

Legal Updates for CPS and Child Welfare: Spring 2009

Thursday, June 18, 2009

Handout Materials



**New York State
Office of
Children & Family
Services**

New York State
Office of Children and Family Services
and
PDP Distance Learning Project

LEGAL UPDATES FOR CPS AND CHILD WELFARE SPRING 2009

June 18, 2009

Table of Contents

SELECTED CHILD WELFARE CASELAW

Removals and General Issues in Abuse and Neglect	Page	1
General Neglect		2
Excessive Corp		5
Sexual Perp. in the Home / Sexual Neglect		6
Substance Abuse		9
Sex Abuse		10
Physical Abuse		12
Article Ten Dispos and Permanency Hearings		14
TPR General		18
Severe Abuse TPR		19
Abandonment		20
Mental Illness and Mental Retardation TPR		21
Permanent Neglect		22
TPR Dispos		24
Post Termination Contact		26
Miscellaneous		27
<u>RECENT CASELAW ON ACCESS TO SEXUAL PREDATOR</u>		30
CLE INSTRUCTIONS		39
CLE ATTORNEY ROSTER		40
CLE EVALUATION		41
QUESTIONS I HAVE		42

6/18/09 TELECONFERENCE

SELECTED CHILD WELFARE CASELAW

MARGARET A. BURT, ESQ. 5/25/09

REMOVALS AND GENERAL ISSUES IN ABUSE and NEGLECT

Matter of Shaun B., 55 AD3d 301, 865 NYS2d 52 (1st Dept. 2008)

The First Department reversed abuse findings and derivative abuse findings against a New York County mother. The court found that the mother was not a person legally responsible for the child of her live in boyfriend. Therefore she did not abuse that child and so her own children were not derivately abused. The boyfriend did abuse his own daughter in the mother's home but this child had only made sporadic visits to the home and was always in the sole care of her father. The child had never been in the care of the respondent. The incident took place when the respondent was asleep and she had no reason to know that her boyfriend would injure this child. Although he had injured the child before, when the child was not at the home, the respondent did not know this. In a concurring opinion, two Justices expressed concern that the Family Court had also found the respondent to be neglectful as she smoked marijuana. The concurring opinion noted that although the mother had admitted that she had smoked marijuana, there was no evidence that this was something she did regularly or that this had any bearing on the child's injuries.

Matter of Whitney B., 57 AD3d 771, 870 NYS2d 391 (2nd Dept. 2008)

The Second Department concurred with Queens County Family Court that a father had violated a temporary order of protection that ordered that he have no unsupervised contact with the children. He approached one child after school, made her get in his car against her will and drove her around for several hours. The violation warranted a 6 month jail sentence.

Matter of Amanda Lynn B., 60 AD3d 939, __NYS2d__ (2nd Dept. 2009)

The Second Department reversed Kings County Family Court's 1027 removal of a child from a grandmother with whom the child had lived for over 12 years. The allegations were of educational neglect and the child was placed with her mother. There was no imminent risk to the child and there were no reasonable efforts made to keep the child in the grandmother's home.

GENERAL NEGLECT

Matter of John H.M., 54 AD3d 763, 864 NYS2d 89 (2nd Dept. 2008)

A Nassau County mother neglected her child given the unsanitary and unsafe living conditions in the house. The home was chaotic and violent which put the child's health in imminent danger. The child was also medically neglected in that the mother failed to administer prescribed medication for his diagnosed emotional problems. She did not seek any alternatives to the medication and the child's behavior's put him at risk of harming himself or others.

Matter of Aliciya R. 56 AD3d 784, 869 NY2d 140 (2nd Dept. 2008)

The Second Department affirmed Orange County Family Court's finding that a mother neglected her children. She knew that her boyfriend physically abused her daughter and she did not prevent the child's contact with him after learning of the abuse. This behavior also merits a derivative finding regarding her other child.

Matter of Eli H., 22 Misc3d 965, 871 NYS2d 846 (St. Lawrence County Family Court 2008)

St. Lawrence County Family Court made a finding of neglect against "loving" Amish parents who would not consent to medical treatment for their son. The child had a birth defect and a shunt had been placed in his heart, the shunt now needed to be replaced with a larger shunt as the child had grown and the parents would not consent even though without the surgery, the child will die in early childhood – likely within the year. The parents' Bishop testified that open heart

surgery was not acceptable “because it stops the heart” which violated the parent’s religious beliefs. There is no other generally accepted medical treatment. Medicaid will pay for the surgery if the parents are unable to pay.

Matter of Jessica J. 57 AD3d 271, __NYS2d__ (1st Dept. 2008)

While the First Department concurred that a Bronx mother neglected her daughter, they reversed the derivative finding regarding a second child. The mother kept her special needs daughter out of school for 44 days with no alternative arrangement for education. This was an “unreasonable over reaction” to an incident where the child had been left at the wrong bus stop. The mother refused offers of car fare and refused to walk the child to the school which was 6 blocks away. The mother also threatened, in front of both of the children, to kill herself and the two children if the children were removed. This threat had a detrimental effect on the children. However, there was no evidence that the younger child had been absent in any excessive way or that her educational needs were not being met.

Matter of Dustin P., 57 AD3d 444, 870 AD2d 287 (4th Dept. 2008)

An Oneida County father medically neglected his son. The child had suicidal and homicidal thoughts as a result of issues between his father, mother and stepmother but the father refused to become involved in family therapy and did not seek any alternative treatment for the boy. The child jumped out of a second floor window at his father’s home and fractured his back.

Matter of Xavier II., 58 AD3d 898, 872 NYS2d 5613rd Dept. 2009)

The Third Department affirmed a Broome County finding of neglect against a mother of three children and the father of two of them. There was a history of violence between the respondents. In 2005, the father, who is a large man had been violent toward the mother and grabbed her by the neck, pulled her hair and covered her mouth as the mother held her 2 year old child. He yelled at and cursed the police and dented their car and was subdued by pepper spray. The child told the caseworker that she had been scared and that the respondent had

been “mean” to her mother. The father alleged that the mother had tried to stab him and burned him with an iron. DSS helped the mother obtain an order of protection but the mother later got the order modified so that she and the children return to him. DSS then set up a safety plan for the children to live with their grandmothers and for the parents to get domestic violence counseling. However 6 months later, the mother punched the father in the face. Then 3 months after that the mother had him arrested for domestic violence only to obtain his release from jail three days later by swearing that she had lied about his abuse of her. During this period, the mother became pregnant with her third child, the second child of the father’s. The mother abused marijuana and cocaine, did not finish a recommended parenting class and obtained no prenatal care for her youngest child. The continuing domestic violence between the parties and the mother failure to see the imminent risk to the children is also neglectful.

Matter of Alexis R., ___AD3d___, ___NYS2d___ dec’d 5/14/09 (1st Dept. 2009)

The First Department reversed a derivative neglect finding on an infant made by New York County Family Court. The evidence was that the mother stopped smoking marijuana when she learned she was pregnant with this child and in 1998 she had voluntarily placed two older children in foster care who were subsequently freed for adoption. The prior proceedings were remote in time and were not based on substance abuse but on medical neglect and a failure to manage her finances. Although she had moved out of her drug treatment center shortly after the child’s birth, the CPS worker had told her that this was “fine” as she had only been there voluntarily.

Matter of Danny R., 60 AD3d 450, 874 NYS2d 122 (1st Dept. 2009)

Bronx County Family Court properly found a mother to have neglected her three children by failing to provide them with adequate mental health and education services. The older children missed 240 and 159 days of school respectively in the last 2 and half years of school without an adequate excuse and compromising their education which supports the derivative finding on the preschool child.

EXCESSIVE CORP

Matter of Derek J., 56 AD3d 558, 867 NYS2d 507(2nd Dept. 2008)

A Richmond County mother used excessive corporal punishment on her children. Two of the children made out of court statements that the mother beat them with a wire and a belt. This was corroborated by the caseworker and a nurse's observations of the injuries. This behavior demonstrated a fundamental defect in her understanding of parental duties such that the other two children were derivatively neglected.

