in March 2024. However, as it is clear that the order actually appealed from is the order of fact-finding and disposition, entered May 22, 2024, we "exercise our discretion to deem the premature notice of appeal as valid" (*Matter of Jayce G. [Daniel H.],* 229 AD3d 857, 858 n 1 [3d Dept 2024]).

Footnote 2: While the father also argues that Family Court improperly considered testimony regarding his drug use as it was outside the four corners of the petition, this contention is unpreserved as the father failed to object (*see Matter of Avery KK. [Nicholas KK.]*, 144 AD3d 1429, 1429 [3d Dept 2016]). Moreover, it is clear from Family Court's fact-finding order that the finding of neglect was primarily based upon the domestic violence in the home and that the testimony of the father's drug use was part and parcel of this violence as well as his failure to intervene when the mother perpetrated violence against the children.

Excessive Corporal Punishment

Matter of S.A., 235 AD3d 523 (1st Dept., 2025)

Order of fact-finding and disposition (one paper), Family Court, Bronx County (E. Grace Park, J.), entered on or about October 31, 2023, which, to the extent appealed from as limited by the briefs, determined, after a fact-finding hearing, that respondent mother neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that the mother neglected the child by inflicting excessive corporal punishment on her (Family Court Act §§

1012[f][i][B]; 1046[b][i]). Family Court properly credited the child's out-of-court statements that the mother hit, punched, dragged, pulled, and threw the child to the ground after the child refused to give the mother a hug, which the child consistently repeated to the police, EMT, and medical professionals who treated her injuries. Although the child's repetition of the statements alone is not sufficient corroboration, the child's consistent recounting of events to more than one person enhances their credibility (*see* Family Court Act § 1046[a][vi]; *Matter of Emily S. [Jorge S.]*, 146 AD3d 599, 600 [1st Dept 2017]).

Family Court properly determined that the child's statements were corroborated by other evidence in the record, including the aunt's statement in the hospital records, which were independently admissible because they were relevant to her treatment, diagnosis, and discharge and therefore fall within the medical diagnosis and treatment exception to hearsay (*see* Family Court Act § 1046[a][vi]; *People v Ortega*, 15 NY3d 610, 619 [2010]; *Matter of E.H. [M.H.]*, 209 AD3d 582, 583 [1st Dept 2022]). The child's statements were also corroborated by the injuries themselves (*see e.g. Matter of Yvelize T.*, 302 AD2d 242, 242 [1st Dept 2003]). By contrast, as the court correctly observed, the mother's version of events, in which the child was the aggressor, fails to account for the child's injuries, which required an arm sling for treatment (*see Matter of Krystopher D'A. [Amakoe D'A.]*, 121 AD3d 484, 485 [1st Dept 2014]). In these circumstances, there is no basis to disturb Family Court's credibility determinations (*Matter of Yvelize T.*, 302 AD2d at 242).

Furthermore, Family Court's finding of neglect was properly predicated on a single incident (*see Matter of Robann H. [Autumn P.]*, 221 AD3d 502, 503 [1st Dept 2023]). Although the mother has a common-law right to discipline her child, here, the discipline of hitting, punching, dragging, and throwing the child "was not appropriate in form or degree" (*Matter of Empress B. [Henrietta L.]*, 204 AD3d 562, 563 [1st Dept 2022]).

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

Matter of Isaiah D.S., 237 AD3d 627 (1st Dept., 2025)

Order of disposition, Family Court, New York County (Valerie A. Pels, J.), entered on or about March 20, 2024, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about March 3, 2024, which found that respondent father neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that the father neglected the subject child by inflicting excessive corporal punishment upon him (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *Matter of Paige T. [Kodjo T.]*, 189 AD3d 563, 564 [1st Dept 2020]). The child's out-of-court statements describing the corporal punishment inflicted upon him are corroborated by the father's own admissions that he "whooped" the child for coming home past his curfew, the caseworker's observation of the injuries, and hospital records and photographic records evidencing visible bruising on the child's neck, arms, and legs several days after the incident (*see Matter of Desiree D. [Iris D.]*, 209 AD3d 547, 548 [1st Dept 2022]; *Matter of Quisbel D.P. [Digna D.P.]*, 199 AD3d 468, 468-469 [1st Dept 2021]).

While the father was understandably concerned about the child's increasingly problematic behavior and might have had valid reasons for disciplining the child, his response was disproportionate and exceeded the physical force reasonable for discipline (s*ee Matter of Desiree D.*, 209 AD3d at 548). As noted by Family Court, placing his hands around the child's neck to such an extent as to cause bruising even days later is beyond reasonable discipline (*id.*).

Matter of Clamar G., AD3d 2025 NY Slip Op 02775 (2nd Dept., 2025)

In related proceedings pursuant to Family Court Act article 10, the subject children, Clamar G. and Iysis G., appeal, and the petitioner separately appeals, from an order of the Family Court, Kings County (Ben Darvil, Jr., J.), dated August 28, 2023. The order, after a fact-finding hearing, and upon a finding that the petitioner failed to establish that the father and the stepmother neglected the subject children, dismissed the petitions.

ORDERED that the appeal by the child Iysis G. and so much of the appeal by the petitioner as relates to the child Iysis G. are dismissed as academic, without costs or disbursements; and it is further,

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

In October 2019, the petitioner commenced these related neglect proceedings against [*2]the father and the stepmother, alleging that they inflicted excessive corporal punishment on the subject children. Following a fact-finding hearing, the Family Court found that the petitioner failed to establish by a preponderance of the evidence that the children were neglected by the father and the stepmother and dismissed the petitions. The children appeal, and the petitioner separately appeals.

The child Iysis G. is now over the age of 18 and is no longer subject to the Family Court Act article 10 proceeding relating to her (*see id.* § 119[c]; *Matter of Jermaine T. [Jairam T.]*, 193 AD3d 943, 945). Thus, the appeal by Iysis G. and so much of the appeal by the petitioner as relates to Iysis G. must be dismissed as academic.

"'In a child neglect proceeding pursuant to Family Court Act article 10, the petitioner must establish by a preponderance of the evidence that the subject child is neglected'" (*Matter of Veronica M. [Ana M.]*, 229 AD3d 626, 627, quoting *Matter of Andrew M. [Brenda M.]*, 225 AD3d 764, 765; *see* Family Ct Act § 1046[b][i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368). "To satisfy this burden, the petitioner may rely upon prior out-of-court statements of the subject children, provided that they are sufficiently corroborated" (*Matter of Ashley G. [Eggar T.]*, 163 AD3d 963, 964; *see* Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 117-118). Corroboration means "[a]ny other evidence tending to support the reliability of the previous statements" (Family Ct Act § 1046[a][vi]; *see Matter of Christina F.*, 74 NY2d 532, 536; *Matter of Nicole V.*, 71 NY2d at 118). "'Family Court Judges presented with the issue have considerable discretion to decide whether the child's out-of-court statements describing incidents of abuse or neglect have, in fact, been reliably corroborated'" (*Matter of Kashai E. [Kashif R.E.]*, 218 AD3d 574, 575-576, quoting *Matter of Nicole V.*, 71 NY2d at 119; *see Matter of Treyvone A. [Manuel R.]*, 188 AD3d 1182, 1183).

"'[A] child's recantation of allegations of abuse does not necessarily require [the] Family Court to accept the later statements as true because it is accepted that such a reaction is common among abused children'" (*Matter of Dayannie I.M. [Roger I.M.]*, 138 AD3d 747, 749 [internal quotation marks omitted], quoting *Matter of Tristan R.*, 63 AD3d 1075, 1077). "'Rather, recantation of a party's initial statement simply creates a credibility issue which the trial court must resolve'" (*Matter of Kenyana D. [Kenneth D.]*, 229 AD3d 544, 546, quoting *Matter of Dayannie I.M. [Roger I.M.]*, 138 AD3d at 749).

Here, the Family Court properly found that the out-of-court statements of the child Clamar G. as to the alleged excessive corporal punishment were not sufficiently corroborated by other nonhearsay evidence. Contrary to the contentions of the petitioner and Clamar G., under the circumstances of this case, the out-of-court statements of Iysis G. did not constitute reliable corroboration (*see Matter of Kashai E. [Kashif R.E.]*, 218 AD3d at 576; *Matter of Gerald W. [Anne R.]*, 129 AD3d 979, 980). Both Clamar G. and Iysis G. specifically denied the allegations in the petition on multiple occasions (*see Matter of Chloe-Elizabeth A.T. [Albert T.]*, 167 AD3d 910, 912; *Matter of Oliver A. [Oguis A.-D.]*, 167 AD3d 867, 868). In the absence of cross-corroboration of the out-of-court statements, the petitioner failed to present any relevant evidence to

reliably corroborate the out-of-court disclosures (*see Matter of Ashley G. [Eggar T.]*, 163 AD3d at 965). The court's determination that the father testified credibly about the incident was adequately supported by the record and is entitled to deference (*see Matter of Malachi M.[Mark M.]*, 164 AD3d 794, 795).

Accordingly, the Family Court properly dismissed the petition relating to Clamar G.

Matter of Jahkell SS., 237 AD3d 1416 (3rd Dept., 2025)

Appeal from an order of the Family Court of Schenectady County (Mark Blanchfield, J.), entered February 9, 2023, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected.

Respondent (hereinafter the mother) is the mother of the five subject children (born in 2006, 2009, 2010, 2012 and 2015). In September 2021, Child Protective Services received a telephone call from the Schenectady Police Department advising that they had picked up the second oldest child (hereinafter the child) after he was found wandering the streets alone, barefoot and in disheveled and torn clothing. When questioned by petitioner's caseworkers, the child relayed that he had been subjected to excessive corporal punishment by the mother and grandmother and, as such, had run away from home. Consequently, the child was protectively removed and placed in foster care. Petitioner thereafter commenced this neglect proceeding alleging that the mother had neglected the children in numerous respects. Following a fact-finding hearing, Family Court ultimately determined that the mother neglected the child by subjecting him to excessive corporal punishment and that such behavior constituted derivative neglect of the other children. The mother appeals.

The mother contends that the child's statements were not sufficiently corroborated and Family Court's findings of neglect and derivative neglect are not supported by a sound and substantial basis in the record. We disagree. "In a neglect proceeding, petitioner bears the burden of establishing, by a preponderance of the evidence, that the children's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and that the actual or threatened harm to the children results from the parent's failure to exercise a minimum degree of care in providing the children with proper supervision or guardianship" (*Matter of Joshua R. [Kimberly R.]*, 216 AD3d 1219, 1220 [3d Dept 2023] [internal quotation marks and citations omitted], *lv denied* 40 NY3d 905 [2023]; *see Matter of Damiek TT. [Damiek UU.]*, 232 AD3d 1157, 1157 [3d Dept 2024]). "A finding of neglect requires only an imminent *threat* of injury or

impairment, not *actual* injury or impairment, and such threat may be established through a single incident or circumstance" (*Matter of Jarrett SS. [Jade TT.-Scott SS.]*, 183 AD3d 1031, 1032 [3d Dept 2020] [internal quotation marks and citations omitted; emphasis added]; *see Matter of Messiah RR. [Christina RR.]*, 190 AD3d 1055, 1057 [3d Dept 2021]). "Family Court's factual findings and credibility determinations are accorded great weight in such a proceeding and will not be disturbed on appeal unless they lack a sound and substantial basis in the record" (*Matter of Ja'Sire FF. [Jalyssa GG.]*, 206 AD3d 1076, 1077 [3d Dept 2022] [internal quotation marks and citations omitted], *lv denied* 38 NY3d 912 [2022]; *see Matter of Asiah S. [Nancy [*2]S.]*, 212 AD3d 1062, 1063 [3d Dept 2023], *lv denied* 39 NY3d 913 [2023]).

Moreover, a child's prior out-of-court statements relating to the alleged neglect may serve as the basis for a finding of neglect, if sufficiently corroborated by any other evidence tending to support their reliability (*see Matter of Lily BB. [Stephen BB.]*, 191 AD3d 1126, 1127 [3d Dept 2021], *lv dismissed* 37 NY3d 927 [2021]; *Matter of Isabella I. [Ronald I.]*, 180 AD3d 1259, 1261 [3d Dept 2020]). "A relatively low degree of corroborative evidence is sufficient to meet this threshold" (*Matter of Lily BB. [Stephen BB.]*, 191 AD3d at 1127 [internal quotation marks and citations omitted]; *see Matter of Stephanie RR. [Pedro RR.]*, 140 AD3d 1237, 1238 [3d Dept 2016]). "[T]he reliability of the corroboration, as well as issues of credibility, are matters entrusted to the sound discretion of Family Court" (*Matter of Olivia RR. [Paul RR.]*, 207 AD3d 822, 824 [3d Dept 2022] [internal quotation marks and citation omitted]; *see Matter of Kristina S. [Michael S.]*, 160 AD3d 1057, 1058 [3d Dept 2018]).

The evidence presented by petitioner at the fact-finding hearing consisted of testimony from a family support unit caseworker and the mother. The caseworker testified that Child Protective Services was initially contactedby the Schenectady Police Department regarding concerns for the safety of the child, and her initial concern was inadequate guardianship as the developmentally delayed child had been wandering the streets without adult supervision for two to three hours before the police were called. Moreover, the child remained at the police station — as the mother had not contacted the police looking for the child — until at least 9:30 p.m., when Child Protective Services were contacted.**[FN1]** However, when the caseworker and her coworker interviewed the child, he reported that he had fled his home because the mother slapped him on his left cheek, and his grandmother got on top of him, beat him and ripped his T-shirt.**[FN2]** He further stated that his siblings were at the residence during the incident. The child eventually ran out of the house, wearing only shorts and the ripped T-shirt.**[FN3]** The caseworker relayed that the child appeared distraught, spoke rapidly when describing

the incident and several times buried his face in his hands. The child stated that he was afraid to go back home because the mother and grandmother were frequently mean to him, and he believed that the mother would "whoop" him. After speaking with him, the caseworker was convinced that the child, who has developmental disabilities, was targeted, not only by the mother and grandmother, but also by his siblings. Based on the caseworker's concerns, the child was protectively removed and placed in foster care. Initially, while in foster care, the caseworker transported the child to and from school. It was during these trips that the child confided to her that he was often "beat" by the mother and grandmother, including, on occasion, being [*3]beaten with both a stick and a belt, and that he had run away before.The caseworker testified that a few days after the child's removal, she spoke to the mother, who admitted that she said in the presence of the police that she "was going to whoop [the child's] a** when he [comes] home."**[FN4]**

The mother testified to her family's composition and her own mental health treatment since approximately 2015; however, she refused to answer any questions pertaining to the September 2021 incident involving the child. Additionally, several of the child's out-of-court statements and the mother's statement that "[the child] left at 3 p.m. and when you bring him out here I'm going to beat his a**" were contained in the police reports that were admitted into evidence.

A review of the record reveals corroboration of the child's statements from a variety of sources, including the mother's assertions that upon the police releasing the child to her, she would subject the child to excessive corporal punishment (*see Matter of Jaivon J. [Patricia D.]*, 148 AD3d 890, 892 [2d Dept 2017]; *Matter of Michael W.*, 263 AD2d 684, 685 [3d Dept 1999]). Additionally, the child's consistent out-of-court descriptions of excessive corporal punishment, along with the child's affect and demeanor while making the statements, provide some degree of corroboration (*see Matter of Lily BB. [Stephen BB.]*, 191 AD3d at 1128; *Matter of Isabella I. [Ronald I.]*, 180 AD3d at 1262). Furthermore, it is well settled that Family Court was permitted to draw the strongest negative inference from the mother's choice not to answer questions concerning the incident although given the opportunity to do so (*see Matter of Cailynn O. [Vincenzo Q.]*, 192 AD3d 1408, 1413 [3d Dept 2021]; *Matter of Makayla I. [Caleb K.]*, 162 AD3d 1139, 1142 [3d Dept 2018]). Given this proof, notably that "even a single incident of excessive corporal punishment can support a finding of neglect and actual physical injury . . . is not required" (*Matter of Bianca QQ. [Kiyonna SS.]*, 75 AD3d 679, 681 [3d Dept 2010] [internal citation omitted]; *see Matter of Bryce Y. [Clint Y.]*, 200 AD3d 1129, 1130 [3d Dept 2021], *lv dismissed* 38 NY3d 1019 [2022]), and according deference to Family

Court's assessment of credibility, we are satisfied that a sound and substantial basis exists for the court's determination that the mother neglected the child (*see Matter of Damiek TT. [Damiek UU.]*, 232 AD3d at 1159; *Matter of Bonnie FF. [Marie VV.]*, 220 AD3d 1078, 1081-1082 [3d Dept 2023]; *Matter of Bryce Y. [Clint Y.]*, 200 AD3d at 1131).

Lastly, as the mother's behavior toward the child revealed an impaired level of parental judgment, which demonstrates a fundamental flaw in her understanding of her duties of parenthood placing the other children at risk, Family Court properly determined that the mother derivatively neglected her other children (*see Matter of Bryce Y. [Clint Y.]*, 200 AD3d at 1131; *Matter of Cailynn O. [Vincenzo Q.]*, 192 AD3d at 1412-1413; *Matter [*4]of Dawn M. [Michael M.]*, 134 AD3d 1197, 1198 [3d Dept 2015]).

ORDERED that the order is affirmed, without costs.

Footnotes

Footnote 1: The caseworker testified that she was familiar with the child and his family as she had been working with them since 2017, when another child of the mother was removed and placed in a residential treatment center.
Footnote 2: The child's T-shirt was ripped from the neckline to the bottom, exposing his entire chest.

Footnote 3: The child reported that he was cold and that his bare feet hurt from walking for hours.

Footnote 4: Although the petition specifically references this single incident, Family Court sua sponte conformed the pleadings to reflect that the child was subject to a pattern of violence.

Educational Neglect

Matter of La. J., 236 AD 3d 517 (1st Dept., 2025)

Order of disposition, Family Court, Bronx County (E. Grace Park, J.), entered on or about March 18, 2024, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about February 13, 2024, which found that respondent mother neglected the subject child by misusing alcohol and failing to provide the child with adequate education, unanimously modified, on the law and the facts, to vacate the neglect finding based upon the misuse of alcohol, and otherwise affirmed, and the

appeal from that portion of the order of disposition which placed the child in the custody of the Commissioner of Social Services until the next permanency hearing, unanimously dismissed, without costs, as moot.

Petitioner did not satisfy its burden of proving, by a preponderance of the evidence, that the mother neglected the child based upon her repeated abuse of alcohol. There was no evidence that she "lost self-control during repeated bouts of excessive drinking, and such evidence is necessary to trigger the presumption of neglect under Family Court Act § 1046 (a)(iii)" (*Matter of G.B. [Gary B.]*, 227 AD3d 581, 582-583 [1st Dept 2024], quoting *Matter of Caleah C.M.S. [Calvin S.]*, 174 AD3d 457, 457 [1st Dept 2019]). While there was credible testimony that the mother, on at least two occasions, behaved inappropriately or caused a scene, there was nothing presented to demonstrate that she was intoxicated at the time.

The finding that the child was educationally neglected by the mother is supported by a preponderance of the evidence (*see* Family Court Act § 1012[f][i][A]). The child, who turned seven in 2022, resided in New York City, and was enrolled in kindergarten for the 2022-2023 school year. She was therefore required to attend school (*see* Education Law § 3205[2]][c]; NY City Dept of Educ, Regulation of Chancellor A-210, Standards for Attendance Programs, Abstract [1][A] [Sept. 28, 2017]; *Matter of Amberlina V. [Alexis R.]*, 187 AD3d 658, 658-659 [1st Dept 2020]). During the 2022-2023 school year, the child was absent from school 73 times and late 30 times. While the mother argued during fact-finding that some of those were medically excused absences, they were not documented by doctors' notes or other documentary support provided to the school. Evidence of excessive unexcused absences from school supports a finding that the child was in imminent danger of becoming impaired (*see Matter of Aliyah B. [Denise J.]*, 87 AD3d 943, 943 [1st Dept 2011]).

The mother's argument that the best interests of the child mandated that the child be released to her care has been rendered moot by subsequent orders which superseded the dispositional order at issue here, and which ultimately released the child to her care.

Matter of Tu'Real A.E.B., 237 AD3d 1532 (4th Dept., 2025)

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered November 3, 2023, in a proceeding pursuant to Family Court Act article 10. The

order determined that respondent had neglected and derivatively neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that adjudicated her child Tu'Real to be neglected and her other child, Ym'Prezz, to be derivatively neglected. Although Tu'Real has attained the age of 18 (*see* Family Ct Act § 119 [c]), the appeal is not moot (*see generally Matter of Caylin T. [Christine T.]*, 229 AD3d 859, 861 [3d Dept 2024]; *Matter of Steven S. [Lyndsey M.]*, 229 AD3d 1207, 1208 [4th Dept 2024]).

Contrary to the mother's contention, petitioner met its burden of establishing neglect by a preponderance of the evidence. "Proof that a minor child is not attending a public or parochial school in the district where the parent[ ] reside[s] makes out a prima facie case of educational neglect" and "[u]nrebutted evidence of excessive school absences [is] sufficient to establish . . . educational neglect" (*Matter of Gabriella G. [Jeannine G.]*, 104 AD3d 1136, 1137 [4th Dept 2013] [internal quotation marks omitted]). Here, petitioner presented evidence that Tu'Real "had a significant, unexcused absentee rate that [had] a detrimental effect on [his] education," and the mother "failed to . . . establish a reasonable justification for [Tu'Real's] absences and thus failed to rebut the prima facie evidence of educational neglect" (*id*. [internal quotation marks omitted]).

We further conclude that Family Court properly determined that the evidence of neglect with respect to Tu'Real "demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [the mother's] care" (*Matter of Daniella HH.*, 236 AD2d 715, 716 [3d Dept 1997]), thus warranting a finding of derivative neglect with respect to Ym'Prezz (*see generally Matter of Dayshaun W. [Jasmine G.]*, 133 AD3d 1347, 1348 [4th Dept 2015]; *Matter of Amber C.*, 38 AD3d 538, 540-541 [2d Dept 2007]).

ABUSE

PERSON LEGALLY RESPONSIBLE

Matter of B.F. v ACS, AD3d 2025 NY Slip Op 03393 (1st Dept., 2025)

Order of disposition, Family Court, Bronx County (Cynthia Lopez, J.), entered on or about October 6, 2023, to the extent it brings up for review a fact-finding order, same court and Justice, entered on or about the same date, which, after a hearing, found that respondent-appellant Roberto R. abused the child B.F., a child for whom he was legally responsible, and derivatively abused the child R.R., and that respondent-appellant Sade E. neglected the child R.R., affirmed, without costs. Appeals from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeals from the order of disposition.

This case arises from allegations that, in December 2019, B.F. (born on March 7, 2010) was sexually abused by respondent-appellant Roberto R. (Roberto), the live-in boyfriend of B.F.'s mother. The Administration for Children's Services (ACS) commenced a child protective proceeding against Roberto. ACS commenced separate child protective proceedings against Roberto and Sade E. (Sade), the parents of child R.R. (R.R.), based on the abuse of B.F. and Sade's failure to protect R.R. from Roberto. R.R. was born on January 14, 2020, approximately one month after B.F.'s alleged abuse.

Family Court conducted a fact-finding hearing over several days. B.F. testified that Roberto lived with her and her mother for approximately five months. She stated that during the time they lived together, she and Roberto would "always talk to each other" and grew "very close." One night in December 2019, B.F. sat between her mother and Roberto on the pull-out couch and watched television. While B.F.'s mother was half asleep, Roberto touched the inner "sides" of B.F.'s crotch area. He eventually pulled her underwear, reached underneath, and touched her vagina. B.F. testified that she was "shocked" because she believed that she and Roberto had a good relationship. Afterwards, her mother woke up, and she told her mother that Roberto had touched her. Her mother reported the incident to the police two days later.

B.F.'s mother testified that Roberto moved in a week after they started dating. Roberto came home around 6:00 p.m. and left around 7:00 a.m. for work. Roberto contributed $100 every week for rent, bills, and home expenses. The mother confirmed that B.F. took her to the bathroom and told her that Roberto touched her thigh and vagina. B.F. further told her mother that she feared Roberto because he threatened her and said he had "friends" that lived on the block. In January 2020, B.F. sought therapy at the Child Center of New York. There, she was diagnosed with post-traumatic stress disorder because she constantly thought of Roberto sexually abusing her and became startled and hypervigilant around men.

The court credited the testimony of B.F. and her mother, which established that Roberto resided in the home for five months prior to the abuse. In a fact-finding order issued after the hearing, Family Court determined that Roberto was a "person legally responsible[*2]" for B.F.

Conversely, the court discredited Roberto's testimony because it was inconsistent as to his relationship with B.F.'s mother and the frequency of contact with B.F. The court drew a negative inference against Sade, based on her failure to testify. The evidence thus established that Roberto sexually abused B.F. in December of 2019. The court further found that Roberto derivatively abused his child, R.R., because his sexual abuse of B.F. — whose mother was present in the same room — demonstrated a parental judgment so flawed as to create imminent risk of harm to R.R.

A fair preponderance of the evidence supports Family Court's conclusion that Roberto sexually abused B.F. (*see* Family Court Act §§ 1012[e][iii]; 1046[b][i]). B.F.'s testimony established that Roberto touched her thigh and genital area both over and under her clothing. There is no basis to disturb Family Court's credibility determinations, which are entitled to deference (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of C.F. [Carlos F.]*, 220 AD3d 506, 506-507 [1st Dept 2023], *lv denied* 41 NY3d 901 [2024]). The court properly found that B.F.'s uncertainty as to the exact date of the abuse did not undermine her credibility, given the passage of time and her age, demeanor, and recollection of the details of the event (*see Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556, 557 [1st Dept 2012]). Moreover, other evidence, such as the date of the initial investigation by ACS, corroborates the timeline.

Family Court providently exercised its discretion in finding that Roberto was a person legally responsible for B.F. within the meaning of the Family Court Act (*see* Family Court Act § 1012[g]; *Matter of Trenasia J. [Frank J.]*, 25 NY3d 1001, 1003 [2015]; *Matter of Yolanda D.*, 88 NY2d 790, 796-797 [1996]). Under the Family Court Act, a proper

respondent in an article 10 proceeding is a person alleged to have abused or neglected a child, including "any parent or other person legally responsible for a child's care" (Family Court Act § 1012[a]). A person legally responsible is broadly defined as "the child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time" (Family Court Act § 1012[g]). The term "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" (*id*.).

The phrase "person legally responsible" does not embrace persons with only "fleeting or temporary care of a child such as a supervisor of a play-date or an overnight visitor or those persons who provide extended daily care of children in institutional settings, such as teachers" (*Yolanda D.*, 88 NY2d at 796). Nonetheless, a person who acts as the "functional equivalent of a parent in a familial or household setting" may be deemed to be a person legally responsible (*Yolanda D.*, 88 NY2d at 796). The definition "expressly encompasses paramours [*3]who regularly participate in the family setting and who therefore share to some degree in the supervisory responsibility for the children" (*Matter of Gary J. [Engerys J.]*, 154 AD3d 939, 941 [2d Dept 2017], quoting *Matter of Bianca M.*, 282 AD2d 536 [2d Dept 2001]).

The determination of whether a particular person has acted as the functional equivalent of a parent is a "fact-intensive inquiry which will vary according to the particular circumstances of each case" (*Yolanda D.*, 88 NY2d at 796). Factors to consider include "(1) 'the frequency and nature of the contact,' (2) 'the nature and extent of the control exercised by the respondent over the child's environment,' (3) 'the duration of the respondent's contact with the child,' and (4) 'the respondent's relationship to the child's parent(s)'" (*Trenasia J.*, 25 NY3d at 1004, quoting *Yolanda D.*, 88 NY2d at 796). These factors "are not meant to be exhaustive, but merely illustrate some of the salient considerations in making an appropriate determination" (*Yolanda D.*,88 NY2d at 796). The weight given to each factor depends on the facts and circumstances of the case (*see id*.).

As the dissent concedes, the first and third *Yolanda D.* factors weigh in favor of finding Roberto a person legally responsible for B.F. The credible testimony of B.F. and her mother established that Roberto lived with them for five months prior to the abuse. The fact that he was primarily in the home after work is inconsequential, given B.F.'s testimony that the two were "very close," "always talk(ed) to each other," and played around, leading B.F. to be "shocked" when Roberto sexually assaulted her. The sexual abuse took place while she, her mother, and Roberto were on the pull-out couch **[FN1]** in

the living room watching television at night — a familial activity. The overall nature of their relationship over the span of five months supports "an inference of substantial familiarity" between B.F. and Roberto (*Matter of Christopher W.*, 299 AD2d 268, 268 [1st Dept 2002]).

The second and fourth factors also weigh in favor of finding that Roberto is a person legally responsible for B.F. As to the second factor, B.F. feared Roberto because he threatened her and said he had "friends" that lived on the block, thus evidencing that he exercised control over B.F. Even if the threats do not fit squarely into the second factor, they were properly considered by the court in finding that Roberto was a person legally responsible for B.F., as the *Yolanda D.* factors are non-exhaustive and may be given differing weight according to the facts and circumstances of the case (*see Yolanda D.*,88 NY2d at 796).

As to the fourth factor, a parent's cohabitant or romantic partner may qualify as a person legally responsible for a child's care (*see Matter of Joel O. [Yvonne O.]*, 93 AD3d 491, 491-492 [1st Dept 2012]). This is the case even where the partner does not spend every night in the home (*see Matter of Mikayla U.*, 266 AD2d 747 [3d Dept 1999]; *Matter of Nichole [*4]SS.*, 296 AD2d 618 [3d Dept 2002]). Here, Roberto was the mother's boyfriend, who lived with the family for a period of five months and contributed $100 a week towards family expenses (*see Matter of Keniya G.*, 144 AD3d 532, 533 [1st Dept 2016]). These circumstances readily support a finding of familial relationship sufficient to determine that Roberto was a person legally responsible for B.F. (*see Trenasia J.*, 25 NY3d at 1006).

The dissent's narrow interpretation of the statute is inconsistent with its purpose. Article 10's stated purpose is to "help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being. It is designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of the parent on behalf of a child so that [the child's] needs are properly met" (Family Court Act § 1011). The protections afforded by Family Court Act § 1012(a) and (g) recognize that "parenting functions are not always performed by a parent but may be discharged by other persons, including custodians, guardians and paramours, who perform caretaking duties commonly associated with parents" (*Yolanda D.*,88 NY2d at 795).**[FN2]**

The term "person legally responsible" is meant to be broad, as it encompasses persons continually or regularly found in the same household as the child. A broad interpretation of the statute is vital so children, such as B.F., receive the same protection as children in

two-parent family units. In this case, the relevant factors support Family Court's determination that Roberto acted as the functional equivalent of a parent towards B.F. during the relevant time period (*see Trenasia J.*, 25 NY3d at 1006; *Yolanda D.*, 88 NY2d at 797). Family Court thus providently exercised its discretion in finding that Roberto was a person legally responsible for B.F. within the meaning of the Family Court Act.[FN3]

Relatedly, with respect to R.R., the child of Roberto and Sade, a finding of derivative abuse or neglect was proper where "the evidence as to the directly abused or neglected child demonstrate(d) such an impaired level of parental judgment as to create a substantial risk of harm for any child in [Roberto's] care" (*Matter of Vincent M.*, 193 AD2d 398, 404 [1st Dept 1993]). Given the serious nature of Roberto's actions, which involved sexually abusing B.F. in the presence of her mother, Family Court properly found that Roberto derivatively abused his biological child R.R., even though R.R. was not yet born when the abuse of B.F. occurred (*see Matter of J.L. [J.A.L.]*, 228 AD3d 474, 474 [1st Dept 2024]; *Kylani R.*, 93 AD3d at 557).

A preponderance of the evidence also supports the finding that Sade neglected her child R.R. Based on the medical records, as well as a negative inference against Sade based on her failure to testify, Family Court found that R.R. was present when Sade displayed erratic, paranoid, and hostile behavior during a hospital visit [*5]that resulted in an overnight stay and evaluation in a psychiatric emergency department. The court properly determined that Sade's behavior during the hospital visit fell below a minimum degree of care, thus placing R.R., her child, in imminent risk of physical, mental, emotional harm (*see* Family Court Act §§ 1012[f][i], 1046[b][i]; *Matter of Shanai W. [Sherry P.]*, 212 AD3d 447, 448 [1st Dept 2023]).

We have considered the remaining contentions and find them unavailing.

All concur except Rodriguez, J. and Rosado, JJ. who dissent in part in a memorandum by Rodriguez, J. as follows:

RODRIGUEZ, J. (dissenting in part),

I dissent from that portion of the majority's decision affirming Family Court's finding that respondent Roberto R. was a "person legally responsible" (PLR) for the child B.F. (*see* Family Court Act § 1012 [g]).[FN4]

The following facts are gleaned from the testimony taken at the fact-finding hearing.[FN5] B.F. stated that Roberto, her mother's boyfriend, lived with them for around five months, coming home at night and leaving in the morning for work. B.F. slept in the

bedroom, and her mother and Roberto slept in the living room on a pull-out couch bed. B.F. described her initial relationship with Roberto as not close, but friendly. B.F. stated that when he first moved in, she and respondent "were cool with each other, we like would play around together, we were okay." Roberto never took her to or brought her home from school, never took her to doctor's appointments, never attended school events, and never disciplined her.

When the abuse occurred, B.F., her mother, and Roberto were watching television together on the pull-out couch. By then it had been a few months since Roberto moved in, and the two were "very close" and would "always talk to each other." B.F. was shocked when the abuse occurred because she and respondent had a "good relationship," and she "didn't think that he would do anything like that." B.F. further stated that her relationship with respondent was "like a good friendship," and "[respondent] was like a brother[,] like if I had a brother that's how I would be with him." The two never did any activities together.

The mother testified that she dated Roberto for around five months. Roberto moved in a week after they started dating. He came home at around 6:00 p.m., and he left for work around 7:00 a.m., before B.F. got up for school. The three never ate dinner as a family, and Roberto never bought anything for B.F. or disciplined her. The mother never left B.F. home alone with Roberto. While Roberto had no responsibilities in the home, he gave the mother $100 every week for rent, bills, and home expenses such as soap and dishes. The mother sometimes used that money to purchase clothes for herself, but never for B.F.

In a proceeding under Family Court Act article 10, a "person [who] acts as the functional equivalent of a parent in a familial or household setting," will be deemed a "personal legally responsible" for [*6]the child's care (*Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]; *see* Family Court Act § 1012 [g]). The non-exhaustive list of factors we must weigh when determining whether a person acts as "the functional equivalent of a parent" are "[1] the frequency and nature of the contact between the child and respondent, [2] the nature and extent of the control exercised by the respondent over the child's environment, [3] the duration of the respondent's contact with the child, and [4] the respondent's relationship to the child's parent(s)" (*Matter of Yolanda D.*, 88 NY2d at 796). Although Family Court Act article 10 is properly applied to a parent's functional equivalent, it "should not be construed to include persons who assume fleeting or temporary care of a child such as a supervisor of a play-date or an overnight visitor or those persons who provide extended daily care of children in institutional settings, such as teachers" (*id*.). The determination of whether a respondent is properly found to be a

PLR involves, above all, "a discretionary, fact-intensive inquiry which will vary according to the particular circumstances of each case" (*id.*). Ultimately, "[t]he weight to be accorded each factor will, of course, be dependent on the circumstances of the particular case" (*id*.).

As to the first and third factors—namely, "the frequency and nature of the contact between the child and respondent" and "the duration of the respondent's contact with the child"—here, Roberto and B.F. interacted mostly at night for the five-month period Roberto resided in the household. B.F. testified that she had a "good relationship" with respondent, and the two were "very close" and would "always talk to each other." Additionally, although respondent, B.F., and the mother did not eat meals or do activities outside the home together, they spent time together, as evidenced by the fact that the abuse occurred while the three were watching television. The total contacts between respondent and B.F. were therefore "significant" (*Matter of Trenasia J. [Frank J.]*, 25 NY3d 1001, 1005 [2015]), and these two factors weigh in favor of finding respondent to be a PLR.

The other two factors, however, militate against such a finding. With respect to the fourth factor, "the respondent's relationship to the child's parent," Roberto and the mother first met and dated for about a week prior to Roberto moving in, and they do not share any children in common (*cf. Matter of Chance R. [Andre W.],* 168 AD3d 554, 554 [1st Dept 2019] [father of children's half-sibling]; *Matter of Jaiden M. [Jeffrey R.],* 165 AD3d 571, 571 [1st Dept 2018] [father of child's two younger half-siblings]; *Matter of Samantha M.,* 56 AD3d 299, 301 [1st Dept 2008] [father of child's unborn half-sibling]; *Matter of Gary J. [Engerys J.],* 154 AD3d 939, 940 [2d Dept 2017] [father of children's half-siblings, who also resided in the home]; *see also Matter of Trenasia J. [Frank J.]*, 25 NY3d at 1006 ["Although the existence of a familial relationship [*7]is not dispositive, it is appropriately considered in determining whether a respondent is a PLR"]).

More importantly here, the second factor of "the nature and extent of the control exercised by the respondent over the child's environment" weighs heavily against finding respondent to be a PLR. Respondent did not exercise control over B.F.'s household to any appreciable degree (*cf. Trenasia J. [Frank J.]*, 25 NY3d at 1005 ["As to 'the nature and extent of the control exercised by the respondent over the child's environment,' this incident occurred in Frank J.'s home during an overnight visit, and he was the only adult present at the time"]; *Matter of Maridas A. [Paula A.]*, 204 AD3d 511, 512 [1st Dept 2022] [while supervising child in mother's absence, the respondent, among other things, fed and disciplined the child]; *Matter of Tony C. [Kristine S.—Jadiel*

L.], 226 AD3d 1008, 1010 [2d Dept 2024] ["the evidence demonstrated that the respondent exercised control over the children's environment during the relevant period by freely accessing the children's home on a regular basis while caring for them when the mother was not at home"]; *Matter of Gary J. [Engerys J.],* 154 AD3d at 941 ["the respondent exercised control over the older children, supervising them when the mother was not present, mediating arguments between the siblings, and disciplining them"]).

Significantly, respondent never took on supervisory responsibility of B.F. (*cf. Trenasia J. [Frank J.]*, 25 NY3d at 1005 [abuse occurred during an overnight visit when the respondent was the only adult home]; *Yolanda D.*, 88 NY2d at 797 [child stayed overnight out of state at the respondent's home without her mother]; *Matter of I.M. [R.L.]*, 233 AD3d 544, 545 [1st Dept 2024] [the respondent picked child up from school for years and watched her until stepfather returned]; *Matter of Maridas A. [Paula A.],* 204 AD3d at 512 [mother routinely left child in the respondent's care]; *Matter of Deandre C. [Luis D.]*, 169 AD3d 609, 610 [1st Dept 2019] [the respondent watched children after school]; *Matter of Ja'Dore G. [Cannily G.]*, 169 AD3d 544, 545 [1st Dept 2019] [child visited the respondent grandparents every other weekend, often spending the night]; *Matter of Jayline R. [Jose M.],* 110 AD3d 419, 420 [1st Dept 2013] [the respondent picked children up from school and cared for them during the day, while mother worked]; *Matter of Keoni Daquan A. [Brandon W.—April A.],* 91 AD3d 414, 415 [1st Dept 2012] [the respondent watched the children]; *Matter of Christopher W.,* 299 AD2d 268 [1st Dept 2002] [child stayed at the respondent's house overnight]; *Matter of Tony C. [Kristine S.—Jadiel L.],* 226 AD3d at 1010 [the respondent cared for children when mother was not home]; *Matter of Erica H.-J. [Tarel H.—Eric J.],* 216 AD3d 954, 957-958 [2d Dept 2023] [the respondent father left child with respondent girlfriend for approximately 30 to 60 minutes]; *Matter of Serenity R. [Truman C.]*, 215 AD3d 854, 856 [2d Dept 2023] [the respondent [*8]would assist in watching child]; *Matter of Isabella E. [James E.]*, 195 AD3d 1096, 1097-1098 [3d Dept 2021] [the respondent babysat children while living in basement of home]; *Gary J. [Engerys J.],* 154 AD3d at 941 [the respondent supervised children when mother was not present]; *Matter of Mackenzie P.G. [Tiffany P.],* 148 AD3d 1015, 1017 [2d Dept 2017] [the respondent watched child when mother was at school]). Indeed, the mother never left B.F. alone with respondent (*see Matter of Shaun B.,* 55 AD3d 301, 301 [1st Dept 2008] ["The child was never left in respondent's sole care and was at all times in the care of her father"]). Further, the abuse occurred while B.F.'s mother was asleep in the same room.

Crucially, there is no testimony to suggest that respondent ever cared for B.F. or that he assumed any parental duties (*see Matter of Mariah B. [Nigel M.],* 178 AD3d 622, 622

[1st Dept 2019]), such as cooking for or feeding B.F. (*see Maridas A. [Paula A.],* 204 AD3d at 512; *Matter of Deandre C. [Luis D.]*, 169 AD3d at 610; *Matter of Angelo P. [Jose C.],* 98 AD3d 908, 908 [1st Dept 2012]; *Matter of Serenity R. [Truman C.]*, 215 AD3d at 856; *Matter of Mackenzie P.G. [Tiffany P.],* 148 AD3d at 1017), helping with homework (*see Deandre C. [Luis D.]*, 169 AD3d at 610; *Matter of Keoni Daquan A. [Brandon W.—April A.],* 91 AD3d at 415; *Tony C. [Kristine S.—Jadiel L.],* 226 AD3d at 1010), attending doctor's appointments (*see Keoni Daquan A. [Brandon W.—April A.],* 91 AD3d at 415), disciplining B.F. (*see Maridas A. [Paula A.],* 204 AD3d at 512; *Matter of Chance R. [Andre W.],* 168 AD3d at 554), taking or picking her up from school (*see Matter of I.M. [R.L.]*, 233 AD3d at 545; *Chance R. [Andre W.],* 168 AD3d at 554; *Matter of Adam C. [Charles R.],* 167 AD3d 487, 488 [1st Dept 2018]; *Matter of Kevin N. [Richard D.],* 113 AD3d 524, 524 [1st Dept 2014]; *Matter of Jayline R. [Jose M.],* 110 AD3d at 420; *Matter of Samantha M.,* 56 AD3d at 301),[FN6] or doing activities outside the home with her (*Matter of Alisha A. [Nelson V.],* 172 AD3d 403, 403-404 [1st Dept 2019] [the respondent arranged family outing with child and his then-girlfriend and her family]; *Matter of Jaiden M. [Jeffrey R.]*, 165 AD3d at 572 [the respondent arranged for eldest child to spend weekends with him]; *Matter of Alexandria X. [Ronald X.],* 80 AD3d 1096, 1098 [3d Dept 2011] [took child shopping]).

There is similarly no testimony to suggest that respondent and B.F. referred to one another as parent and child, respectively, or characterized their relationship in equivalent terms (*see Matter of Alisha A. [Nelson V.],* 172 AD3d at 403 [the respondent held child out as his daughter]; *Matter of Adam C. [Charles R.],* 167 AD3d at 488 [child referred to the respondent as "stepfather"]; *Jaiden M. [Jeffrey R.],* 165 AD3d at 572 [the respondent considered child to be his son and child referred to respondent as "daddy"]; *Matter of Lesli R. [Luis R.],* 138 AD3d 488, 488 [1st Dept 2016] [children referred to as the respondent's stepdaughters[*9]]; *Matter of Kevin N. [Richard D.],* 113 AD3d at 524 [the respondent described himself as child's stepfather]; *Jayline R. [Jose M.],* 110 AD3d at 420 [the respondent referred to himself as a father figure to the children and held himself out as their caregiver]; *Tony C. [Kristine S.—Jadiel L.],* 226 AD3d at 1010 [the respondent "testified that, at one point, the children called him daddy, he saw the children as '[his] own kids,' and the children gave him presents for Father's Day"]; *Matter of Erica H.-J. [Tarel H.—Eric J.],* 216 AD3d at 957 [the respondent testified that she "treated [subject child] like if she was [her] child"]). To the contrary, B.F. testified that the relationship was more akin to that of siblings.

Other than the $100 weekly contribution to the household for rent and household items, respondent did not financially provide for B.F. (*see Jaiden M. [Jeffrey R.],* 165 AD3d at

572). Further, this indirect and limited financial assistance does not demonstrate that respondent meaningfully "contributed to the functioning of the household of which" B.F. was a part (*Matter of Keniya G. [Avery P.],* 144 AD3d 532, 533 [1st Dept 2016] [the respondent, who was found to be a personal legally responsible for the child, contributed to household by preparing meals, cleaning the home, grocery shopping and providing financial assistance]). It is undisputed that respondent had no responsibilities in the home and that the mother covered all household expenses except for the $100 weekly contribution.

With respect to this second factor, the presence of every circumstance described in the case law denoting control over a child's environment is of course not required for a respondent to be properly deemed a PLR. The *absence* of every circumstance, however, casts serious doubt upon the majority's determination that the record supports Family Court's PLR finding.**[FN7]** Importantly, the fact that respondent lived in the same household as B.F. for five months is not dispositive (*see Matter of Zulena G. [Regilio K.],* 175 AD3d 678, 680 [2d Dept 2019]; *Matter of Kameron V*. *[Eva V.—Jamel L.]*, 153 AD3d 1623 [4th Dept 2017]; *Matter of Austin JJ*, 232 AD2d 736 [3d Dept 1996]) and, under these circumstances, respondent's months-long residence is insufficient to establish that he was a PLR for B.F. This is so even considering respondent's $100 weekly contribution to the home and frequent contact with B.F during the relevant time period.

The majority's conclusion that Roberto is a PLR is likewise unsupported by precedent specifically addressing relatively nascent relationships or cohabitation. For example, in *Matter of Samantha M.*,this Court held that the respondent—who had resided in the household as the mother's boyfriend for approximately three months prior to the child's hospitalization—was a PLR (56 AD3d at 301). The respondent, however, "was the father of [the child's] unborn half sibling, picked [the child] up from daycare[,] and took care of [the child]," and he therefore [*10]"acted as the functional equivalent of a parent in the household" (*id*.). Moreover, in *Matter of Jayline R. (Jose M.)*, the respondent resided in the household as the mother's boyfriend for about nine months (110 AD3d at 420). He was determined to be a PLR, as he "picked the children up from school and cared for them during the day, while the mother worked," "described himself as a father figure to the children, and held himself out as the children's babysitter or caregiver so as to be able to stay with them during the time when the family lived in a shelter" (*id*.).

Here, the record fails to provide such additional support for the conclusion that respondent is a PLR for B.F. Although the relevant time periods are similar, unlike the respondent in *Matter of Samantha M*., Roberto did not take care of B.F. *Matter of*

Jayline R. (Jose M.) is distinguishable for essentially the same reasons: Roberto was never alone with B.F., was not tasked with her care or supervision, and did not take on any typical parental responsibilities, such as monitoring that B.F. make it to and from school safely or ensuring she was fed (*see also Matter of Serenity R. [Truman C.]*,215 AD3d at 856 [mother's boyfriend determined to be PLR based on pattern of assisting in watching and cooking for the child, notwithstanding only two months of cohabitation]).

In addition, Roberto did not exercise control over B.F.'s environment, was never left alone with her, and did not discipline her (*cf. Matter of Rebecca X.*,18 AD3d 896, 898 [3d Dept 2005] [mother's boyfriend proper PLR where he lived "with all three children from January through June 2002, was occasionally left alone with them and disciplined them when necessary"]). There is also no testimony in the record that Roberto ever purchased food or groceries for B.F., or that he held himself out as her parent (*cf. Matter of Isaiah L. [Chris B.]*,119 AD3d 797, 799 [2d Dept 2014] [mother's boyfriend proper PLR where he "assumed parental responsibilities . . . , including purchasing food and feeding the child, sleeping in the same bed as the child and the mother, and even representing himself to caseworkers as the child's parent," notwithstanding only one month of cohabitation]). Moreover, respondent, the mother, and B.F. never ate dinner together as a family (*cf. Matter of Jamaal NN.*,61 AD3d 1056, 1057 [3d Dept 2009] [paramour proper PLR where "neighbor stated that she ate dinner every night with the mother, child and respondent," and the respondent "was sometimes left alone with the child and previously disciplined him on several occasions, even when the mother was present"]).

Accordingly, in my view, a PLR finding is proper when supported by more than the physical proximity of cohabitation and the attendant contacts naturally arising therefrom (*cf. Matter of Tyler MM. [Stephanie NN.]*, 82 AD3d 1374, 1375 [3d Dept 2011] [the respondent properly found to be PLR where "he had daily contact with the children since he had lived in the home [*11]for about a year as the mother's paramour, he was often alone with the children, and there was proof that he cooked, cleaned and helped the children prepare for school]). The majority's decision, on the other hand, would support a PLR finding for any non-parent who resides with a child despite never performing a traditional parental function; never caring for or supervising the child; never being tasked with any responsibility for the child by the parent; never exercising control over the child's environment; and never even being left alone with the child.

The other cases relied on by the majority (*Matter of Keniya G. [Avery P.]* and *Matter of Christopher W.*) and Family Court (*Matter of Gary J. [Engerys J.]*) do not compel a different result. In *Matter of Keniya G. (Avery P.)*, as noted above, the respondent

"contributed to the functioning of the household of which [the child] was a part" "by taking [the younger children] to school and picking them up, preparing meals, cleaning the home, preparing the children's clothing, grocery shopping, and providing financial assistance to the household" (144 AD3d 532, 533 [1st Dept 2016]). Here, respondent did not contribute to the home to nearly the same extent. Additionally, unlike here, the child in *Matter of Christopher W.* was visiting respondent's home and staying overnight at the time of the abuse (299 AD2d 268, 268 [1st Dept 2002]). The record also permitted "an inference of substantial familiarity between the child and respondent and respondent's own children" (*id.*). Lastly, in *Matter of Gary J. (Engerys J.)*, the respondent was the father of the older children's half-siblings, and he exercised control over the older children by supervising them, mediating arguments between the siblings, and disciplining them (154 AD3d 939, 941 [2d Dept 2017]). Here, respondent never supervised B.F. and not once was around the child in the mother's absence.

Ultimately, the appropriate PLR inquiry is not whether respondent and the subject child became familiar with one another during the period of respondent's residence in the subject child's household. As noted, though the significance of the relationship is one of several factors to be considered (*see Yolanda D.*, 88 NY2d at 796 [PLR analysis to consider, among other things, "the frequency and nature of the contact between the child and respondent"]), the critical issue is instead whether, during the five months at issue here, respondent "serve[d] as the functional equivalent of [a] parent" (*id.* at 795).

In this regard, *Matter of Zulena G. (Regilio K.)* bears the greatest resemblance to the instant facts. There, the Second Department held that the Family Court erred in determining that the respondent, who was the subject children's cousin—and lived with them for some time in their grandmother's apartment along with, among others, the children's mother, father, aunt, uncle, and grandmother—was a PLR for the children (175 AD3d at 680-681). Among other things, this was due [*12]to the children's mother's testimony that she never made the respondent responsible for the children, and she did not leave the children alone with him, even when she was not home (*id.* at 680). Furthermore, although there was evidence that the respondent contributed money to the shared household and had "performed general household chores for the benefit of the entire family, these circumstances were outweighed by evidence that the [respondent] did not exercise control over the children's environment in a manner commensurate with that of a parent" (*id.* at 680-681).**[FN8]**

Similarly, here, respondent's residence in the household for five months, significant contacts with B.F. during that time, and contribution of $100 per week for rent and household expenses are substantially outweighed by circumstances demonstrating that

respondent was not a PLR. Specifically, respondent did not exercise any control over B.F.'s environment, and he did not assume any parental responsibilities such as supervision, financial support, attendance at doctor's appointments or school functions, cooking, or discipline, nor did he contribute in any other meaningful way to the household of which B.F. was a part.

Finally, the majority's discussion of the statute's purpose underscores its conclusion's lack of textual and case support. By including "other person legally responsible" in Family Court Act § 1012 (a)'s definition of "[r]espondent," the legislature has already recognized that "parenting functions are not always performed by the parent" (*Yolanda, D.*, 88 NY2d at 795). The legislature has therefore addressed the majority's concern that "children, such as B.F., receive the same protection as children in two-parent family units." Notwithstanding this recognition, proper respondents in child protective proceedings are nevertheless limited to parents or others who "perform caretaking duties commonly associated with parents" (*Yolanda*, *D.,* 88 NY2d at 795). As demonstrated at length herein, the record establishes that Roberto did not "serve as the functional equivalent of [B.F's] parent[]" (*id*.).

In addition, although the majority correctly notes that a PLR can encompass "persons continually or regularly found in the same household as the child," such persons must nevertheless provide care to the child that is "analogous to parenting" (*Yolanda, D.*, 88 NY2d at 796; *see id.* ["the care given the child must be analogous to parenting *and* occur in a household or 'family' setting" (emphasis added)]). Further, "the common thread running through the various categories of persons legally responsible for a child's care [i.e., Family Court Act § 1012 (a), (g)] is that these persons serve as the functional equivalent of parents" (*id*. at 795). Ultimately, that standard was not met here, and the majority's conclusion thus lacks support from both the statutory language and Court of Appeals' precedent.

The majority characterizes my view as inconsistent with the statute's purpose. On the contrary[*13], in concluding that Roberto—who did not take on a single caretaking responsibility—is not a PLR for B.F., I merely seek to avoid an extra-statutory expansion of Family Court's subject matter jurisdiction (*see e.g. Matter of Johna M.S. v Russell E.S.*, 10 NY3d 364, 366 [2008] ["Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute"]; *see also e.g. Matter of Lisa T. v King E.T.*, 30 NY3d 548, 552 [2017] ["the clearest indicator of legislative intent is the statutory text"]).**[FN9]**

Because respondent's conduct vis-À-vis B.F. cannot fairly be characterized as anything resembling parenting, I conclude that respondent never served as the functional equivalent of a parent and is thus not a proper PLR as to her. I accordingly dissent in part.

Footnote 1: B.F. slept in the bedroom. Her mother and Roberto slept on the couch.

Footnote 2: *Yolanda D.*'s reference to care that is "analogous to parenting" (88 NY2d at 796) exemplifies the flexible approach endorsed by the Court of Appeals with respect to "other persons legally responsible."

Footnote 3: This case illustrates the practical implication of "person legally responsible" status under the aegis of Article 10 of the Family Court Act. Pursuant to its finding that Roberto was a person legally responsible who sexually abused B.F., the court barred Roberto from further contact with the child. A permanent order of protection may be available, under different standards, in criminal or family offense proceedings.

Footnote 4: Although I conclude that Family Court improperly found respondent to be a PLR for B.F., and thus that the abuse finding with respect to her was error (*see Matter of R./C. Children*, 303 AD2d 172, 172 [1st Dept 2003]; *Matter of Zulena G. [Regilio K.]*, 175 AD3d 678, 681 [2d Dept 2019]), I agree with the majority that Family Court's finding of derivative abuse as to R.R. was proper (*see Matter of Trenasia J. [Frank J.]*, 25 NY3d 1001, 1010 [2015] [Rivera, J., concurring in part and dissenting in part] ["the Appellate Division erroneously affirmed the finding that Frank J. was a person legally responsible for the child's care within the meaning of section 1012 (g), and I would reverse as related to the petition alleging attempted abuse of the child. With respect to the petitions concerning Frank J.'s three children, I agree with the majority that the Appellate Division properly affirmed Family Court's derivative neglect determination"; "The fact that Frank J. does not meet the statutory definition of a PLR concerning the care of another child does not foreclose the agency from proceeding against him with respect to his own"]; *see also Matter of Kole HH.,* 61 AD3d 1049, 1052-1053 [3d Dept 2009], *lv dismissed* 12 NY3d 898 [2009]).

Footnote 5: Family Court largely discredited Roberto's testimony except as to the timeline he met and dated B.F.'s mother. Family Court further found B.F. credible and gave great weight to her testimony, which to B.F.'s credit was taken when she was just twelve years old. I agree with the majority that there is no basis to disturb Family Court's credibility determinations. The facts recounted and relied upon here are thus taken from the mother and B.F.'s testimony.

Footnote 6: The mother testified that B.F. walked home from school. Nevertheless, there is no testimony that Roberto was responsible for ensuring that B.F. made it to and back home from school safely, which is a typical parental responsibility. Instead, the mother testified that she purchased a phone for B.F. so that B.F. could keep in contact with her while B.F. walked home alone from school.

Footnote 7: The majority concludes that Roberto exercised control over B.F.'s environment because he threatened her and said he had "friends" that lived on the block. The mother's testimony regarding threats, upon which the majority relies, was elicited through a series of questions concerning the abuse at issue. In context, the questioning and the mother's testimony strongly suggest that respondent's threat to the child occurred in the immediate wake of the abuse. The threats thus related not to the exercise of any parental authority but, rather, an attempt to intimidate a victim and prevent disclosure of their abuse. It goes without saying that this latter purpose is flatly unconnected to parental responsibility or to "caretaking duties commonly associated with parents" (*Yolanda D.*, 88 NY2d at 795). Above all, however, this circumstance does not outweigh the evidence that demonstrated Roberto did not exercise control over B.F.'s environment.

Footnote 8: To be sure, the dynamics in *Zulena G. (Regilio K.)* are not identical to those in the present case inasmuch as the respondent there was the subject children's cousin and "numerous" adults and children lived in the home (175 AD3d at 680). Here, respondent was the mother's boyfriend, and the mother, B.F., and respondent were the only people living in the home during the relevant period. Nonetheless, much like the respondent in *Zulena G. (Regilio K.)*,respondent here was never responsible for B.F., and B.F.'s mother never left her alone with him when she was away from the home.

Footnote 9: Despite the majority's observation concerning "the practical implication[s]" of its view, the consequences of properly applying Family Court Act § 1012 (a) and (g) should not affect our present reasoning inasmuch as the issue is one of jurisdiction. In any event, the majority identifies the remedy for its own concern: individuals falling outside of Family Court's limited jurisdiction are subject to ordinary criminal proceedings, including applicable orders of protection.

Sexual Abuse

Matter of M.B., 236 AD3d 468 (1st Dept., 2025)

Order of fact-finding and disposition (one paper), Family Court, Bronx County (David J. Kaplan, J.), entered on or about September 15, 2021, which, to the extent appealed from as limited by the briefs, determined, after a hearing, that respondent-appellant sexually abused the subject child M.B., and derivatively abused the subject child I.M., unanimously affirmed, without costs.

Family Court's finding that respondent sexually abused M.B. and derivatively abused I.M. was supported by a preponderance of the evidence (*see* Family Court Act §§ 1012[e][iii]; 1046[b][i]). The court providently exercised its discretion in determining that M.B.'s out-of-court statements were reliably corroborated by a video depicting her interview at a child advocacy center, which the court viewed during the fact-finding hearing, and that the record as a whole supported a finding of neglect. Based on the totality of the circumstances, the court appropriately inferred respondent's intent to gain sexual gratification from his conduct (*see Matter of Maria S. [Angel A.]*, 185 AD3d 437 [1st Dept 2020]). Additionally, there is no basis to disturb the court's credibility determinations (*see Matter of Brittney B. [Marcelo B.]*, 211 AD3d 426, 426 [1st Dept 2022]). The court was entitled to draw the strongest negative inference against respondent for his failure to testify (*see Matter of Markeith G. [Deon W.]*, 152 AD3d 424, 424 [1st Dept 2017]).

Contrary to respondent's contention, the admissibility of a child's prior out-of-court statement regarding abuse or neglect was not limited to such statements that were attributable only to children who were the subject of the current proceeding (*see Matter of Kaliia F. [Jason F.]*, 148 AD3d 805, 806 [2d Dept 2017]; *Matter of Cory S. [Terry W.]*, 70 AD3d 1321, 1322 [4th Dept 2010]; *Matter of Ian H.*, 42 AD3d 701, 702 [3d Dept 2007], *lv denied* 9 NY3d 814 [2007]).

Family Court properly entered a derivative abuse finding against respondent as to I.M. The fact-finding testimony established that I.M. was spending weekends in the home during the period respondent sexually abused M.B. (*see Matter of Brittney B.*, 211 AD3d at 427). M.B.'s statements that I.M. was sleeping in the same room as she when respondent sexually abused her established that respondent's parental judgment and impulse control were so defective as to create a substantial risk of harm to any child in his care (*see Matter of Krystal N. [Juan R.]*, 193 AD3d 602, 602 [1st Dept 2021], *lv*

denied 37 NY3d 906 [2021]; *Matter of Samantha F. [Edwin F.]*, 169 AD3d 549, 550 [1st Dept 2019], *lv dismissed* 33 NY3d 1042 [2019]). Furthermore, a finding of derivative abuse was appropriate even though I.M. was not aware of the abuse (*see Matter of Karime R. [Robin P.]*, 147 AD3d 439, 441 [1st Dept 2017]).

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

Matter of J.M., AD3d 2025 NY Slip Op 03764 (1st Dept., 2025)

Order of disposition, Family Court, Bronx County (Gigi N. Parris, J.), entered on or about November 4, 2022, to the extent it brings up for review an order of fact-finding, same court (Tracey A. Bing, J.), entered on or about September 2, 2022, which found that respondent mother abused and neglected the subject children, J.M. and J.D.M., and derivatively abused and neglected M.M. and L.C., unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Family Court properly concluded, based on the record as a whole, that the mother abused J.M and J.D.M by attempting to prostitute them (Family Ct Act §§ 1012[e][iii][B]; 1046[b][i]). A parent abuses a child when they allow, permit, or encourage such child to engage in an act described in Penal Law § 230.30, which proscribes compelling a person to engage in prostitution by force or intimidation, or profiting from prostitution of a person younger than 18 years old (*see* Family Ct Act § 1012[e][iii][B]; Penal Law § 230.30[1], [2]). Here, the record showed that on two separate occasions, the mother took J.M. and J.D.M. individually to the home of unfamiliar men, accepted money from the men, instructed the children to lie down on a bed, and then left. In both cases, the men attempted to have sex with the child upon the mother's departure.

J.D.M.'s statements were independently admissible, as she first made a disclosure to her treating therapist during a therapy appointment, which constituted an exception to the rule against hearsay (*see Matter of A.M. [Adgraile E.]*, 233 AD3d 481, 481 [1st Dept 2024]). Even if J.D.M.'s statements required corroboration, Family Court providently exercised its discretion in determining that J.D.M.'s out-of-court statements made to the agency caseworker, in which she detailed the sexual abuse, were sufficiently corroborated by her mental health records and by the record, including J.M.'s and the caseworker's testimony (*see Matter of Corey J. [Corey J.]*, 157 AD3d 449, 450 [1st Dept 2018]).

J.M.'s testimony, which the court deemed credible, was also sufficient to establish that the mother attempted to prostitute J.M. (*see Matter of J.M. [Felipe A.]*, 233 AD3d 586, 586 [1st Dept 2024]). J.M. testified in great detail about similar conduct by the mother when J.M. was in high school. The testimony included specific details, such as the name of the man, the location of his home, J.M.'s observation of him giving money to the mother, and the struggle J.M. had with him over their phone before he tried to have sex with her. Additionally, J.M.'s testimony corroborated J.D.M.'s out-of-court statements describing the mother's nearly identical conduct when each child was approximately the same age (*see Matter of A.P. [M.P.]*, 183 AD3d 535, 536 [1st Dept 2020]).

Family court, which explicitly opined that the issue of credibility was a "central theme in this matter," had the benefit of observing [*2]the witnesses' demeanor over a three-year period, and there is no basis for disturbing its credibility determinations, including its assessment of J.M.'s testimony and its finding that the mother's testimony was not credible (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of C.F. [Carlos F.]*, 220 AD3d 506, 506-507 [1st Dept 2023], *lv denied* 41 NY3d 901 [2024]).

The mother does not challenge Family Court's finding that she neglected J.D.M. by failing to ensure that the child received ongoing mental health treatment, which led to her psychiatric hospitalization following an aborted suicide attempt in 2017 (*see Matter of Ivania L.V. [Liz C.]*, 139 AD3d 542, 542 [1st Dept 2016]). Moreover, the evidence supports the court's finding that the mother also neglected the children by failing to provide them with adequate food, clothing, and shelter (*see Matter of Amondie T. [Karen S.]*, 107 AD3d 498, 499 [1st Dept 2013]; *Matter of Elijah J. [Yvonda M.]*, 105 AD3d 449, 450 [1st Dept 2013]). Both J.M. and J.D.M. separately reported to the ACS caseworker, and J.M. also testified to the mother leaving them alone for days at a time without adequate food and failing to provide them with adequate clothing and hygiene products.

The finding of derivative abuse and neglect against the mother as to M.M. and L.C. was appropriate. Her behavior evinced such an impaired level of judgment as to create a substantial risk of harm to the younger children (*see Matter of Gabriel R. [Jose R.]*, 188 AD3d 501, 502 [1st Dept 2020]).

Matter of Alajah H., 234 AD3d 759 (2nd Dept., 2025)

In related proceedings pursuant to Family Court Act article 10, the father appeals, and the subject children separately appeal, from an order of disposition of the Family Court, Kings County (Robert D. Hettleman, J.), dated July 10, 2023. The order of disposition,

upon a finding that the father abused the child Alajah H. and derivatively abused the child Ijah H., made after a fact-finding hearing, and after a dispositional hearing, inter alia, released the subject children to the custody of the nonrespondent mother under the petitioner's supervision.

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

In February 2022, the petitioner commenced these related proceedings pursuant to Family Court Act article 10, alleging, among other things, that the father sexually abused his daughter, the child Alajah H., and derivatively abused his son, the child Ijah H. After a fact-finding hearing, the Family Court found that the father abused Alajah H. and derivatively abused Ijah H. After a dispositional hearing, in an order of disposition dated July 10, 2023, the court, inter alia, released the children to the custody of the nonrespondent mother under the petitioner's supervision. The father appeals, and the children separately appeal (hereinafter collectively the appellants).

"'The Family Court Act defines an abused child as, inter alia, a child whose parent commits against him or her a sex offense as defined in article 130 of the Penal Law, or allows such . . . offense to be committed against the child'" (*Matter of Naima E. [Daryl M.]*, 227 AD3d 901, 902, quoting *Matter of Ciniya P. [Omar S.W.]*, 217 AD3d 954, 955; *see* Family Ct Act § 1012[e][iii][A]; *Matter of Emily R. [Magali M.C.]*, 226 AD3d 794, 795). "To establish its burden of showing by a preponderance of the evidence that [a parent abused or] neglected the child, a petitioner may rely upon prior out-of-court statements of the child, provided that they are properly corroborated" (*Matter of Jada W. [Fanatay W.]*, 219 AD3d 732, 738; *see* Family Ct Act § 1046[a][vi]; *Matter of Christina F.*, 74 NY2d 532, 535; *Matter of Tony C. [Kristine S.—Jadiel L.]*, 226 AD3d 1008, 1010-1011). "Family Court Act § 1046(a)(vi) states a broad flexible rule providing that out-of-court statements may be corroborated by [a]ny other evidence tending to support their reliability" (*Matter of Tony C. [Kristine S.—Jadiel L.]*, 226 AD3d at 1011 [internal quotation marks omitted]; *see* Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 118; *Matter of Omnamm L. [Kumar L.]*, 177 AD3d 973, 975). "The Family Court, as the trier of fact, has considerable discretion in determining whether the child[ren]'s statements are sufficiently corroborated and whether the record as a whole supports a finding of [abuse]" (*Matter of Logan P. [Kendell P.]*, 228 AD3d 867, 869 [internal quotation marks omitted]; *see Matter of Jada W. [Fanatay W.]*, 219 AD3d at 744; *Matter of Silveris P. [Meuris P.]*, 198 AD3d 787, 789).

Here, the Family Court's finding that the father sexually abused Alajah H. is supported by a preponderance of the evidence. Alajah H.'s out-of-court statements were

substantially corroborated by the testimony of the mother and the father that was adduced at the fact-finding hearing (*see Matter of Raveena B. [Khrisend R.]*, 209 AD3d 640, 641-642; *Matter of Anthony M.-B. [Anthony B.]*, 208 AD3d 1327, 1328). In addition, Alajah H.'s recorded statement showed that, when asked about the incident, her demeanor changed and she became withdrawn, which further corroborated her out-of-court statements (*see Matter of Oscar P. [Romulo M.]*, 231 AD3d 731; *Matter of Jada W. [Fanatay W.]*, 219 AD3d at 740; *Matter of Osher W. [Moshe W.]*, 198 AD3d 904, 907).

Further, the Family Court properly determined that Ijah H. was derivatively abused. "'Where a person's conduct toward one child demonstrates a fundamental defect in the parent's understanding of the duties of parenthood, or demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in his or her care, an adjudication of derivative abuse with respect to the other children is warranted'" (*Matter of Naima E. [Daryl M.]*, 227 AD3d at 903, quoting *Matter of Ciniya P. [Omar S.W.]*, 217 AD3d at 955). Here, the father demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for Ijah H. when he sexually abused Alajah H. while Ijah H. was present in the home (*see id.*; *Matter of Osher W. [Moshe W.]*, 198 AD3d at 907-908).

The appellants' remaining contentions are either unpreserved for appellate review, and, in any event, without merit, or without merit.

Matter of Chance F., AD2d 2025 NY Slip Op 03063 (2nd Dept., 2025)

In related proceedings pursuant to Family Court Act article 10, Roy F. appeals from an order of fact-finding and disposition of the Family Court, Queens County (Elenor Reid-Cherry, J.), dated December 22, 2023. The order of fact-finding and disposition, insofar as appealed from, after a hearing, found that Roy F. abused and neglected the subject children Anamaria H. and Giselle Z. H. and derivatively abused and neglected the subject child Chance F.

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

The petitioner commenced these proceedings pursuant to Family Court Act article [*2]10, alleging, inter alia, that the appellant abused and neglected the children

Anamaria H. and Giselle Z. H. and derivatively abused and neglected the child Chance F. Following a fact-finding hearing, the Family Court found that the appellant abused and neglected Anamaria H. and Giselle Z. H., for whom he was a person legally responsible, and derivatively abused and neglected Chance F., his son.

At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject children have been abused or neglected (*see id.* § 1046[b][i]; *Matter of Tammie Z.*, 66 NY2d 1, 3; *Matter of Mariliz G. [Jamie G.]*, 207 AD3d 627).

Here, the petitioner demonstrated by a preponderance of the evidence that the appellant sexually abused Anamaria H. and Giselle Z. H. (*see* Family Ct Act § 1012[e][iii]; *Matter of Taurice M. [Gregory A.]*, 147 AD3d 844, 844-845) and neglected them by inflicting excessive corporal punishment (*see* Family Ct Act § 1012[f][i][B]; *Matter of Leah S. [Barnett V.]*, 228 AD3d 667, 668-669). Those children's out-of-court statements cross-corroborated each other (*see Matter of Alexander S. [Gabriel H.]*, 224 AD3d 907, 909) and the Family Court's determination that the children's recantation was not credible is supported by the record and will not be disturbed (*see Matter of Jazlynn K. [Genesis S.]*, 231 AD3d 952, 955; *Matter of Mariliz G. [Jamie G.]*, 207 AD3d at 629). "[W]here, as here, the Family Court is primarily confronted with issues of credibility, its findings must be accorded deference on appeal, as they were supported by the record" (*Matter of Jada A. [Robert W.]*, 116 AD3d 769, 770).

Moreover, contrary to the appellant's contention, the Family Court's finding that he derivatively abused and neglected Chance F. was supported by a preponderance of the evidence. "'[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent'" (*Matter of Nyla S. [Jason B.]*, 224 AD3d 691, 693, quoting Family Ct Act § 1046[a][i]). "The focus of the inquiry with respect to derivative findings is whether the evidence of abuse or neglect of another child or children demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for the other child or children in the [respondent's] care" (*Matter of Janiyah S. [Pedro H.]*, 226 AD3d 909, 912). Here, the evidence adduced at the fact-finding hearing demonstrated, by a preponderance of the evidence, a fundamental defect in the appellant's understanding of the duties of a person with legal responsibility for the care of children and such an impaired level of judgment as to create a substantial risk of harm for any child in his care (*see Matter of Ciniya P. [Omar S.W.]*, 217 AD3d 954, 956).

Physical Abuse

Matter of Landon K., AD3d 2025 NY Slip Op 03191 (2nd Dept., 2025)

In related proceedings pursuant to Family Court Act article 10, the mother and the father appeal from (1) an order of fact-finding of the Family Court, Nassau County (Robin M. Kent, J.), dated June 22, 2023, (2) an order of fact-finding and disposition of the same court dated September 7, 2023, and (3) a corrected order of fact-finding and disposition of the same court dated October 3, 2023. The order of fact-finding, after a fact-finding hearing, found that the mother and the father abused the child Mackenzie K. and derivatively neglected the child Landon K. The order of fact-finding and disposition and the corrected order of fact-finding and disposition, insofar as appealed from, found that the mother and the father abused the child Mackenzie K. and derivatively neglected the child Landon K.

ORDERED that the appeals from the order of fact-finding and the order of fact-finding and disposition are dismissed, as those orders were superseded by the corrected order of fact-finding and disposition and are brought up for review on the appeal from the corrected order of fact-finding and disposition; and it is further,

ORDERED that the corrected order of fact-finding and disposition is reversed insofar as appealed from, on the facts, the order of fact-finding and the order of fact-finding and disposition [*2]are vacated, the petitions are denied, and the proceedings are dismissed; and it is further,

ORDERED that one bill of costs is awarded to the mother and the father.

In November 2022, the child Mackenzie K., who was then five weeks old, was brought to the emergency room of a hospital because she was exhibiting seizure-like activity and extreme irritability. Upon admission to the hospital, Mackenzie K. tested positive for COVID-19, and medical testing and evaluations revealed, among other conditions, bilateral acute subdural hematomas, subdural hemorrhages, and retinal hemorrhages. The petitioner, Nassau County Department of Social Services, commenced these proceedings pursuant to Family Court Act article 10, alleging, inter alia, that the mother and the father (hereinafter together the appellants) abused Mackenzie K. and derivatively neglected their older son, the child Landon K. After a fact-finding hearing, the Family Court found that the petitioner established by a preponderance of the

evidence that the appellants abused Mackenzie K. and derivatively neglected Landon K. These appeals ensued.

At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected (*see* Family Court Act § 1046[b][i]). A prima facie case of child abuse may be established by evidence of "(1) an injury to a child which would ordinarily not occur absent an act or omission of respondents, and (2) that respondents were the caretakers of the child at the time the injury occurred" (*Matter of Philip M.*, 82 NY2d 238, 243; *see* Family Court Act § 1046[a][ii]). Once the petitioner has made a prima facie case of abuse, the respondents may challenge the establishment of the prima facie case by presenting evidence to "(1) establish that during the time period when the child was injured, the child was not in respondent's care; (2) demonstrate that the injury or condition could reasonably have occurred accidentally, without the acts or omissions of respondent; or (3) counter the evidence that the child had the condition which was the basis for the finding of injury" (*Matter of Philip M.*, 82 NY2d at 244-245 [citations omitted]).

Here, contrary to the appellants' contentions, the petitioner made a prima facie case of abuse. At the fact-finding hearing, the petitioner presented evidence, including medical records and expert testimony, that while Mackenzie K. was in the appellants' care, she sustained certain injuries, including subdural hemorrhages and retinal hemorrhages, which ordinarily would not occur absent an act or omission of the respondents (*see Matter of Clifford S. [Chevon G.]*, 148 AD3d 1159, 1159; *Matter of Jordan T.R. [David R.]*, 113 AD3d 861, 863).

However, contrary to the petitioner's contentions, the appellants presented sufficient evidence to rebut the petitioner's prima facie case of abuse, through the testimony of their expert witnesses (*see Matter of Liana HH. [Christopher HH.]*, 165 AD3d 1386, 1389; *Matter of Miguel G. [Navil G.]*, 134 AD3d 711, 712; *Matter of Tyler S. [Melissa J.]*, 103 AD3d 731, 733-734). The appellants' experts opined that the injuries sustained by Mackenzie K. were not intentionally inflicted, as there were no external injuries, her "bridging veins" were not torn or bleeding, which would have occurred if she had been shaken, and the patterns and amount of bleeding in the brain, along with the location of the subdural hemorrhages, were inconsistent with "shaken baby syndrome." The appellants' experts put forth a reasonable explanation for Mackenzie K.'s injuries by opining that she suffered a stroke, which could have been caused by subdural bleeding sustained during birth, and that her subsequent COVID-19 infection could have prevented this injury from healing, and could have contributed to clotting and rebleeding

in her brain. Although deference is to be given to the Family Court's credibility determinations, this Court is not bound by those assessments, and we find that the court's decision to credit the testimony of the petitioner's experts over that of the appellants' experts is not supported by the record (*see Matter of Zamir F. [Ricardo B.]*, 193 AD3d 932, 934; *Matter of Tazya B. [Curtis B.]*, 180 AD3d 1039, 1040; *Matter of Serenity S. [Tyesha A.]*, 89 AD3d 737, 739). Moreover, the record demonstrates that the appellants are concerned parents who promptly sought medical assistance for Mackenzie K. and were cooperative and forthcoming with information throughout these proceedings (*see Matter of Philip M.*, 82 NY2d at 246; *Matter of Jordan T.R. [David R.]*, 113 AD3d at 863-864; *Matter of Tyler S. [Melissa J.]*, 103 [*3]AD3d at 734).

Accordingly, the petitioner failed to demonstrate by a preponderance of the evidence that the appellants abused Mackenzie K. and derivatively neglected Landon K.

The appellants' remaining contentions need not be reached in light of our determination.

Matter of Chandler W., 237 AD3d 1564 (4th Dept., 2025)

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 19, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had abused the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals in appeal No. 1 from an order of fact-finding and disposition determining that she abused her younger child. In appeal No. 2, the mother appeals from an order of fact-finding and disposition determining that she derivatively abused her older child. We affirm.

Contrary to the mother's contention in appeal No. 1, petitioner established a prima facie case of abuse. In so concluding, we emphasize that it is well settled that "the court's determination regarding credibility of the witnesses is entitled to great weight on appeal" (*Matter of Charity M. [Warren M.]* [appeal No. 2], 145 AD3d 1615, 1616-1617 [4th Dept 2016] [internal quotation marks omitted]; *see Matter of Amire B. [Selika B.]*, 95 AD3d 632, 632 [1st Dept 2012], *lv denied* 20 NY3d 855 [2013]). On this record and affording such deference to Family Court's credibility determinations, there is a sound and substantial basis in the record for the court's finding of abuse (*see Matter of Daniel D.*

[Tara D.], 232 AD3d 1220, 1220 [4th Dept 2024]; *Matter of Dorika S. [Baseme M.]*, 222 AD3d 1445, 1446 [4th Dept 2023]).

It is well settled that a prima facie case of abuse may be established by adducing evidence "(1) [of] an injury to a child which would ordinarily not occur absent an act or omission of respondent[ ], and (2) that respondent[was] the caretaker[ ] of the child at the time the injury occurred" (*Matter of Philip M.*, 82 NY2d 238, 243 [1993]; *see* Family Ct Act § 1046 [a] [ii]). "Although the petitioner bears the burden of proving child abuse by 'a preponderance of evidence' (§ 1046 [b] [i]), the statute 'authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur' and, therefore, once the petitioner 'has established a prima facie case, the burden of going forward shifts to [the] respondent[ ] to rebut the evidence of parental culpability' " (*Matter of Kevin V. [Sarah L.]*, 229 AD3d 1159, 1160 [4th Dept 2024]).

Here, we conclude that petitioner established that the younger child suffered multiple injuries that "would ordinarily not occur absent an act or omission of [the mother]" (*Philip M.*, 82 NY2d at 243). Petitioner adduced evidence from a physician, certified in child abuse pediatrics, who examined the then-five-month-old younger child and testified that the child had rib fractures, as well as multiple other fractures and injuries, that were highly specific for abuse. [*2]The physician explained that the mother provided no history of accidental trauma that could explain the younger child's injuries. Specifically, the physician concluded that it was unlikely that a "non-cruising infant" such as the younger child would be able to generate the amount of force necessary to cause the bruising observed and that being left in a swing at daycare would not cause the type of bruising and fractures that she observed on the child. The physician testified that, based upon her findings, the younger child's case was "diagnostic of abuse to a reasonable degree of medical certainty."

