

Legal Updates for CPS and Child Welfare October 2010

Wednesday, October 20, 2010

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 OCTOBER 2010

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10/20/10 Teleconference

SELECTED CHILD WELFARE CASELAW

MARGARET A. BURT, ESQ. 9/12/10

REMOVALS AND GENERAL ISSUES IN ABUSE and NEGLECT

Matter of Smith Children 26 Misc 3d 826 (Kings County Family Court 2009)

A Brooklyn Judge denied ACS' request for a FCA §1034 access order in the first published decision on the issue. A SCR report had been made on July 13th that there was a concern about ongoing domestic violence in the home and that recently the father had beat the mother such that she required stitches and that this had occurred in front of all the children. On that date and again two days later, the CPS worker left written notes at the family home asking the parents to contact her. On the 20th, the mother and all 5 children appeared at the worker's office but the mother refused to talk to the worker about the situation and would not let the worker speak to the children alone or even in her presence. The mother also refused to set up a home visit. Throughout August and into early September, the CPS worker continued to attempt to make home visits, telephoned and sent letters all asking the parents to speak with her about the allegations. The worker tried to speak with the children at their summer camp and the children refused to speak with her. On September 4th, the worker informed the family by letter that if they did not attend a meeting to discuss the matter, an access order would be sought. When again the parents did not respond, ACS sought a FCA §1034 access order on September 9th. At the application, the court asked who the source of the report was and was told that the source was anonymous. The court was also informed that the family had a prior neglect case. The court adjourned the matter for personal service of the application on the family. (Note: the statute provides for the request to be ex-parte) Although personal service was never effectuated and apparently the family did not appear, the court reviewed the legislative history and the statute and determined that the application for an access order should be denied. There was no "probable cause" to support an application for an order to enter the home. The report was from an anonymous source. The children, when they were observed, seemed clean and healthy. The camp counselors and school personnel did not report any concerns. There was no information that the children

were missing or that they could not be located or that any child's life or health is in immediate danger. The parent's refusal to permit the CPS worker into the home cannot be the sole basis for the order.

Matter of Jesse M., 73 AD3d 780 (2nd Dept. 2010)

In a pending Art. 10 case, Richmond County Family Court released 3 children from foster care into the care of the non-respondent father. This order was made without the court holding a hearing. The children's attorney obtained a stay and brought an appeal. The Second Department reversed, finding that since there were questions raised about the "suitability" of the non-respondent father as a temporary custodian, the court should have held a hearing on the question of his suitability as per FCA §1017 before releasing the children from foster care into the non-respondent father's care.

Matter of Martha A., 75 AD3d 476 (1st Dept. 2010)

The First Department reversed a New York County order in a FCA§ 1028 hearing that released the children to the mother's care. The mother allowed a known abuser to stay overnight in the home and he repeatedly abused the children. She allowed him to stay in the bedroom with the children although she knew he had statutorily raped one daughter when she was 14 and had gotten her pregnant twice. The mother had failed to report the rape, failed to report the sexual abuse of another child by a stepfather. The mother continued her sexual relationship with the boyfriend even after she was aware he had raped her daughter. Although the mother had recently cooperated with the temporary order of protection and kept him away from the children, applying the *Nicholson v Scoppetta* balancing test, it would be in the best interests of the children to be removed from the mother's care while this matter is pending.

ISSUES WITH CHILDREN'S TESTIMONY

Matter of Arlenya B., 70 AD3d 598 (1st Dept. 2010)

The First Department approved of the process Family Court used regarding a child's testimony in a sex abuse matter. The father was alleged to have sexually abused his 13 year old sister in law and therefore derivatively neglected his own daughter. At the hearing, the 13 year old was called to provide testimony but her live in court testimony was interrupted when her voice was inaudible. The child's psychologist indicated that the child had been intimidated by the respondent watching her in open court and that this had led to the child having sleeping difficulties and an increase in her thoughts about the abuse. The court then ruled

that the child could testify via live two way video. The two way live video allowed all the parties to hear the testimony and observe the child's demeanor and allowed for cross examination. The court also then had a full record of the child's testimony. This approach was an appropriate balance between the due process rights of the respondent and the mental and emotional well being of the child. Criminal evidence rules do not apply. The court properly found that the respondent had sexually abused the 13 year old sister in law and therefore also derivatively neglected his own daughter. The 13 year old was placed with her biological mother who was not a respondent and the respondent's child was placed with her mother who also was not a respondent.

Matter of Justin CC., __AD3d__ dec'd 7/1/10 (3rd Dept. 2010)

In a significant decision originating in Chemung County Family Court, the Third Department ruled that sealing the testimony of a child made in a "Lincoln" hearing in an Art. 10 fact finding is inappropriate. The case involved allegations that the 4 children were subjected to excessive corporal punishment and that the father had also sexually abused the teenage stepdaughter including having sexual intercourse with her on multiple occasions. The stepdaughter's attorney asked the Judge to do what she called a "modified Lincoln" where the Judge would hear the child's testimony with all the attorneys present but without the parties present. It appeared from the lower court's record that no one objected to the procedure. The child was allowed to testify and was fully cross examined by all the attorneys but the respondents were not present. The lower court made a finding of abuse regarding the daughter, derivative abuse regarding the three other children and neglect regarding all the children. A transcript was made of the daughter's "Lincoln" and that transcript was marked confidential by the Family Court and delivered to the Third Department under seal. On appeal, the father's lawyer moved for the transcript to be unsealed and made available for purposes of the appellate process, arguing that a "Lincoln" sealing procedure is only statutorily available in Art. 6 custody cases. The father's attorney indicated that she had been present at the child's testimony but she needed the transcript to prepare her appeal. The appellate court agreed that the transcript should not have been sealed and reopened the transcript.