Matter of Devontay M., 56 AD3d 561, 867 NYS2d 508 (2nd Dept. 2008)

In a companion case to the Derek J. case above, the children's father was also found to have neglected the children. The father was aware of the mother's use of corporal punishment and did not protect the children. Even after an order of protection allowing the mother only supervised visitation was issued, he allowed the mother to have access to the children.

Matter of Syed I., ___AD3d___, 877 NYS2d 318 (1st Dept. 2009)

A New York County mother was neglectful of her two older children and derivatively neglectful of her infant where she did not protect them from the father. The children made out of court statements that the father hit them, made them do deep knee bends and threatened to withhold food from them. The mother made statements that she was aware that the father had mental health issues, that she feared the father and that she could not protect the children.

Matter of Rachel H., 60 AD3d 1060 __NYS2d__ (2nd Dept. 2009)

Kings County Family Court was affirmed in finding neglect petition where a mother had thrown a can at her 4 year old daughter. The child made out of court statements which were corroborated by photos, out of court statements by the sisters and an admission by the mother. The mother claimed she threw the can

without being aware that the child was in the room but the lower court did not find her credible and the mother had given two versions of the events. Three siblings were derivatively neglected.

Matter of Chanika B., 60 AD3d 671, 874 NYS2d 251 (2nd Dept. 2009)

The Second Department reversed a Queens County Family Court determination of neglect. The father slapped the child once in the face causing her nose to bleed. The child testified that she had never been hit before and that her brother had never been hit.

SEXUAL PERP IN THE HOME/SEXUAL NEGLECT

Matter of Bethanie AA., 55 AD3d 977, 866 NYS2d 372 (3rd Dept. 2008)

A Columbia County stepfather neglected his 17 year old stepdaughter by having sex with her and by not preventing his father, the child's step grandfather also having sex with her. The child had become pregnant at age 17 and an abuse and neglect petition was filed. The abuse allegation was withdrawn when the evidence indicated that the child was 17 and had "consented" to the sexual contact such that no penal law had been violated and therefore no sexual abuse could be proven. However, the stepfather had lived with the child since she was 4 years old and had treated her as a daughter, therefore his admission that he had, albeit consensual, intercourse with her and may have impregnated her constitutes behavior which is "grossly inappropriate". Further he was aware that his own father had been seen in a sexual situation with the child when she was 15 years old and he had done nothing about it. He failed to satisfy his parental responsibilities to this child and did not provide her with proper supervision and guardianship. His judgment is significantly flawed and his behavior also resulted in a substantial risk of harm to his step son and his own daughter who also live in the house and who are therefore derivatively neglected.

Matter of Neithan CC., 56 AD3d 1000, 867 NYS2d 758 (3rd Dept. 2008)

The Third Department agreed with Clinton County Family Court that a convicted sex offender neglected his live in girlfriend's 7 year old child. The respondent had been convicted in 1998 of a felony due to his repeatedly subjecting his former girlfriend's child to sexual abuse. He is classified as a level three sex offender. He did participate in sex offender treatment while incarcerated. He admitted that he was instructed not to have unsupervised contact with children and not to drink alcohol. The respondent has been alone with the subject child by his own admission, "numerous times" and he continues to consume alcohol. Although the non respondent birth father was properly served, the failure to do so would not be a ground to reverse a neglect finding against the respondent boyfriend.

Matter of Daniel D., 57 AD3d 444, 870 NYS2d 287(1st Dept. 2008)

The New York County Supreme Court made a finding of neglect against a father who had caused emotional harm to his 2 sons by having them make false allegations of sexual abuse against a maternal grandfather. The children suffered from repeated interviews and medical examinations that distressed them. Supreme Court properly consolidated the neglect action with a pending matrimonial matter given the court's experience and knowledge of the common factual and legal issues.

Matter of Nassau County DSS v J.P., 21 Misc3d 1126(A) (Family Court, Nassau County 2008)

Nassau County Family Court granted a summary judgment of derivative neglect against a father who had been criminally convicted of sexually abusing the 14 year old "best friend" of his own daughter. His three children were in the home when the acts were committed. The court ruled that it would hold a hearing to determine if the father was a person legally responsible for the victim child to determine if a finding of abuse could be made as to that child.

Matter of Kirk V., 60 AD3d 427, 874 NYS2d 445 (1st Dept. 2009)

New York County Family Court properly dismissed a neglect petition ruling that the aid of the court was not necessary given that the older brother who had

allegedly sexually abused the younger brother had not lived in or visited the family home for over four years before the decision was issued. ACS was unable to articulate what disposition that were seeking as against the parents given that the older brother had long since been out of the home.

Matter of Patricia B., __AD3d__, __NYS2d__ dec'd 4/21/09 (2nd Dept. 2009)

A Nassau County mother neglected her children as she was aware that one of her sons had sexually abused one of her other children but continued to allow that son to live in the home. The dispositional order of supervision with an order of protection that son who had abused a child could not have contact with the children except in therapeutic counseling was appropriate but could only issued for the duration of one year with a possibility of ongoing extensions.

Matter of Kole HH., __AD3d__, 876 NYS2d 199 (3rd Dept. 2009)

A Broome County father was arrested for sexually abusing the mother's cousin's 9 year old daughter who was on occasion in the home. Ultimately the criminal charges were dismissed. The father and mother were alleged in Family Court to have neglected their own two boys. The mother had consented to a neglect order but the father requested a hearing. The lower court found that the 9 year old had been sexually abused in the home but dismissed the petition regarding the two sons as the father had not been a person legally responsible for the 9 year old and therefore this could not form the basis of a derivative finding regarding the sons. The abused child testified in court, albeit unsworn, and her statements were supported by tapes on her interviews with caseworkers in which she provided graphic descriptions of the sexual activity that were clearly inappropriate for her age. The Third Department ruled that the proven abuse of the 9 year old could in fact provide the legal basis for a derivative finding even though the father had not been a person legally for the victimized child. The father's behavior demonstrates an impaired level of parental judgment to the extent that his own children are at risk. He lacks the capacity to care for and protect his own children.

Matter of Morgan P., 60 AD3d 1362, 875 NYS2d 401 (4th Dept. 2009)

An Erie County mother neglected her daughter as she “coached” the child to allege that she had been sexually abused by her grandfather. The mother subjected the child to medical examination that were not necessary and the child was made extremely anxious.

SUBSTANCE ABUSE

Matter of Paolo W., 56 AD3d 966, 867 NY2d 753 (3rd Dept. 2008)

The Third Department reversed the Schenectady County Family Court’s dismissal of a neglect petition. The evidence established that the father actively used heroin. He admitted that he used between two and six bags of heroin a day and that his withdrawal reactions were so intense that he could not function. He had been dismissed from a drug treatment program for noncompliance. Given this proof, the presumption in FCA §1046(a)(iii) applied and established prima facie evidence that the children were neglected. The evidentiary burden was then on the father to demonstrate that the children were not neglected. The fact that the DSS witnesses stated that the children were clean, well fed and not at risk, does not disprove the prima facie case. It is not the burden of DSS to prove the children are neglected once the FCA §1046 (a)(iii) presumption has been established; it is the respondent’s burden to demonstrate why the children are not neglected. The prima facie case was not defeated, neglect was proven and the case was remanded for a dispositional hearing.

Matter of Anna F., 56 AD3d 1197, 868 NYS2d 442 (4th Dept. 2008)

An Erie County Family Court adjudication of neglect was reversed by the Fourth Department. The only credible evidence offered was that the father admitted that he used alcohol or drugs while he cared for the children. However, his admission indicated that he only did so while the children were asleep. The lower court found the father neglectful in that the children had been placed at risk as they could have awoken with a medical emergency and the father’s intoxication may then have put them at risk. The Fourth Department cited *Nicholson* and

found that this was not sufficient. The imminent danger of neglect must be “near or impending, not merely possible”.