We further conclude that petitioner established that the mother was a "caretaker[ ] of the [younger] child at the time the injur[ies] occurred" (*id.*). It is undisputed that at least one of the younger child's injuries occurred when the child was solely in the mother's care. With respect to the other injuries, section 1046 (a) (ii) of the Family Court Act creates a presumption of culpability for all of the child's caregivers, including the mother in this case, especially where as here the caregivers are few and well defined (*see Matter of Avianna M.-G. [Stephen G.]*, 167 AD3d 1523, 1523-1524 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]). Consequently, petitioner's "inability . . . to pinpoint the time and date of each injury and link it to an individual respondent [is not] fatal to the establishment of a prima facie case" of abuse (*Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 73 [1st Dept 2012]; *see Avianna M.-G.*, 167 AD3d at 1524).

In response to petitioner's demonstration of a prima facie case of abuse, the mother failed to rebut the presumption of parental culpability. Indeed, the mother "fail[ed] to offer any [credible] explanation for the [younger] child's injuries" and simply denied inflicting them (*Philip M.*, 82 NY2d at 246; *see Amire B.*, 95 AD3d at 632; *Matter of William W.*, 125 AD2d 976, 976 [4th Dept 1986]). We conclude that "[t]here is no basis to disturb the court's credibility determinations with respect to the mother's varying accounts of the occurrence, nor the court's decision to credit" the testimony of the daycare workers and the physician that the injuries were not caused by the daycare (*Amire B.*, 95 AD3d at 632).

With respect to appeal No. 2, we conclude that the court's finding of derivative abuse of the older child is supported by a preponderance of the evidence in the record (*see* Family Ct Act § 1046 [a] [i]; [b] [i]; *Matter of Deseante L.R. [Femi R.]*, 159 AD3d 1534, 1536 [4th Dept 2018]). The abuse of the younger child "is so closely connected with the care [of his sibling] as to indicate that [his sibling] is equally at risk" (*Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]). The abuse of the younger child " 'demonstrates such an impaired level of judgment by the [mother] as to create a substantial risk of harm for any child in her care' " (*Matter of Dorian C. [Cyncere G.]* [appeal No. 3], 233 AD3d 1516, 1519 [4th Dept 2023]).

Matter of Ja'Moure D.S., AD3d 2025 NY Slip Op 03485 (4th Dept., 2025)

Appeals from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered July 7, 2023, in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject child in the custody of petitioner.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent mother and Alejandro D.S. (respondent) each appeal in appeal No. 3 from an order determining that they abused their oldest child (child) and derivatively neglected two of the mother's other children, and they appeal in appeal Nos. 1 and 2 from orders determining that they derivatively neglected their two younger children. These abuse and neglect proceedings were commenced after the child, who was six months old at the time, sustained a critical head injury at the mother's home.

Respondent contends in appeal No. 3 that, although he is the child's biological father, he was not a person legally responsible for the care of the child inasmuch as he was not living with the child or spending substantial time in her residence at the time of her injury. We reject that contention. A respondent in an article 10 proceeding includes "any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child" (Family Ct Act § 1012 [a]). A " '[p]erson legally responsible' includes the child's custodian, guardian, [or] 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 Ct Act § 1012 [g]).

As the child's biological father, respondent "is a proper respondent without regard to whether he was also a person legally responsible for the child['s] care at the pertinent time" (*Matter of Nasir A. [Jamilla A.]*, 151 AD3d 959, 960 [2d Dept 2017]; *see Matter of Marcus JJ. [Robin JJ.]*, 135 AD3d 1002, 1003-1004 [3d Dept 2016]; *Matter of Erica B. [Quentin B.]*, 79 AD3d 415, 415 [1st Dept 2010], *lv denied* 16 NY3d 703 [2011]). Moreover, petitioner introduced evidence that respondent received mail at the apartment where the mother and child [*2]resided, that he kept clothing at the apartment, that he watched the child while the mother left the apartment to go shopping, and that one of the child's siblings stated that respondent lived with them. The evidence thus established that respondent was a person legally responsible for the child's care at the relevant time (*see* Family Ct Act § 1012 [g]; *Matter of Elijah AA. [Alexander AA.]*, 216 AD3d 1372, 1374 [3d Dept 2023]; *Matter of Grayson R.V. [Jessica D.]* [appeal No. 2], 200 AD3d 1646, 1647-1648 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022]; *see generally Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]). Although the mother and respondent gave testimony to the contrary, Family Court rejected their testimony as incredible, and we accord great weight and deference to the court's credibility determinations inasmuch as they are supported by a sound and substantial basis in the record (*see Matter of Zakiyyah T. [Lamar R.]*, 221 AD3d 1443, 1445-1446 [4th Dept 2023], *lv denied* 41 NY3d 901 [2024]).

We reject respondent's alternative contention in appeal No. 3 that the court erred in finding that he abused the child. Family Court Act § 1046 (a) (ii) "provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child which would ordinarily not occur absent an act or omission of [the] respondents, and (2) that [the] respondents were the caretakers of the child at the time the injury occurred" (*Matter of Philip M.*, 82 NY2d 238, 243 [1993]; *see Grayson R.V.*, 200 AD3d

at 1648; *Matter of Nancy B.*, 207 AD2d 956, 957 [4th Dept 1994]). Section 1046 (a) (ii) "authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur" (*Philip M.*, 82 NY2d at 244).

We conclude that the court's finding that the child was abused by respondent is supported by a preponderance of the evidence in the record (*see* Family Ct Act § 1046 [b] [i]; *Matter of Jezekiah R.-A. [Edwin R.-E.]*, 78 AD3d 1550, 1551 [4th Dept 2010]). A pediatric surgeon testified that the child sustained non-accidental trauma to the head that required a craniectomy to relieve swelling and remove a blood clot. The surgeon testified that the child's injuries were inconsistent with a fall from a bed, as the mother had reported. Thus, petitioner established that the child suffered injuries that "would ordinarily not occur absent an act or omission of [the mother and respondent]" (*Philip M.*, 82 NY2d at 243; *see Grayson R.V.*, 200 AD3d at 1648; *Matter of Damien S.*, 45 AD3d 1384, 1384 [4th Dept 2007], *lv denied* 10 NY3d 701 [2008]). Petitioner further established that the mother and respondent "were the caretakers of the child at the time the injur[ies] occurred" (*Philip M.*, 82 NY2d at 243), and the "presumption of culpability extends" to both of them (*Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 74 [1st Dept 2012]). We conclude that respondent failed to rebut the presumption of culpability (*see Matter of Tyree B. [Christina H.]*, 160 AD3d 1389, 1389 [4th Dept 2018]; *Damien S.*, 45 AD3d at 1384).

We further reject respondent's contention in all three appeals that the court erred in finding that he derivatively neglected the child's siblings. Respondent was the father of two of the child's siblings, and petitioner established as a matter of law that respondent was a person legally responsible for the mother's other children (*see* Family Ct Act § 1012 [g]; *Matter of Paige K. [Jay J.B.]*, 81 AD3d 1284, 1284-1285 [4th Dept 2011]). The abuse of the child "is so closely connected with the care [of her siblings] as to indicate that [those children are] equally at risk" (*Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]; *see Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849 [4th Dept 2010]). The abuse of the child further "demonstrates such an impaired level of judgment by [respondent] as to create a substantial risk of harm for any child in [his] care" (*Matter of Aaron McC.*, 65 AD3d 1149, 1150 [2d Dept 2009]; *see Matter of Wyquanza J. [Lisa J.]*, 93 AD3d 1360, 1361 [4th Dept 2012]). The court's finding of derivative neglect based on the evidence that respondent abused the child is supported by a preponderance of the evidence in the record (*see* Family Ct Act § 1046 [a] [i]; [b] [i]; *Matter of Deseante L.R. [Femi R.]*, 159 AD3d 1534, 1536 [4th Dept 2018]).

The mother contends in all three appeals that she was denied meaningful representation by her attorney's failure to retain and call a medical witness to rebut the

evidence establishing the cause of the child's injuries. That contention "is 'impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on [her] behalf' " (*Matter of Amodea D. [Jason D.]*, 112 AD3d 1367, 1368 [4th Dept 2013]). In particular, the mother failed to "demonstrate[ ] that there were 'relevant experts who would have been willing to testify in a manner helpful [and favorable] to [her] case[ ]' . . . , and her speculation that [her attorney] could have found an expert with a contrary, exculpatory medical opinion is insufficient to establish deficient representation" (*Matter of Julian P. [Colleen Q.]*, 129 AD3d 1222, 1224-1225 [*3][3d Dept 2015]; *see Matter of Brooke T. [Justin T.]*, 156 AD3d 1410, 1412 [4th Dept 2017]). We have examined the mother's remaining allegations of ineffective assistance and conclude that the record establishes that " 'viewed in the totality of the proceedings, [the mother] received meaningful representation' " (*Matter of Bentleigh O. [Jacqueline O.]*, 125 AD3d 1402, 1404 [4th Dept 2015], *lv denied* 25 NY3d 907 [2015]; *see Matter of Aubree R. [Natasha B.]*, 217 AD3d 1565, 1566-1567 [4th Dept 2023], *lv denied* 40 NY3d 905 [2023]).

Severe Abuse

Matter of Shagun R., 235 AD3d 766 (2nd Dept., 2025)

In related proceedings pursuant to Family Court Act article 10, the father appeals from (1) an order of fact-finding of the Family Court, Queens County (Emily Ruben, J.), dated July 31, 2023, and (2) an order of the same court dated September 28, 2023. The order of fact-finding, after a fact-finding hearing, found that the father severely abused the child Maya R. and derivatively severely abused the children Shagun R., Dave R., Vanamsha R., and Sia R. The order dated September 28, 2023, granted the petitioner's motion pursuant to Family Court Act § 1039-b for a finding that reasonable efforts to reunite the father and the children Shagun R., Dave R., Vanamsha R., and Sia R. are no longer required.

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

ORDERED that the order dated September 28, 2023, is affirmed, without costs or disbursements.

The petitioner commenced this proceeding pursuant to Family Court Act article 10 alleging, inter alia, that the father severely abused the child Maya R. and derivatively severely abused the four younger children, Shagun R., Dave R., Vanamsha R., and Sia R. After a fact-finding hearing, the Family Court found that the father severely abused Maya R. and derivatively severely abused the four younger children. The court thereafter granted the petitioner's motion pursuant to Family Court Act § 1039-b for a finding that reasonable efforts to reunite the father with the four younger children are no longer required.

A child is "severely abused" by his or her parent if, among other things, "the child has been found to be an abused child as a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life, which result in serious physical injury to the child as defined in subdivision ten of section 10.00 of the penal law" (Social Services Law § 384-b[8][a][i]; *see* Family Ct Act § 1051[e]). A finding of severe abuse must be supported by clear and convincing evidence (*see* Family Ct Act § 1051[e]). Derivative findings of 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 (*see Matter of Marino S.*, 100 NY2d 361, 374; *Matter of Amirah L. [Candice J.]*, 118 AD3d 792, 793). Children who are not the direct targets of abuse may suffer damage from witnessing the severe abuse of their sibling even where direct injuries are not sustained by those children (*see Matter of Marino S.*, 100 NY2d at 374; *Matter of George S. [Hilton A.]*, 135 AD3d 563, 564).

Here, the petitioner established, by clear and convincing evidence, that the father severely abused Maya R. and derivatively severely abused the four younger children who witnessed the abuse (*see* Social Services Law § 384-b[8][a][i]; Family Ct Act § 1051[e]; Penal Law § 10.00[10]; *Matter of Marino S.*, 100 NY2d at 374; *Matter of Amirah L. [Candice J.]*, 118 AD3d at 794).

Contrary to the father's contention, the Family Court properly granted the petitioner's motion pursuant to Family Court Act § 1039-b for a finding that reasonable efforts to reunite him with the four younger children are no longer required. Where there is a finding of derivative severe abuse, reasonable efforts to make it possible for the children to return home are not required "unless the court determines that providing reasonable efforts would be in the best interests of the child[ren], not contrary to the health and

safety of the child[ren], and would likely result in the reunification of the parent and the child[ren] in the foreseeable future" (*id.* § 1039-b[b][1]; *see* § 1012[j]; *Matter of Angela N.L. [Ying L.]*, 153 AD3d 1408, 1412). Here, the father failed to meet his burden of establishing that reasonable efforts would be in the best interests of the children, not contrary to the health and safety of the children, and would likely result in the reunification of the father and the children in the foreseeable future (*see Matter of Aliah J. [Candice J.]*, 174 AD3d 898, 900; *Matter of Angela N.L. [Ying L.]*, 153 AD3d at 1412).

Disposition of Art. 10s

Matter of R.C., AD3d 2025 NY Slip Op 01859 (1st Dept., 2025)

Respondent D.C. appeals from an order of the Family Court, New York County (Keith E. Brown, J.), entered on or about January 24, 2024, which, following a dispositional hearing on the neglect case against respondent putative father, continued the child's placement in foster care until the conclusion of the next permanency planning hearing rather than returning the child to respondent mother, and dismissed the mother's petition for a writ of habeas corpus.

On August 21, 2019, approximately two weeks after R.C. was born, the Administration for Children's Services (ACS) filed a petition alleging that R.C. resided with the mother, the putative father lived elsewhere, and that the mother and putative father had neglected the child.[FN1] By order dated January 13, 2020, following an ex parte hearing pursuant to Family Court Act article 10, § 1027, Family Court ordered the temporary removal of the child from the mother's care for her purported failure to "enforce" the order of protection against the putative father,[FN2] and scheduled a date for a permanency hearing pursuant to Family Court Act article 10-A, § 1089. The child has remained in foster care pursuant to that temporary placement with the same non-kinship foster family ever since.

On April 19, 2022, over two and one-half years after the petition was filed, the putative father consented to a finding of neglect against him. Family Court commenced a fact-finding trial on the neglect petition against the mother on the same day. During and prior to the hearing, the mother was only permitted visits with R.C. subject to various conditions imposed by ACS. On June 6, 2022, Family Court found that ACS had failed to prove by a preponderance of the evidence that the mother had neglected the child.

Accordingly, the court dismissed the petition as to the mother pursuant to Family Court Act article 10, § 1051(c). The mother's attorney asked that the child be released to the mother's care, noting that she was now a nonrespondent parent and had no neglect charges pending against her. The court did not return R.C. to her mother's care, but rather issued an order that day permitting the mother to have unsupervised visits, without imposing any of the conditions previously required of her. It noted that there was a "very strong possibility" that the court "might be returning [the child] to [her mother]," unless ACS demonstrated "extraordinary circumstances." The court then scheduled the dispositional hearing on the neglect case against the putative father to begin on July 15, 2022. Although the putative father did not appear, the dispositional hearing continued for another 16 months, during which the child remained [*2]in foster care and the mother continued to visit her. On January 25, 2023, the mother filed a writ of habeas corpus, which Family Court consolidated with the neglect proceeding.

On January 24, 2024, Family Court issued the order appealed from, which decided the disposition on the petition against the putative father, made permanency hearing determinations, and dismissed the mother's habeas petition. Specifically, the court continued the child's placement in foster care pending the next permanency hearing; approved the permanency goal for R.C. of "return to parent" with concurrent planning for adoption; directed the foster care agency to refer the mother for intensive mental health services, monitor her compliance with those services, and arrange for visitation between the mother and the child; and ordered the putative father to engage in services, including a batterer's accountability program and parenting class. In addition, the court dismissed the mother's writ of habeas corpus petition on the basis that the child was not "wrongfully detained by ACS. [She] has been removed from her mother's care pursuant to court order." Although ACS had never filed another neglect petition against the mother, the court relied on evidence about incidents involving the mother that occurred after the date of the petition and after dismissal of the petition against her, even though the dispositional hearing only purported to concern the neglect petition as to the father. The mother now appeals. At no time did ACS move to amend the petition against the mother while it was pending against her, nor did the agency file a new neglect petition against her despite proffering evidence of incidents which had occurred after the date of the petition.

Initially, we decline to dismiss the appeal as moot based on the reported issuance of a subsequent permanency hearing order. The determination not to return the child to the mother based on findings that the child would be at significant risk of neglect if returned to her, may indirectly affect the mother's status in future proceedings (*see Matter of*

Tristram K., 25 AD3d 222, 228 [1st Dept 2005]; *Matter of Durgala v Batrony*, 154 AD3d 1115, 1117 [3d Dept 2017]). Furthermore, for the reasons discussed below, we find that Family Court Acted in excess of its subject matter jurisdiction in continuing the child's placement in foster care and holding further permanency hearings after the article 10 petition was dismissed as against the mother, rather than returning the child to the mother's care.

The mother argues that Family Court lacked subject matter jurisdiction to continue the child's placement in foster care because the putative father has not been adjudicated the child's father. We reject that argument but find that Family Court lacked subject matter jurisdiction to continue R.C.'s foster care placement for the reasons articulated in *Matter of Jamie J. (Michelle E.C.)* (30 NY3d 275 [2017]), in which the Court of Appeals held [*3]that "Family Court's jurisdiction terminates upon dismissal of the original neglect or abuse petition" (*id*. at 284).

The "court's lack of subject matter jurisdiction is not waivable, but may be raised at any stage of the action, and the court may . . . on its own motion . . . at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action" (*Matter of Brian L. v Administration for Children's Servs.,* 51 AD3d 488, 500 n 6 [1st Dept 2008] [internal quotation marks and citation omitted], *lv denied* 11 NY3d 703 [2008]).

Here, once the neglect petition against the mother was dismissed, Family Court lacked subject matter jurisdiction to continue the child's temporary removal from the mother's care and placement in foster care (*Jamie J.*, 30 NY3d at 284-285). Accordingly, it should have immediately returned the child to the mother's care and terminated the child's foster care placement. It erred when it determined that it could hold permanency hearings based on the pending neglect petition against the putative father, since the child was not removed from his care, but from the mother's.**[FN3]** Indeed, there is no evidence in the record that the child ever resided with the putative father and no indication that he ever sought custody of the child.**[FN4]**

Furthermore, we find that the failure of Family Court to immediately return the child to the care of the mother after the dismissal of the neglect petition against her—as well as the subsequent protracted proceedings, including the dispositional hearing, which lasted nearly a year and a half—violated her due process rights (*see Quilloin v Walcott*, 434 US 246, 255 [1978]; *Jamie J.*, 30 NY3d at 282; *Matter of Sapphire W.*, __ AD3d __, 2025 NY Slip Op 00662, *5 [2d Dept 2025]; *Matter of Elizabeth C. [Omar C.]*, 156 AD3d 193, 204 [2d Dept 2017] [failure to provide a parent with a prompt hearing following a child's removal may violate procedural due process]). The purpose of Family Court Act

article 10 is twofold: It was designed not only to "establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being," but also "to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his [or her] needs are properly met" (*Jamie J.*, 30 NY3d at 282, quoting Family Ct Act § 1011). "This makes sense, among other reasons, because a child protective agency's involvement with a family may itself have a negative impact on the parent or the child, even if it may be necessary in some circumstances to prevent or repair the effects of abuse or neglect" (*Sapphire W.*, 2025 NY Slip Op 00662, *3). Although *Sapphire W*. concerns a different section of the Family Court Act than that at issue here, it issued a holding which is highly relevant to this case when it stated that the challenged order "constitute[s] precisely the type [*4]of state intervention that the Legislature sought to avoid in circumstances when it is not warranted" and violated the rights of the mother, a nonrespondent custodial parent (*id.* at *4).

At the dispositional hearing in this case, Family Court improperly accepted into evidence documents and testimony concerning the mother's mental health status after the date of the neglect petition and after the neglect petition against her had been dismissed and then used it to support continuing the child's foster care placement. Approving that procedure "would permit a temporary order issued in an ex parte proceeding to provide an end-run around the protections of article 10" (*Jamie J.*, 30 NY3d at 284-285). These protections include the parent's right to notice of the claims against them (Family Court Act §§ 1031, 1035), the higher standard for evidence admissible at a fact finding hearing, and ACS's burden to prove neglect by a preponderance of such evidence (Family Court Act § 1046[b]). Moreover, "[p]ermanency hearing determinations are based not on the elevated imminent harm standard of article 10, but in accordance with the best interests and safety of the child under article 10-A . . . . Allowing a separate jurisdictional expressway for the placement of a child to substitute for the manner in which article 10 expects that threshold determination to be reached would subvert the statutory scheme" (*Jamie J.*, 30 NY3d at 285 [internal quotation marks and citation omitted]).

Family Court rejected the mother's argument that it was required to find extraordinary circumstances in order to continue the child's placement in foster care. We concur with that result, but for a different reason than that articulated by Family Court. The extraordinary circumstances test applies when a nonparent individual seeks custody of a child over the parent's objection (*see Matter of Bennet v Jeffries*, 40 NY2d 543 [1976]). However, this case deals with the state's intervention in "the child's rights as

well as the parents' rights to bring up their own children . . . . Those rights are among our oldest and most fundamental and are not only provided by statute, but also guaranteed to parents and children by our State and Federal Constitutions" (*Jamie J.,* 30 NY3d at 279-280 [citations omitted]). Where the state seeks custody of a child over a parent's objection, it must follow the requirements of article 10, which "erects a careful bulwark against unwarranted state intervention into private family life, for which its drafters had a deep concern" (*id.* at 284 [internal quotation marks omitted]).

The matter is remanded to Family Court for proceedings in accordance with this order. The matter is further stayed for five days so that the parties may arrange an orderly transition. Should ACS believe that events occurred after the neglect petition against the mother was dismissed which constitute neglect, the agency is free to file a new neglect petition against the mother.

We have considered [*5]the mother's remaining arguments and reject them.

Accordingly, the order of the Family Court, New York County (Keith E. Brown, J.), entered on or about January 24, 2024, which, following a dispositional hearing on the neglect case against respondent putative father, continued the child's placement in foster care until the conclusion of the next permanency planning hearing rather than returning the child to respondent mother, and dismissed the mother's petition for a writ of habeas corpus, should be reversed to the extent that it continued the child's placement in foster care, issued orders and made findings pursuant to Family Court Act §1089, issued orders and made findings as to the mother pursuant to Family Court Act § 1052, and dismissed the mother's habeas petition, and otherwise affirmed, without costs, the matter remanded to the Family Court for further proceedings in accordance with this order, and stayed for five days following entry of this order so that the parties may arrange an orderly transition and take any other appropriate steps.

Order, Family Court, New York County (Keith E. Brown, J.), entered on or about January 24, 2024, which, following a dispositional hearing on the neglect case against respondent putative father, continued the child's placement in foster care until the conclusion of the next permanency planning hearing rather than returning the child to respondent mother and dismissed the mother's habeas petition, unanimously reversed, to the extent that it continued the child's placement in foster care, issued orders and made findings pursuant to Family Ct Act § 1089, issued orders and made findings as to the mother pursuant to Family Ct Act § 1052, and dismissed the mother's habeas petition, and otherwise affirmed, without costs, the matter remanded to the Family Court for further proceedings in accordance with this order and stayed for five days following

entry of this order so that the parties may arrange an orderly transition and take any other appropriate steps.

Opinion by Gesmer, J. All concur.

Renwick, P.J., Gesmer, Shulman, Rosado, O'Neill Levy, JJ.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 27, 2025

Footnotes

Footnote 1: The putative father's name does not appear on the child's birth certificate, and he has not signed an acknowledgment of paternity. The mother testified that she believed he was the child's father. According to the mother's appellate counsel, his paternity petition was dismissed when he failed to appear.

Footnote 2: The petition alleged that the father had punched the mother in the child's presence and that the mother had told a caseworker that he had been violent with her in the past, including during her pregnancy with R.C. Family Court had issued an order of protection directing the putative father to stay away from the mother and R.C. Thus, the mother's inability to "enforce" the order of protection against the putative father became the basis for R.C.'s removal from her mother's care for virtually R.C.'s entire life. That result, particularly to the extent that the child remained in foster care even after the petition asserting the child's exposure to domestic violence as the basis for alleged negligence was dismissed against the mother, was directly contrary to the landmark decision of the Court of Appeals over two decades ago (*Nicholson v Scoppetta*, 3 NY3d 357, 375 [2004]). *Nicholson* held, inter alia, that a child's exposure to domestic violence is not presumptively neglect as against the abused parent, is not presumptively grounds for removal of a child from the abused parent's care and that "in many instances removal may do more harm to the child than good" (*id.* at 375).

Footnote 3: Had the court promptly returned the child upon dismissal of the neglect proceeding against the mother, there would have been no reason to hold a permanency hearing, which is only held while a child is in foster care (*Jamie J.*, 30 NY3d at 283).

Footnote 4: Family Court relied on a Second Department case, *Matter of Sabrina M.A. (Yana A.—Marcus S.)* (195 AD3d 709 [2d Dept 2021]), which affirmed Family Court's

order continuing the child's foster care placement until the next permanency hearing or further order of the court over the objection of the nonrespondent father.
However, *Sabrina M.A.* is distinguishable. There, the child had been temporarily removed from the respondent mother's care and placed in foster care and the neglect petition against the mother was still pending when the father, who lived out of state and had little relationship with the child, intervened in that proceeding. We note that the father had requested a hearing pursuant to Family Court Act § 1028 for release of the child to his care, but that request was not before the Second Department on appeal. We do not view *Sabrina M.A.* as contravening the Court of Appeals' holding in *Jamie J.* that Family Court does not retain subject matter jurisdiction over a child's temporary placement in foster care once the Family Court Act article 10 petition has been dismissed against the parent from whose care the child was temporarily removed. To the extent that it does, we decline to follow it. We note that *Sabrina M.A.* relied on *Matter of Eric W. (Tyisha W.)* (110 AD3d 1000 [2d Dept 2013]), a case decided before *Jamie J.* and before the 2015 amendments to article 10 of the Family Court Act, which recognized the rights of nonrespondent parents in article 10 cases (*see* L 2015 Ch 567; *Matter of Sapphire W.*, __ AD3d __, 2025 NY Slip Op 00662, *4 [2d Dept 2025]).

Matter of Sapphire W., 237 AD3d 41 (2nd Dept., 2025)

APPEAL by the nonrespondent mother, in a proceeding pursuant to Family Court Act article 10, from an order of the Family Court (Robert D. Hettleman, J.), dated August 31, 2023, and entered in Kings County. The order, insofar as appealed from, placed the nonrespondent mother under the supervision of the Administration for Children's Services and the Family Court, and directed her to cooperate with the Administration for Children's Services in certain respects.

This appeal presents this Court with the opportunity to decide an issue of first impression in New York involving the rights of nonrespondent parents in child neglect proceedings, to wit: whether the Family Court may place a nonrespondent custodial parent under the supervision of the Administration for Children's Services (hereinafter ACS) and the court, and direct the parent to cooperate with ACS in various ways, in circumstances where the respondent parent resides elsewhere and the child has not been removed from the nonrespondent parent's home. Considering, inter alia, the well-established "interest of a parent in the companionship, care, custody, and management of his or her children" (*Stanley v Illinois*, 405 US 645, 651) and the lack of any statutory authority permitting the challenged directives, we answer this question in the negative.

Therefore, we conclude that, in this case, the Family Court improperly placed the mother under the supervision of ACS and the court, and directed her to cooperate with ACS in certain respects.

I. Background of the Proceeding

The father and the mother are the parents of a child born in 2022. In August 2023, ACS commenced this proceeding pursuant to Family Court Act article 10 against the father, alleging that he neglected the child by committing acts of domestic violence against the mother at her home in the presence of the child. In the petition, ACS asserted that the mother had previously contacted the police concerning domestic violence perpetrated against her by the father, and that the police returned to her home at a later date to conduct a wellness check. After the police left, the father, who was present in the home while the police were there, allegedly became physically and verbally aggressive with the mother, including by calling her names, slapping her, and forcibly ripping out some of her hair. In response to the mother's demand that he leave the home, the father allegedly urinated in a bathtub before departing. Shortly thereafter, the mother discussed the incident with a therapist, who reported it to ACS.

On the date ACS filed the petition, the Family Court held an initial conference. The mother, who was not named as a respondent, appeared at the conference, while the father did not. During the conference, ACS advised the court that the father "did not reside in the home" with the mother and the child, although he "would occasionally sort of show up." ACS requested that the court issue a temporary order of protection in favor of the mother and the child and against the father, while also seeking the child's "release[ ]" to the mother's custody under ACS's supervision. The attorney for the child objected to so much of ACS's request as sought supervision of the mother, who, by counsel, joined in the objection. The court advised the mother that she was "not accused of anything" but nonetheless granted ACS's request in full. By order dated August 31, 2023, the court, inter alia, placed the mother under the supervision of ACS and the court, and directed the mother to cooperate with ACS in certain respects. Specifically, the court required the mother to "maintain[ ] contact with ACS, permit[ ] [ACS's staff members] to make announced and unannounced visits to the home, and accept[ ] any reasonable referrals for services." The mother appeals.

II. The Issue Presented Falls Within the Exception to the Mootness Doctrine and Was Preserved for Our Review

Initially, although we agree with ACS's contention that the issues raised on this appeal have been rendered academic, we reject ACS's assertion that this appeal should be

dismissed on that basis. On January 22, 2024, months after issuing the order appealed from, the Family Court issued an order of fact-finding and disposition that, among other things, awarded the mother sole legal and physical custody of the child. "It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal" (*C.F. v New York City Dept. of Health & Mental Hygiene*, 191 AD3d 52, 61 [internal quotation marks omitted]). "Under the mootness doctrine, a court is ordinarily precluded from considering questions which, although once live, have become moot by passage of time or change in circumstances" (*Matter of Angel S. [Sadetiana J.]*, 173 AD3d 1188, 1189 [internal quotation marks omitted]). Since the order of fact-finding and disposition resolved this proceeding and effectively terminated the directives challenged by the mother (*see* Family Ct Act § 1088), the issues raised on this appeal have been rendered academic (*see Matter of Abbygail G. [Christine Y.—Karen M.]*, 177 AD3d 878, 880; *Matter of Angel S. [Sadetiana J.]*, 173 AD3d at 1189; *Matter of Raven K. [Adam C.]*, 130 AD3d 622, 624).

Nonetheless, we agree with the mother and the attorney for the child that the exception to the mootness doctrine applies here. "If academic, an appeal is not to be determined unless it falls within the exception to the doctrine that permits courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would otherwise be nonreviewable" (*Matter of Abbygail G. [Christine Y.—Karen M.]*, 177 AD3d at 880 [internal quotation marks omitted]). In other words, "[t]he exception to the mootness doctrine permits judicial review where the case presents a significant issue which is likely to recur and evade review" (*Matter of Darcy M. [Gethylee C.]*, 195 AD3d 719, 720). Specifically,

"[t]he exception to the mootness doctrine is properly applied where there is '(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues'" (*Matter of Chang v Maliq M.*, 154 AD3d 653, 654, quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Here, the issue presented—whether certain provisions of the Family Court Act authorize a court in an article 10 proceeding to subject a nonrespondent custodial parent to supervision by a child protective agency when the respondent parent resides elsewhere and the child is not removed from the home—is "capable of repetition" in other cases (*Matter of Lucinda R. [Tabitha L.]*, 85 AD3d 78, 84; *see Matter of Carmen R. v Luis I.*,

160 AD3d 460, 461). The Family Court, Kings County, recently considered the issue and observed that, in article 10 proceedings, ACS regularly seeks "an order of protection against the respondent, and an order releasing the child to the non-respondent parent, with ACS supervision," in circumstances where "the child [resides] exclusively with the nonrespondent parent prior to ACS filing a case against the noncustodial, respondent parent" (*Matter of Danna T. [Miguel T.]*, 82 Misc 3d 723, 726 [Fam Ct, Kings County] [internal quotation marks omitted]; *see Matter of A.B. [B.F.]*, 74 Misc 3d 1229[A], 2022 NY Slip Op 50251[U], *1 [Fam Ct, Oswego County]). Although the issue was decided against ACS in that case, the court noted that, in its opinion, the relevant statute "ha[d] been misunderstood and misapplied in countless cases" (*Matter of Danna T. [Miguel T.]*, 82 Misc 3d at 725). Further, this appeal involves a phenomenon that will typically evade appellate review, since the type of temporary ACS supervision at issue will ordinarily only remain in effect for a limited time period (*see Matter of Emmanuel B. [Lynette J.]*., 175 AD3d 49, 54; *Matter of Elizabeth C. [Omar C.]*, 156 AD3d 193, 202; *Matter of Anthony H. [Karpati]*, 82 AD3d 1240, 1241). We note that, contrary to the suggestion of ACS, "[t]he correct standard is whether the issue 'typically'—not 'necessarily'—evades review" (*Matter of Crawford v Ally*, 197 AD3d 27, 32, citing *Matter of Hearst Corp. v Clyne*, 50 NY2d at 715). The mother's argument also presents "a substantial and novel issue of statewide importance" (*Matter of Elizabeth C. [Omar C.]*, 156 AD3d at 202), which "has not been the subject of prior appellate review" (*Matter of Anthony H. [Karpati]*, 82 AD3d at 1241; *see Cellular Tel. Co. v Village of Tarrytown*, 209 AD2d 57, 64).

Moreover, contrary to ACS's contention, the mother's argument is preserved for appellate review (*see Matter of Victoria B. [Jonathan M.]*, 164 AD3d 578, 581). Under the circumstances presented, the attorney for the child's objections to ACS's proposed directives, which the mother adopted, "were sufficient to alert [the Family] Court to the relevant question and [thus] sufficiently preserved the legal issue for appellate review" (*Geraci v Probst*, 15 NY3d 336, 342). We therefore reach the merits of this appeal.

III. The Family Court Improperly Imposed Supervision and Cooperation Directives upon the Mother

A. The Plain Text of Family Court Act § 1017 Did Not Authorize the Family Court's Directives

"[The] Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute" (*Matter of Johna M.S. v Russell E.S.*, 10 NY3d 364, 366; *see Matter of Capruso v Kubow*, 226 AD3d 680, 682). Stated otherwise, the Family

Court may not issue a directive or decide a particular issue "in the absence of any express grant of authority by statute" (*Matter of Donald QQ. v Stephanie RR.*, 198 AD3d 1155, 1157; *see Matter of Haber v Strax*, 136 AD3d 911, 913). Similarly, the Family Court's "general parens patriae responsibility to do what is in the best interests of the children . . . cannot create jurisdiction . . . not provided by statute" (*Matter [*2]of Zavion O. [Donna O.]*, 173 AD3d 28, 35 [citation and internal quotation marks omitted]).

Here, although the Family Court did not set forth the statutory basis for its challenged directives, the parties focus on Family Court Act §§ 1017 and 1027(d), disagreeing as to whether these statutes provided the court with authority to subject the mother to supervision by ACS and the court, or authority to require her to cooperate with ACS in various ways. As a result, we consider whether those statutes expressly authorized the court to issue those directives (*see Matter of Zavion O. [Donna O.]*, 173 AD3d at 35; *Matter of Haber v Strax*, 136 AD3d at 913).

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereto" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583; *see Matter of Lisa T. v King E. T.*, 30 NY3d 548, 552). "[W]here the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Matter of D.L. v S.B.*, 39 NY3d 81, 87 [internal quotation marks omitted]). However, "[a]n examination of the legislative history is proper 'where the language is ambiguous or where a literal construction would lead to absurd or unreasonable consequences that are contrary to the purpose of the enactment'" (*Saul v Cahan*, 153 AD3d 951, 952, quoting *Matter of Auerbach v Board of Educ. of City School Dist. of City of N.Y.*, 86 NY2d 198, 204). Indeed, "[a]ny statute or regulation . . . must be interpreted and enforced in a reasonable . . . manner in accordance with its manifest intent and purpose" (*Matter of Sabot v Lavine*, 42 NY2d 1068, 1069). Thus, "'[a] court should avoid a statutory interpretation rendering the provision meaningless or defeating its apparent purpose'" (*Matter of Carver v Nassau County Interim Fin. Auth.*, 142 AD3d 1003, 1008, quoting *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 92 AD3d 148, 157, *affd* 20 NY3d 342). "Finally, it is well settled that a statute must be construed as a whole and that its various sections must be considered with reference to one another" (*Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities*, 19 NY3d 106, 120).

"Family Court Act § 1017 sets out the steps to be followed in determining the appropriate placement of a child when the child is initially removed from his or her home" (*Matter of Paige G. [Katie P.]*, 119 AD3d 683, 684; *see Matter of Lucinda R. [Tabitha L.]*, 85 AD3d at 86-87). Specifically, upon "determin[ing] that a child must be removed from his or her home" and securing a report from "the local commissioner of social services," the court must consider "whether there is a non-respondent parent, relative or suitable person with whom such child may appropriately reside" (Family Ct Act § 1017[1][a], [c][i]; *see Matter of Timothy GG. [Meriah GG.]*, 163 AD3d 1065, 1068; *Matter of Paige G. [Katie P.]*, 119 AD3d at 684). Upon finding "that the child may appropriately reside with a non-respondent parent," the court may "temporarily release the child directly to such non-respondent parent" so long as he or she "submits to the jurisdiction of the court with respect to the child" (Family Ct Act § 1017[2][a][ii]; [3]; *see Matter of Emmanuel B. [Lynette J.]*, 175 AD3d at 59; *Matter of Angel S. [Sadetiana J.]*, 173 AD3d at 1188). The order releasing the child to the nonrespondent parent "shall set forth the terms and conditions" that apply, which, as relevant to this appeal, "may include . . . a direction for [the nonrespondent parent] to cooperate in making the child available . . . for appointments with and visits by the child protective agency, including visits in the home and in-person contact with the child protective agency" (Family Ct Act § 1017[3]; *see Matter of D.L. v S.B.*, 39 NY3d at 90-91).

Contrary to ACS's contention, Family Court Act § 1017 did not provide the Family Court with authority to subject the mother to supervision by ACS and the court, or to require her to "cooperate" with ACS in the manner directed in the order appealed from (*see Matter of Danna T. [Miguel T.]*, 82 Misc 3d at 726-728). Considering the "plain meaning" of the text and construing the statute's "various sections . . . with reference to one another" (*Matter of Jefry H.*, 102 AD3d 132, 136 [internal quotation marks omitted]), the relevant provisions of Family Court Act § 1017 apply only when a court orders the removal of a child from his or her home and releases the child to the home of a nonrespondent and "noncustodial parent" (*Matter of D.L. v S.B.*, 39 NY3d at 91). By the plain language of the statutory text, the provisions requiring the nonrespondent parent, inter alia, to "submit[ ] to the jurisdiction of the court with respect to the child" and "to cooperate" with "the child protective agency" in various ways (Family Ct Act § 1017[3]) are only triggered "[a]fter [the] child is removed from the home" (*Matter of Emmanuel B. [Lynette J.]*, 175 AD3d at 59; *see Matter of Paige G. [Katie P.]*, 119 AD3d at 684). Here, since the court never "determin[ed] that [the] child [*3]must be removed from . . . her home" (Family Ct Act § 1017[1]), it did not have authority pursuant to Family Court Act § 1017 to impose the challenged directives upon the mother, no matter how "well-

intended" the court's "goals" may have been (*Matter of Zavion O. [Donna O.]*, 173 AD3d at 35).

B. The Legislative History Supports the Conclusion that the Family Court's Directives Were Improper

Although we need not review the legislative history of Family Court Act § 1017 because the statutory text is unambiguous and a "literal construction" thereof does not "lead to absurd or unreasonable consequences that are contrary to the purpose of the [statute]" (*Saul v Cahan*, 153 AD3d at 952 [internal quotation marks omitted]), the legislative history nonetheless supports our conclusion.

Since "the institution of the family is deeply rooted in this Nation's history and tradition," and it is the vehicle through which "we inculcate and pass down many of our most cherished values, moral and cultural" (*Moore v East Cleveland*, 431 US 494, 503), it has long been recognized "that freedom of personal choice in matters of family life is a fundamental liberty interest" (*Santosky v Kramer*, 455 US 745, 753). Indeed, "a parent's interest 'in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests'" (*Matter of F.W. [Monroe W.]*, 183 AD3d 276, 280, quoting *Troxel v Granville*, 530 US 57, 65; *see Matter of Elizabeth C. [Omar C.]*, 156 AD3d at 203). "Similarly, . . . children have a parallel right to be reared by their parent" (*Matter of F.W. [Monroe W.]*, 183 AD3d at 280 [alteration and internal quotation marks omitted]). Nonetheless, a parent's "interest in . . . family integrity . . . is counterbalanced by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves" (*Wilkinson v Russell*, 182 F3d 89, 104 [2d Cir] [internal quotation marks omitted]).

Against those background principles, article 10 of the Family Court Act, which includes Family Court Act § 1017 and which pertains to child protective proceedings, "erects a careful bulwark against unwarranted state intervention into private family life, for which its drafters had a deep concern" (*Matter of Jamie J. [Michelle E.C.]*, 30 NY3d 275, 284 [internal quotation marks omitted]). Therefore, "the child protective statutes of Family Court Act article 10 have a twofold purpose: 'to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being,'" while also "'provid[ing] . . . due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his [or her] needs are properly met'" (*Matter of Elizabeth C. [Omar C.]*, 156 AD3d at 204, quoting Family Ct Act § 1011). Stated more succinctly, the

"purpose of article 10 [is] to provide a mechanism to protect children while preserving parental rights" (*id.* at 209).

The competing purposes of article 10 make clear that the Legislature sought to strike a balance between protecting children through "state intervention" while simultaneously shielding "private family life" from such intervention when it is "unwarranted" (*Matter of Jamie J. [Michelle E.C.]*, 30 NY3d at 284 [internal quotation marks omitted]; *see Matter of Elizabeth C. [Omar C.]*, 156 AD3d at 204). This makes sense, among other reasons, because a child protective agency's involvement with a family may itself have a negative impact on the parent or the child, even if it may be necessary in some circumstances to prevent or repair the effects of abuse or neglect. An ACS investigation, by its nature, intrudes upon the private lives of the parent and child to one degree or another (*see Matter of Isabela P. [Jacob P.]*, 195 AD3d 722, 723; *Matter of Anthony JJ. v Joanna KK.*, 182 AD3d 743, 744) and, at least on occasion, may be traumatic for both the child and the parent (*see Matter of Duran v Contreras*, 227 AD3d 1068, 1070; *Matter of Daniel D. [Diana T.]*, 183 AD3d 727, 728). Indeed, in testimony to a New York City Council committee in 2020, the then Commissioner of ACS acknowledged that, while the agency's work in responding to reports of abuse and neglect "may be an essential lifeline for children when they are being seriously harmed or at imminent risk of harm, the child protective response and investigation by its nature can be intrusive and traumatic for families" (Written Testimony of David A. Hansell, NY City Council, Comm on General Welfare, Oct. 28, 2020, at 6, available at https://www.nyc.gov/assets/acs/pdf/testimony/2020/GWCommitteeHearing.pdf [last accessed Dec. 27, 2024]). Considering the intrusive and potentially traumatic impact of ACS involvement in a family's life, the disproportionate involvement of Black and Hispanic children in the child welfare [*4]system cannot be ignored (*see id.* at 2-6).

In any event, in furtherance of the goal of "safeguard[ing] the [child's] physical, mental and emotional well-being," Family Court Act § 1017 "help[s] the child . . . maintain[ ] family ties and reduc[es] the trauma of removal" by placing him or her with a nonrespondent parent or "suitable relative" (*Matter of Harriet U. v Sullivan County Dept. of Social Servs.*, 224 AD2d 910, 911; *see Matter of Richard HH. v Saratoga County Dept. of Social Servs.*, 163 AD3d 1082, 1083). Notably, in 2015, the Legislature enacted sweeping legislation that amended various statutes, including Family Court Act § 1017, in order to provide nonrespondent parents with "greater participation in abuse or neglect proceedings," while "also expand[ing] the options available to Family Court judges" when "craft[ing] appropriate orders respecting the rights of non-respondent parents [and] assuring the safety and well being of children who are the subjects of the

proceedings" (Assembly Memo in Support, Bill Jacket, L 2015, ch 567 at 7). Among other things, the legislation "clarifie[d] the language of Family Court Act § 1017 by referring specifically to 'non-respondent parent, relative or suitable person' as potential resources a court may consider after determining that a child must be removed from his or her home" (*id.* at 8).

Here, considering that article 10 serves, in part, to enact procedures preventing unwarranted state intervention in family life, and that the relevant provisions of Family Court Act § 1017, in particular, serve to help the child maintain family ties while respecting the rights of parents (*see Matter of Jamie J. [Michelle E.C.]*, 30 NY3d at 284; *Matter of Harriet U. v Sullivan County Dept. of Social Servs.*, 224 AD2d at 911; Assembly Memo in Support, Bill Jacket, L 2015, ch 567 at 7), ACS's position is necessarily at odds with the statute's legislative purpose. The challenged directives constitute precisely the type of state intervention that the Legislature sought to avoid in circumstances when it is not warranted, particularly considering the impact ACS involvement can have on a child or a parent. It is also unclear how a nonrespondent custodial parent's rights would be respected by placing his or her parenting of a child under ACS supervision. Nor does interpreting Family Court Act § 1017 in a manner that permits ACS supervision of a nonrespondent custodial parent in the circumstances presented help a child to maintain family ties, since the child is necessarily already in the custody of that parent in such circumstances.

C. Family Court Act § 1027(d) Did Not Authorize the Challenged Directives

Further, the relevant provisions of Family Court Act § 1017 did not apply indirectly to the circumstances presented by way of the reference within Family Court Act § 1027(d) to Family Court Act § 1017(2)(a)(ii).

Pursuant to Family Court Act § 1027(a)(i), (ii), and (iii), a hearing to determine "whether the child's interests require protection" must be held, or may be held, depending upon the circumstances. "Upon such hearing, the court may, for good cause shown, release the child to his or her parent or other person legally responsible for his or her care, pending a final order of disposition, in accord with [Family Court Act § 1017(2)(a)(ii)]" (*id.* § 1027[d]).

Contrary to ACS's contention, even assuming the initial conference at issue constituted such a hearing, Family Court Act § 1027(d) does not provide an independent basis for a court to place a nonrespondent custodial parent under ACS supervision when the child has not been removed from that parent's home and the respondent parent resides elsewhere. Instead, by expressly referring to a subparagraph of Family Court Act §

1017, which, as previously stated, only applies to a nonrespondent parent in such circumstances "[a]fter [the] child is removed from the home" (*Matter of Emmanuel B. [Lynette J.]*, 175 AD3d at 59), Family Court Act § 1027(d) similarly only applies in such circumstances. This is not only the plain meaning of the statutory text, but it is also consistent with the Legislature's recognition that the reference to Family Court Act § 1017 within Family Court Act § 1027(d) serves to establish the former statute as the "authority" for permitting a court to "release a child to his or her parent" during the pendency of an article 10 proceeding (Assembly Memo in Support, Bill Jacket, L 2015, ch 567 at 9).

D. This Court's Decision in Matter of Elizabeth C. (Omar C.) Does Not Support ACS's Position

This Court's determination in *Matter of Elizabeth C. (Omar C.)* (156 AD3d 193) does not warrant a different result. In that case, ACS accused the respondent father, who resided in a home with his children and the nonrespondent mother, of abusing and neglecting the children (*see id.* at 196-197). The father sought a hearing pursuant to Family Court Act § 1028 to contest a temporary order of protection issued on the same day that ACS filed the petitions, which required [*5]him to stay away from the family home (*see Matter of Elizabeth C. [Omar C.]*, 156 AD3d at 196-197). Although Family Court Act § 1028 sets forth standards for conducting hearings to determine whether to "return[ ] [a] child" after his or her "removal . . . from the home" (*id.* § 1028[a], [b]), the father asserted "that his loss of the physical care and custody of the children incidental to his exclusion from the family home was the functional equivalent of a removal of the children, thereby entitling him to the heightened due process afforded by a section 1028 hearing" (*Matter of Elizabeth C. [Omar C.]*, 156 AD3d at 197). The Family Court disagreed, concluding that such a hearing is "only appropriate where . . . children have been physically removed from their residence" (*id.* at 198). On appeal, this Court reversed (*see id.* at 205-210). While recognizing "that the statutes within part 2" of article 10 of the Family Court Act "generally employ the term 'removal' in the context of physically removing the child from his or her home," this Court also noted that there was "no language in any of the statutes [that] expressly limit[ed] the due process protections they contain . . . only [to] situations involving . . . physical removal" (*id.* at 205-206). "Since the removal of a child from the family home and the exclusion of a parent from that same home require equal showings of imminent risk, and both result in similar infringements on the constitutionally protected parent-child relationship," this Court "conclud[ed] that both trigger the same due process protections" (*id.* at 207).

Contrary to ACS's contention, our holding in that case does not lead to the conclusion that, in this case, the child was "removed" for purposes of Family Court Act § 1017, thereby permitting the Family Court to impose the challenged directives upon the mother. In *Matter of Elizabeth C. (Omar C.)*, this Court was focused on a different question than the one presented here: whether a custodial parent's exclusion from the family home triggers the hearing and due process requirements set forth in Family Court Act § 1028, even when the child is still residing at, and has not been removed from, the home. In this case, the question is instead whether Family Court Act § 1017—the relevant provisions of which require a noncustodial nonrespondent parent to, among other things, cooperate with a child protective agency upon assuming temporary custody after the child has been removed from the child's home—can be utilized to impose the type of directives at issue upon a custodial nonrespondent parent when an order of protection has been issued against a respondent parent who resides elsewhere, and when the child has not been removed from the nonrespondent parent's home. Notably, in *Matter of Elizabeth C. (Omar C.)*, this Court did not state that the circumstances presented involved an actual "removal" of the child, as that term is utilized in Family Court Act § 1028. Instead, we reasoned that

"[t]he issuance of a full stay away order of protection excluding the father from the family home . . . [wa]s for all practical purposes akin to a physical removal of the children from his care and custody, . . . produc[ing] the same cessation in his contact with the children, and the same severance of his relationship with them, that an order removing the children from the family residence would bring about,"

thereby involving the "same constitutional considerations" (*Matter of Elizabeth C. [Omar C.]*, 156 AD3d at 208-209).

IV. The Issue of the Due Process Protections Available to Respondent Parents Is Not Before Us

To be clear, our conclusion that Family Court Act §§ 1017 and 1027(d) did not authorize the Family Court to impose the challenged directives upon the mother under the circumstances presented should not be construed as indicating that certain hearing and due process provisions of Family Court Act article 10 were unavailable to the father. That issue is not before us on this appeal, and we do not decide it.

V. Conclusion

Accordingly, the Family Court improperly placed the mother under the supervision of ACS and the court, and directed her to cooperate with ACS in certain respects.

In light of our determination, we need not reach the remaining contentions of the parties and amici curiae.

Accordingly, the order is reversed insofar as appealed from, on the law.

CHAMBERS, J.P., BRATHWAITE NELSON and DOWLING, JJ., concur.

ORDERED that the order is reversed insofar as appealed from, on the law, without costs or disbursements.

Matter of Moses M., 237 AD3d 825 (2nd Dept., 2025)

Act article 10, the mother appeals from an order of disposition of the Family Court, Suffolk County (Frank A. Tantone, J.), dated February 14, 2024. The order of disposition, upon the mother's consent to a finding of neglect, and after a dispositional hearing, inter alia, released the subject child to the custody of the nonrespondent father and directed the mother to complete a parenting skills program.

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

The mother and the nonrespondent father, who were never married, are the parents of the subject child, born in 2015. The child resided with the mother and had scheduled parental access with the father, which ceased in 2020 after the mother refused to comply with a custody stipulation. In 2021, when the child was six years old, the mother failed to enroll him in school. In 2023, the petitioner commenced this proceeding pursuant to Family Court Act article 10 against the mother, alleging that the mother neglected the child by failing to provide him with an adequate education. On December 14, 2023, the mother consented to a finding of neglect. After a dispositional hearing, by order of disposition dated February 14, 2024, the Family Court, inter alia, released the child to the custody of the father and directed the mother to complete a parenting skills program.

The Family Court providently exercised its discretion in releasing the child to the custody of the father. At the dispositional phase of a child protective proceeding, the court must render a determination based upon the best interests of the child (*see* Family Court Act § 1052; *Matter of Kayorie S. [Brandy S.]*, 214 AD3d 886). "The factors to be considered in making the determination include the parent['s] capacity to properly supervise the child, based on current information and the potential threat of future . . . neglect" (*Matter of Tereza R. [Jose A.]*, 199 AD3d 921, 923 [internal quotation marks omitted]; *see Matter of Jaheem M. [Cymon M.]*, 174 AD3d 610, 611). Here, the record

established that the mother failed to enroll the child in school, failed to abide [*2]by the petitioner's directive to have the child evaluated for occupational and physical therapy so that the school could prepare an individualized education program for the child, failed to have the child's vision tested, failed to maintain regular contact with the petitioner, and failed to adhere to the parental access schedule. The father, by contrast, provided the child's prescription for occupational and physical therapy to the petitioner so that the child could be evaluated for special education services, expressed his wish to care for the child, was employed, had an appropriate home, and kept in contact with the petitioner and the school.

Contrary to the mother's contention, the Family Court providently exercised its discretion in directing, as part of its dispositional order, that she complete a parenting skills program, as this condition was fully supported and warranted by the facts of the proceeding (*see* Family Ct Act §§ 1015-a; 1054[c]).

Under the circumstances of this case, the Family Court's failure to ensure that the mother validly waived her right to counsel at an appearance on September 6, 2023, does not warrant reversal. At that court appearance, after the mother stated that she no longer wanted her appointed attorney to represent her, the court "failed to conduct a searching inquiry to ensure" that the mother's waiver of her right to counsel was "made knowingly, voluntarily, and intelligently" (*Matter of Mercado v Arzola*, 212 AD3d 815, 816) and failed to sufficiently "warn [the mother] of the risks of proceedings pro se or apprise [her] of the importance of a lawyer in the adversarial system" (*People v Baines*, 39 NY3d 1, 7; *see Matter of Cerquin v Visintin*, 118 AD3d 987, 989). Nonetheless, under the circumstances of this case, the court's error does not warrant reversal and remittal (*see Matter of Abigail M.A. [James A.]*, 222 AD3d 973). Following court appearances on September 6, 2023, September 8, 2023, and October 12, 2023, wherein the court ensured that the then-eight-year-old child was enrolled in school and that the father was provided with parental access, on October 20, 2023, the mother was appointed new counsel, who represented her at the appearance wherein she consented to a finding of neglect and further represented her at the dispositional hearing. Since the testimony offered in the period in which the mother was represented by counsel was sufficient to establish that she neglected the child and that releasing the child to the custody of the father was in the child's best interest, the court's failure to ensure that the mother validly waived her right to counsel at the conference on September 6, 2023, could not have affected the ultimate outcome of the proceeding (*see id.* at 977; *see also People v Wardlaw*, 6 NY3d 556, 559-561).

The mother's remaining contention is without merit.

Matter of Ava OO., 235 AD3d 1135 (3rd Dept., 2025)

Appeal from an order of the Family Court of Sullivan County (E. Danielle Jose-Decker, J.), entered July 20, 2023, which, among other things, granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected.

Respondent Leanna MM. (hereinafter the mother) is the mother of the four subject children (born in 2012, 2014, 2017 and 2019), the youngest of whom is at issue here. Respondent Michael NN. (hereinafter the father) is the father of the youngest child and, in May 2022, he lived with the mother and the subject children in the Town of Fallsburg, Sullivan County. Following an investigation into a hotline report alleging that the father had struck the mother during a domestic dispute and had sexually abused the oldest of the subject children, petitioner filed separate petitions against the mother and the father alleging that they had abused and neglected the subject children. All of the subject children were temporarily removed from the home.

In October 2022, the parties entered into an agreement to resolve the pending petitions, with the mother and the father both consenting to the entry of a finding of neglect without admission and petitioner agreeing to withdraw the allegations of abuse against them. The agreement contemplated that the subject children would be placed in the care of petitioner, but that the mother and the father would have supervised parenting time with their respective children. Petitioner further stipulated, as is relevant here, that if the father met certain requirements, it would take no position upon an application to return the youngest child to his care and would "leave such decision to the sound discretion of [Family] Court . . . based upon all of the attendant circumstances existing at the time such application is made." Among those requirements was that the father "complete[ ] a sex offender evaluation" with a named evaluator "or some other similarly credentialed practitioner" who had been made aware of the allegations against him, then "follow[ ] all recommendations of such evaluator until receiving a positive discharge." An amended order of fact-finding was issued later that month and embodied the terms of the parties' agreement.

The father had difficulty obtaining the money to pay the named evaluator and, in February 2023, his application for an order directing petitioner to pay the evaluator under County Law § 722-c was denied without prejudice to renewal with motion papers that complied with the statutory requirements.[FN1] The father thereafter underwent an April 2023 mental health assessment from a social worker at the Sullivan County

Department of Community Services — not the named evaluator — that included a sex offender evaluation finding that the father was at a below-average risk of reoffense. The parties then appeared for a dispositional hearing in May 2023, where counsel for petitioner represented that the father had a safe and appropriate [*2]home and that, while "colleagues [could] argue on the issue of the sex offender status," petitioner would honor its commitment to "take no position [on disposition of the youngest child] and leave it to the sound discretion of the Court," given the completed evaluation.

Family Court thereafter issued a July 2023 dispositional order in which it concluded that neither parent had adequately addressed the "shortcomings and flawed judgment" that had led to the findings of neglect against them and that the best interests of the children would be served by leaving them in petitioner's care for the time being. The court further directed that the father "obtain sex offender treatment from a properly credentialed therapist until positive, therapeutic discharge," and issued orders of protection requiring the father to stay away from, and refrain from contacting, all of the subject children except for supervised visitation with the youngest child. The father appeals, focusing upon that aspect of the dispositional order relating to the youngest child.

To begin, petitioner's argument that the father's appeal must be dismissed is without merit. It is true that an order entered upon consent, like the amended order of fact-finding entered in October 2022, is not appealable (*see e.g. Matter of Adam O. v Tracie P.*, 188 AD3d 1312, 1313 [3d Dept 2020]). The father's appeal does not relate to the sex offender evaluation provision of that order, however, instead challenging the later dispositional order in which Family Court determined that his efforts to satisfy the evaluation provision had come up short. There was never any agreement on that point or on the ultimate issue of disposition and, as the father "clearly did not consent to the terms" of the dispositional order, he is free to take an appeal from it (*Matter of Adam V. v Ashli W.*, 180 AD3d 1205, 1206 [3d Dept 2020]).

Upon the merits, we affirm. "A dispositional order in a neglect proceeding must reflect a resolution consistent with the best interests of the child after consideration of all relevant facts and circumstances, and must be supported by a sound and substantial basis in the record" (*Matter of Jaylin XX. [Jamie YY.]*, 216 AD3d 1224, 1228 [3d Dept 2023] [internal quotation marks, brackets and citation omitted]; *see Matter of Tristen S. [Thomas S.]*, 216 AD3d 1237, 1239 [3d Dept 2023]; *Matter of Jamel HH. [Linda HH.]*, 155 AD3d 1379, 1380 [3d Dept 2017]). Here, although the father made no admissions when he consented to a neglect finding against him, he was aware that his consent would have "the same legal effect as if there had been a hearing and all the necessary facts [alleged in the petition] were proven," including the allegation that he had sexually

abused one of the subject children (*see* Family Ct Act § 1051 [a], [f]). It was accordingly contemplated that he would undergo a sex offender evaluation before seeking the return of the youngest child to his care, and the proof at the dispositional hearing [*3]included a sex offender evaluation that scored him as a "below average risk." That said, the evaluation was not prepared by the evaluator named in the fact-finding order and amounted to a one-page form in which the evaluator notably failed to complete the section stating whether the result fairly represented the risk posed by the father. Family Court did not view this to be the "thorough" evaluation contemplated by the fact-finding order and noted, correctly, that there was no reason to believe that the father had undergone any sex offender treatment as a result of it. Family Court therefore found that the father had failed to address the issues that had led to the neglect findings against him. According deference to those findings of fact, we are satisfied that a sound and substantial basis in the record supports Family Court's determination that the best interests of the youngest child will be served by leaving him in petitioner's care, at least until the father obtains an appropriate sex offender evaluation and engages with recommended treatment (*see Matter of Tristen S. [Thomas S.]*, 216 AD3d at 1242; *Matter of Ja'Sire FF. [Jalyssa GG.]*, 206 AD3d 1076, 1080 [3d Dept 2022], *lv denied* 38 NY3d 912 [2022]; *Matter of Heather WW.*, 300 AD2d 940, 941-942 [3d Dept 2002]).

As the order of protection issued in favor of the youngest child expired by its own terms in July 2024, the father's argument regarding the propriety of that order is moot (*see Matter of Noelia F. [Noel G.]*, 204 AD3d 1122, 1123 [3d Dept 2022]; *Matter of Kali-Ann E.*, 27 AD3d 796, 797 n [3d Dept 2006], *lv denied* 7 NY3d 704 [2006]). To the extent that they are properly before us and have not been addressed above, the father's remaining arguments have been considered and are unavailing.

Aarons, Fisher, McShan and Mackey, JJ., concur.

ORDERED that the order is affirmed, without costs.

Footnotes

Footnote 1: The attorney for the child argues that Family Court erred in denying that application, but she is not an appealing party, and her effort to obtain affirmative relief not sought by an appellant is improper (*see Hecht v City of New York*, 60 NY2d 57, 60 [1983]; *Matter of Drey L. [Katrina M.]*, 227 AD3d 1134, 1135 n [3d Dept 2024]).

Permanency Hearings

Matter of Joshua J., NY3d 2025 NY Slip Op 03010 (2025)

TROUTMAN, J.:

Respondent mother contends that the Appellate Division abused its discretion by declining to invoke the mootness exception to review her appeals from two expired permanency hearing orders. The mother further asks this Court to recognize a new exception to the mootness doctrine, which would allow for appellate review of all mooted permanency hearing orders. Because we conclude that the Appellate Division providently exercised its discretion under these circumstances, and that a blanket mootness exception would be imprudent, we affirm the decision of the Appellate Division.

I.

In 2018, petitioner Westchester County Department of Social Services (DSS) commenced these Family Court Act article 10 neglect proceedings against the mother with respect to each of her four children. DSS alleged that the mother left her 5-year-old daughter in the care of her 14-year-old daughter, and, on two occasions, the 5-year-old was found alone in public without supervision. DSS further alleged that the mother allowed her 9- and 10-year-old sons to take public transportation to meet her at work without supervision. Despite being informed about each incident, the mother refused to make alternative care plans for the children or otherwise cooperate with DSS.

The mother consented to a finding of neglect, and a series of permanency hearings ensued [*2]regarding two of the children's placement in DSS custody [FN1]. In 2020, Family Court ordered that the two children be trial discharged to the mother's custody. Two months later, however, DSS reported that, in addition to not complying with Family Court's orders, the State Central Registry received a report alleging that mother was physically aggressive toward one child on video; verbally abused the children; and provided inadequate food, clothing, and shelter for the children. In light of these allegations, Family Court terminated the trial discharge, and the children were returned to DSS custody.

Additional permanency hearings ensued. Relevant to this appeal, in March 2022, Family Court issued a permanency hearing order, which continued the children's placement with DSS until the next permanency hearing; approved a permanency goal of

reunification with the mother; and ordered the mother, among other things, to participate in an intensive parenting program, submit to full psychological and psychiatric evaluations, and comply with the recommendations thereof.

The mother appealed, and during the pendency of her appeal from the March 2022 order, a referee conducted another permanency hearing. While the mother's counsel cross-examined a caseworker regarding the mother's visits with one of the children, the referee asked counsel about the relevance of his questioning. The mother's counsel responded that the questions were relevant to the "ultimate question" of "whether the children should be returned to [the mother]." The referee thereafter stated, "I don't have that authority today to do that, nor would I . . . . [T]his is a pre-dispositional permanency hearing, so this [c]ourt would not be issuing that order today regardless of what I were to hear." Counsel noted his objection to the referee's ruling and indicated that he would not ask "most of the questions that [he] was planning" in light of that ruling.

Following the hearing, in an October 2022 order, Family Court again continued the children's placement with DSS until the next permanency hearing, approved a permanency goal of reunification with the mother, and ordered the mother to submit to and comply with the recommendations of an intensive parenting program and psychological and psychiatric evaluations. The mother appealed the October 2022 permanency hearing order. During the pendency of that appeal, Family Court held another permanency hearing and issued a new order.**[FN2]**

The Appellate Division dismissed the mother's appeals from both the March and October 2022 orders (*see* 220 AD3d 776, 777 [2d Dept 2023]; 220 AD3d 777, 778 [2d Dept 2023]). The Court concluded that, because the respective permanency hearing orders had "expired," the appeals were moot. The Court declined to invoke the exception to the mootness doctrine.

This Court thereafter granted the mother leave to appeal (*see* 41 NY3d 927 [2024]). We now affirm.

II.

Generally, " 'an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment' " (*Matter of Gonzalez v Annucci*, 32 NY3d 461, 470 [2018], quoting *[*3]Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). Here, the Appellate Division properly determined that the mother's appeals are moot. At the time the Appellate Division entered its decisions, both permanency hearing orders were "superseded by subsequent permanency hearing orders, which continued the child's placement in foster care" (*Matter of Breeyanna S.*, 45 AD3d 498, 498 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Our dissenting colleagues propose that, because the "claimed errors" in the October 2022 permanency hearing "carried over into future proceedings," the order is not moot (Wilson, Ch. J., dissenting op at 13). This Court's well-established mootness doctrine simply provides no basis for that conclusion. The impact an error from an expired permanency hearing order *might* have in subsequent permanency hearings is not only entirely speculative, but the potential resolution of that error—long after its occurrence—is not an "immediate consequence" of the underlying order that would "directly affect[ ]" the rights of the parties (*Matter of Hearst Corp.*, 50 NY2d at 714; *see People ex rel. Geer v Common Council of Troy*, 82 NY 575, 576 [1880] ["We do not decide mere abstract questions from the determination of which no practical result can follow"]). The rights of the parties are instead controlled by the superseding order.

The Chief Judge's conclusion that the March 2022 permanency hearing order is not moot "because the failure to return [the mother's] children itself prevented [her] from developing a record in subsequent proceedings" is even more puzzling (Wilson, Ch. J., dissenting op at 15). The sole "alleged error" (*id.* at 16 n 14) the mother argued on appeal from the March 2022 order was that Family Court should not have continued the children's placement with DSS because the mother asserted at the hearing, through counsel, that she was "ready, willing and able to have her children returned to her." Contrary to the Chief Judge's suggestion, this purported "error" did not in any way "impair [the mother's] ability to create a record useable in future proceedings to demonstrate that her children should be returned to her" (*id.*). Notably, it was the mother's decision not to introduce any evidence at the hearing; nothing prevented her from developing a record supporting why the children should be returned to her care, such as by demonstrating her compliance with Family Court's prior orders. Moreover, putting the mootness issue aside, we take issue with the Chief Judge's suggestion that a parent is somehow entitled to custody of their child, following a finding of neglect or abuse, for the purpose of "developing a record" (*id.*). This approach overlooks the sensitive nature of a child's custodial placement and is inconsistent with the Family Court Act's requirement that a child be placed "in accordance with [that child's] best interests and safety . . . , including whether the child would be at risk of abuse or neglect if returned to the parent" (Family Ct Act § 1089 [d]).

In sum, because the orders from which the mother appealed have been replaced by subsequent orders, the orders no longer affect the mother's rights and therefore are moot (*see Matter of Hearst Corp.*, 50 NY2d at 714; *Matter of Destiny F. [Takara E.]*, 217 AD3d 1400, 1401 [4th Dept 2023]; *cf. Matter of Nevaeh L. [Katherine L.]*, 177 AD3d 1400, 1401 [4th Dept 2019]).

III.

A court may nonetheless consider the merits of a moot controversy where "the controversy or issue involved is likely to recur, typically evades review, and raises a substantial and novel question" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 811 [2003], *cert denied* 540 US 1017 [2003]). Where, as here, the Appellate Division dismisses an appeal that it has properly determined to be moot, our review "is limited to whether the Appellate Division abused its discretion in declining to invoke the mootness exception to review the merits of certain of petitioner's challenges in this proceeding" (*Matter of Prisoners' Legal Servs. of N.Y. v New York [*4]State Dept. of Corr. & Community Supervision*, 42 NY3d 936, 937 [2024]; *see Matter of Anonymous*, 55 NY2d 1021, 1022 [1982]).

The mother appears to concede that the appeals are moot but maintains that the Appellate Division abused its discretion by not invoking the mootness exception to review the referee's ruling that she lacked the power to return the children to the mother pre-disposition **[FN3]**. Here, the Appellate Division did not abuse its discretion in determining that the issues raised below were "not sufficiently substantial or novel to warrant an exercise of [its] exceptional discretion to retain the appeal despite mootness" (*Matter of David C.*, 69 NY2d 796, 798 [1987]). They were simply standard issues of the sort that arise in permanency hearing adjudications, such as whether Family Court's determination was "supported by a sound and substantial basis in the record" (*Matter of Dakota F. [Angela H.]*, 180 AD3d 1149, 1151 [3d Dept 2020]; *see Matter of Damani B. [Theresa M.]*, 174 AD3d 524, 526 [2d Dept 2019]). To the extent the mother contends that the referee erred by claiming to lack the power to return the children to the mother's care prior to a dispositional hearing, the record does not demonstrate that the issue is likely to recur (*see generally Hearst Corp.*, 50 NY2d at 714)**[FN4]**. For example, the mother does not refer to any prior instance in which the issue was raised but went unresolved, the issue does not implicate the application of a new statute, and the mother does not raise a systemic problem in the Family Court—such as consistent misinterpretation of a provision of the Family Court Act or the precedents of this Court. As a result, we cannot say that the Appellate Division abused its discretion in declining to invoke the exception to the mootness doctrine under these circumstances.**[FN5]**

IV.

Notwithstanding the Appellate Division's discretionary determination not to invoke the mootness exception, the mother invites us to adopt a blanket mootness exception, which would allow the Appellate Division to review all mooted permanency hearing orders, regardless of the issues presented on appeal. We decline the invitation to guarantee appellate review of these orders regardless of mootness (*see generally Matter of David C.*, 69 NY2d at 798 [declining to recognize [*5]a blanket mootness exception in the context of Mental Hygiene Law retention proceedings])**[FN6]**. As this

Court made clear in *Matter of David C.*, "[t]he determination whether to consider particular issues despite their mootness must depend additionally on the recurring, novel and substantial nature of those issues as they are presented" (*id.*).

Even assuming the Court could properly create such a blanket exception, the mother's proposed rule is not workable or prudent inasmuch as it would unnecessarily flood appellate courts with appeals that, in many cases, present only moot issues whose resolution would have no real impact on the rights of the parties or the law of this State. Moreover, the purpose of the permanency hearing scheme established by Family Court Act article 10-a is to "provide children placed out of their homes timely and effective judicial review that promotes permanency, safety and well-being in their lives" (Family Ct Act § 1086). The six-month schedule governing hearings reflects an understanding that the circumstances of a child or parent may change rapidly, requiring a change in permanency goal. Appellate review of the merits of a permanency hearing order, decided upon circumstances that may have since changed, risks undermining the purpose of article 10-a by injecting unnecessary uncertainty into the life of the child.

Additionally, to the extent that the mootness issue surrounding permanency hearing orders can be addressed through an automatic expedited appeal process, this appeal is not a proper vehicle by which to implement that process. While we appreciate Chief Judge Wilson's observations that the legislature empowered courts to adopt rules aimed at expediting Family Court Act article 10-a appeals (*see* Family Ct Act § 1121 [1]; [7]), and that our courts have successfully navigated expedited appeals in the election law context, such changes to the appellate process are more appropriately addressed through administrative or legislative means.

Finally, we note, contrary to the mother's suggestion, there is no evidence that appellate courts reflexively dismiss appeals from permanency hearing orders for mootness. Where the Appellate Division considers issues within the permanency hearing context sufficiently novel and substantial, that Court often invokes the mootness exception and addresses those issues on the merits (*see e.g. Matter of Malachi B. [Administration for Children's Servs.]*, 228 AD3d 570, 570-571 [1st Dept 2024]; *Matter of Lacee L. [Stephanie L.]*, 153 AD3d 1151, 1151 [1st Dept 2017], *affd* 32 NY3d 219 [2018]; *Matter of Cleophus B. [Torrence B.]*, 93 AD3d 1241, 1241-1242 [4th Dept 2012], *lv denied* 19 NY3d 807 [2012]; *Matter of Latanya H. [Halvorsen]*, 89 AD3d 1528, 1529 [4th Dept 2011]; *Matter of Heaven C. [Julia B.]*, 71 AD3d 1301, 1302 [3d Dept 2010]; *see also Matter of Shawn S.*, 163 AD3d 31, 33 [4th Dept 2018]; *Matter of Dakota F. [Angela F.]*, 92 AD3d 1097, 1098 n 2 [3d Dept 2012]). There is simply no support for the mother's claim to the contrary.

Accordingly, the orders of the Appellate Division should be affirmed, without costs.

WILSON, Chief Judge (dissenting):

I write separately because I do not believe this appeal is moot; were it moot I would join fully in Judge Rivera's dissent. There has been no final disposition in Tameka's case. In both of the orders she has appealed, Tameka asserts the court erred by continuing foster care placement rather than returning her children. At least one of those errors—the Referee's determination that she was powerless to return the children to Tameka—is admitted by all the parties. That, as well as other errors, tainted the subsequent proceedings because the failure to return her children prevented Tameka from developing a record that could have been used in future proceedings to demonstrate that her children were not at risk of abuse or neglect in her care, and served to decrease the later likelihood that her children would ever be returned (*see Veronica P. v Radcliff A.*, 24 NY3d 668, 671 [2015] ["the appeal is not moot if an appellate decision will eliminate readily ascertainable and legally significant enduring consequences that befall a party as a result of the order which the party seeks to appeal"]). Because the initial errors tainted later determinations—and because the later determinations continued the placement of her children in foster care—I would hold that Tameka's appeal is not moot, and remand to the Appellate Division to resolve her challenges on the merits.[FN1]

I.

In 2018, Tameka J., a mother of four children, left her 14-year-old daughter in charge of her younger siblings. The daughter fell asleep, and, on two occasions, the 5-year-old was found wandering outside their home. The Westchester County Department of Social Services filed a neglect petition seeking to remove all of Tameka's children. The petition also alleged that Tameka once allowed her 11 and 9-year-old sons to take the bus together, to come to her work. Based on those three incidents, all four children were removed from her care and placed in foster care. Tameka is a single mother who works full-time at a mental-health center. (She sometimes relied on her 14-year-old to care for her younger children after school until she returned from work between 7:30 and 8:30pm). Throughout the proceedings, Tameka has remained involved in her children's lives and consistently expressed her desire to bring them home. This appeal concerns the middle two children, Christopher and Joshua. The permanency goal has always been to return to Christopher and Joshua to their mother.

It is now seven years later, and Christopher and Joshua have not been returned to her, nor has any court determined that she can never have them back. Instead, they have been in foster care [*6]limbo, with the two brothers separated from each other. During that time, Tameka has participated in at least eight permanency hearings. Each has resulted in the extension of foster placement. Tameka has appealed from six of those

hearings, but no appellate court has ever entertained the merits of her appeal, because each time, the Appellate Division has dismissed her appeal as moot, on the ground that a subsequent permanency hearing had taken place. Tameka has no ability to avoid the periodic permanency hearings, they are required by law, and they would occur even if she chose not to participate. The dispositional hearing, which began in March 2019, remains pending. While Tameka has been waiting for her case to be resolved, two of her children have turned 18 and aged out of the system. Christopher, who was 11 years old when he was put in foster care, recently turned 18. Joshua, who was 9 when he was removed, is now 16.

Those facts would be troubling anywhere, but they are especially concerning in New York, where the Legislature passed laws precisely to prevent what happened in this case. Compared to many other states, New York mandates more frequent permanency hearings (Family Court Act § 1089 [a] [2] - [3]). Unlike many other states and especially important in this case, New York grants parties the right to appeal, on an expedited basis, the orders issued in permanency hearings (*id.* §§ 1112; 1121).

As this case illustrates, that right to appeal has proven illusory. Because of the six-month timeline for new hearings, by the time the Appellate Division hears an appeal, inevitably, a superseding permanency hearing has taken place and a subsequent order has been issued. The overwhelming practice of the Appellate Division has been, as here, to dismiss permanency hearing appeals as mooted by subsequent permanency orders and to refuse to entertain them on the merits (*see infra* Part III).

That practice is wholly inconsistent with the Family Court Act, which not only grants a right to appeal intermediate orders (which is not being honored), but also specifically outlines a procedure for expedited treatment of those appeals (which is being completely ignored) (*id.* § 1121). The consequences for families are dire. Given the delays and challenges in reaching a final disposition, in many cases, a permanency hearing is the only opportunity, after the initial removal hearing, for a parent to be reunified with a child who has been removed. The absence of meaningful appellate review has both allowed systemic failures to go unchecked and permitted errors to carry over in subsequent hearings, further delaying parents' hopes of ever being reunited with their children. The majority condones that practice, disregarding both the plain language of the statute and the clear legislative intent. Its decision has adverse consequences not only for parents, but also for the State, which has an economic interest in preventing children from remaining in foster care longer than necessary.**[FN2]**

II.

New York's foster care scheme is structured to uphold and safeguard the fundamental rights of parents to the care, custody, and control of their children (*Matter of Jamie J.*, 30

NY3d 275, 279 [2017], citing *Matter of Michael B.*, 80 NY2d 299, 308-309 [1992] ["'Looking to the child's rights [*7]as well as the parents' rights to bring up their own children, the Legislature has found and declared that a child's need to grow up with a normal family life in a permanent home is ordinarily best met in the child's natural home'"]; *see Matter of Marino S.*, 100 NY2d 361, 372 [2003] ["It has long been the public policy of this State to keep biological families together and to require foster care agencies to exercise diligent efforts to reunite abused and neglected children with their birth parents, once rehabilitated"]).

Permanency hearings are a crucial part of that statutory scheme. After the court determines a child should be removed, the court sets a date for an initial permanency hearing, which must occur within eight months of removal, and every six months thereafter (*id.* § 1089 [a] [2] - [3]). At each permanency hearing, among other requirements, the court must determine whether a child in foster care can be released from placement and returned "to the parent or other person legally responsible for the child's care," and, if the child will not be returned, the court must determine whether the agency made "reasonable efforts . . . to eliminate the need for placement" and "enable the child to safely return home" (*id.* § 1089 [d] [1], [d] [2] [iii] [B]).

That requirement has constitutional dimensions. As we have long held—and recently reaffirmed in *Matter of Jamie J.* (30 NY3d 275, 285 [2017])—when the original reasons for a child's removal no longer apply, such as when the State has failed to prove neglect or abuse, Family Court lacks jurisdiction to issue orders or impose conditions on a child's release (*see Matter of Tammie Z.*, 66 NY2d 1, 4-5 [1985] ["If abuse or neglect is not proved, the court must dismiss the petition . . . at which time the child is returned to the parents"]; *Matter of Male Infant L.*, 61 NY2d 420, 427 [1984] ["For once it is found that the parent is fit . . . the inquiry ends and the natural parent may not be deprived the custody of his or her child"]).

The same logic applies to when parents have remedied the conditions that led to the initial removal. As the United States Supreme Court has recognized, parents' rights "do[] not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State" (*Santosky v Kramer*, 455 US 745, 753 [1982]). To the contrary, "parents retain a vital interest in preventing the irretrievable destruction of their family life," and, "[i]f anything, they have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs" (*id.*)**[FN3]**.