The Third Department reviewed the history of "Lincoln" hearings and ruled that these are hearings allowed by case law and statute in Art. 6 custody cases. The process consists of the court talking to the child with just the child's attorney present – not the other attorneys. Further what the child says in an Art. 6 Lincoln is not disclosed to the parties and the statute clarifies that the testimony is kept under seal even during the appellate process. In an Art. 10 proceeding, a

respondent has due process rights and the position of a child in such a proceeding may be adverse to the respondents. Clearly in an Art. 10 proceeding, the court can determine that the child is going to testify outside of the presence of the respondents but that should only happen after a hearing on the record where the court balances the due process rights of the respondents with the mental and emotional well being of the child. Deciding to hear the child's testimony outside of the hearing of the respondents should only be done where the court concludes that the child could suffer emotional harm by being made to testify in front of the respondents. The purpose of the child's testimony in Art. 10 case is quite different than in an Art. 6. In custody cases the "Lincoln" hearing is used to help the court corroborate the evidence heard in open court. In Art. 10 cases the child's testimony may be the key corroboration to the child's out of court statements of abuse. In this particular case, the child's testimony in the "modified Lincoln" became a significant issue as the defense argued that the child's testimony was inconsistent with her out of court statement. All counsel need access to the transcript in order to properly argue the appeal. The Third Department stated "...where a child provides testimony during a fact finding stage of a Family Ct Act article 10 proceeding" is a situation where the respondent is not present but all "counsel are present and afforded a full opportunity to cross-examine the child, the child's testimony shall not be sealed." The court ruled that the parties would be given the transcript of the child's testimony and be allowed to re-brief the appeal.

Matter of Jesse XX., 69 AD3d 1240 (3rd Dept. 2010)

Two Chenango County parents neglected their three children. A series of petitions had been filed regarding a variety of allegations against the parents, The Third Department concurred that the proof established neglect of the children. The father frequently used alcohol and was violent to the children and to the mother in front of the children. He hit them, slapped them and spanked them. He overturned a couch when one child was sitting on it, choked another child and threw her across the room. He had sexually abused the oldest on two occasions – one time when the mother was present. The father seemed to have mental health problems, talked to himself, and talked of events that had not happened. He threatened and verbally abused the caseworkers. He took the children's money from them and spent it and other family money on alcohol. The parents lived in a tent at one point with one of the children although neighbors offered housing. They refused other housing for the family as it would mean that they would have to give up their dogs. The mother allowed the father to continue to hurt the children, left the children in his care when he was drunk and offered to give up her children to be able to stay with the father. The father did not testify at the hearing and the strongest of

inferences can be drawn against him. The mother's testimony had many inconsistencies and contradictions .

The court did conduct an in camera hearing with the children after the DSS made a written motion to do so. The respondents did not object nor did they request the alternative of the children being subpoenaed for testimony. The parents did not ask to be present. The court advised the parties how it would conduct the in camera and accepted questions submitted by the father. After the in camera, the court met with the parties and summarized what the children had said and indicated that the parties could have transcripts. The parents did not ask for transcripts nor did they ask to cross examine the children. When they argued on appeal that their due process rights were violated by the in camera with the children, the Third Department found that due to their actions, they had failed to preserve the issue.

DERIVATIVE ISSUES

Matter of Majarae T., 74 AD3d 1784 (4th Dept. 2010)

A Erie County mother had her parental rights to her older child terminated by reason of mental illness and the DSS then made a motion for summary judgment regarding a neglect petition filed on a new baby. The Fourth Department affirmed the summary judgment on neglect. There are no triable issues of fact in the new neglect when the court had just ruled in the TPR that the mother was incapable of caring safely for a child in the foreseeable future. At the TPR, the testimony was that the mother had a bipolar disorder, ADD, PTSD, RAD, a psychotic disorder, was possibly autistic, had lead poisoning and a thyroid condition and was dependant on marihuana. She had threatened to "blow up" DSS. She does not take prescribed meds, will not follow medical advice and has not completed mental health, substance abuse or anger management programs. At the TPR, the evidence was that she would create a substantial risk of harm to any child in her care.

Matter of Dana T., 71 AD3d 1376 (4th Dept. 2010)

The Fourth Department reversed a derivative neglect finding from Onondaga County Family Court. The mother argued that her rights were abridged when the lower court failed to schedule a requested FCA §1028 hearing within 3 court days and the appellate court agreed with her. Since no "good cause" was shown, the removal hearing should have been held within 3 days. Further the Fourth Department reversed the neglect finding itself. The mother had been found to have neglected two children five years earlier due to the condition of her home and the

lack of proper medical treatment for the children. This is too remote in time to serve as a basis for a derivative on the newborn baby particularly as there was no evidence that the conditions were still the same. The agency had only had limited contact with the family in the last two and a half years and could not testify as to the mother's current situation.

Matter of Nyjaiah M., 72 AD3d 567 (1st Dept. 2010)

The First Department reversed the Bronx County Family Court's dismissal of a derivative neglect petition regarding a father's three daughters. On appeal the court determined that there was derivative neglect and that it warranted the removal of the three children from his care. The father had been found to have sexually abused an older daughter in 2004. He had admitted in 2004 that he had improperly touched the older daughter's genitals. The sexual abuse of this child took place continually over a four year period and there was no evidence that the respondent had changed his proclivity for sexually abusing children. In fact he had "blown on" the exposed genitals of his 6 month old and placed the head of his 3 year old daughter under his shirt near his crotch mimicking oral sex. The fact that the prior abuse was five years old was not relevant.

Matter of Takia B., 73 AD3d 575 (1st Dept. 2010)

New York County Family Court granted a summary judgment motion and found that a new baby was derivatively neglected. The adjudication was affirmed on appeal. A few months earlier both parents had been found to have neglected and abused their older children. Their five month old son had unexplained injuries - four broken ribs and a fractured clavicle. The father had admitted to beating a five year old. These events were very proximate in time and the parents failed to offer any evidence that the conditions that led to the finding a few months earlier had been resolved.

Matter of Christopher C., 73 AD3d 1349 (3rd Dept. 2010)

The Saratoga County father of young child had a history of sexual abuse of children. He had been convicted of sexual abuse of his niece and served time in jail and was a level three sex offender. He also admitted sexually abusing another niece over the course of a three year period, including engaging in sexual intercourse. These events occurred when he lived in the home with the nieces. Further he had sexually abused an unrelated 8 year old boy. He had not completed sex offender treatment. When he fathered this baby, DSS became involved and still he was unable to complete any sex offender treatment as the program discharged him due to his untruthfulness. They recommended that he have no contact with any child at all due to his high risk of reoffending. The Saratoga County Family

Court dismissed the petition. DSS appealed and the Third Department reversed. The father not only had a lengthy history of sexually abusing children but this history included male and female children, related and unrelated and had gone on for years. He failed to stay in treatment even at the risk of having a neglect petition filed regarding his own child. He did not act as a reasonably prudent parent to prevent imminent danger to his son.