SEX ABUSE

Matter of Jelani B., 54 AD3d 1032, 865 NYS2d 114 (2nd Dept. 2008)

The Second Department affirmed the dismissal of sexual abuse allegations in a petition filed against a Queens father. The child had alleged that her father had put his hand on her buttocks. She reported a various times that it was over or under her clothing. It was the only such incident alleged. This act alone did not provide proof that the father’s intention was to gratify his or the child’s sexual desire and therefore the sexual abuse allegation must be dismissed. However the court did find that the father had, with his open hand, hit the child once on the nose and that this action constituted neglect. Given the dismissal of the sex abuse allegations and the single isolated instance of excessive corporal punishment, the court properly dismissed derivative abuse and neglect allegations regarding the sibling.

Matter of Nassau County DSS o/b/o C.R., 21 Misc3d 1126(A) (Family Court, Nassau County 2008)

The respondent in this Nassau County sex abuse case was ordered to submit to a buccal swab for DNA analysis to compare his DNA to that found on a condom that was alleged used in the sexual abuse (under FCA § 1038-a). There is probable cause to believe that the DNA evidence is reasonably related to the allegations and the buccal swab is not an unreasonable intrusion.

Matter of Richard SS., 55 AD3d 1001, 871 NYS2d 383 (3rd Dept. 2008)

In 2006 the Third Department had reversed Schenectady County Family Court’s dismissal of a sex abuse petition against a foster mother regarding allegations that she had sexually abused her foster son. The Appellate Court had remanded the matter for a new hearing (29 AD3d 1118) . Upon remand the lower court made a finding of sexual abuse and the matter was appealed again and upheld. After the

first appeal and the remand order in which the Third Department had indicated that there was evidence that supported the child's out of court statements, OCFS "unfounded" the original indicated report upon an administrative directive and without a hearing. The Third Department said that this OCFS determination did not "meaningfully undermine" the court's decision and did not warrant any reconsideration by the court system. The child's out of court statements were consistent, detailed and credible. He provided signed sworn statements that the foster mother had engaged in oral sex and had intercourse with him in her car, her home as well as the group home he was placed in after he was removed from her home. The out of court statements were sufficiently corroborated by a report from a validator, the daughter of his new foster mother who made the SCR report, telephone and school records as well as statements that the foster father had made about the "unhealthy" relationship his wife and the foster son had. The foster mother claimed that she had physical problems that would have prevented her from performing the sex acts that were described. Her witnesses also claimed that any tattoos the foster child described were incorrectly described or were visible while she was clothed and that the child had incorrectly described her pubic area as shaven. The lower court's determination of credibility on these issues was accepted by the Third Department.

Matter of Breanna R., ___AD3d___, __NYS2d___dec'd 4/24/09 (4th Dept. 2009)

The Fourth Department reversed Erie County Family Court's dismissal of a sex abuse petition. The two oldest children made out of court statements disclosing sexual abuse to a CPS worker and one of them also disclosed to a therapist. Validation testimony was presented by a licensed psychologist who interviewed the two older children and the parents and who opined that the behavior of the two older children was indicative of having been sexually abused by the father. The Appellate Court found that the children's statements were in fact credible contrary to the lower court's assessment given that they has sexual knowledge inappropriate to their age and that the cross corroborated each other's accounts.

PHYSICAL ABUSE

Matter of Yahnlis M., 55 AD3d 376, 865 NYS2d 214 (1st Dept. 2008)

The two sisters of a New York County two year old boy who had been beaten to death were found to have also been severely abused as well as neglected. The mother argued on appeal that she had been denied her due process right to retain an expert to put forth a defense of battered woman syndrome. No foundation had been laid for such a defense as the proof showed that it was the children - and not the mother - had been subject to repeated beatings and emotional harm at the hands of the mother's boyfriend. The mother had also physically abused the children and had failed to obtain medical care for the child who had died. Her failure to obtain timely care for that child was motivated by her fear of blame and fear that the children would be removed and not by any fear of her boyfriend.

Matter of Madeline A., 55 AD3d 430, 866 NYS2d 150 (1st Dept. 2008)

Bronx County Family Court correctly found that the parents of a 3 month old had abused her. The child had non accidental injuries that included internal bleeding in the cranium, fractures of her knee, her ankle and her rib and retinal hemorrhaging in her eye. The parents offered neither an explanation nor any medical evidence on their behalf. Their complaint that they were not provided sufficient monies to hire expert services was without merit.

Matter of Chaquill R., 55 AD3d 975, 865 NYS 716 (3rd Dept. 2008)

A Schenectady County mother was found to have abused her 10 month old baby and therefore derivately abused her 5 other children. The baby suffered second and third degree burns to his buttocks and thighs from scalding hot water. The burns created a prima facie case of child abuse and the burden to rebut such abuse is on the mother. The mother claimed the child was injured by accident due to a defective water heater that allowed the bath water to become excessively hot in a very short time. The mother claimed that the child was crying when she put him in the tub but did not cry any harder when placed in the tub

and that she did not see that he was burned until she took him out of the tub. However the testimony of her investigators and a plumber's report that she submitted did not prove that the faucet would not allow the mixing of cold water into the hot. One of the older children had been able to take a shower immediately before the incident without any burning. The mother admitted that she did not attempt to mix in any cold water. Photos of the injuries and a letter from the Burn Center, which was stipulated into evidence, indicated that the burn patterns were consistent with the child being held under scalding running water. The mother's lawyer's decision to stipulate the letter into evidence as well as defense counsel's decision to not call the Burn Center physicians as witnesses was not ineffective assistance of counsel.

Matter of Samantha M., 56 AD3d 299, 867 NYS2d 406 (1st Dept. 2008)

The First Department affirmed New York County's abuse and medical neglect finding against a mother and her boyfriend. The boyfriend was a person legally responsible as he had lived in the home for about 3 months before the incident. He was the father of the child the mother was currently pregnant with. He took care of the 2 year old, picked her up from day care and was the functional equivalent of a parent. The two year old had multiple bruises to her face and body and a severe duodenal hematoma. The medical testimony was that these injuries were not accidental. The mother and the boyfriend concocted an elaborate lie to cover up the fact that the boyfriend had been alone with the child for several hours right before her hospitalization for injuries. The respondents experts testified that the child's injuries were due to an undiagnosed disease called Henoch-Schlein Purpura, However, since the experts did not actually examine the child, the lower court correctly disregarded this opinion. The respondents also medically neglected the child given that she appeared to be sick for about 2 weeks before her hospitalization and had vomited some 4 or 5 times during that period. An ordinarily prudent parent would be on notice that the child needed medical treatment. These acts demonstrated an impairment of judgment that supported a derivative finding as well.

ARTICLE TEN DISPOS and PERMANENCY HEARINGS

Matter of Ileana C., 55 AD3d 424, 866 NYS2d 65 (1st Dept. 2008)

New York County Family Court properly denied a grandmother's petition for visitation of 2 grandchildren who were in foster care. The grandmother had had no real relationship with the children since they had been very young. She had only visited them once since they had gone into foster care. As she did not have a relationship with the children, she did not have standing under DRL §72. Even if she had standing, the children would not even recognize her, would not benefit from seeing her and it might be confusing and "could bring up issues of abandonment."

Matter of Rebecca KK., 55 AD3d 984, 865 NYS2d 722 (3rd Dept. 2008)

A Cortland child had been placed in foster care on the basis of the mother's neglect and visitation was suspended. That finding was ultimately affirmed by the Third Department. At the child's permanency hearing and while that appeal was pending, Cortland County DSS presented evidence that the mother had not completed parenting or mental health course or cooperated with the caseworkers and further advised the court that a TPR had been filed against the mother on severe abuse approximately one month before the permanency hearing. The lower court changed the child's goal to adoption, continued the child's placement and continued the suspension of the visitation. On appeal of the permanency hearing decisions, the mother argued that DSS had not offered her reasonable efforts toward reunification given that she was not provided with visitation. She also argued that the court could not change the goal to adoption as that was not the goal listed in the permanency hearing report. The Third Department rejected both arguments. There were still circumstances which supporting suspending visits and DSS was obligated to follow that order and not provide visits. The TPR petition was served before the permanency report so the parties were on notice that DSS was seeking to terminate the mother's rights. Further the court is permitted to modify any permanency plan at the permanency hearing. The lower court's modification of the goal to adoption was appropriate given the

evidence of the mother's failure to allow home inspections, sign releases, meet with caseworkers and participate in services.