Reflecting the need to protect parents' rights, federal law requires, as a condition of federal funding, that states hold a "permanency planning hearing" within 14 months of a child's placement in foster care, and every 12 months thereafter (*see* 42 USC § 675[5][C]). Permanency hearings are not review hearings; the purpose is not merely to review case progress, but to determine a child's permanent placement (*id.* ["(the)

hearing shall determine the permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent"]; *see* National Council of Juvenile and Family Court Judges, Resource Guidelines: Improving Court Practice in [*8]Child Abuse & Neglect Cases 78 [1995] ["Resource Guidelines"] ["A review hearing is to oversee case progress; a permanency planning hearing is to make a definitive long-term decision"]; *see also* USC § 675[5][C][iii] [requiring "procedural safeguards" at permanency hearings]).[FN4]

Federal law sets a floor. New York's permanency hearing framework deliberately provides protections beyond what federal law requires. New York's 2005 "Permanency Bill" was enacted to ensure that children placed out of their homes did not "stay needlessly in foster care," and to provide them with "timely and effective judicial review that promotes permanency, safety and well-being in their lives" (Senate Introducer's Mem In Support, Bill Jacket, 2005 S.B. 5805, Ch. 3, at 61; FCA § 1086; *see also Matter of Jamie J.*, 30 NY3d at 284-286)[FN5]. In addition to other changes,[FN6] the 2005 amendments increased the frequency of permanency hearings, previously required only annually in accordance with the federal mandate, to require hearings every six months (*id.* § 1089 [a] [2] - [3]).

In contrast to many other states, which do not permit appeals of permanency hearing orders, New York's Family Court Act expressly provides that the order resulting from a permanency hearing is appealable as of right (*id.* § 1112 ["An appeal from an *intermediate or* final order in a case involving abuse or neglect may be taken as of right to the appellate division of the supreme court" [emphasis added])[FN7]. The right to appeal permanency orders serves as a vital safeguard and is consistent with the Legislature's intent—to create a forum "for a more thoughtful and substantive review of the issues that gave rise to foster care and that may be creating barriers to reunification or other permanency for the child" (Senate Introducer's Mem In Support, Bill Jacket, 2005 S.B. 5805, Ch. 3, 62; *see also* dissenting op at 3-4 [Rivera, J.]).

III.

The Appellate Division dismissed both of Tameka's appeals as moot on the ground that each of the orders had expired and had been superseded by subsequent permanency hearing orders (*see* 220 AD3d 776, 777 [2d Dept 2023]; 220 AD3d 777, 778 [2d Dept 2023]).

Tameka's case reflects the common practice: across Departments, the overwhelming practice of the Appellate Division has been to dismiss as moot appeals of permanency orders that have expired or were succeeded by subsequent determinations (*see e.g. Matter of Gabrielle N.*, 139 AD3d 504 [1st Dep't 2016]; *Matter of Victoria B.*, 164 AD3d

578, 580 [2d Dep't 2018]; *Matter of Cheyeanne E.*, 154 AD3d 1206 [3d Dep't 2017]; *Matter of Destiny F.*, 217 AD3d 1400 [4th Dep't 2023]).[FN8]

The system of perpetual mootness defies the plain text and legislative purpose of the Family Court Act, which not only provides a statutory right to appeal, but also sets out a procedure for expediting appeals. FCA § 1121 specifically provides that, for Article 10-A proceedings—which include permanency hearings—counsel for the parties and for the child must promptly notify the client of the right to appeal and the expedited appeal processes required in that section. Unlike a preference, which merely expedites the calendaring of a perfected case (*see e.g.* CPLR 5521[b]), an expedited appeal under § 1121 accelerates the entire appellate process by imposing strict deadlines at each stage. Specifically, the statute requires that transcripts must be ordered within 10 days of assignment of counsel and completed within 30 days of receipt of the order; counsel must then perfect the appeal within 60 days of receiving the transcript (FCA § 1121 [6] [b], [7]; *see* Merril Sobie, Practice Commentaries, McKinney's FCA § 1121 ["The thirty day rule is absolute"]). To prevent transcript delays from frustrating appeals, the statute empowers courts to adopt procedures to ensure timely preparation (FCA § 1121 [7]). It also requires the Appellate Division Departments to adopt rules governing the "expeditious" filing of briefs (*id.*). It is unreasonable to expect that the legislature required that permanency determinations be treated with extreme expedition on appeal with expectation that they would be expedited to dismissal. Instead, the legislature provided expedited treatment so that the appeals would be decided before the next six-month period occurred.[FN9]

The majority posits that the six-month schedule "reflects an understanding that the circumstances of a child or parent may change rapidly, requiring a change in permanency goal," and that appellate review of the merits "risks undermining the purpose of article 10-a by injecting unnecessary uncertainty into the life of the child" (majority op at 9). If that had been the Legislature's conclusion, it would not have provided for appeal of permanency hearings or would have limited the appeals to cases in which a hearing changed the permanency goal.

Indeed, the majority is substituting its own judgment as to the desirability of merits appeals of permanency hearings for the Legislature's determination. The 2005 amendments introduced the requirement for more frequent permanency hearings as part of an effort to increase judicial oversight and improve decision-making to facilitate permanency for children placed out of their homes (*see e.g.* Senate Introducer's Mem In Support, Bill Jacket, 2005 S.B. 5805, Ch. 3, 62 ["These planned-for permanency hearings will provide a forum for a more thoughtful and substantive review of the issues that gave rise to foster care and that may be creating barriers to reunification or other permanency for the child"]).

As a fallback, the majority contends that requiring courts to decide the merits of permanency hearing appeals is "not workable or prudent" and "would unnecessarily flood appellate courts with appeals" (majority op at 9). I offer three responses. First, I fully agree with my dissenting colleague that if, as the majority suggests, our appellate courts already look to the merits of an issue to gauge whether it is "substantial or novel" enough to apply a mootness exception, it would not be much more work to decide that issue on the merits; Appellate Division decisions are often quite short (*see* majority op at 6; *see also* dissenting op at 16-17 [Rivera, J.]). Second, the majority provides no basis for why a rule expediting appeals for permanency hearing orders is unworkable, when expedited appeals are implemented in other contexts, such as election law, without issue.**[FN10]**

Third, and most importantly, our role is to interpret the law and assess whether courts are applying it correctly **[FN11]**. We cannot disregard the plain text of the law simply out of concern it might [*9]increase courts' workload. If the Legislature has created too much work for courts, that is for the Legislature to address, either by providing more specifics on how appeals should be expedited, by creating more judgeships, or, if it so chooses, by limiting the right to appeal. At bottom, the majority's rationale is that when courts are too busy, they can assert that as a justification to nullify a right explicitly granted by the Legislature (and which due process may require) (*see Matter of Regina Metro. Co., LLC v New York State Div of Hous. & Community Renewal*, 35 NY3d 332, 348 [2020] ["It is the distinct role of the courts to interpret the laws to give effect to legislative intent while safeguarding the constitutional rights of impacted individuals"]; *see also Mathews v Eldridge*, 424 US 319 [1976]).

IV.

Although I agree with my dissenting colleague that as to Christopher, who has aged out of Family Court's jurisdiction with respect to custody, this case fits into the mootness exception, insofar as the orders affect Joshua as well, it is unnecessary to reach the exception because the orders appealed from are not moot. Tameka appeals from two orders: one issued by a Family Court judge in March 2022, and the other issued by a referee in October 2022. In both cases, Tameka claims the court erred in failing to return her children. Neither order was mooted by subsequent proceedings, because in both, the claimed errors carried over into future proceedings.

"Where . . . a judicial determination carries immediate, practical consequences for the parties, the controversy is not moot" (*Saratoga Cnty. Chamber of Commerce v Pataki*, 100 NY2d 801, 812 [2003]; *see Matter of Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of the United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 72 NY2d 307, 311, [1988] ["(A)n appeal is not rendered moot if there remain undetermined rights or interests which the respective parties are entitled to assert"]; *see also Matter of Hearst*

Corp. v Clyne, 50 NY2d 707, 713-714 [1980]; *People ex rel. Geer v City of Troy*, 82 NY 575, 575 [1880] ["The Court of Appeals will not decide mere abstract questions from the determination of which no practical result can follow"]).

First, the October 2022 order issued by the referee was not moot, because the error repeated in subsequent proceedings and had continuing effects. As DSS concedes, the referee erred in concluding she lacked power to return the children to Tameka so long as the dispositional determination was still pending [FN12]. FCA § 1089(d) lists the options available in permanency hearings, the first of which is returning the child to the parent:

"At the conclusion of each permanency hearing, the court shall, upon the proof adduced, and in accordance with the best interests of the child, including whether the child would be at risk of abuse or neglect if returned to the parent or other person legally responsible, determine and issue its findings, and enter an order of disposition in writing: (1) directing that the placement of the child be terminated and the child returned to the parent [*10]or other person legally responsible for the child's care with such further orders as the court deems appropriate . . . ."

The referee clearly made an error of law in holding that she lacked the power to return the children; her conclusion is flatly at odds with the statutory language, clear statutory purpose, and the constitutional requirement to return children to their parents (*see e.g. Matter of Jamie J.*, 30 NY3d 275, 285 [2017]). The referee repeated that error in at least one subsequent hearing. However, even setting aside that hearing, the error infected the other proceedings as well. Because the referee ruled she had no authority to return Tameka's children, Tameka's counsel explained to the referee that although he had proof he intended to offer, he would not do so because the referee said she was powerless to return the children no matter what the evidence showed. As a result, the error carried over into the subsequent permanency hearings, leading to a less developed record and undermining Tameka's continued efforts to seek the return of her children.

Second, although the March 2022 order occurred before the referee's statement and was not itself affected by it, that order was also not moot, because the failure to return her children itself prevented Tameka from developing a record in subsequent proceedings. Had her children been returned, as she argued they should have been, she would have had the opportunity to demonstrate that they were not at risk of abuse or neglect in her care (*see e.g.* § 1089 [d] [directing courts to consider at each permanency hearing "whether the child would be at risk of abuse or neglect if returned to the parent or other person legally responsible"]). Alternatively, if the return had not gone well and there was further evidence of neglect, the court and agency would have had a more fully developed record to support continued placement at future

permanency hearings. The failure to return had lasting consequences in another respect: It compounded the harm caused by the initial separation and potentially undermined the attachment interest in reunification. Although both the Legislature and courts have long recognized that reunification is the preferred outcome, children have an obvious interest in maintaining relationships with caregivers to whom they have become attached [FN13]. When reunification remains the stated goal and has not been achieved, the initial error continues to cause harm by eroding the child's attachment to the parent. Each subsequent permanency hearing that failed to reunite Tameka with Christopher and Joshua only compounded the harm.

In sum, the appeals were not moot, because the orders had profound, lasting implications on subsequent proceedings. The harm resulting from the errors was not merely speculative and continued to impact Tameka's rights in subsequent proceedings. The majority's observation that the admitted errors occurred several years ago goes not to mootness, but to the nature of the remedy, and further drives home the point that the legislative command for highly expedited appeals is being [*11]flouted (*see* majority opinion at 5)[FN14]. Moreover, because no dispositional order has yet been entered and no final determination made in her case, Tameka's rights remain active and will be directly affected by today's decision (*see Heart Corp.*, 50 NY2d 707, 714 [1980] ["An appeal is not moot if "the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment"]).

V.

The referee's error was the most flagrant, but not the only error, in these proceedings.[FN15]

Tameka contends that the court failed to obtain her consent to proceed before a referee, as required under New York Judiciary Law § 117 (which permits proceedings to be submitted to a referee only by stipulation of the appearing parties or by court order). The record does not contain any stipulation or order referring the case to a referee, and counsel for the Westchester DSS had no knowledge of the existence of either, so the proceedings before the referee appear to be entirely invalid.

She also contends that the court improperly excluded her then-13-year-old son Joshua from one of the hearings without making the requisite findings under Family Court Act § 1090 (a) (2) regarding the exclusion of a child under the age of 14. The record does not contain the statutorily mandated findings, and therefore Joshua's exclusion from the proceedings appears to have been unjustified (Joshua stated on the record that he wished to attend the proceedings in their entirety).

Like the Appellate Division, the majority leaves these (and the other merits issues) for another day that, because of the majority's holding, will never come. We are left, therefore, with a system in which Family Courts make errors that affect family reunification, the Legislature has mandated super-expedited appeal of those decisions, but they are not reviewable because we deem them moot, to avoid a purported flood of appeals.

The practice above disproportionately impacts marginalized families. Racial and socioeconomic disparities in the child welfare system are striking and well-documented. Nonwhite children are overrepresented in foster care and are disproportionately subjected to invasive state [*12]action across the stages of a child protection case [FN16]. Low-income families are also much more likely to become subject to the child protection system.[FN17]

The flaws in the Family Court system are on full display in this case. Tameka was accused of neglect because she asked her 14-year-old daughter to babysit her other children and allowed her 9- and 11-year-old sons take the bus to meet her at work. Ask yourself how many middle-class suburban families would be accused of child neglect and had all their children placed into foster care based on those facts. Instead of providing financial assistance for child-care, or helping her arrange alternative transportation, DSS removed her children. For nearly seven years, the system spent far more—on foster care, court proceedings, and hearings—than it would have cost to help this family from the start. A better system would not have treated her family this way. A better system would have provided immediate appellate review instead of none.

VI

The straightforward interpretation of the Family Court Act is that it provides for regular permanency hearings and gives parents an ability to challenge a permanency hearing order on a highly expedited appeal. Instead, an infinite loop of mootness perpetuates systemic delays and maintains families in limbo until children age out of the system and the appeal becomes truly moot.

The majority's explanation that our hands are tied cannot be the right answer. It is unfathomable that the Legislature intended this. I would hold simply that a parent who, as here, claims there has been an error in continuation of foster placement for a child, when the ultimate permanency goal is to return the child, may continue to pursue an appeal even if there has been a subsequent permanency determination, unless that subsequent permanency determination returns the child to the parent, or there has been a final order of disposition (which itself would be appealable). Because the orders appealed from are not moot (or even if they are, as my dissenting colleague explains), I

would reverse the Appellate Division and remit for it to evaluate the merits of the claims Tameka has raised on appeal.

RIVERA, J. (dissenting):

The article 10 Family Court proceedings against respondent mother have continued for over six years without any resolution. Throughout that time, mother's children have been in the foster care system administered by the Westchester County Department of Social Services (DSS). Mother's case exemplifies the protracted litigation that is all too common in New York's Family Courts, undermining stability for children and stalling family reunification as children languish in foster care.

The Legislature sought to remedy the deep-rooted problems of long-term foster care placements and the attendant delays to family reunification by ensuring timely Family Court oversight of cases where children have been removed from the home. To that end, it enacted Family Court Act § 1089, which provides for permanency hearings to review continued placement of children outside the home (FCA art 10-A; FCA §§ 1086-1089). As required by law, Family Court must hold these hearings every six months until the child is reunified with the parent or an alternative permanency plan is adopted (FCA § 1089).

In mother's case, there have been numerous permanency hearings over the years, each continuing the placement of her children in foster care. Mother appeals from orders issued at two of those hearings. In one, the presiding referee concluded that they had no power to grant mother's [*13]request for return of the children to her care because, at the time, the Family Court judge had not issued a disposition order. The Appellate Division dismissed mother's appeals, which had been pending for over a year, as moot because the relevant permanency orders had expired by the time she appeared before that court. Mother argued that they should apply a mootness exception to reach the merits of the appeals, and the Appellate Division declined to do so. That was error. The dismissed appeals fall squarely within the mootness exception for substantial and novel issues that are likely to recur and typically evade review (*see Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). Mother's appeals presented at least two open questions: (1) whether a Family Court referee has authority in a pre-disposition permanency hearing to order a child's return to their parent; and (2) whether a blanket exception to mootness applies to at least some expired permanency orders in a pending Family Court matter.[FN1] These issues are of statewide importance and implicate a parent's constitutional right to custody of their children (*see Matter of Jamie J.*, 30 NY3d 275 [2017]; *Nicholson v Scoppetta*, 3 NY3d 357, 380 [2004]). The Appellate Division abused its discretion when it failed to invoke the mootness exception to address these issues.

I.

"A biological parent has a right to the care and custody of a child, superior to that of others, unless the parent has abandoned that right or is proven unfit to assume the duties and privileges of parenthood, even though the State perhaps could find 'better' parents" (*Matter of Jamie J.*, 30 NY3d at 279, quoting *Matter of Michael B.*, 80 NY2d 299, 308-309 [1992]). "Those rights are among our oldest and most fundamental and are not only provided by statute, but also guaranteed to parents and children by our State and Federal Constitutions" (*id.* at 280). Family Court proceedings must protect those rights, as well as the rights of children.

Pursuant to the FCA, "[t]he initial permanency hearing shall be commenced no later than six months from the date which is sixty days after the child was removed from [their] home," and:

"[s]ubsequent permanency hearings for a child who continues in out-of-home placement or who is freed for adoption shall be scheduled for a date certain which shall be no later than six months from the completion of the previous permanency hearing and such subsequent permanency hearings shall be completed within thirty days of the date certain set for such hearings" (FCA §§ 1089 [a] [2] - [3]).

"The permanency hearing shall be completed within 30 days" (FCA § 1089 (a) [2]). "Permanency hearings are intended to be automatically expedited" (Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, 2021 Electronic Update, FCA § 1089). That intent ensures that a child who can be reunified with their parent does not "stay needlessly longer in foster care" (Senate Introducer's Mem. in Support, Bill Jacket, L 2005, ch 3 at 61). Permanency hearings were designed to provide ongoing oversight, and, crucially, ongoing jurisdiction and authority to act in the child's best interest. In fact, the Legislature anticipated that, "[s]imply providing the Court with *continuing jurisdiction* should reduce by [*14]months the time a child spends in foster care" (*id*. at 62 [emphasis added]).

To facilitate the implementation of an appropriate permanency plan, section 1089 requires preparation of a comprehensive up-to-date hearing report describing "the child's current permanency goal, which may be [ ] return to the parent or parents," among other options (FCA § 1089 [c] [1] [i]).**[FN2]** The report must also include "a description of the reasonable efforts to achieve the child's permanency plan that have been taken by the local social services district or agency since the last hearing" (FCA § 1089 [c] [4]). "Unless the child is freed for adoption or there has been a determination by a court that such efforts are not required, [the report shall describe] the reasonable efforts that have been made by the local social services agency to eliminate the need for placement of the child and to enable the child to safely return home" (*id*.). The social

services district or agency must serve the report no later than 14 days before the hearing on the parent and their attorney, parties responsible for the child's care, and the attorney for the child (FCA § 1089 [b] [1] [i] - [iii]).

Section 1089 provides for judicial oversight to ensure the expeditious disposition of the child's placement, including return to the parents:

"At the conclusion of each permanency hearing, the court shall, upon the proof adduced, and in accordance with the bests interest and safety of the child, including whether the child would be at risk of abuse or neglect if returned to the parent or other person legally responsible, determine and issue its findings and enter an order of disposition in writing:

"(1) directing that the placement of the child be terminated and the child returned to the parent or other person legally responsible for the child's care with such further orders as the court deems appropriate; or

"(2) where the child is not returned to the parent or other person legally responsible" (FCA §§ 1089 [d] [1] - [2]).

Throughout the process, reunification with the parent is a priority, if appropriate under the circumstances (*id*.). Thus, the court must determine whether the permanency goal should be to return the child to the parent(s), or to pursue one of the statutory alternatives:

"(A) return to parent;

"(B) placement for adoption with the local social services official [*15]filing a petition for termination of parental rights;

"(C) referral for legal guardianship;

"(D) permanent placement with a fit and willing relative; or

"(E) placement in another planned permanent living arrangement that includes a significant connection to an adult willing to be a permanency resource for the child if the child is age sixteen or older [and other conditions are met]" (*id.* § 1089 [d] [2] [i]).

The court must also determine whether the social services district or agency made the required reasonable efforts to achieve the permanency goal (*id.* § 1089 [2] [iii]). The court may, as it deems appropriate, order services tailored to the needs of the child and the family to achieve the permanency plan (*id.* § 1089 [d] [2] [viii] [A]). This may include "an order directing a local social services district or agency to undertake diligent efforts to encourage and strengthen the parental relationship when it finds such efforts will not

be detrimental to the best interests of the child and there has been no prior court finding that such efforts are not required" (*id.* § 1089 [d] [2] [viii]).

Despite the best intentions of the Legislature, the judiciary, and advocates, delays are endemic in the Family Courts, impacting this comprehensive permanency framework and the primary goal of reunification. When there is a case opened against a parent, the Family Court holds a fact-finding hearing to decide whether the child has been abused or neglected. If so, then the Family Court schedules a dispositional hearing to hear evidence and determine the most appropriate placement for the child. Permanency hearings were designed to be periodic, ongoing checks throughout this process to ensure whether the child is placed in the best interest of the child. However, one study found that only *half* of all cases statewide had a dispositional hearing before the first permanency hearing, and 32% of cases had a permanency hearing take place before any dispositional hearing (New York Quality Permanency Hearings, Statewide Findings Report, https://ww2.nycourts.gov/sites/default/files/document/files/2018-10/CWCIP_Statewide_findings_report.pdf). The average statewide time to disposition was 203 days, and the average time from removal to closure of the case was 2.78 years, with many cases including delays much longer than this average (*id*. at 19, 25); *see also* New York State Senate Comm. on the Judiciary, *et al.*, *The Crisis in New York's Family Courts* 21, 23, 29 [Feb. 2024], https://www.nysenate.gov/sites/default/files/admin/structure/media/manage/filefile/a/2024-02/2.12-family-court-hearing-report-w-graphics-1.pdf [noting "undue delays, where cases drag on for multiple years with no fact-finding"]).

II.

As relevant to this appeal, in 2018, two of mother's children were removed. On consent, Family Court entered an order of neglect. Family Court issued several pre-dispositional permanency orders, meaning the court had not made a final determination on the permanency plan. Indeed, the disposition hearing commenced in 2021 and had not been completed three years later. During the pendency of the disposition hearing, the permanency hearings continued. Mother represents that at least eight orders have been issued, all of which were appealed.

At one of the first two hearings, mother requested return of the children. The presiding referee stated that they had no authority to grant that relief. Based on the referee's legal conclusion, mother's counsel determined not to put forward evidence that mother claims would have supported [*16]her request for the children to return home. She appealed the resulting permanency order continuing placement. While that appeal was pending, Family Court held the next permanency hearing, which resulted in another order continuing placement. Mother appealed that order. During the year while these appeals were pending in the Appellate Division, Family Court issued two subsequent

permanency orders.[FN3] The Appellate Division concluded that mother's two appeals were moot because the relevant permanency orders had expired (*see* 220 AD3d 776, 777 [2d Dept 2023]; 220 AD3d 777, 778 [2d Dept 2023]). The Court rejected mother's request to invoke the mootness exception in both appeals.

Mother concedes that the two adverse permanency orders denying return of her children expired during the pendency of her appeals before the Appellate Division and that, as a consequence, the appeals are moot. However, she argues that the mootness exception applies, and that her arguments would prevail on the merits. She further asserts that the Court should recognize a judicial exception to mootness on appeals from Family Court's extension of foster care placement, as necessary to effectuate the FCA's statutory right of appeal. DSS responds that there is nothing substantial or novel about the regular mooting of permanency order appeals, and that applying a blanket mootness exception would serve no purpose other than flooding the courts. DSS also argues that, in any event, the permanency determinations below were supported by sound and substantial record evidence.[FN4]

III.

A.

"It is a fundamental principle of our jurisprudence that the power of the court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal" (*Hearst Corp.*, 50 NY2d at 713 [citations omitted]). Thus, courts may not "consider[] questions which, although once live, have become moot by passage of time or change in circumstances" (*id.* at 714). "[A]n appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment" (*id*.). However, we have recognized an "exception to the [mootness] doctrine which permits the courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable" (*id*.). The exception applies when the moot issue is likely to recur, typically evades review, and involves "a significant or important question[] not previously passed on, i.e. substantial and novel" (*id.* at 715; *Alcantara v Annucci*, 42 NY3d 142, 147 [2024]; *[*17]People ex rel. Johnson v Supt., Adirondack Corr. Facility*, 36 NY3d 187, 195-196 [2020]).[FN5] We review an Appellate Division's decision not to invoke the mootness exception under an abuse of discretion standard (*see Prisoners' Legal Servs. of N. Y. v N.Y. State Dept. of Corr. & Community Supervision*, 42 NY3d 936, 937 [2024]).

B.

The only question before us is whether the Appellate Division abused its discretion in refusing to invoke the mootness exception, first, to assess the scope of the referee's authority to order return of the children to mother before the Family Court's issuance of a disposition order, and, second, to ensure appellate review of at least some permanency orders appeals from which might otherwise be moot.[FN6]

These issues implicate a parent's constitutional right to custody (*see Matter of Jamie J.*, 30 NY3d at 280). And neither this Court nor the Appellate Division has opined on these matters. Significantly, mootness dismissals of orders from permanency hearings, which by law must be held every six months may, as mother asserts, undermine the legislative intent of reunification and, instead, extend foster care placements. Therefore, the Appellate Division abused its discretion in declining to invoke the mootness exception to consider these issues of statewide importance, resolution of which would impact large numbers of parents and children.

C.

Turning to the scope of the referee's authority in a permanency hearing to order the return of the children, the majority erroneously concludes that the mootness exception does not apply because this open question is not likely to recur (majority op at 7-8). That assertion is belied by the record here, where the referee throughout the permanency hearings adhered to their determination that they lacked authority to grant the relief requested by mother.[FN7] Moreover, we have never held that the exception only applies to a "new statute," as suggested by the majority (*id.*). Nor is it [*18]dispositive that mother "does not raise a systemic problem in the Family Court" (*id.*). The question presented by mother's appeals is not whether the referee misapplied an established interpretation of the FCA, but rather the scope of that authority given the lack of caselaw defining a referee's power at a permanency hearing before Family Court has issued a disposition order. Given the lack of a definitive answer to this question and the short life span of permanency orders, the referee's misinterpretation of the law (if it is a mistake) may recur and is likely to evade review. Apparently, this question escaped review of DSS and the Family Court Judge. Moreover, this potential error is compounded at each permanency hearing because a parent, such as mother, has no opportunity to present evidence supporting an argument for return of the children as it develops during the course of the Family Court proceedings, thus prolonging those proceedings. And the longer the Family Court proceedings continue and the children are separated from their parents, the more difficult to achieve the goal of reunification—the same goal ordered by the Family Court here (*see* American Academy of Pediatrics, Committee on Early Childhood, Adoption and Dependent Care, *Developmental Issues for Young Children in Foster Care* 106 Pediatrics 1145, 1146 [Nov. 2000], available at https://www.umassmed.edu/globalassets/faces/documents/fostercare-general/

developmental-issues-for-young-children-in-foster-care.pdf [noting that the longer a child's placement is extended, the more harm accrues]).

D.

The majority appears to concede that the Appellate Division should have considered a blanket application of the mootness exception to appeals from permanency orders and addresses that question on the merits (*see* majority op at 7 n 3). Given the novelty and significance of the issue, that these orders expire within six months or fewer, that many expired orders have lasting effects in the Family Court proceedings, and that orders are nearly certain to expire during a lengthy appellate process, the Appellate Division abused its discretion in declining to invoke the exception and reach the merits. I would remit for the Appellate Division to consider both the legal ramifications and practical implications of a blanket exception for mootness purposes. The Appellate Division's extensive experience with these cases can inform its analysis. In fact, the majority relies on intermediate appellate courts' experiences to reach its own conclusion in these appeals to reject an exception, regardless of the continuing relevance of a permanency order (*id*. at 6-7). I believe we would benefit from the Appellate Division's initial views on the matter.

Even if I agreed that we should resolve this issue in these appeals, I would not adopt the majority's analysis. First, the majority's reliance on *Matter of David C.* (69 NY2d 796, 798 [1987]) is misplaced. That case does not support rejection of the mootness exception here (majority op. at 7). *Matter of David C.* is a short memorandum decision regarding the right to a "rehearing" of retention order pursuant to Mental Hygiene Law § 15.35, not a direct appeal from a permanency order issued under FCA § 1089. Further, the *Matter of David C.* language quoted by the majority cites to *Matter of Barbara C.*—where this Court dismissed the appeal in an entry for lack of preservation below—and *Matter of Hearst* (*id*. at 798, citing *Matter of Barbara C*., 64 NY2d 866, 868 [1985]). Neither case stands for the broad proposition promoted by the majority.

Second, the majority's further reliance on Appellate Division caselaw is similarly unavailing. In *Matter of Dakota F. [Angela F.]*, the Appellate Division applied an exception to the mootness doctrine to address the Family Court's imposition of contradictory permanency goals, noting that "this is not the only time that Family Court has improperly ordered concurrent permanency goals" (92 AD3d 1097, 1099 n 3 [3d Dept 2012]). *Matter of Damani B. [Theresa M.]* (174 AD3d 524, 527 [*19][2d Dept 2019]) solely serves as an example of the Appellate Division reviewing a live claim as to whether a Family Court's determination was supported by a "sound and substantial basis in the record." Under the majority's view, we would never have occasion to take corrective action to address errors from permanency hearings such as those alleged here. If the Appellate Division determined the challenge was moot because it lacked

merit and dismissed without invoking the exception, then we would not grant leave because, according to the majority, the Appellate Division did not abuse its discretion.

Finally, the majority's assertion that "there is no evidence that appellate courts reflexively dismiss appeals from permanency hearing orders for mootness" (majority op at 10) lacks support in the record or the cases cited. The parties have presented no data to support that conclusion. In fact, the few occasions in which the Appellate Division has invoked the mootness exception for Family Court cases have mostly involved similar questions of jurisdiction and decision-making authority raised by permanency orders (*Matter of Malachi B. [Admin. for Children's Servs.]*, 228 AD3d 570, 570-571 [1st Dept 2024] [applying mootness exception to address whether "Family Court has the decision-making authority as to the appropriateness of the child's continued placement in a (Qualified Residential Treatment Program) at every permanency hearing"]; *Matter of Cleophus B. [Torrence B.]*, 93 AD3d 1241, 1241-1242 [4th Dept 2012], *lv denied* 19 NY3d 807 [2012] [applying mootness exception to address whether Family Court had jurisdiction to impose conditions on father despite dismissing the neglect petition against him]; *Matter of Shawn S.*, 163 AD3d 31, 33 [4th Dept 2018] [applying mootness exception to address the question of whether the court "lacked the authority to compel the child to be present at the permanency hearing]).

IV.

The merits of the underlying issues are not a factor in determining whether to invoke the mootness exception, except insofar as they bear upon whether a question is "substantial" (*see Hearst Corp.*, 50 NY2d at 715; *Alcantara*, 42 NY3d at 147; *People ex rel. Johnson v Supt., Adirondack Corr. Facility*, 36 NY3d 187, 195-196 [2020]). Nevertheless, it bears noting that mother's arguments are significant and compelling.

DSS concedes that the referee's decision was error. Indeed, the FCA provides that at the end of each permanency hearing, the court must issue an order of disposition in writing, with the first dispositional option listed as, "directing that the placement of the child be terminated and the child returned to the parent or other such person legally responsible for the child's care with such further orders as the court deems appropriate" (FCA § 1089 [d] [1]). "Upon the proof adduced, and in accordance with the best interests and safety of the child" the court must evaluate the evidence and make a factual determination about whether to contemporaneously terminate the child's placement (FCA § 1089 [d]).

Mother makes a persuasive argument that a mootness exception for permanency orders is necessary so that the right to appeal those orders is not rendered illusory. Permanency hearings must take place every six months (FCA §§ 1089 [2]-[3]), and the resulting order is appealable as of right (FCA § 1112). On its face, a parent's appeal will

in all likelihood be rendered moot by expiration of that time frame during the case's pendency.

Frequent mootness dispositions would also be contrary to the legislative intent. The permanency hearings process was designed to ensure prompt and ongoing judicial oversight to prevent children from being lost in the foster care system. We have noted that Article 10-A of the [*20]FCA, which outlines the permanency hearing process,[FN8] "establish[es] uniform procedures for permanency hearings for all children who are placed in foster care . . . [in order] to provide children placed out of their homes timely and effective judicial review that promotes permanency, safety and well-being in their lives" (*Matter of Lacee L.*, 32 NY3d 219, 226 [2019]).

Nor is there any basis for the majority's conclusion that a blanket exception is "not workable or prudent" because it would "flood appellate courts with appeals" with moot issues that "have no real impact on the rights of the parties or the law of this State" (majority op at 9). There is no data to support the bald assertion that an exception would lead to a dramatic increase in appeals from permanency orders that would not have otherwise been filed, but for the exception, and that by comparison any additional appeals would be less meritorious. Moreover, if, as the majority assumes, the Appellate Division engages in a merits analysis as part of its mootness determination, then the court has already done the work that the majority says would be overburdensome. All that is required is to externalize the mootness analysis and address the merits where the issue falls within the mootness exception. In any case, the FCA provides for an appeal by right of a permanency order and the court is obligated to follow the law and avoid nullifying that right.[FN9]

For the reasons I discuss, I would reverse because even if the issues presented in mother's appeals are moot, the exception to mootness applies here. I dissent.

Orders affirmed, without costs. Opinion by Judge Troutman. Judges Garcia, Singas and Cannataro concur. Chief Judge Wilson dissents in an opinion, in which Judge Halligan concurs. Judge Rivera dissents in a separate dissenting opinion.

Decided May 20, 2025

Footnotes

Footnote 1: The mother's other two children were placed in different settings. Their placement is not at issue here.

Footnote 2: In the superseding order, Family Court continued the children's placement with DSS until the next permanency hearing, approved a permanency goal of reunification with the mother, and directed the mother to comply with the same

mandates ordered in previous permanency hearing orders.

Footnote 3: We respectfully disagree with Judge Rivera's assertion that the Appellate Division abused its discretion by declining to review the "open question[ ]" of "whether a blanket exception to mootness applies to at least some expired permanency orders in a pending Family Court matter" (Rivera, J., dissenting op at 2-3). It is difficult to conceive why a court would need to invoke the mootness exception to address whether a blanket mootness exception exists. The blanket mootness exception proposed by the mother is a potential method by which an appellate court could review the merits of an expired permanency hearing order—not a justification for invoking the existing mootness exception in the first instance.

Footnote 4: While our dissenting colleagues correctly observe that the referee repeated the same ruling at one subsequent permanency hearing, we note that, according to the mother, the purported error has not since recurred.

Footnote 5: Contrary to Judge Rivera's suggestion, merely because one might determine that the mootness exception applies to these facts does not require this Court to hold that the Appellate Division erred as a matter of law. Absent an abuse of discretion, it is not the role of this Court to substitute its discretion for that of the Appellate Division.

Footnote 6: We further reject the notion that a blanket mootness exception should apply to "at least some" appeals from permanency hearing orders (Rivera, J., dissenting op at 3, 11). Initially, we note that narrowing the application of a *blanket* mootness exception is not a blanket mootness exception at all. Moreover, it is entirely unclear which permanency hearing orders would be subject to the exception and why our ordinary mootness exception is insufficient to determine which orders are reviewable on appeal.

Footnote 1: Christopher has turned 18 and the Family Court no longer has jurisdiction over him with respect to custody matters (*see* Family Court Act § 651 [a], [b]; *id.* § 119 [c]). Because the orders are moot as they pertain to Christopher, I join Judge Rivera's dissent regarding those portions of the orders.

Footnote 2: *See* Angela Olivia Burton, Introduction, 20 CUNY L Rev 1, 19 (2016) ("[T]he minimum cost to keep one child in foster care for a year in New York City is $30,000"); Lucas A. Gerber, et al., Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare, 102 Child & Youth Servs Rev 42, 52 (2019) (discussing the potential cost-saving effects of vigorous parental representation that reduces

children's stays in foster care by 118 fewer days on average and may save "millions of government dollars").

Footnote 3: Over a century ago, we articulated the rationale for that rule as follows:

"Intemperate parents are deemed to be unfit custodians of their children, and the state steps in and cares for and supports them for the time being. It now appears that the parents have reformed, are living honorable lives, and are abundantly able to care for their children. It seems self-evident that public policy and every consideration of humanity demand the restoration of these children to parental control" (*Matter of Knowack*, 158 NY 482, 488 [1899]).

Footnote 4: The concept of "permanency" originates from the federal Adoption Assistance and Child Welfare Act of 1980 (Pub L No. 96-272), which was enacted to deal with the problem of "foster care drift" (*see* H. R. Rep. No. 96-136 at 50 [1979] ["(M)any children, because of the inadequacies of current review procedures, and lack of family reunification services, become 'lost' in foster care, and continue to remain in care unnecessarily at great cost to the government, themselves and their families"]).

Footnote 5: *See* Justice Denied: Delays in Resolving Child Protection Cases in New York, 12 Va J Soc Pol'y & L. 546, 563 (2005) (describing the "pervasive delays" endemic to the New York Family Court system prior to 2005, and citing studies showing that New York ranked below the national standard for reunifying children with their families out of foster care).

Footnote 6: For example, the Act granted indigent parents the right to have appointed counsel and specified that the rules of evidence applied at hearings (*id.* § 1089 [d]).

Footnote 7: Federal law is silent as to whether parties can appeal a permanency order, and many states do not provide a right to appeal (*see* Josh Gupta-Kagan, Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency, 10 Conn Pub Int L J 13, 29-32 [2010] [surveying state statutes and caselaw on the appealability of permanency hearing orders and finding that, as of 2010, "(a)t least twelve states plus the District of Columbia explicitly bar such appeals, three states bar them with narrow exceptions, thirteen explicitly permit them in at least some cases, () at least one state court has noted conflicting opinions within that jurisdiction," and "(t)he remaining twenty-one states do not have clear case law on point"]).

Footnote 8: In contrast, courts have generally held that the mootness exception applies to appeals of orders that changed permanency goals (and thus will review on the merits) (*see e.g. Matter of Peter T.*, 173 AD3d 1046 [2d Dep't 2019] [reviewed only as to

change of permanency goal from reunification to adoption]). A lonely anomaly to this pattern is *Matter of Jolani P.* (184 AD3d 574 [2d Dep't 2020], *lv denied*, 35 NY3d 911 [2020]), which, because of the pandemic and the Governor's tolling order of statutes of limitations for family court act proceedings, the subsequent permanency hearing could not be held before the appeal from the prior permanency appeal was decided, and the appeal was therefore not moot.

Footnote 9: The 2005 Permanency Bill, which transferred permanency hearings from Article 10 to the newly created Article 10-A, added a cross-reference to Article 10-A in Section 1121—clear evidence the Legislature intended the expedited appeal provisions to apply to permanency hearings (Senate Introducer's Mem In Support, Bill Jacket, 2005 S.B. 5805, Ch. 3, at 56). The 2005 Bill also added the requirements for expediting transcripts and directing the Departments to establish rules for the expedited filing of briefs (*id.*; *see id.* at 63 [noting in the context of termination appeals that the Bill would "eliminat(e) . . . obstacles that currently slow the appeals process"]). The majority's statement that "changes to the appellate process" aimed at expediting appeals are "more appropriately addressed through administrative or legislative means" (majority op at 10) overlooks the fact that the Legislature has already enacted such measures. It is the responsibility of courts to implement and ensure compliance with the Legislature's directives.

Footnote 10: *See e.g.* Justice Denied, *supra* n 4 at 548 (citing New York's election law system as an example of the state's ability to operate a "time sensitive" legal framework, and referencing *Stoppenback v Sweeney* [98 NY2d 431 (2002)], an election law case challenging the validity of a congressional petition, in which both the Appellate Division and Court of Appeals issued decisions on the merits—after briefing and argument—within just two weeks).

Footnote 11: The majority claims that Tameka "does not raise a systemic problem in the Family Court—such as consistent misinterpretation of a provision of the Family Court Act" (majority op at 8). I see no ambiguity in her argument that the "statutory right, however, is in almost every instance denied by a declaration of mootness by the Appellate Division," or that requiring courts to hear appeals of permanency orders extending foster care placement "is mandatory in order to effectuate the statutory right to appeal."

Footnote 12: In response to Tameka's counsel stating the ultimate question was "whether [her] children should be returned," the referee interrupted, stating, "It's pre-disposition, Mr. Reed, so this Court would not be returning children pre-disposition to a parent. I don't have that authority today to do that, nor would I, not when there's a case

pending before Judge Oliver . . . this is a pre-dispositional permanency hearing, so this Court would not be issuing that order today regardless of what I were to hear." Following the referee's statement, counsel explained that, "given the court's ruling," he would not present the proof he had intended to offer.

Footnote 13: *See* Justice Denied, *supra* n 4, at 570 ("[D]elay substantively affects the outcomes of child welfare cases in ways that it does not in other types of cases . . . Because children's lives are constantly evolving, their attachments and needs shift over time such that the ex ante best outcome can fall off the list of possible outcomes as time goes by. A child for whom the best result early in the case is to be returned to a parent who is the child's primary attachment figure may not have such an option later in the case. Later, the parent and the primary attachment figure often will no longer be the same person").

Footnote 14: The majority misunderstands my position in two ways. First, as to the March 2022 order, Tameka was not "prevented . . . from developing a record supporting why the children should be returned to her care" (majority op at 6), but rather, the error(s) impaired her ability to create a record useable in future proceedings to demonstrate that her children should be returned to her. Second, I do not contend she was "entitled to custody . . . for the purpose of developing a record" (majority op at 6). I merely propose that, in the context of an alleged error in failing to return a child to their parent, where the ultimate goal of return to parent remains unaltered, the court's error is not rendered moot in future proceedings because those future proceedings depend on the entire record, including the prior errors, which keeps the issue alive.

Footnote 15: Amici point to widespread problems with permanency hearings, including: "courts' failure to (1) comply with the statutory mandate to reunify children with their parents when continued placement is no longer necessary; (2) hold full evidentiary hearings, even when there are material issues in genuine dispute; (3) ensure that findings are made based on up-to-date and accurate information; (4) comply with statutory timelines; (5) consider the possibility of finding that the agency failed to make reasonable efforts to enable the child to return home; and (6) obtain consent from the parties before sending permanency hearings to referees to hear and determine."

Footnote 16: *See e.g.* NYS Office of Children & Family Services, Office of Research, Evaluation and Performance Analytics, Disproportionate Minority Representation in Child Welfare Services Dashboard: 2023 & Five Year Trends (2024), https://ocfs.ny.gov/reports/sppd/dmr/Disparity-Rate-Packet-2023-Dashboard.xlsx (documenting racial disparities in the child welfare system in New York State); E. Jason Baron, Joseph J. Doyle Jr., Natalia Emanuel & Peter Hull, Unwarranted Racial Disparity

in U.S. Foster Care Placement, National Bureau of Economic Research (Nov. 2024) ("Black children in the U.S. are twice as likely as white children to spend time in foster care").

Footnote 17: New York State Bar Association, Report and Recommendations of the Committee on Families and the Law Racial Justice and Child Welfare 6-7, 10 (Apr. 2022), https://nysba.org/app/ uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf.

Footnote 1: Insofar as the majority concludes that a court must consider every colorable basis for invoking the mootness exception, I agree (*see* majority op at 7 n 3).

Footnote 2: "The plan may include a goal for adoption, a referral for legal guardianship, placement with a relative, or another living arrangement" (FCA § 1089 [c] [ii] - [v]).

Footnote 3: Mother also appealed these subsequent orders, although those are not before us here. Those orders, too, were mooted by another round of subsequent orders.

Footnote 4: The Attorney for the Child representing the younger of the two children argues that there should be a procedural distinction between a pre-disposition permanency hearing and a post-disposition permanency hearing, and that a pre-disposition permanency hearing does not substitute for the initial dispositional hearing. Furthermore, they argue that the permanency order was valid and a judicial exception to mootness is not warranted. Mother did not preserve this argument and thus whether this distinction matters cannot be considered on this appeal.

Footnote 5: To the extent that the Court has on rare occasion referred to the third factor in the disjunctive—"substantial or novel" (*Maul*, 14 NY3d at 507; *Mental Hygiene Legal Serv. v Delaney*, 38 NY3d 1076, 1091 [2022])—the correct articulation is that found in *Hearst* and the overwhelming majority of our decisions discussing the exception or citing *Hearst* (*see e.g.*, *Alcantara*, 42 NY3d at 147; *People ex rel. Johnson v Supt., Adirondack Corr. Facility*, 36 NY3d 187, 195-196 [2020]; *Gonzalez v Annucci*, 32 NY3d 461, 470 [2018]).

Footnote 6: The majority misconstrues the second of these issues (*see* majority op at 7 n 3, 9 n 6). Whether a blanket mootness exception should apply to permanency orders is a substantial and novel question. That question is likely both to recur and to evade review so long as the Appellate Division determines the mootness of each appeal in isolation, as it did here. In answering that question, the Appellate Division might have concluded that a blanket exception was warranted, but only as to some (not all)

permanency orders.

Footnote 7: Although the error occurred at least twice here, there is no general requirement of established repetition in the case on appeal, only a likelihood that the issue will recur in the future in some other case (*see e.g. Codey on Behalf of State of N.J. v Capital Cities, Am. Broadcasting Corp*., 82 NY2d 521, 527 [1993]; *Coleman ex rel. Coleman v Daines*, 19 NY3d 1087, 1090 [2012]). To the extent the majority suggests otherwise, the majority contradicts well-established precedent.

Footnote 8: While Article 10-A of the FCA outlines the permanency hearing process, DSS commenced the underlying Family Court neglect action under Article 10 (Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, 2021 Electronic Update, FCA § 1089).

Footnote 9: Chief Judge Wilson, joined by Judge Halligan, similarly rejects the majority's argument from administrative convenience (*see* Wilson, Ch. J., dissenting op at 12-13). In so doing, the Chief Judge is guided, as I am, by the Legislature's intent of promoting family reunification (*see id.* at 5-6, 8-9).

Matter of D.M., 236 AD3d 570 (1st Dept., 2025)

Order, Family Court, Bronx County (Ronna H. Gordon-Galchus, J.), entered on or about December 6, 2023, which, to the extent appealed from as limited by the briefs, after a permanency hearing, provided for unsupervised two-hour "sandwich visits" between respondent-mother and the subject children, unanimously affirmed, without costs.

Family Court providently exercised its discretion in finding that the children's best interests were served by granting unsupervised visitation only on the condition that the visits with the mother were "sandwiched" in between visits supervised by petitioner Administration for Children's Services (ACS) (*see Melissa G. v John W.*, 143 AD3d 406, 407 [1st Dept 2016]; *see Matter of Christopher M.S. [Christine F.S.],* 174 AD3d 535, 536 [2d Dept 2019]). Family Court properly balanced the competing considerations presented here, appropriately considering the mother's growth and resilience as a victim of sexual abuse while also protecting the children from any potential exposure to the mother's abuser (*see Matter of Christopher M.S*., 174 AD3d at 536). Although the court's written order did not explicitly direct ACS to accommodate the mother's work schedule, it did direct ACS to hold virtual visits if the mother was unable to attend her in-person visits, and it gave ACS the discretion to expand visitation on notice to counsel.

The mother failed to preserve her claim that ACS failed to make reasonable efforts toward reunification because it did not refer her for a type of therapy known as "trauma bonding." She never asked for this relief below, and we decline to review the matter in the interest of justice (*see Matter of C.F. [Carlos F.]*, 220 AD3d 506, 507 [1st Dept 2023]).

Matter of Rosie C. D., 236 AD3d 1025 (2nd Dept., 2025)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an order of the Family Court, Kings County (Erik S. Pitchal, J.), dated May 3, 2023. The order granted the petitioner's motion to modify a permanency order of the same court (Frank M. Hoelldobler, Ct. Atty. Ref.) dated November 18, 2022, and an order of the same court (Erik S. Pitchal, J.) dated February 17, 2023, so as to, inter alia, vacate the provisions therein providing for certain unsupervised overnight parental access with the subject child, and denied the mother's cross-motion, in effect, to enforce the overnight parental access provisions of the permanency order dated November 18, 2022, and the order dated February 17, 2023.

ORDERED that the order dated May 3, 2023, is affirmed, without costs or disbursements.

In a child protective proceeding pursuant to Family Court Act article 10, "[t]he best interests of the children determine whether [parental access] should be permitted to a parent who has committed abuse or neglect" (*Matter of Amparo B.T. [Carlos B.E.]*, 118 AD3d 809, 811; *see* Family Court Act § 1030[c]; *Matter of Tito T. [Carlos T.]*, 144 AD3d 813, 814). Moreover, "pursuant to Family Court Act § 1061, the Family Court may, for good cause shown, set aside, modify, or vacate any order issued in the course of a child protective proceeding" (*Matter of Jahred S. [Wilbert S.]*, 149 AD3d 963, 965; *see* Family Court Act § 1061). "As with an initial order, the modified order must reflect a resolution consistent with the best interests of the children after consideration of all relevant circumstances, and must be supported by a sound and substantial basis in the record" (*Matter of Jahred S. [Wilbert S.]*, 149 AD3d at 965; *see Matter of Kevin M.H. [Kevin H.]*, 102 AD3d 690, 692).

Here, the Family Court providently exercised its discretion in granting the petitioner's motion to modify a permanency order dated November 18, 2022, and an order dated February 17, 2023, so as to, inter alia, vacate the provisions therein providing for certain unsupervised overnight [*2]parental access with the subject child, and in denying the

mother's cross-motion, in effect, to enforce the overnight parental access provisions of those orders (*see* Family Court Act §§ 1030[c]; 1061). Contrary to the mother's contention, under the circumstances of this case, the court was not required to hold a hearing on the petitioner's motion and the mother's cross-motion (*see Matter of Jenna C. [Omisa C.]*, 81 AD3d 941, 943; *Matter of Attallah N.*, 65 AD3d 1047, 1048; *Matter of Amir J.-L.*, 57 AD3d 669, 669-670).

Matter of Asharia W. 234 AD3d 979 (2nd Dept., 2025)

In related proceedings pursuant to Family Court Act articles 6 and 10, (1) the mother, [*2]Maisha H., appeals, and the maternal great-grandmother, Whilma H., cross-appeals, from a decision of the Family Court, Kings County (Erik S. Pitchal, J.), dated November 1, 2022, (2) the mother appeals from an order and a permanency hearing order of the same court, both dated November 1, 2022, and (3) the maternal great-grandmother appeals from an order of the same court, also dated November 1, 2022. The first order, insofar as appealed from, upon the decision, made after a hearing, awarded the maternal great-grandmother and the father, Timothy W., joint legal custody of the child Asharia W. The permanency hearing order, upon the decision, made after a hearing, placed the child Asharia W. into the custody of the maternal great-grandmother and the father pursuant to Family Court Act § 1089-a. The second order, insofar as appealed from, upon the decision, made after a hearing, denied the maternal great-grandmother's petition for custody of the child Giomari H.

ORDERED that the appeal and cross-appeal from the decision are dismissed, without costs or disbursements, as no appeal lies from a decision (*see Matter of Ariana M. [Edward M.]*, 179 AD3d 923); and it is further,

ORDERED that the orders are affirmed insofar as appealed from, without costs or disbursements; and it is further,

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

The mother and the father are the parents of the child Asharia W. The mother is also the parent of the child Giomari H.

In 2016, the maternal great-grandmother filed a petition for custody of Asharia and a separate petition for custody of Giomari, alleging that the mother had left the subject children at the maternal great-grandmother's home without warning and had not come

back for them. Also, in 2016, the Administration for Children's Services commenced a neglect proceeding alleging that the mother neglected Asharia. The father thereafter filed a petition for custody of Asharia. In 2017, the Family Court found that the mother neglected Asharia. Between 2021 and 2022, the court held a combined hearing on the custody petitions and permanency hearing over 15 days, in which it took the testimony of the maternal great-grandmother, the mother, and the father, among others. The court additionally conducted in camera interviews with the two children. In an order dated November 1, 2022, upon a decision dated November 1, 2022, made after the hearing, the court, inter alia, awarded the maternal great-grandmother and the father joint legal custody of Asharia. In a permanency hearing order dated November 1, 2022, upon the decision, made after the hearing, the court placed the child Asharia into the custody of the maternal great-grandmother and the father pursuant to Family Court Act § 1089-a. In a second order, also dated November 1, 2022, upon the decision, made after the hearing, the court denied the maternal great-grandmother's petition for custody of Giomari but awarded her certain visitation with Giomari.

"In a . . . custody [proceeding] between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right due to surrender, abandonment, persistent neglect, unfitness, or other extraordinary circumstances" (*Matter of Diana B. v Lorry B.*, 111 AD3d 927, 927; *see Matter of Flores v Flores*, 91 AD3d 869, 869-870). The nonparent party seeking custody bears the burden of establishing the existence of extraordinary circumstances (*see Matter of Cambridge v Cambridge*, 13 AD3d 443, 443-444). Even when the nonparent satisfies that burden, the court must determine whether placing custody with the nonparent is in the best interests of the child (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 548-549; *Matter of Culberson v Fisher*, 130 AD3d 827, 828).

Here, the Family Court properly determined that the maternal great-grandmother sustained her burden of demonstrating the existence of extraordinary circumstances (*see Matter of Culberson v Fisher*, 130 AD3d at 828; *Matter of Flores v Flores*, 91 AD3d at 870). The court's determination that the best interests of Asharia would be served by an award of joint legal custody to the maternal great-grandmother and the father is supported by a sound and substantial basis in the [*3]record and, therefore, we decline to disturb it (*see Matter of Ferrson v Dixon*, 215 AD3d 834, 835; *Matter of Culberson v Fisher*, 130 AD3d at 828-829).

The Family Court's further determination to deny the maternal great-grandmother's petition for custody of Giomari has a sound and substantial basis in the record. "[W]hile

courts should be reluctant to separate siblings, there are circumstances in which the best interest of each child lies with a different parent" (*Matter of Gulzar v Gulzar*, 173 AD3d 1183, 1184 [citation and internal quotation marks omitted]; *see Matter of Olimpia M. v Steven M.*, 228 AD2d 270). Here, the evidence established that the best interests of Giomari would not be served by an award of custody to the maternal great-grandmother. Rather, the court appropriately awarded the maternal great-grandmother visitation with Giomari in her home on the weekends when Asharia was also in the home, thus, providing for substantial contact between the siblings.

1061 Motions

Matter of E.I., 234 AD3d 411 (1st Dept., 2025)

Order, Family Court, Bronx County (E. Grace Park, J.), entered on or about February 7, 2024, which sua sponte modified a May 9, 2023 order of fact-finding and disposition to vacate the release of the subject children to respondent mother and to place them in the custody of the Commissioner of the Administration for Children's Services (ACS) pending a hearing on the agency's motion to extend the period of supervision by six months, and order, same court and Judge, entered on or about February 16, 2024, which, to the extent appealed from as limited by the briefs, after an extension hearing, continued the children's placement in the care and custody of ACS until the next permanency hearing, unanimously reversed, on the law and the facts, without costs, and the matter remanded for further proceedings consistent with this decision.
A parent's due process "interest in the care, custody, and control of their children . . . [and] the children[s'] . . . parallel right to be reared by their parent" continues even after a dispositional order in a Family Court article 10 proceeding (*Matter of F.W. [Monroe W.]*, 183 AD3d 276, 280 [1st Dept 2020] [internal quotation marks omitted]).

Here, pursuant to a dispositional order, the children were released to their mother's care with ACS supervision. ACS moved pursuant to Family Court Act § 1061 to extend the period of supervision. Family Court violated the mother's due process rights when, on the return date of the motion, it sua sponte removed the children without giving the mother notice or an opportunity to be heard and, at a later hearing, effectively imposed upon the mother the burden of showing that the removal was unwarranted (*see Matter of Angelina AA*, 222 AD2d 967, 969 [3d Dept 1995]). There was nothing in the language

of the agency's motion to put the mother on notice that the children might be removed from her care on the return date, and the record demonstrates that the mother was not given a meaningful opportunity to be heard on the issue (*see id.* at 969-970). Moreover, the agency maintained that it was in the children's best interests to remain with the mother, and the children's attorney supported the agency's position.

Furthermore, Family Court's decision to continue the children's placement in the agency's care until the next placement hearing was not supported by a sound and substantial basis in the record (*see Matter of Leenasia C.*, 154 AD3d 1, 9 [1st Dept 2017]). Contrary to the court's conclusion, neither the initial neglect petition nor the order to show cause alleged that the mother used illicit substances or was impaired while taking care of the children. Moreover, during the 10-month period of supervision in 2023—2024, the mother submitted to at least three random drug screenings and tested negative for all illicit substances. When the mother underwent an evaluation by a credentialed alcohol and substance abuse counselor on February 1, 2024, she was not found to need any drug treatment [*2]services.

Matter of Maria S.D., 235 AD3d 487 (1st Dept., 2025)

Order, Family Court, Bronx County (Lauren T. Broderick, J.), entered on or about March 1, 2024, which, to the extent appealed from as limited by the briefs, denied respondent father's motion to vacate an order of fact-finding of neglect, unanimously affirmed, without costs.

The court entered a finding of neglect against the father on his consent, without an admission (Family Court Act § 1051 [a]), after informing him that his consent would result in the court making a fact-finding order of neglect and of the potential consequences of such order, as required by Family Court Act § 1051 (f). Neither the father nor his attorney advised the court that the father had a hearing impairment. After discharging his retained counsel and being assigned counsel, the father moved to vacate the finding of neglect for good cause under Family Court Act § 1061, claiming that he was unable to hear the proceedings due to a hearing impairment and that he received ineffective assistance of counsel.

The court providently denied the motion without a hearing, as a review of the record supports the conclusion that the father consented to entry of the neglect order. The court conducted a full allocution, stopping at various points to answer the father's questions and make sure that he had heard and understood, thus ensuring that the

father knowingly was waiving his right to contest the allegations on which the neglect petition was based and that he had discussed all issues with his attorney (*see Matter of Gabriella R. [Mindyn S.]*, 68 AD3d 1487, 1488 [3d Dept 2009], *lv dismissed* 14 NY3d 812 [2010]).

Even if, as the father contends, there were issues with the audio during virtual hearings, when the father expressed that he could not hear, the court obligingly repeated, spoke slower, and rephrased until the father indicated that he had heard and understood. Nor does the father's medical documentation, first submitted to the court at its request after the conclusion of the proceedings, change these facts. Nor can the court be faulted for failing to accommodate a hearing impairment under the Americans with Disabilities Act when the court was unaware of the issue (*see Kadanoff v Kadanoff*, 46 AD3d 626, 627 [2d Dept 2007]).

To the extent the father now claims that the court's allocution was inadequate and failed to provide mandated notice under Family Court Act § 1051 (f), this issue, raised for the first time on appeal, is unpreserved (*see Matter of Nicole KK.*, 46 AD3d 1267, 1268 [3d Dept 2007]). In any event, the court conducted a full allocution covering all the points required by the statute (*see Matter of Gabriella R. [Mindyn S.]*, 68 AD3d at 1488).

The father did not raise an issue as to whether his retained counsel provided ineffective assistance of counsel (*see Matter of Judith L.C. v Lawrence Y.*, 179 AD3d 616, 617 [1st Dept 2020], *lv denied* 35 NY3d 911 [2020]). Ineffectiveness cannot be inferred from the attorney counseling him to consent to settling the petition and [*2]there is no showing of actual prejudice, given that the court fully explained the terms of the settlement (*see Matter of Aaron Tyrell W.*, 58 AD3d 419, 420 [1st Dept 2009]; *Matter of Nasir H.*, 251 AD2d 1010, 1010 [4th Dept 1998], *lv denied* 92 NY2d 809 [1998]).

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

Matter of Wynter S. A., AD3d 2025 NY Slip Op 03188 (2nd Dept., 2025

In related proceedings pursuant to Family Court Act article 10, the mother and the father separately appeal from an order of disposition of the Family Court, Queens County (Margaret Morgan, J.), dated June 24, 2024. The order of disposition, upon an amended order of fact-finding of the same court dated January 12, 2024, made upon the consent of the mother and the father to a finding of neglect without admission pursuant to Family Court Act § 1051(a), finding that the mother and the father neglected the child Summer R. A. and derivatively neglected the children Wynter S. A. and Bernard B., and after a

dispositional hearing, denied the applications of the mother and the father for a suspended judgment and, in effect, to vacate the findings of neglect and derivative neglect, released the subject children to the custody of the mother and the father with supervision by the petitioner for a period of six months, and directed the mother and the father to comply with certain conditions.

ORDERED that the appeals from so much of the order of disposition as released the subject children to the custody of the mother and the father with supervision by the petitioner for a period of six months are dismissed as academic, without costs or disbursements, as the period of supervision has expired; and it is further,

ORDERED that the order of disposition is reversed insofar as reviewed, on the facts and in the exercise of discretion, without costs or disbursements, and the applications of the mother and the father for a suspended judgment and, in effect, to vacate the findings of neglect and derivative neglect are granted.

In October 2022, the petitioner filed petitions alleging that the mother and the father neglected the child Summer R. A. and derivatively neglected the children Wynter S. A. and Bernard B. In an amended order of fact-finding dated January 12, 2024, made upon the consent of the mother and the father to a finding of neglect without admission pursuant to Family Court Act § 1051(a), the Family Court found that the mother and the father neglected Summer R. A. and derivatively neglected Wynter S. A. and Bernard B. At the conclusion of a dispositional hearing, the mother and the father made applications for a suspended judgment and, in effect, to vacate the findings of neglect and derivative neglect. In an order of disposition dated June 24, 2024, the court denied the applications, released the children to the custody of the mother and the father with supervision by the petitioner for a period of six months, and directed the mother and the father to comply with certain conditions. The mother and the father (hereinafter together the appellants) separately appeal.

The appeals from so much of the order of disposition as released the children to the custody of the mother and the father with supervision by the petitioner for a period of six months have been rendered academic, since the period of supervision has expired by its own terms (*see Matter of Cherli Q. [Mauricio C.]*, 231 AD3d 833, 834; *Matter of Serenity R. [Truman C.]*, 215 AD3d 854, 856). However, since the adjudications of neglect and derivative neglect constitute a permanent and significant stigma that might indirectly affect the appellants' status in future proceedings, the appeals from so much of the order of disposition as bring up for review the findings of neglect and derivative

neglect are not academic (*see Matter of Cherli Q. [Mauricio C.]*, 231 AD3d at 834; *Matter of Aliyah T. [Jaivon T.]*, 174 AD3d 722, 723).

"Pursuant to Family Court Act § 1061, the Family Court may set aside, modify, or vacate any order issued in the course of a child protective proceeding for good cause shown" (*Matter of Nila S. [Priscilla S.]*, 202 AD3d 695, 696 [internal quotation marks omitted]; *see Matter of Sophia W. [Tiffany P.]*, 176 AD3d 723, 724). "The statute expresses the strong [l]egislative policy in favor of continuing Family Court jurisdiction over the child and family so that the court can do what is necessary in the furtherance of the child's welfare" (*Matter of Nila S. [Priscilla S.]*, 202 AD3d at 696 [internal quotation marks omitted]; *see Matter of Boston G. [Jennifer G.]*, 157 AD3d 675, 677). "As with an initial order, the modified order must reflect a resolution consistent with the best interests of the children after consideration of all relevant [facts and] circumstances, and must be supported by a sound and substantial basis in the record" (*Matter of Nila S. [Priscilla S.]*, 202 AD3d at 696 [internal quotation marks omitted]).

Here, the appellants demonstrated good cause to vacate the findings of neglect and derivative neglect. The appellants demonstrated their insight into how their actions affected the children, their commitment to ameliorating the issues that led to the findings of neglect and derivative neglect, including their compliance with undergoing parenting and anger management programs, and their lack of a prior child protective history (*see id.*; *Matter of Boston G. [Jennifer G.]*, 157 AD3d at 677; *Matter of Leenasia C. [Lamarriea C.]*, 154 AD3d 1, 12-13).

In light of our determination, we need not reach the parties' remaining contentions.

Accordingly, under the circumstances of this case, the Family Court should have granted the appellants' applications for a suspended judgment and, in effect, to vacate the findings of neglect and derivative neglect (*see Matter of Nila S. [Priscilla S.]*, 202 AD3d at 697).

Matter of Ilan Z., AD3d 2025 NY Slip Op 03199 (2nd Dept., 2025)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from an order of the Family Court, Queens County (Margaret Morgan, J.), dated October 30, 2023. The order, after a hearing, denied the mother's motion pursuant to Family Court Act § 1061 to modify an order of fact-finding and disposition of the same court dated September 18, 2019, so as to grant the mother a suspended judgment and vacate the

finding of neglect against her, which was entered upon her consent to the entry of an order of fact-finding without admission pursuant to Family Court Act § 1051(a).

ORDERED that the order dated October 30, 2023, is affirmed, without costs or disbursements.

In October 2017, the Administration for Children's Services filed petitions alleging, inter alia, that the mother abused the subject child Ilan Z. and derivatively abused the subject child Eliana Z. The petitions were based on an incident in which Ilan Z., then age six months, was treated at a hospital for a traumatic head injury. The mother subsequently consented to the entry of a finding of neglect without admission pursuant to Family Court Act § 1051(a) and waived her right to a fact-finding or a dispositional hearing. In an order of fact-finding and disposition dated September 18, 2019, the Family Court, among other things, entered a finding of neglect against the mother. The children were subsequently released to the mother.

In July 2022, the mother moved pursuant to Family Court Act § 1061 to modify the order of fact-finding and disposition so as to grant her a suspended judgment and vacate the finding of neglect against her. Following a hearing, in an order dated October 30, 2023, the Family Court denied the mother's motion. The mother appeals.

"Family Court Act § 1061 provides that, for good cause shown, a court may set aside, modify, or vacate any order issued in the course of a child protective proceeding" (*Matter of Jessiah K. [Shakenya P.]*, 207 AD3d 724, 724; *see Matter of Sophia W. [Tiffany P.]*, 176 AD3d 723, 724). "'As with an initial order, the modified order must reflect a resolution consistent with the best interests of the child[ren] after consideration of all relevant facts and circumstances, and must be supported by a sound and substantial basis in the record'" (*Matter of Cassidy B. [Cyntora B.]*, 227 AD3d 711, 713 [internal quotation marks omitted], quoting *Matter of Nila S. [Priscilla S.]*, 202 AD3d 695, 696). "Courts have identified four factors to consider when determining whether to vacate a finding of neglect: '(1) [the] respondent's prior child protective history; (2) the seriousness of the offense; (3) [the] respondent's remorse and acknowledgment of the abusive/neglectful nature of [their] act; and (4) [the] respondent's amenability to correction, including compliance with court-ordered services and treatment'" (*id.*, quoting *Matter of Leenasia C. [Lamarriea C.]*, 154 AD3d 1, 12).

Here, the Family Court providently exercised its discretion in denying the mother's motion. Although the mother has complied with services, including parenting skills courses and therapy, and she contends that vacatur of the neglect finding is warranted so that she may seek employment as a pediatric nurse, the record demonstrates that

she continues to lack insight into the seriousness of Ilan Z.'s injury. Under these circumstances, the mother failed to demonstrate good cause to modify the order of fact-finding and disposition so as to grant her a suspended judgment and vacate the finding of neglect against her (*see id.*; *Matter of Sophia W. [Tiffany P.]*, 176 AD3d at 725; *Matter of Alisah H. [Syed H.]*, 168 AD3d 842, 844) and that the requested relief was in the best interests of the children (*see Matter of Sophia W. [Tiffany P.]*, 176 AD3d at 725).

The remaining contentions of the mother and the attorney for the children are not properly before this Court.

TERMINATION of PARENTAL RIGHTS

Abandonment

Matter of Brooke S. M., 234 AD3d 764 (2nd Dept., 2025)

In related proceedings pursuant to Social Services Law § 384-b, the mother appeals from three orders of fact-finding and disposition of the Family Court, Kings County (Melody Glover, J.) (one as to each child), all dated November 27, 2023. The orders of fact-finding and disposition, insofar as appealed from, after fact-finding and dispositional hearings, found that the mother abandoned and permanently neglected the subject children, terminated her parental rights, and transferred guardianship and custody of the subject children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.

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

In January 2021, the petitioner commenced these proceedings pursuant to Social [*2]Services Law § 384-b, inter alia, to terminate the mother's parental rights to the subject children on the grounds of abandonment and permanent neglect. Following fact-finding and dispositional hearings, the Family Court, among other things, found that the mother abandoned and permanently neglected the children, terminated her parental rights, and transferred guardianship and custody of the children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother appeals.

To establish that the mother abandoned the children, the petitioner was required to demonstrate by clear and convincing evidence that during the six months prior to the filing of the petitions, the mother evinced an intent to forego her parental rights, as manifested by her failure to visit the children and communicate with them or the petitioner, although able to do so and not prevented or discouraged by the petitioner from doing so (*see id.* § 384-b[4][b]; [5][a]; *Matter of Abel J.R. [Michael S.]*, 207 AD3d 727, 728; *Matter of Dion J.L. [Danac L.]*, 183 AD3d 736, 737). "The burden rests on the parent to maintain contact, and the agency need not show diligent efforts to encourage the parent to visit the child[ren] or to communicate with the child[ren] or the agency" (*Matter of Dion J.L. [Danac L.]*, 183 AD3d at 737). A mere showing of sporadic and insubstantial contacts is insufficient to overcome a demonstration of abandonment (*see Matter of Abel J.R. [Michael S.]*, 207 AD3d at 728; *Matter of Dion J.L. [Danac L.]*, 183 AD3d at 737).

Contrary to the mother's contention, the Family Court correctly determined that the petitioner demonstrated by clear and convincing evidence that she abandoned the children. The evidence adduced at the fact-finding hearing reflected that the mother's contacts with the children and the petitioner during the relevant six-month period were minimal, sporadic, and insubstantial, and, therefore, insufficient to overcome a demonstration of abandonment (*see Matter of King-Osiris A.T. [Isis S.]*, 224 AD3d 839, 840; *Matter of Abel J.R. [Michael S.]*, 207 AD3d at 728).

Further, the petitioner established, by clear and convincing evidence, that the mother permanently neglected the children. Contrary to the mother's contention, the record demonstrates that the petitioner made diligent efforts to strengthen the mother's parental relationship with the children by developing an appropriate service plan for the mother, attempting to schedule parental access, and providing referrals to the mother for required programs and treatment (*see Matter of Remi-Radell J.C.-G. [Shamica M.C.]*, 226 AD3d 772, 773). The record further demonstrates that despite these efforts, the mother failed to maintain contact with the children or the petitioner, failed to plan for

the children or acknowledge their placement in foster care, and failed to comply with her service plan (*see* Social Services Law § 384-b[7][a]; *Matter of Dynasty S.G. [Paula G.]*, 228 AD3d 657, 658; *Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d 679, 681).

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

Matter of Ciara FF., 235 AD3d 1162 (3rd Dept., 2025)

Appeal from an order of the Family Court of Schenectady County (Mark Blanchfield, J.), entered January 30, 2024, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject child to be abandoned, and terminated respondent's parental rights.

Respondent (hereinafter the father) is the father of the subject child (born in 2013). The child resided with the mother until August 2016, when the child was removed and placed with the child's maternal grandmother. The father last visited with the child at the child's fifth birthday in 2018, and then began a term of incarceration in April 2019. While the father was still incarcerated, in March 2021, the child was removed from the custody of the grandmother and placed in the care and custody of petitioner. In June 2023, petitioner commenced this abandonment proceeding seeking to terminate the father's parental rights to the child, who had been in foster care with petitioner for more than two years. The father was released from incarceration in November 2023, and, following a fact-finding hearing, Family Court granted petitioner's application and terminated the father's parental rights. The father appeals.

We affirm. "[A] finding of abandonment is warranted when it is established by clear and convincing evidence that, during the six-month period immediately prior to the date of the filing of the petition, a parent evinces an intent to forego his or her parental rights as manifested by his or her failure to visit or communicate with the child or the petitioner, although able to do so and not prevented or discouraged from doing so by that petitioner" (*Matter of Syri'annah PP. [Sayyid PP.]*, 212 AD3d 1005, 1007 [3d Dept 2023] [internal quotation marks and citations omitted]). Once it is established that a parent failed to maintain sufficient contact with a child for the statutory period of six months, "the burden shifts to the parent to establish that he or she maintained sufficient contact, was unable to do so, or was discouraged or prevented from doing so by the petitioner" (*Matter of Jaxon UU. [Tammy I.-Nicole H.]*, 193 AD3d 1269, 1271 [3d Dept 2021] [internal quotation marks, brackets and citations omitted]). "Parents are presumed able

to visit and communicate with their children and, although incarcerated parents may be unable to visit, they are still presumed able to communicate with their children absent proof to the contrary" (*Matter of Mason H. [Joseph H.]*, 31 NY3d 1109, 1110 [2018] [citations omitted]). In the context of an abandonment proceeding, "the agency is under no obligation to exercise diligent efforts to encourage a parent to establish a relationship with his or her child" (*Matter of Joseph D. [Joseph PP.]*, 193 AD3d 1290, 1291 [3d Dept 2021] [internal quotation marks and citation omitted]; *see* Social Services Law § 384-b [5] [b]).

Here, the father concedes that petitioner met its burden of establishing that he did not visit or communicate [*2]with the child or petitioner during the relevant six-month period. However, he contends that Family Court erred in finding that he did not meet his corresponding burden of showing that petitioner prevented him from doing so. Specifically, he contends that petitioner failed to apprise him of the child's whereabouts or facilitate such contact between him and the child. We disagree. The record reveals that, although the father may have missed one letter sent to him by petitioner due to his transfer to a different correctional facility, he received the first letter that contained a mailing address and two phone numbers that he could have used to obtain the information he sought. The caseworker testified that the father never contacted her or petitioner during the alleged abandonment period, and that she had last heard from him during a phone call that she initiated in March 2021. It was also established that, after this last conversation with the caseworker, the father was in communication with the mother and his niece, both of whom were themselves in contact with petitioner — the niece apparently on the father's behalf on at least one occasion — demonstrating that the father could both obtain the child's whereabouts through other means and freely communicate despite his incarceration.

Although it is true that petitioner did not inform the father of the child's whereabouts during the relevant time period, it did inform him of the neglect proceedings and that the child was in foster care. Nonetheless, and contrary to the father's contentions, petitioner was under no obligation to make any diligent efforts to encourage the father to communicate with the child in the abandonment context (*see Matter of Kamariana SS. [Anthony SS.]*, 227 AD3d 1166, 1167 [3d Dept 2024], *lv denied* 42 NY3d 903 [2024]; *Matter of Joseph D. [Joseph PP.]*, 193 AD3d at 1291). To the extent that the appellate attorney for the child contends that petitioner failed to properly serve the father with notice of the permanency hearings, when considering that the father testified he had last seen the child approximately a year before he was incarcerated — over five years before the abandonment petition was filed — petitioner's failure, "while

inexcusable, was not in fact the reason he failed to communicate with his [child]" (*Matter of Annette B.*, 4 NY3d 509, 514 [2005]; *see Matter of Chartasia Delores H. [Charles H.]*, 88 AD3d 460, 460 [1st Dept 2011], *lv denied* 18 NY3d 803 [2012]).Based on the foregoing and our review of the remaining record, which does not reveal any refusal or interference by petitioner frustrating an attempt by the father to visit or communicate with the child, we conclude that the father failed to rebut petitioner's showing of abandonment and there is no basis upon which to disturb Family Court's adjudication (*see Matter of Annette B.*, 4 NY3d at 514-515; *Matter of Kamariana SS. [Anthony SS.]*, 227 AD3d at 1168; *Matter of Taj'ier W. [Joseph W.]*, 209 AD3d 1203, 1205 [3d Dept [*3]2022]; *Matter of Damien D. [Ronald D.]*, 176 AD3d 1411, 1413 [3d Dept 2019]; *compare Matter of Xena X.*, 279 AD2d 691, 692 [3d Dept 2001]). We have examined the father's remaining contentions and have found them to be without merit.

Matter of Gabriel VV., 236 AD3d 1161 (3rd Dept., 2025)

Appeal from an order of the Family Court of Schenectady County (Mark Blanchfield, J.), entered August 16, 2023, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject child to be abandoned, and terminated respondent's parental rights.

Respondent (hereinafter the mother) is the mother of a child (born in 2021) who has been in petitioner's care since shortly after his birth. In August 2022, petitioner commenced this proceeding alleging that the mother had not had meaningful contact with the child for six months and seeking to adjudicate the child abandoned and terminate the mother's parental rights. The mother appeared with assigned counsel in October 2022 and was arraigned on the petition but, despite Family Court's warnings that the mother's in-person appearance at the subsequent fact-finding hearing was mandatory and the hearing would proceed even in her absence, the mother did not appear, nor was her counsel able to contact her. Petitioner moved to enter a default judgment, which motion was supported by the attorney for the child (hereinafter AFC) and unopposed by the mother's counsel. The court granted the motion and proceeded with the hearing; the mother's counsel remained but did not participate. The court withheld decision on the petition until a scheduled January 2023 appearance, which the mother also did not attend. During that appearance, the mother's counsel requested to be relieved, citing multiple unanswered attempts to contact the mother. Ruling from the bench, the court granted counsel's request and, as to the petition, determined the child to be abandoned and terminated the mother's parental rights. The court's ruling on the

petition was reduced to an August 2023 decision and order on default, from which order the mother appeals.

The mother contends that Family Court had no basis to find her in default. We disagree. "To be sure, a respondent's failure to appear at a fact-finding or dispositional hearing does not automatically result in a default, as where counsel appears, explains a client's absence, objects to a finding of default, and actively participates by cross-examining witnesses, offering proof or making motions or arguments" (*Matter of Myasia QQ. [Mahalia QQ.]*, 133 AD3d 1055, 1056 [3d Dept 2015] [internal quotation marks and citations omitted]). Here, Family Court advised the mother of the hearing date and admonished her several times that she must appear in person or else the hearing on the petition would go forward without her. The mother's counsel appeared on the hearing date and advised the court that she had been unable to discuss the case with the mother despite several attempts to contact her using the information the mother provided at the October 2022 arraignment. Counsel could therefore not explain the mother's absence but remained at the hearing in case the mother appeared and decided to participate. Counsel otherwise took no part in the proceedings[*2]. Accordingly, Family Court properly found the mother defaulted on the petition (*see id.*; *compare Matter of Richard TT. [Kara VV.]*, 223 AD3d 1070, 1072 n 3 [3d Dept 2024], *appeal dismissed* 41 NY3d 989 [2024], *and Matter of Elaysia GG. [Amber HH.]*, 221 AD3d 1338, 1338-1339 [3d Dept 2023], *with Matter of Devon W. [Lavern D.]*, 127 AD3d 1098, 1099 [2d Dept 2015]).

"Moreover, no appeal is permitted from an order entered upon a default" (*Matter of Myasia QQ. [Mahalia QQ.]*, 133 AD3d at 1056 [citation omitted], citing CPLR 5511). "The proper procedure would be for [the mother] to move to vacate the default and, if denied, appeal from that order" (*Matter of Deshane v Deshane*, 123 AD3d 1243, 1244 [3d Dept 2014] [citation omitted], *lv denied* 25 NY3d 901 [2015]). Consequently, the mother's contention that Family Court improperly relieved her counsel at the January 2023 appearance is not properly before us (*see Matter of Adele T. [Kassandra T.]*, 143 AD3d 1202, 1204 [3d Dept 2016]; *Matter of Scott KK. v Patricia LL.*, 110 AD3d 1260, 1261 [3d Dept 2013], *lv dismissed & denied* 22 NY3d 1054 [2014]).

Matter of Aiden R., 235 AD3d 1259 (4th Dept., 2025)
Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered August 15, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order denied respondent's motion to "reopen [her] default".

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

Memorandum: In appeal No. 1, respondent mother appeals from an order denying her motion to "reopen [her] default" after she failed to appear at the fact-finding hearing on petitioner's petition seeking to terminate her parental rights with respect to the subject child on the ground of abandonment. In appeal No. 2, the mother appeals from an order, entered upon her default, that, inter alia, determined that the subject child had been abandoned and terminated the mother's parental rights with respect to that child.

Addressing first appeal No. 2, we note that the mother failed to appear at the fact-finding hearing and, although her attorney was present at the hearing, the attorney did not participate. Under the circumstances, we conclude that Family Court properly determined that the mother's unexplained failure to appear constituted a default (*see Matter of Malachi S. [Michael W.]*, 195 AD3d 1445, 1446 [4th Dept 2021], *lv dismissed* 37 NY3d 1081 [2021]; *Matter of Tiara B.* [appeal No. 2], 64 AD3d 1181, 1181-1182 [4th Dept 2009]). We therefore dismiss the appeal from the order in appeal No. 2 (*see Tiara B.*, 64 AD3d at 1182; *see also Matter of Josaph M. [Wanda A.]*, 221 AD3d 1458, 1459 [4th Dept 2023], *lv denied* 42 NY3d 903 [2024]).