Matter of Abraham P., 69 AD3d 492 (1st Dept. 2010)

The Bronx County Family Court issued a derivative abuse adjudication against a mother, which resulted in her children being placed in foster care. The adjudication was affirmed on appeal. The mother's 4 month old son had died of asphyxiation due to a coin being lodged in his throat. The child was not developmentally mature enough to have picked up the coin himself and there had been a previous choking incident. The baby had been in her exclusive care. The mother's other children were therefore derivatively abused. At the very least there was proof that she took no action to assist the baby when he was unable to breathe on two occasions. The strongest inference can be drawn against the mother for her failure to testify.

Matter of Anthony Y., 72 AD3d 1419 (3rd Dept. 2010)

A Broome County mother and her parents were found to have neglected the mother's four children. The mother had medical problems and arranged for the children to primarily reside with her parents. The grandparents had a long child protective history. In 1991 the grandfather had been convicted of raping his then 14 year old daughter – this mother's sister. He had also forced his son to have sex with the sister as well. He also had been convicted of assault on the grandmother and served prison sentences for these actions. When he was released from prison, he was not allowed contact with children – including his own -- while he was on parole. He is a level two sex offender. The parental rights of these grandparents to their own children – including this mother – had been terminated. When Broome County DSS learned that these grandparents were now caring for the four grandchildren, they brought neglect proceedings. Broome County Family Court determined that all three were neglectful in exposing the children to the grandfather. The grandparents appealed the findings as to them, supported by the children's attorney. Their argument was that the grandmother protected the children from the grandfather and that the lower court ruled that neglect existed solely based on the fact that the grandfather was a level two sex offender. In fact the lower court had found ample evidence beyond the classification. The grandfather did participate in sex abuse counseling in prison but was not accepted into treatment when he was released and had had no treatment since then. The

grandparents were often with the children, including overnight. The grandmother denied that there was any reason that her parental rights should have been terminated in the past. She did not know the details of the grandfather's sexual abuse of their own children and had never spoken to him about getting further treatment. She was willing to leave the grandchildren alone with him and "if something happened, turn it in". These grandparents fail to understand the dynamics of sexual abuse and the grandchildren are at imminent risk of substantial harm.

GENERAL NEGLECT

Matter of Jahyalle F., 66 AD3d 1019 (2nd Dept. 2009)

The Second Department affirmed a Rockland County Family Court adjudication of neglect based on the mother having placed her child in a hot oven as a punishment. The behavior demonstrated a fundamental defect in her understanding of parental duties such that the other children were derivately neglected.

Matter of Alasha M., 67 AD3d 476 (1st Dept. 2009)

The First Department affirmed a Bronx County Family Court neglect adjudication against the mother of 4 children. One child was neglected as the mother should have known that the child was in danger of being sexually abused by the mother's live in boyfriend. The mother did not supervise his access to the child and therefore demonstrated impaired parental judgment that supported derivative findings for the other children.

Matter of Stephanie S., 70 AD3d 519 (1st Dept. 2010)

New York County Family Court found that a father had neglected his daughter and an older sister to the child. The father exposed the children to harm by failing to ensure that the girl's mother attend a court ordered drug treatment program and remain drug free. He allowed the mother unsupervised access to the children – who were 4 years old and 10 months old – even when he had been repeatedly told not to leave them with her. The father claimed that since ACS was supervising the family, it was their job to deal with the mother. The First Department agreed with the lower court that since the children lived with him, he was responsible to deal with their safety and he had in fact exposed them to harm. The adjudication was affirmed as was the dispositional order that left the 10 month old in his care but under ACS supervision and placed the 4 year old with her non respondent biological father, also under supervision.

Matter of Janice G., 70 AD3d 1210 (3rd Dept. 2010)

A Chemung County mother had placed her child with relatives but the child ran away and was placed in foster care on a PINS. Thereafter DSS filed a neglect petition against the mother and the Third Department affirmed the lower court's adjudication. The mother simply wanted no contact or involvement with her child. The mother would not cooperate with DSS, would not visit the child or participate in her schooling or mental health counseling. The mother stated that she did not care what happened to the child and wanted the state to take care of her daughter. The child was depressed, suicidal and had to be placed in a treatment center. This was at least partially due to her mother's behavior.

Matter of Clydeane C., 74 AD3d 486 (1st Dept. 2010)

The First Department reversed New York County Family court's finding of neglect in a "dirty house" case. The mother and her 11 year old daughter lived with an elderly man and took care of him- bringing him to medical appointments and cooking for him. The man died at age 96 after they had lived there and cared for him for 3 years. The man's son then attempted to have them evicted. At the suggestion of the police, the mother went over to the housing court to attempt to stop the eviction and the son then called CPS to report a child had been left alone. The apartment was cluttered but many of the things were legal files that belonged to the old man. The kitchen was dirty and the caseworker said there was a mild smell of urine. However a musty or urine smell in the apartment of an elderly sick man is not unusual. The cat feces found in one room is not unexpected in a home with a pet cat. The home may have been far from ideal but none of these conditions seemed to have impacted the child. The 11 year old had adequate sleeping conditions and was observed as well taken care of, verbal, very smart and was attending school and passing. The child sometimes had body odor and dirty clothing but she was not at imminent risk of neglect. Further either leaving an 11 year old alone or with a known adult in an apartment for 2 hours is not neglect.

Domestic Violence

Matter of Errol S., 66 AD3d 579 (1st Dept. 2009)

A Bronx father neglected his children by committing acts of domestic violence against the children's mother in their presence. The acts included threatening the mother with a firearm. One of the children witnessed the acts, another child was present but asleep nearby and therefore both were at imminent risk of harm.