Matter of Shelby B., 55 AD3d 986, 866 NYS2d 375 (3rd Dept. 2008)

The Third Department affirmed Clinton County Family Court's finding of a willful violation of an Art. 10 dispo order and the sanction of a 90 day jail sentence on the mother. The mother had been found to have neglected her children and the court ordered her to attend several assessments and evaluations. She was ordered to cooperate with the caseworkers and keep them informed of her address. Two months after the order was issued, a violation was filed alleging that she had moved and was not keeping the caseworker aware of her whereabouts. DSS presented competent proof establishing by clear and convincing evidence that the mother violated the order. The caseworkers testified that the mother's landlord indicated that she no longer lived at the address she had given and that the locks had been changed. The caseworkers did not know where the mother was living for 2 months.

Matter of Tiajianna M., 55 AD3d 1321, 867 NYS2d 287 (4th Dept. 2008)

An Erie County Art. 10 petition was resolved with an ACD and one of the terms of the ACD was that the caseworker would be allowed to "examine the children and interview the children privately in the home and outside the home". Although the law guardian had originally consented to these terms, she then moved to modify the dispo order seeking a clarification that unless there was an emergency, the caseworker would need advance permission of the law guardian to talk to the children. The lower court, upon the motion, indicated that the caseworker's scope of any questioning of the children was limited to safety concerns for the children and that any statement made by a child that might be against the child's own interests would be precluded. The Fourth Department agreed that the lower court had the power to allow DSS to interview the children without the law guardian's consent and prior knowledge. The lower court properly balanced the child's right to an attorney against the statutory requirement that the child and parent remain under the DSS supervision during

the period of the ACD. The DSS caseworkers are not bound by ethical requirements in the Code of Professional Responsibility not to speak with a represented party as caseworkers are not lawyers and these rules apply to attorneys.

Matter of Dylan L., 55 AD3d 1343, 864 NYS2d 636 (4th Dept. 2008)

Although there was not sufficient proof that a father had sexually abused his 2 sons, Erie County Family Court did adjudicate neglect based on the father having exposed the children to pornographic videos. There was evidence that suggested another perpetrator of the sex abuse. However, as part of the dispo order, the lower court ordered that the father undergo a mental health evaluation to see if he needed sex offender treatment. The father appealed but the Fourth Department concurred that the order was well reasoned given the father's conduct in exposing his two sons to pornographic videos.

Matter of Hobb Y., 56 AD3d 998, 868 NYS2d 335 (3rd Dept. 2008)

Broome County Family Court terminated visitation with a father and his two children less than a month after the dispo order on a neglect and the Third Department concurred. The children were 17 and 15 years old and indicated that they did not want to visit with the father. He had admitted to using excessive corporal punishment, to physically and verbally abusing them and admitted that he used illegal drugs and abused alcohol in their presence. Denial of parental visitation must be based on compelling reasons. Here the older girl had deeply cut her own wrist after a visit because she did not want to see the father again. A letter from the child's counselor was admitted into evidence that opined that the child's self mutilating behavior was done as a calming behavior and that the father presented an ongoing risk that the child would harm herself. The younger boy said that his father had told him that he should kill members of the DSS staff and told him how to do it. The boy expressed fear of the father and of what the father was trying to make him do. He no longer wanted to visit. The court also talked to the children in camera and found that the children's testimony was "extremely credible, compelling" and "extremely troubling". The older girl had

even written a letter to the court saying how threatened and harmed she felt by the father and how she did not want to have contact with him. Both children have emotional and mental health problems that the father does not have any insight about.

Matter of John H., 56 AD3d 1024, 868 NYS2d 790(3rd Dept. 2008) and Matter of John H. 60 AD3d 1168, 876 NYS2d 169 (3rd Dept. 2009)

The Third Department reviewed a matter from Greene County regarding discovery demands. The children were freed for adoption and the law guardian served DSS as well as a contract agency with notice to take a deposition of the caseworker and well as a request for records. Without moving for a protective order, DSS returned the notices to the law guardian indicating that they were not valid. The children's attorney then moved to compel compliance and the court ordered compliance by DSS but not by the contract agency who was deemed not to be a party. Since permanency hearings for freed children provide ongoing jurisdiction with the court, it was not relevant that a hearing had just concluded, discovery demands can be made at any time. The disclosure devices of CPLR Art. 31 are available to parties to FCA Art. 10-A proceedings. Although the statute says that FCA §1038 applies, that section states that CPLR Art. 31 is applicable with only limitations that are not relevant in this matter. CPLR §408 special proceeding rules for discovery do not apply as the specific provisions of FCA §1038 which state that CPLR Art. 31 applies override CPLR §408. Therefore, if DSS had disagreed with the time or manner of service of the notice, then the proper response was written objections. If they objected to the deposition or the production of the documents, then DSS should have moved for a protective order. Since they did neither, the law guardian was entitled to seek the court's order to compel the disclosure. However, as to the contract agency, the court found them not to be a party and the lower court erred in holding that they would be considered a party in the future. The appellate court also ruled on the question of whether there was an automatic stay of the court's order to comply with discovery. The specific language of FCA § 1114 overrides that of CPLR §5519(a) and therefore there is no automatic stay and the DSS was obligated to comply

with the court's order even though they had sought an appeal. In the second appeal, the Third Department affirmed the monetary sanction that had been ordered against the DSS for failing to comply with the discovery motion but lowered the amount ordered against DSS.

Matter of Gabriel James Mc., 60 AD3d 1066, ___ NYS2d ___ (2nd Dept. 2009)

During the pendency of an Art. 10 proceedings, Kings County Family Court properly held a grandmother's Art. 6 petition for custody in abeyance until the ICPC home study was returned. The mother's motion to dismiss the petition was properly denied. The court does not need the mother's consent to choose the option of a custody order.

Matter of Naricia Y., __ AD3d __, 876 NYS2d 546 (3rd Dept. 2009)

Clinton County Family court's disposition in a permanency hearing was modified on appeal. Although the order for the children to be returned with supervision of the mother and the children was appropriate, two terms were not. The court had ordered that the mother could not have any unrelated male in the home without the DSS conducting a background check and an interview of the male in advance. The Third Department found that this was overly broad as he would prevent repair persons and the children's friends from coming to the home and there was no evidence presented that the mother had allowed any inappropriate contact recently. Also the lower court had inappropriately ordered that the mother could not purchase, possess or consume any alcoholic beverages at any time. There was nothing in the record that suggested that the mother abused alcohol and in fact a substance abuse evaluation indicated that she was not in need of treatment.

TPR GENERAL

Matter of Davonte D., ___ AD3d __, __ NYS2d __ dec'd 5/1/09(4th Dept. 2009)

Monroe County Family Court erred in making a default order terminating the rights of a mother to her five children. When the mother failed to appear at fact

finding , the lower court allowed the defense attorney to withdraw. This was inappropriate as the withdrawal was not done on notice to the mother. The withdrawal was ineffective and the matter was remanded for a reassignment of counsel and a new hearing on the petition.

Matter of Isaiah H., ___AD3d___, 877 NYS2d 786 (4th Dept. 2009)

The Fourth Department reversed Erie County Family Court’s default order in a termination. The mother failed to appear for the fact finding but since her attorney did appear and requested an adjournment, this was not a default proceeding. A party who appears by counsel is not in default. The matter was remitted for a new hearing.