With respect to appeal No. 1, the determination "whether to relieve a party of a default is within the sound discretion of the [court]" (*Matter of Goldstein v Goldstein*, 190 AD3d 971, 972 [2d Dept 2021]; *see Matter of Shehatou v Louka*, 145 AD3d 1533, 1533-1534 [4th Dept 2016]). In order to succeed on her motion, the mother was required to demonstrate a reasonable excuse for the failure to appear and a potentially meritorious defense to the relief sought in the petition (*see Malachi S.*, 195 AD3d at 1446; *Matter of Alexander G.R. [Kristin G.P.]*, 192 AD3d 1501, 1501-1502 [4th Dept 2021]; *Matter of Strumpf v Avery*, 134 AD3d 1465, 1465-1466 [4th Dept 2015]).

Here, the mother alleged that she missed the hearing because she had shut off her phone and no longer had her calendar, and that she could not find transportation when she learned of the hearing the day before. Contrary to the mother's contention, those allegations do not constitute a reasonable excuse for her default because, inter alia, she had prior written notice of the hearing and failed to provide a credible explanation for her failure to advise the court or petitioner of her unavailability (*see Matter of Kenneth L. [Michelle B.]*, 92 AD3d 1245, 1246-1247 [4th Dept [*2]2012]; *see also Alexander G.R.*, 192 AD3d at 1501-1502). Moreover, even assuming, arguendo, that the mother established a reasonable excuse for her default, we conclude that she failed to demonstrate a meritorious defense to the abandonment petition, which alleged that she

had no meaningful contact with the subject child during the six-month period immediately preceding the filing of the petition (*see* Social Services Law § 384-b [4] [b]). In the affidavit submitted by the mother in support of her motion, she did not dispute that she did not visit or have contact with the child during the relevant time period. We therefore conclude that the court did not abuse its discretion in denying the motion (*see Matter of Marianys I. [Gabrielle I.]*, 187 AD3d 1570, 1571 [4th Dept 2020], *lv dismissed* 36 NY3d 1036 [2021]; *Matter of Mikia H. [Monique K.]*, 78 AD3d 1575, 1576 [4th Dept 2010], *lv dismissed in part & denied in part* 16 NY3d 760 [2011]).

Permanent Neglect

Matter of A.E.H.L., 234 AD3d 607 (1st Dept., 2025)

Orders, Family Court, Bronx County (Karen M.C. Cortes, J.), entered on or about May 1, 2024, which, insofar as appealed from, upon a finding of permanent neglect, terminated respondent father's parental rights as to the subject children A.E.H.L, A.K.H.L , and M.A.H.L., and transferred custody of the children to petitioner agency and the Commissioner of the Administration for Children's Services (ACS) for the purposes of adoption, unanimously affirmed, without costs. Appeal from order, same court and Judge, entered on or about May 1, 2024, which, after a fact-finding hearing, held that respondent was not entitled to notice before freeing the child J.C.H.L. for adoption, unanimously dismissed, without costs, as respondent fails to challenge Family Court's determination that respondent is not a consent father.

Clear and convincing evidence supports the finding that the father permanently neglected the elder children (Social Services Law § 384-b[7][a], [f]). Contrary to the father's contention, the record supports Family Court's determination that the agency made diligent efforts to encourage and strengthen his relationship with the children, including referring the father to anger management, domestic violence, parenting skills classes, and scheduling regular visits with the children (*see Matter of Julianna Victoria S. [Benny William W.]*, 89 AD3d 490, 491 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]). Despite these diligent efforts, during the relevant statutory period, the father only completed his parenting class, partially completed his anger management class,

and failed to consistently visit the children, doing so only five times in more than a year (*see Matter of Zariah M.E. [Alexys T.]*, 171 AD3d 607, 608 [1st Dept 2019]). The father also failed to plan for the children's future by obtaining suitable housing, only agreeing to do so in the event the children were returned to him. Nor did the father plan for the children's future by making efforts to understand and gain insight into their special needs, of which the agency informed him.

A preponderance of the evidence supports Family Court's determination that it was in the children's best interests to terminate the father's parental rights with respect to the three elder children and free them for adoption (*see Matter of Raul R. [III] [Raul R.—Cinthia R.]*, 199 AD3d 594, 595 [1st Dept 2021], *lv denied* 38 NY3d 944 [2022]). The father failed to raise any arguments on appeal with respect to Family Court's determination that no party was entitled to notice of the adoption of the youngest child, rendering those arguments abandoned, and the appeal from that dispositional order dismissed (*see e.g. Matter of Spencer Isaiah R. [Spencer R.]*, 78 AD3d 561 [1st Dept 2010]). In any event, the father failed to establish that he would be able to care for the children on a permanent basis. The father testified to having only vague plans to arrange his work schedule to manage their care and to secure adequate [*2]housing at some future point, and he took no steps to understand his children's special needs (*Matter of Raul R. III*, 199 AD3d at 595). The evidence also established that a suspended judgment was not warranted where, as here, the children have been living for years in their foster homes where their needs are being met, and both foster mothers are pursuing adoption (*see Matter of Angelica D. [Deborah D.]*, 157 AD3d 587, 588 [1st Dept 2018]).

Matter of M.V., 235 AD3d 420 (1st Dept., 2025)

Order, Family Court, Bronx County (David J. Kaplan, J.), entered on or about December 16, 2022, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child M.V. and committed custody and guardianship of the child to petitioner agency and the Commissioner for the Administration of Children's Services for the purpose of adoption, unanimously modified, on the facts, to vacate the order terminating the mother's parental rights to the child M.V. and freeing her for adoption, and to remand the matter to Family Court for a new dispositional hearing regarding M.V's best interests, and otherwise affirmed, without costs. Order, same court and Judge, entered on or about December 16, 2022, which, upon a finding of permanent neglect, terminated the mother's parental rights to the subject child H.V. and

committed custody and guardianship of the child to petitioner agency and the Commissioner for the Administration of Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The findings of permanent neglect are supported by clear and convincing evidence that despite the agency's diligent efforts to encourage and strengthen the parental relationship, the mother failed to plan for the children's return (Social Services Law § 384-b[7][a]). The mother's service plan called for substance abuse treatment, mental health services, a parenting skills program, maintaining her sobriety, and consistent visitation with the children, and the agency made repeated attempts to engage the mother in her service plan (*see Matter of N.S. [M.H.]*, 228 AD3d 471, 472 [1st Dept 2024]).

Despite these efforts, the mother failed to plan for the children's future by failing to complete any portions of the service plan and demonstrating a lack of insight into the conditions that led to the children's removal (*see Matter of Maria G.T. [Maria T.]*, 213 AD3d 556, 557 [1st Dept 2023]). During the relevant time period, despite being engaged in substance abuse treatment and having attended an inpatient rehab program, the mother repeatedly tested positive for cocaine and marijuana. Her engagement in services at Promesa was inconsistent and resulted in being discharged due to lack of compliance. She also failed to meaningfully and consistently engage in mental health services where she missed multiple appointments and reported irregular compliance with medication management. Moreover, she never completed a parenting skills program, despite referrals to multiple providers, and she failed to visit the children regularly.

A preponderance of the evidence supports the determination that it was in the best interests of the children to terminate the mother's parental rights and free the children for adoption (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The record shows that the child H.V. was doing well living with the foster mother, who had cared for her since 2018, and that the foster mother wished to adopt [*2]her (*see Matter of Raul R. [III] [Raul R.-Cinthia R.]*, 199 AD3d 594, 595 [1st Dept 2021], *lv denied* 38 NY3d 944 [2022]).

As for M.V., the record also supported the court's determination that adoption by the foster parent was in her best interests. However, the dispositional finding is vacated, and the matter remanded for a new dispositional hearing with respect to M.V. due to changed circumstances (*see Matter of Michael B.*, 80 NY2d 299, 318 [1992]). Her attorney has advised that she no longer resides in the same pre-adoptive foster home,

is now 15 years old, and does not consent to being adopted (*see Matter of Daleena Q.T. [Wanda W.]*, 211 AD3d 497, 499 [1st Dept 2022]).

Matter of E. M., 235 AD3d 593 (1st Dept., 2025)

Orders, Family Court, Bronx County (David J. Kaplan, J.), entered on or about December 6, 2023, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject children and transferred custody of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect against the mother was supported by clear and convincing evidence. The record shows that the agency made diligent efforts to encourage and strengthen the relationship between the mother and the children by (i) maintaining frequent contact with the mother; (ii) meeting with the mother to review the service plan and emphasize the importance of compliance with the service plan; (iii) scheduling visitation and encouraging the mother to resume in-person visitation with the children; (iv) monitoring the mother's mental health treatment progress with her provider; and (v) referring the mother to parenting skills and training and anger management classes (*see Matter of Serenity K.T. [Shanisha S.]*, 190 AD3d 572, 573 [1st Dept 2021]).

Despite the agency's diligent efforts, the mother failed to plan for the children's return during the statutorily relevant time period. The case planner's fact-finding testimony and the agency's progress notes in evidence established that the mother did not complete her service plan and demonstrated a lack of insight into the conditions that led to the children's removal (*see Matter of Tashenea J.S. [Donald R.]*, 227 AD3d 514, 514 [1st Dept 2024], *lv denied* 42 NY3d 906 [2024]). The mother failed to visit the children regularly, missing approximately half of the scheduled visits (*see Matter of B.W. [N.W.]*, 214 AD3d 425, 426 [1st Dept 2023], *lv denied* 39 NY3d 915 [2023]). The mother failed to testify or present any evidence, and her various explanations for her failure to comply with all of her services, attend the majority of her case planning sessions, and visitation are speculative and otherwise unsupported by the credible evidence.

The finding that termination of the mother's parental rights is in the children's best interests is supported by a preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *Matter of Shilloh M.J. [Jamesina M.J.]*, 183 AD3d 540,

541 [1st Dept 2020]). As to the child P.M., the record shows that he has been in the same foster home since 2020, where he is well cared for and his needs are met, and his foster mother wishes to adopt him (*see Matter of Shilloh M.J. [Jamesina M.J.]*, 183 AD3d at 541). Regarding E.M. and M.M., despite the children's previous ambivalence about adoption and the possibility that their respective foster mothers may not be willing to adopt, termination of parental rights to free the children for possible adoption is in their best interests (*see Matter of Bianca J.N. [Swevia C.N.]*, 166 AD3d 466, 467 [1st Dept 2018]; *Matter of Isaac Ansimeon F[*2]. [Mark P.]*, 128 AD3d 486, 486 [1st Dept 2015]). This is particularly true given that they have been out of the mother's care since 2017, have thrived in foster care, and expressed their desire not to return to the mother's care. The record shows the court carefully weighed the children's expressed wishes and the mother's failure to complete rehabilitative services in its decision to terminate the mother's parental rights.

A suspended judgment was not appropriate here because there is no evidence that the mother had a realistic and feasible plan to provide an adequate and stable home for the children, particularly in light of her decision to move to Pennsylvania (*see Matter of Andrea L.P. [Cassandra M.P.]*, 156 AD3d 413, 414 [1st Dept 2017]). There is also no evidence to suggest that further delay would lead to family reunification, and the children, all of whom have been out of the mother's care since at least 2017, have expressed a strong desire for permanency (*see Matter of Felicia Malon Rogue J. [Lena J.]*, 146 AD3d 725, 726 [1st Dept 2017]).

The mother's argument that she was denied effective assistance of counsel is unpreserved (*see Matter of Ethan M.*, 223 AD3d 471, 472 [1st Dept 2024]) and, in any event, unavailing (*see Matter of Frederick T. [Maria T.]*, 191 AD3d 489, 490 [1st Dept 2021], *lv denied* 37 NY3d 926 [2021]; *Matter of Devin M. [Margaret W.],* 119 AD3d 435, 437 [1st Dept 2014]).

Matter of Anthony A. R., 234 AD3d 696 (2nd Dept., 2025)

In related proceedings pursuant to Social Services Law § 384-b, the mother appeals from three orders of fact-finding and disposition of the Family Court, Queens County (Joan L. Piccirillo, J.) (one as to each child), each dated July 19, 2022. The orders of fact-finding and disposition, made after fact-finding and dispositional hearings, found that the mother permanently neglected the subject children, terminated the mother's parental rights, and transferred guardianship and custody of the subject children to the

petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.

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

The petitioner commenced these proceedings pursuant to Social Services Law § 384-b to terminate the mother's parental rights to the subject children on the ground of permanent neglect. Following fact-finding and dispositional hearings, the Family Court found that the petitioner [*2]established by clear and convincing evidence that the mother had permanently neglected the children, terminated her parental rights, and transferred guardianship and custody of the children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother appeals.

"'When a foster care agency brings a proceeding to terminate parental rights on the ground of permanent neglect, it must, as a threshold matter, prove by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship'" (*Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d 952, 953, quoting *Matter of Shimon G. [Batsheva G.]*, 206 AD3d 732, 733). "Those efforts must include counseling, making suitable arrangements for [parental access], providing assistance to the parents to resolve the problems preventing the child's discharge, and advising the parents of the child's progress and development" (*Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d at 953 [internal quotation marks omitted]). "Once the petitioner establishes that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child's future, although physically and financially able to do so" (*id.* [internal quotation marks omitted]). "[T]he planning requirement contemplates that the parent shall take such steps as are necessary to provide a home that is adequate and stable, under the financial circumstances existing, within a reasonable period of time" (*id.* [internal quotation marks omitted]).

However, in providing appropriate services to a parent, a petitioner need not "guarantee that the parent succeed in overcoming his or her predicaments" (*Matter of Sheila G.*, 61 NY2d 368, 385; *see Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d at 953-954). Instead, "[p]arents must themselves assume a measure of initiative and responsibility; they have a duty to plan for the future of their child" (*Matter of Jamie M.*, 63 NY2d 388, 393; *see Matter of Star Leslie W.*, 63 NY2d 136, 143). Moreover, a parent's "mere participation in classes and programs [is] not enough to meet the requirement to plan for the children's future when he [or she does] not benefit from the services, programs, and

support offered and [does] not utilize the tools or lessons learned in those classes in order to successfully plan for the children's future" (*Matter of Tymel P. [Tyrone P.]*, 157 AD3d 699, 700; *see Matter of Aniya L. [Samantha L.]*, 124 AD3d 1001, 1004).

Here, the petitioner established, by clear and convincing evidence, that the mother permanently neglected the children (*see* Social Services Law § 384-b[7][a]; *Matter of Shimon G. [Batsheva G.]*, 206 AD3d at 733). As a threshold matter, contrary to the mother's contention, the petitioner established that it had made "diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Shimon G. [Batsheva G.]*, 206 AD3d at 733 [internal quotation marks omitted]). The record demonstrates that the petitioner facilitated the mother's supervised parental access sessions with the children and implemented a coach to assist her with having more successful sessions, which often became volatile. The petitioner referred the mother to parenting and domestic violence programs, provided her with family care supportive services, referred the mother to mental health services, and encouraged her to attend therapy in order to enable her to care for her children. The petitioner also conducted service plan reviews and family team conferences. Contrary to the mother's contention, the petitioner's efforts to facilitate therapeutic parental access and family therapy were suitable under the circumstances of this case. Although the petitioner offered the mother an opportunity to engage in collateral therapy with the children's mental health provider, she refused to participate unless the provider was changed, notwithstanding that the children's therapist noted that such a change would be detrimental to the children's mental health.

Further, the petitioner established that despite its efforts, and notwithstanding the services completed by the mother, the mother failed to plan for the return of the children as she failed to gain insight into the issues that caused the children's removal and were preventing their return to her care (*see Matter of Scott I.R. [Jennifer M.I.]*, 180 AD3d 686, 687; *Matter of Tymel P. [Tyrone P.]*, 157 AD3d at 700). The evidence showed that the mother did not understand why the children had been removed and that she failed to acknowledge how her actions led to the underlying neglect proceeding and removal. The mother continued to blame others for her separation from the children and did not benefit from the services, programs, and support offered and did not utilize the tools or lessons learned (*see Matter of Shimon G. [Batsheva G.]*, 206 AD3d at 734; *Matter of Tymel P. [*3][Tyrone P.]*, 157 AD3d at 700). Contrary to the mother's further contentions, there is no evidence in the record that would support the inference that the foster parents or the petitioner deliberately undermined any measures towards reunification (*see Matter of Sean P.H. [Rosemarie H.]*, 122 AD3d 850, 851).

Accordingly, the Family Court properly found that the mother permanently neglected the children, terminated her parental rights, and transferred guardianship and custody of the

children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.

Matter of Ella Elizabeth V., 234 AD3d 703 (2nd Dept., 2025)

In a proceeding pursuant to Social Services Law § 384-b, the father appeals from (1) an order of fact-finding of the Family Court, Queens County (Monica D. Shulman, J.), dated May 17, 2023, (2) an order of the same court dated October 4, 2023, and (3) an order of fact-finding and disposition of the same court dated October 25, 2023. The order of fact-finding, insofar as appealed from, after a fact-finding hearing, found that the father permanently neglected the subject child. The order, insofar as appealed from, after a dispositional hearing, determined that it was in the subject child's best interests to terminate the father's parental rights and free the subject child for adoption. The order of fact-finding and disposition, insofar as appealed from, upon the order of fact-finding and the order, found that the father permanently neglected the subject child, terminated his parental rights, and transferred guardianship and custody of the subject child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.

ORDERED that the appeals from the order of fact-finding and the order are dismissed, without costs or disbursements, as the portions of those orders appealed from were superseded by the order of fact-finding and disposition and are brought up for review on the appeal from the order of fact-finding and disposition; and it is further,

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

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b, inter alia, to terminate the father's parental rights to the subject child on the ground of permanent neglect. After a fact-finding hearing, at which the father testified, the Family Court found that the father permanently neglected the child. After a dispositional hearing, the court determined that it [*2]was in the child's best interests to terminate the father's parental rights and free the child for adoption. In an order of fact-finding and disposition dated October 25, 2023, the court, among other things, found that the father permanently neglected the child, terminated his parental rights, and transferred guardianship and custody of the child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The father appeals.

In a proceeding to terminate parental rights on the ground of permanent neglect, the agency must demonstrate "'by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child

relationship'" (*Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 960, quoting *Matter of Shimon G. [Batsheva G.]*, 206 AD3d 732, 733; *see Matter of Dynasty S.G. [Paula G.]*, 228 AD3d 657, 657; *Matter of Skylah R. [Heather S.]*, 211 AD3d 1027, 1028). Once the agency demonstrates that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child's future, although physically and financially able to do so (*see Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 961; *Matter of Geddiah S.R. [Seljeana P.]*, 195 AD3d 725, 726; *Matter of Samatha B. [Cynthia J.]*, 159 AD3d 1006, 1008). A parent who only "'partially complie[s] with his or her service plan and who has not gained insight into the issues that caused the removal of the child has not planned for the child's future'" (*Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 961, quoting *Matter of Shimon G. [Batsheva G.]*, 206 AD3d at 733; *see Matter of Phoenix E.P.-W. [Felicita P.]*, 225 AD3d 875, 876).

Here, the petitioner met its burden of establishing that the father permanently neglected the child. Contrary to the father's contention, the petitioner demonstrated, by clear and convincing evidence, that it made diligent efforts to strengthen the parent-child relationship by forming a service plan that served the needs of the father, scheduling parental access, and providing referrals to programs for the father (*see Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 961). The record shows that despite the petitioner's diligent efforts, the father did not comply with his service plan, as he failed to provide adequate proof of housing and income during the relevant time period (*see Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d 952, 954). Moreover, while there was evidence that the father had commenced various services to which he was referred by the petitioner as part of his service plan, there was inadequate proof that he completed all of them. The record also demonstrates that the father did not engage fully in the parental access offered to him and, instead, for example, often limited virtual visits to a few minutes. Further, the evidence adduced at the dispositional hearing established that termination of the father's parental rights was in the child's best interests (*see Matter of Malazah W. [Antoinette W.]*, 206 AD3d 1003, 1005).

The father's contention that the Family Court should have granted him a suspended judgment, rather than terminate his parental rights, is unpreserved for appellate review and, in any event, without merit (*see Matter of Camila G. C. [Matthew C.]*, 229 AD3d 461; *Matter of Mathew B.C. [Sue-Ann L.C.]*, 200 AD3d 689, 690). Contrary to the father's contention, a suspended judgment would not be in the best interests of the child, as she has lived with her foster parent, who has provided a stable and loving home, almost her entire life, and a suspended judgment would only prolong the delay of stability and permanence in her living situation (*see Matter of Elizabeth M.G.C. [Maria L.G.C.]*, 190 AD3d 730, 732; *Matter of Noel Sean CJ Ivan W. [Danica W.]*, 179 AD3d 1078, 1080).

Matter of Jack T., 234 AD3d 782 (2nd Dept., 2025)

In related proceedings pursuant to Social Services Law § 384-b, the mother appeals from two orders of fact-finding and disposition of the Family Court, Kings County (Melody Glover, J.) (one as to each child), both dated November 13, 2023. The orders of fact-finding and disposition, insofar as appealed from, after fact-finding and dispositional hearings, found that the mother permanently neglected the subject children, terminated her parental rights, and transferred guardianship and custody of the subject children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.

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

The petitioner, HeartShare St. Vincent's Services (hereinafter the agency), commenced these proceedings, inter alia, to terminate the mother's parental rights to the subject children on the ground of permanent neglect. Following fact-finding and dispositional hearings, the Family Court found, among other things, that the mother permanently neglected the children, terminated her parental rights, and transferred guardianship and custody of the children to the agency and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother appeals.

"When a foster care agency brings a proceeding to terminate parental rights on the ground of permanent neglect, it must, as a threshold matter, prove by clear and convincing evidence [*2]that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Phoenix E.P.-W. [Felicita P.]*, 225 AD3d 875, 876 [internal quotation marks omitted]; *see Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 960; *Matter of William E.P. [Monasha A.B.]*, 137 AD3d 918, 919). "Once the agency demonstrates that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving by clear and convincing evidence, that for a period of one year following the child's placement with the agency, the parent failed to maintain contact with the child or, alternatively, failed to plan for the future of the child, although physically and financially able to do so" (*Matter of Phoenix E.P.-W. [Felicita P.]*, 225 AD3d at 876 [internal quotation marks omitted]; *see Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 960). "A parent who has only partially complied with his or her service plan and who has not gained insight into the issues that caused the removal of the child has not planned for the child's future" (*Matter of*

Phoenix E.P.-W. [Felicita P.], 225 AD3d at 876 [internal quotation marks omitted]; *see Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 960).

Here, the agency met its burden of establishing that the mother permanently neglected the children. The agency demonstrated, by clear and convincing evidence, that it made diligent efforts to strengthen the mother's relationship with the children by formulating a service plan that served the needs of the mother, providing referrals to programs for the mother, explaining the importance of compliance with the mother's service plan, assisting her in accessing a domestic violence shelter, and facilitating parental access between the mother and the children (*see Matter of Phoenix E.P.-W. [Felicita P.]*, 225 AD3d at 876; *see Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 960; *Matter of William E.P. [Monasha A.B.]*, 137 AD3d at 919). Moreover, the record shows that the mother failed to plan for the children's futures, despite the agency's diligent efforts, as she only partially complied with her service plan. Accordingly, the Family Court properly found that the mother permanently neglected the children.

Matter of Chiamaka B. O., 235 AD3d 759 (2nd Dept., 2025)

In related proceedings pursuant to Social Services Law § 384-b, the father appeals from three orders of fact-finding and disposition of the Family Court, Queens County (Margaret Morgan, J.) (one as to each child), all dated March 28, 2024. The orders of fact-finding and disposition, insofar as appealed from, after fact-finding and dispositional hearings, found that the father permanently neglected the subject children, terminated his parental rights, and transferred guardianship and custody of the subject children to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption.
ORDERED that the orders of fact-finding and disposition are affirmed insofar as appealed from, without costs or disbursements.

The petitioner commenced these proceedings pursuant to Social Services Law § 384-b, inter alia, to terminate the father's parental rights to the subject children on the ground of [*2]permanent neglect. Following a fact-finding hearing, at which the father testified, the Family Court found that the petitioner established by clear and convincing evidence that the father permanently neglected the children. After a dispositional hearing, the court concluded that it was in the children's best interests to terminate the father's parental rights and free the children for adoption, terminated the father's parental rights, and transferred guardianship and custody of the children to the petitioner and the

Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The father appeals.

Initially, contrary to the contention of the attorney for the children, the father's failure to appear on certain dispositional hearing dates did not constitute a default. The father's attorney continued to participate in the proceedings on all of the dates on which the father failed to appear (*see Matter of Zephaniah Z. [Charlene F.]*, 220 AD3d 800, 801; *Matter of Amira W.H. [Tamara T.H.]*, 182 AD3d 547, 547).

"In a proceeding to terminate parental rights because of permanent neglect, the agency must demonstrate by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Orazio R. [Nanci P.]*, ___ AD3d ___, ___, 2024 NY Slip Op 06049, *1 [internal quotation marks omitted]; *see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d 679, 680). "Those efforts must include counseling, making suitable arrangements for [parental access], providing assistance to the parents to resolve the problems preventing the child's discharge, and advising the parents of the child's progress and development" (*Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d 952, 953 [internal quotation marks omitted]; *see Matter of Shimon G. [Batsheva G.]*, 206 AD3d 732, 733). "Once the agency demonstrates that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child's future, although physically and financially able to do so" (*Matter of Orazio R. [Nanci P.]*, ___ AD3d at ___, 2024 NY Slip Op 06049, *1-2 [internal quotation marks omitted]; *see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 680). "[T]he planning requirement contemplates that the parent shall take such steps as are necessary to provide a home that is adequate and stable, under the financial circumstances existing, within a reasonable period of time" (*Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d at 953 [internal quotation marks omitted]; *see Matter of Shimon G. [Batsheva G.]*, 206 AD3d at 733).

"[I]n providing appropriate services to a parent, an agency need not guarantee that the parent succeed in overcoming his or her predicaments" (*Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d at 953-954 [internal quotation marks omitted]; *see Matter of Sheila G.*, 61 NY2d 368, 385). "Instead, [p]arents must themselves assume a measure of initiative and responsibility; they have a duty to plan for the future of their child" (*Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d at 954 [internal quotation marks omitted]; *see Matter of Jamie M.*, 63 NY2d 388, 393). Thus, "'[a] parent who has only partially complied with his or her service plan and who has not gained insight into the issues that caused the removal of the child has not planned for the child's future'"

(*Matter of Orazio R. [Nanci P.]*, ___ AD3d at ___, 2024 NY Slip Op 06049, *2, quoting *Matter of Shimon G. [Batsheva G.]*, 206 AD3d at 733; *see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 681; *Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 961).

Here, the petitioner met its burden of establishing that the father permanently neglected the children (*see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 680; *Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 961). Contrary to the father's contention, the petitioner demonstrated, by clear and convincing evidence, that it made diligent efforts to strengthen the parent-child relationship by, inter alia, forming a service plan that served the needs of the father, assisting him in his housing search, scheduling regular parental access between him and the children, and providing him with referrals to programs to complete his service plan (*see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 680; *Matter of S.E.M. [Elizabeth A.M.]*, 213 AD3d 667, 668). The record showed that despite the petitioner's diligent efforts, the father failed to plan for the return of the children since, among other things, he did not complete any required programs but for one, did not gain insight into the issues that led to the children's removal, and did not consistently attend parental access sessions (*see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 680; *Matter of S.E.M. [Elizabeth A.M.]*, 213 AD3d at 668).

Alternatively, the father contends that the Family Court should have granted him a suspended judgment. However, this contention is unpreserved for appellate review (*see Matter of Mathew B.C. [Sue-Ann L.C.]*, 200 AD3d 689, 690; *Matter of Hope J. [Fatima M.]*, 191 AD3d 673, 674) and, in any event, without merit. A suspended judgment was not appropriate since 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 (*see Matter of Jeremiah W.T. [Shaunta K.J.—William T.]*, 206 AD3d 662, 663; *Matter of Mathew B.C. [Sue-Ann L.C.]*, 200 AD3d at 689).

The father's remaining contention is without merit.

Matter of Christopher C., 235 AD3d 865 (2nd Dept., 2025)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from an order of fact-finding and disposition of the Family Court, Kings County (Ilana Gruebel, J.), dated August 30, 2023. The order of fact-finding and disposition, insofar as appealed from, after fact-finding and dispositional hearings, found that the mother permanently neglected the subject child, terminated the mother's parental rights, and

transferred custody and guardianship of the subject child to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption.

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

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b, inter alia, to terminate the mother's parental rights to the subject child on the ground of permanent neglect. Following a fact-finding hearing, at which the mother testified, the Family Court found, among other things, that the mother permanently neglected the child. Following a dispositional hearing, the court terminated the mother's parental rights and transferred custody and guardianship of the child to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The mother appeals.

"When a foster care agency brings a proceeding to terminate parental rights on the ground of permanent neglect, it must, as a threshold matter, prove by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Naijah-S.G.B. [Thomas X.B.]*, 230 AD3d 1314, 1314 [internal quotation marks omitted]; *see Matter of Geddiah S.R. [Seljeana P.]*, 195 AD3d 725, 725). "Those efforts must include counseling, making suitable arrangements for [parental access], providing assistance to the parents to resolve the problems preventing the child's discharge, and advising the [*2]parents of the child's progress and development" (*Matter of Naijah-S.G.B. [Thomas X.B.]*, 230 AD3d at 1314-1315 [internal quotation marks omitted]; *see Matter of Geddiah S.R. [Seljeana P.]*, 195 AD3d at 725). "However, in providing appropriate services to a parent, an agency need not guarantee that the parent succeed in overcoming his or her predicaments" (*Matter of William S.L. [Julio A.L.]*, 195 AD3d 839, 842 [internal quotation marks omitted]; *see Matter of Angelina J.W. [Tanya J.W.]*, 217 AD3d 773, 775). Moreover, a parent's "mere participation in classes and programs [is] not enough to meet the requirement to plan for the children's future when he [or she does] not benefit from the services, programs, and support offered and [does] not utilize the tools or lessons learned in those classes in order to successfully plan for the children's future" (*Matter of Tymel P. [Tyrone P.]*, 157 AD3d 699, 700; *see Matter of Aniya L. [Samantha L.]*, 124 AD3d 1001, 1004). "Once the agency demonstrates that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child's future, although physically and financially able to do so"

(*Matter of Dynasty S.G. [Paula G.]*, 228 AD3d 657, 658 [internal quotation marks omitted]; *see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d 679, 681). A parent who has only partially complied with his or her service plan and who has not gained insight into the issues that caused the removal of the child has not planned for the child's future (*see Matter of Dynasty S.G. [Paula G.]*, 228 AD3d at 658; *Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 681).

Here, the petitioner met its burden of establishing that the mother permanently neglected the child. Contrary to the mother's contention, the petitioner demonstrated, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the parent-child relationship (*see* Social Services Law § 384-b[3][g][i]; [7][a]; *Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d 952, 954; *Matter of Geddiah S.R. [Seljeana P.]*, 195 AD3d at 726). Those efforts included scheduling and facilitating parental access; providing referrals to programs for the mother, including mental health services, medication management, dyadic therapy sessions with the child, and parenting classes; providing the mother with support to secure permanent housing; monitoring the mother's participation in services; meeting with the mother to review her service plan; and encouraging the mother to comply with her service plan. Despite the petitioner's efforts, although the mother attempted to comply with her service plan, she failed to plan for the child's safe return, as she failed to gain insight into the issues that caused the child's removal from her care and were preventing his return to her care (*see Matter of Scott I.R. [Jennifer M.I.]*, 180 AD3d 686, 687; *Matter of Himallay M.F.G. [Cherry A.G.]*, 141 AD3d 521, 521). Further, the mother failed to learn and benefit from the programs she attended (*see Matter of Joelle V.H. [Salvatore R.]*, 227 AD3d 1077, 1078; *Matter of Omarie S.B. [Evan J.]*, 137 AD3d 902, 903).

"At the dispositional stage of a proceeding to terminate parental rights, the court focuses solely on the best interests of the child" (*Matter of Kasimir Lee D. [Jasmaine D.]*, 198 AD3d 754, 756 [internal quotation marks omitted]; *see Matter of Aliah M.J.-N. [Candice J.—Anna J.]*, 182 AD3d 557, 559). "The factors to be considered in making the determination include the parent or caretaker's capacity to properly supervise the child, based on current information and the potential threat of future abuse and neglect" (*Matter of Jaheem M. [Cymon M.]*, 174 AD3d 610, 611 [internal quotation marks omitted]; *see Matter of Kasimir Lee D. [Jasmaine D.]*, 198 AD3d at 756). "There is no presumption that those interests will be served best by a return to the biological parent" (*Matter of Aliah M.J.-N. [Candice J.—Anna J.]*, 182 AD3d at 559; *see Matter of William S.L. [Julio A.L.]*, 195 AD3d at 843). "A suspended judgment . . . is permitted only where the court determines that such disposition is in the children's best interests" (*Matter of*

Davon K.W. [Lissette N.C.], 187 AD3d 766, 768; *see Matter of Malazah W. [Antoinette W.]*, 206 AD3d 1003, 1004).

Here, the Family Court properly determined that termination of the mother's parental rights was in the child's best interests (*see Matter of Malazah W. [Antoinette W.]*, 206 AD3d at 1004; *Matter of Davon K.W. [Lissette N.C.]*, 187 AD3d at 768). Moreover, a suspended judgment was not appropriate in light of concerns over the mother's ability to safely care for the child (*see Matter of Joelle V.H. [Salvatore R.]*, 227 AD3d at 1078; *Matter of Kasimir Lee D. [Jasmaine D.]*, 198 AD3d at 755-756; *Matter of Alfonso J.C. [Jamie A.]*, 188 AD3d 1196, 1197).

Matter of Ahking-Tyheem C. J., AD3d 2025 NY Slip Op 02778 (2nd Dept., 2025)

In a proceeding pursuant to Social Services Law § 384-b, the mother and the father separately appeal from an order of fact-finding and disposition of the Family Court, Kings County (Robert D. Hettleman, J.), dated March 26, 2024. The order of fact-finding and disposition, after fact-finding and dispositional hearings, found that the mother and the father permanently neglected the subject child, terminated their parental rights, and transferred guardianship and custody of the subject child to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption.

ORDERED that the appeal by the mother from so much of the order of fact-finding and disposition as found that the mother permanently neglected the subject child is dismissed, without costs or disbursements, as no appeal lies from that portion of the order which was entered on the mother's default (*see Matter of Serenity C.W. [Antoinette W.]*, 158 AD3d 716, 717); and it is further,

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

The petitioner, Mercy First (hereinafter the agency), commenced this proceeding pursuant to Social Services Law § 384-b, inter alia, to terminate the parental rights of the mother and the father on the ground of permanent neglect. Following a fact-finding hearing, at which the father testified, and a dispositional hearing, at which both the mother and the father testified, the Family Court determined, among other things, that the agency established by clear and convincing evidence that the mother and the father permanently neglected the subject child, terminated their parental rights, and transferred guardianship and custody of the child to the agency and the Commissioner

of the Administration for Children's Services of the City of New York for the purpose of adoption. The mother and the father separately appeal.

As an initial matter, the mother is foreclosed from raising issues related to the fact-finding phase of the proceeding, since a party cannot appeal from an order entered upon that party's default (*see* CPLR 5501[a][1]; *Matter of King D.C. [Dwayne C.]*, 222 AD3d 746, 746; *Matter of Serenity C.W. [Antoinette W.]*, 158 AD3d at 717). Since the mother appeared at the dispositional hearing, this Court may reach the issue of whether the Family Court properly terminated her parental rights and freed the child for adoption (*see Matter of King D.C. [Dwayne C.]*, 222 AD3d at 747).

"In a proceeding to terminate parental rights because of permanent neglect, the agency must demonstrate by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Dynasty S.G. [Paula G.]*, 228 AD3d 657, 658 [internal quotation marks omitted]; *see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d 679, 680). Diligent efforts include making referrals for counseling and classes, discussing the service plan with the parent and emphasizing the importance of complying with it, scheduling and supervising parental access sessions, and providing assistance to the parent to resolve the problems preventing the child's discharge (*see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 681; *Matter of Navyiah Sarai U. [Erica U.]*, 221 AD3d 959, 961; *Matter of Noel Sean CJ Ivan W. [Danica W.]*, 179 AD3d 1078, 1079). "Once the agency demonstrates that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child's future, although physically and financially able to do so" (*Matter of Dynasty S.G. [Paula G.]*, 228 AD3d at 658 [internal quotation marks omitted]; *see Matter of Orazio [Nanci P.]*, 233 AD3d 689, 690). "'[P]arents must themselves assume a measure of initiative and responsibility; they have a duty to plan for the future of their child'" (*Matter of Chiamaka B.O. [Stanley N.O]*, 235 AD3d 759, 760, quoting *Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d 952, 954). A parent's "mere participation in [classes and programs is] insufficient to meet the requirement to plan for the child's future [when the parent] failed to benefit from the services[, programs, and support] offered and did not utilize the tools or lessons learned in those classes in order to successfully plan for the child's future" (*Matter of Mark M.L. [Shantia B.]*, 210 AD3d 1093, 1094). Moreover, "[a] parent who has only partially complied with his or her service plan and who has not gained insight into the issues that caused the removal of the child has not planned for the child's future" (*Matter of Navyiah Sarai U. [Erica U.]*, 221 AD3d at 961 [internal quotation marks omitted]).

Here, contrary to the father's contentions, the agency demonstrated, by clear and convincing evidence, that it made diligent efforts to strengthen the parent-child relationship by forming a service plan that served the father's needs, consistently providing him with referrals for those services, and scheduling regular parental access sessions with the child (*see Matter of Anthony A.R. [Taicha M.P.]*, 234 AD3d 696, 696; *Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d at 954). The record shows that, despite the agency's diligent efforts, the father failed to plan for the return of the child, as he failed to complete any services, did not gain insight into the issues that led to the child's removal, and did not consistently attend parental access sessions with the child (*see Matter of Ryder S.R. [Shaquana R.]*, _____ AD3d _____, _____, 2025 NY Slip Op 01813, *2; *Matter of Christopher C. [Sonia C.]*, 235 AD3d 865, 867)

The mother and the father separately contend that the Family Court should have granted each of them suspended judgments. "[A]t the . . . dispositional hearing the court must consider only the best interests of the child involved" (*Matter of Jeremiah W.T. [Shaunta K.J.—William T.]*, 206 AD3d 662, 663 [internal quotation marks omitted]). "A dispositional order suspending judgment provides a brief grace period to give a parent found to have permanently neglected a child a second chance to prepare for reunification with the child" (*id.*; *see Matter of Amaarie L.M. [Kelly R.]*, 166 AD3d 977, 978). However, a suspended judgment "may be utilized only when the court determines that a second chance is in the child's best interests" (*Matter of Amaarie L.M. [Kelly R.]*, 166 AD3d at 978 [internal quotation marks omitted]; *see Matter of Tymel P. [Tyrone P.]*, 157 AD3d 699, 700).

The mother's lack of insight into her problems was demonstrated by her testimony that the child's placement in foster care was unrelated to the mother's drug abuse and her failure to complete any portion of her service plan. Therefore, a suspended judgment was not appropriate for [*2]the mother (*see Matter of Davon K.W. [Lissette N.C.]*, 187 AD3d 766, 768). Similarly, a suspended judgment was not appropriate for the father, as he has unequivocally refused to engage in services since the child was initially placed into foster care (*Matter of Mathew B.C. [Sue-Ann L.C.]*, 200 AD3d 689; *Matter of Christina M.A.R. [Megan M.R.]*, 154 AD3d 690, 691).

Moreover, a suspended judgment is not appropriate where, as here, a child has lived with his or her foster parent for most of the child's life, is strongly bonded to the foster parent, and is well cared for in the foster parent's home (*see Matter of Abbygail H.M.G. [Eddie G.]*, 205 AD3d 913, 915; *Matter of William S.L. [Julio A.L.]*, 195 AD3d 839, 844).

The father's remaining contention is without merit.

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

Matter of Ahmad S. M., AD3d 2025 NY Slip Op 02783 (2nd Dept., 2025)

In related proceedings pursuant to Social Services Law § 384-b, the father appeals, and the petitioner cross-appeals, from an order of fact-finding and disposition of the Family Court, Queens County (Emily Ruben, J.), dated February 14, 2024. The order of fact-finding and disposition, insofar as appealed from, after a fact-finding hearing, found that the father abandoned the subject children and terminated his parental rights. The order of fact-finding and disposition, insofar as cross-appealed from, after a fact-finding hearing, dismissed the petitions insofar as asserted against the mother.

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

The petitioner commenced these proceedings to terminate both the father's and the mother's parental rights to the subject children. Following a fact-finding hearing, the Family Court found that the father abandoned the children, terminated his parental rights without a dispositional hearing, found that the petitioner failed to establish by clear and convincing evidence that it exercised diligent efforts to strengthen the parental relationship between the mother and the children, and dismissed the petitions insofar as asserted against the mother. The father appeals, and the [*2]petitioner cross-appeals.

"Termination of parental rights is authorized by Social Services Law § 384-b(4)(b) when a parent abandons a child for a period of six months immediately prior to the date of the filing of the petition" (*Matter of Myla-Ray L. [Ryan L.]*, 195 AD3d 1024, 1024; *see Matter of Kylee I.C. [Thomas C.]*, 213 AD3d 659, 660). To establish abandonment, "the petitioner was required to demonstrate by clear and convincing evidence that during the six months prior to the filing of the petitions, the [father] evinced an intent to forgo [his] parental rights, as manifested by [his] failure to visit the children and communicate with them or the petitioner, although able to do so and not prevented or discouraged by the petitioner from doing so" (*Matter of Brooke S.M. [Carletta M.]*, 234 AD3d 764, 765; *see Matter of Dion J.L. [Danac L.]*, 183 AD3d 736, 737). "Abandonment must be proven by clear and convincing evidence" (*Matter of Kylee I.C. [Thomas C.]*, 213 AD3d at 660; *see Matter of Abel J.R. [Estilia R.]*, 220 AD3d 785, 786). "The burden rests on the parent to maintain contact, and the petitioner need not show diligent efforts to encourage the parent to visit or communicate with the child" (*Matter of Myla-Ray L. [Ryan L.]*, 195 AD3d at 1024-1025; *see Matter of King-Osiris A.T. [Isis S.]*, 224 AD3d 839, 840). "Once

the petitioning agency establishes that the parent failed to maintain contact with his or her child, the burden shifts to the parent to prove an inability to maintain contact or that he or she was prevented or discouraged from doing so by the . . . agency" (*Matter of Abel J.R. [Estilia R.]*, 220 AD3d at 786-787 [internal quotation marks omitted]; *see Matter of Kylee I.C. [Thomas C.]*, 213 AD3d at 660).

Here, there was clear and convincing evidence presented at the hearing that the father abandoned the children. Testimony by the petitioner's caseworkers and the father established that during the relevant period, the father never contacted the children or the petitioner, never provided contact information to the petitioner, and sent no letters, cards, gifts, or financial support for the children (*see Matter of King-Osiris A.T. [Isis S.]*, 224 AD3d at 840; *Matter of Myla-Ray L. [Ryan L.]*, 195 AD3d at 1024). In opposing the petition, the father failed to establish that he was unable to maintain contact or that he was prevented or discouraged from doing so by the petitioner (*see Matter of Abel J.R. [Estilia R.]*, 220 AD3d at 786-787; *Matter of Kylee I.C. [Thomas C.]*, 213 AD3d at 660).

"When a foster care agency brings a proceeding to terminate parental rights on the ground of permanent neglect, it must, as a threshold matter, prove by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Angelina J.W. [Tanya J.W.]*, 217 AD3d 773, 774 [internal quotation marks omitted]; *see* Social Services Law § 384-b[7][a]). "Those efforts must include counseling, making suitable arrangements for parental access, providing assistance to the parents to resolve the problems preventing the child's discharge, and advising the parents of the child's progress and development" (*Matter of Kasey R.L.R. [Sharreise B.]*, 233 AD3d 877, 878 [internal quotation marks omitted]; *see Matter of Karina J.M. [Carmen Enid G.]*, 145 AD3d 893, 894). "An agency must always determine the particular problems facing a parent with respect to the return of his or her child and make affirmative, repeated, and meaningful efforts to assist the parent in overcoming these handicaps" (*Matter of Kamiah J.N.H. [Katrina H.]*, 220 AD3d 861, 862; *see Matter of Jamie M.*, 63 NY2d 388, 394).

Here, the petitioner failed to meet its initial burden of establishing by clear and convincing evidence that it exercised diligent efforts to strengthen the parental relationship between the mother and the children (*see* Social Services Law § 384-b[7][a], [f]). The evidence adduced at the hearing failed to establish that the petitioner made affirmative, repeated, and meaningful efforts to obtain a psychological evaluation to assist treatment of the mother's mental illness, to prepare the mother to provide care for the children's medical needs, or to provide a referral for services that would assist the mother in managing and engaging with the children. In light of the petitioner's failure

to meet its burden of establishing its diligent efforts, the Family Court properly dismissed the petitions insofar as asserted against the mother (*see Matter of Elijah W.L. [Omisa S.C.]*, 146 AD3d 782, 784).

The parties' remaining contentions either are without merit or have been rendered [*3]academic in light of our determination.

Matter of Asia M. A., AD3d 2025 NY Slip Op 03186 (2nd Dept., 2025)

In related proceedings pursuant to Social Services Law § 384-b, the mother appeals, and the father separately appeals, from two orders of fact-finding and disposition of the Family Court, Kings County (Robert D. Hettleman, J.) (one as to each child), both dated March 6, 2024. The orders of fact-finding and disposition, after fact-finding and dispositional hearings, found that the mother and the father permanently neglected the subject children, terminated their parental rights, and transferred guardianship and custody of the subject children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.

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

The petitioner commenced these proceedings pursuant to Social Services Law § 384-b to terminate the parental rights of the mother and the father to the subject children on the ground of permanent neglect. Following fact-finding and dispositional hearings, the Family Court found that the mother and the father permanently neglected the children, terminated their parental rights, and transferred guardianship and custody of the children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother and the father separately appeal.

"'In a proceeding to terminate parental rights because of permanent neglect, the agency must demonstrate by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship'" (*Matter of Chiamaka B.O. [Stanley N.O.]*, 235 AD3d 759, 760, quoting *Matter of Orazio R. [Nanci P.]*, 233 AD3d 689, 690). "'Those efforts must include counseling, making suitable arrangements for [parental access], providing assistance to the parents to resolve the problems preventing the child's discharge, and advising the parents of the child's progress and development'" (*id.*, quoting *Matter of Alonso S.C.O. [Angela O.M.]*,

211 AD3d 952, 953). "'Once the agency demonstrates that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child's future, although physically and financially able to do so'" (*id.*, quoting *Matter of Orazio R. [Nanci P.]*, 233 AD3d at 690). "'[T]he planning requirement contemplates that the parent shall take such steps as are necessary to provide a home that is adequate and stable, under the financial circumstances existing, within a reasonable period of time'" (*id.*, quoting *Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d at 953).

"'[I]n providing appropriate services to a parent, an agency need not guarantee that the parent succeed in overcoming his or her predicaments'" (*id.*, quoting *Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d at 953-954; *see Matter of Sheila G.*, 61 NY2d 368, 385). "'Instead, [p]arents must themselves assume a measure of initiative and responsibility; they have a duty to plan for the future of their child'" (*Matter of Chiamaka B.O. [Stanley N.O.]*, 235 AD3d at 760, quoting *Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d at 954; *see Matter of Jamie M.*, 63 NY2d 388, 393). "Thus, [a] parent who has only partially complied with his or her service plan and who has not gained insight into the issues that caused the removal of the child has not planned for the child's future" (*Matter of Chiamaka B.O. [Stanley N.O.]*, 235 AD3d at 761 [internal quotation marks omitted]; *see Matter of Orazio R. [Nanci P.]*, 233 AD3d at 691; *Matter of Shimon G. [Batsheva G.]*, 206 AD3d 732, 733).

Here, the petitioner met its burden of establishing that the mother and the father permanently neglected the children (*see Matter of Chiamaka B.O. [Stanley N.O.]*, 235 AD3d at 761; *Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d 679, 680; *Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 961). Contrary to the parents' contentions, the petitioner demonstrated, by clear and convincing evidence, that it made diligent efforts to strengthen each parent's relationship with the children by, inter alia, formulating service plans that served the needs of each parent, offering assistance with housing to the mother, scheduling regular parental access between the parents and the children, and providing the parents with referrals to programs to complete their service plans (*see Matter of Chiamaka B.O. [Stanley N.O.]*, 235 AD3d at 761; *Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 680). The record shows that despite the petitioner's diligent efforts, the parents failed to plan for the return of the children since, among other things, they did not engage with their respective service plans, did not gain insight into the issues that led to the children's removal, and did not consistently attend parental access sessions (*see Matter of Chiamaka B.O. [Stanley N.O.]*, 235 AD3d at 761; *Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 680).

"'[A]t the . . . dispositional hearing the court must consider only the best interests of the child involved'" (*Matter of Jeremiah W.T. [Shaunta K.J.—William T.]*, 206 AD3d 662, 663, quoting *Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 430; *see* Family Ct Act § 631; *Matter of Star Leslie W.*, 63 NY2d 136, 147-148). "A dispositional order suspending judgment provides a brief grace period to give a parent found to have permanently neglected a child a second chance to prepare for reunification with the child" (*Matter of Jeremiah W.T. [Shaunta K.J.—William T.]*, 206 AD3d at 663; *see* Family Ct Act § 633; *Matter of Michael B.*, 80 NY2d 299, 311; *Matter of Adam M.D. [Victoria M.C.]*, 170 AD3d 1006, 1007). "A suspended judgment is permitted only where the court determines that such disposition is in the child's best interests" (*Matter of Jeremiah W.T. [Shaunta K.J.—William T.]*, 206 AD3d at 664; *see Matter of Michael B.*, 80 NY2d at 311; *Matter of Adam M.D. [Victoria M.C.]*, 170 AD3d at 1007).

Here, the Family Court properly determined that it was in the children's best interests to terminate the parental rights of the mother and the father and that a suspended judgment was not [*2]appropriate since the parents lacked insight into their problems and failed to address the issues that led to the children's removal and the finding of permanent neglect (*see Matter of Chiamaka B.O. [Stanley N.O.]*, 235 AD3d at 761; *Matter of Jeremiah W.T. [Shaunta K.J.—William T.]*, 206 AD3d at 664).

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

Matter of Makari A. H., AD3d 2025 NY Slip Op 03569 (2nd Dept., 2025)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from an order of fact-finding and disposition of the Family Court, Queens County (Monica D. Shulman, J.), dated August 1, 2024. The order of fact-finding and disposition, insofar as appealed from, upon a decision of the same court dated September 7, 2023, made after a fact-finding hearing, and after a dispositional hearing, found that the mother permanently neglected the subject child, terminated the mother's parental rights, and transferred custody and guardianship of the subject child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.

ORDERED that the order of fact-finding and disposition is reversed insofar as appealed from, on the law and the facts, without costs or disbursements, the petition insofar as asserted against the mother is denied, and the proceeding against the mother is dismissed.

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b, inter alia, to terminate the mother's parental rights to the subject child on the ground of permanent neglect. In an and order of fact-finding and disposition dated August 1, 2024, upon a decision dated September 7, 2023, made after a fact-finding hearing, and after a dispositional hearing, the Family Court, among other things, found that the mother permanently neglected the child, terminated the mother's parental rights, and transferred custody and guardianship of the child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother appeals.

"When a foster care agency brings a proceeding to terminate parental rights on the ground of permanent neglect, it must, as a threshold matter, prove by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 960 [internal quotation marks omitted]; *see* Social Services Law §§ 384-b[3][g][i], [7][a]; *Matter of Alexis M.B. [*2][Jaclyn R.P.]*, 224 AD3d 679, 680). "Those efforts must include counseling, making suitable arrangements for parental access, providing assistance to the parents to resolve the problems preventing the child's discharge, and advising the parents of the child's progress and development" (*Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 960-961 [alteration and internal quotation marks omitted]; *see* Social Services Law § 384-b[7][f]).

"Once the [agency] establishes that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child's future, although physically and financially able to do so" (*id.* at 961 [internal quotation marks omitted]; *see* Social Services Law § 384-b[7][a]; *Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 680). "A parent who has only partially complied with his or her service plan and who has not gained insight into the issues that caused the removal of the child has not planned for the child's future" (*Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 961 [internal quotation marks omitted]; *see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 680).

Here, the petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parent-child relationship, inter alia, by devising a service plan for the mother, monitoring and encouraging the mother's and the child's siblings' participation in mental health services, facilitating parental access with the child, and providing the mother with cleaning supplies and storage options to keep her apartment in a condition that could safely accommodate the child's medical condition

(*see* Social Services Law § 384-b[7][f]; *Matter of Geddiah S.R. [Seljeana P.]*, 195 AD3d 725, 726; *Matter of Winstoniya D. [Tammi G.]*, 123 AD3d 705, 706).

However, contrary to the Family Court's determination, the petitioner failed to establish, by clear and convincing evidence, that during the relevant statutory period, the mother failed substantially and continuously to maintain contact with the child or plan for his future, although physically and financially able to do so (*see* Social Services Law § 384-b[7][a]; *Matter of Geddiah S.R. [Seljeana P.]*, 195 AD3d at 726-727; *Matter of Jaylen R.B. [Lisa G.]*, 167 AD3d 871, 873). The petitioner acknowledged the mother and child's "close bond" and that he appeared to be "well cared for" during visits with the mother. Further, after the child was removed from the mother's care, the mother consistently visited the child when she was allowed to do so and substantially complied with all terms set forth by the petitioner (*see Matter of Winstoniya D. [Tammi G.]*, 123 AD3d at 706-707; *Matter of Christopher John B. [Christopher B.]*, 87 AD3d 1133, 1134).

Although the mother was at times inconsistent in attending therapy or facilitating the child's siblings' therapy, she completed a special needs parenting class as well as a psychiatric evaluation and maintained consistent contact with her caseworkers in an effort to comply whenever her obligations presented conflicts (*see Matter of Geddiah S.R. [Seljeana P.]*, 195 AD3d at 726-727; *Winstoniya D. [Tammi G.]*, 123 AD3d at 706-707; *Matter of Christopher John B. [Christopher B.]*, 87 AD3d at 1134). Overall, the record shows that the mother did remarkably well in following her service plan, despite facing significant obstacles in raising the child's siblings within the shelter system and managing her parental access with the child, who had been placed in a foster home in another borough, which was a subway and ferry ride away.

The Family Court's emphasis on an incident in which the mother either accidently or intentionally provided the child with candy was misplaced, as no competent evidence was presented at the fact-finding hearing that the child's medical condition prevented him from eating the candy and, in fact, the petitioner's own progress notes suggested the opposite. Similarly, under the circumstances, the court's emphasis on "dirty dishes" and other housekeeping issues in the mother's apartment was misplaced in light of the mother's efforts and the reality of her living situation during the relevant period.

In sum, the record supports the conclusion that the mother planned for the future of the child to the extent she was physically and financially able to do so (*see* Social Services Law § 384-b[7][a]). Therefore, the Family Court erred in adjudicating the child permanently neglected by [*3]the mother and terminating her parental rights (*see Matter*

of Geddiah S.R. [Seljeana P.], 195 AD3d at 726-727; *Matter of Winstoniya D. [Tammi G.]*, 123 AD3d at 707; *Matter of Christopher John B. [Christopher B.]*, 87 AD3d at 1134).

Matter of Keylin D. C. D., AD3d 2025 NY Slip Op 03715 (2nd Dept., 2025)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from an order of fact-finding and disposition of the Family Court, Queens County (Monica D. Shulman, J.), dated September 5, 2023. The order of fact-finding and disposition, after fact-finding and dispositional hearings, found that the mother permanently neglected the subject child, terminated the mother's parental rights, and transferred guardianship and custody of the subject child to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption.

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

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b, inter alia, to terminate the mother's parental rights to the subject child on the ground of permanent neglect. Following fact-finding and dispositional hearings, the Family Court found that the mother permanently neglected the child, terminated the mother's parental rights, and transferred guardianship and custody of the child to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The mother appeals.

"In a proceeding to terminate parental rights because of permanent neglect, the agency must demonstrate by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Ryder S.R. [Shaquana R.]*, 236 AD3d 1045, 1046 [internal quotation marks omitted]; *see* Social Services Law § 384-b[4][d]; [7][a], [f]). "Once an agency demonstrates that it made diligent efforts to encourage and strengthen the parental relationship, the agency bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child's future, although physically and financially able to do so" (*Matter of Ryder S.R. [Shaquana R.]*, 236 AD3d at 1046; *see* Social Services Law § 384-b[7][a]; *Matter of Jack T. [Carmen H.]*, 234 AD3d 782, 783).

Here, the petitioner met its burden of establishing, by clear and convincing evidence, that the mother permanently neglected the child. Contrary to the mother's contention, the petitioner demonstrated that it made diligent efforts to strengthen the parent-child

relationship by, among other things, developing a service plan that served the needs of the mother, scheduling regular parental access between the mother and the child, and providing referrals to programs and treatment for the mother (*see Matter of Dynasty S.G. [Paula G.]*, 228 AD3d 657, 658; *Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 961). Despite the petitioner's diligent efforts, the mother failed to plan for the child's return, as she failed to gain insight into the issues that caused the child's removal and were preventing the child's return to her care (*see Matter of Nathaniel T.*, 67 NY2d 838, 842; *Matter of Alice Z. [Lin Z.]*, 225 AD3d 887, 888; *Matter of Scott I.R. [Jennifer M.I.]*, 180 AD3d 686, 687). Accordingly, the Family Court properly found that the mother permanently neglected the child.

The evidence adduced at the dispositional hearing established that termination of the mother's parental rights was in the best interests of the child (*see Matter of Dynasty S.G. [Paula G.]*, 228 AD3d at 659; *Matter of Ruth C. [Jaslene C.]*, 226 AD3d 677, 679). Contrary to the mother's contention, a suspended judgment was not appropriate in light of her failure to consistently attend parental access sessions with the child (*see Matter of Ruth C. [Jaslene C.]*, 226 AD3d at 679-680; *Matter of Davon K.W. [Lissette N.C.]*, 187 AD3d 766, 768). Moreover, a suspended judgment would not be in the child's best interests, as such a disposition would only prolong the delay of stability and permanency in the child's life (*see Matter of Dynasty S.G. [Paula G.]*, 228 AD3d at 659; *Matter of Phoenix E.P.-W. [Felicita P.]*, 225 AD3d 875, 877). Further, the record supports the Family Court's determination that the best interests of the child would be served by freeing her for adoption by her foster parents, with whom the child has bonded and resided over a prolonged period of time (*see Matter of Phoenix E.P.-W. [Felicita P.]*, 225 AD3d at 877; *Matter of Abbygail H.M.G. [Eddie G.]*, 205 AD3d 913, 915).

Matter of Annabelle W., AD3d 2025 NY Slip Op 03813 (2nd Dept., 2025)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from (1) an order of fact-finding of the Family Court, Queens County (Monica D. Shulman, J.), dated January 22, 2024, and (2) an order of disposition of the same court dated August 5, 2024. The order of fact-finding, insofar as appealed from, after a fact-finding hearing, found that the mother permanently neglected the subject child. The order of disposition, upon the order of fact-finding and after a dispositional hearing, terminated the mother's parental rights and transferred guardianship and custody of the subject child to the petitioner for the purpose of adoption.

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

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

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b, inter alia, to terminate the mother's parental rights to the subject child on the ground of permanent neglect. Following a fact-finding hearing, the Family Court found, among other things, that the mother permanently neglected the child. Thereafter, following a dispositional hearing, the court terminated the mother's parental rights and transferred guardianship and custody of the child to the petitioner for the purpose of adoption. The mother appeals.

"When a foster care agency brings a proceeding to terminate parental rights on the ground of permanent neglect, it must, as a threshold matter, prove by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Christopher John B. [Christopher B.]*, 87 AD3d 1133, 1134; *[*2]see* Social Services Law § 384-b[3][g][i]; [4][d]; [7][a]; *Matter of Shimon G. [Batsheva G.]*, 206 AD3d 732, 733). "Those efforts must include counseling, making suitable arrangements for [parental access], providing assistance to the parents to resolve the problems preventing the child's discharge, and advising the parents of the child's progress and development" (*Matter of Geddiah S.R. [Seljeana P.]*, 195 AD3d 725, 725 [internal quotation marks omitted]; *see* Social Services Law § 384-b[7][f]; *Matter of Christopher C. [Sonia C.]*, 235 AD3d 865, 866). "Once the agency demonstrates that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child's future, although physically and financially able to do so" (*Matter of Ella Elizabeth V. [Reginald P.]*, 234 AD3d 703, 704; *see* Social Services Law § 384-b[7][a]; *Matter of Geddiah S.R. [Seljeana P.]*, 195 AD3d at 725-726). "A parent who has only partially complied with his or her service plan and who has not gained insight into the issues that caused the removal of the child has not planned for the child's future" (*Matter of Shimon G. [Batsheva G.]*, 206 AD3d at 733; *see Matter of Ella Elizabeth V. [Reginald P.]*, 234 AD3d at 704).

Here, the petitioner met its burden of establishing that the mother permanently neglected the child. Contrary to the mother's contention, the petitioner established, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the mother's relationship with the child by forming a service plan that served the needs

of the mother, discussing with the mother the importance of compliance with the service plan, attempting to conduct home visits, and facilitating parental access with the child. Despite those efforts, the mother failed to plan for the child's future, as she only partially complied with her service plan (*see Matter of Damaris E.A. [Johanna A.M.]*, 217 AD3d 860, 861; *Matter of Shimon G. [Batsheva G.]*, 206 AD3d at 734). Accordingly, the Family Court properly found that the mother permanently neglected the child.

The evidence adduced at the dispositional hearing established that termination of the mother's parental rights was in the child's best interests (*see Matter of Damaris E.A. [Johanna A.M.]*, 217 AD3d at 861-862). Further, the record supports the Family Court's determination that the best interests of the child would be served by freeing her for adoption by her foster mother, with whom the child has bonded and resided over a prolonged period of time (*see Matter of Abbygail H.M.G. [Eddie G.]*, 205 AD3d 913, 915).

Contrary to the mother's contention, she was not deprived of the effective assistance of counsel. Viewed in totality, the record reflects that the mother received meaningful representation (*see Matter of Bella S. [Alice Y.-S.]*, 225 AD3d 883, 885; *Matter of Fatoumata A.C. [Amadou C.]*, 206 AD3d 991, 992).

The mother's remaining contention is without merit.

Matter of Izabela T., AD3d 2025 NY Slip Op 02835 (3rd Dept., 2025)

Appeal from an order of the Family Court of Broome County (Holly Levine, J.), entered January 26, 2024, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject children to be permanently neglected, and terminated respondent's parental rights.

Respondent (hereinafter the mother) is the mother of two children (born in 2019 and 2022) who have been in petitioner's custody since 2021 and 2022, respectively. The mother was found to have neglected both children and, in April 2023, petitioner filed a permanent neglect petition alleging that she had permanently neglected the children and seeking to terminate her parental rights. The parties discussed the option of the mother executing a conditional surrender of the children to avoid a permanent neglect finding and, on the morning of December 15, 2023, counsel for petitioner advised Family Court that the mother wished to avail herself of that option. The mother refused to attend the fact-finding hearing that occurred later that day, however, and eventually appeared electronically and indicated that she wanted to instead consent to a finding of

permanent neglect. Following a colloquy in which the mother admitted to the allegations in the petition and acknowledged understanding that she was consenting to a finding of permanent neglect that would result in the termination of her parental rights, Family Court determined that the mother's consent was knowing, intelligent and voluntary. Thereafter, Family Court issued an order determining that the mother had permanently neglected the children and terminating her parental rights. The mother appeals.

The mother now argues that the allocution was inadequate and that Family Court should have gone forward with the contemplated conditional surrender, but "it is well settled that no appeal lies from an order entered on consent" because the appealing party is not aggrieved by it (*Matter of Fantasia Y.*, 45 AD3d 1215, 1216 [3d Dept 2007]; *accord Matter of Vicktoriya DD. [Daniel EE.]*, 172 AD3d 1473, 1474 [3d Dept 2019]; *see* CPLR 5511; *Matter of Tyler I. [Shawn I.]*, 219 AD3d 1097, 1099 n 6 [3d Dept 2023]; *Matter of Connor S. [Joseph S.]*, 122 AD3d 1096, 1097 [3d Dept 2014]). The appeal must therefore be dismissed. This does not preclude the mother from challenging the provisions of the order; her remedy, however, lies in filing a motion to vacate the order before Family Court and then, if necessary, appealing from the denial of that motion (*see Matter of Vicktoriya DD. [Daniel EE.]*, 172 AD3d at 1474; *Matter of Rumpel v Powell*, 129 AD3d 1344, 1345 [3d Dept 2015]; *see also Matter of Brandon N. [Joseph O.]*, 165 AD3d 1520, 1521-1522 [3d Dept 2018]).

Matter of Jayden M., 237 AD3d 1560 (4th Dept., 2025)

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), dated September 29, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent challenges the denial of his attorney's request for an adjournment, and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order of fact-finding and disposition that, inter alia, adjudicated the subject child to be permanently neglected by the father and terminated the father's parental rights. As a preliminary matter, we agree with the father that the appeal should not be dismissed as untimely. Inasmuch as the record and information before us "indicate that the [father] may have been served the order[ ] by [Family Court] via email

only, which is not a method of service provided for in Family Court Act § 1113, and the record does not otherwise demonstrate that [he] was served by any of the methods authorized by the statute," we cannot determine when, if ever, the time to take the appeal began to run, and thus it cannot be said that the father's appeal is untimely (*Matter of Bukowski v Florentino*, 210 AD3d 1520, 1521 [4th Dept 2022]; *see Matter of Robert M. v Barbara L.*, 227 AD3d 141, 144 [3d Dept 2024]; *Matter of Grayson S. [Thomas S.]*, 209 AD3d 1309, 1310-1311 [4th Dept 2022]).

We nonetheless reject the father's further contention that the order was not entered upon his default. Subject to limited exceptions not applicable here, a party "may prosecute or defend a civil action in person *or* by attorney," including such an action in Family Court (CPLR 321 [a] [emphasis added]; *see* Family Ct Act § 165 [a]; *Matter of Kwasi S.*, 221 AD2d 1029, 1030 [4th Dept 1995]; Merril Sobie, Prac Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 165). Thus, it is well established that a party's "failure to appear [in person] at the hearing on [a] petition does not automatically constitute a default" (*Matter of David A.A. v Maryann A.*, 41 AD3d 1300, 1300 [4th Dept 2007]; *see Matter of Gabriel VV. [Joni TT.]*, — AD3d &mdash, &mdash, 2025 NY Slip Op 01412, *1 [3d Dept 2025]; *Matter of Yakov T. v Tracy S.*, 227 AD3d 633, 633 [1st Dept 2024]; *Matter of O'Leary v Frangomihalos*, 89 AD3d 948, 949 [2d Dept 2011]). We have held, consistent with that principle, that in the absence of additional circumstances, " '[w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded' " (*Matter of Pollard v Pollard*, 63 AD3d 1628, 1628 [4th Dept 2009], quoting *Kwasi S.*, 221 AD2d at 1030; *see e.g. Matter of Bailey v Bailey*, 213 AD3d 1329, 1329 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]; *Matter of Hilton v Hilton*, 173 AD3d 1674, 1674 [4th Dept 2019]; *Matter of [*2]Cameron B. [Nicole C.]*, 149 AD3d 1502, 1503 [4th Dept 2017])**.** We have nonetheless clarified that "a party's failure to appear may, under certain circumstances, constitute a default, particularly where the party's attorney, although present, declines to participate in the hearing in the party's absence and instead elects to stand mute" (*Matter of Reardon v Krause*, 219 AD3d 1710, 1711 [4th Dept 2023], *lv denied* 41 NY3d 905 [2024]; *see Matter of Bianca F. [Terrald F.]*, 191 AD3d 1491, 1491 [4th Dept 2021], *lv denied* 37 NY3d 901 [2021]; *Matter of Lastanzea L. [Lakesha L.]*, 87 AD3d 1356, 1356 [4th Dept 2011], *lv dismissed in part & denied in part* 18 NY3d 854 [2011]; *cf. Matter of Clausell v Salame*, 156 AD3d 1401, 1401 [4th Dept 2017]; *Cameron B.*, 149 AD3d at 1503). As we previously suggested (*see Reardon*, 219 AD3d at 1711), the other Appellate Division departments have applied the same rule (*see e.g. Matter of Anastasia N.A. [Latonia J.]*, 218 AD3d 563, 564 [2d Dept 2023]; *Matter of Jaylen Derrick Jermaine A. [Samuel K.]*, 125 AD3d 535, 536 [1st Dept

2015]; *Matter of Naomi KK. v Natasha LL.*, 80 AD3d 834, 835 [3d Dept 2011], *lv denied* 16 NY3d 711 [2011]).

Here, we conclude that the father's refusal to appear at the fact-finding hearing constituted a default (*see Matter of Larae L. [Heather L.]*, 202 AD3d 1454, 1455 [4th Dept 2022], *lv denied* 38 NY3d 907 [2022]; *Matter of Harold L.S. [Harold S.]*, 89 AD3d 1447, 1447 [4th Dept 2011]). The record establishes that the father, who had a history of intermittent attendance, failed to appear at the fact-finding hearing despite having been made aware of the scheduled court date. The father's attorney initially explained that he had received an email from the father on the morning of the fact-finding hearing in which the father indicated that he lacked transportation. A foster care caseworker further explained, however, that the father had previously expressed his preference to skip the scheduled court date concerning his parental rights to the child rather than reschedule a conflicting appointment regarding a benefits program application. When the caseworker spoke with the father on the morning of the fact-finding hearing to offer him transportation to court, the father responded with an expletive-filled diatribe expressing his displeasure with petitioner's caseworkers, emphatically refusing to appear in court, and representing that the parental rights termination proceeding could proceed "by default." The father's attorney, having explained that he was not authorized to proceed in the father's absence, declined to participate in the fact-finding hearing and instead elected to stand mute (*see Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1403 [4th Dept 2016]; *cf. Matter of Bradley M.M. [Michael M.—Cindy M.]*, 98 AD3d 1257, 1258 [4th Dept 2012]; *see also Larae L.*, 202 AD3d at 1455). Under these circumstances, as the court indicated in the order and contrary to the father's contention, we conclude that the order was entered upon the father's default (*see Larae L.*, 202 AD3d at 1455; *Harold L.S.*, 89 AD3d at 1447; *see also Matter of Corey MM. [Cassandra LL.]*, 177 AD3d 1119, 1120-1121 [3d Dept 2019]; *see generally* CPLR 5511). We also note that the record supports the additional conclusion that the father willfully failed to appear at the fact-finding hearing (*see Matter of Malachi S. [Michael W.]*, 195 AD3d 1445, 1446 [4th Dept 2021], *lv dismissed* 37 NY3d 1081 [2021]; *Matter of Scott KK. v Patricia LL.*, 110 AD3d 1260, 1261 [3d Dept 2013], *lv dismissed in part & denied in part* 22 NY3d 1054 [2014]; *cf. Matter of Kendra M.*, 175 AD2d 657, 657-658 [4th Dept 1991]).

"[N]otwithstanding the prohibition set forth in CPLR 5511 against an appeal from an order or judgment entered upon the default of the appealing party, the appeal from [such an] order [or judgment] brings up for review those 'matters which were the subject of contest' before the [trial court]" (*Tun v Aw*, 10 AD3d 651, 652 [2d Dept 2004], quoting *James v Powell*, 19 NY2d 249, 256 n 3 [1967], *rearg denied* 19 NY2d 862

[1967]; *see Reardon*, 219 AD3d at 1712; *Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1080 [4th Dept 2019]). Thus, the father's contention that the court abused its discretion in denying his attorney's request for an adjournment is reviewable on this appeal (*see Larae L.*, 202 AD3d at 1455; *Matter of John D., Jr. [John D.]*, 199 AD3d 1412, 1413 [4th Dept 2021], *lv denied* 38 NY3d 903 [2022]; *Matter of Ramere D. [Biesha D.]*, 177 AD3d 1386, 1386-1387 [4th Dept 2019], *lv denied* 35 NY3d 904 [2020]).

We nonetheless reject that contention. "The grant or denial of a motion for 'an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*Matter of Steven B.*, 6 NY3d 888, 889 [2006]; *see Matter of Aniyah J. [Katara J.]*, 221 AD3d 1472, 1472 [4th Dept 2023]). Here, the father's attorney "failed to demonstrate that the need for the adjournment to [arrange transportation or avoid a scheduling conflict] was not based on a lack of due diligence on the part of the [father] or [his] attorney" (*Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747 [4th Dept 2011]; *see Matter of Grice v Harris*, 114 AD3d [*3]1276, 1276 [4th Dept 2014]; *see generally Steven B.*, 6 NY3d at 889). Consequently, we conclude that the court did not abuse its discretion in denying the request of the father's attorney for an adjournment (*see Matter of Tyrone O. [Lillian G.]*, 199 AD3d 1386, 1387 [4th Dept 2021], *lv denied* 38 NY3d 904 [2022]; *Grice*, 114 AD3d at 1276).

Finally, the remaining issues raised by the father are not reviewable on appeal from the order entered upon his default because neither issue was a subject of contest before the court (*see Reardon*, 219 AD3d at 1713; *Larae L.*, 202 AD3d at 1455; *cf. DiNunzio*, 175 AD3d at 1080-1082).

Matter of Jemma M., 237 AD3d 1569 (4th Dept., 2025)

Appeals from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered September 19, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondents with respect to the subject child.

It is hereby ORDERED that said appeal by respondent Gregory M. is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father and respondent mother appeal from an order that, inter alia, terminated their parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption.

With respect to the father's appeal, the father refused to attend the fact-finding and dispositional hearing and his attorney was not present. The father's refusal to appear constituted a default, and "[i]t is well settled that no appeal lies from an order that is entered upon the default of the appealing party" (*Matter of David P.S. [Grace C.L.]*, 222 AD3d 1332, 1332 [4th Dept 2023] [internal quotation marks omitted]). We therefore dismiss the father's appeal (*see id.* at 1332-1333; *Matter of Paul S. [Ingrid D.]*, 191 AD3d 1421, 1422 [4th Dept 2021]; *Matter of Harold L.S. [Harold S.]*, 89 AD3d 1447, 1447 [4th Dept 2011]).

With respect to the mother's appeal, we affirm. Contrary to the mother's contention, petitioner established that it exercised diligent efforts to encourage and strengthen the parent-child relationship, as required by Social Services Law § 384-b (7) (a). "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parent[ ] to overcome problems that prevent the discharge of the child into their care, and informing the parent[ ] of [the] child's progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901 [4th Dept 1997]; *see* § 384-b [7] [f]). Petitioner is not required, however, to "guarantee that the parent succeed in overcoming [their] predicaments" (*Matter of Sheila G.*, 61 NY2d 368, 385 [1984]; *see Matter of Jamie M.*, 63 NY2d 388, 393 [1984]). Rather, the parent must "assume a measure of initiative and responsibility" (*Jamie M.*, 63 NY2d at 393). Here, petitioner established by clear and convincing evidence (*see* § 384-b [3] [g] [i]) that it exercised diligent efforts to encourage and strengthen the mother's relationship with the child (*see Matter of Janette G. [Julie G.]*, 181 AD3d 1308, 1308-1309 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020]). Petitioner developed a plan for services addressing the mother's needs; reviewed and discussed the service plan with the mother and apprised the mother of her progress on a regular basis; referred her to substance abuse treatment and family therapy; and encouraged the mother to visit the child.

Contrary to the further contention of the mother, we conclude that, despite petitioner's diligent efforts, the mother failed to plan for the child's future. " '[T]o plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child" (Social Services Law § 384-b [7] [c]). Here, the evidence established that the mother failed to obtain suitable housing and failed to progress to unsupervised visitation with the child. She also failed to complete substance abuse treatment, and thus did not "take steps to correct the conditions that led to the removal of the child from [her] home" (*Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986] [internal quotation marks omitted]; *see Matter of Jacob A. [Robert G.N.]*, 231 AD3d

1485, 1486 [4th Dept 2024]; *Matter of Giohna R. [John R.]*, 179 AD3d 1508, 1509 [4th Dept 2020], *lv dismissed in part & denied in part* 35 NY3d 1003 [2020]).

Contrary to the mother's further contention, we conclude that "the record supports [Family Court's] determination that termination of her parental rights is in the best interests of the child, and that a suspended judgment was not warranted under the circumstances inasmuch as any progress made by the mother prior to the dispositional determination was insufficient to warrant any further prolongation of the child's unsettled familial status" (*Matter of Kendalle K. [Corin K.]*, 144 AD3d 1670, 1672 [4th Dept 2016]).

We reject the mother's contention that she was denied effective assistance of counsel. She raised many of the same alleged failures by counsel in a related proceeding, and we concluded that they were without merit (*Matter of Nedia M. v Ashley M.*, — AD3d &mdash, &mdash, 2025 NY Slip Op 01731, *2 [4th Dept 2025]). We conclude that "the record, viewed in totality, reveals that the [mother] received meaningful representation" (*Matter of Carter H. [Seth H.]*, 191 AD3d 1359, 1360 [4th Dept 2021]; *see Matter of Nykira H. [Chellsie B.-M.]*, 181 AD3d 1163, 1165 [4th Dept 2020]).

The mother further contends that the court erred in sua sponte conforming the pleading to the proof by amending the one-year period stated in the petition by six days. We reject that contention. The petition alleged that the mother failed for a period of one year, from October 2, 2019, until October 2, 2020, to plan for the future of the child, but in fact the child was not removed from the mother's home until October 8, 2019. Family Court has the authority to conform the pleadings to the proof, sua sponte (*see Matter of Pandora S.D. [Isabelle D.]*, 231 AD3d 575, 575-576 [1st Dept 2024], *lv denied* 43 NY3d 901 [2025]; *Matter of Jackalyne WW. [Kevin VV.]*, 195 AD3d 1092, 1092-1093 [3d Dept 2021]; *see generally* CPLR 3025 [c]). The court did not abuse its discretion inasmuch as the mother was neither surprised nor prejudiced by the amendment (*see Jackalyne WW.*, 195 AD3d at 1092-1093; *Matter of Ariel C.W.-H. [Christine W.]*, 89 AD3d 1438, 1438-1439 [4th Dept 2011]).

The mother's contention that the court erred when it proceeded to a dispositional hearing prior to making the required findings for permanent neglect (*see* Family Ct Act § 625 [a]) is not preserved for our review (*see* CPLR 5501 [a] [3]; Family Ct Act § 1118; *see generally Matter of Kasprowicz v Osgood*, 101 AD3d 1760, 1761 [4th Dept 2012]).

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

TPR Mental Illness

Matter of Justina C. M. J., 236 AD3d 1026 (2nd Dept., 2025)

In related proceedings pursuant to Social Services Law § 384-b, the mother appeals from two orders of fact-finding and disposition of the Family Court, Westchester County (Nilda Morales-Horowitz, J.) (one as to the subject child Amanda J. O. and one as to the subject children Justina C. M. J., Stephen F. L. J., and Maximus L. J.), both dated February 23, 2022. The order of [*2]fact-finding and disposition relating to the subject child Amanda J. O., after a hearing, found that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for that child, terminated her parental rights, and transferred guardianship and custody of that child to the petitioner for the purpose of adoption. The order of fact-finding and disposition relating to the subject children Justina C. M. J., Stephen F. L. J., and Maximus L. J., after a hearing, found that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for those children, terminated her parental rights, and transferred guardianship and custody of those children to the petitioner.