Matter of Enrique V., 68 AD3d 427 (1st Dept. 2009)

A Bronx father neglected his children when he committed acts of domestic violence against the mother in their presence. “No expert or medical testimony is required to show that the violent acts exposed the children to an imminent risk of harm”

Matter of Celine O., 68 AD3d 1373 (3rd Dept. 2009)

The Third Department affirmed a Broome County finding of neglect against a mother and her boyfriend. The mother had appealed. The children were 16 and 11 and they were aware of the domestic violence that the boyfriend was perpetrating on the mother. The boyfriend began physically abusing the mother soon after he moved in and although the children did not see the fighting, they hear it and saw the mother’s injuries. The children feared for the mother’s safety. In one incident, the mother sought medical attention and called the police from the hospital. She promised the police that she would take the children to a shelter but instead she returned home to the boyfriend who physically assaulted her again. A few days later, the children came home from school to find the mother and the boyfriend gone. The 16 year old found a note under his pillow to call 911 and he did, fearing for his mother’s safety. The mother had driven out of state with the boyfriend and left the children unattended and with little food. The mother minimized her actions and lacked insight into the effect the incidents had on her children. The children were placed in the care of a grandmother.

Matter of Briana F., 69 AD3d 718 (2nd Dept. 2010)

A Suffolk County father neglected his son and derivatively neglected his daughter . The father demanded that the son get the father a knife which he then held to the mother’s neck in the presence of the son. This action impaired the child or created an imminent danger of impairment to the child’s physical, emotional and mental condition. The daughter was derivatively neglected as well. The disposition that the father undergo mental health and substance abuse evaluations was appropriate.

Matter of Niyah E., 71 AD3d 532 (1st Dept. 2010)

A Bronx father neglected his daughter by engaging in domestic violence against the child’s mother in the girl’s presence. No expert or medical evidence needed to be presented to prove the risk to the child in these circumstances. The child was appropriately released to her mother under agency supervision.

Matter of Shiree G., 74 AD3d 1416 (3rd Dept. 2010)

The Third Department agreed that a respondent had neglected children when he grabbed the pregnant mother, threw her into a wall. The mother grabbed a knife

and held it to the respondent's throat. The children were present and were terrified, screaming and crying, hysterical and trying to get to the mother.

Matter of Eustace B., __AD3d__, dec'd 8/10/10 (1st Dept. 2010)

The First Department reversed an order that had denied a respondent mother's motion to reopen a neglect entered upon default. The lower court determined that there had been a one time incident of domestic violence where the child felt "scared and nervous". This is not sufficient for a finding of neglect, Further the "aid" of the court was not necessary here where the child wanted to stya with his mother, the child was a "model person and student" and the mother had ended the relationship with the boyfriend.

Alone/Unsupervised

Matter of Susan XX., 74 AD3d 1543 (3rd Dept. 2010)

The Third Department refused to overturn a fair hearing decision and determined that the behavior of a Tioga County mother constituted an indicated report. The fair hearing decision had ruled that the indication was not "reasonable related" to the care of children and so it would not be disseminated but continued it as an indicated report. The mother had left her two children in a locked car at 9pm at night while she went into a store. A passerby called law enforcement who waited by the car for 20 minutes before the mother arrived back with shopping bags. The children were asleep and in car seats and the car had been left running . The mother claimed that she did not want to wake the children and had left the motor running so the air conditioning would be on. She thought it was safe as she could see the car from the store. It did not seem that the mother could in fact see the car as the deputy was by the car for 20 minutes and the mother did not exit the store. Leaving children for a such a period of time in a locked running car is so inherently dangerous that it carried a very high risk the child children could be harmed.

Matter of Serenity P., 74 AD3d 1855 (4th Dept. 2010)

The Fourth Department affirmed Erie County Family Court that a mother neglected her children by leaving a one and a three year old alone in a car for at least 15 minutes while she was grocery shopping.

Matter of Joyce AM., 68 AD3d 417 (1st Dept. 2009)

A Bronx mother neglected her children when she failed to pick them up from day care and the police had to be called . She had been found to have neglected the children in the past in a separate proceeding.

Matter of Febles v Dutchess County DSS 68 AD3d 993 (2nd Dept. 2009)

In an Art. 78 appeal from a fair hearing that denied a mother's request to unfound a report, the Second Department confirmed the ruling. Witnesses indicated that the mother had left her 7 year old son in a car with the engine running for at least 20 minutes while she was in a store.

Parental Substance Abuse

Matter of Fernando S., 63 AD3d 610 (1st Dept. 2009)

A Bronx father failed to provide adequate guardianship and supervision of his children. He admitted in federal court that he sold drugs and possessed loaded firearms in the home with his children.

Matter of Brian W., 66 AD3d 791 (2nd Dept. 2009)

The Second Department affirmed Suffolk County Family Court's neglect adjudication. DSS established a prima facie case under FCA §1046 (a)(iii) given the mother's use of drugs. The mother did not prove the exception to the statutory presumption that she was regularly and voluntarily participating in a recognized rehabilitation program.

Matter of Albert G. Jr., 67 AD3d 608 (1st Dept. 2009)

A New York County father was properly adjudicated neglectful and his children placed in foster care. He should have known of the mother's substance abuse and he failed to protect the children from it.

Matter of Taliya G., 67 AD3d 546 (1st Dept. 2009)

The First Department affirmed New York County Family Court's adjudication of neglect. The mother knew or should have known that her live in boyfriend was selling drugs out of her apartment. Her seven year old son had access to the drugs as they were stored in his dresser. The lab report analyzing the drugs did not require a delegation of authority as it was not a record that related to the child. There were reasonable assurances that identified the drugs as the ones recovered from the home and that they were in an unchanged condition. The mother's infant is also derivately neglected due to the neglect of the seven year old. Also there

was a risk that the seven year old could have given drugs to the infant, even if there was no proof offered that the children were left together unsupervised.

Matter of Tylasia B., 72 AD3d 1074 (2nd Dept. 2010)

The Second Department agreed with Suffolk County Family Court that a father had neglected his 8 year old daughter when he did nothing to prevent the child from getting into a car driven by the child's mother who he knew to be intoxicated. The father also admitted that he had an ongoing substance abuse problem. This behavior shows an impaired level of parental judgment such that the son was derivatively neglected.