Matter of Sarah A., 60 AD3d 1293, 874 NYS2d 653 (4th Dept. 2009)

The Fourth Department reversed Erie County Family Court’s denial of a motion to reopen a default termination order. The lower court erred in terminating parental rights of the father after he failed to appear for the fact finding. The court is required to hold a fact finding or an inquest even if the respondent does not appear and cannot make the determinations without any evidence being presented.

SEVERE ABUSE TPR

Matter of Rebecca KK., 55 AD3d 710, 865 NYS2d 722 (3rd Dept. 2008)

The Third Department affirmed Cortland County Family Court’s termination of a father’s rights on the basis of severe abuse. The Appellate Court had previously upheld the lower court’s Art. 10 finding of severe abuse and the subsequent no reasonable efforts order. The finding of severe abuse was at the clear and convincing level and therefore a summary judgment determination to terminate parental rights due to severe abuse was appropriate.

ABANDONMENT

Matter of Nevaha J., 56 AD3d 989, 870 AD2d 470 (3rd Dept. 2008)

An incarcerated Broome County father abandoned his child. Although he knew the child to be in foster care, he did not contact the agency or the foster parents. He claimed that he wrote to the child's mother but expressed doubts as to her receipt of the letters. His alleged communication with the child's mother when he knew she was not the child's caretaker is not sufficient to defeat the abandonment prima facie case.

Matter of Jacob WW., 56 AD3d 995, 868 NYS2d 348 (3rd Dept. 2008)

The Third Department agreed with Schuyler County Family Court that a mother had abandoned her three children. The children were placed in foster care voluntarily by the father. The caseworkers reached out to the mother on several occasions offering to help set up visitation with the possibility of working toward a placement with the mother. The mother had only one contact with the caseworkers some 6 months after the children went into care. At that time she acknowledged that she knew the children had been in foster care and indicated that she was not sure she was interested in visitation. The mother was also present at 3 holiday occasions when the maternal grandmother asked for the children to be allowed to join the family but the mother's interaction with the children at these events was perfunctory at best. No evidence was presented that the mother ever made any attempt herself to visit or communicate with the children. She never initiated any contact with the DSS or the foster parents in the 6 month period. The minimal contact she did have was all initialed by the grandmother and is not sufficient to rebut the presumption of the intent to abandon.

Matter of Lucas B., 60 AD3d 1352, 876 NYS2d 255 (4th Dept. 2009)

Erie County Family Court properly found that a father had abandoned his child. Although one of his parole terms was that he could have no contact with any children under age 18, he was not prohibited from staying in contact with DSS

about his child's status and he did not do so. The father was represented by counsel during the relevant 6 months and he made no motion for visitation or custody and failed to communicate with the caseworkers, even when he saw them at court proceedings, about the child's status.

MENTAL ILLNESS and MENTAL RETARDATION TPR

Matter of Ashanti A., 56 AD3d 373, 869 NYS2d 20 (1st Dept. 2008)

A Bronx County mother's mental illness resulted in her inability to parent the child safely for the foreseeable future. The lower court appropriately credited the agency's experts over the mother's experts. The mother's experts focused only on her current issues and not her long standing personality issues. Her experts' opinions were also largely based on the mother's self reporting. A dispositional hearing is not required to terminate on mental illness grounds.

Matter of Anthony M., 56 AD3d 1124, 867 NYS2d 590 (4th Dept. 2008)

The parents of a Seneca County child are unable to care for him safely for the foreseeable future due to their mental illness. The child has Down syndrome and special needs. The court appointed psychologist opined that the parents were unable to meet his needs based on the results of testing, extensive interviews with the parents and a review of the parent's records. The prognosis for the parents was poor and the mere possibility of improvement is not enough to preclude a finding.

Matter of Arielle Y., __AD3d ____, 876 NYS2d 529 (3rd Dept. 2009)

A Clinton County Family Court termination of parental rights of two parents on mental illness grounds was reversed by the Third Department. The Appellate Court found that substance abuse was the issue that had resulted in the children being placed. The Family Court had ordered DSS to file the termination petitions as soon as the children had been in care for a year. Although the court appointed psychologist testified that the parents had personality disorders as well as substance dependency: he did not testify as to how the mental illness precluded

them in caring for the children in the future. This was a particular concern as the parents had recently been sober. Prior to the evaluation, neither parent had been diagnosed with a mental illness nor had psychiatric or any mental health treatment ever been recommended.

PERMANENT NEGLECT

Matter of Pedro C., 55 AD3d 47, 867 NYS2d 53 (1st Dept. 2008)

The First Department affirmed a termination of both parents' rights in this Bronx County matter. There was clear and convincing evidence of diligent efforts that included psychiatric evaluations, parenting skills, drug and alcohol screenings and regular visitation. The mother continued to deny she had substance abuse problems or that she needed any psychiatric medication. The father only visited the child sporadically even though he was offered visits around his work schedule. He only visited the child alone once, the other times he was with the mother who "dominated" the visit. The father's behavior showed a lack of interest in establishing a relationship with the child. A preponderance of the evidence showed that adoption was the appropriate permanency for the child. His aunt was his foster mother and she provided a nurturing environment. He was attending school and therapy and his special needs were met.

Matter of Aisha T., 55 AD3d 435, 866 NYS2d 628 (1st Dept. 2008)

New York County Family Court terminated the parental rights of a mother to her daughter. The agency made diligent efforts by attempting to assist the mother to obtain legal residency, to help her with housing, finances, employment and by providing regular visitation. The mother did not obtain legal residency, a suitable home environment or employment. She was not consistent in her visitation and missed visits at one point for three months in a row. The child has lived her whole life with the foster family. She is now 5 years old and bonded to the family who want to adopt her.

Matter of Imani Elizabeth W., 56 AD3d 318, 868 NYS2d 171 (1st Dept. 2008)

The First Department agreed that a Bronx father rights were properly terminated. The agency offered diligent efforts by working with the father to set up a service plan, offered anger management and domestic violence services. The agency also offered parenting skills classes and mental health evaluations. The father was urged to remain drug free, to maintain a stable household and to visit regularly. The father was also told that he could not include his teenage girlfriend into his future plans for his child. The father did participate in some of the programs but he did not assist in SCR clearances of the girlfriend and refused to plan with for the care of the child without involving his minor girlfriend. Although visitation was to increase to unsupervised and overnight, the father visited less frequently and in fact visited only once in 3 months. He stopped contacting the agency and did not complete all the programs and displayed ongoing anger management issues. He continued to have inappropriate relationships with minors and would not consider a future that did not involve his teenage girlfriend. He failed to accept responsibility for the child's placement in care and gain insight into his issues.

Matter of Imani M., ___AD3d___, 877 NYS2d 417 (2nd Dept. 2009)

Dutchess County DSS made diligent efforts regarding an incarcerated father by learning his identity, contacting him, keeping him advised of the child's progress, advising him of the need to find a non foster care resource for the child and exploring individuals who he suggested might be resources for the child. Since none of the resources proved to be viable placements, the father failed to have a realistic plan for the child other than foster care - and therefore he had permanently neglected the child. The matter was remanded as the court had failed to hold a dispositional hearing.

Matter of Charles Michael J., 58 AD3d 401, 870 NYS2d 310 (1st Dept. 2008)

A permanent neglect termination by Bronx County Family Court was affirmed. The agency made diligent efforts by arranging for frequent visitation, holding

service plan reviews, and setting up medical and educational appointments. The mother failed to visit consistently, did not attend therapy or undergo a psychiatric evaluation and therefore failed to follow the courts orders. The four younger children should be freed for adoption as they had been in foster care for 6 years when the lower court freed them. These children are in foster homes where other siblings are placed where the children can be adopted by their maternal aunts. The oldest child is over 14 and does not want to be adopted and so freeing that child for adoption “would serve no useful purpose”. The lower court should hold a new dispositional hearing (the appellate court’s decision came 21 months after the lower court’s termination) regarding the eldest child to see if the mother has continued any progress such that this child could return home.