ORDERED that the appeal from so much of the order of fact-finding and disposition relating to the subject child Amanda J. O. as terminated the mother's parental rights and transferred guardianship and custody of that child to the petitioner for the purpose of adoption is dismissed as academic, without costs or disbursements; and it is further,

ORDERED that the order of fact-finding and disposition relating to the subject child Amanda J. O. is reversed insofar as reviewed, on the law and in the exercise of discretion, without costs or disbursements; and it is further,

ORDERED that the order of fact-finding and disposition relating to the subject children Justina C. M. J., Stephen F. L. J., and Maximus L. J. is reversed, on the law and in the exercise of discretion, without costs and disbursements, and the matter is remitted to the Family Court, Westchester County, for further proceedings in accordance herewith.

The petitioner commenced these proceedings pursuant to Social Services Law § 384-b to terminate the mother's parental rights to the subject children, alleging that she suffered from a mental illness that put the children in danger of becoming neglected if they were returned to her care. On March 9, 2021, the Family Court granted the mother's application to represent herself in the proceedings with the assistance of a legal advisor.

On December 8, 2021, the Family Court commenced a hearing on the petitions in the mother's absence, despite a representation from the mother's legal advisor that the mother had been directed by her medical provider to quarantine and was requesting an adjournment. The hearing continued on December 15, 2021, at which point the mother appeared and made certain applications to the court, including for additional time to obtain new counsel, to review evidence admitted on the prior date, and to consult with her legal advisor. The court denied the mother's applications and, after a verbal exchange, directed that the mother be removed from the courtroom for the remainder of the hearing. Thereafter, in an order of fact-finding and disposition, the court found that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child Amanda J. O., terminated the mother's parental rights, and transferred guardianship and custody of that child to the petitioner for the purpose of adoption. In a separate order of fact-finding and disposition, the court found that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the children Justina C. M. J., Stephen F. L. J., and Maximus L. J., terminated the mother's parental rights, and transferred guardianship and custody of those children to the petitioner. The mother appeals.

The appeal from so much of the order of fact-finding and disposition relating to Amanda J. O. as terminated the mother's parental rights and transferred custody of that child to the petitioner for the purpose of adoption must be dismissed as academic, since that child has since reached the age of 18 (*see Matter of Marthina S.J.Z.H.-B.R. [Calvin R.]*, 198 AD3d 655, 657). Nevertheless, the mother's challenge to the Family Court's finding that her mental illness rendered her unable to provide proper and adequate care for Amanda J. O. is not academic, since such finding was in and of itself stigmatizing to the mother and might indirectly affect the mother's status in future proceedings (*see id.*).

"A parent has a due process right to be present during proceedings to terminate parental rights" (*Matter of Jacqueline E.S.B. [Daniel B.]*, 160 AD3d 828, 828; *see Matter of Laticia [*3]B.*, 156 AD2d 681, 682). Nonetheless, "[a] parent's right to be present for fact-finding and dispositional hearings in proceedings to terminate parental rights is not

absolute" (*Matter of Jayson C. [Kimberly C.]*, 219 AD3d 949, 952 [internal quotation marks omitted]). "The child whose guardianship and custody is at stake also has a fundamental right to a prompt and permanent adjudication" (*id.* [citations and internal quotation marks omitted]). "Thus, when faced with the unavoidable absence of a parent, a court must balance the respective rights and interests of both the parent and the child in determining whether to proceed" (*id.* [internal quotation marks omitted]).

Here, based on a confluence of factors, the mother was deprived of her due process right to be present in the proceedings seeking to terminate her parental rights. First, the Family Court determined to commence the hearing in the mother's absence, even though she was proceeding pro se and had made representations to the court through her legal advisor that she had been directed to quarantine by her medical provider and was requesting an adjournment (*see Matter of Jonathan N., Jr. [Jonathan N., Sr.]*, 194 AD3d 815, 816; *Matter of Chloe N. [Joshua N.]*, 143 AD3d 1114, 1116). Notably, the record does not indicate that the mother had a history of failing to appear, nor did the court apparently rely on that factor in deciding to commence the hearing in the mother's absence (*cf. Matter of Jasiah T.-V.S.J. [Joshua W.—Shatesse J.]*, 166 AD3d 876, 878).

Furthermore, when the hearing continued one week later, the Family Court improvidently exercised its discretion in denying the mother's requests, among other things, for a copy of her own court-ordered psychiatric evaluation, which, at that point, was in evidence, and for additional time to obtain a court transcript and to consult with her legal advisor. Perhaps most significantly, the court abused its discretion in excluding the mother from the courtroom for the remainder of the hearing, without the issuance of a warning and with knowledge of the mother's diagnoses contained in the psychiatric evaluation (*see* 22 NYCRR 205.4[b]; *see also People v Antoine*, 189 AD3d 1445, 1446-1447). Thus, on both dates of the hearing, the mother was left without an advocate (*cf. Matter of Sean P.H. [Rosemarie H.]*, 122 AD3d 850, 851).

Under these circumstances, the mother was deprived of her due process right to be present in the proceedings. The deprivation of the mother's right to due process requires reversal without regard to the merits of her position on the petitions (*see Matter of Chloe N. [Joshua N.]*, 143 AD3d at 1116; *cf. Matter of Sa'Nai F.B.M.A. [Chaniece T.]*, 232 AD3d 597, 599; *Matter of Jonathan N., Jr. [Jonathan N., Sr.]*, 194 AD3d at 816). Accordingly, we reverse the order of fact-finding and disposition relating to Amanda J. O. insofar as reviewed, reverse the order of fact-finding and disposition relating to Justina C. M. J., Stephen F. L. J., and Maximus L. J., and remit the matter to the Family Court, Westchester County, for a new hearing, after the mother has been assigned

counsel or permitted an opportunity to retain counsel, with respect to Justina C. M. J., Stephen F. L. J., and Maximus L. J.

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

Matter of Jamari O. C., AD3d 2025 NY Slip Op 03568 (2nd Dept., 2025)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from an order of fact-finding and disposition of the Family Court, Rockland County (Keith J. Cornell, J.), dated January 2, 2024. The order of fact-finding and disposition, after a hearing, found that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the subject child, terminated her parental rights, and transferred guardianship and custody of the subject child to the petitioner for the purpose of adoption.

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

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

An agency seeking termination of parental rights on the ground of mental illness or intellectual disability must demonstrate by clear and convincing evidence that the parent is "presently and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate care for a child who has been in the care of [the] agency for the period of one year immediately prior to the date on which the petition is filed" (*id.* § 384-b[4][c]; *see Matter of Bella S. [Alice Y.-S.]*, 225 AD3d 883, 883). For the purpose of Social Services Law § 384-b, "'mental illness' means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in or returned to the custody of the parent, the child would be

in danger of becoming a neglected child as defined in the family court act" (*id.* § 384-b[6][a]; *see Matter of [*2]Megan A.F. [Megan R.]*, 224 AD3d 684, 684-685).

Here, the petitioner presented the testimony of an expert psychologist, who personally interviewed and conducted psychological testing on the mother and concluded that she suffers from schizoaffective disorder. The psychologist opined that due to, among other things, the mother's history of noncompliance with treatment and lack of insight into her mental heath needs, the mother is presently and for the foreseeable future unable to provide proper and adequate care for the child. The psychologist further opined that if the child were returned to the mother, the child would be at risk of being neglected due to the nature of the mother's illness. 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, to provide proper and adequate care for the child and supported the Family Court's determination to terminate the mother's parental rights to the child (*see Matter of Bethany R. [Bethmarie R.]*, 213 AD3d 676, 677; *Matter of Kasimir Lee D. [Jasmaine D.]*, 198 AD3d 754, 756; *Matter of Eliyah I.M. [Angel C.M.]*, 154 AD3d 696, 697). Contrary to the mother's contention, the psychologist's evaluation was not stale (*see Matter of Edward E.M. [Edward M.]*, 222 AD3d 527, 528; *Matter of Brianna K.R. [Bernard R.]*, 199 AD3d 500, 501-502).

Matter of Albert S., AD3d 2025 NY Slip Op 02695 (4th Dept., 2025)

Appeals from an order of the Family Court, Erie County (Margaret O. Szczur, J.), dated January 30, 2023, in proceedings pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondents with respect to the subject children.

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

Memorandum: In these proceedings pursuant to Social Services Law § 384-b, respondent father and respondent mother each appeal from an order of Family Court that terminated their parental rights with respect to the subject children on the ground of mental illness. We affirm.

To meet its burden on a petition seeking termination of parental rights on the ground of mental illness, the petitioner must establish by clear and convincing evidence that the parent is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately prior to the date on which the

petition is filed" (Social Services Law § 384-b [4] [c]; *see* § 384-b [3] [g] [i]; *Matter of Nereida S.*, 57 NY2d 636, 640 [1982], *rearg denied* 57 NY2d 775 [1982]; *Matter of Ashley L.*, 22 AD3d 915, 915-916 [3d Dept 2005]). For purposes of the statute, " 'mental illness' means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child" (§ 384-b [6] [a]). "[O]nly the totality of the mental illness need be proven by clear and convincing evidence" (*Matter of Dylan K.*, 269 AD2d 826, 827 [4th Dept 2000], *lv denied* 95 NY2d 766 [2000] [internal quotation marks omitted]). In any proceeding for termination of parental rights on the ground of mental illness, "the court is required to order the parent, alleged to be mentally ill, to be examined by a qualified psychiatrist or psychologist and shall take testimony from the appointed expert" (*Matter of Rahsaan I. [Simone J.]*, 180 AD3d 1162, 1163 [3d Dept 2020]; *see* § 384-b [6] [e]; *Matter of Hime Y.*, 52 NY2d 242, 247-248 [1981]). In sum, termination of parental rights on the ground of mental illness "requires a two-part determination at the fact-finding stage, first of the parent['s] condition and capacity, including consideration of measures on the part of the [s]tate to maintain the family setting, and second of the anticipated effect for the foreseeable future if the child is returned to the[parent's] care" (*Matter of Joyce T.*, 65 NY2d 39, 48 [1985]).

Here, contrary to respondents' contentions, we conclude that petitioner met its burden of establishing by clear and convincing evidence that both the mother and the father are presently [*2]and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the children, who had each been in the care of an authorized agency for over one year immediately prior to the filing of the respective petitions (*see* Social Services Law § 384-b [4] [c]).

Petitioner presented the testimony and two reports of a court-appointed psychologist who clinically observed respondents, both alone and with the children, and reviewed their history and test results. The court-appointed psychologist diagnosed the mother with depression accompanied by, among other things, a history of trauma, and further opined that the mother's resistence to taking her prescribed antidepressant medication was indicative of her lack of insight and motivation to address her condition (*see Matter of Charity A.*, 38 AD3d 1276, 1276 [4th Dept 2007]; *see also Matter of M.R.V. [B.V.]*, 224 AD3d 579, 580 [1st Dept 2024]; *Matter of William M.E. [Shaunette W.]*, 204 AD3d 532, 532 [1st Dept 2022]). The court-appointed psychologist also opined that the father, who does not dispute on appeal that he suffers from mental illness, had a mixed personality disorder characterized by antisocial, narcissistic, and borderline traits and maladaptive

behavior (*see Matter of Steven M. [Scott M.]*, 221 AD3d 1518, 1518-1519 [4th Dept 2023], *lv denied* 41 NY3d 905 [2024]; *Matter of Evelyn B.*, 37 AD3d 991, 992-993 [3d Dept 2007]; *Matter of Dayjah Ann B.*, 13 AD3d 518, 519 [2d Dept 2004]). Additionally, petitioner presented the testimony of another psychologist who, after performing an independent evaluation at the request of counsel for respondents, agreed completely with the court-appointed psychologist and added that testing revealed that the mother also suffered from a personality disorder (*see Charity A.*, 38 AD3d at 1276; *see also Matter of Rosie Shameka S.R. [Tulip S.R.]*, 102 AD3d 480, 481 [1st Dept 2013]). Although the psychologists acknowledged that the mother's condition could theoretically improve with proper medication and therapy, "[t]he mere possibility that [her] condition, with proper treatment, could improve in the future is insufficient to vitiate [the court's determination]" (*Matter of Steven M.*, 37 AD3d 1072, 1072 [4th Dept 2007] [internal quotation marks omitted]; *see Matter of Joseph E.K. [Lithia K.]*, 122 AD3d 1373, 1373-1374 [4th Dept 2014]).

The record further establishes that the psychologists agreed that respondents, whether alone or together, were, by reason of their respective mental illnesses, "unable to parent the children effectively, and that the children would be in danger of being neglected if they were returned to [their] care at the present time or in the foreseeable future" (*Matter of Jason B. [Phyllis B.]*, 160 AD3d 1433, 1434 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]; *see M.R.V.*, 224 AD3d at 580; *William M.E.*, 204 AD3d at 532; *Charity A.*, 38 AD3d at 1276). Although respondents' psychological expert disputed that respondents suffered from mental illness, he further testified that he was not retained to offer an opinion whether respondents could properly and adequately care for the children. To the extent that the opinion of respondents' psychological expert conflicts with the opinions of the psychologists relied upon by petitioner, it "merely raised a question of credibility for the court to determine" (*Matter of Damion S.*, 300 AD2d 1039, 1040 [4th Dept 2002]; *see Matter of Meyah F. [Shelby L.]*, 203 AD3d 1558, 1559 [4th Dept 2022]). The court's "determination regarding the credibility of witnesses is entitled to great weight on appeal[ ] and will not be disturbed if supported by the record," and we perceive no basis here for disturbing the court's credibility determinations (*Meyah F.*, 203 AD3d at 1559 [internal quotation marks omitted]; *see Matter of Shahida M.*, 59 AD3d 976, 976 [4th Dept 2009], *lv denied* 12 NY3d 708 [2009]; *Matter of Anthony M.*, 56 AD3d 1124, 1125 [4th Dept 2008], *lv denied* 12 NY3d 702 [2009]).

TPR DISPOSITIONS

Matter of Messiah S. E., 237 AD3d 698 (2nd Dept., 2025)

In related proceedings pursuant to Social Services Law § 384-b, the mother appeals from three orders of fact-finding and disposition of the Family Court, Queens County (Margaret Morgan, J.) (one as to each child), all dated May 13, 2024. The orders of fact-finding and disposition, insofar as appealed from, after fact-finding and dispositional hearings, found that the mother permanently neglected the subject children, terminated the mother's parental rights, and transferred custody and guardianship of the subject children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.

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

The petitioner commenced these related proceedings pursuant to Social Services Law § 384-b, inter alia, to terminate the mother's parental rights to the three subject children on the [*2]ground of permanent neglect. In three orders of fact-finding and disposition dated May 13, 2024, one as to each child, the Family Court, after fact-finding and dispositional hearings, found that the mother permanently neglected the children, terminated her parental rights, and transferred guardianship and custody of the children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother appeals.

"To constitute a business record exception to the hearsay rule, the proponent of the record must first demonstrate that it was within the scope of the entrant's business duty to record the act, transaction or occurrence sought to be admitted" (*Matter of Leon RR*, 48 NY2d 117, 122; *see* CPLR 4518[a]; *Matter of James M.B. [Claudia H.]*, 155 AD3d 1027, 1030). "In addition, each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception" (*Matter of Leon RR*, 48 NY2d at 122; *see Matter of Sincere S. [Jahquan S.]*, 176 AD3d 1072, 1074).

Here, during the fact-finding hearing, the petitoner submitted, through its witness's testimony, its progress notes. A "proper foundation for the admission of" the progress notes "was laid by the testimony" of the petitioner's witness (*Matter of James M.B.*

[Claudia H.], 155 AD3d at 1030), who testified that the progress notes were prepared in the ordinary course of the petitioner's business, that she was familiar with the petitioner's record-keeping practices, and that anyone who worked on a case was required to make entries. Accordingly, the progress notes were properly admitted into evidence as a business record (*see id.*).

"When a foster care agency brings a proceeding to terminate parental rights on the ground of permanent neglect, it must, as a threshold matter, prove by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 960 [internal quotation marks omitted]; *see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d 679, 680). Once the agency demonstrates that it made diligent efforts to encourage and strengthen the parental relationship, "it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child's future, although physically and financially able to do so" (*Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 961 [internal quotation marks omitted]; *see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 680). "A parent who has only partially complied with his or her service plan and who has not gained insight into the issues that caused the removal of the child has not planned for the child's future" (*Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 961 [internal quotation marks omitted]; *see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 680).

Here, the petitioner met its burden of establishing that the mother permanently neglected the three children. Contrary to the mother's contention, the petitioner demonstrated by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parent-child relationship by forming a service plan that addressed the mother's needs, providing referrals for the mother to various programs, informing the mother of the development of the children, and assisting her in acquiring stable housing. Despite the petitioner's diligent efforts, the mother did not comply with her service plan, as she failed to engage with and benefit from services provided to her, to regularly visit the children, to submit for drug screenings, and to maintain consistent contact with the petitioner during the relevant time period.

Family Court Act § 1033-b(1)(b) requires the court, at an initial appearance based on a petition filed pursuant to Family Court Act article 10, "to, among other things, advise [the] respondent of the allegations in the petition" (*Matter of Timothy K. Jr. [Timothy K.]*, 225 AD3d 700, 701 [internal quotation marks omitted]). Here, the mother was not read the allegations in the petitions at her initial court appearance. Notwithstanding, "[t]here is no indication that the [mother], who was aided by counsel, was not fully aware of the

contents of the petition[s] at the time of [her] first appearance" (*id.* at 702). The mother testified at the fact-finding hearing that she understood that these proceedings were initiated because the oldest child sustained burns. She also testified that she knew what was required of her to regain custody of her children and the consequences of her [*3]failure to comply with her service plan.

The mother's contention that the Family Court should have granted her a suspended judgment, rather than terminate her parental rights, is without merit. Contrary to the mother's contention, a suspended judgment was not warranted under the circumstances since it "would [have] only prolong[ed] the delay of stability and permanence in [the children's] living situation," and the best interests of the children were to be freed for adoption (*Matter of Ella Elizabeth V. [Reginald P.]*, 234 AD3d 703, 705; *see Matter of Destiny B.-R. v Juan A.R.*, 231 AD3d 944, 945).

The mother's contention that the Family Court should have ordered post-termination parental access is also without merit. A court may order post-termination parental access "when the termination of parental rights results from a voluntary surrender under Social Services Law § 383-c, but an adversarial proceeding pursuant to Social Services Law § 384-b does not offer such option" (*Matter of Allyana J. [Sophia Y.]*, 232 AD3d 896, 897-898). Here, since the mother's parental rights were terminated as a result of an adversarial proceeding, the "Family Court ha[d] no authority to permit post-termination [parental access] between" her and the children (*Matter of Destiney D.M.L. [Jose L.]*, 170 AD3d 838, 839; *see Matter of "Baby Boy" I. v Edna I.*, 166 AD3d 975, 975).

The mother's remaining contentions are without merit.

Matter of Hanah A., AD3d 2025 NY Slip Op 03187 (2nd Dept., 2025)

In related proceedings pursuant to Social Services Law § 384-b, the father appeals from (1) an order of fact-finding of the Family Court, Orange County (Victoria B. Campbell, J.), dated April 15, 2024, and (2) an order of disposition of the same court also dated April 15, 2024. The order of fact-finding, insofar as appealed from, after a fact-finding hearing, found that the father permanently neglected the subject children. The order of disposition, insofar as appealed from, upon the order of fact-finding and after a dispositional hearing, terminated the father's parental rights and transferred custody and guardianship of the subject children to the Orange County Department of Social Services for the purpose of adoption.

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

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

The petitioner commenced these proceedings pursuant to Social Services Law § 384-b, inter alia, to terminate the father's parental rights on the ground of permanent neglect. Following a fact-finding hearing, the Family Court found, among other things, that the father permanently [*2]neglected the subject children. Following a dispositional hearing, the court, inter alia, terminated the father's parental rights and transferred custody and guardianship of the children to the petitioner for the purpose of adoption. The father appeals.

"In a proceeding to terminate parental rights on the ground of permanent neglect, the agency must demonstrate 'by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship'" (*Matter of Ella Elizabeth V. [Reginald P.]*, 234 AD3d 703, 704 [internal quotation marks omitted], quoting *Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 960; *see* Social Services Law § 384-b[7][a]). "'Those efforts must include counseling, making suitable arrangements for [parental access], providing assistance to the parents to resolve the problems preventing the child's discharge, and advising the parents of the child's progress and development'" (*Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d 952, 953, quoting *Matter of Shimon G. [Batsheva G.]*, 206 AD3d 732, 733). "Once the agency demonstrates that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child's future, although physically and financially able to do so" (*Matter of Ella Elizabeth V. [Reginald P.]*, 234 AD3d at 704). "A parent who has only partially complied with his or her service plan and who has not gained insight into the issues that caused the removal of the child has not planned for the child's future" (*Matter of Shimon G. [Batsheva G.]*, 206 AD3d at 733; *see e.g. Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d 679, 681; *Matter of Elizabeth M.G.C. [Maria L.G.C.]*, 190 AD3d 730, 731).

Here, the petitioner met its burden of establishing that the father permanently neglected the children. Contrary to the father's contention, the petitioner demonstrated that it made diligent efforts to strengthen the father's parental relationship with the children, including attempting to schedule parental access, offering mental health counseling to the father,

providing him with monthly updates as to the status of the children, and attempting to schedule meetings to help the father plan for the children's future. Despite these efforts, the father failed to maintain contact with the children during the relevant time frame and further failed to complete his service plan (*see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 681).

"At the dispositional stage of a proceeding to terminate parental rights, the court focuses solely on the best interests of the child, and there is no presumption that those interests will be served best by any particular disposition" (*Matter of Orazio R. [Nanci P.]*, 233 AD3d 689, 691, citing Family Ct Act § 631; *see Matter of Star Leslie W.*, 63 NY2d 136, 147-148). "'The factors to be considered in making the determination include the [parent's] capacity to properly supervise the child, based on current information and the potential threat of future abuse and neglect'" (*Matter of Orazio R. [Nanci P.]*, 233 AD3d at 691, quoting *Matter of William S.L. [Julio A.L.]*, 195 AD3d 839, 843). "At disposition, '[t]here is no presumption that those interests will be served best by a return to the biological parent'" (*Matter of William S.L. [Julio A.L.]*, 195 AD3d at 843, quoting *Matter of Aliah M.J.-N. [Candice J.—Anna J.]*, 182 AD3d 557, 559).

Here, the evidence adduced at the dispositional hearing demonstrated that the father lacked capacity and willingness to properly supervise the children, to communicate with the children or the petitioner, or to resolve the issues that led to the removal of the children five years prior. Furthermore, the children had been in foster care for five years, the majority of their lives, at the time of the hearing. Therefore, the Family Court properly determined that it was in the children's best interests to terminate the father's parental rights and free the children for adoption (*see Matter of Orazio R. [Nanci P.]*, 233 AD3d at 691).

The father's remaining contentions are without merit.

Matter of Konner N., 235 AD3d 1112 (3rd Dept., 2025)

Appeal from an order of the Family Court of Chemung County (Richard Rich Jr., J.), entered January 25, 2023, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject child to be permanently neglected, and terminated respondent's parental rights.

Respondent (hereinafter the father) is the father of the subject child (born in 2010). As relevant here, in September 2020, petitioner filed a neglect petition against the father and the child's mother seeking to remove the child due to the mother's history of drug

use and the father's incarceration. After the petition was filed, the father consented to the temporary removal of the child and the child was placed, by way of Family Ct Act article 10, with a maternal cousin. Subsequently, the father consented to an entry of a finding that he had neglected the child and the placement with the maternal cousin was continued. Additionally, a temporary order of protection was entered that prevented the father from contacting or visiting the child. Thereafter, in February 2022, petitioner commenced this permanent neglect proceeding against the father, who had been released from custody and was on parole, seeking to terminate his parental rights based upon the father's failure to plan for the future of the child.[FN1] Following a fact-finding hearing, Family Court determined that petitioner had demonstrated that it engaged in diligent efforts to reunify the child with the father, but the father had failed to plan for the child's future. As such, Family Court adjudicated the child to be permanently neglected by the father and determined that a dispositional hearing was not required because there was a sufficient basis to conclude that termination of the father's parental rights was in the best interests of the child. The father appeals.

Family Court's finding that the father permanently neglected the child is supported by a sound and substantial basis in the record. "As relevant here, a permanently neglected child is one who is in the care of an authorized agency and whose parent has failed, for at least one year after the child came into the agency's care, to substantially and continuously or repeatedly plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship" (*Matter of Makayla I. [Sheena K.]*, 201 AD3d 1145, 1147 [3d Dept 2022] [internal quotation marks and citations omitted], *lvs denied* 38 NY3d 903 [2022], 38 NY3d 903 [2022]; *see* Social Services Law § 384-b [7] [a]). "As a threshold matter, the agency must prove — by clear and convincing evidence — that it made diligent efforts to encourage and strengthen the parent's relationship with the child" (*Matter of Jason O. [Stephanie O.]*, 188 AD3d 1463, 1464 [3d Dept 2020] [citations omitted], *lv denied* 36 NY3d 908 [2021]; *see Matter of Nikole V. [Norman V.]*, 224 AD3d 1102, 1103 [3d [*2]Dept 2024], *lv denied* 41 NY3d 909 [2024]). "To satisfy its duty of diligent efforts, petitioner must make practical and reasonable efforts to ameliorate the problems preventing reunification and strengthen the family relationship by such means as assisting the parent with visitation, providing information on the child's progress and development, and offering counseling and other appropriate educational and therapeutic programs and services" (*Matter of Makayla I. [Sheena K.]*, 201 AD3d at 1147 [internal quotation marks and citations omitted]; *see Matter of Desirea F. [Angela H.]*, 217 AD3d 1064, 1066 [3d Dept 2023], *lv denied* 40 NY3d 908 [2023]). "Notably, diligent efforts will be found where appropriate services are offered but the

parent refuses to engage in them or does not progress" (*Matter of Carmela D. [Shameeka G.]*, 232 AD3d 1126, 1128 [3d Dept 2024] [internal quotation marks and citations omitted]; *see Matter of Jessica U. [Stephanie U.]*, 152 AD3d 1001, 1003 [3d Dept 2017]).

The foster care caseworker for the child testified that, starting in January 2021, she met with the father on a monthly basis following his release from prison. During these meetings the caseworker would discuss with the father his compliance with parole as well as any services with which he was supposed to be engaging, such as anger management and sex offender treatment. The caseworker also provided the father with updates regarding the child and discussed planning and permanency. This included a conversation in September 2021 about possible surrender of the child. The caseworker explained that she was in contact with various service providers to confirm the father was in compliance. She stated that she and the father also discussed his employment, which involved mowing lawns and doing odd jobs, and that she confirmed he was receiving SNAP benefits. The caseworker testified that, although the father was prohibited from contacting the child directly, after confusion as to whether the father was permitted to contact the child's service providers and foster parents, the caseworker reached out to the father's parole officer who informed her that this contact was permissible. She relayed this to the father on two or three occasions, the first of which was in August 2021. The caseworker provided the father with phone numbers for the child's mental health counselor and the cell phone number for the child's foster parents. The caseworker testified that, upon sharing with the father the child's desire to no longer have any contact with him, the father refused to meet with her and instructed her that everything was to go through his attorney. The last meeting the caseworker had with the father was in December 2021. The caseworker testified that she had not been provided with any additional information from the father regarding his treatment providers and did not know where the father was currently residing. The caseworker explained that his phone number was no longer in service and [*3]that she received an updated telephone number from the father's attorney but was unsuccessful in making contact. The caseworker also made an unannounced visit to the father's residence in February 2022 in an attempt to make contact with him, but he was not home. The only time the caseworker was able to make contact with the father was at court appearances, but rather than set up a meeting, the father referred her to his attorney. Given the foregoing, "Family Court did not err in determining that petitioner satisfied its threshold burden of establishing that it exercised diligent efforts to encourage and strengthen the parental relationship" (*Matter of Makayla I. [Sheena K.]*, 201 AD3d at 1148 [citations

omitted]; *see Matter of Nikole V. [Norman V.]*, 224 AD3d at 1104; *Matter of Jessica U. [Stephanie U.]*, 152 AD3d at 1003-1004).

"Once diligent efforts have been shown, the petitioner must then prove by clear and convincing evidence that the respondent failed to substantially plan for the child's future" (*Matter of Issac Q. [Kimberly R.]*, 212 AD3d 1049, 1051 [3d Dept 2023] [internal quotation marks, brackets and citations omitted], *lv denied* 39 NY3d 913 [2023]; *see Matter of Drey L. [Katrina M.]*, 227 AD3d 1134, 1137 [3d Dept 2024]). "To substantially plan, a parent must, at a minimum, take meaningful steps to correct the conditions that led to the child's initial removal. The parent's plan must be realistic and feasible, and his or her good faith effort, alone, is not enough" (*Matter of Harmony F. [William F.]*, 212 AD3d 1028, 1031 [3d Dept 2023] [internal quotations marks and citations omitted]; *see Matter of Gabriel J. [Christina I.]*, 232 AD3d 1093, 1095 [3d Dept 2024]). "Notably, a parent's failure to utilize available services or fully cooperate with the authorized agency are factors to be considered in assessing whether a parent has complied with the statutory requirements" (*Matter of Matthew YY.*, 274 AD2d 685, 686-687 [3d Dept 2000] [citations omitted]; *see* Social Services Law § 384-b [7] [c]; *Matter of Logan C. [John C.]*, 169 AD3d 1240, 1243 [3d Dept 2019]).

Testimony established that, despite being informed by the caseworker that the father could contact the foster parents and the child's mental health counselor, the father failed to do so. Although the father testified that he did, at one point, contact the child's mental health counselor, that did not occur until after the permanent neglect petition was filed and, at that point, the child had ceased working with that counselor. Additionally, while the father blamed special parole conditions for his inability to contact the foster parents and the child's treatment provider, the court did not find this assertion credible, a determination to which we give deference (*see Matter of Caylin T. [Christine T.]*, 229 AD3d 859, 861 [3d Dept 2024]; *Matter of Ryan J. [Taylor J.]*, 222 AD3d 1207, 1212 [3d Dept 2023], *lv denied* 41 NY3d 909 [2024]). Moreover, while the father did make positive strides in successfully [*4]completing his parole and actively engaging in sex offender treatment, testimony demonstrated that the father had not made any progress toward obtaining a suitable residence for the child nor did he have steady employment to support himself and the child. Finally, and most significantly, the father failed to fully cooperate with petitioner, given his outright refusal to continue working with the caseworker (*see Matter of Arianna I. [Roger I.]*, 100 AD3d 1281, 1283 [3d Dept 2012]). "According deference to Family Court's credibility determinations, we are of the view that petitioner met its burden of establishing that respondent permanently neglected the child[ ] by failing to make a realistic and feasible plan for [his] future, as [the father] had,

essentially, no plan in place" (*Matter of James J. [James K.]*, 97 AD3d 936, 939 [3d Dept 2012] [citations omitted]; *see Matter of Ronaldo D. [Jose C.]*, 177 AD3d 1217, 1220 [3d Dept 2019], *lv denied* 35 NY3d 906 [2020]). Therefore, based on the foregoing, Family Court's determination that the child is permanently neglected by the father has a sound and substantial basis in the record.

We do, however, agree with the father that Family Court erred in failing to hold a dispositional hearing. "Family Ct Act § 625 (a) expressly provides that, upon completion of a fact-finding hearing, a dispositional hearing may commence immediately after the required findings are made; provided, however, that *if all parties consent* the court may, upon motion of any party or upon its own motion, dispense with the dispositional hearing and make an order of disposition on the basis of competent evidence admitted at the fact-finding hearing" (*Matter of Harmony F. [William F.]*, 212 AD3d at 1033 [internal quotation marks and brackets omitted]). Given that the record is devoid of the parties' consent to dispense with a dispositional hearing, the matter is remitted for a dispositional hearing "or to otherwise affirmatively gain the parties' consent to dispense of the matter without one" (*id.*; *see Matter of Shavonda GG.*, 232 AD2d 780, 782 [3d Dept 1996]).

Garry, P.J., Ceresia, Powers and Mackey, JJ., concur.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as terminated respondent's parental rights; matter remitted to the Family Court of Chemung County for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

Footnotes

Footnote 1: In July 2022, during the pendency of this proceeding, the mother surrendered her parental rights to the child.

Matter of R.E., AD3d 2025 NY Slip Op 03377 (3rd Dept., 2025)

Appeal from an order of the Family Court of Ulster County (Anthony McGinty, J.), entered May 20, 2024, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to revoke a suspended judgment, and terminated respondent's parental rights.

Respondent (hereinafter the father) is the father of the child (born in 2018). The child was removed from the care of his parents in 2020 and placed in foster care, and that

placement was continued after Family Court determined in 2021 that both parents had neglected him (*see Matter of R.E. [S.F.]*, 212 AD3d 1009 [3d Dept 2023]). Petitioner subsequently commenced a permanent neglect proceeding against both parents and, as is relevant here, the father made admissions of permanent neglect and agreed to an order of fact-finding and disposition with a suspended judgment set to expire on January 31, 2024. The suspended judgment required the father to, among other things, keep petitioner informed of his current address and telephone number, notify petitioner in advance if he could not attend scheduled visitation with the child and submit to drug testing as arranged by petitioner.

Petitioner sought to revoke the suspended judgment and terminate the father's parental rights via a petition filed in July 2023, alleging that the father had violated the conditions of the suspended judgment. Following a fact-finding hearing that ended in March 2024, Family Court determined from the bench that the father had violated conditions of the suspended judgment and conducted a dispositional hearing the same day. At the conclusion of the dispositional hearing, Family Court rendered a decision from the bench in which it determined that revoking the suspended judgment and terminating the father's parental rights would be in the best interests of the child. The father appeals from the written order issued thereon.

We affirm. A suspended judgment is intended to give a parent who has permanently neglected his or her child with a brief period of time within which to become a fit parent who can be safely reunited with the child (*see Matter of Alexis X. [Tara Y.]*, 222 AD3d 1213, 1213-1214 [3d Dept 2023]; *Matter of Elaysia GG. [Amber HH.]*, 221 AD3d 1338, 1339 [3d Dept 2023]). The parent must comply with the terms and conditions imposed to address the difficulties that led to the suspended judgment, and, where it is shown by a preponderance of the evidence that he or she failed to do so, "Family Court may revoke the suspended judgment and, if in the child's best interests, terminate parental rights" (*Matter of Max HH. [Kara FF.]*, 170 AD3d 1456, 1458 [3d Dept 2019]; *see Matter of Michael B.*, 80 NY2d 299, 311 [1992]; *Matter of Alexis X. [Tara Y.]*, 222 AD3d at 1214).

Petitioner here came forward with testimony from the caseworker who had worked with the father since 2021 and described how he had failed to comply with the terms of the suspended judgment in multiple respects. The caseworker specifically described [*2]how the father's compliance with the conditions of the suspended judgment had deteriorated in the spring of 2023 and how he, among other things, missed several scheduled drug screens in June and July 2023 and stopped communicating with petitioner, failing without explanation to attend scheduled visitation

with the child or keeping petitioner apprised of his living arrangements as required. The father himself testified in response and, while he attempted to justify his behavior in various respects, even he acknowledged that he had failed to undergo drug screening, attend visits with the child or keep the caseworker apprised of his whereabouts as required under the terms of the suspended judgment. Family Court credited the largely undisputed testimony of the caseworker that the father had violated the terms of the suspended judgment in significant respects and, according deference to its decision to do so, a sound and substantial basis exists in the record to support its revocation of the suspended judgment (*see Matter of Elaysia GG. [Amber HH.]*, 221 AD3d at 1340; *Matter of Donte LL. [Crystal LL.]*, 141 AD3d 907, 908 [3d Dept 2016]).

Turning to the disposition, the father complains that Family Court conducted the dispositional hearing immediately after it had concluded the fact-finding hearing and made its findings, but Family Court was empowered to begin that hearing "immediately after the required findings are made" (Family Ct Act § 625 [a]). As the father offered no objection to immediately beginning the dispositional hearing and, indeed, made clear that he was not seeking to present any witnesses at it, we perceive no error in Family Court's decision to do so (*see* Family Ct Act § 626 [a]; *see e.g. Matter of Nina TT. [Jimmy P.]*, 218 AD3d 873, 874-875 [3d Dept 2023]).

As for the proof itself, the fact that the father had failed to comply with the conditions of a suspended judgment to begin with did not automatically warrant termination of his parental rights, but was strong evidence that termination would be in the best interests of the child (*see Matter of Alexis X. [Tara Y.]*, 222 AD3d at 1214; *Matter of Max HH. [Kara FF.]*, 170 AD3d at 1458). The caseworker testified that the father had reestablished contact with petitioner in November 2023 but had only visited with the child four times after that point, although he missed a few visits during that period because he was incarcerated from December 2023 to February 2024. The caseworker further confirmed that the father continued to avoid required drug screening after his release from jail. The proof at the fact-finding hearing and the dispositional hearing also reflected that the child had been living with his foster family since 2020 and that his foster parents, who had provided him with an appropriate living situation and developed a strong bond with him, aimed to adopt him if the opportunity presented itself. Family Court cited that evidence, as well as the proof that the father had tested positive [*3]for alcohol and marihuana use on those infrequent occasions when he submitted to drug screening as requested, to determine that the best interests of the child lie in terminating the parental rights of the father. We are satisfied that such evidence provided a sound and substantial basis in the record for doing so (*see Matter of*

Nahlaya MM. [Zaianna LL.], 193 AD3d 1294, 1298 [3d Dept 2021], *lv denied* 37 NY3d 905 [2021]; *Matter of Jeremiah RR. [Bonnie RR.]*, 192 AD3d 1338, 1341 [3d Dept 2021], *lv denied* 37 NY3d 905 [2021]; *Matter of Donte LL. [Crystal LL.]*, 141 AD3d at 908).

Matter of Aubrey M.T., 237 AD3d 1506 (4th Dept., 2025)

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered August 23, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, transferred custody of the subject children to petitioner.

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

Memorandum: In this termination of parental rights proceeding pursuant to Social Services Law § 384-b, the father, the respondent in appeal No. 1 and the petitioner in appeal No. 2, appeals from an order of disposition in appeal No. 1 that transferred the custody of the subject children to petitioner in that appeal, Jefferson County Department of Social Services (DSS), after a finding that the father had permanently neglected the children. In appeal No. 2, the father appeals from an order dismissing his petition for enforcement of an order of parenting time.

Contrary to the father's contention in appeal No. 1, the evidence at the hearing establishes that, despite the diligent efforts of DSS, the father failed to plan for the future of the children. "It is well settled that, to plan substantially for a child's future, the parent must take meaningful steps to correct the conditions that led to the child's removal within a reasonable period of time" (*Matter of Patience E. [Victoria E.]*, 225 AD3d 1181, 1182 [4th Dept 2024], *lv denied* 42 NY3d 904 [2024] [internal quotation marks omitted]). Here, the father "did not successfully address or gain insight into the problems that led to the removal of the [children] and continued to prevent [their] safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]; *see Matter of Soraya S. [Kathryne T.]*, 158 AD3d 1305, 1306 [4th Dept 2018], *lv denied* 31 NY3d 908 [2018]).

The father also contends in appeal No. 1 that Family Court erred when it admitted a psychological report during the fact-finding hearing. Although the psychological report does not appear to have been admitted during the fact-finding hearing, even assuming, arguendo, that it was improperly admitted because it constitutes hearsay (*see Matter of Chloe W. [Amy W.]*, 137 AD3d 1684, 1685 [4th Dept 2016]), we conclude that such error

was harmless inasmuch as the record otherwise contains ample evidence supporting the court's determination (*see Matter of Juliet W. [Amy W.]*, 216 AD3d 1424, 1425 [4th Dept 2023], *lv denied* 40 NY3d 1059 [2023]; *Matter of Brooklyn S. [Stafania Q.—Devin S.]*, 150 AD3d 1698, 1700 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]).

Although the father contends in appeal No. 1 that the court erred in not granting him a suspended judgment, the father did not request a suspended judgment, and thus he failed to preserve for our review his contention that the court abused its discretion in failing to issue one (*see Matter of Natalee F. [Eric F.]*, 194 AD3d 1397, 1398 [4th Dept 2021], *lv denied* 37 NY3d 911 [2021]*; Matter of Jamarion N. [Ernest N.]*, 181 AD3d 1200, 1201-1202 [4th Dept 2020]).

In appeal No. 2, the father contends that his enforcement petition seeking, inter alia, make up parenting time, which was dated the same day as the order in appeal No. 1 terminating his parental rights, was not rendered moot by that order. We reject that contention. The issue of visitation was rendered moot by the court's final order of disposition (*see generally Matter of Keon D.W. [Desire E.]*, 167 AD3d 1582, 1583 [4th Dept 2018]).

Matter of Hanalise, AD3d 2025 NY Slip Op 02687 (4th Dept., 2025)

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered June 28, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, petitioner moved by order to show cause to revoke a suspended judgment entered upon, inter alia, the admission of respondent father that he had permanently neglected the subject child. The father appeals from an order by which Family Court, inter alia, effectively granted petitioner's motion and terminated the father's parental rights with respect to the subject child. We affirm.

As a preliminary matter, we reject petitioner's contention that the appeal should be dismissed as untimely. Inasmuch as there is no evidence in the record of when the order was served on the father, "we cannot determine on this record when, if ever, the time to take the appeal[ ] began to run, and thus it cannot be said" that the father's

appeal is untimely (*Matter of Bukowski v Florentino*, 210 AD3d 1520, 1521 [4th Dept 2022]; *see also Matter of Grayson S. [Thomas S.]*, 209 AD3d 1309, 1310-1311 [4th Dept 2022]).

With respect to the merits, it is well settled that, "[w]here petitioner establishes by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights" (*Matter of Ramel H. [Tenese T.]*, 134 AD3d 1590, 1592 [4th Dept 2015] [internal quotation marks omitted]; *see* Family Ct Act § 633 [f]; *Matter of Ronald O.*, 43 AD3d 1351, 1352 [4th Dept 2007]). "[L]iteral compliance with the terms of the suspended judgment will not suffice to prevent a finding of a violation. A parent must [also] show that progress has been made to overcome the specific problems which led to the removal of the child[ ]" (*Matter of Joseph M.*, *Jr. [Joseph M.*, *Sr.]*, 150 AD3d 1647, 1648 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017] [internal quotation marks omitted]; *see Matter of Maykayla FF. [Eugene FF.]*, 141 AD3d 898, 899 [3d Dept 2016]). Further, "a hearing on a [motion] alleging that the terms of a suspended judgment have been violated is part of the dispositional phase of the permanent neglect proceeding, and . . . the disposition shall be based on the best interests of the child" (*Matter of Jenna D. [Paula D.]*, 165 AD3d 1617, 1619 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019] [internal quotation marks omitted]). Contrary to the father's contention, the record establishes that he violated the suspended judgment order by, inter alia, failing to undergo a [*2]mental health evaluation within 30 days of the order, failing to maintain stable and suitable housing, and violating the prohibition on discussing "the instant case, the [c]hild's caretakers, [p]etitioner, or any other legal matter" in front of the subject child. Again, the failure to comply with " 'any of the terms of the suspended judgment' " permits the court to revoke the suspended judgment (*Joseph M.*, *Jr.*, 150 AD3d at 1648).

Finally, a preponderance of the evidence supports the court's determination that it was in the child's best interests to terminate the father's parental rights (*see Jenna D.*, 165 AD3d at 1619; *Matter of Mikel B. [Carlos B.]*, 115 AD3d 1348, 1349 [4th Dept 2014]). "Although [the father's] breach of the express conditions of the suspended judgment does not compel the termination of [his] parental rights, [it] is strong evidence that termination is, in fact, in the best interests of the child[ ]" (*Jenna D.*, 165 AD3d at 1619 [internal quotation marks omitted]; *see Matter of Michael HH. [Michael II.]*, 124 AD3d 944, 945-946 [3d Dept 2015]). Here, "any progress that [the father] made was not sufficient to warrant any further prolongation of the child['s] unsettled familial status"

(*Matter of Brendan S.*, 39 AD3d 1189, 1190 [4th Dept 2007] [internal quotation marks omitted]).

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

Matter of Sky F.-M.J., AD3d 2025 NY Slip Op 03462 (4th Dept., 2025)

Appeals from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered January 9, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, revoked a suspended judgment and terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother and the Attorney for the Child (AFC) appeal from an order by which Family Court, inter alia, revoked a suspended judgment, entered upon, inter alia, the admission of the mother that she had permanently neglected the subject child, and terminated the mother's parental rights with respect to that child**.** We affirm.

The mother and the AFC contend that the court erred in refusing to extend the suspended judgment (*see* Family Ct Act § 633 [b])**.** We reject that contention because we conclude that the mother "failed to demonstrate that 'exceptional circumstances' required extension of the suspended judgment" (*Matter of Cornelius L.N. [Cornelius N.]*, 117 AD3d 1487, 1487 [4th Dept 2014], *lv denied* 24 NY3d 901 [2014]; *see* Family Ct Act § 633 [b]; *Matter of Lestariyah A. [Demetrious L.]*, 89 AD3d 1420, 1420-1421 [4th Dept 2011]; *see generally Matter of Emily A. [Gina A.]*, 129 AD3d 1473, 1475 [4th Dept 2015]).

We also reject the contention of the mother and the AFC that there is not a sound and substantial basis in the record for the court's determination that termination of the mother's parental rights is in the best interests of the subject child. Here, the mother concedes that the record supports the finding that she failed to comply with the terms of the suspended judgment. Although it is not dispositive, "a parent's noncompliance with the terms of [a] suspended judgment constitutes strong evidence that termination of parental rights is in a child's best interests" (*Matter of James D. [Leslie S.]*, 199 AD3d 1375, 1376 [4th Dept 2021] [internal quotation marks omitted]). Moreover, additional

factors also support the conclusion that the court's determination is in the best interests of the child. Here, the court considered that the child had been in the same preadoptive foster care placement for the majority of her life, that the mother had repeatedly canceled visits due to a perceived lack of safety in her home, that the mother had not been able to hold steady employment or housing, and that the mother had not [*2]made significant progress in her mental health treatment. Additionally, the child's foster mother had already been facilitating sibling visits at her home and she testified that those visits would continue. Thus, a preponderance of the evidence supports the court's determination that it is in the child's best interests to terminate the mother's parental rights (*see Matter of Jenna D. [Paula D.]*, 165 AD3d 1617, 1619 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]; *Matter of Mikel B. [Carlos B.]*, 115 AD3d 1348, 1349 [4th Dept 2014]).

Further, contrary to the contention of the mother and the AFC, this is not a case in which new facts and allegations warrant remittal for a new dispositional hearing. "We may consider . . . new facts and allegations 'to the extent [that] they indicate that the record before us is no longer sufficient' to determine" the child's best interests (*Matter of Gena S. [Karen M.]*, 101 AD3d 1593, 1595 [4th Dept 2012], *lv dismissed in part & denied in part* 21 NY3d 975 [2013]; *see also Matter of Noah C. [Greg C.]*, 225 AD3d 1178, 1179-1180 [4th Dept 2024]). Here, the mother and the AFC contend that reports after the entry of the order on appeal call into question whether the child's foster mother will adopt the child. However, the most recent permanency report indicates that the child's placement remains preadoptive. Thus, we conclude that the record remains sufficient to determine that termination of the mother's parental rights is in the child's best interests (*cf. Noah C.*, 225 AD3d at 1179; *Matter of Shad S. [Amy C.Y.]*, 67 AD3d 1359, 1360 [4th Dept 2009]).

We next reject the contention of the mother and the AFC that the court abused its discretion when it denied the AFC's request for an adjournment to review discovery. "The granting of an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*James D.*, 199 AD3d at 1376-1377 [internal quotation marks omitted]). It is generally not an abuse of discretion for a court to deny an adjournment request if the party requesting the adjournment "fail[s] to demonstrate that the need for the adjournment . . . was not based on a lack of due diligence on the part of [that party] or [their] attorney" (*Matter of Latonia W. [Anthony W.]*, 144 AD3d 1692, 1693 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]). Here, the AFC did not demonstrate that the basis for her adjournment request was not based on a lack of due diligence, inasmuch as the

ongoing obligation of the prior Family Court Act § 1038 (b) demand had long expired and the AFC failed to make a new demand.

The contention of the mother and the AFC that the mother's right to a hearing before an impartial factfinder was violated because the court displayed bias by predetermining the outcome of her case is unpreserved for our review inasmuch as no party filed a motion for the court to recuse (*see Matter of Anthony J. [Siobvan M.]*, 224 AD3d 1319, 1319 [4th Dept 2024]; *Matter of Tartaglia v Tartaglia*, 188 AD3d 1754, 1756 [4th Dept 2020]; *Matter of Chromczak v Salek*, 173 AD3d 1750, 1750 [4th Dept 2019]).

The AFC's contention that the court violated the child's Fourteenth Amendment rights when it terminated the mother's parental rights with respect to the subject child but allowed one of her siblings to remain in the mother's care is also unpreserved for our review inasmuch as the contention is raised for the first time on appeal (*see Matter of Alexander G.R. [Kristin G.P.]*, 192 AD3d 1501, 1501 [4th Dept 2021]; *see generally Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1494 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]).

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

Matter of Moses K.B., AD3d 2025 NY Slip Op 03927 (4th Dept., 2025)

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered July 1, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject children.

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

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to the subject children and freeing them for adoption. Contrary to the father's contention, Family Court did not abuse its discretion in denying his request for a suspended judgment. A suspended judgment "is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311 [1992]; *see Matter of Danaryee B. [Erica T.]*, 151 AD3d 1765, 1766 [4th Dept 2017]; *Matter of James P. [Tiffany H.]*, 148 AD3d 1526, 1527 [4th Dept 2017], *lv denied* 29 NY3d 908 [2017]), and is appropriate only "where the parent has clearly demonstrated that [they] deserve[ ] another opportunity to show that [they have] the

ability to be a fit parent" (*Matter of Illion RR. [Rachael SS.]*, 154 AD3d 1126, 1128 [3d Dept 2017], *lv denied* 30 NY3d 908 [2018] [internal quotation marks omitted]).

Here, " 'there was no evidence that [the father] had a realistic, feasible plan to care for the children' " (*Matter of Nicholas B. [Eleanor J.]*, 83 AD3d 1596, 1598 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011]; *see Matter of Sean W. [Brittany W.]*, 87 AD3d 1318, 1319 [4th Dept 2011], *lv denied* 18 NY3d 802 [2011]). In addition, any progress that the father had made in addressing the issues that led to the children's removal was not sufficient to warrant "further prolongation of the [children's] unsettled familial status," especially given that the children have now spent almost seven years in petitioner's custody (*Matter of Mea V. [Brandon V.]*, 235 AD3d 1242, 1243 [4th Dept 2025] [internal quotation marks omitted]; *see Matter of Matthew S., Jr. [Matthew S.]*, 169 AD3d 1456, 1456-1457 [4th Dept 2019]; *Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1627-1628 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]). Therefore, the court did not abuse its discretion in determining that a suspended judgment was not in the children's best interests (*see Matter of Latoria B. [Bianca B.]*, 222 AD3d 1449, 1450 [4th Dept 2023], *lv denied* 41 NY3d 987 [2024]).

CUSTODY

Matter of Karma-Marie W., 234 AD3d 705 (2nd Dept., 2025)

In a proceeding pursuant to Family Court Act article 6, the petitioner appeals from an order of the Family Court, Kings County (Sharon N. Clarke, J.), dated March 28, 2024. The order, sua sponte, dismissed the petition for guardianship of the subject child with prejudice.

ORDERED that the order is reversed, on the law, without costs or disbursements, the petition for guardianship of the subject child is reinstated, and the matter is remitted to the Family Court, Kings County, for a hearing and a determination of the petition thereafter.

On September 1, 2023, the petitioner filed a petition pursuant to Family Court Act article 6 to be appointed the guardian of the subject child. The petitioner is not related to the child. In an order dated March 28, 2024, the Family Court, without a hearing, sua sponte, determined that the petitioner lacked standing to bring the petition and dismissed the petition with prejudice. The petitioner appeals.

The Family Court should not have dismissed the petition on the ground that the petitioner was not a relative of the child (*see Matter of Dalida P.*, 204 AD2d 645, 645). Although the petitioner is not biologically related to the child, SCPA 1703, which is applicable to this proceeding (*see* Family Ct Act § 661), provides that a petition for the appointment of a guardian may be brought by "any person" (SCPA 1703; *see Matter of Dalida P.*, 204 AD2d at 645). Nor was there any basis in the record to dismiss the petition with prejudice (*see Matter of Linares-Mendez v Cazanga-Payes*, 183 AD3d 738, 739).

Accordingly, since the Family Court dismissed the petition for guardianship of the child with prejudice without conducting a hearing or considering the child's best interests, the matter must be remitted to the Family Court, Kings County, for a hearing and determination of the petition thereafter (*see Matter of Francisca M.V.R. v Jose G.H.G.*, 154 AD3d 856, 857; *Matter of Jorge A.V.G. [Marta G.]*, 119 AD3d 566, 567).

Matter of Graesser v Erie County Children's Servs., 235 AD3d 1241 (4th Dept., 2025)

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered July 31, 2023, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: In a prior proceeding pursuant to Social Services Law § 384-b, Family Court terminated the parental rights of the mother with respect to the subject child on the ground of mental illness and placed the child in the custody and guardianship of Erie County Department of Social Services (DSS) (*Matter of Landin F. [Jodi G.]*, 222 AD3d 1405 [4th Dept 2023], *lv denied* 41 NY3d 909 [2024]). Thereafter, petitioner, who is the child's biological maternal grandmother, commenced this proceeding pursuant to Family Court Act article 6 seeking custody of the child. The court dismissed the petition with prejudice, and we now affirm.

Contrary to petitioner's contention, the court properly dismissed the petition without conducting a hearing. Inasmuch as the court terminated parental rights and committed the child's custody and guardianship to DSS thereby freeing the child for adoption, adoption became the sole and exclusive means to gain care and custody of the child, and the court was " 'without authority to entertain custody . . . proceedings commenced by a member of the child's [extended] family' " (*Matter of Amber W. v Erie County Children's Servs.*, 185 AD3d 1445, 1446 [4th Dept 2020]; *see* Social Services Law §

384-b [10], [11]; *Matter of Mirely M. v Wilbert L.*, 221 AD3d 1227, 1228-1229 [3d Dept 2023]; *Matter of Mu'Min v Mitchell*, 19 AD3d 1116, 1117 [4th Dept 2005]). Petitioner's "recourse was to seek adoption, and not mere custody, of the . . . child" (*Matter of Boyd v Westchester County Dept. of Social Servs.*, 149 AD3d 1069, 1070 [2d Dept 2017]; *see Amber W.*, 185 AD3d at 1446).

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

Matter of Shakema R. v Mesha B., 236 AD3d 1383 (4th Dept., 2025)

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered November 29, 2022, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking the third ordering paragraph requiring respondent to submit proof that he is engaged in and compliant with mental health counseling with a psychiatrist as a prerequisite to filing a modification petition and substituting therefor a provision requiring respondent to comply with that condition as a component of supervised visitation, and as modified the order is affirmed without costs.

Memorandum: In appeal No. 1, respondent father appeals from an order entered in a proceeding pursuant to Family Court Act article 6 that, inter alia, granted sole custody of the subject child to petitioner in appeal No. 1, the subject child's mother, Shakema R., and ordered that the father have supervised visitation with the child. In appeal No. 2, the father appeals from an order issued in a proceeding pursuant to Family Court Act article 6 that, inter alia, ordered that petitioner in appeal No. 2, the subject child's mother, Charde P., continue to have sole custody of subject child, and ordered that father have supervised visitation with the child. In appeal Nos. 3 and 4, the father appeals from two orders of fact-finding and disposition entered in proceedings pursuant to Family Court Act article 10, each of which adjudged that the father neglected the respective subject child. The four orders were entered after Family Court jointly held the hearings on the article 6 custody and visitation petitions and the article 10 neglect petitions.

We reject the father's contention in all four appeals that the court abused its discretion in denying his request to adjourn the combined hearing to allow him more time to secure witness testimony. " '[T]he determination whether to grant a request for an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*Matter*

of Jaylin B. [Mariah S.], 221 AD3d 1418, 1420 [4th Dept 2023], *lv denied* 41 NY3d 905 [2024]). Here, the court did not abuse its discretion in denying the father's request for an adjournment inasmuch as the father's counsel stated that she contacted all of the people on the father's proposed witness list and none of those proposed witnesses had information about the case (*see Matter of Steven B.*, 6 NY3d 888, 889 [2006]).

Next, in appeal Nos. 3 and 4 the father contends that the findings of neglect are not supported by a preponderance of the evidence. We reject that contention. A neglected child is defined, in relevant part, as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be [*2]inflicted harm, or a substantial risk thereof . . . or by any other acts of a similarly serious nature requiring the aid of the court" (Family Ct Act § 1012 [f] [i] [B]). "The statute thus imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence . . . First, there must be proof of actual (or imminent danger of) physical, emotional or mental impairment to the child . . . Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care

. . . This is an objective test that asks whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances" (*Matter of Barry G., Jr. [Barry G.]*, 221 AD3d 1596, 1596 [4th Dept 2023], *lv denied* 41 NY3d 904 [2024] [internal quotation marks omitted]). " 'A respondent's mental condition may form the basis of a finding of neglect if it is shown by a preponderance of the evidence that his or her condition resulted in imminent danger to the child[ ],' " although " '[p]roof of mental illness alone will not support a finding of neglect . . . The evidence must establish a causal connection between the parent's condition, and actual or potential harm to the child[ ]' " (*Matter of Lil B. J.-Z. [Jessica N.J.]* [appeal No. 2], 194 AD3d 1413, 1414 [4th Dept 2021]).

Here, the agency "established, by a preponderance of the evidence, the existence of a causal connection between [the father's actions] and actual or potential harm to the child[ren]" based upon the father's "repeated unfounded allegations of [sexual and physical] abuse . . . , necessitating that the children undergo . . . interviews regarding intimate issues" (*Matter of Tyler W. [Janice B.]*, 149 AD3d 968, 969 [2d Dept 2017]; *see Matter of Leilani D. [Linsford D.]*, 190 AD3d 478, 478 [1st Dept 2021]; *Matter of Morgan P.*, 60 AD3d 1362, 1362 [4th Dept 2009]; *see generally Matter of Elizabeth W. [Theresa W.]*, 74 AD3d 1787, 1788 [4th Dept 2010], *lv denied* 16 NY3d 704 [2011]). Thus, the

record establishes that there was a risk of imminent emotional harm to the children that was caused by the father's conduct (*see Matter of Juliette R. [Jordan R.T.]*, 203 AD3d 1678, 1679 [4th Dept 2022]; *Matter of Salvatore M. [Nicole M.]*, 104 AD3d 769, 769 [2d Dept 2013], *lv denied* 21 NY3d 858 [2013]). We therefore conclude in appeal Nos. 3 and 4 that the court's findings of neglect have a sound and substantial basis in the record (*see Lil B. J.-Z.*, 194 AD3d at 1414; *see generally Matter of Ahren B.-N. [Gary B.-N.]*, 222 AD3d 1403, 1404 [4th Dept 2023], *lv denied* 41 NY3d 909 [2024]).

Contrary to the father's contention in appeal No. 2, although the court modified the prior custody order in that appeal without making an express finding of a change in circumstances sufficient to warrant an inquiry in the subject child's best interests (*see Matter of Kirkland v Crawford*, 225 AD3d 1127, 1127-1128 [4th Dept 2024], *lv denied* 42 NY3d 901 [2024]; *see generally Matter of Osborne v Tulwits*, 227 AD3d 1541, 1541-1542 [4th Dept 2024]), upon our own review of the record, we nevertheless conclude that the mother in appeal No. 2 established the requisite change in circumstances. Specifically, the father's resort to self-help in withholding the child in appeal No. 2 from her mother after the alleged disclosures made by that child constituted a change in circumstances (*see Matter of Patricia Y. v Justin X.*, 219 AD3d 1586, 1587 [3d Dept 2023]; *Matter of Fox v Fox*, 93 AD3d 1224, 1225 [4th Dept 2012]).

In all four appeals, we reject the father's challenges to the determinations that it is in the best interests of the subject children to award sole custody to their respective mothers, with supervised visitation for the father. Where, as here, the court "jointly hear[s] the hearing on the custody and visitation petition[s] under [article 6] and the dispositional hearing on the petition[s] under article [10] . . . , the court must determine the custody and visitation petition[s] in accordance with the terms of . . . article [6]" (Family Ct Act § 651 [c-1]; *see* § 1055-b [a-1]; *Matter of Lillyana B. [Brittney B.]*, 221 AD3d 1522, 1522-1523 [4th Dept 2023]).

Although the court did not expressly state which factors it considered in conducting its best interests analyses, reversal is not warranted on that ground with respect to either child inasmuch as the record is adequate for this Court to make a best interests determination, and it supports the result reached by the hearing court (*see Matter of Bailey v Bailey*, 213 AD3d 1329, 1330 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]; *Matter of Montalbano v Babcock*, 155 AD3d 1636, 1638 [4th Dept 2017], *lv denied* 31 NY3d 912 [2018]). "A custody determination by the trial court must be accorded great deference

. . . and should not be disturbed where . . . it is supported by a sound and substantial basis in the record" (*Matter of Benson v Smith*, 178 AD3d 1430, 1431 [4th Dept 2019] [internal quotation marks omitted]). "In making a custody determination, the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the [*3]current home environment, the financial status of the parties, the ability of [the parties] to provide for the child's emotional and intellectual development and the wishes of the child . . . No one factor is determinative because the court must review the totality of the circumstances" (*Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015] [internal quotation marks omitted]; *see Eschbach v Eschbach*, 56 NY2d 167, 171-173 [1982]).

Here, the court's determinations with respect to custody and visitation have a sound and substantial basis in the record inasmuch as the evidence at the hearing established that the children are currently thriving in the care of their respective mothers, and there is a risk that the father will unreasonably keep the children in his custody if allowed to visit them unsupervised (*see generally Matter of Owens v Garner*, 63 AD3d 1585, 1586 [4th Dept 2009]). With respect to the determinations that the father have only supervised visitation with each subject child, such visitation is in the children's best interests because the father's relentless pursuit of uncovering sexual or physical abuse is not beneficial to either child (*see generally Braverman v Braverman*, 140 AD3d 413, 413 [1st Dept 2016], *lv denied* 28 NY3d 910 [2016]). Furthermore, both mothers testified to having close relationships with the father's mother, who would be supervising the father's visitation, and the mothers stated that they were willing to work with the father's mother to organize visits, demonstrating that they were willing to foster a positive relationship between the children and the father (*see Matter of Muriel v Muriel*, 228 AD3d 1345, 1347 [4th Dept 2024]; *Matter of Cameron C.*, 283 AD2d 946, 947 [4th Dept 2001], *lv denied* 97 NY2d 606 [2001]; *see generally Matter of LaFountain v Gabay*, 69 AD3d 994, 995 [3d Dept 2010]).

Finally, we agree with the father in appeal Nos. 1 and 2 that the court erred in conditioning his right to file modification petitions with respect to the order of custody in appeal No. 1 and the order of custody and visitation in appeal No. 2. "It is well established that a court lacks authority to condition any future application for modification of a parent's [custody or] visitation on [that parent's] participation in mental health treatment" (*Benson*, 178 AD3d at 1432; *see Matter of Allen v Boswell*, 149 AD3d 1528, 1529 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]). We therefore modify the order in appeal No. 1 by striking the provision requiring that the father submit proof that he is engaged in and compliant with mental health counseling with a psychiatrist as a

prerequisite to filing a modification petition and providing instead that the father comply with that condition as a component of supervised visitation (*see Matter of Ordona v Cothern*, 126 AD3d 1544, 1546 [4th Dept 2015]). We likewise modify the order in appeal No. 2 by striking the provision requiring that the father complete or comply with a mental health evaluation and recommended treatment as a prerequisite to filing a modification petition, and providing instead that the father comply with that condition as a component of supervised visitation (*see id.*).

FAIR HEARINGS

Matter of Gloria Brown v New York State Office of Children and Family Services, 237 AD3d 1191

Proceeding pursuant to CPLR article 78 to review a determination of the New York State Office of Children and Family Services dated December 28, 2020. The determination, after a fair hearing pursuant to Social Services Law § 422(8), denied the petitioners' application to amend and seal an indicated report maintained by the New York State Central Register of Child Abuse and Maltreatment, which proceeding was transferred to this Court by order of the Supreme Court, Queens County (Pam Jackman Brown, J.), dated January 24, 2022, and appeal by the petitioners from the same order.

ORDERED that the appeal is dismissed (see CPLR 5701[b]; 7804[g]); and it is further,

ADJUDGED that the determination is confirmed, the petition is denied, and the proceeding is dismissed on the merits; and it is further,

ORDERED that one bill of costs is awarded to the respondent.

The petitioners were the subject of a report made to the New York State Central Register of Child Abuse and Maltreatment (hereinafter the State Central Register). The petitioner Kwame Brown (hereinafter Kwame) was accused of hitting the three subject

children and the petitioner Gloria Brown (hereinafter Gloria) was accused of being aware of the fact that Kwame was using physical punishment on the children and failing to protect them. The Administration for Children's Services investigated the report and thereafter determined that the report of maltreatment was "indicated."

The petitioners made an application to the New York State Office of Children and Family Services (hereinafter OCFS) to amend the indicated report maintained by the State Central Register from "indicated" to "unfounded" and to seal the report. In a determination dated December 28, 2020, made after a fair hearing pursuant to Social Services Law § 422(8), OCFS denied the petitioners' application. The petitioners then commenced this proceeding pursuant to CPLR article [*2]78 to review the determination. By order dated January 24, 2022, the Supreme Court transferred the proceeding to this Court pursuant to CPLR 7804(g) for determination.

"At an administrative expungement hearing to determine whether a report of child abuse or maltreatment is substantiated, the allegations in the report must be established by a preponderance of the evidence" (*Matter of Brown v Velez*, 153 AD3d 517, 518). Judicial review of a determination that a report of child maltreatment has been substantiated is limited to whether the determination is supported by substantial evidence in the record (*see Matter of Doe v New York State Off. of Children & Family Servs.*, 173 AD3d 1020, 1022; *Matter of Brown v Velez*, 153 AD3d at 518). "Substantial evidence is 'less than a preponderance of the evidence' and 'demands only that a given inference is reasonable and plausible, not necessarily the most probable'" (*Matter of Doe v New York State Off. of Children & Family Servs.*, 173 AD3d at 1022, quoting *Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1045-1046). "'Where substantial evidence exists, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently'" (*id.*, quoting *Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d at 1046). Likewise, "'[i]t is the function of the administrative agency, not the reviewing court, to weigh the evidence [and] assess the credibility of the witnesses'" (*Matter of Brown v Velez*, 153 AD3d at 518, quoting *Matter of Bullock v State of N.Y. Dept. of Social Servs.*, 248 AD2d 380, 382).

Here, the determination 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 result of being hit by Kwame and as a result of Gloria being aware of the situation and failing to protect the children and also failing to take responsibility for the deplorable condition of the children's bedroom is supported by substantial evidence in the record (*see Matter of Podell v New York State Cent. Register of Child Abuse & Maltreatment*, 215 AD3d 751; *Matter of Conklin v New York State Off. of Children &*

Family Servs., 204 AD3d 668, 669). Contrary to the petitioners' contention, foster parents are prohibited from using corporal punishment (*see* 18 NYCRR 441.9[c]). Further, "the fact that the . . . determination was based, in large part, on hearsay evidence, does not require a different conclusion. Hearsay is admissible in an administrative hearing and, in this case, was sufficiently relevant and probative to support the determination" (*Matter of Brown v Velez*, 153 AD3d at 518; *see Matter of Podell v New York State Cent. Register of Child Abuse & Maltreatment*, 215 AD3d 751).

Substantial evidence also supported the determination that the maltreatment of the children was relevant and reasonably related to childcare employment (*see* Social Services Law § 422[8][c][ii]; *Matter of Ciccarelli v New York State Off. of Children & Family Servs.*, 227 AD3d 1066, 1068; *Matter of Conklin v New York State Off. of Children & Family Servs.*, 204 AD3d at 670).

CHILD VICTIMS ACT

Weisbrod-Moore v Cayuga County, NY3d 2025 NY Slip Op 00903 (2025)

Today we hold that municipalities owe a duty of care to the children the municipalities place in foster homes because the municipalities have assumed custody of those children. As a result, we reverse the decision of the Appellate Division.

Plaintiff, formerly a child in foster care, commenced this action pursuant to the Child Victims Act (*see* CPLR 214-g) against defendant Cayuga County and "Does 1-10," who she alleged were "persons or entities with responsibilities for [p]laintiff's safety, supervision and/or placement in foster care." According to the complaint, the County placed plaintiff in foster care in 1974, when she was three months old. While in the foster home selected by the County, plaintiff allegedly suffered horrific abuse. Plaintiff alleged that her foster parent sexually abused her over the course of approximately seven years, beginning when she was 18 months old and continuing until she was eight years old. The foster parent allegedly coerced plaintiff's compliance with the sexual abuse by inflicting severe physical abuse, resulting in plaintiff sustaining broken bones and a head wound.

In asserting that the County was liable for negligence, plaintiff alleged, among other things, that the County had a duty to exercise reasonable care in selecting, retaining, and supervising her foster placement, and that the County breached this duty by placing her in the foster home and failing to adequately supervise her placement to ensure that she was safe under her foster parents' care.

In lieu of answering, the County moved to dismiss the complaint pursuant to CPLR 3211 (a) (7). The County argued that the complaint failed to state a cause of action inasmuch as plaintiff failed to plead that the County owed her a special duty. Alternatively, the County asserted that it was immune from suit because it was engaged in a governmental function. Plaintiff opposed, asserting that the County's duty arose from its "custodial relationship" with plaintiff and that the governmental function immunity defense did not apply.

Supreme Court denied the County's motion. The court acknowledged that the County's statutory obligations did not give rise to a private cause of action pursuant to *Mark G. v Sabol* (93 NY2d 710 [1999]) and correctly recognized that plaintiff was asserting only a claim for common-law negligence, not a statutory claim. With respect to common-law negligence, the court concluded that, because plaintiff was in the custody of the County, the case was distinguishable from *Maldovan v County of Erie* (188 AD3d 1597 [4th Dept 2020], *affd* 39 NY3d 166 [2022]).

The Appellate Division reversed and granted the County's motion to dismiss the complaint (*see* 216 AD3d 1459 [4th Dept 2023]). Relying on our cases involving the special duty doctrine (*see e.g. McLean v City of New York*, 12 NY3d 194 [2009]; *Cuffy v City of New York*, 69 NY2d 255 [1987]), the Appellate Division determined that, because the County was acting in a governmental capacity in administering the foster care system, plaintiff was required to plead and prove that the County owed her a special duty under one of three recognized categories (*see* 216 AD3d at 1460). The Court concluded that plaintiff failed to establish that any of the three special duty categories applied (*see id.*).

We granted plaintiff leave to appeal (*see* 41 NY3d 908 [2024]) and now reverse.

Under common-law negligence principles, the plaintiff must establish the existence of a duty of care owed to them by the defendant (*see Sanchez v State of New York*, 99 NY2d 247, 252 [2002]; *see Pulka v Edelman*, 40 NY2d 781, 782 [1976]). "The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the courts" (*Sanchez*, 99 NY2d at 252; *see Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015]).

We have held that a municipality engaged in a governmental function may be liable in negligence where "the facts demonstrate that a special duty was created" (*Ferreira v City of Binghamton*, 38 NY3d 298, 310 [2022] [internal quotation marks and citation omitted]; *see Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013]). The special duty doctrine was developed as a mechanism " 'to rationally limit the class of citizens to whom the municipality owes a duty of protection' " (*Ferreira*, 38 NY3d at 310, quoting *Kircher v City of Jamestown*, 74 NY2d 251, 258 [1989]). We have explained that" '[a] special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition' " (*Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs.*, 28 NY3d 709, 714 [2017], quoting *Applewhite*, 21 NY3d at 426).**[FN1]**

Although the parties do not dispute that, in administering the foster care system, the County was engaged in a governmental function, plaintiff contends that she was not required to establish the existence of a special duty in light of the County's custody of her while in foster care **[FN2]**. Plaintiff asserts that the three-category special duty rule was developed by this Court for circumstances other than persons in governmental custody, which is a pre-existing and well-established category of common-law special relationships. We agree.

We have consistently recognized that the government owes "a duty of care to safeguard" those in its custody, including incarcerated persons, juveniles in delinquency facilities, and schoolchildren (*Villar v Howard*, 28 NY3d 74, 80 [2016]; *see Sanchez*, 99 NY2d at 252-253; *Pratt v Robinson*, 39 NY2d 554, 560 [1976]; *Flaherty v State of New York*, 296 NY 342, 346 [1947]; *see also A.J. v State of New York*, 231 AD3d 237, 239 [3d Dept 2024]). This duty stems from common-law principles and is not restricted to cases where the government has direct physical control (*see e.g. Paige v State of New York*, 269 NY 352, 356 [1936] [private entity charged by the State with running a reformatory could be liable as State agents for negligence of the employees of the private company])**[FN3]**. Of course, the government's duty to those in its custody "does not mandate unremitting surveillance in all circumstances, and does not render [the government] an insurer of . . . safety" (*Sanchez*, 99 NY2d at 256). The government's duty is only to protect those in its custody from "risks of harm that are reasonably foreseeable" (*id.* at 253). Such risks extend to reasonably foreseeable harm inflicted by non-governmental third parties (*see id.* at 253-254; *Pratt*, 39 NY2d at 560). The principal

rationale for recognizing a duty of care in our governmental custody cases is that, by taking a person into custody, the government necessarily limits that person's avenues for self-protection (*see Sanchez*, 99 NY2d at 252). Particularly, with respect to children in its custody, the government's duty derives from the fact that [*2]the government, by assuming custody over the child "effectively takes the place of parents and guardians" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *see Pratt*, 39 NY2d at 560).

Foster children are no exception. By assuming legal custody over the foster child, the applicable government official steps in as the sole legal authority responsible for determining who has daily control over the child's life **[FN4]**. We thus hold that a municipality owes a duty to a foster child over whom it has assumed legal custody to guard the child from "foreseeable risks of harm" arising from the child's placement with the municipality's choice of foster parent (*Sanchez*, 99 NY2d at 255).

Consistent with our governmental custody cases, the Second and Third Departments have held that, by assuming legal custody over a foster child, a municipality necessarily owes a duty to the child greater than that owed to the public generally, and thus, it is unnecessary for the child to plead or prove that one of the three special duty categories applies (*see e.g. Adams v Suffolk County*, — AD3d &mdash, 2024 NY Slip Op 05428 [2d Dept 2024]; *Grabowski v Orange County*, 219 AD3d 1314, 1314-1315 [2d Dept 2023]; *Grant v Temple*, 216 AD3d 1351, 1352 [3d Dept 2023]; *Bartels v County of Westchester*, 76 AD2d 517, 519, 521-522 [2d Dept 1980]; *see also A.J.*, 231 AD3d at 239 [juvenile in a delinquency facility was not required to plead one of the three bases for special duty because he was in the State's custody]).

The County, in contrast, argues that there is no common-law special relationship arising out of a municipality's assumption of custody over a foster child. The County instead argues that a plaintiff is required to establish the existence of a special duty under one of the three categories. The Fourth and First Departments have adopted this view (*see Q.G. v City of New York*, 222 AD3d 443, 444 [1st Dept 2023]), relying heavily on our decision in *McLean* (12 NY3d 194 [affirming dismissal for lack of special duty where the plaintiff alleged that her infant daughter was injured at a daycare that was allowed to remain on State's list of approved childcare facilities]), and our special duty case law generally (*see e.g. Maldovan*, 39 NY3d 166 [affirming dismissal for lack of special duty where decedent's brother alleged that County failed to protect decedent from her abusive family members]).

Such reliance, however, is misplaced. The myriad of special duty cases identified by the dissent and the County all suffer from the same obvious defect: none of the plaintiffs in those cases were in the custody of the government, so there was no common-law special relationship established. The injured child in *McLean* was in the care and custody of her mother (*see* 12 NY3d at 198-199). Similarly, the decedent victim in *Maldovan* was in the care and custody of her abusive family members (*see* 39 NY3d at 170; *see also O'Connor v City of New York*, 58 NY2d 184, 187 [1983] [persons injured by a gas explosion alleging negligence against the city]; *Riss v City of New York*, 22 NY2d 579, 581 [1968] [woman who informed law enforcement of a threat against her alleging negligence against the police]; *Steitz v City of Beacon*, 295 NY 51, 54 [1945] [railroad employee alleging negligence against his employer]). Far from "ignor[ing] our precedent" (dissenting op at 4), our decision simply acknowledges and gives meaning to our governmental custody line of cases—a well-established theory of common-law liability that falls outside the special duty doctrine **[FN5]**. Indeed, *Maldovan* expressly left open the possibility that the special duty rule may not apply [*3]"where the injured party [is] a child . . . incapable of pursuing other avenues of protection and [without] a competent adult family member advocating on their behalf" (39 NY3d at 174). Moreover, this is not a case where the government's duty to plaintiff " 'was neither more nor less than its duty to any other . . . child in need of' foster care" (dissenting op at 8, quoting *McLean*, 12 NY3d at 201). By assuming custody of plaintiff, and thus assuming the authority to control where and with whom plaintiff lived, the County necessarily assumed a duty to her beyond what is owed to the public generally.

Neither the County nor the dissent explain how our governmental custody cases were somehow eclipsed by the special duty doctrine. Rather, they attempt to distinguish our custody cases by asserting that a duty can be imposed on the government only where it assumes physical custody over an individual as opposed to legal custody. We do not consider this distinction compelling or dispositive.

In *Pratt*, we explained that a public school district owes a duty to its students that is "coextensive with and concomitant to its physical custody of and control over the child" (*Pratt*, 39 NY2d at 560). But *Pratt* does not stand for the proposition that a duty can only arise from physical custody. On the contrary, we explained that the school's liability ceases when its physical custody of the child ceases "because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection" (*id.*). Implied in our reasoning was the understanding that a child's parents retain legal custody over the child even while that child is in the school setting. Conversely, although a foster child may leave the municipality's physical custody once placed in a foster home, that child does not return to the legal custody of any parental authority; legal custody remains with the municipality (*see* Social Services

Law § 383 [2]; *see also Matter of Michael B.*, 80 NY2d 299, 309 [1992] ["(l)egal custody of a child in foster care remains with the agency that places the child, not with the foster parents"]; *Matter of Spence-Chapin Adoption Serv. v Polk*, 29 NY2d 196, 202 [1971] [foster parents never have "true custody"]). Thus, the child never truly passes out of the orbit of the municipality's authority. A municipal defendant cannot simply shirk liability arising from its exercise of that broad authority by placing the child in a different physical setting (*see Moch Co. v Rensselaer Water Co.*, 247 NY 160, 167 [1928] ["The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all"]). While the foster parent has physical custody, the municipality has a continuing and independent responsibility to safeguard the child from foreseeable harm that may result from the foster placement it selected.

We also do not consider the distinction between physical and legal custody compelling in light of the negligence plaintiff alleged. Here, plaintiff alleged that the County was negligent in its placement of her and its supervision of that placement. In other words, plaintiff alleged that the County's negligent act was giving her foster parents physical custody of her. Exercising a degree of care in selecting and supervising plaintiff's foster placement is exactly the type of duty that flowed from the kind of custody and control the County possessed over plaintiff. The dissent's suggestion that the County did not exert a great enough "level of control" over plaintiff's care to be fairly exposed to liability strains credulity (dissenting op at 11, 12). Municipalities assert a great deal of control in the selection and monitoring of the physical environment in which a foster child, who has been removed from the care and custody of their parents, is placed. There is no question that the government should be required to make these decisions with due care. After all, the government removes a child from the care and custody of their parents with the intention of placing that child in a *safe* environment **[FN6]**. The fact that the County did not exert complete control over plaintiff's day to day [*4]life did not relieve the County of its duty, in exercising its legal custody over the plaintiff, to place her in a safe foster home and supervise that home for foreseeable risks. Foster children, minors over whom the government has taken custody and control, are incapable of removing themselves from the environment in which the government has placed them. Although the type of custody may inform the nature and scope of the government's duty (*see Sanchez*, 99 NY2d at 252), it does not by itself dictate whether the government has a duty in the first instance. Unlike the dissent, we are confident that our courts are capable of defining the nature and scope of the government's duty to those in its custody, as they have done for decades.