Matter of Arthur S., 68 AD3d 1123 (2nd Dept. 2009)

The Second Department reviewed the FCA §1046(a)(iii) presumption of neglect based on a parent's misuse of drugs and reversed the dismissal of an Art. 10 petition by Richmond County Family Court. The mother had admitted to ACS that she had used illegal drugs for a long time. In 2008, she had tested positive for various drugs and had been arrested for possession of marijuana. She was asked to leave a treatment program in 2008 for failure to comply and for avoiding drug tests. This long term use of drugs, her failure to stay and make any progress in treatment and her history of erratic behavior established the mother's neglect. The lower court erred, as a matter of law, when it dismissed the petition based on the failure of ACS to show any impairment or imminent impairment to the child. The presumption of FCA §1046(a)(iii) does not require such a showing.

Matter of Christine Y., 75 AD3d 831 (3rd Dept. 2010)

A Saratoga County mother was indicated in a CPS report and the Third Department agreed that the report should not be unfounded. The mother took her 3 year old to a party and when the child was disruptive, she left the party with the toddler. It was after midnight and after she had been drinking. She was pulled over by the State Troopers for swerving and her BAC was .09%. She pled guilty to driving while ability impaired. She failed to properly care for her child and placed him at imminent risk of physical injury when she drove with him in the car when her ability to drive safely was impaired by alcohol.

Excessive Corporal Punishment

Matter of Kathleen K., 66 AD3d 683 (2nd Dept. 2009)

A Suffolk County Family Court adjudication of neglect was affirmed on appeal. The father had neglected his daughters by punching one in the face and leaving red

marks, grabbing the other child's arm and leaving bruises as well as subjecting them to extreme, repeated verbal abuse. Both children stated that they wanted to run away from home.

Matter of Corey Mc. 67 AD3d 1015 (2nd Dept. 2009)

The Second Department reversed a neglect finding made in Queens County Family Court. The incident occurred between the mother and her 15 her old son – who the appellate court pointed out was 5'10". The mother confronted her son in his room about an incident where he had been inconsiderate. The teenager left his room and "directed a stream of profanity laced invective" at his mother. The mother attempted to withdraw but then she struck him in the face. This caused the son to knock his mother down and continue to curse at her. In response she hit him in the face with the heel of her shoe causing a bloody nose. The mother then called the police asking for medical attention for her son. Although her responses to the child's behavior were not appropriate, they were not neglect. The age and size of the boy, the provocation and the dynamics as well as the mother's acknowledgement of her inappropriateness mitigate against a finding that this one action constituted neglect as defined by law.

Matter of Alexander J.S., 72 AD3d 829 (2nd Dept. 2010)

The Second Department reversed Suffolk County Family Court 's adjudication that a father's discipline was excessive and therefore constituted neglect. When the child disobeyed him, the father pulled on his daughter's shirt and she fell on the floor, injuring her wrist. He spanked her on the buttocks and hit her on her arm with his open hand. There was no evidence that he intended to injure her or that he had used corporal punishment as a pattern. A single act can constitute neglect but this act was not sufficient to adjudicate neglect.

SEX ABUSE

Matter of Anahys V., 68 AD3d 485 (1st Dept. 2009)

The First Department affirmed a Bronx County Family Court sex abuse adjudication against a father. The children made out of court statements that were corroborated by the one child's change in demeanor when talking about the father. Expert testimony of a psychologist was presented that the child's disclosures were both consistent and lacked the "robotic" quality of coached children. The child had told a therapist that the father had sexually abused her and her sister and that she was angry and afraid of him, had nightmares and other symptoms. The children's statements cross corroborated each other and were similar although the

younger child had verbal limitation and was not able to be very detailed. The older girl repeatedly said that the father had touched the younger sister in the same way he had touched her. The expert's report was admissible in evidence without redacting the statements made by the children's foster mother as her statements were not admitted for the truth but to show what information the expert had relied on.

Matter of Isaiah F., 68 AD3d 627 (1st Dept. 2009)

The First Department affirmed a sex abuse adjudication from Bronx County Family Court. A mental health expert testified about the child's behavior based on observations, the child demonstrated to the expert using dolls. The expert's opinion corroborated the child's prior consistent out of court statements. The child had also repeated the disclosures to the expert. The brother's out of court statements also corroborated the abuse. The lower court properly found that the "Able" test results were not admissible as this test is designed to diagnose and treat pedophilia. It does not apply to interfamilial sexual abuse which is the result of family dynamics and not a result of the general sexual interest in children.

Matter of Aaliyah B., 68 AD3d 1483 (3rd Dept. 2009)

The Third Department affirmed a Broome County sexual abuse finding against a father regarding his 8 year old daughter. The child made out of court statements that her father had touched her genital area and made her perform oral sex on him. The child corroborated this out of court disclosure with sworn in camera testimony about the details of sexual incidents. The child was allowed to testify in camera outside of the presence of her father but was cross examined and the lower court was able to observe her demeanor. The mother also testified that shortly before the child's allegations, the father had told her that it was customary in his culture for a father to take his daughter's virginity. The mother also had witnessed the father making the child touch his scrotum and had suspected the father of sexual contact with the child once when the child had slept with the two of them. On another occasion when the child slept with them, the mother noticed that the child no longer had any underwear on in the morning. The mother testified that the father had admitted to sexual contact with the child. The child's out of court statements were sufficiently corroborated and the adjudication was appropriate.

Matter of Brooke KK., 69 AD3d 1059 (3rd Dept. 2010)

The Third Department affirmed a sex abuse adjudication regarding a father and his 3 year old daughter. The testimony indicated that at the emergency room, the child told the nurse that her vagina hurt and when asked why said said , "Daddy.

Daddy's big finger." She made similar statements to the caseworker but then would say no more. The child did have redness and soreness in the vaginal area but the doctor could not say this was due to sexual abuse as the child had other conditions that could have caused these symptoms and in fact continued to have the symptoms long after contact with her father was ended. The child's out of court statements were sufficiently corroborated, though, by statements the father made to a State Police investigation. He admitted he had touched the child's vaginal area on two occasions and told two investigators that he "needed help". The father produced expert testimony that he was easily manipulated and had been pressured into making the statement but the court found the father's testimony that he had not touched the child weak and unconvincing.