TPR DISPOS

Matter of McHarris v ACS 53 AD3d 660, 862 NYS2d 382(2nd Dept. 2008)

The Queens children who were the subject of this matter had been in foster care since 2003 and had been freed for adoption since 2006. Ten months after they were freed for adoption, and while they were placed in a “preadoptive home”, a cousin of the mother filed for custody and thereafter also filed for visitation. The Second Department concurred that both petitions should be dismissed without a hearing. Since the children were freed for adoption, a “mere” custody petition was not a proper recourse – only an adoption petition could be filed. Also the legislature has limited visitation petitions to parents, grandparents and siblings and a cousin does not have standing to seek visitation.

Matter of Carolyn F., 55 AD3d 832, 866 NYS2d 298 (2nd Dept. 2008)

The Second Department concurred with Orange County Family Court that a father had violated the terms of the suspended judgment. The agency is not required to prove it offered diligent efforts given the permanent neglect admission and adjudication.

Matter of Pathjrie J., 56 AD3d 282, 867 NYS2d 409 (1st Dept. 2008)

Termination of the parental rights of a Bronx mother to her child was the appropriate disposition after her admission to permanent neglect. The mother had not requested a suspended judgment. The child was thriving in the foster home where she had lived for her whole life. They wanted to adopt her. The child's grandmother had filed a custody petition but that was appropriately denied. The child had no real relationship with the grandmother. There had only been a few visits between and the grandmother did not know the child or her needs very well. The grandmother did not understand that her visitation was emotionally harmful for the child.

Matter of Seandell L., 57 AD3d 1511, 870 NYS2d662 (4th Dept. 2008)

A Monroe County mother's suspended judgment was revoked as she violated the conditions. The issue of diligent efforts is not properly before the court as that issue was resolved in adjudication of permanent neglect. The court need not hold a separate dispositional hearing on a suspended judgment violation as a suspended judgment is a dispositional hearing. The court need only consider, as it did hear what the children's best interests are in the context of the hearing on the violation.

Matter of Kayshawn Raheim E., 56 AD3d 471, 867 NYS2d 468 (2nd Dept. 2008)

The Second Department affirmed the permanent neglect finding made by Kings County Family Court against a mother as to her four children. However, the matter was remanded for a new dispositional hearing for two of the children. For two of the children, freeing for adoption was in their best interests. For the other two children, both of who were over 14 years of age, there were no adoptive resources. This was a new fact as the proposed adoptive mother had died and the two teens were now expressing a desire to be with their mother. (Note: The appeal was decided 19 months after the lower court decision) The Second Department found that it may properly consider new facts and that these new facts warranted a new dispositional hearing.

Matter of Danielle Joy K., 60 AD3d 948, 875 NYS2d 257 (2nd Dept. 2009)

The Second Department remanded a permanent neglect matter back to Kings County Family Court for a new dispositional hearing where the child is now 16 years old and does not want to be adopted.

POST TERMINATION CONTACT

Matter of Diana M.T., 57 AD3d 1492, 870 NYS2d 656 (4th Dept. 2008)

The Fourth Department reviewed an Allegany County Family Court's termination of a father's rights to his two daughters on mental illness grounds given that the expert testimony was that the father had a personality disorder, alcohol dependency and posttraumatic stress disorder that prevented him from safely caring for the children. The father's treating psychologist did opine that he could provide proper care if he were gradually given responsibility with a system in place to provide him support and treatment. Since he had been unable to do that very thing with petitioner's help, the mere possibility that he might be able to in the future did not defeat the termination. The father had requested post termination visitation but the lower court properly denied the request as the father failed to establish that the visitation would be in the girl's best interests.

Matter of Kahlil S., 60 AD3d 1450, 876 NYS2d 310 (4th Dept. 2009) and Matter of Terreell Z., 60 AD3d 1451, __NYS2d__ (4th Dept. 2009)

In 2006, the Fourth Department reversed all precedent and ruled that Family Court had authority to order post termination contact in terminations based on permanent neglect, mental illness and mental retardation in **Matter of Kahlil S. 35 AD3d 1164**. That matter was remanded for a best interest hearing in Erie County Family Court. At the remanded hearing, the court ordered that there should be no post termination contact with one of the children and that "reasonable" post termination contact should occur with the second child. The mother then appealed both determinations. Both findings were affirmed by the

Fourth Department as appropriate based on the evidence regarding each child's best interests.

Matter of Josh M., ___AD3d___, 877 NYS2d 784 (4th Dept. 2009)

While upholding a mental retardation termination of a father's rights, the Fourth Department remanded the disposition back to Ontario County Family Court for failing to hold a *Kahlil* inquiry about post adoption visitation. The lower court had urged the parties to consider having the father surrender with some agreement for visitation after the child's attorney and the court expressed the opinion that post termination visitation might be appropriate but the father refused to surrender when the parties could not reach agreement on the terms. The lower court then ordered a termination without holding a hearing to determine if post termination should be ordered as being in the child's best interests.

Matter of Christopher J., 60 AD3d 1402, ___NYS2d___ (4th Dept. 2009)

In reviewing a Oswego County Family Court's revocation of a suspended judgment in a permanent neglect termination, the Fourth Department ruled that the mother did not ask the court to consider post termination contact or to hold a hearing on that issue and that in any event, she failed to establish that the contact would be in the children's best interests.

MISCELLANEOUS

Matter of Florence Y., 21 Misc3d 516, 864 NYS2d 859 (Family Court, Albany County 2008)

Albany County Family Court dismissed a visitation petition filed by a biological grandmother. She has surrendered her own son when he was 9 and he was later adopted. The grandmother now seeks a court order to visit the son's own 2 children who are in their mother's custody. The mother's custody order forbids the father from visiting the children in the "presence" of his biological parents or siblings. The grandmother claimed she had been visiting regularly. The court

examined the appellate caselaw on the issue and found divergent opinions with no clear bright line but determined that the legislative intent appeared to be that when the grandmother had surrendered her son, she had lost all potential rights as a grandmother as well.

Matter of Arthur O., 55 AD3d 1019, 871 NYS2d 396 (3rd Dept. 2008)

A 13 year old youth was placed in foster care with Delaware County on a voluntary basis by his mother. Two weeks later, the police wished to talk to him about some possible JD incidents in Otsego County. The Delaware DSS caseworker and the child signed a written waiver of the child's Miranda rights and the child made incriminating statements to law enforcement. After the JD finding the youth appealed the admissibility of his incriminating statements. The Third Department affirmed that the statements were admissible. The mother's testimony established that she had voluntarily placed the child in foster care and therefore DSS was legally responsible for the child at the time of the interrogation. DSS was not "ineffective or improper" as a custodian and had not acted in conflict with his interests by waiving his rights and encouraging him to talk to law enforcement. This behavior does not prove that DSS acted against his interests and had his parent done the same, law enforcement would not be obligated to determine if the parent was sufficiently supportive of the child.

Matter of Richard UU., 56 AD3d 973, 870 NYS2d 472 (3rd Dept. 2008)

A 14 year old Delaware County foster child was observed by his foster mother engaged in oral sexual contact with his four year old foster sister. The next day the DSS caseworker brought the child to DSS to be questioned by the police. The teen and the caseworker waived the youth's Miranda rights and he made incriminating statements that ultimately were used against him in the subsequent JD adjudication. The Third Department upheld the JD adjudication. Neither law enforcement nor DSS was obligated to contact the child's law guardian prior to his questioning as it is "now settled" that a person in custody on matters unrelated to the matter on which he has assigned counsel is competent to waive counsel. Even though the child's attorney continued to represent the child in his ongoing

permanency hearings, those hearings were in connection with a different matter. DSS was a person legally responsible for the child's care and was notified and present as required when law enforcement questions a child. The fact that DSS advised the child to speak to the investigator does not establish that DSS was not competent or was not acting in the child's best interests. The child was 14 and being interviewed on the day after the event at a reasonable hour in the day and he unequivocally indicated that he understood his rights and wanted to talk. The interview was only 45 minutes long and took place in a room certified for the questioning of juveniles. The teen was not tricked, threatened or coerced. The same attorneys who represent DSS are also prosecutors in JD matters in Delaware County but that does not disqualify them from the prosecution of the JD action as there was not showing of actual prejudice.