Finally, while we appreciate the concern over the financial impact on municipalities that liability may pose in these types of cases, we have consistently held the government may be held liable for the foreseeable injuries inflicted on those in its custody and

control. The dissent laments that our decision will unleash a "crushing burden" on municipalities and impede the ability of municipal officials to perform its responsibilities (dissenting op at 16). The dissent's warnings, however, are premised on a fundamental misconstruction of our holding. The duty we announced today does not require government employees to "monitor foster children 24 hours a day" and take responsibility for "harm inflicted by third parties on foster children" (dissenting op 12, 15 [emphasis omitted])[FN7]. Our holding merely requires that municipalities, in making decisions about the child's placement, make those decisions with reasonable care. Contrary to the foreboding picture painted by the dissent, recognition of a duty on the part of municipalities administering foster care systems does not impart strict liability upon the government. The dissent's fears in this respect unnecessarily conflate the existence of a duty with breach of that duty. "Like other duties in tort," however, "the scope of the [government's] duty to protect [foster children will be] limited to risks of harm that are *reasonably foreseeable*" (*Sanchez*, 99 NY2d at 253 [emphasis added]).

In light of our holding, we do not address plaintiff's remaining argument as to whether the complaint sufficiently sets forth one of the three special duty categories. We further conclude that resolution of the County's "argument that [it] is entitled to governmental [function] immunity—an affirmative defense on which [it] bears the burden of proof—is not appropriate" at the motion to dismiss stage of this action (*Villar*, 28 NY3d at 80-81, citing *Valdez v City of New York*, 18 NY3d 69, 79-80 [2011]).

Accordingly, the order of the Appellate Division should be reversed, with costs, and the motion of defendant Cayuga County to dismiss the complaint denied.

SINGAS, J. (dissenting):

Born from the desire to protect those most vulnerable among us and in response to the horrific facts of this case, the majority has rashly enacted a staggering expansion of municipal liability. Casting aside our carefully crafted special duty doctrine, the majority gives in to the temptation to create an exception for "an especially appealing class of cases" (*McLean v City of New York*, 12 NY3d 194, 204 [2009]). Though the nature of the crimes committed against the plaintiff in this case must evoke compassion, it is up to the legislature, and not this Court, to make such consequential [*5]policy decisions. Because the majority ignores our special duty precedent, the principles that have guided us in reaffirming that rule, and the staggering effects of its expansion of municipal liability, I dissent.

After the enactment of the Child Victims Act (CVA), plaintiff commenced the instant action against defendant Cayuga County (County) and several unnamed defendants.

Plaintiff asserted a single claim of negligence against the County, alleging that, after being placed into a foster home, she was sexually abused and assaulted by her foster father beginning in 1975 when plaintiff was eighteen months old and continuing until 1982 when she was eight years old. The County moved to dismiss the complaint on the ground that plaintiff failed to establish that the County owed her a special duty. In opposition, plaintiff argued that the County voluntarily assumed a duty to her and, therefore, owed her a special duty.

Supreme Court denied the motion, but the Appellate Division reversed (*see* 216 AD3d 1459 [4th Dept 2023]). The Appellate Division, relying on this Court's precedent, held that the County's alleged failure to meet its obligations under the Social Services Law did not give rise to a special duty, because "the failure to perform a statutory duty, or the negligent performance of that duty, cannot be equated with the breach of a duty voluntarily assumed" (*id*. at 1462 [alterations omitted]). We granted plaintiff leave to appeal (*see* 41 NY3d 908 [2024]).

As a threshold issue, plaintiff failed to preserve the argument endorsed by the majority—that she was not required to establish a special duty, and that the County owed her a common-law duty instead. In response to the County's motion to dismiss, plaintiff argued only that the County owed her a *special* duty, and cited the County's status as her legal guardian as a basis for finding that special duty. Plaintiff never argued that she could sidestep the special duty framework. The majority's artful characterization of plaintiff's argument, i.e., that a "duty arose from its 'custodial relationship' with plaintiff" (majority op at 2-3), omits this key context from her opposition papers.

Nor did Supreme Court find that plaintiff had pleaded such a common-law duty. The majority mischaracterizes Supreme Court as having decided that "because plaintiff was in the custody of the County, the case was distinguishable from *Maldovan v County of Erie* (188 AD3d 1597 [4th Dept 2020], *affd* 39 NY3d 166 [2022])," where we held that the plaintiff's claim failed under the special duty framework. To the contrary, Supreme Court explained that the "*facts*" of this case "are distinguish[able] from those of *Maldovan*" (emphasis added). This discussion, if anything, reinforces that Supreme Court analyzed the issue in the only manner that plaintiff chose to present it—within the special duty framework.

Yet plaintiff now advances a different argument: that she need not demonstrate a special duty at all. Instead, she contends that the County owed her a common-law duty of care because she was in its custody as a foster child. Because plaintiff failed to make that argument before Supreme Court, this Court has no power to reach the issue (*see*

Sabine v State of New York, — NY3d &mdash, 2024 NY Slip Op 06288, *1-2 [2024]; *cf. Maldovan*, 39 NY3d at 171).

III.

In any event, our precedent is clear that a plaintiff suing a municipality for the negligent performance of its governmental functions must establish a special duty under one of the recognized categories (*see Pelaez v Seide*, 2 NY3d 186, 199-200 [2004]). Today the majority ignores our precedent, which squarely rejects the recognition of duties outside of that framework under these circumstances, and adds an asterisk to the special duty rule, opening municipalities to liability for a new class of plaintiffs: every child under the age of 18 in the foster care system. Doing so comes at significant financial and operational cost to local governments, and may worsen outcomes for children in foster care. The majority has created expansive liability for all municipalities operating a foster care system based on the concept of "legal," as opposed to physical, custody. And foster children are in the municipality's legal custody 24 hours a day, seven days a [*6]week, year in and year out, despite being in the physical custody of a foster family. It is up to the legislature—and not this Court—to reorder municipal liability on this scale.

A.

In 1929, New York waived immunity from liability through the Court of Claims Act (*see* Court of Claims Act former § 12-a, now § 8), permitting individual suits against the State and its subdivisions (*see Bernardine v City of New York*, 294 NY 361, 365 [1945]). However, "other recognized limitations still govern the tort liability of municipal officers, and governmental defendants unquestionably continue to enjoy a significant measure of immunity" (*Ferreira v City of Binghamton*, 38 NY3d 298, 308 [2022] [internal quotation marks, citation, and ellipsis omitted]). In particular, if a governmental entity was acting in its "governmental capacity" when a claim arose, a plaintiff bringing a negligence claim may not simply rely on the breach of a duty owed to the public generally. Rather, a plaintiff must establish that the government owed them a "special duty," i.e., a "duty to use due care for the benefit of particular persons" (*Motyka v City of Amsterdam*, 15 NY2d 134, 139 [1965]) that is "more than that owed the public generally" (*Lauer v City of New York*, 95 NY2d 95, 100 [2000]). Such a special duty is "born of a special relationship between the plaintiff and the governmental entity" (*Pelaez*, 2 NY3d at 198-199). This special duty rule has a long history in our jurisprudence.

In *Steitz v City of Beacon*, this Court held that there was an important distinction between a duty owed to the public and that owed to a particular individual (295 NY 51

[1945]). There, the plaintiffs alleged that the city's failure to create a fire department or maintain certain infrastructure caused their property to be destroyed in a fire (*id.* at 54). The Court determined that the laws governing the city's conduct at issue "were not in terms designed to protect the personal interest of any individual and clearly were designed to secure the benefits of well ordered municipal government enjoyed by all as members of the community" (*id.* at 55). Because the city owed no special duty, the plaintiffs were not entitled to recover for the city's failure to adhere to those laws (*id.*).

In *Riss v City of New York*, this Court similarly held that the city owed no special duty to an assault victim who, prior to the assault, had alerted the police that the assailant was threatening her (*see* 22 NY2d 579, 581-582 [1968]). The Court noted that "proclaim[ing] a new and general duty of protection in the law of tort . . . would inevitably determine how the limited police resources of the community should be allocated and without predictable limits" (*id.* at 582). This sort of "judicial innovation," the Court warned, would constitute "an assumption of judicial wisdom and power not possessed by the courts" (*id.*).

This Court again affirmed the distinction between liability to the public generally and to a particular individual in *O'Connor v City of New York* (*see* 58 NY2d 184 [1983]). In that case, a city inspector certified that a newly installed gas system complied with certain safety regulations, but failed to correct defects that caused an explosion resulting in deaths and injuries. Although it was "beyond dispute that the city inspector should not have" certified that the system was in compliance, the Court held that the municipality could not be held liable because the safety regulations in question were intended to "protect[ ] all members of the general public similarly situated" (*id.* at 189-190). Once again, the Court warned that diverging from our special duty precedent would "subject municipalities to open-ended liability of enormous proportions and with no clear outer limits" (*id.* at 191).

Over time, this Court identified three narrow circumstances in which a special relationship can be formed:

"(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation" (*Pelaez*, 2 NY3d at 199-200).

We have repeatedly reiterated this three-pronged framework (*see Maldovan*, 39 NY3d at 171; *Ferreira*, 38 NY3d at 310; *Tara N.P. v Western Suffolk Bd. of Coop. Educ.*

Servs., 28 NY3d 709, 714 [2017]; *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013]; *Metz v State of New York*, 20 NY3d 175, 180 [2012]; *McLean*, 12 NY3d at 199; *Kovit v Estate of Hallums*, 4 NY3d 499, 506 [2005]). As we recently explained, "the special duty requirement applies to *all* negligence actions against a governmental defendant" acting in its governmental capacity (*Ferreira*, 38 NY3d at 316 [emphasis added]).

We have maintained that, absent a special duty, "there should be a legislative determination" of "the scope of public responsibility" (*Riss*, 22 NY2d at 582; *see Kircher v City of Jamestown*, 74 NY2d 251, 259 [1989]; *O'Connor*, 58 NY2d at 192 ["If liability to individuals is to be imposed on municipalities for failure to enforce statutes or regulations intended for the general welfare, that imposition should come from the (l)egislature"]; *Steitz*, 295 NY at 55 ["An intention to impose upon the city the crushing burden of such an obligation should not be imputed to the (l)egislature in the absence of language clearly designed to have that effect"]). Our special duty case law sets the outer bounds of governmental liability under the common law, and we have left it for the political branches to further extend this liability.

B.

Consistent with this history, we have rejected the expansion of the special duty doctrine in strikingly similar circumstances. In *McLean*, a child was injured at a daycare facility that was required to register with the State Department of Social Services and, as in this case, was subject to municipal oversight under article 6 of the Social Services Law (*see* 12 NY3d at 197). The defendant, the City of New York, did not have physical custody or control over the children at the daycare center, like the County here. While at the daycare, the child fell and suffered a brain injury (*see id.* at 199). The Court concluded that the plaintiff failed to demonstrate that the City owed her a duty specifically, rather than the general duty the City owed to all parents and children in need of daycare (*see id.* at 201-202). Thus, the plaintiff failed to establish a special duty between the child and the City. The Court further held that recognizing a private right of action under the Social Services Law, where the statute provided none by its terms, "would be inconsistent with the legislative scheme" (*id.* at 200).

Like the children in daycare in *McLean*, the County's duty to plaintiff "was neither more nor less than its duty to any other . . . child in need of" foster care (*id.* at 201). Yet the majority fails to appreciate this distinction between liability to the public generally and liability to a particular individual—the key distinction that has animated the special duty doctrine since its inception. Like in *McLean*, a carefully calibrated legislative and regulatory scheme governs the municipal conduct at issue here, including by vesting legal custody over foster children to the municipality (*see* Social Services Law § 383

[2]). That scheme is not designed "to protect the personal interest of any individual," but rather "clearly [was] designed to secure the benefits of well ordered municipal government enjoyed by all as members of the community" (*Steitz*, 295 NY at 55). Indeed, the statutes and regulations governing foster care "protect[ ] all members of the general public similarly situated," and thus, there is no basis for municipal liability (*O'Connor*, 58 NY2d at 190).

In addition to being incompatible with our precedent, imposing novel liability in this circumstance is also inconsistent with the Social Services Law, as we again squarely held in *McLean* (*see* 12 NY3d at 200-201, citing *Mark G. v Sabol*, 93 NY2d 710, 720-721 [1999]). Because the legislature "specifically considered and expressly provided for enforcement mechanisms" in the laws governing provision of foster care, and those laws "were enacted as the 'comprehensive' means by which the statute accomplishes its objectives," it is "inappropriate for [this Court] to find another enforcement mechanism beyond the statute's already 'comprehensive' scheme" (*Mark G.*, 93 NY2d at 720). Critically, the legislature saw fit to create a private right of action under Social Services Law § 420, which "provides for criminal and civil liability for the *willful* failure of persons, officials or institutions required by title 6 to report cases of 'suspected child abuse or maltreatment' " (*id.* at 722 [emphasis added], quoting Social Services Law § 420). "If the [l]egislature had [*7]intended for liability to attach for [*negligent*] failures to comply" with the statutes at issue here, "it would likely have arranged for it as well" (*id.*).

McLean is on all fours in yet another respect: in it we rejected the very same theory of common-law duty on which the majority's holding now rests. The plaintiff there asserted that this Court should recognize "a new category" that included her and the City, and that she could thus prevail "without fitting her case into . . . a [special duty] category" (12 NY3d at 202). She also contended that the "City should stand liable at common law for its plainly negligent performance of admittedly ministerial functions" (brief for respondent at 60 in *McLean*, 12 NY3d 194 [emphasis omitted]). The plaintiff's argument in part derived from the public policy concern "that the helplessness of young children, and the State's powerful interest in protecting them from neglect or abuse, should lead [the Court] to announce the existence of a special relationship between those who register child care providers and parents and children who need child care" (*McLean*, 12 NY3d at 204). This Court declined this "invitation to relax the special relationship rule to accommodate an especially appealing class of cases," explaining that "[a] well settled rule of law denies recovery in cases like this, and that rule, by its nature, bars recovery even where a government blunder results in injury to people deserving of the government's protection" (*id.*). Properly applied, *McLean* forecloses any argument that the County owed plaintiff a duty here.

C.

Notwithstanding, today's ruling disregards our foreboding warnings against expanding the special duty doctrine. Here too, plaintiff urges this Court to create a new special duty category for her case. Instead of exercising the restraint consistently reflected throughout our precedent, the majority accepts plaintiff's invitation, creating uncertainty where this Court has made concerted efforts to establish consistency. In abandoning this precedent, the majority holds that municipalities owe "a duty of care to the children the municipalities place in foster homes because the municipalities have assumed custody of those children" (majority op at 1). This sweeping rule suggests that the government would be liable for any harm that a foster child suffers—all the liability associated with physical custody without the same control over the environment.

Attempting to sidestep *McLean*, the majority insists that its decision "simply acknowledges and gives meaning to our governmental custody line of cases," by extending their holdings to those in the government's "legal custody," including those in foster care (majority op at 8).**[FN8]** In the cases the majority cites (*see e.g. Sanchez v State of New York*, 99 NY2d 247 [2002]; *Mirand v City of New York*, 84 NY2d 44 [1994]; *Pratt v Robinson*, 39 NY2d 554 [1976]; *Flaherty v State*, 296 NY 342 [1947]), the Court determined that the State owed a duty of care to those in its physical custody, including incarcerated individuals (*see Sanchez*, 99 NY2d at 252) and students while at school (*Pratt*, 39 NY2d at 560), because of the nature of the custody.

Despite the majority's protestations, our physical custody cases are inapplicable for the obvious reason that plaintiff was not in the County's physical custody when the alleged incidents occurred. Our physical custody precedent makes sense: the government exercises a high level of control over an individual in its physical custody. As we explained in *Pratt v Robinson*, "[t]he duty owed by a school to its students . . . stems from the fact of its *physical custody* over them. As the Restatement puts it, by taking custody of the child, the school has 'deprived [the child] of the protection of his parents or guardian. Therefore, the actor who takes custody of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him' " (39 NY2d at 560 [emphasis added], quoting Restatement [Second] of Torts § 320, Comment *b*).

Notably, *Pratt* recognized that "[w]hen [physical] custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection, the school's custodial duty also ceases" (*id.*). Similar to students leaving the "orbit" of a school, municipalities relinquish day-to-

day physical custody and control of foster children when they are placed with foster parents, even if municipalities retain legal custody.

Here, no one disputes that foster children are not in the government's physical custody. Rather, "foster parents are responsible for making routine day-to-day decisions about things like play dates or school trips, assisting with homework and other school activities, and taking children to medical appointments" (brief for amicus curiae City of New York at 5). Consequently, a municipality does not decide how a foster child's daily needs are met, but rather performs the more limited role of oversight and enforcement. Enforcing regulations enacted to help ensure that foster children receive the care they need is not the same as caring for foster children in the first instance. Without municipalities having that level of control, this Court is exposing municipalities to a wide array of negligence claims that extend beyond the sympathetic facts of this case. Municipalities may now have to monitor foster children 24 hours a day in response to such a duty. As a result, the majority's troublesome expansion of our physical custody cases goes far beyond merely "acknowledg[ing] and giv[ing] meaning to our governmental custody line of cases" (majority op at 8).

The majority instead ignores that the foster parents had physical custody of plaintiff here. While in this case a foster parent was allegedly the bad actor, that allegation alone does not change that bad actors are sometimes the only ones who can be held legally responsible for their actions. Moreover, the majority seems to criticize the entire foster care system without recognizing that most foster parents are loving and caring, and often offer welcome refuge to a child in danger.

The majority's holding also overlooks that municipalities are not solely responsible for placing and removing foster children. Except in emergency situations, a Family Court judge decides whether to remove a child from a home (Family Court Act §§ 1022, 1024, 1027 [a] [iii]; *see* brief for amicus curiae City of New York at 5).**[FN9]** If there is a finding of abuse or neglect against the child's guardian, a Family Court judge then renders an order of disposition determining where the child will live (*see* Family Court Act § 1052), which could result in the child being placed in foster care by court order (*see id.* § 1055 [a] [i]). Notwithstanding the court's integral role in this process—and localities' obligation to implement court orders placing children into foster care—the majority makes municipalities liable for such placements' consequences.

Ultimately, the majority leaves the lower courts to speculate what other duties the government might owe to those in its "legal custody." For example, "[a] person who is under a sentence of probation is in the *legal custody* of the court that imposed it pending expiration or termination of the period of the sentence" (CPL 410.50 [1]

[emphasis added]). Likewise, parolees are "in the *legal custody* of the [Department of Corrections] until expiration of the maximum term or period of sentence, or expiration of the period of supervision, including any period of post-release supervision, or return to imprisonment in the custody of the department" (Executive Law § 259-i [2] [b] [emphasis added]). This potential for broad new liability [*8]highlights why this Court has consistently forbidden making "ad hoc exceptions to the special duty/special relationship rule" (*McLean*, 12 NY3d at 204).

The majority compounds this confusion by failing to explain its rejection of the County's governmental function immunity defense (majority op at 13). The County will undoubtedly continue to assert this defense in this litigation. But by omitting any discussion of how this crucial step of the governmental liability analysis interacts with its novel holding, the majority has abdicated its duty to provide lower courts and litigants meaningful guidance on how to implement its decision.

D.

This Court has explained that

"the special duty rule is grounded in separation of powers concerns and a recognition that executive agencies, not the courts and juries, have the primary responsibility to determine the proper allocation of government resources and services. Indeed, the special duty rule minimizes a municipality's exposure to 'open-ended liability of enormous proportions and with no clear outer limits,' which could otherwise 'discourage municipalities from undertaking activities to promote the general welfare' that may expose them to liability. . . . [I]t is intended to allow municipalities to 'allocat[e] resources where they would most benefit the public' and ensure that 'the prime concern' is not 'the avoidance of tort liability' but 'the promotion of the public welfare' " (*Ferreira*, 38 NY3d at 316, quoting *O'Connor*, 58 NY2d at 191 [citation omitted]).

"Allowing such decisions regarding allocation of resources and services to be made by the government, and not this Court, is one of the primary reasons for the special duty rule" (*Maldovan*, 39 NY3d at 175 n 1).

Today, this Court, in essence, codifies a new private right of action that the legislature has heretofore declined to create.**[FN10]** In doing so, this Court makes the policy judgment that the government should pay for harm *inflicted by third parties* on foster children, without due consideration for "[t]he deleterious impact that such a judicial extension of liability would have on local governments, the vital functions that they serve, and ultimately on taxpayers" (*O'Connor*, 58 NY2d at 192).

As the County of Westchester highlights in its amicus curiae brief, extending liability in this manner could well generate multimillion dollar judgments against localities for the acts of third parties (*see* Andrew Denney*, Federal Jury Awards Record Nine-Figure Verdict to Child Victims Act Plaintiff*, NYLJ, Mar. 29, 2024, available at https://www.law.com/newyorklawjournal/2024/03/29/federal-jury-awards-record-nine-figure-verdict-to-child-victims-act-plaintiff/?slreturn=20241025104458 [last accessed Feb. 10, 2025] [reporting jury awards in CVA cases of $95 million, $100 million, and $160 million]). "Even if a court substantially reduced such an award, it is likely that municipalities—without the protection of the special duty rule—will be faced with multi-million dollar verdicts in a substantial number of cases" (brief for amicus curiae County of Westchester at 15 n 7). Indeed, the City of New York notes that it alone currently faces more than 600 lawsuits brought under the CVA, and that " '[i]mposing liability here' risks inflicting a [*9]'crushing burden' on child protective agencies like [New York City Administration for Children's Services]" (brief for amicus curiae City of New York at 1-2, 25 [citation omitted]). The majority ignores that such a crushing burden not only stems from potential judgments (*see* majority op at 12-13), but also arises from increased litigation costs. This new avenue of liability will increase the number of cases brought and force municipalities to litigate past the motion to dismiss stage. This will inevitably cause municipalities to settle meritless claims to avoid significant litigation costs and the risk of monumental judgments.

Subjecting municipalities to such "open-ended liability of enormous proportions and with no clear outer limits" will "impede municipal officials from allocating resources where they would most benefit the public" (*O'Connor*, 58 NY2d at 191). As a result, I fear that the majority's holding will have the unintended consequence of "discourag[ing] municipalities from undertaking activities to promote the general welfare" (*id.*; *see Maldovan*, 39 NY3d at 175 [warning that placing such a "crushing burden" may "render them less effective in fulfilling their mission to protect vulnerable individuals"]). To combat the ensuing onerous costs, municipalities will respond as they often must—by diverting precious resources from those who need them most. "[C]ourts should not take it upon themselves to, in effect, reorder municipal priorities" (*O'Connor*, 58 NY2d at 191).

Even more concerning, today's holding may create a perverse financial incentive to resist removing children from their abusive or neglectful families because negligence claims can now proceed if a municipality removes a child and places them with a foster family, but cannot if the municipality declines to remove a child from a dangerous home (*see Maldovan*, 39 NY3d at 175). Additionally, to avoid facing potentially crushing liability outside their control, municipalities may regress to placing children in institutional settings like orphanages rather than foster homes. "[P]lacements in

institutional care generally have less favorable outcomes than those in family-based settings" and "often have a negative impact on children's overall development that may be serious and irreversible" (Eric Rosenthal, *The Right of All Children to Grow Up with a Family under International Law: Implications for Placement in Orphanages, Residential Care, and Group Homes*, 25 Buff Hum Rts L Rev 65, 90 [2019], quoting Nigel Cantwell, *The Human Rights of Children in the Context of Formal Alternative Care* in Wouter Vandenhole et al., Routledge International Handbook of Children's Rights Studies at 268 [2015]). This Court is distinctly ill-equipped to wade into these complex and competing policy interests—interests that the legislature has presumably balanced by choosing to enact a statutory scheme that does not impose liability on municipalities in these circumstances (*see Mark G.*, 93 NY2d at 720, 722). I would respect that choice.

V.

Plaintiff is required to plead and prove that the County owed a special duty to her, separate from the general duty owed to the public and she has failed to meet this burden. "Special duty cases often come to us following instances of domestic violence and other 'sympathetic circumstances' where emotions are charged and our shared 'humanistic intuition' necessarily tempts us to disregard settled law in order to permit individual recovery" (*Howell v City of New York*, 39 NY3d 1006, 1010 [2022] [citation omitted]). "Our responsibility, however, is to set the particular case before us into its carefully developed precedential framework, mindful always of the opportunities the common law allows for refinements to assure that the rule or principle that emerges is a sound one" (*Lauer*, 95 NY2d at 103-104). The outcome dictated by faithfully applying our precedent here might well spark a debate over the costs and benefits of expanding municipal liability, in the proper forum with the appropriate stakeholders. Instead, the majority usurps that role, weighing policy choices and overriding precedent limiting liability in special duty cases. In doing so, it has set the stage for system-wide change, likely not of the kind, or with the salutary effects, that the majority envisions.

Order reversed, with costs, and motion by defendant Cayuga County to dismiss the complaint denied. Opinion by Judge Troutman. Chief Judge Wilson and Judges Rivera, Cannataro and Halligan concur. Judge Singas dissents in an opinion, in which Judge Garcia concurs.

Decided February 18, 2025

Footnote 1: Although not directly relevant to the question before us, we note our recent clarification that this third situation also includes instances where a municipality

effectively takes control of a premises, thereby "knowingly *creating* an unpredictable and potentially dangerous condition" (*Ferreira*, 38 NY3d at 317 [emphasis added]).

Footnote 2: Plaintiff's argument is preserved. In an affirmation provided in opposition to the County's motion to dismiss, she argued that the County had "a duty arising from a custodial relationship," and that this duty continued after the County placed plaintiff in her foster home. In an accompanying memorandum of law, plaintiff elaborated that, because of that custodial relationship, she had adequately "allege[d] a special relationship" between the County and herself such that the duty owed to her "was more than a general duty owed to the public." She makes the same argument here. Furthermore, we and the dissenters appear to agree that Supreme Court distinguished *Maldovan* based on the fact that, here, plaintiff was in the custody of the County (*see* dissenting op at 3).

Footnote 3: The dissent relies on *Mark G.* (*see* dissenting op at 9), but that case is inapposite because there were no allegations that the government had breached a common-law duty. There, we decided only that plaintiffs, some of whom suffered abuse in the foster homes, could not allege a private right of action based on provisions of the Social Service Law (*see Mark G.*, 93 NY2d at 720-722). However, we granted plaintiffs leave to replead any common-law claims or theories (*see id.* at 726-727). When we cited *Mark G.* in *McLean*, we did so only with respect to our discussion concerning the statutory duty category of the special duty doctrine (*see McLean*, 12 NY3d at 200-201). The holding of *Mark G.* therefore remains cabined solely to alleged breaches of statutory duty and does not extend to common-law negligence claims.

Footnote 4: We do not consider the question of whether a special duty arises when legal custody is vested with a non-government official.

Footnote 5: We are puzzled by our dissenting colleagues' reliance on our "carefully crafted special duty doctrine" yet insistence that only the legislature can recognize a duty on the part of municipalities under these circumstances (dissenting op at 1). Indeed, the special duty doctrine itself was not the result of legislative judgment but instead is a creature of common law (*see Maldovan*, 39 NY3d at 174). Further puzzling is our dissenting colleagues' emphasis that the " 'comprehensive' scheme" of the Social Services Law precludes this Court from recognizing a duty that may create liability for a municipality's negligence (dissenting op at 9, quoting *Mark G.*, 93 NY2d at 720). While the dissent claims that "[t]his Court is distinctly ill-equipped to wade into these complex and competing policy interests"
(dissenting op at 17-18), it appears willing to impose such liability where a plaintiff otherwise satisfies one of the special duty categories, which were crafted from the

policy decisions of this Court. Our decision is not, as the dissent suggests, merely "[b]orn from the desire to protect those most vulnerable among us and in response to the horrific facts of this case" (dissenting op at 1). We simply apply the longstanding doctrine concerning persons in government custody.

Footnote 6: We respectfully disagree our dissenting colleagues' accusation that our decision "criticize[s] the entire foster care system without recognizing that most foster parents are loving and caring, and often offer welcome refuge to a child in danger" (dissenting op at 13). We have no doubt that the majority of municipal actors and foster parents provide foster children with invaluable care and protection. Our decision merely allows the opportunity to recover for foster children who suffer harm in the care and custody of bad actors where the government could have reasonably foreseen such harm. In this respect, our decision does not hold municipalities liable for the actions of bad actors. Indeed, plaintiff may be unable to establish any negligence by the County even if the she suffered the grievous injuries of which she has complained.

Footnote 7: Municipal liability would not foreclose an action against the foster parent for potential liability based on their acts.

Footnote 8: The majority's legal analysis is not entirely consistent or clear. Is this new duty owed to those in the government's legal custody based on (1) common-law liability, "fall[ing] outside the special duty doctrine" (majority op at 8); or (2) the voluntary assumption of a duty (*see* majority op at 9 ["By assuming custody of plaintiff, and thus assuming the authority to control where and with whom plaintiff lived, the County necessarily assumed a duty to her beyond what is owed to the public generally"])?

Footnote 9: "[I]f the court finds that removal is necessary to avoid imminent risk to the child's life or health, it is required to remove or continue the removal and remand the child to a place approved by the agency" (*Nicholson v Scoppetta*, 3 NY3d 357, 376-377 [2004], citing Family Court Act § 1027 [b] [i]). "In undertaking this inquiry, the statute also requires the court to consider and determine whether continuation in the child's home would be contrary to the best interests of the child" (*id.*).

Footnote 10: I would adhere to this Court's precedent consistently holding that only the legislature may expand liability beyond the special duty framework (*see Kircher*, 74 NY2d at 259; *O'Connor*, 58 NY2d at 192; *Riss*, 22 NY2d at 582; *Steitz*, 295 NY at 55). Stare decisis dictates that "common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court, will generally be followed in subsequent cases presenting the same legal problem" (*Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald*, 25 NY3d 799, 819 [2015]

[internal quotation marks omitted]). Substituting their own policy judgments for our precedent, the majority ignores this important prudential limitation on exercising our authority to change the common law (*see* majority op at 8 n 5). I "do not blithely decline to amend the common-law rule in this case without reason" (*Maldovan*, 39 NY3d at 174). Rather, I am bound to adhere to our precedent.

Failure to Appear

Matter of A.R., 237 AD3d 551 (1st Dept., 2025)

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about June 14, 2023, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about February 14, 2023, which found, after a hearing, that respondent neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Respondent's contention that the court should not have proceeded with the last day of the fact-finding hearing in his absence, raised for the first time on appeal, is unpreserved for review (*see Matter of Anthony G. v Stephanie H.*, 189 AD3d 615, 616 [1st Dept 2020], *lv denied* 36 NY3d 911 [2021]). Even if we were to review this claim, we would find, for the reasons set forth below, that respondent's absence from the proceedings did not violate his due process rights.

On the last day of the fact-finding hearing, the officer at the prison where respondent was being held relayed to the trial court that the respondent "refuse[d] to appear." Respondent's counsel stated that she was prepared to proceed in respondent's absence. Respondent's counsel indicated that she would not be putting on a case, and the court entered a finding of neglect against respondent. Respondent's mother, who was present for the hearing, informed the court that her son was ill and that was the reason for his nonappearance. The court instructed respondent's counsel to verify the mother's statement, and it was confirmed that respondent had not been produced for the fact-finding because he was hospitalized and receiving treatment. The court then noted that if respondent's nonappearance was due to his illness, it would be a "perfectly valid reason for an adjournment or a continuance." Respondent's counsel made no such application.

While it is concerning that respondent's nonappearance on the last day of the fact-finding hearing was determined to be unwilful only *after* the court entered a finding of neglect against him and drew a negative inference from his nonappearance, respondent has not raised any issue regarding representation by his counsel (*see Matter of Anthony G.,* 189 at 616), nor has respondent made a motion for rehearing or moved to vacate the order (*see* Family Ct Act § 1042). It is undisputed that respondent's counsel was present at all stages of the fact-finding hearing and participated on his behalf (*see Matter of Anthony G.,* 189 AD3d at 616), and that the child was represented by counsel (*see* Family Ct Act § 1042).

Turning to the merits of petitioner's case, a preponderance of the evidence supports the finding that respondent neglected the child by inflicting an act of domestic violence upon the mother, resulting in injuries that required treatment at the hospital, while the child was present in the home (*see Matter of Amelia A. [Saul A.]*, 223 AD3d 401, 401 [1st Dept 2024]). That the finding was based [*2]on a single incident did not preclude Family Court from entering a finding of neglect, because "a single incident where the parent's judgment was strongly impaired and the child was exposed to a risk of substantial harm can sustain a finding of neglect" (*Matter of Allyerra E. [Alando E.]*, 132 AD3d 472, 473 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]). The court credited the testimony of the mother and the caseworker as to the nature and severity of the mother's injuries, and its credibility determinations are entitled to deference (*see Matter of N.R. [D.W.]*, 227 AD3d 596, 596 [1st Dept 2024]). Furthermore, respondent failed to offer any contradictory evidence, and his claim that the mother's injury resulted from an accidental push has no support in the record. Given that respondent elected not to testify, the court was entitled to draw the strongest negative inference against him (*see Matter of Nicole H.*, 12 AD3d 182, 183 [1st Dept 2004]).

Guardian *ad litem*

Matter of Joyce Q. v Clarissa R., 237 AD3d 1257 (3rd Dept., 2025)
Appeals (1) from an order of the Family Court of Saratoga County (Paul Pelagalli, J.), entered September 7, 2022, which granted petitioner's application, in proceeding No. 1 pursuant to Family Ct Act article 6, for custody of the subject child, and (2) from an order of said court, entered September 7, 2022, which granted petitioner's application, in

proceeding No. 2 pursuant to Family Ct Act article 10, to adjudicate the subject child to be neglected.

Respondent (hereinafter the mother) is the mother of a child (born in 2017), and petitioner Joyce Q. (hereinafter the grandmother) is the child's maternal grandmother. In January 2022, petitioner Saratoga County Department of Social Services (hereinafter DSS) filed a request for access into the mother's home for observation, inspection and photographs to be taken and a temporary order of protection for the child due to the mother's mental health issues and poor living conditions. Subsequently, the grandmother filed a custody petition. Two days later, DSS filed a neglect petition against the mother. Ultimately, the mother consented to a finding of neglect, without an admission, and the child was adjudicated to be a neglected child by the mother.

A dispositional hearing was then held, at which the grandmother's petition was also addressed. Following the hearing, Family Court issued an order of custody granting the grandmother legal and physical custody, with the mother having "incidents of legal custody" to meaningfully participate in medical appointments and educational events. At the same time, the court issued an order of disposition resolving the neglect petition by way of the order of custody (*see* Family Ct Act § 1052 [a] [vi]). The mother appeals from both orders.

The mother's sole contention on appeal is that Family Court erred by not appointing a guardian ad litem for her. Initially, we note that, during the pendency of the proceedings, neither the mother nor her attorney requested the appointment of a guardian ad litem (*see Matter of Marie ZZ. [Jeanne A.]*, 140 AD3d 1216, 1217 [3d Dept 2016]; *Matter of Shawndalaya II.*, 31 AD3d 823, 825 [3d Dept 2006], *lv denied* 7 NY3d 714 [2006]). As to the merits, despite the mother, at times, giving lengthy and incoherent answers, many of her responses were appropriate. She sufficiently demonstrated that she understood the effect of consenting to a finding of neglect, given her responses to Family Court as well her specific inquiry about expunging the finding of neglect. Additionally, at the dispositional hearing, she defended her position by testifying to her mental health treatment, her steps taken to improve her living conditions and why she opposed the grandmother having legal custody of the child. Accordingly, the record demonstrates that the mother understood the proceedings, defended her rights and assisted her counsel (*see Matter of Marie ZZ. [Jeanne A.]*, 140 AD3d at 1217; *Matter of Leala T.*, 55 AD3d 1007, 1008 [3d Dept 2008]; *Matter of Shawndalaya [*2]II.*, 31 AD3d at 825). "As such, viewing the record as a whole, we cannot conclude that Family Court erred in failing to sua sponte appoint a guardian ad litem for [the mother]" (*Matter of Marie ZZ.*

[Jeanne A.], 140 AD3d at 1217 [citations omitted]; *see Matter of Leala T.*, 55 AD3d at 1008).

Host Family Homes

Matter of Lawyers for Children v New York State Office of Children and Family Services, AD3d 2025 NY Slip Op 02115 (3rd Dept., 2025)

Appeal from a judgment of the Supreme Court (Richard McNally Jr., J.), entered December 6, 2023 in Rensselaer County, which dismissed petitioners' application, in a proceeding pursuant to CPLR article 78, to review certain regulations enacted by respondent Office of Children and Family Services.

This matter, concerning certain regulations enacted by respondent Office of Children and Family Services (hereinafter OCFS), returns to us for a second time (218 AD3d 913 [3d Dept 2023]). The subject regulations established the Host Family Home program (*see* 18 NYCRR 444.1), which aims to provide "supportive services . . . to children and their families . . . for the purpose of: assisting a family in need of day-to-day community-based supports by peers, arranging for parents and children to be temporarily cared for together in a host family home, and/or temporarily supporting a family when a parent has determined that he/she is temporarily unable to care for their child . . . as a way to avert the need for more formal child welfare intervention" (18 NYCRR 444.2 [f]). Pursuant to the program, OCFS would designate qualified entities as "host family home agenc[ies]" (18 NYCRR 444.2 [c]; *see* 18 NYCRR 444.12), and, as "authorized agenc[ies]" (18 NYCRR 444.2 [c]), those agencies would, in turn, recruit, vet, train and supervise volunteer host families willing to provide such support to families in need (*see* 18 NYCRR 444.9-444.17). A parent would then be able to choose from among volunteers to select a family that best meets their present needs (*see* 18 NYCRR 444.4). When it is temporary care of a child that is needed, legal custody would not be relinquished; instead, the parent would execute "a designation of 'person in parental relation,' " in accordance with the General Obligations Law, for the intended duration of the care (18 NYCRR 444.5 [b]), which could be revoked at any time (*see* 18 NYCRR 444.5 [h] [5]; *see also* General Obligations Law art 5, title 15-A).

Petitioners, legal organizations with contracts to represent children in foster care proceedings, commenced this CPLR article 78 proceeding seeking to annul the

regulations in their entirety. In petitioners' view, the Host Family Home program is a shadow voluntary foster care system without the procedural safeguards prescribed by the Legislature for such voluntary commitments. It is therefore argued that OCFS acted without legislative authority in creating the program and that the regulations are in conflict with the existing statutory scheme. Supreme Court disagreed and dismissed the petition. Petitioners appeal.[FN1]

Petitioners' argument that OCFS exceeded its authority when it created the Host Family Home program is unpersuasive. "Administrative agencies have all the powers expressly delegated to them by the Legislature, and are permitted to adopt regulations that go beyond the text of their enabling legislation, so long as those regulations are consistent with the statutory language and underlying purpose[*2]" (*Matter of Juarez v New York State Off. of Victim Servs.*, 36 NY3d 485, 491-492 [2021] [internal quotation marks, brackets and citations omitted]; *see State Div. of Human Rights v Genesee Hosp.*, 50 NY2d 113, 118 [1980]). "While an administrative agency may not, in the exercise of rule-making authority, engage in broad-based public policy determinations, the cornerstone of administrative law is the principle that the Legislature may declare its will, and after fixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation" (*Matter of Juarez v New York State Off. of Victim Servs.*, 36 NY3d at 492 [internal quotation marks, brackets and citations omitted]; *see Matter of Consolidated Edison Co. of N.Y. v Department of Envtl. Conservation*, 71 NY2d 186, 191 [1988]).

We begin by briefly observing that the challenged program was inspired by a "preventive model," which, according to the record before us, appears to have been implemented in some form in at least 38 states.[FN2] That model was created by a nonprofit organization, Safe Families for Children, to assist families in need of support, including temporary care for their children, but lacking extended familial or community connections. According to Safe Families, the most common reasons why families use programs based on their model — either as a unit or for placement of a child/children only — include homelessness, hospitalizations, lack of family support, parental crisis and respite. Less common reasons include mental health issues, incarceration and unemployment. The model is fashioned as supplementary rather than substitute care, and the record reveals that, under Safe Families programs, a child's average length of stay with a "host family" was 22 days, compared to a national average of 13½ months for a child placed in foster care.

Against that backdrop, we examine the General Obligations Law title invoked by the regulations. As relevant here, General Obligations Law title 15-A empowers a parent of a minor to "designate another person as a person in parental relation to such minor" for the purpose of making certain healthcare and educational decisions for the child (General Obligations Law § 5-1551).[FN3] Such designation is presently permitted up to 12 months and grants the designee all the powers and duties set forth in the Public Health Law provisions governing (1) immunization requirements for a child's enrollment in school and (2) consent to certain medical, dental, health and hospital services and the provisions of the Education Law relating to duties regarding compulsory education, unless otherwise specified in the designation (*see* General Obligations Law § 5-1555 [1]; *see also* General Obligations Law § 5-1553).[FN4] Because the execution of a designation under title 15-A does not transfer legal custody of the subject child to the designee, any authorized decision [*3]of a designee is superseded by a contravening decision of a parent (*see* General Obligations Law § 5-1555 [5]) and the designation may be revoked by the parent at any time (*see* General Obligations Law § 5-1554).

The plain language of General Obligations Law title 15-A does not limit who may be designated a person in parental relation. We therefore need not consider the legislative history of the title to reject petitioners' claim that such a designation was only intended to be used for relatives (*see Matter of Avella v City of New York*, 29 NY3d 425, 437 [2017]). Nonetheless, it bears noting that nothing in that history evinces such an intent. In 2004, the Legislature enacted General Obligations Law former title 18, empowering a parent to authorize "an adult person in whose care a minor has been entrusted" or "caregiver" to make certain healthcare and educational decisions for that minor (L 2004, ch 749, § 1). That enactment was in acknowledgment that there had been a dramatic increase in the number of "grandparents and other non-parent caregivers" in recent years and that it could be difficult for "grandparents or other caregivers, who do not have legal custody of the children in their care, to sign relevant consent forms for educational or health care services" (Senate Introducer's Mem in Support, Bill Jacket, L 2004, ch 749 at 4).[FN5] A 2005 chapter amendment repealed that title to address a number of issues not relevant here and replaced it with title 15-A (*see* L 2005, ch 119, §§ 1, 2). The 2005 legislation similarly contemplated a designation of person in parental relation being utilized for "grandparents and other non-parent caregivers" (Senate Introducer's Mem in Support, Bill Jacket, L 2005, ch 119 at 3). Indeed, when General Obligations Law § 5-1551 was amended in 2018 to increase the maximum period of a designation from 6 to 12 months, several of the petitioners presently before us recognized that the designation could be used for both relatives and nonrelatives alike

(*see* Letter from NYS Kinship Navigator et al., June 27, 2018 at 1, Bill Jacket, L 2018, ch 80 at 11).[FN6]

With that preexisting statutory mechanism in mind, we turn to the question of OCFS's authority. OCFS is the agency responsible for administering the child welfare laws of this state (*see* L 1997, ch 436, part B, § 122 [d]; *see also* Social Services Law §§ 17, 20, 34). To that end, it has been delegated broad authority "to establish rules, regulations and policies to carry out its powers and duties" under the Social Services Law (Social Services Law § 20 [3] [d]). One such duty is the care and protection of children, a matter governed by Social Services Law article 6, title 1. That title grants OCFS the authority to designate "[a]uthorized agenc[ies]" that are in turn empowered "to care for, to place out or to board out children" (Social Services Law § 371 [10] [a]; *see* Social Services Law §§ 374 [1]; 460-a [2]). The Legislature has defined to "[p]lace out" as "to arrange for the [*4]free care of a child in a family other than that of the child's parent, step-parent, grandparent, brother, sister, uncle, or aunt or legal guardian, for the purpose of adoption or for the purpose of providing care" (Social Services Law § 371 [12]), and to " '[b]oard out' means to arrange for the care of a child in a family, other than that of the child's parent, step-parent or legal guardian, to whom payment is made or agreed to be made for care and maintenance" (Social Services Law § 371 [14]). Section 374 of that title expressly provides that nothing therein shall restrict or limit the right of a parent to place out or board out their own child (*see* Social Services Law § 374 [2]), and there is similarly no limitation upon a parent's use of General Obligations Law title 15-A when they do so.

OCFS also has the authority to provide preventive services for children and their families (*see* L 1997, ch 436, part B, § 122 [d]; Social Services Law art 6, title 4) and to promulgate regulations concerning same, including "specification of services to be classified as preventive services; appropriate circumstances and conditions for the provision of particular services; appropriate providers and recipients of such services; and time limits, as may be appropriate, for the provision of particular services" (Social Services Law § 409-a [5] [a]). OCFS is also tasked with "promulgat[ing] regulations to prevent social services districts from overutilizing particular forms or types of preventive services and to encourage districts to provide balanced preventive services programs based on the identified needs of children and families residing in such districts" (Social Services Law § 409-a [5] [a]). The Legislature has defined preventive services, in pertinent part, as "supportive and rehabilitative services provided . . . to children and their families for the purpose of: averting an impairment or disruption of a family which will or could result in the placement of a child in foster care" (Social Services Law §

409). Although there are a number of circumstances when such services are legislatively mandated, the provision of preventive services to a child and his or her family is also generally authorized whenever OCFS believes that such services will avoid foster care placement (*see* Social Services Law § 409-a [2]).

Initially, it must be noted that the Host Family Home program is broader than petitioners' challenge to it. The program involves the provision of short-term care to children when that child's parent has determined that he or she is temporarily unable to provide such care, but it is also designed to provide care to children and parents together and to connect families with supportive individuals in their communities more generally (*see* 18 NYCRR 444.2 [f]). Petitioners do not address or challenge these significant aspects of the program. As for the short-term care of children, OCFS has been expressly delegated the authority to decide the appropriate circumstances [*5]for preventive services. In our view, the creation of a safe and reliable pool of volunteers for parents otherwise lacking "a village" of their own falls within the definition of such service (*see* Social Services Law § 409). As explained by OCFS in opposition to this petition, the hope is that, without the fear of unnecessary child welfare entanglement and the relinquishment of both care *and custody* of their child, as would be required with a voluntary foster care placement (*see*s26 Social Services Law § 384-a), parents will take advantage of available support, which, in turn, may help to avoid circumstances that could result in foster care placements and the prolonged separation of the family. We further find that implementation of that preventive service through the utilization of authorized agencies — that may *arrange for* the care of children with a family not their own — also falls within OCFS's authority (*see* Social Services Law § 371 [10] [a]; [12]). That said, the fact that OCFS is marshalling resources for parents does not change the fact that, under the Host Family Home program, it is ultimately the parent who is deciding whether and with whom to place their child (*see* 18 NYCRR 444.4) and, further, what the terms and length of that placement will be (*see* 18 NYCRR 444.5; *see also* General Obligations Law §§ 1-1553, 1-1555 [1]; Social Services Law § 372 [2]). This distinction, rejected by our dissenting colleagues, is critical to our consideration of petitioners' arguments regarding the alleged lack of protections for children and families under the program.

Petitioners argue that, notwithstanding the foregoing law, the Host Family Home regulations strip families of rights granted to them by the Legislature relating to voluntary foster care placements and, thus, are out of harmony with existing law regarding placements "outside of the home." Petitioners point to the requirements of preventive services prior to placement (*see* Social Services Law §§ 398 [1] [a]; 409-a [1]

[a] [i]), prioritization of kin resources and placing siblings together (*see* Social Services Law § 384-a [1-a], [1-b]), various judicial oversight (*see* Social Services Law § 358-a [1], [2] [c] [iv], [vii]; *see also* Family Ct Act § 1089 [d] [2] [iii], [iv]), independent legal counsel, including for children (*see* Social Services Law § 358-a [6]; *see also* Family Ct Act §§ 249 [a]; 262 [a]; 1090 [a], [b]), diligent efforts by the state toward the child's discharge from care (*see* Social Services Law § 358-a [3] [e]; *see also* Family Ct Act § 1089 [d] [2] [iii]) and limitations on out-of-state placements (*see* Social Services Law § 374-a). To the extent that these safeguards are in fact absent from the Host Family Home program, their absence is in alignment with (1) the program's intended lack of involvement of the child welfare and court systems, in order to encourage parents to utilize the resource; and (2) the lack of governmental intrusion when fit parents provide for the care of [*6]their children (*see generally Troxel v Granville*, 530 US 57, 65-66 [2000]; *Matter of Bennett v Jeffreys*, 40 NY2d 543, 545-546 [1976]).

It is important to note, however, that the Host Family Home program is not without its own protections, and there are many. The regulations require procedures ensuring that parents are informed of their legal rights and not acting as a result of coercion (*see* 18 NYCRR 444.11). This includes the provision of information and referral services designed to address the needs of the family, both before a parent elects to participate in the program and continuing after execution of a designation (*see* 18 NYCRR 444.4 [e]), as well as their right to consult with an attorney and available free or low-cost legal services for the parent and child (*see* 18 NYCRR 444.5 [e]-[f]). Authorized agencies must also make diligent efforts to notify any parent with legal custody prior to the execution of designation of person in parental relation (*see* 18 NYCRR 444.4 [f]). Local care is to be prioritized (*see* 18 NYCRR 444.4 [a]-[c]), parents are permitted to formalize their expectations for continuing contact with the child (*see* 18 NYCRR 444.5 [h] [2]), and the short-term arrangement may be terminated at any time (*see* 18 NYCRR 444.5 [5]; 444.18 [a] [1]). Children 14 years old or older are provided the opportunity to be involved in making care arrangements (*see* 18 NYCRR 444.5 [j]). Host families must undergo, among other inquiry, formal background checks, home study and trainings (*see*{fs26 18 NYCRR 444.90, 444.15-444.16), and both the host family home agency and OCFS provide continuing oversight (*see* NYCRR 444.10, 444.17). Discriminatory treatment is prohibited (*see* 18 NYCRR 444.3), parameters on the discipline of children are prescribed (*see* 18 NYCRR 444.8), and staff of authorized agencies are mandated reporters (*see* 18 NYCRR 444.6 [b]). The regulations also set forth a comprehensive children's bill of rights (*see* 18 NYCRR 444.7) and corresponding expectations of host families (*see* 18 NYCRR 444.13), including consequences for failing to immediately honor the request of a parent to revoke the person in parental relation designation

(*see* 18 NYCRR 444.18 [a]). Given that parents have always been permitted to place their children in the care of others, the challenged regulations result in increased protections for children, as well as their parents, under such circumstances.

Petitioners further assert that the regulations amount to legislative policymaking and thus violate the separation of powers doctrine. *Boreali v Axelrod* (71 NY2d 1 [1987]) continues to be the touchstone for "determining whether an agency has crossed the hazy 'line between administrative rule-making and legislative policy-making' " (*Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 25 NY3d 600, 610 [2015], quoting *Boreali v Axelrod*, 71 NY2d at 11; *see Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv.*, 27 NY3d 174, [*7]178 [2016]). The circumstances to be considered in differentiating between the two are "whether (1) the agency did more than balance costs and benefits according to preexisting guidelines, but instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) the [L]egislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and (4) the agency used special expertise or competence in the field to develop the challenged regulation" (*Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv.*, 27 NY3d at 179-180 [internal quotation marks, brackets and citations omitted]; *see Matter of Independent Ins. Agents & Brokers of N.Y., Inc. v New York State Dept. of Fin. Servs.*, 39 NY3d 56, 69-70 [2022]). These considerations "are not mandatory, need not be weighed evenly, and are essentially guidelines for conducting an analysis of an agency's exercise of power" (*Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv.*, 27 NY3d at 180 [internal quotation marks and citation omitted]; *see Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d 681, 696-697 [2014]).

First, although the Host Family Home program relates to a multitude of difficult social problems that may cause a parent to be temporarily unable to care for their child, the Legislature, not OCFS, made the basic policy choice that is central to the program — avoiding placement of children in the foster care system in the first instance by proactively offering services to families (*see Boreali v Axelrod*, 71 NY2d at 11-12). In providing an additional form of support to parents "to avert the need for more formal child welfare intervention" (18 NYCRR 444.2 [f]), OCFS furthered that policy and did not

make any sweeping value judgments of its own or otherwise transgress into the Legislature's role. Petitioners — and the dissent — view the central legislative policy at issue here as the need for robust protections for children residing outside their homes. However, we agree with respondents that the protections invoked by petitioners, discussed above, pertain to circumstances where the state has taken custody of a child and, thus, both parent and child have suffered the deprivation of a legal right, with court proceedings likely to ensue. We also reject the argument that the entire Host Family Home program is itself an impermissible "exception[ ]" to the voluntary foster care system (*Boreali v Axelrod*, 71 NY2d at 11-12). This is no truer for the subject program than any other preventive service aimed at avoiding foster care placement[*8]. There is also no record support for petitioners' claim that the program was merely a cost-savings measure.

Nor do we find that OCFS wrote on a clean slate in enacting the Host Family Home program (*see Boreali v Axelrod*, 71 NY2d at 13). Although, the program may indeed prove to be a "transform[ative]" service for families of this state, as noted by the dissent, OCFS has broken no new ground in its facilitation of such a preventive resource. Additionally, to the extent that the program involves short-term placements of children, it is largely a form of respite care — defined by the Legislature as "the temporary care and supervision of a child to relieve parents or other persons legally responsible for the care of such child where immediate relief is needed to maintain or restore family functioning" (Social Services Law § 409-a [5] [f]). As with preventive services generally, respite care is a matter that has long been entrusted to the discretion of OCFS (*see* Social Services Law § 409-a [5] [a]), and it is one on which OCFS has extensively regulated (*see* 18 NYCRR part 35). "Where an agency has promulgated regulations in a particular area for an extended time without any interference from the legislative body, we can infer, to some degree, that the [L]egislature approves of the agency's interpretation or action" (*Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 25 NY3d at 612 [citations omitted]).

We are also unpersuaded that the Legislature has unsuccessfully tried to reach agreement on the issue, so as to suggest that the matter is a topic within the legislative domain (*see Boreali v Axelrod*, 71 NY2d at 13). Petitioners point to a stalled proposal that would have allowed parents to make alternative living arrangements for children at substantial risk of abuse (*see* 2021-2022 NY Assembly Bill A8090, 2021-2022 NY Senate Bill S08148; *see also* 2023-2024 NY Assembly Bill A4383, 2023-2024 NY Senate Bill S5029). We first do not agree that this legislative effort concerns the same subject matter as the Host Family Home program as such circumstances of

maltreatment would preclude a family's participation in the program (*see* 18 NYCRR 444.5 [c]). Moreover, the cited bill repeatedly died in committee, and "legislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences" (*Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601, 615 [n 2018] [internal question marks, brackets and citations omitted]; *see Matter of Vapor Tech. Assn. v Cuomo*, 203 AD3d 1516, 1519 [3d Dept 2022], *lv dismissed* 39 NY3d 960 [2022]).

Finally, OCFS clearly utilized its expertise in crafting the Host Family Home program, and the fact that a model program was presented to it does not alter this conclusion (*see Boreali v Axelrod*, 71 NY2d at 13-14). The record establishes that, apart from drawing upon its understanding of this state's child welfare system, OCFS reviewed data suggesting that preventive [*9]programs led to a reduced number of children removed from their homes, fewer child protective service contacts, and reduced foster care entries. The record further reveals that OCFS consulted with child welfare agencies in various other states about those states' implementation of the model program. OCFS also meaningfully engaged in two notice and comment periods and made substantive revisions to the program in response thereto.

On balance, the *Boreali* factors lead us to the conclusion that the Host Family Home program regulations are a valid exercise of OCFS's rulemaking authority, bringing an end to our inquiry. We emphasize that "[o]ur role in this regard is not to question the efficacy or wisdom of the means chosen by the agency to accomplish the ends identified by the [L]egislature" (*Matter of LeadingAge N.Y., Inc. v Shah*, 32 NY3d 249, 261 [2018] [citation omitted]). As we have also found that the regulations are consistent with the governing statutory language and its purpose, we affirm.

Powers and Mackey, JJ., concur.

Pritzker, J. (dissenting).

As aptly noted by Supreme Court, the Host Family Home regulations (*see* 18 NYCRR 444.1 *et seq.*) establish a program which "allow[s] parents the option to circumvent foster care placement." Notably, before being sued for administrative overreach, respondent Office of Children and Family Services (hereinafter OCFS), who ostensibly runs the child welfare system, touted this program as a "bold, new initiative" that "will support New York's families without requiring the involvement of the child welfare system." However, whether to create a "bold, new" program that circumvents the current, statutorily created foster care system presents a question of public policy which is for our elected representatives to decide. Thus, it is our opinion that by choosing to

promulgate these regulations instead of pursuing legislation, OCFS exceeded its authority by substituting its own policy preferences. To wit, the regulations not only "circumvent foster care placement," but directly conflict with and are anathema to the many hard-fought and critical due process safeguards specifically designed by the Legislature to protect the rights of children and their families. In our view, this eschewing of legislative intent is the hallmark of unbridled agency action and the ultra vires nature of the Host Family Home regulations is unmistakable. As such, we respectfully dissent.

To understand how far these regulations deviate from current policy, a brief overview of the historical evolution of the foster care system in New York is necessary. In 1884, the Legislature abolished both the ancient system of housing needy, neglected and abandoned children in poor houses and the practice of contracting placed children to private employers for reimbursement (*see* L 1884, ch 438, ch 470). Although this reform unquestionably benefited children, an unfortunate and unintended consequence was that counties, unable to rely upon child labor [*10]to defray associated costs, sought to place children, often informally, "in any home obtainable, where it will cease to be a county charge" (David M. Schneider & Albert Deutsch, *The History of Public Welfare in New York State: 1867-1940*, 57 Political Science Quarterly 3, 165 [1941]).**[FN7]** Notably, neither parents nor their children were represented in those placements, nor were judges involved, and there was a paucity of governmental supervision over the system (*see* L 1884, ch 438; *Matter of Tyriek W.*, 85 NY2d 774, 779 [1995]). Minimal state oversight had been achieved by the establishment of the State Board of Charities, the late nineteenth century predecessor of OCFS (*see generally* L 1875, ch 173). Until reforms in the late twentieth century, parents who wanted to remove their children from a voluntary foster care placement were forced to navigate an informal system without counsel and with few material regulations or procedures (*see generally Matter of Tyriek W.*, 85 NY2d at 779).

The enactment of former Social Services Law § 392 in 1970 "was intended to reform the existing State foster care system by guaranteeing that all children within that system would have their cases subjected to regular judicial oversight" (*Matter of Tyriek W.*, 85 NY2d at 779; *see* L 1970, ch 742; L 1971, ch 1970). Such oversight included mandatory court reviews of all cases where a child had been in voluntary placement for at least 24 months (*see* Social Services Law former § 392). Additional procedural protections exist today, which include, but are not limited to, required periodic judicial review whenever a child is not residing in his or her home (*see* Family Ct Act § 1086), a focus on reunification (*see* Social Services Law §§ 358-a, 384-a), court approval for any voluntary placement of a child in excess of 30 consecutive days (*see* Social Services

Law § 358-a), the prioritization of kinship placement and the placement of siblings together (*see* Social Service Law § 384-a [1-a]) and the right to counsel, which includes the appointment of legal representation for children and for parents who are financially unable to obtain representation (*see* Family Ct Act §§ 249 [1]; 262). While still far from perfect, statutory reforms enacted by the New York State Legislature in response to the inadequacies of prior systems for placing children serve to protect the rights and best interests of children and families.

Next, it is important to discuss the genesis of the Host Family Home program and how it took root in New York. As set forth in the record on appeal, Safe Families for Children (hereinafter SFC) describes itself as a national faith-based nonprofit organization operating chapters around the country which connect families with volunteers who agree to provide homes for children whose parents, for various reasons, are unable to care for them. In 2016, SFC first sought approval to act as an authorized agency in New York "to provide volunteers to mentor families in need or in crisis [*11]situations." OCFS advised SFC that approval was not needed to mentor families and cautioned SFC that the organization could not "place out" or "board" children in New York without prior written approval of OCFS. Thereafter, in June 2018, Laura Galt, the New York City director of SFC met with Sheila Poole, the then-Commissioner of OCFS. After this meeting, Galt sent an email to an attorney at OCFS stating that SFC was "thrilled that [Poole] is supportive of our model and taking the next steps to figure out the legal part of things." In October 2018, Galt and Renee Hallock, the Associate Commissioner of Prevention, Permanency & Program Support of OCFS, began frequent email correspondence regarding bringing the SFC model of placing children with volunteers outside of the foster care system to New York. In an October 2018 email, Hallock informed Galt that she was "wondering how other states have implemented Safe Families and what legislation or regulations did they have to put in place, if any[,] to have you do this work in their state." Subsequently, in January 2019, Hallock opined that legislation was not needed to bring about this program; rather, OCFS was looking to expand the definition of "authorized agency."**[FN8]**

Ultimately, expansion of the definition of "authorized agency" did not occur, through legislation or otherwise; rather, OCFS elected to go the route of implementing regulations that would allow for the SFC model in New York. In early 2019, while OCFS was drafting the Host Family Home regulations, Hallock continued to inquire as to whether Galt could provide any regulations from states that had implemented the program. Galt initially replied that, to her knowledge, "[o]ther states have passed legislation[,] but there are no state regulations in other states." Hallock replied that

OCFS was "really looking for regulations." Galt later informed Hallock, by email dated February 22, 2019, that she "confirmed with [SFC's] national organization that no state has passed state regulations. We have only passed legislative change (in 14 or 15 states)."[FN9] Apparently undeterred to be the first state to do so, OCFS pushed on. Thereafter, in January 2020, OCFS published proposed regulations (*see* NY Reg, Jan. 29, 2020 at 1-2) to establish the Host Family Home program in New York. After a protracted comment period, in July 2021 OCFS published revised Host Family Home regulations (*see* NY Reg, July 7, 2021 at 7-9). After another public comment period, in December 2021 OCFS adopted the regulations as final (*see* 18 NYCRR 444.1-444.19).[FN10]

Touching briefly on the comments, OCFS received 137 during the first round. The comments in opposition were primarily from established organizations made up of, among others, family court judges, child welfare commissioners, foster care providers and advocates for children and parents. Some notable organizations which commented opposing the regulations in this vein include the New York State Unified Court System - Statewide Advisory [*12]Committee on Attorneys for Children, New York State Office of Court Administration - Family Court Advisory and Rules Committee, three separate committees of the New York State Bar Association, American Bar Association, New York State Defenders Association, New York State Permanent Judicial Commission on Justice for Children, Legal Aid Society of New York City - Juvenile Rights, United Family Advocates, Lawyers for Children, Legal Service of NYC, Children's Law Center and the New York State Kinship Navigator.[FN11] In contrast, the comments in support of the regulations were overwhelmingly from individuals. Due to redactions, the only thing that can be gleaned regarding these individuals is that, based on their comments, many are either volunteers or otherwise affiliated with SFC. The comments from those in opposition largely criticized the regulations as creating a "shadow foster care system" but without the protections statutorily provided to children in foster care and their parents such as judicial oversight, the right to counsel, the consideration of alternatives to placement and the provision of appropriate services. After this initial round of comments, revisions were made to the regulations, many of which further eroded the protections provided by the traditional foster care system, including removal of the prohibition of placing children outside of New York without the requirement of compliance with the Interstate Compact on the Placement of Children and a provision that parents using the Host Family Home program would sign a designation of a person in parental relation to give authority for the child's care to go directly to the host family rather than to the agency itself (*see* 18 NYCRR 444.5, 444.17; *see also* General Obligations Law art 5, title 15-A). During the second round of comments, OCFS

received 85 comments. As was the case during the first round, the comments in opposition were primarily from established organizations whereas those in support were primarily from individuals. Despite the comments in opposition continuing to criticize the regulations for failing to protect children and families, no further changes were made.

With this backdrop in mind, we turn our focus to the real issue at hand; to wit, whether OCFS, in creating the Host Family Home regulations, "transgressed the line that separates administrative rule making from legislating and thereby exceeded its statutory powers" (*Boreali v Axelrod*, 71 NY2d 1, 16 [1987]; *see Matter of Acevedo v New York State Dept. of Motor Vehs.*, 29 NY3d 202, 222 [2017]). Certainly, "the legislature cannot cede its fundamental policy-making responsibility to an administrative agency. Nor may an agency use its enabling statute as a basis for drafting a code embodying its own assessment of what public policy ought to be. To be sure, it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing [*13]ends" (*Matter of Acevedo v New York State Dept. of Motor Vehs.*, 29 NY3d at 222 [internal quotation marks and citations omitted]).

That said, to determine whether an agency has engaged in improper policymaking, *Boreali* and its progeny set forth a four-part test,[FN12] which has been "distilled" by the Court of Appeals to a consideration of "whether (1) the agency did more than balance costs and benefits according to preexisting guidelines, but instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) the [L]egislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and (4) the agency used special expertise or competence in the field to develop the challenged regulation[s]" (*Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv.*, 27 NY3d 174, 179-180 [2016] [internal quotation marks, brackets and citations omitted]; *accord Matter of LeadingAge N.Y., Inc. v Shah*, 32 NY3d 249, 260-261 [2018]). These "four circumstances [are not] discrete, necessary conditions that define improper policymaking by an agency, nor [are they] criteria that should be rigidly applied in every case . . . . Rather[,] . . . the circumstances [are to be treated] as overlapping, closely related factors that, taken together, support the conclusion that an agency has crossed th[e] line" (*Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d 681, 696-697 [2014]; *see Matter of Acevedo v New*

York State Dept. of Motor Vehs., 29 NY3d at 222). "Consequently, respondents may not counter petitioners' argument merely by showing that one *Boreali* factor does not obtain" (*Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d at 697).

Beginning with the first factor, it is our opinion that OCFS acted outside its legislatively delegated authority and substituted its own value judgment regarding the provision of temporary care to families in need.[FN13] As set forth in an affidavit submitted by respondents, OCFS was on a quest to "transform and modernize New York State's child welfare system" by offering "families a reliable place to seek temporary care . . . without *invasive and unnecessary engagement of the child welfare and court systems*" by way of creating a novel, parallel and unauthorized voluntary foster care system. However, the Legislature has already created a voluntary foster care system by way of a carefully enacted framework of Social Services Law § 384-a which allows for the voluntary placement of children into foster care by signing custody and care of the [*14]child to OCFS. Significantly, this voluntary foster care system provides families with all of the same protections as any other placement. Pursuant to Social Services Law § 358-a, if a parent or guardian voluntarily places their child in the care and custody of social services and it is determined that the "child is likely to remain in the care of such official for a period in excess of [30] consecutive days, . . . [social services] shall petition the family court judge . . . to approve such [voluntary] instrument upon a determination that the placement of the child is in the best interest of the child, that it would be contrary to the welfare of the child to continue in his or her own home and, that where appropriate, reasonable efforts were made prior to the placement of the child into foster care to prevent or eliminate the need for removal of the child from his or her home and that prior to the initiation of the court proceeding . . . reasonable efforts were made to make it possible for the child to return safely home" (Social Services Law § 358-a [1] [a]). Prior to accepting the care and custody of a child, social services investigate possible familial resources who could care for the child and also identify any siblings who are already in care and, if so, arrange for the child to be placed with those siblings, unless such placement would be contrary to the best interests of the children (*see* Social Services Law § 384-a [1-a]).

Upon commencement of a proceeding, Family Court must appoint an attorney for the child to represent the child's interests and, should a parent or guardian be unable to afford legal representation, Family Court is empowered to appoint counsel to represent that parent or guardian at no cost (*see* Family Ct Act §§ 249, 262; Social Services Law § 358-a). Prior to approving a voluntary placement instrument, Family Court must

determine, among other things, whether, "[if] appropriate, reasonable efforts were made prior to the placement of the child into foster care to prevent or eliminate the need for removal of the child" and that a parent or guardian is executing the voluntary placement instrument "knowingly and voluntarily and because he or she would be unable to make adequate provision for the care, maintenance and supervision of such child in his or her home" (Social Services Law § 358-a [1] [a]; *see* Social Services Law § 358-a [3] [b], [c]). Once Family Court approves a voluntary care instrument, the court maintains jurisdiction of the matter and must schedule a permanency hearing within eight months from the time the child is placed in foster care (*see* Social Services Law § 358-a [2-a]).[FN14] To assure that children do not languish in care without a permanency goal, permanency hearings continue for a child who remains in care every six months, and the child and parent or guardian continue to be afforded legal representation for the purpose of these permanency hearings (*see* Family Ct Act §§ 249, 262, 1089).

Despite this carefully [*15]crafted voluntary foster care system in which the Legislature granted numerous protections to children and parents, OCFS attempted to administratively create a separate voluntary foster care system that not only amends, but debrides the Social Services Law and the Family Court Act. In its brief on appeal, OCFS cites to multiple sources of authority and presents distinctions it asserts serve as a legitimate basis for its regulatory action. We are unpersuaded. First, we disagree that the retention of legal custody by the parent or guardian in the Host Family Home program provides a safe harbor, thus insulating the regulations from the need for the "numerous safeguards that apply to voluntary-care placements." In fact, the retention of legal custody is a chimerical distinction without a difference. Notably, legal custody is the right of a parent to make "decisions with respect to . . . important issues, such as religious training, education and medical care" (*Trapp v Trapp*, 136 AD2d 178, 181 [1st Dept 1988]). As a general matter, a Host Family Home placement, by regulatory design, places a child in the home of a stranger, potentially for an extended period and possibly in another state, without court oversight. The sole vehicle to effect a Host Family Home placement is the execution by the parent or guardian of "a designation of 'person in parental relation,' " in accordance with the General Obligations Law (18 NYCRR 444.5 [b]; *see also* General Obligations Law art 5, title 15-A), through which parental authority is relinquished to the host family in matters integral to the parenting of children.[FN15] Pursuant to General Obligations Law § 5-1555 (1), generally, a designee "shall possess all the powers and duties of a person in parental relation pursuant to [Public Health Law §§ 2164 (immunizations) and 2504 (provision of medical, dental, health, and hospital services to a child)] and [Education Law §§ 2 and 3212 (authorizing educational decisions)]." Accordingly, respondents' claim that parents do not give up

their right to make fundamental decisions about their children's upbringing under the Host Family Home regulations is nothing more than form over substance. From a commonsense point of view, the host family not only has physical custody, but will make numerous everyday decisions without parental input, notwithstanding the parent retaining in-name-only legal custody.

Respondents also incorrectly assert that OCFS's authority to promulgate the Host Family Home regulations exists because the program merely "implement[s] [the] legislative policy" that underpins preventive services or amounts to respite care. However, in reality, the program is facially and substantively in conflict with the unmistakable goals of preventive services, which are designed to *prevent* a child's removal from their home or *expedite* their return (*see* Social Services Law §§ 409, 409-a [1] [a]). Ironically, under the Host Family Home regulations, in contrast to current law regarding [*16]voluntary placements, the Host Family Home agency has *no obligation to provide* preventative services prior to placing the child with strangers; rather, the agency must only inform the parent or guardian of the availability of such services (*see* Social Services Law §§ 358-a [1]; 384-a [2]; *compare* 18 NYCRR 444.4 [e]; 444.9 [a]; 444.11). In sum, the Host Family Home program does nothing to *prevent* the impairment or disruption of a family but instead facilitates the placement of children with strangers through a new state-run program that lacks critically important protections mandated by the Legislature when children are placed outside their home by way of voluntary placements. Respondents' argument that OCFS's authority to promulgate the Host Family Home regulations exists because the program implements legislative policy is precariously based on the unsound conclusion that *avoiding any* involvement with the foster care system, even on a voluntary basis, constitutes a preventive service.

Nor is the Host Family Home program by any means "respite care," which is a preventive service defined as "the temporary care and supervision of a child to relieve parents or other persons legally responsible for the care of such child where immediate relief is needed to maintain or restore family functioning" (Social Services Law § 409-a [5] [f]). 18 NYCRR 435.3 (a) specifies in what circumstances a family is eligible for respite care and services, including when "a parent is suddenly hospitalized due to accident, injury or illness" or is "participating in a substance abuse detoxification program." In conformity with the enabling legislation, the respite care regulations impose strict time limitations (*see* Social Services Law § 409-a [5] [a]). For example, absent "extraordinary circumstances," respite care may only be provided, for nonfoster families, for up to a maximum of seven weeks per child, per year (18 NYCRR 435.5 [c]). The Host Family Home program runs afoul of both the respite care statute and implementing

regulations because it is far broader in scope, is not limited to "immediate relief," and allows a child's placement to last indefinitely, provided that the placement is renewed by the parent every six months (*see* 18 NYCRR 444.5 [h] [1]). As such, the Host Family Home program does not qualify as "respite care" (*see* 18 NYCRR 444.5) and respondents' assertions that its legislative mandate to provide respite care is a legitimate legislative tether is frankly illogical.

Indeed, it is a hallmark of agency overreach when a regulation is grounded on "administratively created exemptions rather than on rules that promote the legislatively expressed goals, since exemptions ordinarily run counter to such goals and, consequently, cannot be justified as simple implementations of legislative values" (*Boreali v Axelrod*, 71 NY2d at 12; *see Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 110 AD3d [*17]1, 10 [1st Dept 2013], *affd* 23 NY3d 681 [2014]). Here, OCFS has done just this by ushering in an administrative protocol based on exemptions to the statutorily enacted voluntary foster care system. As previously discussed, a comparison to the existing voluntary foster care system reveals that these exemptions create a parallel extrajudicial program bereft of many due process protections enacted by the Legislature. In essence, the Host Family Home regulations do away with fundamental protections for families and children enacted by the Legislature and deviate far from "mere implementation of the [L]egislature's chosen goal" (*Matter of LeadingAge New York, Inc. v Shah*, 32 NY3d at 269) and, in fact, negate that chosen goal by way of exemptions to New York's public policy. Moreover, respondents' refrain that the intent of the regulations "is not and will not be to create a new form of foster care" will fall deafly on the ears of a child placed outside of their home with strangers. In our opinion, such characterization is not only inaccurate, but also abstract and supercilious.

We now turn our attention to factor two of *Boreali.* It is our opinion that OCFS not only "wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance" (*Boreali v Axelrod*, 71 NY2d at 13), but it did so in a manner contrary to legislative intent, essentially erasing the blackboard and using new chalk. While it is true that OCFS has broad authority, such authority is limited to "fill[ing] in details and interstices and . . . mak[ing] subsidiary policy choices *consistent with the enabling legislation*" (*Matter of Citizens For An Orderly Energy Policy v Cuomo*, 78 NY2d 398, 410 [1991] [emphasis added]; *accord Matter of Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d at 700). Certainly, the agency may not implement an "entirely new rule" that "reflects a new policy choice" (*Matter of Statewide Coalition of Hispanic Chambers of*

Commerce v New York City Dept. of Health & Mental Hygiene, 23 NY3d at 700). Stated bluntly, OCFS's broad authority to place out and/or board children does not provide it the authority to promulgate regulations establishing a parallel voluntary foster care system with significantly less guardrails than the voluntary foster care system created by the Legislature.

Lack of guardrails aside, OCFS asserts that Social Services Law § 374 (2), which codifies the right of parents to place out or board their own children, provides it with the authority to promulgate the Host Family Home regulations. To the contrary, the Host Family Home program runs afoul of this statute and is illegal. First, the parent is neither placing out nor boarding his or her child; rather, as in a voluntary placement, he or she is seeking assistance from a Host Family Home agency to place their child. The Host Family Home agency is then placing the child with a family of strangers who have [*18]been pre-selected and vetted by the agency, which is being overseen and monitored by OCFS (*see* 18 NYCRR 444.10, 444.11, 444.15, 444.16). However, while a Host Family Home agency is indeed an agency, it is not an "authorized agency" (*see* Social Services Law §§ 371 [10]), thus it cannot legally place out or board children (*see* Social Services Law § 374 [2]; *see generally Anonymous v Anonymous*, 108 Misc 2d 1098, 1103-1104 [Sup Ct, Queens County 1981]; *Matter of Anonymous*, 46 Misc 2d 928, 929-930 [Fam Ct, Dutchess County 1965]). Indeed, it is evident from the record that OCFS would agree that a Host Family Home agency is not an authorized agency, as it clearly informed SFC of this from the beginning. Moreover, as previously discussed herein, OCFS explored expanding the definition of "authorized agency," but ultimately declined to do so. Instead, lineit circumvented the legal definition and implemented a regulatory scheme that would not only make Host Family Home agencies ostensibly authorized agencies, but it also created an unauthorized out-of-home placement (*see* Social Services Law § 374).**[FN16]**

Additionally, as a source of legislative authority, OCFS relies upon an interpretation of title 15-a of the General Obligations Law which is both exaggerated and incorrect. This provision was enacted in 2005 to provide parents the power to designate a person in parental relation to ease the difficulties of grandparents and other nonparent caregivers in obtaining "school services and health care in a timely fashion" (Senate Introducer's Mem in Support, Bill Jacket, L 2005, ch 119 at 3).**[FN17]** Given that this designation is applicable to only situations surrounding school and healthcare, as well as the intent behind its enactment, it seems apparent that the provisions within title 15-a do not provide OCFS with the sweeping authority to enact a state-sponsored placement program in which children are removed from their homes and full authority for their care

is transferred to strangers. "Therefore, it is clear that [OCFS] wrote the [Host Family Home regulations] without benefit of legislative guidance, and did not simply fill in details guided by independent legislation. . . . [As such,] the application of the second *Boreali* factor generates the same conclusion as the first factor: the adoption of the rule involved the choosing of ends, or policymaking" (*Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d at 700).

As to the third factor, there has not been any activity by the Legislature as to the Host Family Home program, thus, we do not find this factor to be relevant (*see generally Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601, 615 [2018]). Nor do we find the fourth factor to be relevant, given that OCFS exceeded its authority (*see Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d at 700-701[*19]). Nevertheless, it is our opinion that the Host Family Home program is invalid under *Boreali* by virtue of the first and second factors (*see Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d at 701).

In conclusion, the question at bar is not whether the Host Family Home regulations create a well-meaning program or feature certain reasonable protections as noted by the majority. In fact, we can agree that there are certainly reasons, good and bad, why families in turmoil may wish to avoid governmental entanglement when they cannot care for their children. Of course, the legislatively created voluntary foster care system is not perfect. Nevertheless, the sole question here is whether there is legitimate legislative authority and guidance underpinning these regulations, which were ushered in purposively without such legislation. In our opinion, the answer to this question is a resounding no. In fact, we would go so far as to say that OCFS has gone rogue. Indeed, not only do the Host Family Home regulations lack legislative mandate, they dispense with the hard-fought, constitutionally grounded due process rights of children who have no say as to their fate, no counsel, no permanency hearings, no judicial oversight at all and are trapped in an administrative mousetrap with no way out. What could possibly go wrong?

Ceresia, J., concurs.

ORDERED that the judgment is affirmed, without costs.

Footnotes

Footnote 1: Professor Merril Sobie has been granted leave to file a brief amicus curiae and has detailed for this Court a history of New York's voluntary foster care system.

Footnote 2: Our record contains a number of documents obtained through a Freedom of Information Law request, including the OCFS communications referenced by the dissent. While these documents provide some useful context, we do not regard them as authoritative or even necessarily complete in that respect. For this reason, and because of certain inconsistencies that we perceive among the responsive documents, we question whether this state was the first to implement the Safe Families model by way of regulation, as our dissenting colleagues assert. However, because we view resolution of that claim as peripheral to the issues before us, we do not address this in depth, but instead merely note this underlying disagreement.

Footnote 3: It is, of course, a prerequisite to such a designation that there is no prior order in effect that would prohibit the parent from exercising the same or similar authority (*see* General Obligations Law § 5-1551). Additionally, where a court has ordered that both parents must agree on education or health decisions regarding the child, a designation of person in parental relation is not valid unless both parents have consented to it (*see* General Obligations Law § 5-1551).