Matter of Destiny UU., 72 AD3d 1407 (3rd Dept. 2010)

Schenectady County Family Court correctly ruled that a five year old had been sexually abused by her father. The child gave detailed out of court disclosures that were corroborated by her age inappropriate knowledge. She gave graphic descriptions of sexual acts. An expert witness testified that the child demonstrated the behaviors of a sexually abused child and that it was likely that the father had been the abuser. The child also provided unsworn testimony in camera. The father provided improbable testimony that he had never been alone with the child.

Matter of Aaron H., 72 AD3d 1602 (4th Dept. 2010)

The Fourth Department affirmed Oneida County Family Court's vacating and order that had dismissed a severe abuse petition. After the court had dismissed the petition based on mother's testimony that she did not abuse the child, the mother entered an Alford plea in criminal court with respect to sexually abusing her child. Family Court had authority to vacate the prior order in the interest of justice. Even though she made no admissions, her Alford plea is a criminal conviction for sexual abuse which constitutes conclusive proof of the abuse allegations in Family Court.

ARTICLE TEN DISPOS and PERMANENCY HEARINGS

Matter of Leon K., 69 AD3d 856 (2nd Dept. 2010)

The Queens parents of three children pled guilty in criminal court to felony assault charges regarding the injuries to one of the children. The Second Department concurred with ACS and the children's attorney that these convictions warranted summary judgment of abuse regarding that child and derivative abuse regarding the other two. However, as to severe abuse, the Second Department, found that

diligent efforts had not been proven as required by SSL § 384-b(8) (a) (iii) (C) and therefore severe abuse and derivative severe abuse findings were inappropriate. ACS “conceded” this on appeal. The Second Department noted that ACS was free to establish the diligent efforts issue in further proceedings. NOTE: Both the First and the Second Departments continue to incorrectly read the diligent efforts requirement of a severe abuse TPR into the Art. 10 severe abuse definition. The severe abuse finding in an Art. 10 allows for a motion that no diligent efforts are needed as a disposition which then sets up the severe abuse termination. It is completely illogical and an incorrect reading of the statute to require diligent efforts to be proven in order to find severe abuse in an Art. 10.

Matter of Dashawn W., 73 AD3d 574 (1st Dept. 2010)

The First Department reversed New York County Family Court’s dismissal of the severe abuse cause of action in a physical abuse case. Applying the criminal case law standards regarding the “depraved indifference to human life” requirement, the lower court had ruled that severe abuse was not proven. The First Department however found that the father’s actions on separate occasions that resulted in his five month old baby sustaining a fractured clavicle and some four to seven broken ribs did evince a depraved indifference either intentional or reckless as per SSL § 384-b (8)(a). The First Department then remanded the matter for the lower court to reach the issue of diligent efforts which the Appellate Court interpreted to be a requirement in the determination of Art. 10 the severe abuse.

NOTE: Unfortunately, yet again the Appellate Division seems to have misread the definition of Art. 10 severe abuse. There is no “diligent efforts” finding needed to adjudicate severe abuse in an Art. 10 action. That finding is only needed for a termination on the severe abuse grounds . The severe abuse Art. 10 adjudication allows motion to make a finding that no reasonable or diligent efforts are needed – it is nonsensical to require a finding of diligent efforts to make a finding that diligent efforts are not needed.

Matter of Davion A., 68 AD3d 406 (1st Dept. 2009)

The First Department affirmed a New York County Family Court decision that a father had inflicted excessive corporal punishment on one child and had engaged in domestic violence against the nonrespondent mother in front of the children , therefore neglecting the children. The court released the children to the nonrespondent mother under the supervision of ACS. (Note: the release to the nonrespondent mother was under FCA 1054, not an Art. 6)

Matter of Randi NN., 68 AD3d 1458 (3rd Dept. 2009)

The Third Department reversed a Schenectady Family Court's dismissal of a grandmother's motion to terminate the foster care placement of her grandchild. The child was removed from the parents in August of 2005. The DSS caseworker at the time called the grandmother, who had custody of two of the child's siblings, and left her message to call back but provided no other information. Three weeks later, a counselor of the grandmother's called the DSS caseworker and according to the worker's notes told her that the grandmother did not want custody.

Grandmother denied that she had ever said that or had authorized the therapist to say that on her behalf and the counselor repeatedly failed to respond to any subpoena for her testimony. The subsequent DSS caseworker admitted that he had never had any conversation with the grandmother about custody or foster care possibilities. The grandmother claimed that she told the DSS attorney in November, 3 months after the child's removal, that she would file for custody of the child if that was needed but DSS did not take any action or give her any information. Five months after the child had been placed in foster care, the grandmother filed a visitation petition and a year after the child had been in care the grandmother filed a custody petition as well as a motion under FCA §1061 to modify the court's prior order placing the child in foster care. At this point, although the child's goal was still reunification, DSS had begun termination proceedings and intended to have the child be freed and adopted. The lower court denied the grandmother's motion to terminate the placement.

The appellate court criticized DSS for not following the requirements of FCA §1017 and not clearly notifying the grandmother of the removal and explaining her options for custody and foster care. The statute is to protect the rights of the child to be placed with their relatives, not just to protect relatives. A placement order should be set aside where a failure to comply with the statute prejudices the relative as well as the child's rights. The burden is placed on the DSS to explain the options to the relative, it is not on the relative to ask. The grandmother claimed that if she had understood her options, it would have helped her see what she could do. She was not told that her inaction could ultimately lead to the foster parents having the child. The Third Department reversed the dismissal and remanded the matter for a de novo determination if the grandmother is a suitable placement and if the child should be placed with her.

The Third Department also stated that the child's attorney did not need to be replaced as there was no conflict of interest in her prior role as an attorney for some of the siblings, even if those siblings now seek sibling visitation with this child that the child's attorney may oppose. In footnotes, the court commented that since the facts here, FCA §1017 has been amended and DSS has even clearer responsibility re relatives. The court lastly commented that there was no need to

address the grandmother's claim that the Family Court Judge involved had behaved inappropriately as the judge had recused herself.