Recent Caselaw on Access to Sexual Predator

Margaret A. Burt, Esq. 2009

Matter of Anndrena 13 Ad3d 1164, 787 NYS2d 766 (4th Dept. 2004)

A Cattaraugus County neglect finding was upheld by the Fourth Department. The respondent neglected his girlfriends's 15 year old daughter. He has prior convictions of sexual abuse of children. This child is at risk of sexual abuse because this respondent is in her home and is "unreconstructed sexual abuser who denies his guilt in ht prior incidents" (citing **Kasey C. 1182 AD2d 1117 (4th Dept. 1992)**)

Matter of Alan FF., 27AD3d 800, 811 NYS2d 158 (3rd Dept. 2006)

The Third Department reversed Saratoga County Family Court's dismissal of neglect proceeding against two parents. The lower court had dismissed, on motion, a petition, which alleged that the father was living in the home with 3 children and was an untreated sex offender who had sexually abused another child. Without holding a fact-finding, Family Court had found that the allegations in the petition would not demonstrate that the father was a substantial risk to the children. The Third Department disagreed. Upon a motion to dismiss, the court must consider as true all the allegations in the petition. Here if the allegations were true the children were neglected. The petition alleged that the father was a convicted sex offender who had admitted in both Family Court and criminal court to having sexual abused an infant daughter in a prior petition. There had been a Family Court order in 2001 requiring that all contact with his children be supervised. That order had expired in 2003. In the meantime, he failed to complete any offender program and his limited intellect and mental health issues impair his ability to benefit from any program. A 2002 mental health evaluation recommended that his contact with his children be supervised. Now, he denies having sexually abused the other child. The mother is fully aware of his prior admissions, his current denial, his lack of treatment and the recommendation that he have no unsupervised contact with the children. She does not prevent unsupervised contact. Further, the petition alleged that there was domestic violence in front of the children and that the father threw one of the children into a couch. If DSS can prove these allegations, these children are neglected by both of the parents. The court did make a comment in a footnote that the record contained no explanation why the DSS had not sought ongoing orders of supervision of this family after the original dispositional order of 2001 had ended in 2003.

Matter of Ahmad H., 46 AD3d 1357, 849 NYS2d 140 (4th Dept. 2007)

The Fourth Department found a derivative neglect adjudication was appropriate regarding two children even though the original finding on which it was based was from 1989. Although 17 years had passed since the Onondaga County father had been found to have neglected other children in his care, this original finding had been based on sexual abuse of those children. There is no indication that the father's "proclivity for sexually abusing children" has changed. The father is a convicted sex offender and has never been in a treatment program despite much advice that he get treatment. He is on probation with a condition that he have no contact with children under 18 years of age and there is an order of protection that he stay away from another child that is in the custody of the respondent mother. This man has a fundamental defect in his understanding of parenthood and even 17 years between the Art. 10 petitions is not too remote in time.

Matter of Selena J. __AD3d__, 825 NYS2d 749 (2nd Dept. 2006)

The Second Department upheld Queens County Family Court's neglect adjudication against a mother. The mother allowed a cousin access to her home and her children even after a counselor informed her that the younger's child had revealed that the cousin had her buttocks. The mother choose not to believe the child. A few months later she learned that the cousin had sexually abused her 14 year old daughter and she still allowed him access to the home. A reasonable prudent parent would have taken steps to protect the children.

Matter of Mary MM 38 AD3d 956, 831 NYS2d 273 (3rd Dept. 2007)

The Third Department affirmed a finding of neglect regarding a Broome County mother. The mother's 8 year old daughter had been the victim of sexual abuse by a 13 year old boy in another state. DSS found a convicted sex offender at the family home on two occasions after specifically advising the mother on the first occasion that the offender, who was about to begin a prison sentence, should not be in the home. The DSS brought both a sexual abuse petition against the convicted offender who appeared to be residing in the home and a neglect petition against the mother. DSS was unable to prove the sex abuse but the lower court did make a

finding of neglect against the mother. The Third Department agreed that the mother was neglectful even though there was no proof that the current paramour had abused the child. The mother had a known history of associating with sex offenders. The child's father had been a convicted sex offender, she had dated a man convicted of indecent exposure and she was aware that this new boyfriend had plead guilty to sexual abuse in the first degree and was about to be incarcerated as a second felony offender. Allowing this man to be in the presence of her child is more than sufficient for find that she neglected the child. Further it was appropriate to place and keep the child in foster care given that the mother "has used what Family Court charitably termed "extremely poor judgment" in associating with known sex offenders". Until the mother and the child receive counseling and services, it is in the child's best interests to remain in foster care.

Matter of Kayla F., 39 AD3d 938, 833 NYS2d 742 (3rd Dept. 2007)

The Third Department reversed a sex abuse and neglect findings against two parents. An Otsego County father had been placed on probation due to a criminal conviction involving photographing girls undressing in the locker room at the high school where he worked. A condition of his probation was that he not be responsible for the care of any child although he was permitted to live at home with his two children. His 7 year old daughter was in special education and was diagnosed with anxiety and selective mutism and it was alleged that she told a school counselor that she had been alone with her father and that he had put his penis between her legs. The child told the caseworker and law enforcement that she had been alone with her father but did not repeat any allegations of sexual abuse. The older brother also alleged that he knew that his sister had been alone with the father and that he had been alone with the father on at least 2 occasions. Otsego County Family Court found that the father had abused the daughter and derivately neglected the son and that the mother had neglected both children by allowing them to be alone with the father. The Third Department found that the out of court statement by the child about sexual abuse was not sufficiently corroborated, There was no medical evidence offered and there was no expert witness called to interpret any behavior on the part of the child. Given the child's problems, there would need to be specific interpretation of any behaviors of the child. The child did not repeat the allegations to the caseworker or to law enforcement - although that in and of itself would not serve as corroboration as repetitious out of court statements by the same child are not enough. The court can take a strong negative inference from the father's lack of testimony but that cannot

be used to corroborate the child's out of court statement. Since the child's out of court statements were not corroborated, abuse can not be adjudicated and neither can the derivative neglect on the son as there was no underlying abuse for the basis. As to the mother, one parent permitting the child to have contact with the other parent in violation of an order of protection may be, but is not automatically, neglect. Here there was no order of protection and no court had ruled that this father was a danger to his own children. The probation terms specifically allowed him to live in the same house as the children. The mother testified that she had no reason to not trust him with his own children as she had never been aware of any sexual contact. She did know that he had been convicted and what the probation conditions were but leaving them alone with the father on a few occasions is not proof that she failed to exercise reasonable care.

Matter of Christian F. 42 AD3d 716, 838 NYS2d 451 (3rd Dept. 2007)

The Third Department affirmed Tompkins County Family Court's dismissal of neglect proceedings against a grandmother and her boyfriend. The boyfriend was a convicted sex offender and the grandmother knew of the conviction. She had custody of her young granddaughter. The petition against the boyfriend was appropriately dismissed as he had never been legally responsible for the child. It was also appropriate to dismiss the petition against the grandmother as she kept the boyfriend away from the child and in fact terminated her relationship with the boyfriend. (Note: the child was in the home for 15 months before she terminated the relationship) While exposure of a child to a known sex offender can constitute neglect, the grandmother's testimony that she did not allow contact between the boyfriend and the child was believed by the lower court.