Footnote 4: A designation of person in parental relation notably does not impose upon the designee the duty to support the child or cause a change in the child's school district (*see* General Obligations Law § 5-1555 [2], [3]).

Footnote 5: Previous versions of the bill that were ultimately vetoed for flaws not relevant here were similarly intended to apply to "caregivers," "adult caregiver[s]" or "[g]randparent caregivers and other caregivers" (Senate Introducer's Mem in Support, Veto Jacket, Veto 138 of 2003 at 7; Senate Introducer's Mem in Support, Veto Jacket, Veto 1388 of 1998 at 3).

Footnote 6: Those petitioners notably went on to take the position, with respect to General Obligations Law § 5-1551, that "[p]roviding parents and guardians with legal tools to plan for the smooth transition of care in the event of a major life disruption is a crucially important step in ensuring stability in the children's lives" (Letter from NYS Kinship Navigator et al., June 27, 2018 at 1, Bill Jacket, L 2018, ch 80 at 11).

Footnote 7: As aptly discussed by Professor Merril Sobie in the brief amicus curiae,

this "scheme" bears a resemblance to the Host Family Home program as it "similarly replaces foster care obligations and expenses with unpaid informal placement devoid of reimbursement or services."

Footnote 8: Pursuant to Social Services Law § 371 (10), an authorized agency, as relevant here, is "[a]ny agency, . . . which is incorporated or organized under the laws of this state with corporate power or empowered by law to care for, to place out or to board out children" (Social Services Law § 371 [10] [a]).

Footnote 9: Notably, whether the Host Family Home program could be enacted through legislation is irrelevant since the question here is whether the Host Family Home program placing children could be enacted *in a regulatory context*.

Footnote 10: The majority notes that "the challenged program was inspired by a model preventive service, which, according to the record before us, has been implemented in 38 states" (majority op at ___). The record does not, however, reveal how many states have implemented programs which involve placing children, such as the Host Family Home program, or how many have implemented other types of programs which feature ancillary services that do not involve placing children. Indeed, the latter was already being provided by SFC in New York, as detailed in the aforementioned 2016 application to act as an authorized agency "to provide volunteers to mentor families in need or in crisis situations."

Footnote 11: Certainly, had OCFS proposed the Host Family Home program by way of legislation, the litany of issues raised by these many stakeholders opposing the program render questionable the likelihood of the passage of such legislation in its current iteration.

Footnote 12: The *Boreali* analysis has been criticized. Interestingly, one such criticism concisely and precisely supports petitioners' view here that the regulations are ultra vires. As noted by Judge Wilson in *Matter of LeadingAge N.Y., Inc. v Shah*, "[a] better view. . . is to say that while the executive may consider and advance its own policy goals in executing the laws, it may not execute the laws in a manner, or with a result, *objectively inconsistent with the policy goals articulated, expressly or implicitly, in the legislation that purportedly authorizes that action*" (32 NY3d 249, 289 [2018, Wilson, J., dissenting] [emphasis added]). With this criticism and crystallization framing the *Boreali* analysis, we will proceed.

Footnote 13: This value judgment is clearly demonstrated in an email written by Hallock, whose primary role was to administer child welfare laws. In this email, in response to a question by Galt at SFC as to whether families could simply use the existing voluntary placement procedure codified in Social Services Law § 384-a, Hallock replied, "[y]es[,] parents do use them, but why should they have to." Of course, one reason is that it is the law and OCFS has a duty to enforce it. Also demonstrating the value judgment made in promulgating these regulations, Hallock stated, again referring to the statutory foster care system she is tasked with enforcing, to Galt at SFC, "[w]e can do better, we must do better. I will continue to fight for your type of program." When Galt inquired as to Hallock's pending retirement, Hallock stated that she was "not leaving at this time, and won't leave until I get [the Host Family Home program] across the finish line. I firmly believe this is what families need."

Footnote 14: This is it not to say that a child must remain in care for eight months, or until the time of the first permanency hearing (*see* Social Services Law § 384-a [2] [a]).

Footnote 15: We note that the reliance on the designation of a person in parental relation form (*see* General Obligations Law art 5, title 15-A) is curious given that this form had no place in the first iteration of the program (*see* NY Reg, Jan. 29, 2020 at 1-2), but rather was added after the first comment period (*see* NY Reg, July 7, 2021 at 7-9).

Footnote 16: Social Services Law §§ 374-B through 374-F list specific kinds of out-of-home placements that are permitted. Notably, placements in a Host Family Home is not listed as a statutorily authorized out-of-home placement (*see* Social Services Law §§ 374-B through 374-F).

Footnote 17: Title 15-a of the General Obligations Law was amended in 2018 to "extend the time periods [from 6 months to 12 months] in which a parent or guardian may designate a caregiver as a person in parental relation[ ] to better reflect the realities of kinship caregiving" (Assembly Mem in Support, Bill Jacket, L 2018, ch 80 at 6). The driving force behind this amendment was to make it easier for undocumented parents and caregivers to prepare for the possibility of "sudden detention or deportation" (Assembly Mem in Support, Bill Jacket, L 2018, ch 80 at 7).

ICPC

Matter of Camiyah B., 234 AD3d 845 (2nd Dept., 2025)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an order of the Family Court, Queens County (Joan L. Piccirillo, J.), dated December 4, 2023. The order granted, without a hearing, the application of nonparty SCO Family of Services to permit the foster parent to relocate with the subject child to Texas.

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

In June 2021, the petitioner commenced this proceeding pursuant to Family Court Act article 10, alleging that the mother neglected the subject child. In an order of fact-finding and disposition dated March 7, 2022, the Family Court, upon the mother's consent to a finding of neglect without admission pursuant to Family Court Act § 1051(a), found that the mother neglected the child and placed the child in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing. The child was subsequently placed in the foster care of her paternal grandmother (hereinafter the foster parent).

At a court appearance on November 8, 2023, SCO Family of Services (hereinafter SCO), the agency supervising the child's foster care placement, made an application to permit the foster parent to relocate with the child to Texas. Counsel for the mother opposed the application. In an order dated December 4, 2023, the Family Court granted the application without a hearing. The mother appeals.

The mother contends that the Family Court should not have allowed the child to relocate to Texas prior to the completion of the necessary process under the Interstate Compact on the Placement of Children (hereinafter ICPC). Pursuant to Social Services Law § 374-a(1)(art III)(b), "[p]rior to sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall [*2]furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state." "The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child" (*id.* § 374-a[1][art

III][d]). However, pursuant to ICPC Regulation No. 1 promulgated by the Association of Administrators of the Interstate Compact on the Placement of Children (*see id.* § 374-a[1][art VII]), subject to certain restrictions, a child who relocates with their "approved placement resource" may be permitted to remain in the receiving state while the ICPC process is pending where the child was already placed with the "approved placement resource" in the sending state and the parties prepare an ICPC application "immediately upon the making of the decision" to relocate (ICPC Regulation No. 1[2], [5][a]).

Here, the child had already been placed with the foster parent, and the foster parent was seeking to relocate with the child, bringing this case within the ambit of ICPC Regulation No. 1. The parties timely sought permission to relocate and prepared an ICPC application, which the Family Court directed them to submit and which the sending and receiving states were required to timely rule upon (*see* ICPC Regulation No. 1[5][a]). At oral argument, counsel represented that although the receiving state has not yet ruled on the application, the receiving state has been providing ongoing supervision. There is no indication in the record that the ICPC application was denied by Texas. Thus, the court did not err in granting the application to relocate.

The mother further contends that the Family Court, in allowing the child to relocate, failed to consider the best interests of the child. "[I]t is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests" (*Matter of Caruso v Cruz*, 114 AD3d 769, 771 [internal quotation marks omitted]). "In relocation proceedings, this Court's authority is as broad as that of the hearing court, and a relocation determination will not be permitted to stand unless it is supported by a sound and substantial basis in the record" (*id.* at 771-772). Here, the court's determination that the child's best interests would be served by the relocation to Texas was supported by a sound and substantial basis in the record (*see Matter of Plica v Almonte*, ___ AD3d ___, 2024 NY Slip Op 06048; *Matter of Hernandez v Viana*, 213 AD3d 934, 936).

The mother's contention that the Family Court erred in failing to conduct a full dispositional hearing is unpreserved for appellate review because she did not request a full dispositional hearing, despite having the opportunity to do so (*see Matter of Thomas J. [Joan D.]*, 112 AD3d 718, 719). In any event, the court, which had detailed knowledge of the extensive history of the case, clearly articulated the undisputed facts that supported its determination that it was in the child's best interests to relocate, and those undisputed facts were sufficient, in and of themselves, to support that determination (*see Loggia v Verardo*, 167 AD3d 612, 613).

The mother's remaining contention is without merit.

INEEFECTIVE ASSISTANCE OF COUNSEL

Matter of Jezrel C., 237 AD3d 1303 (3rd Dept., 2025)

Appeal from an order of the Family Court of Schenectady County (Mark Blanchfield, J.), entered January 29, 2024, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected.

Respondent (hereinafter the mother) is the mother of the subject children (born in 2014, 2020 and 2022). In July 2023, petitioner received a hotline report that the mother was engaged in violent and dangerous behavior, including attempting to run over her paramour — the father of the two younger children — with her vehicle while the children were inside. After implementing a safety plan and obtaining temporary orders of protection on behalf of the children, petitioner commenced this neglect proceeding, alleging, among other things, that the mother placed the children at significant risk of harm by engaging in incidents of domestic violence in their presence. The mother initially entered a general denial, but ultimately consented to a finding of neglect and further consented to the terms of the proposed disposition, which required her to participate in mental health treatment and prohibited her from being together with the paramour in the presence of the children. An order of fact-finding and disposition was entered, and Family Court issued separate orders of protection and supervision. The mother appeals.

Generally, "[n]o appeal lies from an order entered upon the consent of the appealing party, since a party who consents to an order is not aggrieved thereby" (*Matter of Adam V. v Ashli W.*,180 AD3d 1205, 1206 [3d Dept 2020] [internal quotation marks and citation omitted]; *see Matter of Adam O. v Tracie P.*,188 AD3d 1312, 1313 [3d Dept 2020]). The appealing party is "not precluded from bringing a challenge to such orders, but instead must do so in the first instance by filing a motion to vacate the order, thus providing Family Court with an opportunity to consider and correct any deficiencies" (*Matter of Vicktoriya DD. [Daniel EE.]*,172 AD3d 1473, 1474 [3d Dept 2019]; *see Matter of Dimitry E. [Clarissa E.]*, 177 AD3d 1223, 1224 [3d Dept 2019]).

The mother does not dispute that these principles are controlling. Rather, conceding that her attorney did not move to vacate the consent order, her sole argument on appeal is that counsel was ineffective for failing to do so. However, the mother has not identified any reason as to why the failure to seek vacatur constituted ineffective assistance. For example, she does not challenge the voluntariness of her consent (*compare Matter of Erica X. v Lisa X.*, 180 AD3d 1187, 1189 [3d Dept 2020]), nor does she argue that the order differed from or exceeded her consent (*compare Matter of Jordan v Horstmeyer*, 152 AD3d 1097, 1098 [3d Dept 2017]; *see also Matter of Armani KK. [Deborah KK.]*, 81 AD3d 1001, 1001-1002 [3d Dept 2011], *lv denied* 16 NY3d 711 [2011]). "In the absence of any nonspeculative basis in the record upon which to conclude that there were grounds [*2]for a motion to vacate . . . , counsel cannot be faulted for failing to make a motion that has little or no chance of success" (*Matter of Ritter v Moll*, 148 AD3d 1427, 1429 [3d Dept 2017] [internal quotation marks and citations omitted]).

Matter of Anavias D., 234 AD3d 1370 (4th Dept., 2025)

Appeal from an order of the Family Court, Oneida County (Paul M. Deep, J.), entered July 6, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: Respondent father appeals from three orders terminating his parental rights with respect to each of his three children upon a finding of severe abuse arising from his conviction of murder in the second degree for killing their mother (*see* Social Services Law § 384-b [4] [e]; [8] [a] [iii] [A]; Penal Law § 125.25 [1]). Family Court conducted a combined fact-finding and dispositional hearing and concluded that the best interests of the children required that they be placed for adoption.

We reject the father's contention in each appeal that he was denied effective assistance of counsel by his attorney's failure to negotiate a settlement with petitioner. Here, the father rejected the offer of surrender made by petitioner and elected to proceed to a hearing. Under these circumstances, any additional course of negotiations by his counsel would have been, "at best, 'dubious' " (*People v Collins*, 129 AD3d 1676, 1677

[4th Dept 2015], *lv denied* 26 NY3d 1038 [2015]; *see also Matter of Daltun A.B. [Daniel B.]*, 103 AD3d 1181, 1182 [4th Dept 2013], *lv denied* 21 NY3d 949 [2013]), and the father failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Jazmine M. [Willie R.]*, 185 AD3d 1457, 1458 [4th Dept 2020], *lv denied* 36 NY3d 902 [2020] [internal quotation marks omitted]; *see Matter of Brown v Gandy*, 125 AD3d 1389, 1390-1391 [4th Dept 2015]).

RECUSAL

Matter of Shealyn S.-O., 237 AD3d 831 (2nd Dept., 2025)

In related proceedings pursuant to Family Court Act article 10, the child appeals from an order of the Family Court, Orange County (Carol S. Klein, J.), entered April 11, 2024. The order, insofar as appealed from, denied those branches of the child's motion which were for recusal of the Judge presiding and for leave to renew that branch of her prior motion which was to disqualify the petitioner's counsel, and, in effect, denied that branch of the child's motion which was for leave to reargue that branch of her prior motion which was to disqualify the petitioner's counsel.

ORDERED that the appeal from so much of the order as, in effect, denied that branch of the child's motion which was for leave to reargue that branch of her prior motion which was to disqualify the petitioner's counsel is dismissed, without costs or disbursements, as no appeal lies from an order denying reargument; and it is further,

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

In May 2022, the petitioner commenced these proceedings pursuant to Family Court Act article 10, alleging, inter alia, that the father abused and the mother neglected the subject child. Later that year, the child moved, among other things, to disqualify the petitioner's counsel. In an order entered February 16, 2024, the Family Court, inter alia, denied that branch of the child's motion. The child thereafter moved, among other things, for recusal of the Judge presiding and for leave to renew that branch of her prior motion which was to disqualify the petitioner's counsel. In an order entered April 11,

2024, the court, inter alia, denied those branches of the child's motion. The child appeals.

"A motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination' (CPLR 2221[e][2]) and 'shall contain reasonable [*2]justification for the failure to present such facts on the prior motion' (CPLR 2221[e][3])" (*Matter of Leslie J.D. [Maria A.A.G.—Silvia D.]*, 167 AD3d 1004, 1005). Here, the Family Court providently exercised its discretion in denying that branch of the child's motion which was for leave to renew that branch of her prior motion which was to disqualify the petitioner's counsel, since the "new facts" offered by the child would not have changed the prior determination (*see Matter of O'Gorman v O'Gorman*, 122 AD3d 744, 745; *Wells Fargo Bank, N.A. v Caro*, 82 AD3d 880, 882; *Matter of Nathalia P.*, 22 AD3d 496, 497).

"Absent a legal disqualification under Judiciary Law § 14" or Code of Judicial Conduct Canon 3(E)(1)(d)(i), "the determination of a motion for recusal of the Justice presiding based on alleged impropriety, bias, or prejudice is within the discretion and the personal conscience of the court" (*Matter of Parietti v Day*, 215 AD3d 897, 899 [internal quotation marks omitted]; *see* 22 NYCRR 100.3[E][1][d][i]; *Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, Intl. Assn. of Firefighters, AFL-CIO*, 175 AD3d 676, 677). "A court's decision in this respect may not be overturned unless it was an improvident exercise of discretion" (*D'Andraia v Pesce*, 103 AD3d 770, 771). "The denial of a recusal motion will constitute an improvident exercise of discretion only where the movant puts forth demonstrable proof of the judge's bias or prejudgment" (*Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, Intl. Assn. of Firefighters, AFL-CIO*, 175 AD3d at 678). Here, the child did not allege that the Judge presiding had "any familial relationship to any party to th[ese] proceeding[s]," and she "failed to set forth any proof of bias or prejudice on the part of the court which would have warranted recusal" (*Matter of Parietti v Day*, 215 AD3d at 899 [alteration and internal quotation marks omitted]; *see Schwarz v Schwarz*, 150 AD3d 915, 918).

The child's remaining contentions are not properly before this Court.

MISCELLANEOUS TRIAL LEVEL CASES

1028

Matter of Y, Misc3d 2025 NY Slip Op 50689(U) (Family Court, Bronx County, 2025)

Lauren Broderick, J.

Pending before the Court is a petition filed by the Administration of Children's Services (ACS), "Petitioner" herein, on June 13, 2024, alleging that Ms. A, "Respondent" herein, is the mother of the subject child, Y born in May 2024 and that she abused and neglected the subject child Y. Specifically, the petition alleges that Y was brought to New York Presbyterian Hospital on or about June 2 or June 3 of 2024 by Ms. .A due to her concerns about Y's left arm. The petition alleges that Ms. .A reported that Y's arms were tucked under Ms.A's arms, and after radiological examination it was determined that Y had a displaced fracture of the left humerus bones. Further X-rays demonstrated that Y had one distal femur fracture and one other leg fracture for which Ms. .A has provided no explanation. The petition alleges that these injuries are consistent with non-accidental trauma which would not be sustained absent the acts or omissions of the Ms. A. Finally, the petition alleges that Ms. .A has a history of mental health problems and at the time of filing, she was psychiatrically hospitalized with depression with an unidentified discharge date.

On June 13, 2024, Y was remanded to the care of the Commissioner of Children's Services and placed in non-kinship care. The agency was directed to provide Ms. A with regular visitation, supervised by the agency or a resource approved by the agency, with discretion to expand. During the pendency of the proceeding, visitation was expanded, without objection, to unsupervised day visits, and then an unsupervised overnight visit.

A fact-finding trial commenced on November 25, 2024. On December 2, 2024, Respondent filed by way of Order to Show Cause for a 1028 hearing. A combined fact-finding [*2]and 1028 hearing was held on December 5, 2024, December 6, 2024, December 9, 2024, December 10, 2024, December 13, 2024, December 19, 2024, January 3, 2025, January 8, 2025, January 10, 2025, January 15, 2025, January 17, 2025, January 21, 2025, January 24, 2025, January 28, 2025, January 29, 2025, February 5, 2025, February 11, 2025, February 21, 2025, February 25, 2025, February 28, 2025, March 7, 2025, and March 18, 2025. This written decision memorializes the oral decision placed on the record on April 1, 2025.

During the 23 days of the trial, testimony was taken from CPS Ramirez, Case planner Soto, CPS ECS Abreu Rosa, child abuse expert Dr. Brown, pediatric radiologist Dr. Liszewski, emergency medicine Dr. Mitchell, pediatric radiologist Dr. Mack, pediatric

orthopedist Dr. Sullivan, and the Respondent Ms. A. The parties entered extensive documentary evidence consisting of medical records for Ms. A and Y, slides prepared by experts, case notes and case law. Petitioner is seeking a finding that the subject child Y is an abused and neglected child who would be at imminent risk if returned to his mother's care. Both the attorneys for Ms. A and for Y have argued there is no imminent risk, and Y should be released to Ms. A's care.

As a threshold matter, the courts have held that a 1028 application can be combined with fact-finding in an Article Ten matter. See *In re Kristina R.*, 21 AD3d 560 (2nd Dept. 2005). *Matter of Yahmir G. (Tanisha N.)*, 48 Misc 3d 1224(A) (Fam. Ct. Bronx 2015). All counsel consented to a combined hearing, as the issues of the credibility of the witnesses and the sufficiency of the evidence overlapped.

Section 1012 (e)(i) of Family Court Act defines an abused child as a child less than eighteen years of age whose parent or other person legally responsible for his care inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ.

Section 1046 (a)(ii) of the Family Court Act states that in any hearing under this article and article ten-A of this act that proof of injuries sustained by a child or of the condition of a child of such a nature as 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 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.

Section 1012(f)(i)(B) of the Family Court Act defines a neglected child as one less than eighteen years of age whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care in providing the child with proper supervision and guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment.

Petitioner bears the burden of proving the allegations in the petition by a preponderance of the evidence. See FCA 1046[b][i]. "To establish a fact by a preponderance of the evidence means to prove that the fact is more likely than not to have occurred." Matter of Beautisha B., 115 AD3d 854 (2nd Dept. 2014); Matter of Jamie TT., 191A.D.2d 132, 134 (3d Dept. 1993).

Section 1028 of the Family Court Act requires the court grant a Respondent's application for the return of a child "unless it finds that returning the children would present an imminent risk to the children's life or health." In *Nicholson v Scoppetta*, 3 NY3d 357 (2004), the Court of Appeals clarified the standard of "imminent risk" and the factors courts must weigh in deciding [*3]applications pursuant to 1028 of the Family Court **Act**. Specifically, the court must conduct a fact based inquiry to determine whether the "children were actually or imminently harmed by reason of [the parent's] failure to exercise even minimal care in providing them with proper oversight," the court must consider the "special vulnerabilities of the child," and the court must conduct an objective evaluation of parental behavior to determine, "would a reasonable and prudent parent have so acted, or failed to act, under the circumstances then and there existing." *Nicholson* at 370, 372.

Pursuant to *Nicholson*, the court "must do more" than identify the existence of a risk of serious harm. The Court must determine whether imminent risk to the child might be eliminated by other means, such as issuing a temporary order of protection or providing services. *Nicholson v Scoppetta*, 3 NY3d 357 (2004); Family Court Act § 1027 (b)(iii)(iv). Furthermore, the Court must balance the risk of harm to a child remaining in a parent's care against the risk of harm his or her removal might bring and determine what is in the child's best interest. *Nicholson* at 378.

Applications pursuant to section 1028 of the Family Court Act may be made no matter the severity of the allegations. Furthermore, courts have released children to respondents even where findings of abuse are entered. See e.g., *In re Philip M.*, 82 NY2d 238 (1993)(where the children were released to the respondents despite an abuse finding based on the children's contraction of a sexually transmitted disease and the respondents had no explanation); *Matter of Radames S.*, 112 AD3d 433 (1st Dept. 2013)(where the court found the respondent mother abused her daughter and derivatively neglected the child's two siblings, based on the finding of skull and humerus fractures, and released the children to respondent's care with 12 months of supervision); *Matter of Matthew O.*, 103 AD3d 67 (1st Dept. 2012)(where the court made findings of abuse where a 5 month old child suffered multiple fractures of her arms, legs and skull, and eventually released the children with orders of supervision). See also, *Matter of Maria S. (Samantha S.)*, 43 Misc 3d 1218(A) (Fam. Ct. 2014).

In the present case the parties have opposing views as to the actual injuries suffered by Y as well as who was responsible for his injuries. However, there is no dispute as to the following facts leading up to the filing of the petition:

(1) Y was born in May 2024, at New York Presbyterian Hospital.

(2) Other then being born by cesarian, there is no indication that Y had an eventful birth or suffered any injury at birth.

(3) Ms. A took Y to his scheduled well visit on May 29, 2024, at a clinic associated with New York Presbyterian Hospital. Y appeared as a healthy child with full mobility of all his limbs.

(4) On June 3, 2024, Ms. A took Y to the emergency room at New York Presbyterian Hospital. The medical records indicate that upon his initial evaluation Y appeared active, was not in acute distress, had decreased movement in his left arm, and no signs of swelling. An X-ray was taken of Y's arm on June 3rd, and although the radiologist had ordered lateral views, those views were not taken. The medical records from June 3rd state radiological findings that Y has no fracture and no dislocation.

(5) An addendum, noting subtle periosteal reaction in the June 3rd X-ray, was added to Y's medical records from New York Presbyterian in December 2024 by Dr. Liszewski.

(6) On June 3, 2024, hospital staff performed two reductions on Y's left arm, after which Y appeared in significant distress.

(7) On June 6, 2024, a full skeletal survey was taken of Y. This skeletal survey clearly demonstrated that Y had a displaced fracture in his left humerus bone. The skeletal survey also showed that Y had two irregularities, one in the corner of the right distal femoral metathesis and one in the corner of his left femoral metathesis.

(8) After the skeletal survey, on June 6, 2024, Dr. Brown, a child abuse expert, and ACS became involved with Y and Ms. A due to concerns of child abuse. Y was removed from Ms. A's care on June 13, 2024, pursuant to court orders.

(9) On June 10, 2024, Ms. A was psychiatrically hospitalized at New York Presbyterian Hospital. Ms. A was diagnosed with depression, (principal problem), and post-partum depression (active problem). Ms. A was discharged on June 25, 2024, with instructions for follow up care at The Bridge PROS and with her OBGYN doctor. Ms.A was prescribed Lithium and Olanzapine.

The Court does not have to determine the extent, or cause, of Y's injuries to decide Ms. A's 1028 application. The evidence presented competing views both about what injuries Y suffered and what caused these injuries. However, the issue before the Court is limited to whether Y's physical and/or emotional health is at imminent risk if he is released to Ms. A. See *In re Neveah N.,* 56 Misc 3d 1212 A (Fam Ct., 2017); *Matter of*

Neriah N., 77 Misc 3d 809 (Fam. Ct., 2022). The ultimate determination about what injuries Y did suffer, and who was responsible for them, is reserved for the fact-finding.

The Court finds Ms. A's testimony credible. Ms. A testified clearly and calmly. Ms. A was never evasive and testified about facts even when they were not favorable. For example, Ms. A acknowledged that she still suffers from depression and can feel sad or isolated. Ms. A answered questions on cross-examination earnestly. Ms. A presented as genuine and dedicated to her son, as she appeared on-time to an enormous number of court dates.

The Court finds that Ms. A took the steps a loving parent would to care for Y before, and after, his birth. Ms. A testified that she is the mother of two children, Yl and Y. Ms. A has no ACS or child protective history. Ms A testified that when she was pregnant with Y, she moved from the Dominican Republic to New York to live with her mother and siblings, leaving her daughter in the Dominican Republic with her daughter's father. Ms. A testified that she returned to the United States to receive better treatment for her mental health. Ms. A testified that she received prenatal care and participated in counseling with a social worker while pregnant. This information was echoed by CPS Ramirez who testified that Ms. A received prenatal care, attended a program for single mothers, and had provisions for Y. Ms. A testified that she gave birth on May xx, 2024, by cesarean at New York Presbyterian Hospital. Other than it being a c-section, there was no indication that Y's birth was unique in any way. Ms. A**.** had the necessary provisions to care for Y including a bassinet, car seat, clothing, diapers and wipes. On May 29th Ms. A took Y for a scheduled well-visit where he was deemed a healthy baby.

On June 3rd, after noticing Y's left arm seemed to be bothering him and speaking with her mother, Ms. A took Y to New York Presbyterian Hospital, the same hospital where he was born. Ms. A acted as a reasonable and prudent parent, taking him to receive emergency medical attention and complying with all testing and procedures, including X-rays, MRIs, and two reductions. Ms. A testified that she agreed to all these procedures because she was, "a concerned mom and all I wanted was help for my son." (Transcript February 25, 2025, page 32). Between June 3rd and June 10th Ms. A only left the hospital once, while her mom was with Y, to shower, [*4]change clothes, and try to rest. During this time Ms. A slept on a couch in Y's room. Even after ACS and Dr. Brown became involved, Ms. A remained compliant, answering all their questions. These are not the actions of a parent who has intentionally caused an injury to their child but rather, the actions of a concerned parent, trying to ensure her child's medical needs are met.

There are no current physical health concerns for Y and by all accounts he is a healthy baby. Since Y's removal and placement in non-kinship foster care, Ms. A has complied with every referral made to her by the agency. Starting on June 10th, Ms. A consented to her admission to the Psychiatry Unit at New York Presbyterian Hospital. Ms. A testified she agreed because she was sad, crying, and knew she needed help. Upon her discharge she attended follow up appointments at The Bridge and then with a therapist referred to her by case planner Soto at New Horizons. Ms.A remains in counseling and testified that she wants to be in counseling so that she can be healthier for her children. Ms. A acknowledged dealing with depression her entire life. Ms.A testified that there are still times she feels sad and isolated but that she does not have feelings of wanting to hurt herself or losing control. Ms. A testified that she is willing to take medication if prescribed to her. Ms. A testified that her coping skills including going outside, writing in a journal, and reaching out to her therapist. Ms. A never minimized her mental health condition and acknowledged that she needed and wanted help to assist her in treating it.

Additionally, Ms. A completed the parenting classes that she was referred to by the agency and attended visits with Y. The current case planner, Mr. Soto, testified that he supervised Ms. A.'s visits at the agency and that she consistently attended. Furthermore, case planner Soto testified that he has observed visits go well and that during the visits Ms. A cares for Y, is affectionate with Y, and plays with Y. To attend the visits, Ms.A traveled two times a week at least one hour each way by public transportation. Case planner Soto testified that Ms. A has signed all releases requested by the agency and cooperated with home visits. Ms. A's visits have shifted from supervised at the agency, to a resource supervised visit, to unsupervised "sandwich" visits, to unsupervised day long visits, and to even an overnight. The agency did not object to any expansion of visits, and no safety concerns have been raised about any visits.

In a testament to the agency's confidence in Ms. A's caretaking abilities, case planner Soto testified that he wrote a letter in support of Ms. A becoming a home health aide for her sister J. The letter commended Ms. A.'s ability to build a relationship with J, administer her medication, and treat her with compassion. Throughout the pendency of this case and before, Ms. A has been a daily caretaker for her sister J who has Downs Syndrome. She has been responsible for fixing her meals, assisting with personal hygiene, such as showering, and otherwise providing constant supervision for J. Ms. A's testimony about J exhibited both knowledge about her needs and schedule as well the patience and love she has for J. There have been no safety concerns raised regarding

Ms.A's care of her 12-year-old sister with special needs, and the agency actively supported such a role.

Upon due consideration of the of the extensive evidence before the court including testimony of competing experts, the review of sizeable documentary evidence including medical records, and the opportunity to assess the credibility of Ms. A, the Court finds that Petitioner has failed to show there is a current imminent risk of harm to the subject child Y if he is released to the care of his mother, Ms. A. The Court is especially cognizant of the high risks associated with the continued removal to Y's ability to attach and bond with his mother. It is in Y's best interest that he be returned to his mother's care. Any concerns raised can be mitigated and addressed [*5]while Y is in his mother's care with ACS supervision.

It is hereby, **ORDERED**, that the subject child Y, is released to the care of Ms. A with the following terms and conditions:

• Ms. A shall cooperate with ACS and Court supervision including signing releases for herself and Y, comply with announced and unannounced visits, which the agency shall conduct on a weekly basis, and all other reasonable referrals made in writing and on notice to counsel

• Ms. A shall accept a referral for preventative services

• The agency shall assist Ms. A in obtaining a daycare voucher

• Ms. A shall comply with her mental health services as recommended by her provider including, but not limited to, any evaluations, any individual counseling, any group counseling, and medication management

• The agency shall provide a copy of all petitions and court orders to Ms A's mental health evaluators.

• Ms. A shall ensure that Y attends all medical appointments

• Ms. A shall comply with a referral for didactic therapy for her and Y, or any similar parent-child attachment focused therapy

• Ms. A shall provide appropriate supervision of Y at all times and shall not leave Y in the care of any person or provider not approved in advance by Petitioner

• Ms. A shall maintain suitable housing at an address known to the agency

1061 Request

Cooperation of Non-Respondent Parent

Custody- “Extraordinary Circumstances”

Evidence- Recorded Conversation

Excessive Corporal Punishment

Matter of A.H., Misc3d 2025 NY Slip Op 50317(U) (Family Court, New York County, 2025)
Yael Wilkofsky, J.

On February 9, 2024, the petitioner Administration for Children's Services ("ACS") filed a Family Court Act ("FCA") Article 10 neglect petition against the respondent mother J.H. ("respondent mother") on behalf of the subject child A.H. ("subject child"). The petition alleges that the respondent mother neglected the subject child by failing to provide him with proper supervision or guardianship based on allegations of excessive corporal punishment. After a fact-finding hearing, and for the reasons set forth below, the Court finds that ACS failed to prove, by a fair preponderance of the evidence, that the respondent mother neglected the subject child and therefore, the petition is dismissed.

On or about February 8, 2024, the non-respondent father, M.H. ("non-respondent father") filed a family offense petition against J.H. on behalf of the subject child, based on allegations of excessive corporal punishment. On that date, the non-respondent father informed the Court that he and the respondent mother have a pending divorce matter and that parenting time with the subject child is split between himself and the respondent mother. The Court Attorney Referee issued a limited temporary order of protection against the respondent mother on behalf of the [*2]subject child. The next day, ACS filed the neglect petition. The neglect petition alleges as follows. On February 1, 2024, the respondent mother hit the subject child on his right arm resulting in a bruise. On February 6, 2024, the subject child requested an ice pack for his bruised arm from the school nurse. On February 7, 2024, the ACS Child Protective Specialist ("CPS") observed a bruise on the subject child's right inner arm, which the subject child attributed to the respondent mother hitting him. The subject child told CPS that he is afraid of the respondent mother because she has hit him and slapped him many times in the past. On February 9, 2024, at the intake appearance on the neglect petition, the Court temporarily released the subject child to the non-respondent father and issued a full stay away temporary order of protection against the respondent mother on behalf of the subject child, allowing for agency-supervised visitation and joined the family offense case with the neglect case. As the subject child's attorney told the Court that the subject child did not want to visit with the respondent mother, on September 20, 2024, the Court issued an order that the respondent mother begin therapeutic visitation with the subject child.

A fact-finding hearing on the neglect petition commenced on October 1, 2024, continued on December 3, 2024 and December 17, 2024 and concluded on February 6, 2025. At the fact-finding hearing, the petitioner introduced into evidence the subject child's birth certificate, an Oral Report Transmittal ("ORT") dated February 6, 2024, certified and delegated school nurse records and a photograph of the subject child's arm taken on February 7, 2024 and offered the testimony of CPS. At the close of the petitioner's case, the respondent introduced into evidence the curriculum vitae of Dr. A.M. ("Dr. M.") and photographs and videos of the subject child and offered the testimony of Dr. M. and the respondent mother. The attorney for the child did not present a case.

Pursuant to FCA § 1012(f)(i)(B), a subject child is neglected when his,

"physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted

harm, or a substantial risk thereof, including the infliction of excessive corporal punishment."

An "isolated instance of excessive corporal punishment resulting in relatively mild physical injuries...does not support a finding of neglect." *In re Kennya S.,* 89 AD3d 570, 570 (1st Dept 2011). *See also Matter of Avrie P. (Meliza T.),* 185 AD3d 444 (1st Dept 2020) (a finding of neglect was not supported by the evidence that the child's mother "pulled her daughter by the arms, attempted to drag her home, and pulled her hair"); *Matter of Christian O.,* 51 AD3d 402 (1st Dept 2008) (a finding of neglect was not supported by the evidence that, in an isolated incident, the father lost his temper and kicked the child once in the ankle); *Matter of Chanika B.,* 60 AD3d 671 (2nd Dept 2009) (a finding of neglect was not supported by the evidence that, in an isolated incident, the father "slapped the child in the face, causing her nose to bleed, because she had disobeyed him"). Pursuant to FCA § 1046(b)(vi), "previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect." To prevail at a fact-finding in a proceeding filed pursuant to Article 10 of the FCA, the petitioner must prove that a subject child has been abused or neglected by a preponderance of the [*3]evidence (*see* NY Fam. Ct. Act § 1046(b)(i)).

The petitioner failed to establish, by a fair preponderance of the evidence, that the respondent mother neglected the subject child. The ORT, dated February 6, 2024, establishes as follows. The source of the ORT is J.Y., school personnel the subject child's school. The "narrative" section of the ORT states,

On 2/1/24, the mother (J.H.) became upset with [the subject child] (8) and hit the child with an open hand on the right arm and grabbed the child aggressively on the arm. The child sustained two fingerprint bruises on the right forearm as a result. The mother then hit the child again. The mother often screams at the child as well. The role of the father (M.H.) is unknown.

The "miscellaneous information" section of the ORT states,

The child mentioned to the mother that he missed the father and the mothers reaction was to hit the child. The child asked the nurse at school for an ice pack. The child is "a little scared to go home with mom I hope she does not yell or hit me."

The certified and delegated school nurse records establish as follows. The subject child was treated by the school nurse on February 6, 2024, from 10:05 AM through 10:30 AM.

The nurse observed a bruise on the subject child's right arm, which was treated with an ice pack. The nurse's assessment was, "c/o pain to the rt. arm when he touches it. Observed 2 red marks on the rt. forearm." The nurse also noted, "Child reported that his Mom hit him on the arm last Thursday." Following his treatment, the subject child was returned to his class and a report of the treatment was referred to Ms. J.Y. in Guidance and Ms. L.G. in the General Office. The petitioner also introduced into evidence a photograph taken by CPS on February 7, 2024. The photograph depicts two circular red marks on the subject child's arm.

CPS credibly testified as follows. On February 6, 2024, upon receipt of the ORT, CPS was assigned to investigate the allegations made against the respondent mother. On February 7, 2024, CPS interviewed the subject child at his school. CPS observed a reddish bruise on the subject child's arm and took a photograph of the bruise, which was introduced into evidence at the fact-finding. CPS did not observe any lacerations on the subject child's arm. When asked how he sustained the bruise, the subject child told CPS that on February 1, 2024, following a therapy session, the subject child was in the car with the respondent mother. The subject child started to cry because he missed the non-respondent father. The respondent mother then grabbed the subject child with one of her hands and slapped him with the other hand. The subject child also told CPS that he did not want to return to the respondent mother's home and that he was afraid of the respondent mother because she was not nice to him. The subject child told CPS that the respondent mother calls him names like "trash" and "mother fucker" in Serbian and a liar, but that he is not a liar. The subject child also told CPS that the respondent mother left him alone for hours, meaning that she would use her phone for hours and not give him any attention. The subject child told CPS that interactions with the respondent mother made him feel sad and lonely. The subject child further told CPS that the respondent mother hit him in the past and would grab him by the ear, slap him on the back of his neck and shake him by the arm if he did not like what she had cooked for him or if he was not behaving. The respondent mother told CPS that the incident the subject child described never happened and that she does not speak Serbian so she would not have called the subject child any names in Serbian. The respondent mother also [*4]told CPS that the subject child had started to withdraw from her and that she believed he had started lying to her. The respondent mother then showed CPS photographs and videos of the subject child participating in activities and sports during the weekend prior to the incident being reported but after the incident had allegedly occurred.

After ACS rested, the respondent mother presented her case. The photographs and videos that the respondent mother introduced into evidence establish as follows. A video taken on February 2, 2024 shows the subject child playing a computer game with another child during a class field trip. A photograph taken on February 2, 2024 shows the subject child with other children in the same clothing he was wearing in the video from the class field trip. A video taken on February 2, 2024 shows the subject child actively playing table tennis with another child. A photograph taken on February 2, 2024 shows the subject child playing table tennis with the same child. Two videos taken on February 3, 2024 show the subject child spinning on the ice while ice skating. A video taken on February 3, 2024 shows the subject child performing gymnastics while wearing a sleeveless top, with no visible marks or bruises on his arms. A photograph taken on February 3, 2024 shows the subject child sitting on a couch with other children while wearing a short sleeve shirt, with no visible marks or bruises on his arms. Finally, a photograph taken on February 4, 2024 shows the subject child performing gymnastics while wearing a sleeveless top, with no visible marks or bruises on his arms.

Dr. M. was qualified as an expert by the Court and credibly testified as follows. Dr. M. is an emergency medicine physician. Dr. M. reviewed the photograph of the subject child's arm taken by CPS on February 7, 2024. Dr. M. testified that the photograph showed an arm with redness, but without welts or lacerations, and explained that such redness is referred to as a contusion. Dr. M. stated that the red marks look like a superficial bruise which could be anywhere from 12-48 hours old. Dr. M. testified that, to a reasonable degree of medical certainty, the bruise could not have been five- or six-days-old because it looked fresh and because a five- or six-day-old bruise would not appear red in color, but would appear yellow, green or black and blue in color. Dr. M. further testified that the bruise in the photograph was mild and could have been caused by a grab, by falling on that area or from engaging in athletic activities.

The respondent mother credibly testified as follows. On Thursday, February 1, 2024, the respondent mother picked the subject child up from school. The respondent mother then drove the subject child to his scheduled therapy session. As the respondent mother drove home from the therapy session, she and the subject child discussed what to eat for dinner. The subject child did not seem upset, did not cry and did not mention the non-respondent father. When they arrived home, the subject child attended a chess lesson, ate dinner with the respondent mother, finished his homework and then went to bed at the respondent mother's home. The respondent mother stated that she did not hit, slap or grab the subject child at any point that day. On Friday, February 2, 2024, the respondent mother brought the subject child to school and chaperoned the subject

child's class field trip to a museum. At the end of the field trip, the respondent mother kissed subject child, said goodbye and went home. At the end of the school day, the respondent mother picked the subject child up from school, they talked about their weekend plans and then the respondent mother brought the subject child to a playdate where he played table tennis with a friend. After the playdate, the respondent mother and the subject child returned to the respondent mother's home and ate dinner before the subject child went to bed.

The respondent mother further credibly testified as follows. On Saturday, February 3, [*5]2024, the respondent mother brought the subject child to his regularly scheduled weekend activities. The subject child started his day at soccer class, which lasted for about one hour and took place indoors at a school basketball court. The subject child wore a new soccer outfit that the subject child had asked the respondent mother to buy for him. The respondent mother did not notice anything unusual about the subject child during the class. Following the class, the respondent mother allowed the subject child to play for 10 additional minutes because he wanted to practice his soccer goalie skills, which included falling on the floor and landing on his elbows while defending the soccer goal. Following the soccer class, the respondent mother brought the subject child to Chelsea Piers to participate in an ice skating lesson. The respondent mother watched the subject child spinning on the ice and recorded videos of the subject child's lesson. The respondent mother did not notice anything unusual about the subject child while he skated and the subject child did not complain about any discomfort or pain during or after his skating lesson. At the end of the ice skating lesson, the subject child ate pizza and played with his friends. Following his ice skating lesson, the respondent mother brought the subject child to Chappaqua, New York for a two-hour gymnastics lesson. The respondent mother recorded videos of the subject child during his gymnastics lesson. The subject child wore his typical gymnastics outfit, consisting of a sleeveless top and long leggings. The respondent mother did not notice any bruises on the subject child's arms or anything unusual about the subject child during the lesson and the subject child did not complain about any discomfort or pain during or after his gymnastics lesson. After the gymnastics lesson, the respondent mother and the subject child ate food and drove home. At home, the subject child did some homework and played. That evening, the subject child had a playdate with a friend. The respondent mother did not notice anything unusual about the subject child that night and noted that the subject child seemed happy. The subject child slept at the respondent mother's home again that night.

The respondent mother further credibly testified as follows. The next day, Sunday, February 4, 2024, the subject child and the respondent mother played outside. The respondent mother then brought the subject child back to Chappaqua, New York for another gymnastics lesson. The subject child wore a sleeveless shirt with his arms exposed. The subject child was able to complete all his gymnastics exercises and the respondent mother did not notice anything unusual about the subject child or any marks or bruises on his arms. Following the gymnastics lesson, the respondent mother and the subject child ate food and then went home. The respondent mother and the subject child then spent time with the respondent mother's brother and his daughter, the subject child's cousin, at the respondent mother's apartment. After the visit from the respondent mother's brother, the subject child and the respondent mother went outside to play soccer. That night, the subject child slept at the respondent mother's home. The next day, Monday, February 5, 2024, the respondent mother brought the subject child to school. The respondent mother did not notice anything out of the ordinary with the subject child or any marks or bruises on his arms and the subject child did not seem to be in pain.

The respondent mother further credibly testified as follows. On February 5, 2024 and February 6, 2024, the non-respondent father was responsible for picking the subject child up from school in accordance with their parenting time schedule. On February 7, 2024, the respondent mother picked the subject child up from school. The respondent mother and the subject child played soccer in the gym inside the respondent mother's apartment building. In the gym, the subject child again practiced falling on the floor defending the soccer goal. The respondent mother and the subject child then went to the respondent mother's home to eat dinner. [*6]As the respondent mother was getting the subject child ready for bed, she noticed some redness on the subject child's skin near his elbow. The respondent mother asked the subject child what caused the redness and the subject child replied, "Daddy didn't do it." The respondent mother then repeated the question and the subject child paused, and then said that he was tired and wanted to go to bed. They did not further discuss the redness on the subject child's arm. On February 8, 2024, the respondent mother was contacted by CPS. The respondent mother was not aware of why she was being contacted. When CPS told the respondent mother about the allegations, she denied ever hitting the subject child. The respondent mother told CPS that she had photographs and videos of the subject child that she believed would be relevant to the ACS investigation. The respondent mother stated that she disciplines the subject child by raising her voice, that she never hits the subject child for not eating his food, that she does not call him any mean names in any language and that she knows the subject child is not afraid of her. The respondent

mother believes that the subject child is a good and wonderful kid but that he has been influenced.

Based on the evidence presented at the fact-finding hearing, the Court finds that ACS failed to prove, by a fair preponderance of the evidence, that the respondent mother neglected the subject child, as defined in Article 10 of the FCA. As an initial matter, the petitioner failed to prove neglect based on the allegations in the petition that the respondent mother inflicted excessive corporal punishment on the subject child prior to February 1, 2024. The only evidence of such behavior offered at the fact-finding hearing is the subject child's statements to CPS that the respondent mother grabbed, slapped and shook him in the past. However, these statements were not corroborated at the fact-finding and are therefore insufficient to sustain a finding of neglect. (*see* NY Fam. Ct. Act § 1046(b)(vi)).

Additionally, considering the totality of the evidence presented at the fact-finding hearing, the petitioner also failed to prove, by a fair preponderance of the evidence, that the February 1, 2024 incident alleged in the petition actually occurred. CPS credibly testified that the subject child told her that he was hit by the respondent mother, and that it resulted in the red bruise CPS observed on his arm six days later. However, the evidence presented by the respondent undermines the reliability of the subject child's statements. Specifically, the Court credits the respondent mother's testimony that she did not hit or grab the subject child at any point on February 1, 2024 or otherwise, that she did not observe any marks or bruises on his arms in the days immediately following the alleged incident, that she did not notice any change in the subject child's demeanor or behavior and that the subject child continued to participate in all of his regular activities at a high level in the days that followed. Further, the Court credits the testimony of Dr. M. that the bruise in the photograph taken on February 7, 2024, which was offered into evidence by the petitioner, was not five or six days old and was actually 12-48 hours old, which undermines the subject child's report to the school nurse and CPS that the bruise at issue was the result of a hit or grab by the respondent mother on February 1, 2024. Additionally, the photographs and videos of the subject child offered by the respondent, which show the subject child engaging in activities in the days following the alleged incident, establish that there were no apparent marks or bruises on the subject child's arms.

In any event, even if the petitioner proved, by a fair preponderance of the evidence, that the incident on February 1, 2024 actually occurred, such evidence would not be sufficient to sustain a finding of neglect. Indeed, evidence of one isolated incident in which the respondent mother lost her temper and spontaneously grabbed or hit the

subject child's arm, resulting in [*7]relatively mild physical injury, is not sufficient to sustain a finding of neglect under the law. Here, not only is the subject child's injury mild, the respondent mother's conduct was less severe than the conduct of the respondent parents in *Matter of Avrie P. (Meliza T.), Matter of Christian O.* and *Matter of Chanika B.*, none of which was sufficient to sustain a cause of action for neglect.

Therefore, as the Court finds that the petitioner failed to establish, by a preponderance of the evidence, that the respondent neglected the subject child, the neglect petition against the respondent mother is dismissed. All orders issued by this Court on the neglect docket are therefore also dismissed. This constitutes the decision and order of the Court.

Expert Witness

Matter of Y., Misc3d 2025 NY Slip Op 50690(U) (Family Court, Bronx County, 2025)

Lauren Broderick, J.

On June 13, 2024, a petition was filed by the Administration of Children's Services (ACS) "Petitioner" herein, alleging that A, "Respondent" herein, abused and neglected her son Y, born in May 2024. In sum and substance, Petitioner alleges that Y suffered a displaced fracture of his left humerus bone at the elbow joint, at least one distal femur fracture and at least one other femur fracture and that those injuries are consistent with non-accidental trauma. The petition further alleges that at the time of the filing of said petition, A was psychiatrically hospitalized with depression and had an unidentified discharge date.

The fact-finding commenced on November 25, 2024. The hearing continued as a combined fact-finding hearing and FCA Section 1028 hearing on December 5, 2024, and for over 20 court dates thereafter. All counsel rested on the combined hearing, with oral summations on the FCA 1028 hearing on March 18, 2025.

On March 13, 2025, Petitioner filed the instant motion, by way of Order to Show Cause, seeking to strike certain portions of the testimony of Respondent's expert witnesses Dr. Julie Mack and Dr. Christoper Sullivan at the fact-finding hearing and the FCA Section 1028 hearing pursuant to *Frye v. United States*, 293 F. 1013, 54 App. D.C. 46 (1923) and its applicable progeny in New York. On March 21, 2025 counsel for Respondent

filed an affirmation opposing the relief. Also on March 21, 2025, Y's attorney filed an affirmation opposing the relief. On March 25, 2025, Petitioner filed a Reply Affirmation.

Petitioner contends that the testimony of Respondent's expert witnesses Dr Julie Mack and Dr Christoper Sullivan lacked a sufficient basis for the court to conclude that their opinions about classic metaphysical lesions are generally accepted in the medical community. [*2]Specifically, Petitioner argues that the opinions proffered by Respondent's expert witnesses were primarily based upon their individual clinical experiences and not based on objectively accepted scientific principles and methodologies.

Respondent argues that Petitioner's motion should be denied because (1) the motion is procedurally improper and untimely; (2) the arguments raised by Petitioner go to the weight of and credibility of each expert's testimony, not their admissibility; and (3) the expert testimony is based on generally accepted scientific principles and methodologies.

Y's attorney adopts the arguments made by Respondent's counsel in its affirmation in opposition and emphasizes that the opinions of Respondent's expert witnesses were based on generally accepted principles and methodologies in their respective scientific fields and should not be stricken.

Petitioner, in its reply affirmation, maintains that its motion is not untimely, that the CPLR 3101d disclosure notice provided for Respondent's expert witnesses were not sufficiently detailed for Petitioner to move for a Frye hearing earlier, and contends that a Frye hearing is warranted in this case.

A review of the relevant parts of the record reflects Respondent provided all counsel with CPLR Section 3101(d) expert disclosures for Dr Julie Mack and Dr Christopher Sullivan as well as their curriculum vitaes. Dr Mack testified before the court on direct and cross examination on February 5, 2025. Dr Mack was deemed an expert in pediatric radiology upon Petitioner's and Y's attorney's consent. Dr Mack disagreed with the diagnosis that Y suffered from fractures as opined by Petitioner's expert witnesses who testified on Petitioner's case in chief. Petitioner, as well as Y's attorney had the opportunity to cross-examine Dr Mack. Petitioner did not seek to voir dire Dr Mack, did not file a motion for a Frye hearing to challenge her testimony, or otherwise object that Dr Mack's testimony was inadmissible scientific evidence.

Dr Christopher Sullivan, was the next witness called by Respondent on February 11, 2025. Dr Sullivan was deemed an expert in pediatric orthopedics upon Petitioner's and

Y's attorney's consent. Dr Sullivan disagreed with the diagnosis that Y suffered from fractures as opined by Petitioner's expert witnesses who testified on Petitioner's case in chief. On February 11, Dr Sullivan testified on direct examination, and cross examination by Y's attorney, and the matter was adjourned to February 21, 2025 for Petitioner's cross examination. On February 21, 2025, Petitioner cross examined Dr Sullivan. Petitioner did not seek to voir dire Dr Sullivan, did not file a motion for a Frye hearing to challenge Dr Sullivan's testimony or otherwise object that Dr Sullivan's testimony was inadmissible scientific evidence.

Respondent A testified on February 25, February 28 and March 7, 2025.

On February 25, 2025, Petitioner informed court and counsel of its intention to present rebuttal evidence. The court directed Petitioner to make its application for a rebuttal witness on February 28, 2025. Petitioner did not provide the court and counsel with the name of a rebuttal witness on February 28, and the court directed that Petitioner make its application for a rebuttal witness in writing by March 7, 2025, to include the specific portions of Respondent's expert testimony it intended to rebut and the proposed testimony of the rebuttal witness. On March 7, 2025, Petitioner instead filed an Order to Show Cause seeking an adjournment to locate a rebuttal witness because Dr Sullivan's testimony could not have been reasonably anticipated by Respondent's CPLR 3101d notice. In court on March 7 Petitioner, in sum and substance clarified that it had "been trying to explore a witness, having spoken to doctors, to other orthopedic [*3]surgeons, who will come in to speak about some of his opinions and whether they are regularly held realize that we never established if Dr Sullivan's opinions are actually accepted in the medical field, which is required under Frye ..." . The court granted Petitioner's request to locate a rebuttal witness and ordered that information regarding a rebuttal witness be provided to court and counsel by March 11, 2025. The court set March 14 as the court date for the testimony of the rebuttal witness. Alternatively, if no rebuttal witness testified, counsel would give oral summations as scheduled on March 18.

On March 11, 2025, Petitioner informed Court and counsel via email that it did not intend to call a rebuttal witness at the hearings on this matter. The matter was adjourned as previously scheduled, to March 18 for summations by counsel on the 1028 hearing.

DISCUSSION

"The long recognized rule *of Frye v. United States* (293 F. 1013, 54 App. D.C. 46 (1923) is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field . *People v. Wesley, 83 NY2d 417, 422, 611 NYS2d 07 (1994); See, People v. Wernick,*

89 NY2d 111, 117, 651 NYS2d 392 (1996). Objections pursuant to Frye contemplate a hearing be conducted to challenge the admissibility of the expert's testimony. *See Mitchell v. Brown, 43 AD3d 1009, 842 NYS2d 507 (2nd Dept., 2007),* where the judgment was reversed based upon the improvident exercise of discretion by the trial court which granted the plaintiff's pre-trial motion to preclude defendant's proposed expert without conducting a hearing pursuant to *Frye*. *Frye* hearings, like motions in limine, challenge the admissibility of evidence and should be addressed prior to trial in order to achieve its stated purpose. *See, Parker v. Mobil Oil Corp, 7 NY3d 434(2006), rearg den., 8 NY3d 828(2007).* In *Troyano v. Burris, 196 AD3d 525 (2nd Dept, 2021), t*he court held that a defendant's motion to strike expert testimony made after the close of evidence was untimely and prejudicial to the plaintiff. The court further held that any defects in the expert's opinion or the foundation on which those opinions are based should go to the weight to be accorded that evidence by the trier of fact, and not to its admissibility. In *Goldsmith v. Kipnis, 186 AD3d 572(2nd Dept, 2020),* the court denied plaintiff's motion, made mid-trial in a medical malpractice case, to preclude defendant's expert from testifying about theories of causation which were not specifically referenced in defendant's CPLR 3101d expert disclosure statement. As noted by the court, the basis of plaintiff's objection to the expert disclosure was readily apparent based on the disclosure and could have been raised and cured prior to trial.

In *Zelaya v. New York, NY Auto Body Inc. 41 AD3d 594, 836 NYS2d 430(2nd Dept., 2007), t*he court upheld the judgment and affirmed the lower court's decision to allow plaintiff's medical expert's testimony, as defendant waived any objection to this testimony by failing to raise a Frye objection until after the close of plaintiff's case.

The *Frye* rule does not apply where experts base their testimony on personal training or their own experiences. *People v. Oddone*, 22 NY3d 369, 375 (2013). Absent a novel or experimental scientific theory, a *Frye* hearing is generally unwarranted. *People v. Brooks,31 NY3d 939, 941 (2018); People v. Williams, 35 NY3d 24, 124 NYS3d 593, 147 NE3d 1131 (2020)*. A physician's factual disagreement with a patient's causation theory in a medical malpractice action did not require a Frye hearing to determine the admissibility of expert testimony as it was not a novel theory of causation. *See, Lipschitz v Stein, 65 AD3d 573, 884 NYS 2d 442, 446 (2nd Dept., 2009).*

Upon review of the instant motion, including all papers filed in support and in opposition [*4]hereto, and after due deliberation thereon, the Court denies Petitioner's motion to strike portions of Respondent's expert witness's testimonies.

Petitioner's motion as filed, is procedurally improper and untimely. Petitioner's motion seeks the preclusion of the **witnesses**' testimony without first allowing for a hearing to challenge the admissibility of the testimony. Additionally, Petitioner's motion, filed after all counsel had rested, is untimely and prejudices Respondent who subsequently testified. Petitioner waived prior opportunities to object to and challenge the admissibility of Dr Mack's and Dr Sullivan's testimony.

The court is not persuaded by Petitioner's attempt to distinguish *Troyano v. Burris* and finds Petitioner's reliance on *Lara v NYC Health and Hosps Corp* 305 AD2d 106, 757 NYS2d 740 (1st Dept., 2003) unpersuasive,, as the lower court held a *Frye* hearing during trial, the court reserved decision on said hearing, and thereafter permitted the doctor to testify. Similarly, Petitioner's reliance on *Sepulveda v. Dayal, 143 AD3d 591, 39 NYS2d3451 (1st Dept*., *2016)* is misplaced, as the case was set down for a Frye hearing by the motion court, in the context of a determination for summary judgment, prior to the trial itself.

Dr. Mack and Dr Sullivan disagreed with the diagnosis that Y suffered from fractures, as opined by Petitioner's expert witnesses. The sufficiency of the basis of an expert's opinion goes to the weight to be accorded to the evidence. The court will have to determine the reliability, credibility and appropriate weight to be given to each expert's testimony, but that does not necessitate a Frye hearing in order to properly do so. Dr Mack's and Dr Sullivan's testimony were based on their personal training and experience and relied upon generally accepted scientific theories and methodologies. These expert opinions were not novel scientific theories contemplated by *Frye.*

It is hereby

ORDERED that Respondent's motion is denied.

Hostile Witness

Matter of Davin P., Misc3d 2025 NY Slip Op 25092 (Family Court, Kings County, 2025)

Erik S. Pitchal, J.

By case management order dated October 9, 2024, all counsel were directed to brief the following question: When petitioner calls a respondent in a TPR trial as his own witness, and the Court permits him to ask leading questions because the respondent is

an adverse party, may respondent's own lawyer also ask leading questions because it is "cross-examination," or must respondent's own lawyer limit the inquiry to non-leading questions? Petitioner filed a timely brief dated January 31, 2025. No other counsel filed a brief.

Built into the question presented is a preliminary issue - whether petitioner's counsel may put leading questions to the respondent even though he called respondent as his own witness. The answer is unquestionably yes; moreover, there need not be a demonstration of hostility by the witness. "Where, as here, an 'adverse party' is called as a witness, it may be assumed that such adverse party is a hostile witness, and, in the discretion of the court, direct examination may assume the nature of cross-examination by the use of leading questions." *Ferri v. Ferri*, 60 AD3d 625 (2d Dep't. 2009) (citations omitted).

During the first iteration of trial in this matter, despite being permitted by the Court to ask leading questions of Mr. P., Petitioner's counsel asked several non-leading ones. For example, he asked Mr. P. "When was [Davin] born?" Mr. P. was unable to remember his son's birth date. When Mr. P.'s counsel commenced her cross-examination of her own client, her very first question was "Davin was born on [XX XX, 2012], correct?" Petitioner's counsel objected, and the Court reserved decision on the question of whether Mr. P.'s attorney would be permitted to ask leading questions such as that one. The October 9, 2024, case management order followed.

As to the operative question presented here — whether respondent's counsel may ask leading questions of her own client in the context of his testimony as a witness for the petitioner — the answer is no.

The purpose of allowing leading questions during cross-examination is to test the accuracy of or discredit the direct testimony of an adverse witness. "[S]hould it develop that an opponent's witness proves to be biased in favor of the cross-examiner, he may then be forbidden to propound leading questions even to the opponent's witness." *J. &B. Motors v. Margolis*, 75 Ariz. 382, 396 (1963) (citing *Wigmore on Evidence* § 915). Clearly, one's own client is "biased" in favor of his counsel even if the counsel's inquiry is labeled "cross-examination" merely because the client was called by the other side's lawyer in the first instance. Thus, the rule in Arizona is a lawyer cannot put leading questions to her own client — or any other witness who is biased in the client's favor - even on "cross-examination." *Id.* at 397.

"Generally, when a witness identified with an adverse party is called, the roles of the parties are reversed. Leading questions would be appropriate on direct examination but

not on cross-examination." *Alpha Display Paging, Inc. v. Motorola Communications and Electronics, Inc.*, 867 F.2d. 1168, 1171 (8th Cir. 1989). This is true in many other jurisdictions in both civil and criminal matters. *See*, *e.g.*, *Zurkowsky v Brown*, 79 Wash.2d 586, 604 (1971); *State v. Preston*, 673 S.W.2d 1, 6 (Mo. 1984); *People v. Spain*, 154 Cal.App.3d 845, 853 (1984).

New York appears to favor this rule as well. In personal injury cases, it is common for the plaintiff to call the defendant on its case-in-chief. When defendant's counsel cross-examines her own client, "leading questions are also forbidden." *NY Prac., Personal Injury Practice in NY* § 9:311.

The reason for this rule is amply demonstrated by the single leading question Mr. P.'s lawyer posed to him before the trial was adjourned. Counsel effectively suggested to her client the correct answer to a question which he had been unable to handle when questioned by petitioner's counsel. While the child's date of birth is not really in dispute in this proceeding, there is a significant danger if counsel is permitted to inquire into more material and controversial matters by use of leading questions.

The Court thus holds that if the respondents' lawyers wish to "cross-examine" their own clients following the adverse, "direct" examination conducted of them by petitioner's counsel, respondents' counsel can only do so with non-leading questions. Regardless, respondents can be called as witnesses during their own cases-in-chief, using traditional direct examination techniques.

Ineffective Assistance of Counsel

Media In Court

Matter of J.R., Misc3d 2025 NY Slip Op 50698(U) (Family Court, New York County, 2025)

Janet L. McFarland, J.

On October 15, 2024, the Administration for Children's Services (hereinafter "ACS") filed an abuse petition against the Respondent Mother, N.R., and the Respondent Father, L.M., on behalf of the subject children, hereinafter referred to as "The Children" or "J.R.," "J.M. Boy," "J.M. Girl." The petition alleged that on or about October 14, 2024, the Children's sibling, J., was pronounced deceased based upon allegations of malnourishment and starvation by the Respondents. The remaining subject children were also observed to be severely malnourished. As a result, ACS filed the pending Article 10 petition and sought a remand of the subject children.

The Respondents were arrested based upon the allegations. Media coverage of the case, [*2]both in the criminal court and family court, ensued including TV coverage and newspaper articles. The media has covered photos of the deceased child, photos of the Respondents, and details of the condition of the home, condition of the deceased, and details of the current case. Members of the press have also appeared in court to observe the proceedings and subsequent news articles have been posted detailing the legal procedures.

Based upon the media coverage, the Attorney for the Children filed an Order to Show Cause [No.3] on December 9, 2024 seeking to exclude the press from all future proceedings, sealing the court transcripts, and any evidentiary evidence submitted to the record in this matter. On December 11, 2024, a hearing was conducted on the Order to Show Cause.

On consent, the Court received the following items into evidence:

AFC Exhibit 1: New York Daily News Article Dated 11/12/24, ABC News Article dated 10/16/24, CBS News Article Dated 10/25/24, CNN News Article dated 10/19/24, ABC News Article Dated 10/21/24, CBS News Article Dated 10/19/24, NBC News Article Dated 10/24/24, NBC News Article Dated 10/26/24, NBC News Article Dated 10/20/24, Spectrum News Article Dated 10/15/24, Gothamist Article Dated 10/16/24

AFC Exhibit 2: *"Protecting Victims' Identities in Press Coverage of Child Victimization*, Journal Article by Lisa M. Jones, David Finkelhor, and Jessica Beckwith

AFC Exhibit 3: Affidavit of S.C., LMSW, Forensic Social Worker Juvenile Rights Practice, Legal Aid Society.

The Court also heard testimony from S.C., LMSW, Forensic Social Worker from the Legal Aid Society's Juvenile Rights Practice. Both the Respondent Mother and the Respondent Father were in support of the Attorney for the Child's application. ACS took no position.

Attorney for the Child's Exhibit 1

Based upon a review of the documents in Exhibit 1, the following has been disclosed by the media:

-Names of the deceased child, the parents, the paternal grandmother, two aunts, the attorneys assigned, the jurist assigned, the foster care agency assigned.

-The subject children's prior address

-The ages of the surviving siblings

-The children's prior stay at Bellevue Hospital

-The area of the children's foster home

-Date of the deceased child's death

-Basis and details of the child's death

-Description of the home

-Criminal charges against the parents

-Neighbor's statements

-Children's condition at the hospital

-Photos of family members

Testimony of S.C.

The Court heard testimony from S.C., forensic social worker from the Legal Aid Society's Juvenile Rights Practice. Ms. C. testified that she has been an LMSW in New York since 2014 and received her master's degree in social work at Columbia University. She has been employed with the Legal Aid Society for ten years where she interviews children, makes [*3]recommendations, identifies the children's needs, and makes necessary recommendations. Ms. C. was qualified as an expert in social work.

Ms. C. met with the subject children twice; once at Bellevue Hospital in October 2024 and once in the foster home in November 2024. During her first interviews with the children, they could not communicate or answer any questions. She testified that the children appeared to be very weak and appeared smaller than other children in their

age range. Per Ms. C.'s conversation with the hospital social worker at Bellevue, the children presented to the hospital with significant communication and speech delays.

On November 18, 2024, Ms. C. met the children at the foster home after they had been residing there for about a week. The children were still unable to answer any questions. It appeared that J.R. and J.M. Boy were somewhat verbal whereas J.M. Girl appeared to be a bit shier than her siblings. Ms. C. noted that the children's appearances improved from her initial assessment. The children's foster parent indicated that the children were having a hard time sleeping through the night and would spend time having to calm the children.

After her assessments with the children, Ms. C. testified that it is her recommendation that the media and press be excluded from all future proceedings on the basis that the information that will be shared in the proceedings would be a violation of the HIPAA laws, the children will be exposed to the public which would damaging to their well-being. Specifically, as life goes on for the children, they will have access to the internet and see their information which would potentially be a source of bullying.

LEGAL ANALYSIS

Public access to court proceedings is a fundamental tenet in law. Public access has long had its roots based upon the need to protect citizens from unjust persecution by governmental authorities and to safeguard from any possible abuse of judicial power. *See People v. Jelke* 308 NY 56 [Ct of App 1954.] There are, however, limitations to such public access contemplated by NY JUD §4 stating that "sitting of every court within this state shall be public, and every citizen may freely attend the same, *except that in all proceedings and trials in cases for divorce, seduction, rape, assault with intent to commit rape, bastardy, filiation, or a crime formerly defined in sections 130.50, 130.45, and 130.40 of the penal law*, the court may in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court."

The fundamental rule of public access applies equally to matters heard in Family Court. *See Kent v. Kent* 29 AD3d 123 [App Div 2006.] Pursuant to 22 NYCRR 205.4, the Family Court is open to the public including news media. Such access would include courtrooms, lobbies, public waiting areas, and other common areas of the Family Court. Upon a finding that compelling interests justify closure or partial closure, the right of public access to court proceedings may be limited, especially where the interests of children are implicated. *See Herald Co., Inc. v. Weisenberg* 89 AD2d 224 [App Div 1982], *see also Anonymous v. Anonymous* 263 AD2d 341 [App Div 2000.] Thus, Section

1043 of the Family Court Act contemplates the need for exclusion from the courtroom, stating, that the general public may be excluded from any hearing under this article. When considering an application to exclude the public or a person the courtroom, the Court must apply the strict standard laid out in 22 NYCRR 205.4(b) regarding what the Court should consider.

Specifically, 22 NYCRR 205.4(b) states the following:

(b) The general public or any person may be excluded from a courtroom only if the judge presiding in the courtroom determines, on a case-by-case basis based upon supporting evidence, that such exclusion is warranted in that case. In exercising this inherent and statutory discretion, the judge may consider, among other factors, whether:

(1) the person is causing or is likely to cause a disruption in the proceedings;

(2) the presence of the person is objected to by one of the parties, including the attorney for the child, for a compelling reason;

(3) the orderly and sound administration of justice, including the nature of the proceeding, the privacy interests of individuals before the court, and the need for protection of the litigants, in particular, children, from harm, requires that some or all observers be excluded from the courtroom;

(4) less restrictive alternatives to exclusion are unavailable or inappropriate to the circumstances of the particular case.

Whenever the judge exercises discretion to exclude any person or the general public from a proceeding or part of a proceeding in Family Court, the judge shall make findings prior to ordering exclusion.

Such determination requires the Court to strike "'the proper' balance [between] the right of access of the public and the press to judicial proceedings [and] the interest in protecting children from the possible harmful effects of disclosing [harmful information] to the public" *See id* at 343. *See also Matter of P.B. v. C.C*., 647 NYS2d 732, [App Div 1996] quoting *Matter of Katherine B*. [App Div 1993], 189 AD2d 443 at 450 "Judicial discretion must be exercised against a strong presumption of openness." Matter of M. S., 173 Misc 2d 656, 659, 662 N.Y.S.2d 207. A court may find against the presumption *only* when evidence of that harm, or potential harm, is compelling.

In *Katherine B.,* the Appellate Division overturned an order from family court denying an application for exclusion of the press. The Appellate Division, in balancing the press' right of access against the State's interest in protecting children from the possible

harmful effects of disclosing the public allegations and evidence of parental abuse and neglect, based their decision utilizing the factors set forth in 22 NYCRR 205.4. *Katherine B.* involved a child kidnapped by an adult family friend, imprisoned in an underground dungeon in his home for 16 days where he sexually abused her. An Article 10 petition was filed against the child's mother and subsequently became the topic of media coverage. At the time of the proceedings, the child's identity had been disclosed to the public and several sensitive details about the case had already been widely disseminated. An affidavit from the child was submitted to the Court detailing the child's embarrassment and shame about the events, such emotions, exacerbated by her knowledge that the details of her life and the incident were not private. Based upon the harm posed by the media's presence in the courtroom to the child's mental and emotional health as well as the information already disclosed to the media, the court excluded the press from all future proceedings.

Disruption

The Attorney for the Children contends that while the presence of the press in the courtroom would not cause a physical disruption, it would cause subtler distractions. The Attorney for the Child states that his duty to protect his clients from the press will hinder his ability to zealously advocate for the children as he will be unable to fully advocate without risking their confidentiality and safety to detail facts of the case.

The Attorney for the Children cites to *Matter of Ruben R*. 219 AD2d 117 (1st Dept 1996) where the court overturned an order denying an application to exclude the press based upon extraordinarily sensitive and personal nature of the information that was going to be addressed in open court, strong evidence that publication would be harmful to the children, and the impossibility of protecting the children's right to privacy due to the previous disclosure of the children's identities. In *Ruben R.* the court was tasked with striking a sensitive balance between the potential trauma to the mental and physical well-being of the children from public dissemination of certain personal aspects of their lives and the interests of the press in having free access to judicial proceedings. The facts in *Ruben R* involved a six-year-old who had been murdered and her mother was indicted for the murder. The child's half-siblings were the subject of an Article 10 petition and the case became the topic of intensive media coverage. At the time of the motion, the media had disclosed the identities of the surviving children, full names, and ages of the two oldest children, photos of the children, a statement by one of the children, a photo of the parents with the children on the cover of Time Magazine, and an account of the grand jury testimony of the children in the New York Post. Present during the

hearing were reporters from WCBS, the New York Post, the New York Times, the Associated Press, the Daily News, and New York 1.

In the attorney for the children in *Ruben R.*, much like the attorney for the children in this matter, argued about their inability to advocate for their client due to having to refrain from discussing the details of the children's past or present circumstances to avoid disclosure of sensitive information. The court noted that the cases cited in support of exclusion had shown that the identities of those children in those cases had already been disclosed in the media. Thus, the court deemed that exclusion of the press was necessary as protections such as not publishing the children's names in accounts of the abuse proceedings would be futile since their names, and pictures, had already been disseminated by the media.

At the time of filing of the instant Order To Show Cause, there had been numerous appearances before this Court. Of those appearances, members of the press have been present. Like *Katherine B.,* there have been no disruptions by the mere presence of the press and the decorum presented by members of the press has been appropriate thus far. However, the cases cited are different in this matter in that the children's identities or names have not been disclosed. At this time, the only name disclosed has been the parents, family members, and the deceased child. This Court believes that by taking certain measures such as abbreviating the children's names can still be utilized in this matter to protect the children's privacy.

Compelling Reason and Orderly and Sound Administration of Justice

The Attorney for the Children argues that exclusion of the press is necessary for the compelling reason that the children's personal medical information and service plan will be an important part of the evidence. The Attorney for the Child points to any future proceeding requiring information about the children's fragility, their understanding of their sibling's death, and their ongoing medical and therapeutic treatment.

22 NYCRR 205.4(3) delineates the factors the court should consider as when determining whether the presence of press would create a disruption in the orderly and sound administration of justice, namely: the nature of the proceeding, privacy interests, and the need for protection of the litigants, in this instance, the children from harm.

The Attorney for the Children contends that the presence of the press would make it [*4]impossible to represent their clients without risking their confidentiality and safety such that they would not be able to freely discuss the case. He further argues that the

media reports posted on the internet pose lifelong consequences to the subject children. As such, he argues, the orderly and sound administration of justice warrants an exclusion of the press based upon the potential harm posed by the discussion of pertinent medical and psychological information.

In *Katherine B.* and *Ruben R.,* the Court deemed exclusion necessary based upon the lifelong consequences of internet exposure, the additional burden victims carry based upon media publicity, and the potential increase of shame and ridicule from peers. In *Katherine B.,* the child had already been exposed to bullying from her peers and her affidavit submitted to court detailed the shame and embarrassment she felt by media presence in the courtroom. Similarly in *Ruben R*, the personal and identifying details of the children had already been disseminated resulting in ridicule from their peers and shame and guilt arising from the incident. In both cases, as stated previously in this decision, the children's identities had already been identified and the press' presence and actions caused emotional harm to the children. Counsel cites to *In re S.B.B.R. Children* 12 Misc 3d 1172(a) [2006] where press was excluded based upon concerns about discussing the surviving children's current needs. Again, like *Katherine B.* and *Ruben R.*, the children's identities were already publicized.

In the Matter of Crocker C. v. Anne R. 52 Misc 3d 1205(a) [2016], the court in that matter denied the application for exclusion of the press where the damage to the children in that matter was speculative. *Crocker* notes that the child in *Katherine B* had already experienced bullying by the ongoing television coverage. In *Crocker*, much like the instant case at hand, the Attorney for the Children had raised arguments about the *potential* harm in "this internet age" and that the children may one day learn about the allegations, and it may cause them embarrassment. However, the "possibility of some unspecified future harm does not constitute a compelling interest to justify closure. *See Anonymous* at 263.

Thus, while the Court does share concerns about the potential harm by the media coverage, any harm in this matter, remains speculative. The children have not expressed any active bullying or ridicule, or shame caused by the media's presence in the courtroom. While there is the potential for harm based upon articles on the internet, there is no active harm to the children. Further, this Court finds that by creating strict conditions about disclosures of the children's identities and presence of the press in the courtroom, there are safety measures that can be implemented to mitigate that harm.

Less Restrictive Alternatives.

Lastly, 22 NYCRR 205(4) states that exclusion of the press is warranted when there are no lesser restrictive alternatives to safeguard the protection of the children against the public's access to courtroom proceedings.

In all cases cited by counsel in support of exclusion, the children's identities from their names, ages, dates of birth, and photographs had already been widely disseminated within the media. In this instant matter, the children maintain some semblance of privacy as their names, photographs, or dates of birth have not been disclosed. The information disseminated has not shown much identifying information regarding the subject children except their current location and their ages.

Thus, this Court believes there are less restrictive alternatives and appropriate safeguards that can be implemented to maintain the privacy of the subject children. This Court has the [*5]discretion to set forth reasonable conditions on those who are permitted to attend its proceedings to maintain courtroom decorum and to protect the privacy of the parties before the court. As such, the following conditions will be reduced to a short form order and provided at each appearance to every observer including members of the press who attend.

Conditions for Press

1. Any member of the press must identify themselves and provide appropriate press credentials prior to entering the courtroom.

2. To maintain and safeguard the privacy of the parties involved, no member of the press may disclose the identity of the children involved nor publish any information from which their identities could be ascertained including but not limited to: the children's names, dates of birth, the children's school, and service providers. Sanctions may be imposed for violation of this clause upon application. Failure to agree with the conditions may result in exclusion from the courtroom.

Additional Conditions

3. The children's full names will be abbreviated in all court documents as follows: J.R., J.M. Boy, and J.M. Girl.

4. All reports submitted to the court must redact the following: any information containing the children's names and dates of birth, the names of the children's school, doctors, service providers, names of the foster parents, addresses, phone numbers.

5. All evidence submitted to the Court will be deemed confidential and sealed to protect the identities of the subject children.

6. All transcripts shall abbreviate the children's names. Any release of the transcripts shall be upon application to the Court. If granted, an in-camera review will be conducted to redact any confidential or identifying information of the subject children.

7. Court documents released to attorneys and non-parties on the Article 10 matter is to be upon application to the Court. If granted, any identifying information of the subject children shall be redacted.

8. Any disclosure of the children's names, providers, and location during testimony shall be protected by clauses #2, #3, #5, #6, #7.

9. Any party may file a motion to re-argue if new information is obtained that would warrant exclusion of the press.

Based upon the foregoing, the Attorney for the Child's Motion to Exclude the Press [#3] is DENIED IN PART and GRANTED IN PART as it relates to the sealing of evidence.

ENTER:

_____
HON. JANET L. MCFARLAND, J.F.C.

Neglect- Mental Illness

Matter of A.F., 85 Misc3d213(A) (Family Court, New York County, 2025)

Yael Wilkofsky, J.

On or about April 21, 2022, the petitioner Administration for Children's Services ("ACS") filed Family Court Act ("FCA") Article 10 neglect petitions against the respondent mother L.F. ("respondent mother" or "L.F.") on behalf of the subject children J.F., age 5, and A.F., age 7 (the "subject children"). The petitions allege, inter alia, that the respondent mother neglected the subject children by failing to provide them with proper supervision

or guardianship in that she suffers from a mental illness which impairs her ability to care for the subject children.

On April 21, 2022, at intake on the petitions, the respondent mother failed to appear and the Court remanded the subject children to the care and custody of the Commissioner of ACS. The subject children were then placed in the care of their maternal great aunt (the "maternal great aunt"). On or about April 25, 2022, the respondent mother appeared in court, was assigned [*2]counsel and requested a hearing pursuant to FCA § 1028. A 1028 hearing was held, at the conclusion of which the Court denied the respondent mother's application, finding that the petitioner established that the subject children would be at imminent risk of harm if returned to the respondent mother's care.

Thereafter, a full fact-finding hearing was held at which petitioner presented documentary and testimonial evidence. The respondent mother also testified at the hearing. In a decision entered on February 13, 2024, the Court found that the petitioner established, by a fair preponderance of the evidence, that the respondent mother neglected the subject children on the ground that she failed to provide the subject children with proper supervision or guardianship in that she suffers from a mental illness that impaired her ability to care for the subject children. The Court then entered findings of neglect against the respondent mother based only upon allegations 1(a) and 1(c) in the petition, specifically, that the respondent mother has a diagnosis of bipolar disorder and depression, that she is prescribed psychotropic medication, that in or around March 2022, the respondent mother stopped attending her psychiatric appointments and stopped taking her prescribed medication, and that on or about April 21, 2022, the respondent mother reported that she is going through things mentally and needs a break and that she would shoot up NYC if she did not get her children back.