Matter of Caitlyn U., 69 AD3d 1012 (3rd Dept. 2010)

The Third Department affirmed an Albany County finding that a respondent was clearly and convincingly in willful violation of the dispositional order entered after a sexual abuse adjudication. The respondent was found to have sexually abused his stepdaughter and was placed under the supervision of DSS. Part of the dispositional order was that he successfully complete sex offender treatment. The DSS filed a violation alleging that he had been discharged from the program for a failure to cooperate and the lower court found him in violation. The father argued on appeal that the order had not said when he had to finish the treatment program and that he had attended every session until he was discharged. However the order had required him to fully cooperate and successfully complete the program and he did not do that. He had been repeatedly told that he had to acknowledge the abuse to reach the treatment goals and he would not do so. He even refused alternative treatments that would have not required acknowledgement such as taking a polygraph, discussing hypothetical sexual abuse or watching a videotape on sexual abuse. He also failed to let the DSS know where he was living. The lower court was free to draw a negative inference from the respondent's failure to offer any evidence at the violation hearing.

Matter of Heaven C., 71 AD3d 1301 (3rd Dept. 2010)

In a much discussed case, the Third Department ruled that 22 NYCRR 130-1.1a (a) requires that all permanency hearing reports must be signed by an attorney for the social services agency responsible for the report as it is a "paper" that is "submitted to the court". A report pursuant to FCA Art. 10-A is not listed in the regulation as being one of the exceptions to the attorney certification rule. The Third Department did say that an unsigned report "need not be stricken" if the omission is "corrected promptly after being called to the attention of the attorney" NOTE: The current mandated forms for permanency reports do not carry this certification language and most attorneys have not been reviewing every one of the permanency hearing reports in their county and without a change in the law, this will be a very daunting process for some of our larger counties and could delay the timely filing of reports.

ABANDONMENT TPRs

Matter of Alex Jordan D., 66 AD3d 1013 (2nd Dept. 1013)

The Second Department affirmed that a Suffolk County mother abandoned her child. The fact that there was an order of protection prohibiting contact did not excuse her from having contact about the child with DSS. The mother's incarceration also did not excuse her from keeping in contact with the agency about the child's status. The court found it significant that the caseworker visited the mother in prison twice during the relevant 6 months and on both occasions she expressly told the worker that she did not intend to parent this child.

Matter of Mahogany Z., 72 AD3d 1171 (3rd Dept. 2010)

The Third Department reviewed an abandonment termination from Albany County Family Court. The child's attorney argued that the appeal was moot as the child had been adopted. The Third Department ruled that an adjudication of abandonment carries a serious stigma and should be reviewed regardless of the adoption having already occurred. The Third Department then found that the proof of the father's abandonment was clear and convincing. He was aware of the child and visited her once at the birth. He did not interact with the child or DSS during the 6 months preceding the TPR filing. The father claims that DSS did not make enough effort to involve him – but the appellate court found that diligent efforts on the part of the agency are not required in an abandonment TPR. In fact the DSS did make diligent efforts to seek him out and made multiple efforts to contact him at the location where he lived with no response. The court need not hold a dispositional hearing in an abandonment.

NOTE: The court did not comment on what they would have ruled regarding the adoption had they in fact overturned the TPR. Regulations require that local DSS not consent to the adoption of any foster child while an appeal is pending and DRL requires the consent of the agency before the court can finalize an adoption.

MENTAL ILLNESS and MENTAL RETARDATION TPR

Matter of Darren HH., 72 AD3d 1147 (3rd Dept. 2010)

The Third Department affirmed terminations of parental rights on mental illness grounds to two Clinton County parents. The children were in care due to sexual abuse and the father had a history of sexually abusing children. The licensed psychologist who interviewed the parents also administered tests and reviewed prior mental health evaluations, court findings, school reports from the mother's childhood and DSS records. The psychologist testified that the mother suffered

from a personality disorder, with anti social narcissistic features, an anxiety disorder, a post traumatic stress disorder, borderline intellectual functioning and a learning disorder. She continued to deny that the father had sexually abused children even though he had admitted to it. She was unable to multi task, had no empathy for her children and could not follow recommendations from caseworkers or court orders all due to her mental illnesses. The psychologist testified that the father had pedophilia, a personality disorder, anti social features and borderline intellectual functioning. He is impulsive, places his needs above his children's, is unable to consider the welfare of other people, does not understand consequences and has a lack of conscience. He adamantly denies any wrongdoing which make it virtually impossible to treat the pedophilia.

Matter of Karen GG., 72 AD3d 1156 (3rd Dept. 2010)

A Clinton County mother's rights were terminated when the licensed clinical psychologist testified that the mother suffered from a personality disorder with dependant antisocial features, borderline intellectual functioning and a longstanding chronic low to moderate level of depression. She was not able to problem solve and protect the children. The children had special needs and she could not meet their proper medical care. Her mental health problems led to interpersonal issues – such as her repeated decision to become involved with various sex offenders. She was unable to improve her parenting skills due to her mental illness and she could not understand how to feed her son who had a swallowing disorder. She would not discipline her daughter as she did not want the daughter to not like her. She could not safely care for her children for the foreseeable future. The expert had reviewed the mother's background information, court orders, prior petitions , case notes, mental health records, interviewed the caseworkers, homemakers as well at the respondent herself. Although some of his findings differed from some prior evaluations, the psychologist explained that the other evaluations were in different contexts and his were more comprehensive on the issue of parenting ability.

PERMANENT NEGLECT

Matter of John G. Jr., 70 AD3d 419 (1st Dept. 2010)

The First Department affirmed a Bronx County termination of a father's rights to his son. The agency provided diligent efforts but the father failed to plan for the child in that the father refused to admit, even years after the adjudication, that he had failed to protect his son from the mother's alcoholism. The father repeatedly

described the placement of the child in foster care as “kidnapping” The fact that the father had complied with the agency’s plan including drug testing , does not change the fact that the father remains in denial of the issues involved in the placement. There is no reason to do a suspended judgment where the child has been in care for years, there is substantial question as to the father’s ability to safely care for the child and the child’s psychologist opined that the child needed to remain in a stable environment.