Matter of Krista LL, 46 AD3d 1209, 849 NYS2d 398 (3rd Dept. 2007)

The Third Department agreed with Columbia County Family court that a mother had neglected her two children based on her response to her oldest child when the child disclosed that the stepfather was sexually abusing her. When the older girl told her mother of the sexual abuse, the mother's initial response was appropriate. She took the child to counseling and called the state police. Thereafter her conduct was neglectful. She refused to believe that the sexual abuse occurred even when her husband confessed that he had done it. She repeatedly accused the child of lying and breaking up the family. She used excessive corporal punishment on the girl when the girl refused to recant. The mother convinced the younger child that her older sister was lying. After the stepfather was released from jail, the mother

had the older child go live with friends and then permitted the father to return to the home where he was in contact with the younger child. This mother failed to provide any assistance to her daughters over this obvious emotional issue. The mother placed the two girls in imminent risk.

Matter of Jessica P., 46 AD3d 1142, 848 NYS2d 412 (3rd Dept. 2007)

A Columbia County mother neglected her three children by living with her mother and her mother's boyfriend when she had reason to be suspicious of the boyfriend's potential for sexual abuse. After the mother had left the grandmother's home, her oldest daughter revealed that the grandmother's boyfriend had been sexually abusing her for a long time. Both the mother and the grandmother were found to have neglected the children and the mother only appealed. The mother knew that another family member had accused the boyfriend of raping her when she was 17 years old. The mother also had been subjected to unwanted sexual advances by the boyfriend and admitted to being scared to be alone with him. "Most notably", on at least two occasions while living in the home with the boyfriend, the mother asked her daughter if "anything bad" was happening with the boyfriend. Given these concerns, it was neglect to continue to live in the home with the boyfriend, to allow him to be alone with the child and to allow him to bathe the child. The mother claimed that the out of court statements of the child were not corroborated. However, the mother was not charged with sexual abuse, only neglect, and she in fact conceded that the child had been sexually abused. The mother's neglect is based on her failure to take action to protect the child based on her own fears and suspicions about the boyfriend and therefore corroboration of the undisputed sexual acts are not required.

Matter of Ian H., 42 AD3d 701, 840 NYS2d 202 (3rd Dept. 2007)

In a case of first impression, the Third Department reviewed evidentiary issues in a neglect matter from Tioga County. The father in this matter lived with his wife and twin sons. The mother operated a day care in the home and although the father was not an employee of the day care, he did assist from time to time in the care of the day care children. The father was criminally charged with sexually touching two female day care children and DSS then filed an Art. 10 petition alleging that this behavior resulted in derivate neglect of his own children. The proof of the sexual abuse included the taped interview of a 7 year old who had attended the day care until she was about 5 and who disclosed sexual penetration as well as the out

of court statements of a 3 year old who alleged touching when the father assisted her in toileting. The out of court statements that the DSS used to establish the allegations were statements by children who themselves were not the subjects of the petition. The Third Department found that the term “child” in FCA 1046 (a)(iv) is not limited by its’ definition to only children named in the petition. The father also argued that the out of court statements were not adequately corroborated but the Third Department disagreed. The children’s statements cross corroborated each other and the spontaneous circumstances of the out of court statement of the 7 year old also corroborated. The 7 year old former day care child saw the TV report of the father being arrested and was told that he was being arrested for touching little girls and she spontaneously declared “just like he did to me” . The respondent also admitted that he had placed his hands in the vaginal area of the two current day care children under the guise of checking them for wetness and this also supported the older child’s statement that he had touched his penis to her vagina while in the bathroom. Lastly, the respondent failed to take the stand and this also added corroboration and allowed the court to draw a strong negative inference. The father argued that his request to have the 7 year old former day care child testify in court should not have been denied. The lower court acknowledged his obligation to balance the rights of the father against the emotional well being of the child and had all the parties brief the issue and concluded that the child’s age and emotional well being indicated that she should not be made to testify. The derivative neglect finding regarding his own two children was based in the neglect of the day care children as it showed his impaired level of judgment as to appropriate parenting and it was perpetuated on multiple victims when his own children were in the same home.

Matter of Brian L., 51 AD3d 792, 858 NYS2d 286 (2nd Dept. 2008)

The Second Department affirmed Orange County Family Court’s adjudication of neglect against a father and the placement of the children in foster care. The father had been criminally convicted of multiple sexual crimes against other children which demonstrated an impaired level of parental judgment as to create a substantial risk of harm to the children.

Matter of Nassau County DSS v J.P., 21 Misc3d 1126(A) (Family Court, Nassau County 2008)

Nassau County Family Court granted a summary judgment of derivative neglect against a father who had been criminally convicted of sexually abusing the 14 year old “best friend” of his own daughter. His three children were in the home when the acts were committed. The court ruled that it would hold a hearing to determine if the father was a person legally responsible for the victim child to determine if a finding of abuse could be made as to that child.

Matter of Neithan CC., 56 AD3d 1000, 867 NYS2d 758 (3rd Dept. 2008)

The Third Department agreed with Clinton County Family Court that a convicted sex offender neglected his live in girlfriend’s 7 year old child. The respondent had been convicted in 1998 of a felony due to his repeatedly subjecting his former girlfriend’s child to sexual abuse. He is classified as a level three sex offender. He did participate in sex offender treatment while incarcerated. He admitted that he was instructed not to have unsupervised contact with children and not to drink alcohol. The respondent has been alone with the subject child by his own admission, “numerous times” and he continues to consume alcohol.

Matter of Bethanie AA., 55 AD3d 977, 866 NYS2d 372 (3rd Dept. 2008)

A Columbia County stepfather neglected his 17 year old stepdaughter by having sex with her and by not preventing his father, the child’s step grandfather also having sex with her. The child had become pregnant at age 17 and an abuse and neglect petition was filed. The abuse allegation was withdrawn when the evidence indicated that the child was 17 and had “consented” to the sexual contact such that no penal law had been violated and therefore no sexual abuse could be proven. However, the stepfather had lived with the child since she was 4 years old and had treated her as a daughter, therefore his admission that he had, albeit consensual, intercourse with her and may have impregnated her constitutes behavior which is “grossly inappropriate”. Further he was aware that his own father had been seen in a sexual situation with the child when she was 15 years old and he had done nothing about it. He failed to satisfy his parental responsibilities to this child and did not provide her with proper supervision and guardianship. His judgment is significantly flawed and his behavior also resulted in a substantial risk of harm to his step son and his own daughter who also live in the house and who are therefore derivately neglected.

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Matter of Kirk V., 60 AD3d 4271, 874 NYS2d445(1st Dept. 2009)

New York County Family Court properly dismissed a neglect petition ruling that the aid of the court was not necessary given that the older brother who had allegedly sexually abused the younger brother had not lived in or visited the family home for over four years before the decision was issued. ACS was unable to articulate what disposition that were seeking as against the parents given that the older brother had long since been out of the home.

Matter of Patricia B., __AD3d __, __NYS2d __ dec’d 4/21/09 (2nd Dept. 2009)

A Nassau County mother neglected her children as she was aware that one of her sons had sexually abused one of her other children but continued to allow that son to live in the home. The dispositional order of supervision with an order of protection that son who had abused a child could not have contact with the children except in therapeutic counseling was appropriate but could only issued for the duration of one year with a possibility of ongoing extensions.

Matter of Kole HH., __AD3d __, 876 NYS2d 199 (3rd Dept. 2009)

A Broome County father was arrested for sexually abusing the mother’s cousin’s 9 year old daughter who was on occasion in the home. Ultimately the criminal charges were dismissed. The father and mother were alleged in Family Court to have neglected their own two boys. The mother had consented to a neglect order but the father requested a hearing. The lower court found that the 9 year old had been sexually abused in the home but dismissed the petition regarding the two sons as the father had not been a person legally responsible for the 9 year old and therefore this could not form the basis of a derivative finding regarding the sons. The abused child testified in court, albeit unsworn, and her statements were supported by tapes on her interviews with caseworkers in which she provided graphic descriptions of the sexual activity that were clearly inappropriate for her age. The Third Department ruled that the proven abuse of the 9 year old could in fact provide the legal basis for a derivative finding even though the father had not been a person legally for the victimized child. The father’s behavior demonstrates

an impaired level of parental judgment to the extent that his own children are at risk. He lacks the capacity to care for and protect his own children.

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