A dispositional hearing commenced on June 10, 2024, continued on August 12, 2024 and September 20, 2024, and concluded on December 18, 2024. On December 18, 2024, the Court reserved decision and adjourned the matter until February 5, 2025. At the hearing, the petitioner introduced into evidence the two neglect petitions, redacted to include only allegations 1(a) and 1(c), the February 13, 2024 fact-finding order, the February 7, 2024 permanency hearing order, an agency court report dated May 3, 2024, an agency court report dated June 7, 2024, a court order dated January 18, 2024 and an Observation and Evaluation (Supervised Visitation) Report written by E.W., Ph.D. ("Dr. E.W."), dated August 9, 2024. The petitioner also called as witnesses the agency case worker ("agency case worker" or "Ms. G.") and the maternal great aunt. The petitioner then rested at which point the respondent mother introduced into evidence an October 25, 2023 letter from her social worker at the Henry Street Settlement, her

certification of completion of her "Parenting Discoveries" course, dated August 17, 2023, and five letters from the Emma L. Bowen Community Service Center ("Emma Bowen") about the respondent mother's engagement in mental health services, dated October 18, 2023, January 12, 2024, February 4, 2024, April 8, 2024 and June 6, 2024. The respondent mother testified on her own behalf, and she was her only witness. The attorney for the children did not present any evidence or call any witnesses to testify at the hearing.

The documentary evidence, upon which the Court relies, establishes as follows. On January 18, 2024, the Court ordered the agency to "locate and pay for a licensed clinical social worker approved by the Appellate Division First or Second Department to supervise three (3) visits between the [respondent mother] L.F. and the subject children A.F. and J.F. and prepeare (sic) a report for the court and counsel indicating the quality of visitation, any safety issues that arose and any other pertinent information for the court." Additionally, in the February 7, 2024 permanency hearing order, the Court made a finding that the agency made reasonable efforts to effectuate the goal of placement with a fit and willing relative by attempting to set up in-person visits between the respondent mother and the subject children, by following up regarding the respondent mother's mental health services and parenting skills classes, and by retaining a private psychologist to supervise visits between the respondent mother and the subject children.

The May 3, 2024 St. Dominic's Family Services court report, written by the agency case worker, Ms. G., states as follows. The maternal great aunt has identified herself as a long-term resource for the subject children and has expressed interest in pursuing kinship guardianship or adoption for the subject children. A.F. does not wish to return to her mother's home but wishes to continue residing with her maternal great aunt. With regards to services, on August 17, 2023, the respondent mother completed her parenting class, on September 22, 2023, the respondent mother completed a psychological assessment, and on September 27, 2023, the respondent mother completed an intake appointment for mental health services. The respondent mother was assigned a therapist in December 2023 and she has been consistently attending her therapy appointments. The respondent mother was diagnosed with major depressive disorder and she is working on anger management techniques to help her cope with her trauma responses. The agency is unable to inquire about the respondent mother's progress in her programs directly from the providers themselves because the respondent mother has refused to sign HIPAA releases. The respondent mother's agency-supervised in-person visits are scheduled for Tuesdays and Wednesdays from

4:30-6:00 p.m. but she has not been visiting consistently. Specifically, the respondent mother only visited with the subject children once in the month prior to May 3, 2024 and the respondent mother informed the agency that she prefers to have virtual visitation with the subject children rather than in-person visitation.

Additionally, the Court relies on the June 7, 2024 St. Dominic's Family Services court report, written by the agency case worker, Ms. G., which states much of the same information that was stated in the May 3, 2024 court report with the exception of the following information. The respondent mother is still scheduled to have her agency-supervised in-person visits with the subject children on Tuesdays and Wednesdays from 4:30-6:00 p.m. The respondent mother has continued to visit inconsistently in that since the court appearance held on April 10, 2024, the respondent mother has attended a total of two visits at the agency, one on April 16, 2024 and the other on May 29, 2024. Additionally, the respondent mother informed the agency that she has to work long hours at work and is not able to come to the agency for her weekly visits. Further, the maternal great aunt informed the agency that she does not feel comfortable supervising any visits due to the respondent mother's combative behavior towards her. The respondent mother has also requested virtual visitation but has not been consistent in attending. In December 2023, the respondent mother requested that her mother-in-law be cleared as a visitation resource. However, in January 2024, the agency determined that her mother-in-law could not be cleared as a visitation resource due to the results of her criminal background check. Although the agency informed the respondent mother that she could propose additional visitation resources for the agency to clear, she has not done so.

The August 9, 2024 observation report written by Dr. E.W. states as follows. Pursuant to the Court's January 18, 2024 order, visits between the respondent mother and the subject children were supervised by Dr. E.W. on March 7, 2024, June 6, 2024 and August 1, 2024. There was a visit scheduled for April 25, 2024, which was cancelled because the respondent mother said she could not make it, and there was a visit scheduled for June 27, 2024, which was canceled due to the late arrival of A.F. from the school bus. The first two visits took place in the library and the second visit took place in the community outside at the park. At the conclusion of the three visits, Dr. E.W. summarized her observations in her report as follows:

"[L.F.] did display some capacity for warm and positive interactions with her children, and in many moments, she spoke to them gently and appropriately, showing affection, as [*3]when she held J.F. in her lap and swang (sic) with him at the playground, or when she sat with the children and praised them as they played computer games. Aside from

these positive moments, there were also moments in which [L.F.] appeared angry at the children and spoke loudly and aggressively to them, and lacked constructive approaches to setting limits. For example, at the most recent visit at the playground, she yelled several times at both children — e.g., shouting at J.F., "Stop rubbing your friggin' face" and when J.F. cried, showing no empathy and instead asking him, "Why are you crying?" In the first visit which took place at the library, [L.F.] appeared preoccupied with A.F. not sitting in a certain way, given that she was wearing a skirt. She then appeared angry at A.F. and told her, "You're not acting your age, you're acting like you're 4 years old," to which A.F. replied, "I am 6 years old." [L.F.] continued, "A 6 year old knows to keep their legs closed when they got a dress on, ask that lady right there." [L.F.] also appeared distracted at times and towards the end of one visit at the library, she went to another area of the library, where she was out of sight and earshot of the children, who remained with the evaluator. On a final note, at times, [L.F.] smiled and giggled to herself, and although the evaluator wondered about the possibility that she was responding to internal stimuli (e.g., hallucinations or preoccupying thoughts), there was no definitive evidence for this."

An October 25, 2023 letter from the respondent mother's social worker at Henry Street Settlement states that the respondent mother completed her parenting class at Henry Street Settlement, which began on July 13, 2023 and ended on August 17, 2023. The letter further states that during the parenting class, the respondent mother participated in discussions, answered questions and interacted with other participants while addressing topics including stress management and self-care, effective communication skills, positive discipline strategies and others.

Finally, the letters from the respondent mother's therapist from Emma Bowen detail that the respondent mother was diagnosed with major depressive disorder, that the respondent mother has consistently been engaging in her therapy sessions and that the respondent mother is learning new coping skills and anger management techniques to help her with her everyday routines. However, the Court notes that many of the substantive statements in the letters are repeated word for word throughout the letters and that the letters do not include any information about whether the sessions are addressing the underlying allegations that led to the findings of neglect made against the respondent mother in February 2024.

The Court also relies on the following testimonial evidence. The agency case worker, Ms. G. credibly testified as follows. Ms. G. is employed by St. Dominic's Family Services foster care agency as a case worker for the family. The respondent mother's service plan consists of a mental health evaluation, individual therapy, which incorporates anger

management skills, parenting classes and compliance with visitation. The respondent mother completed her parenting classes with Henry Street Settlement and the agency received a copy of the certificate of completion. During the parenting class, the respondent mother participated in discussions with other participants about topics including stress management, self-care and positive discipline strategies. In September 2023, the respondent mother completed intake for mental health services at Emma Bowen, in December 2023, she began weekly therapy sessions, and she has attended consistently since the therapy began. Ms. G. has not received any information regarding [*4]any recent mental health evaluation, including a psychiatric evaluation, conducted for the respondent mother and is not aware of any recent mental health diagnoses given to the respondent mother or whether medication has been prescribed to the respondent mother. This is because Ms. G. has been unable to speak directly with any of the respondent mother's mental health services providers as the respondent mother has refused to provide the agency with signed HIPAA releases. However, as far as Ms. G. is aware, the respondent mother is not taking any medication.

Ms. G. further credibly testified as follows. The respondent mother has agency-supervised in-person visitation scheduled with the subject children at the agency on Tuesdays and Wednesdays from 4:30-6:00 p.m. However, the respondent mother is not consistently attending the visits, despite Ms. G's regular outreach to the respondent mother inquiring about her attendance. The respondent mother requested virtual visitation in lieu of in-person visitation with the subject children because she reported that it was difficult for her to get to the agency due to her full-time job and that her work schedule is unpredictable. However, the respondent mother never provided Ms. G. with any documentation or details about her work schedule and she never suggested specific days of the week or times that might work with the respondent mother's schedule in order to have in-person visitation with the subject children. The respondent mother also requested virtual visitation instead of in-person visitation when the weather was bad as she reported that the subject children are prone to getting sick in bad weather. Ms. G. facilitated virtual visitation and approximately two virtual visits were supervised by the agency. The respondent mother calls the subject children on the maternal great aunt's phone and sometimes does video visits with them, all supervised by the maternal great aunt. The respondent mother attended the subject children's birthdays as well as A.F.'s graduation ceremony and interacted appropriately with the subject children at the funeral of a family member in September 2024. No safety concerns were reported to the agency after the visits.

Ms. G. also credibly testified as follows. Ms. G. has been unable to conduct a visit to the respondent mother's home to ensure that it is safe and appropriate for the subject children because the respondent mother has continued to refuse to inform the agency of her address. The last known address that the agency has for the respondent mother is no longer her address and the agency has no information as to where the respondent mother currently resides. On June 5, 2024, at a case planning conference, the respondent mother told Ms. G. that she did not understand why the agency needed to conduct a home visit even though the agency explained to the respondent mother why it was necessary.

Ms. G. further credibly testified as follows. The subject child J.F. is receiving speech therapy, which was recommended following his Individualized Education Program ("IEP") meeting held in September 2023. Ms. G. became aware that J.F. was having speech issues as early as April 2023, but she had great difficulty getting the respondent mother's consent to get the IEP evaluation for J.F. The respondent mother told Ms. G. that she did not want to sign the consents because she did not think J.F. needed services. Ms. G. has seen a lot of progress in J.F.'s speech since he started speech therapy. Additionally, Ms. G. regularly speaks with the subject children and since July 2023, A.F. has consistently stated that she wants to continue residing with her maternal great aunt.

Finally, Ms. G. credibly testified that pursuant to the Court's January 18, 2024 order, the agency located and paid for a licensed clinical social worker to observe three visits between the respondent mother and the subject children and report on the quality of the visitation and any [*5]safety concerns that arose during the visits. The first visit that the social worker observed occurred on March 7, 2024, the second, which was supposed to occur in April 2024, did not occur and was rescheduled to June 6, 2024, and the third visit occurred in August 2024.

The subject children's maternal great aunt credibly testified at the hearing as follows. The respondent mother visits with the subject children whenever she decides she wants to. In the month of September 2024, the respondent mother called the subject children approximately five times but was not able to speak with them all five times because on one occasion, they were sleeping, and on another occasion, the maternal great aunt was not available. Also in September 2024, the respondent mother visited the subject children in person only once at the maternal great aunt's home and saw them a second time that month at a family funeral. In the month of October 2024, the respondent mother did not visit with the subject children in person at the maternal great aunt's home at all. In the month of November 2024, the respondent mother attempted to visit the

subject children in person only once when the maternal great aunt cooked a dinner for the respondent mother's birthday at her home, but because the respondent mother arrived late, the subject children were already sleeping and the respondent mother did not get to visit with them. The visits between the respondent mother and the subject children are inconsistent but appropriate.

The respondent mother also testified at the hearing but the Court found her testimony to be only partially credible. She testified as follows. With regards to visitation with the subject children, the respondent mother is permitted in-person, video and telephone contact with the subject children. The respondent mother calls the maternal great aunt on the telephone or via video call to speak to the subject children at night before they go to sleep and during the day, and she reaches out when she can or when she wants to. A.F. usually comes to the phone to speak with the respondent mother but J.F. does not always as he is sometimes asleep or playing on his electronic device. The respondent mother visited with the subject children in the month of November 2024 but did not visit in December 2024 because it was cold and she did not know what to do with them. The respondent mother prefers in-person visitation in the community rather than at the agency because during visits at the agency, there is nothing to do and A.F. becomes bored and would rather be outside. During the agency visits, the respondent mother mostly lets the subject children play on her phone or do puzzles. During visits in the community, she joins the subject children in the park, they dance, play hopscotch, go on the swings and play in the water. Regarding the three visits that were observed by Dr. E.W., two of the visits took place in the library and the third visit took place outside in the community. The respondent mother wanted all three visits to be in the community so that she could make memories with the subject children. The respondent mother testified that the visits observed by Dr. E.W. went well but that since those visits, she has not been visiting with the subject children consistently because she has not had time and the weather has not been good.

The respondent mother further testified as follows. Since the subject children were removed from her care, the agency has asked the respondent mother to engage in therapy and a parenting course. She completed the parenting course and received a certificate of completion. The respondent mother has been engaged in weekly individual therapy at Emma Bowen for a long time. The respondent mother only stopped attending her therapy sessions when her therapist left and no therapist was found to replace her. The respondent mother was then assigned a new therapist and speaks to her every Tuesday or whenever the respondent mother can call her. The respondent mother is only engaged in therapy now because of "threat and coercion" and not [*6]because she

wants to engage in therapy. During her therapy sessions, the respondent mother discusses missing her children, wanting her children back, and "all of the BS and lies and what the court is doing." The respondent mother has been diagnosed with depression and anxiety but she does not believe she is bipolar. Her depression stems from past traumas, including family members passing away, and she is not currently prescribed any medication. The respondent mother would not agree to sign any HIPAA release that would give any information to Ms. G. because she does not trust Ms. G. as Ms. G. lied when she testified that A.F. did not want to go to the agency for visits. However, that testimony was not credible as the respondent mother herself testified that A.F. does not like visiting at the agency because she thinks it is boring.

The respondent mother further testified as follows. She lives in the Bronx in a two-bedroom apartment with two emotional support service dogs. The respondent mother has a full time job as a caretaker for people who have mental illness and sometimes she is on call. Her employer would be able to accommodate her schedule if the subject children were released to her care. If the subject children were released to her care, they would have their own room, A.F. would remain in her current school, the respondent mother might switch J.F. to a different school and she would continue to take them to their current pediatrician. If the subject children were released to her care, she would take them to Chuck E. Cheese, take them out to eat, take them to the movies and take them to visit with family members. However, that testimony was not entirely credible as no explanation was provided as to why the respondent mother has not been taking the subject children to those places, even though she is permitted to have agency-supervised visits in the community. When asked whether she would allow the agency to conduct a home visit to ensure that her home is safe and appropriate, the respondent mother testified that she would not allow anyone from the agency into her home. When asked whether she would abide by a court order requiring her to allow the agency into her home to conduct a home visit, the respondent mother said she would only comply if the person conducting the visit signs a contract stating that that they would not disclose her private information to anyone because her private life has nothing to do with this case and she should not have to tell anyone where she lives since she does not know where anyone in the court room resides. If the subject children were released to her care, the respondent mother would continue to engage in her individual therapy and she would engage in an anger management course only if the agency paid for it, but she prefers a group anger management class.

Finally, the respondent mother testified that she and A.F. have a good, mother-daughter relationship but they are not best friends because, unlike the maternal great aunt, the

respondent mother does not give A.F. whatever she wants and does not do whatever A.F. wants her to do. The respondent mother testified that she expresses to A.F. that she does not like A.F.'s behavior at times and A.F. gets upset. The respondent mother further testified that she loves J.F. and that he is her best friend.

Pursuant to FCA § 1052 (a)(iii), at the conclusion of a dispositional hearing pursuant to Article 10, the Court may place the child in the care and custody of the Commissioner of ACS. "The paramount issue in a dispositional hearing is the best interest of the child." *In re Marie Annette M.*, 23 AD3d 167, 169 (1st Dept 2005). Indeed, "[i]n making a determination of placement, Family Court must consider all the facts and circumstances relevant to the child's best interest." *Id.*; *see also Matter of Giselle H.*, 22 AD3d 578, 580 (2d Dept 2005) ("the relevant inquiry concerns the [parent's] capacity to properly supervise the child and the potential for future neglect based on current information"). Moreover, "there is no presumption that [the [*7]child's best] interests will be best served by a return to the parent." *Matter of Giselle H.*, 22 AD3d at 580.

After the full dispositional hearing, and a thorough review of all the testimony and documentary evidence submitted, the Court finds that placement of the subject children in the care and custody of the Commissioner of ACS is in the subject children's best interests. As an initial matter, although the respondent mother completed her parenting skills course and asserts that she is consistently attending her individual therapy sessions, she has still not completed anger management and has refused to sign HIPAA releases to verify her engagement in services. The neglect findings made against the respondent mother are based on evidence that she suffered from a mental illness that impaired her ability to care for the subject children. However, the agency has been unable to verify, on its own, whether the respondent mother is indeed engaged in mental health services, whether she has had a recent mental health evaluation, including a psychiatric evaluation, whether she has been prescribed medication and whether her service providers are adequately addressing the underlying allegations that led to the findings of neglect made against the respondent mother.

Additionally, placement of the subject children is in their best interests as the evidence adduced at the hearing establishes that although the respondent mother visits with the subject children on occasion, she does not visit consistently. While it was evident from the testimony that the respondent mother loves her children, the respondent mother is permitted to have agency- and resource-supervised visitation with the subject children at the agency, at the maternal great aunt's home and in the community but she does not regularly avail herself of those opportunities to see her children. Indeed, the evidence establishes that the respondent mother has declined to visit with the subject children at

the agency, apparently because A.F. does not enjoy visiting there, and the respondent mother believes there is nothing for them to do during the visits, that the respondent mother visits the subject children at the maternal great aunt's home only when she has time and when she feels like visiting, and that the respondent mother visits the subject children in the community only sporadically and only when the weather is good. The evidence establishes that the respondent mother has not prioritized visiting with the subject children in person, regardless of where the visits take place, and that she has not made efforts to make in-person visitation work with her employment schedule. Moreover, visitation in the community does not require the respondent mother to visit with the subject children outside, if weather is indeed the barrier to the visits in the community going forward, as the respondent mother testified. To the contrary, the respondent mother can visit with them at the library, at a shopping mall, or at a restaurant, yet the respondent mother has chosen only to sporadically visit with the subject children in person based on when she feels like she wants to see them. The evidence establishes that the only barrier to the respondent mother consistently visiting with the subject children is the respondent mother herself.

Additionally, placement of the subject children is in their best interests as a release of the subject children to the care and custody of the respondent mother would require cooperation with ACS, including supervision and monitoring of the respondent mother's home, as well as compliance with Court orders, which, the evidence establishes, the respondent mother is either unable, or unwilling, to do. The respondent mother has made it clear that she wants the subject children released to her care, which is the reason that the Court ordered that the agency conduct a visit to the respondent mother's home, and the Court has explained the importance of the home visit to the respondent mother on numerous occasions. However, the respondent mother has [*8]refused to allow the agency to visit her home and has refused to provide the agency with her address. Moreover, the respondent mother's demand that the agency sign a contract prior to being allowed into her home is inappropriate and demonstrates a lack of insight into the need for the agency to ensure the subject children's safety were they to be released to the respondent mother's care and the reasons the findings of neglect were made against the respondent mother in the first place.

Further, placement of the subject children is in their best interests as the evidence establishes that the respondent mother lacks insight into her mental health condition and how her behavior plays a role in whether the subject children can be safely released to her care. It was evident from the respondent mother's testimony that she feels extremely frustrated having to engage with the agency and visit with the children

under supervision, and it is reasonable that the respondent mother would feel that way. However, during the respondent mother's testimony, the Court observed that she was unable to effectively regulate her emotions as she was evasive and irritable, with counsel and the Court, and that the respondent mother has failed to meaningfully benefit from her therapeutic services. Indeed, the respondent mother testified that she did not understand why a neglect case was brought against her in the first place or why she had to have visits supervised by the agency, and this was after months of attending therapy sessions. Further, the respondent mother testified that she was only engaged in therapy due to "threat and coercion" and not because she wants to engage in therapy or because she believes that she has any issues to address. Moreover, Dr. E.W.'s report also establishes that the respondent mother lacks insight into her mental health and behavior. Initially, Dr. E.W. reported that the respondent mother was quick to anger with the subject children during some of the visits and did not know how to appropriately communicate with the subject children. Additionally, Dr. E.W. reported that at one point during one of the visits, the respondent mother disappeared to another part of the library, out of sight and earshot of the subject children, without letting them or Dr. E.W. know where she was going.

Finally, placement of the subject children is in their best interests as they have remained placed in foster care, residing with their maternal great aunt, since they were initially removed on April 21, 2022, and their needs are being met. Indeed, the maternal great aunt ensures that the subject children's medical appointments are up to date and that they are regularly attending school. The subject children are thriving in her care and A.F. has consistently stated, since summer 2023, that she wants to continue residing with the maternal great aunt. The maternal great aunt is not only the placement resource for the subject children but is also a resource for supervised visitation between the subject children and the respondent mother and the maternal great aunt is willing to continue to be a supervision resource so that the respondent mother can spend time with her children outside of the agency. Additionally, the attorney for the subject children strongly supports placement of the subject children with the Commissioner of ACS and for the subject children to continue to reside in the home of their maternal great aunt.

Based on the foregoing, it is hereby

ORDERED that the subject children are placed in the care and custody of the Commissioner of ACS until the completion of the next permanency hearing; and it is hereby

ORDERED that the respondent mother is to comply with the following conditions and orders:

• The respondent mother is to continue to engage in her mental health services and follow all recommendations stemming therefrom, including medication management, if clinically indicated;

• The respondent mother is to complete a mental health evaluation and the clinician is to be provided a copy of the redacted neglect petition and the February 13, 2024 fact-finding order;

• The respondent mother is to engage in an anger management course, which may be incorporated into her individual therapy;

• The respondent mother is to regularly and consistently visit with the subject children, as the Court permits and the agency has discretion to expand to unsupervised visitation on 10 days written notice to counsel;

• The respondent mother is to provide the agency with her current address and contact information and notify the agency of any changes in address and contact information;

• After consultation with counsel, the respondent mother is to cooperate with, and sign all consents for, any necessary medical treatment, mental health treatment and educational planning for the subject children;

• The respondent mother is to sign all HIPAAs for the agency so the agency can verify the respondent mother's engagement in services; and

• The respondent mother is to comply with reasonable referrals on notice to counsel.

This constitutes the decision and order of the Court.

QRTP

Matter of C.L., 85 Misc3d 1213(A) (Family Court, Saratoga County, 2024)

Michael J. Hartnett, J.

WHEREAS, on November 7, 2024, the Saratoga County Department of Social Services [*2]having filed a Notice of Motion (Motion #2) seeking Approval of a Placement in Qualified Residential Treatment Program (QRTP); and

WHEREAS, the Court having issued a Corrective Order to Show Cause on November 13, 2024, and thereafter having scheduled a hearing on December 3, 2024; and

WHEREAS, on December 3, 2024, Petitioner Saratoga County Department of Social Services having appeared through counsel, Margaret McGannon, Esq., with Caseworker Vincent Castaldo; and C. G. having appeared with counsel, G. Thomas Dale, Esq.; and Interested Party J. Q. having appeared through counsel, Beth-el Thomas, Esq.; and C.L. having appeared with Attorney for the Child, Daryl Cutler, Esq.; and

WHEREAS, the Court having considered the following information, testimony and evidence:

1. Notice of Motion, dated November 6, 2024;

2. Attorney Affirmation of Margaret McGannon, Esq., dated November 6, 2024;

3. Affidavit of Vincent Castaldo, dated November 6, 2024;

4. Attorney Affirmation in Opposition of Daryl Cutler, Esq., dated November 14, 2024;

5. Corrective Order to Show Cause issued November 14, 2024;

6. Letter Order, dated November 15, 2024;

7. Court's Exhibit 1: Qualified Individual Assessment and Summary Report, dated November 27, 2024;

8. Court's Exhibit 2: *Social Services Law §409-h*;

9. Court's Exhibit 3: *Social Services Law §393*;

10. Attorney for Child Exhibit 1: Northern Rivers Policies;

11. Testimony of Caseworker Vincent Castaldo;

12. Testimony of Senior Caseworker Tara Fox;

13. Testimony of Caseworker Chris Cittadino;

14. Testimony of C.L.; and

15. Testimony C.G.

***NOW THEREFORE*,** after due consideration and upon review of the written submissions of the parties, and testimony and evidence submitted at the hearing on December 3, 2024; the Court finds as follows:

Background

This proceeding was commenced by the filing of two Neglect Petitions on May 29, 2024, alleging that C.G. and J.Q. neglected the subject child, C.L. The Petitioning party is an Authorized Agency — Saratoga County Department of Social Services (hereinafter "the Department" or "SCDSS"). C.G. is C.L.'s mother. J.Q. is not biologically related to C.L. and is/was a "person legally responsible" for his care.

On June 6, 2024, the Court issued two Temporary Orders of Protection for the benefit of [*3]C.L. — restricting C.G. to having only supervised contact with C.L. At the time of the Petitions being filed, C.L. was residing at a youth shelter. On June 14, 2024, the Court issued an Order directing C.L.'s removal and thereafter placed C.L. with his maternal grandmother — W.G. pursuant to FCA §1017. From June 14, 2024, through June 24, C.L. was in direct placement with his maternal grandmother.

On June 24, 2024, the Department filed a motion requesting that C.L.'s placement be modified to a foster care placement. The Court issued an Order to Show Cause on June 24, 2024, temporarily modifying the placement. On June 24, 2024, C.L. was placed in the custody of the Commissioner of the Saratoga County Department of Social Services (foster care).

On October 29, 2024, C.G. consented to a finding of Neglect and the Court (on consent) issued an Order of Disposition continuing C.L.'s placement in foster care. On November 8, 2024, J.Q. consented to a finding of Neglect and the Court (on consent) issued an Order of Protection barring J.Q. from having contact with C. through C.'s eighteenth birthday.

Placement at NEPCS

On or about mid-October 2024, the foster home where C.L. was placed submitted a "10-day notice" to the Department, notifying the Department that the child had to be removed from their foster boarding home. The foster parents agreed to keep C.L. for an additional (approximate) week beyond their 10-day notice. The Department was unable

to locate another foster boarding home or other relative resource. As a result of the lack of available foster homes, the Department decided for C.L. to be placed at Northeast Parent and Child Society (hereinafter "NEPCS") — a residential program located in Schenectady, New York. NEPCS is a Qualified Residential Treatment Program (hereinafter "QRTP") subject to the requirements of *Family Court Act §1055-c*, *Social Services Law §409-h*, and *Social Services Law 393*. C.L. was placed at NEPCS on November 1, 2024.

No evidence was submitted in connection with the motion that notifications were provided to any party as required by *FCA §1017(5)*; *FCA §1055(j)*. Prior to November 1, 2024, no arrangements were made for a Qualified Individual to assess the placement.

The Department filed a Motion to approve the QRTP at NEPCS on November 6, 2024. The Attorney Affirmation in support of the motion indicates that "[a] Qualified Individual has been contacted, and the requisite thirty (30) day assessment has been initiated.[FN2] "

A Court appearance was held on November 14, 2024, where representatives of the Department, counsel for all parties and the Attorney for the Child were present. At that appearance, the Court accepted a *FCA §1051(a)* consent to a finding of Neglect by J.Q., and issued an Order of Disposition on consent, consisting of an Order of Protection barring J.Q. from having contact with C.L., through C.L.'s eighteenth birthday.

At the appearance and conference on November 14, 2024 — the Court conducted a conference relative to the representation that C.L. had been placed in a QRTP. The Attorney for the Child expressed concern about the placement at that conference. The Court and parties were notified that the "QI Assessment" had been initiated — and was being done by Together for Youth (formerly Berkshire Farm Center for Youth). Additional discussion was had concerning expanding the search for additional foster homes, steps required to get C. back into his home [*4]school district (Ballston Spa CSD), providing C. with his cellular phone, and expanding visitation with C.G.

Notably — the Department opposed modifying the contact between C.L. and his mother to unsupervised visitation, citing a general reluctance to move the visits to unsupervised. The Court in considering the concerns raised, in conjunction with the age of the child — over the general objection of the Department — provided a bench Order modifying the visits to unsupervised and requiring that the visits occur in a public place (or a specified location for the upcoming Thanksgiving Holiday) and directed the Department to get C.L. his cellular phone [FN3] .

A meeting was held with the Qualified Individual to discuss the assessment on November 15, 2024. The Attorney for the Child was not notified of the meeting.[FN4] The Department was provided with the verbal result of the Qualified Assessment on or about November 15, 2024. The Qualified Assessment Summary (Court's Exhibit 1) indicates that the 30-Day Assessment decision was made on November 15, 2024. The Department did not notify the Attorney for the Child, or any other counsel, of the decision at that time.

The Qualified Assessment report was provided to the Department on or about November 27, 2024. There was insufficient evidence or testimony to determine why there was a twelve-day delay in providing the report to the Department aside from the evaluator indicating to the assigned Caseworker that the report needed supervisory review before being finalized.

The Qualified Assessment Summary and Report was filed with the Court on December 2, 2024 at 1:45P.M.; approximately twenty hours before the hearing was scheduled to commence. No credible explanation was provided to the Court as to why the report was filed five days after receipt. The Department did not provide the Qualified Assessment or Summary Report to the Attorney for the Child or counsel for Respondent C.G.

Notice of Placement

A local department of social services is obligated to report any *anticipated* placement or change in placement of a child into a QRTP to the Court and the attorneys for the child, forthwith, but not later than one business day following either the decision to place the child in a QRTP (including a change in QRTP placements) or the actual date of placement, *whichever is sooner*. (emphasis added). *See FCA §1017(5)*; *FCA §1055(j)*.

According to the testimony provided by Department staff — the notice from C.L.'s prior foster parents requesting his removal was received sometime in mid-October 2024; and the placement of C.L. in a QRTP was at that point being considered — and notification should have been sent. Even *after* the initial placement of C.L. in NEPCS, no notices were provided. The text of the statute is unambiguous on the point that notification must be made within one (1) business [*5]day of either the consideration of a placement in a QRTP or the actual placement — *whichever is sooner*. No notices were ever provided to the Court as required by the applicable statute. It is unknown if any notice was provided to the Attorney for the Child, or C.L.'s mother (or her counsel). Notification of the placement was inferred when the Department filed a motion seeking approval of the QRTP placement on November 7, 2024 — 6 days after the actual placement and weeks

after the placement was initially being considered. There was no reason or justification provided by the Department for the abject lack of notice as required by statute.

Family and Permanency Team

When conducting a Qualified Assessment, the Qualified Individual conducting the assessment shall consult with the "Family and Permanency Team" *Social Services Law §409-h(1)b)*; *42 U.S.C. §675a* — including all appropriate biological family members, relatives, and fictive kin of the child, as well as appropriate professionals who are a resource — including, but not limited to, the attorney for the child, attorney for the parents, teachers, medical or mental health providers or clergy. Notably, where the child has attained the age of fourteen the case plan *shall* be developed in consultation with the child, with up to two members of the case planning team who are chosen by the child who are not a foster parent or caseworker for the child. (emphasis added) *See 42 U.S.C. §675(5)(C)(iv)*.

According to the Qualified Assessment Report, the following information was provided under the section heading: "Indicate the date of the child and family permanency team meeting and who contributed to the assessment and report" and provides a list of attending: (1) C.G. — Mother; (2) Vincent Castaldo — County Worker; (3) Lauren Mayben — Clinician — Northern Rivers; (4) Tara Columbus — QI Clinician — Together for Youth.

It is noted that the evidence and testimony from the Department staff indicated that the child and family permanency team meeting was — through email exchanges — being scheduled during the week of November 17th. When the meeting was scheduled, no notification was provided to the Attorney for the Child; and to the contrary — the parties, including C.L. and his counsel were present in Court *on this case* on November 14, 2024 — no mention was made regarding the child and family permanency team meeting scheduled to occur the following day. In fact, the Attorney for the Child was never notified of the meeting **[FN5]** — and Caseworker Castaldo testified that he attempted to notify the Attorney for the Child with email address that didn't work — citing he" sent it to the email we had on file." Caseworker Castaldo could not remember when he attempted to send the email to the Attorney for the Child. Further, there is no evidence or testimony before the Court that the child — who is fourteen years old — was notified of his right to participate or offered the opportunity to suggest two additional participants.

It is of significant note to the Court that the Department did not call the Qualified Individual (Tara Columbus) to testify.

[*6]Intermediate Time Frames

Family Court Rule §205.18 provides intermediate time frames to support the Court's ability to meet the timeframes established by federal law to review QRTP placements. These intermediate time frames include that a motion requesting a hearing to approve the placement must be made *no later than five days* after the entry of the child into the QRTP.

As previously noted, a Qualified Assessment must be completed within thirty (30) days of the initial placement in the QRTP. Pursuant to *Family Court Rule 205.18*, upon receipt of the Assessment Report, the Commissioner (or his designee) shall *no later than five (5) days* after the completion of the report (and in no event less than ten (10) days prior to any hearing) provide the report to the counsel, parties and the Attorney for the Child.

In this instance, the Department was made aware of the recommendations in the report on November 15, 2024. No notice was provided to the parties or counsel regarding the recommendation. The written report notes a "date signed" of November 27, 2024 — which is a federal holiday (Thanksgiving). The report was not filed with the Court until the following week — on the afternoon of December 2, 2024 (the day before the hearing was scheduled to commence). A copy of the report was not sent to counsel, parties or the Attorney for the Child.

Qualified Assessment Report

A Qualified Assessment of a QRTP placement must be completed by a Qualified Individual no later than thirty days after the placement of the child in a QRTP. There is no prohibition from commencing the assessment before the actual placement of the child in a QRTP (*SSL §409-h(1)(a)* stating *"[p]*rior to a child's placement in a qualified residential treatment program . . . .)

In this instance, the Qualified Assessment was commenced on November 1, 2024, the date of the initial placement of C.L. at NEPCS.

Assessment Report Findings

Tara Columbus was identified as the Qualified Individual performing the assessment of the QRTP placement for C.L. No information or testimony was provided to the Court as to the qualifications of the Qualified Individual; however, no party interposed a challenge or objection to the evaluator chosen.

The QI Assessment provided that "due to the CANS-NY rating and the lack of current unsafe behavior, this Clinician recommends community placement in a therapeutic foster home." The evaluation also provided "Community placement in a therapeutic foster home is the most effective and appropriate level of care for C.L. He does not demonstrate the unsafe behavior that warrants QRTP placement."

Department Staff Testimony

The Department proffered two witnesses: Caseworker Vincent Castaldo and Caseworker Chris Cittadino. Caseworker Castaldo testified that he disagreed with the Qualified Assessment [*7]insofar as from the Department's perspective, there is no alternative to NEPCS for C.L. Chris Cittadino is the home finder for the Department and tasked with matching placements with foster homes. Caseworker Cittadino testified to efforts made to locate foster homes — including contacting other county home finders and multiple contract agencies, efforts which ultimately were unsuccessful **[FN6]** .

Underlying Neglect and Current Circumstances of C.G.

The underlying Neglect proceedings were initiated as a result of multiple concerns including substance abuse by the parent; domestic violence; and unstable housing.

As to the concerns regarding substance abuse, testimony was elicited in the context of the hearing as to the current circumstances of Respondent C.G. The credible testimony adduced indicated that C.G. had maintained sobriety for multiple months and relapsed in early October 2024. Following the relapse, C.G. immediately entered — and completed — inpatient substance abuse treatment. According to the credible testimony adduced, C.G. has tested negative for illicit substances since October 1, 2024, and by all accounts has maintained sobriety since that date.

As to the concern of domestic violence, testimony was elicited that J.Q. was currently incarcerated and an Order of Protection had been issued directing him to stay away from C.L. Although C.G. had visited J.Q. while he was incarcerated, there is no evidence to suggest that J.Q. has been in the presence of C.L. since May 2024.

As to the concern of unstable housing, C.G. testified that she is currently residing in the home of an acquaintance and does not have current housing that would be appropriate for her and C.L. Testimony was elicited that the Department provides emergency housing and pending an eligibility determination, could provide C.G. with housing.

Discussion

The federal Family First Prevention Services Act was enacted on February 9, 2018 and reformed the federal financing of placements to prioritize family based foster care, preferably with kin, over residential foster care.[FN7] The New York Family First Prevention Services Act (FFPSA) took effect on September 29, 2021. The FFPSA provides a framework for when there is consideration of placing a child in a QRTP, and the law requires a Qualified Individual to assess the need for a QRTP with an age-appropriate, evidence based validated, functional assessment, conducted in conjunction with the permanency team within thirty days of placement.

Social Services Law §393, *Social Services Law §409-h* and *Family Court Rule §205.18* promulgate the framework in which Qualified Residential Treatment Placements are judicially [*8]reviewed.

Here, despite the lack of appropriate notifications to the Court or counsel as required by statute, a Qualified Assessment of C.L. was conducted. Thereafter, a Summary Report and Qualified Assessment was generated. It is unknown based on the record before this Court as to whether or not the Qualified Individual followed the statutory requirements to consult with the child's "permanency team" and to allow the child to participate in the discussions regarding assessment of the placement. The summary and Qualified Assessment Report were received by the Department on November 25, 2024 and withheld for an additional six days — until the eve of the hearing at which placement was contested. The QI provided an assessment that recommended C.L. be placed in a lower level of care than NEPCS — specifically that a therapeutic foster home would be an appropriate placement for C.L. given his needs.

Additionally, the Court credits the testimony of C.L. — provided in open court and under oath — that his placement at NEPCS is unduly restrictive and not consistent with his best interests. To be sure, C.L. was initially placed as a result of being neglected by his mother. He thereafter was placed for a short duration with his grandmother and then through a foster home for approximately three months. He was then placed by the Department in a residential group home — where he was initially required to change schools and placed under a regiment that is remarkably restrictive and designed to provide structure for children with high level needs.

The Department maintains that the motion to approve the QRTP placement should be granted, citing to a lack of foster homes available to provide care for C.L. Stated otherwise; the Department is advocating for C.L. to be placed in a QRTP because — from their perspective - there is nowhere else for him to go [FN8] .

The Department in support of their motion has asked this Court to find that the lack of foster homes to be appropriate criteria under *Social Services Law §393(2)(iii)(A)(1)* as "circumstances exist that necessitate the continued placement of the child in a [QRTP]." The Court declines to adopt the position of the Department in this regard. Even if the Court, *arguendo*, were to agree with the Department — under *SSL §393(2)(iii)(A)*, the Court would be required to make a finding that the continued placement in a QRTP is consistent with the child's best interest — which on the record before this Court, it is clearly not. To the contrary, C.L.'s best interests would not be promoted by a continued placement at NECPS or any other QRTP. It is noted that *Social Services Law §409-h(1)(c)* specifically provides that "[a] shortage of foster family homes *shall not* constitute circumstances warranting a determination that the needs of the child cannot be met in a foster home."

Accordingly, after due consideration of the evidence and testimony adduced at the hearing on December 3, 2024, and after a review of the papers submitted in connection with the [*9]motion to approve the placement, the Court declines to approve the placement, and as such it is

ORDERED and **ADJUDGED**, that the needs of the child can be met through placement in a foster family home for the following reasons: due to the CANS-NY low rating and lack of current unsafe behavior, community placement in a foster home is suitable to meet the needs of the subject child. C.L. does not demonstrate unsafe behavior warranting placement in a QRTP. A family home setting is appropriate and the least restrictive environment and level of placement consistent with the short-term and long-term goals for the child, as specified in his permanency plan.

This determination is based upon:
• Court's Exhibit 1: Summary Report and Qualified Assessment;
• Testimony of Caseworker Vincent Castaldo;
• Testimony of Caseworker Chris Cittadino;
• Testimony of C.L.; and
• AFC Exhibit 1.

ORDERED and **ADJUDGED**, that placement of the child in a Qualified Residential Treatment Program (QRTP) does not provide the most effective and appropriate level of care for the child in the least restrictive environment; and it is further

ORDERED and **ADJUDGED**, that placement in Northern Rivers, Inc. (Northeast Parent and Child Society) is not consistent with the short-term and long-term goals for the child as specified in the child's permanency plan; and it is further

NOW THEREFORE, after examination and inquiry into the facts and circumstances and after hearing the proof and testimony offered in relation thereto, it is therefore

ORDERED and **ADJUDGED**, that the Motion (Motion #2) requesting approval of a placement in a Qualified Residential Treatment Program (QRTP) is *DENIED*, and it is further

ORDERED and **ADJUDGED**, that any relief requested through Motion (Motion #2) not specifically addressed herein has been considered and is hereby *DENIED*, and it is further

ORDERED and **ADJUDGED**, that upon good cause shown, pursuant to *Family Court Act §1061*, that the Order of Disposition, issued on October 29, 2024, and modified by Letter Order issued on November 15, 2024, is modified such that the above-named child shall be released to the following parent: C.G., on or before December 3, 2024, subject to supervision by the Department of Social Services; and it is further

ORDERED and **ADJUDGED**, that the Court is issuing a Modified Order of Disposition of even date, relative to provisions applicable to the return of C. to his mother's care, and supervision of Respondent C.G. by the Department of Social Services.

Next Appearance, Service and Right to Appeal

ORDERED, that the above-captioned proceedings are scheduled for the commencement of a Status Conference on *January 14, 2025 at 11:00A.M.*, before Part III of the Saratoga County Family Court, 35 W. High Street, Ballston Spa, NY 12020; and it is further

ORDERED, that the Clerk's Office is directed to provide service of a copy of this Order upon counsel for all parties by electronic mail, and upon the Department of Social Services by reception bin pickup, same to be considered good and sufficient service pursuant to *FCA §1113*; [*10]and it is further

ORDERED, all parties shall take notice that: pursuant to section 1113 of the Family Court Act, an appeal must be taken within thirty days of receipt of the order by appellant in court, thirty-five days from the mailing of the order to the appellant by the clerk of the court, or thirty days after service by a party or Attorney for the Child upon the appellant, whichever is earliest.

Footnotes

Footnote 1: The parties are provided with anonymous letter initials to maintain their confidentiality.

Footnote 2: Attorney Affirmation of Margaret McGannon, Esq. at Paragraph 6.

Footnote 3: Letter Order dated November 15, 2024.

Footnote 4: Testimony and evidence was elicited that this meeting was set up approximately a week before; and despite knowing about the meeting at the time of the Court conference on November 14, 2024 — no representative of the Department notified the Attorney for the Child (or any other party) that the meeting would be held *the next day*.

Footnote 5: The Qualified Assessment Report indicates that the Attorney for the Child was interviewed — which occurred on November 13, 2024. At the appearance on November 14, 2024, the Department did not know the identity of who was conducting the Qualified Assessment. The Attorney for the Child reported that he had proactively figured out who was conducting the assessment and had proactively reached out to that person to establish contact — and at the appearance on November 14, 2024, confirmed the telephone contact number of the evaluator.

Footnote 6: Caseworker Cittadino testified that a potential match was made with a foster boarding home in Otesaga County and at the time of the hearing, the placement was a "possibility" and in the early stages — as before being matched C. and the proposed foster parent(s) would need to meet and visit before confirming C.'s placement.

Footnote 7: 21 OCFS-ADM-17

Footnote 8: As the hearing progressed on December 3, 2024, and information was being offered as to C.G.' recent sobriety, compliance with treatment and services, and willingness to cooperate with the Department - the possibility of C.L. returning to his mother's care under the Article 10 Supervision of the Department was broached and inquiry was made to counsel as to the party's willingness to enter into an order on consent returning C. to his mother with Court Ordered services in place. The Department was unwilling to accede to the request and maintained that not only should C.L. remain placed — but should remain placed in a QRTP over the recommendation of the QI.

Sex Abuse

Matter of A.M. (A.R.), 85 Misc3d 1241(A) (Family Court, New York County, 2025)

Yael Wilkofsky, J.

On February 2, 2024, the petitioner Administration for Children's Services ("ACS") filed Family Court Act ("FCA") article 10 abuse and neglect petitions against the respondent A.R. (the "respondent" or "A.R.") on behalf of the subject children A.M. and M.R. (the "subject children" or "A.M." and "M.R."). The petitions allege that the respondent is the father of M.R., is a person legally responsible for A.M., that the respondent abused A.M. in that he committed a sexual offense against her as defined in Penal Law article 130 and that based on such conduct, M.R. is derivatively abused. The petitions also allege that the respondent neglected the subject children in that he failed to provide them with proper supervision or guardianship by allowing to be inflicted harm or a substantial risk thereof based on the allegations of sexual abuse of A.M. and that M.R. is derivatively neglected. After a fact-finding hearing, for the reasons set forth below, the Court finds that the respondent abused and neglected the subject children.

The petitions allege as follows. The respondent is the father of M.R. and a person legally [*2]responsible for A.M. under the FCA in that the respondent and the non-respondent mother are legally married, the respondent provides financial assistance to the family and, prior to the incidents that led to the filing of the petitions, A.M. referred to the respondent as "dad." The respondent abused A.M. in that he committed a sexual

offense against her pursuant to Penal Law §§ 130.05, 130.52, 130.55 and 130.60 in that in or around March 2022, the respondent stood over A.M. while she was laying on an air mattress and touched her vagina by rubbing it in a circular motion. In December 2023, the respondent started kissing A.M.'s arm while she was in bed and said you're my princess. These incidents made A.M. feel uncomfortable. On or about January 31, 2023, A.M. disclosed to her school's social worker that she is scared of the respondent, that she goes to her Aunt's house after school to avoid being alone with the respondent because she feels uncomfortable after he touched her vagina and kissed her arm. Based on the respondent's conduct, M.R. is derivatively abused. The respondent neglected the subject children by failing to provide them with proper supervision or guardianship by allowing to be inflicted harm, or a substantial risk thereof, on the subject children in that the respondent sexually abused A.M. and thus, M.R. is derivatively neglected.

A fact-finding hearing commenced on September 12, 2024, continued on November 20, 2024 and concluded on February 27, 2025. At the fact-finding, the petitioner introduced into evidence the certified Criminal Court records, which include a Criminal Court order of protection and the Criminal Court Complaint, and the Child Advocacy Center ("CAC") video interview conducted of the subject child A.M., and offered the testimony of the subject child A.M. and the non-respondent mother. At the conclusion of ACS's direct case, the respondent moved to dismiss the petition, asserting that the petitioner did not meet its prima facie burden of proving the allegations in the petition by a preponderance of the evidence. The Court denied the motion, finding that, in viewing the evidence in the light most favorable to the petitioner, the petitioner proved, by a fair preponderance of the evidence, that the respondent abused and neglected the subject child A.M., as defined in article 10 of the FCA, and that therefore, M.R. was derivatively abused and neglected. At the continuation of the fact-finding, the respondent declined to testify or offer any evidence to refute ACS's prima facie case and the fact-finding concluded.

The FCA defines a "respondent" in a child protective proceeding as "any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child" (Family Court Act § 1012[a]). Pursuant to FCA § 1012(g), a "person legally responsible"

"includes the child's custodian, guardian, or 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."

"The common thread running through the various categories of persons legally responsible for a child's care is that these persons serve as the functional equivalent of parents" (*Matter of Yolanda D.*, 88 NY2d 790, 795 [1996]). "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" (*Matter of Yolanda D.*, 88 NY2d at 796).

"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 [*3]be considered and weighed by a court in determining whether a respondent fits within the catch-all category of section 1012(g)" (*Matter of Yolanda D.*, 88 NY2d at 796).

Pursuant to FCA § 1012(e)(iii)(A), a child is abused when their parent or other person legally responsible for their care "commits, or allows to be committed an offense against such child defined in article one hundred thirty of the penal law." Pursuant to Penal Law § 130.52, "a person is guilty of forcible touching when such person intentionally, and for no legitimate purpose . . . forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person, or for the purpose of gratifying the actor's sexual desire . . . [and] includes squeezing, grabbing or pinching." "[W]hen done with the relevant mens rea, any bodily contact involving the application of some level of pressure to the victim's sexual or intimate parts qualifies as a forcible touch within the meaning of Penal Law § 130.52" (*People v Guaman*, 22 NY3d 678, 684 [2014]).

Pursuant to Penal Law § 130.55, "[a] person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter's consent." Pursuant to Penal Law § 130.60, "[a] person is guilty of sexual abuse in the second degree when he or she subjects another person to sexual contact and when such other person is . . . [l]ess than fourteen years old." The Penal Law defines "sexual contact" as "any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party" and "includes the . . . touching of the victim by the actor, whether directly or through clothing . . . ." (Penal Law § 130.00[3]). The intent to receive "sexual gratification may be inferred from the totality of the circumstances" (*In re Jani Father B.*, 104 AD3d 508, 509 [1st Dept 2013]). Pursuant to Penal Law § 130.05(1), "it is an element of every offense defined in this article that the sexual act

was committed without consent of the victim." Further, pursuant to Penal Law §§ 130.05(2)(b) and 130.05(3)(a), "[l]ack of consent results from incapacity to consent," and "[a] person is deemed incapable of consent when he or she is less than seventeen years old."

Pursuant to FCA § 1012(f)(i)(B), a subject child is neglected when his or her,

"physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof."

Moreover, to prevail at a fact-finding in a proceeding filed pursuant to article 10 of the FCA, the petitioner must prove that a subject child has been abused or neglected by a preponderance of the evidence (*see* Family Court Act § 1046[b][i]). Additionally, pursuant to FCA § 1046(a)(i), "proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent." Further, as a respondent's "sexual abuse of [a] child demonstrate[s] a fundamental defect in understanding of his parental obligations," a finding of sexual abuse "support[s] a derivative abuse finding of the younger child" (*Matter of M.R.*, 233 AD3d 454, 455 [1st Dept 2024]).

The petitioner has proven, by a fair preponderance of the evidence, that the respondent abused and neglected the subject children, as defined in article 10 of the FCA, by committing an offense against A.M. as defined in article 130 of the Penal Law and thereby derivatively abusing M.R., and by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, on A.M. and thereby derivatively neglecting M.R. The Court credits the testimony of the subject child A.M., who credibly testified as follows. A.M. currently lives with the non-[*4]respondent mother and her brother M.R., who is two years old. Prior to January 24, 2022, A.M. lived in the Dominican Republic with the non-respondent mother, which is where she first met the respondent as he used to come to the Dominican Republic to visit them. On January 24, 2022, when A.M. was 10 years old, she came to New York to reside with the respondent and the non-respondent mother in the respondent's home and they lived together for two years. When A.M. first began living with the respondent, their relationship was good. They would go out as a family to the park and to restaurants, the respondent bought A.M. clothing, shoes and toys and A.M. called the respondent "papi."

A.M. further credibly testified as follows. In March 2022, A.M. was living with the respondent, the non-respondent mother and M.R. A.M. slept in her own bed and the respondent, the non-respondent mother and M.R. slept in a separate bed. The two beds were in the same room. In March 2022, when A.M. was sleeping during the night, she fell out of her bed. When she awoke, she felt the respondent touch her on her vagina. She was wearing her pajamas, which consisted of long pants and a long sleeve top. A.M. felt the respondent touch her vagina with his hand, on top of her clothing. A.M. testified that with his hand, the respondent was caressing her vagina and that she did not like it and thought it was strange. While the respondent touched A.M.'s vagina, the non-respondent mother and M.R. were asleep in the other bed in the same room. After the respondent touched A.M.'s vagina, he left the room and eventually came back into the room and laid down in his bed. A.M. then went back to sleep. In the morning after the incident, A.M. told the non-respondent mother what the respondent had done, specifically, that the respondent touched her vagina and A.M. showed the non-respondent mother how he touched her vagina by demonstrating with her hands.

A.M. further credibly testified as follows. In January 2024, A.M. still shared a bedroom with the respondent, the non-respondent mother and M.R. The non-respondent mother bought a bunk bed for their bedroom and A.M. slept in the top bunk. One morning in January 2024, before the respondent went to work, he touched and kissed A.M.'s feet and hands and called her his "princess queen." A.M. moved her body so that the respondent would think she was going to get up and then he left the room. A.M. did not like when the respondent touched her as it made her feel uncomfortable. After that incident, A.M. told the non-respondent mother and her school counselor about what the respondent had done and she stopped speaking to the respondent and would try not to be in the same room as the respondent when they were home together.

The Court also credits the testimony of the non-respondent mother, who credibly testified as follows. The non-respondent mother has two children; A.M., who is 12 years old and M.R., who is two years old. The respondent is not A.M.'s biological father but he is M.R.'s biological father. The non-respondent mother began a romantic relationship with the respondent in 2012 when she was residing in the Dominican Republic and the respondent was residing in the United States. The respondent would visit her in the Dominican Republic and stay in her home. In 2018, when A.M. was six years old, the non-respondent mother and the respondent got married. In October 2021, the non-respondent mother came to New York to reside with the respondent. During this time, the respondent provided the non-respondent mother with financial and other support

and the non-respondent mother did not have anyone else she could rely on in New York.

The non-respondent mother further credibly testified as follows. In January 2022, approximately two months after the non-respondent mother arrived in New York, A.M. traveled from the Dominican Republic to New York to reside with the non-respondent mother and the respondent in the respondent's home. When A.M. first arrived, everything was fine in that they [*5]got along as a family and the respondent was very involved in their lives. A.M. called the respondent "papi" and the respondent loved A.M. a lot. They did not leave the apartment often because it was cold, but when they did leave, they would go shopping for clothes, to restaurants and to the park.

The non-respondent mother further credibly testified as follows. One morning in March 2022, the non-respondent mother saw A.M. standing in front of the non-respondent mother's bed and she looked pale. When the non-respondent mother asked A.M. what was wrong, A.M. said "Daddy touched me," pointed to her vagina and showed the non-respondent mother with her hands how the respondent rubbed her vagina. When the non-respondent mother asked A.M. if she was sure the respondent touched her in that manner, A.M. stated "yes." The non-respondent mother believed A.M. when she told her what the respondent had done because A.M. is not the kind of child who lies. The non-respondent mother testified that there were occasions, after she had just given birth to M.R., when she woke up during the night and saw the respondent next to A.M. while A.M. was in her own bed, and that when the respondent noticed the non-respondent mother was awake, he would run out of the bedroom.

The non-respondent mother further credibly testified as follows. After the March 2022 incident, the non-respondent mother confronted the respondent about what A.M. had told her and the respondent said that the incident never happened. The non-respondent mother did not believe the respondent but she did not report anything to ACS or to the police because she did not have proof of what had occurred. After the incident, the non-respondent mother felt like there was no privacy in the home and she and A.M. were not comfortable there. The non-respondent mother told the respondent father that A.M. was afraid of him and that she wanted to leave New York and go home to the Dominican Republic. The respondent did not want to return to the Dominican Republic and he refused to give the non-respondent mother M.R.'s passport so she could not travel back to the Dominican Republic.

The non-respondent mother further credibly testified as follows. In or around December 2023, A.M. told the non-respondent mother that she felt uncomfortable because the

respondent caressed her arms and legs. When the non-respondent mother asked A.M. if he touched her like a father, A.M. said no, not like a father, and stated that she felt uncomfortable in his presence. By January 2024, the non-respondent mother and the respondent were still married but were having relationship problems due to the incidents reported by A.M. and during that month, the respondent moved out of the bedroom in which they were all sleeping.

Based on the uncontroverted evidence presented at the fact-finding hearing, the Court finds that the petitioner has established, by a fair preponderance of the evidence, that the respondent abused the subject children, as defined in article 10 of the FCA, in that the respondent committed offenses against A.M. defined in Penal Law article 130 and that based on such conduct, M.R. is derivatively abused. As an initial matter, the petitioner established that the respondent is a person legally responsible for A.M.'s care under the FCA. A.M. credibly testified that she resided with the respondent in the respondent's home when the respondent touched her vagina, that the respondent provided for her financially and that she called him "papi." Additionally, the non-respondent mother credibly testified that she and the respondent have been married since 2018, that prior to her move to the United States to live with the respondent, the respondent would visit the non-respondent mother in the Dominican Republic and routinely stayed with her and A.M. in the non-respondent mother's home, that they were residing in the respondent's home when the respondent touched A.M.'s vagina, that the respondent provided for [*6]her and A.M. financially and that A.M. called the respondent "papi."

Additionally, the petitioner established, by a preponderance of the evidence, that the respondent committed the offense of forcible touching under Penal Law § 130.52 through A.M.'s credible testimony that the respondent intentionally touched her vagina over her pajama pants in the middle of the night and through the non-respondent mother's testimony that A.M. told her the respondent touched her vagina and demonstrated how he did it by using her hands to reflect a rubbing motion. Petitioner also established that the respondent's forcible touching of A.M. was done for the purpose of gratifying the respondent's sexual desire as sexual gratification can be inferred from the totality of the circumstances, including that the respondent touched A.M.'s vagina over her pajamas in the middle of the night, and the respondent failed to testify and offer any other explanation for his actions.

The petitioner also established, by a preponderance of the evidence, that the respondent committed the offense of sexual abuse in the third degree under Penal Law § 130.55 through A.M.'s credible testimony that the respondent touched her vagina over

her pajama pants and that such conduct occurred without A.M.'s consent as she was incapable of consenting to the respondent's conduct because she was less than seventeen years old (*see* Penal Law §§ 130.05[2][b] and 130.05[3][a]). The petitioner also established that the respondent committed the offense of sexual abuse in the second degree under Penal Law § 130.60 through A.M.'s credible testimony that the respondent touched her vagina over her pajama pants and that she was less than fourteen years old when that occurred. Petitioner also established that the respondent sexually abused A.M. for the purpose of gratifying the respondent's sexual desire as sexual gratification can be inferred from the totality of the circumstances, including that the respondent touched A.M.'s vagina over her pajamas in the middle of the night, and the respondent failed to testify and offer any other explanation for his actions.

The petitioner also established, by a fair preponderance of the evidence, that the respondent neglected the subject children, as defined in article 10 of the FCA, in that he inflicted harm against A.M. which resulted in her mental and emotional impairment. Specifically, A.M. credibly testified that the respondent touched her vagina over her pajamas while she was sleeping in her own bed, that he did this without her consent and when she was 10 years old, and that it made her feel scared and uncomfortable. Additionally, based on this Court's finding that the respondent abused and neglected A.M., as defined in article 10 of the FCA, the petitioner also established, by a preponderance of the evidence, that M.R. was derivatively abused and derivatively neglected by the respondent.

Finally, the Court draws a strong negative inference from the respondent's failure to testify at the fact-finding. Contrary to the respondent's assertion, "[t]he criminal case pending against him at the time of the hearing did not deprive the court of the right to draw on adverse inference from his failure to testify" (*Matter of Markeith G. (Deon W.)*, 152 AD3d 424, 425 [1st Dept 2017]).

For the foregoing reasons, the Court enters findings of abuse and neglect, as defined in article 10 of the FCA, against the respondent on behalf of the subject children A.M. and M.R..

This constitutes the decision and Order of the Court.

Unfounded Reports

Vaccination

Matter of A.L., 85 Misc3d 1207(A) (Family Court, Kings County, 2024)

Erik S. Pitchal, J.

By order to show cause (# 1) dated August 21, 2022, Respondent Ms. B.L. seeks an order enjoining ACS and Children's Aid from vaccinating the children A.L., I.D., and A.K. without a court order or parental consent. She further seeks an order directing ACS and Children's Aid to make a plan for daily parenting time for Ms. L. to homeschool A.K. and I.D. using the curriculum attached to her moving papers.

Following the submission of other papers, the Court issued an interim order dated September 5, 2024, setting the motion down for a hearing. The hearing took place on September 9 and 17, 2024. The record consisted of all the papers submitted in advance, as well as Petitioner's Hearing Exhibits 1-9; the credible testimony of Dr. Angel Mendoza; the credible testimony of Taisha Pavlica; Respondent's Hearing Exhibits A and B, and the testimony of Ms. L., which the Court found not credible. Mr. D. did not testify but the Court understands from his attorney that he "supports" Ms. L.

Based on the record, the motion is denied, and the Court furthermore enters the order below granting ACS authorization to consent to the children receiving certain vaccinations and appointing an education surrogate to consent to certain education matters for A.K. and I.D.

In reaching this result, the Court carefully balanced the potential benefits to be attained against the risks involved in the treatment, as well as the validity of the parents' objections to the treatment with a focus on whether their refusal to authorize vaccination constitutes an acceptable course of medical treatment for her children in light of all the surrounding circumstances. See [*2]the Court's order of September 5, 2024 (citing Matter of Athena Y., 201 AD3d 113 (3d Dep't. 2021)). The Court also made a determination of the best interests of the school age children as to their school enrollment, taking into account any credible alternative plans to public school the parents might have, considering their objection to the vaccination requirement.

BENEFITS OF VACCINATION

The Court credits completely the persuasive, unrebutted testimony of Dr. Mendoza and the other medical evidence in the record concerning the clear benefits to all three children to receive the standard vaccinations recommended by the American Academy

of Pediatrics and the Centers for Disease Control and Prevention. Once they receive these vaccines, it is highly unlikely that they will get measles, mumps, or polio, or any of several other diseases that have been mostly eradicated in the population thanks to widespread vaccination. They are also much less likely to get COVID or influenza, and if they do, their disease course is more likely to be mild. Being vaccinated thus grants them the freedom to enjoy childhood likely free of serious, potentially life-threatening diseases; free of the paralysis that can come from polio; and free of the impact of being sick with one or more communicable diseases that can prevent them from enjoying all life has to offer.

The additional benefit to A.K. and I.D. of having the recommended vaccines is that they can attend public school and various afterschool, camp, and community activities that require vaccination. While home schooling is a permissible, legal choice for parents, public education has a clear benefit that is in these children's best interests on this record. First, the Court credits the evidence suggesting that the parents did not comply with DOE regulations for home schooling for the 2023-24 year, and they only followed the requirements for 2024-25 after the dispute in this hearing came to light. The Court further credits the evidence that home schooling these children who are in foster care due to a finding of imminent risk is simply not feasible. The home schooling plan, if implemented, would be chaotic and incomplete. The children wish to go to school and should have that opportunity. Moreover, the socializing benefits of school as well as the other activities that they can only participate in if vaccinated are overwhelming. The parents offer no credible evidence for how they would ensure their children have a somewhat normal childhood experience interacting with other children. Going to the zoo during the school day to possibly interact briefly with pre-school aged children is not adequate socialization.
The risks to the children to not be vaccinated, as alluded to above, are the converse of the benefits: exposure to serious diseases, against which they have no natural immunity, and which have morbidity and mortality risks that are intolerable for young children in our modern society. A.L. is at heightened risk because her malnourishment has suppressed her immune system. Even though Blythedale does not require vaccination for its residents, her treating physician recommends it. (ACS hearing exhibit 9.)

RISKS OF VACCINATION

Meanwhile, the risks to have the vaccine are minimal. There is no scientific evidence that these vaccines cause any serious problems; there is a correlation with Guillame-Barre Syndrome, but the rates are infinitesimal. The only common side effect of any note is pain on the injection site, swelling and redness, and a general feeling of malaise,

all of which self-resolve within a day or two. Ms. L.'s citation to vaccine manufacturers' statutory immunity from liability ignores the fact that the federal government has also established the national Vaccine Injury Compensation Program, which creates a no-fault compensation scheme as an alternative to the tort system. See Health Resources and Services Administration, "About the National Vaccine Injury Compensation Program," available at https://www.hrsa.gov/vaccine-compensation/about.

ASSESSMENT OF PARENTS' OBJECTION

ACS hearing exhibit 2 documents that when asked about their reasons for opposing vaccination, the parents were unable to articulate anything, other than that they are opposed. Documentation from NYU (ACS hearing exhibit 3) demonstrates that the parents affirmatively misrepresented the state of Lotus's vaccination history, claiming that she was up to date when in fact, she had had none. The failure to articulate any reason for vaccinating and the effort to hide their most at-risk child's vaccination status suggests that the parents in fact lack any principled, let alone rational, basis for their objections.
There is some evidence that before this motion hearing commenced, they claimed "religion" as an explanation for their objections, but they never specified to the agency or doctors what their religious beliefs were or why vaccinating their children would violate them. In fact, Ms. L. initially consented to A.L. having the MMR vaccine on August 6, before revoking her consent the next day. (ACS hearing exhibit 8.) During the hearing, Ms. L.'s attorney tried to ask Dr. Mendoza about his understanding of the religious objections to vaccines that "some" parents have; the Court sustained an objection to this question and suggested that counsel should ask him to opine about the specific reasons Ms. L. has for objecting. Counsel declined to do so. Thus Dr. Mendoza was never given the opportunity to address the religious objections claimed by Ms. L. later in the hearing for the first time. In that testimony, Ms. L. explained her Christian beliefs about the sanctity of life and how, in her view, use of vaccines would violate this tenet. She also testified about her objection to the use of certain animal products she claims are in vaccines as also violative of Biblical teachings.

In any event, the Public Health Law no longer recognizes religion as a basis to exempt children from the vaccination requirement when it comes to public school enrollment. Even if there were still such an exemption, on this record the Court would find that Ms. L. lacks a credible, sincerely held religious view on the issue of vaccines, and that her objection comes more from a personal "lifestyle" philosophy. To the extent respondent raises a pure First Amendment objection to the administration of vaccines apart from the public school enrollment issue, the Court also finds that her claim of a religious basis for her objection is not credible or sincerely held, for the same reasons. Mr. D. did

not testify about his views at all and thus the Court finds that he too lacks a credible, sincerely held religious view.

Ms. L. emphasized an overall objection to modern medicine and preference for using "holistic" practitioners — and Mr. D. did not present a case at all. Ms. L. also has a fundamental misunderstanding about the ingredients in vaccines, claiming, erroneously, that they contain "aborted fetuses." (While embryonic diploid cells from lines dating back to the 1960's and 1970's are used in the manufacture of several of the vaccines at issue in this hearing, the original abortions were not conducted for the purpose of harvesting cells for vaccines, no additional abortions are needed to sustain manufacture, and there are no human cells present in the vaccines themselves. See John D. Grabenstein, "What the World's Religions Teach, Applied to Vaccines and Immune Globulins," 31 Vaccine 2011, 2017 (2013).) This error reveals immaturity in her moral reasoning and insincerity in her professed religious belief. The church she has attended since childhood does not support her position, and she has never discussed the matter with her father, who introduced her to that church. The "divine messages" she claims to have started receiving since having children do not constitute a sincere religious belief under the totality of the evidence.

There are no other ways for children to get the benefit of vaccines other than from the injections themselves. To avoid infection, they would have to isolate from other people, undermining their socialization. A.L. is already medically fragile and should not be put in a situation where she must be isolated to protect her from diseases such as measles, polio, and the others discussed in this hearing. The parents have simply not proposed any credible alternative approach to keeping their children safe. Ms. L. presented no expert evidence and her own testimony lacked details concerning her holistic approach to preventing and treating illness.

This case began with allegations that the parents had abused A.L. by failing to feed her properly; she arrived at the hospital, according to the record, in respiratory distress due to malnourishment. While the case is pre-fact-finding, the Court has remanded all three children, having found them to be at imminent risk to be in the parents' care. (A contested hearing was settled, but the findings were nevertheless made.) Thus, deferring to the parents' views on what medical treatment is best for their children is not proper, particularly when those views are unsupported by any credible evidence. This Court respectfully disagrees with the outcome in Matter of Christine M., 157 Misc 2d 4 (Kings Co. Fam. Ct. 1992) as applied in the current case.

SCHOOL ENROLLMENT (I.D. AND A.K.)

Even if the Court were to find that the risk/benefit assessment were a closer call, and/or that the parents' objection to vaccination had some principled or rational basis worthy of deference, their schooling plan is not in the best interest of I.D. and A.K.. Based on ACS hearing exhibit 4 and the credible testimony of Ms. Pavlica, the Court finds that the parents do not intend to actually follow DOE requirements for home schooling. Even if they had a sound, credible plan to home school in accordance with regulations, the reality is that the extended parenting time required to effectuate this plan is contrary to the children's best interests. If the parents had been sincere about designing, developing, and implementing a credible home schooling plan, the Court would have expected them to share with the agency all their plans in a [*3]timely manner, particularly when asked directly to do so. Instead, they provided no information or documentation, forcing the agency to do all the legwork to obtain whatever the DOE had on file. Simply put, the parents did not come to the table in good faith to plan for their children's education, and the Court will exercise its discretion to make its own determination about their best interests in education at this time.

Ms. L.'s argument that she should be permitted to home school I.D. and A.K., thus obviating the need to require vaccination, is really an attempt to expand her visitation in the guise of a hearing on a different matter. Her home schooling plan, for her children who are in foster care, is simply not appropriate or feasible here. Unsupervised visits of any amount, let alone 25 hours a week, are not warranted on this record. Ms. L. has not fully engaged in her service plan — notably, she has not yet had a mental health evaluation or any treatment. Moreover, in the initial stages of the case, the foster parent agreed to supervise visits in her home, but Ms. L. violated the ground rules and visits reverted to the agency. The Court does not trust that she can be alone with the children at the present time. It is impractical to require the agency to make staff available for 25 hours a week for one family to supervise visits. The Court notes that this foster parent was nominated by the respondents at the outset of the case when the parents already planned (unknown to the agency) to home school the children.

Moreover, based on the aforementioned incident, the foster parent no longer welcomes them in her home.

Taking into account the parents' proposed alternative to public school and finding it not credible, and also considering their objection to the vaccination requirement for public school enrollment and finding it without a sincere, credible religious basis, the Court's determination is that it is in A.K. and I.D.'s best interests to be enrolled in public school.

CONCLUSION

The parents' plea concerning the sanctity of their right to raise their children as they see fit is misplaced. "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

Therefore, the Court HEREBY ORDERS THAT:

1) Motion # 1 is denied.

2) The Commissioner of ACS through his designee is authorized to consent to vaccination of the children as follows:

   a. I.D. and A.K: Hepatitis B, DTaP (Diptheria, Tetanus, and Pertussis), Polio, MMR (Measles, Mumps, and Rubella), influenza, Varicella, Hepatitis A, and COVID-19.

   b. A.L.: All vaccines recommended by public health authorities based on her age, as detailed at https://www.cdc.gov/vaccines/by-age/index.html.

   3) The Court hereby subrogates the rights of the parents to make certain educational decisions for the children I.D. and A.K., who are in foster care and do not reside with them, and hereby appoints foster parent R.S. as the education surrogate for the sole purposes of a) enrolling the children in public elementary school, and b) consenting to a standard educational evaluation (not for special education purposes) to take place at the Children's Aid Society. This appointment shall automatically expire if/when the children are removed from Ms. S.'s care.

   4) Enforcement of this order is hereby stayed until 5pm on Friday, September 20, 2024, in order to afford aggrieved parties the opportunity to seek a longer stay from the Appellate Division.

Visitation

Matter of Z.V. (J.V.), 85 Misc3d 1206(A) (Family Court, New York County, 2025)

Yael Wilkofsky, J.

On or about May 31, 2024, the petitioner Administration for Children's Services ("ACS") filed a Family Court Act ("FCA") Article 10 neglect petition on behalf of the subject child Z.V. (the "subject child") against the respondent J.V. (the "respondent father"). The respondent father now moves for an Order directing that a visitation assessment be conducted by S.N., LMSW, to assess what, if any, parental visitation or conduct is recommended between the respondent father and the subject child. For the reasons set forth below, the respondent father's motion is denied.

The petition alleges that the respondent father fails to provide the subject child with proper supervision and guardianship based on allegations of excessive corporal punishment. Specifically, the allegations in the petition are as follows. On or about May 22, 2024, the [*2]respondent father burst into the bathroom of their apartment and told the subject child, who was 12 years old at the time, to "square up." The respondent father then took the subject child's laptop and antagonized her to take the laptop back from him. When the subject child attempted to retrieve her laptop from the respondent father, he placed her into a chokehold with his arm around her neck. The subject child then went into the kitchen and the respondent father followed her, at which point the respondent father again placed her in a chokehold and wrestled her to the living room floor. The subject child reported that during the incident, she felt strangled and like she was about to die as she was struggling to breathe and could not feel oxygen. After the respondent father released the subject child from the chokehold, the subject child ran out of the apartment, went to her former school to report the incident, and refused to return to the respondent father's home. On or about May 23, 2024, a forensic interview was conducted at the Manhattan Child Advocacy Center ("CAC") during which the subject child disclosed that the respondent father had wrestled her to the floor prior to the May 22, 2024 incident and that he does so whenever she behaves badly in school or is disrespectful. At the CAC interview, the subject child was observed to have a quarter-sized brown bruise in the center of her right cheek, two-inch long red scratch marks on her right forearm and a red mark on her left forearm, which, the subject child reported, were caused by the respondent father during the May 22, 2024 incident. Thereafter, the subject child was brought to the hospital, received medical attention and was subsequently discharged.

On May 31, 2024, at intake on the neglect petition, the Court removed the subject child from the respondent father, finding that it would be contrary to the subject child's welfare to return home to the respondent father and that removal was necessary to avoid imminent risk to the subject child's life or health. The Court temporarily directly placed the subject child with her adult half-sister. The Court issued a full stay away temporary order of protection against the respondent father on behalf of the subject child except for agency supervised visitation, at the subject child's discretion. At a June 10, 2024 court appearance, the respondent father made an application for resource supervised visitation and family therapy. The subject child's counsel opposed the request on the grounds that there had not yet been any agency-supervised visits based on the subject child's steadfast refusal to visit with the respondent father, that she had not yet spoken to the subject child about expanding to resource-supervised visits and that based on the allegations in the petition, the respondent father should be engaged in his own services prior to beginning family therapy with the subject child. The Court issued an Order permitting the respondent father to have resource-supervised phone contact with the subject child, at the subject child's discretion, and reiterated that all in-person visitation was to be agency-supervised and at the subject child's discretion. At a court appearance on July 25, 2024, the Court again addressed visitation between the respondent father and the subject child. The Child Protective Specialist ("CPS") assigned to the case informed the Court that the subject child was reluctant to have in-person visitation with the respondent father, even if the visits were supervised, and that although the subject child loves her father, she was not yet ready to have virtual visits with him either as she was still working through her feelings about the respondent father's behavior toward her. At a court appearance on November 18, 2024, when discussing visitation, counsel for the subject child informed the Court that in October 2024, the subject child had a telephone visit with the respondent father that did not go well, specifically, that during the visit, the respondent father was crying to the subject child asking the subject child to return home and blaming the subject child's sister for things that the subject child felt were the respondent father's fault. Counsel for [*3]the subject child further reported that the subject child did not wish to have any visits with the respondent father, that she wanted to remain in her sister's care and that the subject child would like to engage in therapy. Counsel for the subject child also asserted that perhaps if the respondent father was engaged in his own therapeutic services, the subject child would be less reluctant to visit with him. Additionally, counsel for the subject child requested that the respondent father provide the subject child with all her personal belongings which had remained in his home since the case was filed. The Court ordered that the respondent father give the subject child all her personal belongings and that the petitioner assist in ensuring that the subject child obtain all her belongings from the respondent father's home. The Court also ensured that the petitioner was making a referral for individual therapy for the subject child.

The respondent father's motion for an Order directing that a visitation assessment be conducted by S.N., LMSW, to assess what, if any, parental visitation or conduct is recommended between the respondent father and the subject child, is denied as the Court finds that it is not in the subject child's best interests to undergo such an assessment. Initially, the Court finds that the visitation assessment that the respondent father seeks is akin to a forensic evaluation conducted in custody cases and is not appropriate in a neglect case such as this one. Moreover, even if such a visitation assessment were appropriate, the Court finds that there is no need for such an assessment, which would be intrusive and burdensome to the subject child, as the Court is in the best position, and has all the information it needs, to make the assessment about what type of visitation between the respondent father and the subject child is appropriate in this case.

Indeed, throughout this case, based on all the information before it, the Court has assessed the type of visitation that is in the subject child's best interests and permitted the respondent father to have supervised in-person visitation with the subject child only at the subject child's discretion based on such assessment. Pursuant to FCA 1030(a), "[a] respondent shall have the right to reasonable and regularly scheduled visitation with a child in the temporary custody of a social services official unless limited by an order of the family court." "[T]he presumption that parental visitation is in the best interests of a child [may be] overcome by evidence showing that visitation with respondent would not be in [the child's] best interests" (*In re Giovanni H.B.*, 172 AD3d 489 [1st Dept 2019]). Initially, the Court determined that visitation with the respondent father only at the subject child's discretion is in the subject child's best interests because the subject child, who is a mature and articulate 13 year-old, has been adamant that she does not want visits with her father. Indeed, the record reflects that the subject child did try to visit with her father but that the visit did not go well because the subject child felt that the respondent father did not take accountability for his actions.

However, the subject child's refusal to visit with the respondent father is not the only factor the Court considered in making such a determination, although it is certainly an important one. In addition, the Court based its determination on the respondent father's failure to demonstrate a commitment to ensuring that the subject child's needs are met and to complying with court orders. The subject child has reiterated, to the Court and to the respondent father, that prior to continuing any visitation with the respondent father, she would like to engage in therapy to work through trauma she has experienced. However, petitioner has made numerous requests, over a period of approximately six months, that the respondent father provide his medical insurance information so that the subject child may be referred for therapeutic services. However, despite these requests, the respondent father failed to provide the petitioner with active [*4]insurance

information and thus, the subject child has not yet been referred for mental health services. Indeed, in her affirmation attached to the petitioner's opposition to the motion, CPS affirms that although the respondent father has provided some insurance information, and only after numerous requests were made, the information provided was inaccurate. Moreover, CPS affirms that she notified the respondent father that he had provided inaccurate insurance information and requested additional information, but that as of January 10, 2025, the respondent father has not been responsive or forthcoming with the correct insurance information. The Court notes that at argument on the motion on January 28, 2025, the petitioner informed the Court that the respondent father had just recently provided new medical insurance information, but that petitioner had not yet had an opportunity to check whether the insurance was active and whether the information was accurate.

Additionally, the Court based its determination on the respondent father's refusal to provide the subject child with her personal belongings, despite the Court's order that he do so. The subject child has repeatedly requested that the respondent father give her all her personal belongings, which have remained in the respondent father's home since the petition was filed in May 2024. Indeed, the Court ordered such relief on the record and ordered that the petitioner assist in ensuring that the subject child obtains her personal belongings from the respondent father's home. However, the respondent father has refused to give the subject child her personal belongings, allegedly because she was not agreeing to visitation. Moreover, when the petitioner reached out to the respondent father to coordinate the transfer of the subject child's personal belongings, the respondent father refused or was unresponsive. The Court notes that at argument on the motion on January 28, 2025, the petitioner informed the Court that the respondent father finally provided the subject child with her personal belongings, one week prior to argument on the motion, despite the fact that the subject child has been requesting those items since at least November 2024, if not earlier.

The respondent father's reliance at argument on a recent First Department case, *Matter of Michael B. v Patricia S.*, 2024 NY Slip Op. 06005 (1st Dept 2024), is misplaced as that case is distinguishable. As an initial matter, *Matter of Michael B.* is a custody case and not a neglect case such as this one. Additionally, in that case, the First Department held that "[a] court may not delegate its authority to determine visitation to either a parent or a child" and that "[w]hile a child's views should be considered when determining issues of custody or visitation, they should not be determinative." *Matter of Michael B. v Patricia S.*, 2024 NY Slip Op. 06005 at 2. Here, the Court has not delegated its authority to determine visitation to the subject child and is also declining to delegate its authority to a third-party social worker, despite the respondent's request.As the Court has explained, the Court, and the Court alone, has assessed what type of

visitation is in the subject child's best interests at this time and has repeatedly explained to the respondent father that his behavior during the pendency of the neglect case plays a role in the Court's visitation assessment. Indeed, the Court continuously assesses and re-assesses the type of visitation that is in the subject child's best interests based on new information provided to the Court, and the respondent father has failed to offer a sufficient basis for this Court to delegate such assessment to a third-party social worker. Based on the foregoing, the respondent father's motion for an Order directing that a visitation assessment be conducted by S.N., LMSW, to assess what, if any, parental visitation or conduct is recommended between the respondent father and the subject child, is denied. This constitutes the decision and order of the Court.