Matter of Raquel N., 71 AD3d 418 (1st Dept. 2010)

New York County Family Court’s termination of both parents’ rights was upheld on appeal. The mother permanently neglected the children. She did attend all the programs recommended but she failed to correct the problems that had led to the placement. She remained in an abusive relationship with the father and lied to the agency about the relationship. She made no progress in handling her own mental problems or in assessing her children’s needs particularly the mental health needs of her daughter. During visits with the children , she remained passive. The father also abandoned the children by making no attempt to see them at all. He was aware that they were living with the maternal grandmother and although he had an order of protection, he did not maintain contact and made no attempt to regain contact after the order expired. The children have lived with the grandmother of over 6 years. They want to remain with her and she wishes to adopt them.

Matter of Christopher V., 72 AD3d 980 (2nd Dept. 2010)

Westchester County mother’s rights were terminated. The mother had failed to plan for the return of the child and to maintain contact with the child despite the agency’s diligent efforts. It was not error for the court to consider the time she was in a drug treatment facility as part of the one year required time frame. Except for the initial 30 days of the treatment, she was not prevented from visitation with the child or working with the agency to plan for the child and therefore she was not “institutionalized” as per the meaning of SSL § 384-b (7)(d) (ii). The Second Department did remand the matter as the lower court had not held the required dispositional hearing .

Matter of Lawrence KK., 72 AD3d 1233 (3rd Dept. 2010)

An Albany County child was placed in foster care as a destitute child when his mother died while his father was incarcerated. The child has Down syndrome and other special needs and was placed with a foster parent who cares for special needs children. After 15 months, the DSS brought a termination petition against the incarcerated father. Diligent efforts were offered. The agency told the father that

he had to make a plan for the child to be cared for since his sentence still had four to six more years when the child entered care. The worker investigated every relative that the father identified. The worker also kept the father informed of the child's health and progress. Since the child was very young and had acute special needs, visitation was not offered however some telephone contact was provided although the child was non verbal. The father did not develop a realistic plan for the child as every relative he identified was unable, unwilling or unacceptable. While the father had shown a good faith efforts to indentify relatives, that is not sufficient – he simply had no plan but for the child to remain in care until he finished his prison sentence and this would only mean prolonged foster care for this special needs child.

Matter of Jasmine F., 74 AD3d 1396 (3rd Dept. 2010)

The Third Department reversed a permanent neglect finding against two Ulster County parents. The children had been in care since 2007 and the parents were not complying with the court orders to be involved in drug rehab and to refrain from drug use. DSS filed violation petitions against the parents. The lower court did find the parents in violation of the dispo orders and in fact found clearly and convincingly that they had failed to address the shortcomings that led to the removal of the children and had failed to plan for the children's future. DSS then filed termination petitions and moved for a partial summary judgment arguing that the only needed proof was of the DSS' diligent efforts since the court had already ruled on the parent's failure to plan. The lower court granted the motion and after hearing diligent efforts testimony, terminated the parent's rights. The Third Department found this to be error and reversed. The first element of permanent neglect is diligent efforts by the agency and the second is the parental failure to plan or maintain contact. The court must first hear of the diligent efforts and in that context decide if the parent has fulfilled the duties to maintain contact and plan for the future. The parent's planning and contact cannot be fairly assessed until DSS establishes the efforts it made to permit and facilitate such contacts and planning.

TPR DISPOS

Matter of Chastity Imani Mc. 66 AD3d 782 (2nd Dept. 2009)

The Second Department affirmed a Queens County Family Court decision to dismiss a grandmother's custody petition filed at the time of the parent's TPR. The lower court properly applied the standard of best interests of the child and as well as SSL §383(3) which gives preference to foster parents who have care for the

child for more than a year. The child had lived with the foster mother for the majority of her life, was bonded to her, and was healthy and happy.

Matter of Teshana Tracey T., 71 AD3d 1032 (2nd Dept. 2010)

A Queens County mother's rights were properly terminated. The agency offered diligent efforts by scheduling visitation, reminding the mother of the need for visitation and therapy and referring her for housing assistance. The mother failed to do what was required. The lower court correctly freed the children for adoption despite the fact that one of the children, a boy over the age of 14, did not want at that point to be adopted. The fact that an older child does not yet want to be adopted is a factor but not a determining factor in freeing the child for adoption. It may still be in the child's best interests to terminate the parent's rights. The children here had been placed in care due to violent abuse and the mother has made clear that she will not exclude the violent father from her life. Even if the child does not want to be adopted, the court can consider that the best interest of the child may mean that termination of the mother's rights is appropriate. The child does not want to be involved with the father and has indicated that he is willing to work with the foster parents and attend adoption counseling.

POST TERMINATION CONTACT

Matter of Heidi E. v Phyllis G., 68 AD3d 1174 (3rd Dept. 2009)

A Warren County birth mother filed an enforcement petition under DRL §112-b for visitation with her two children who had been adopted. She has signed a conditional surrender to receive annual photos and an annual visit. The agreement also stated that the visits would be suspended if they were deemed detrimental to either child by a therapist. Family Court ordered a therapeutic visit with the birth mother and a counselor but the children apparently refused to attend and the visit did not take place. The lower court did receive an evaluation of the children and dismissed the petition without a hearing. The birth mother appealed to the Third Department who remanded the matter for a hearing. The oldest child had since turned 18 and so issues regarding her are now moot. But as to the younger child, the court should hear testimony to determine if visitation is or is not in the child's best interests and should not base its ruling on unsworn statements made at court appearances and the psychological report.

Matter of Malashia B., 71 AD3d 1493 (4th Dept. 2010)

The Fourth Department agreed with Onondaga County Family Court that a mother had violated the suspended judgment and that her rights should be terminated. The

mother was not even at a point where she could have unsupervised visits with the child. She had not learned anything in her parenting classes and was not consistent in her parenting when she saw the child. She could not set boundaries for the child and would become frustrated with her daughter. She had been unemployed since the child's birth – three years – and had recently been arrested for shoplifting. She was then a resident in an inpatient treatment facility for substance abuse where the child was not allowed to live. Not one of her service providers recommended that she was ready to have the child returned and her own therapist said she was not even ready for unsupervised visits. The child had been with the same foster parents since her birth three years ago and they wanted to adopt her.

The court also correctly denied post termination *Kahlil S.* visitation. The child had never lived with the mother and there had only been supervised visitation two times per week. The child did have a bond with the mother but there was a strong bond with the foster parents who wanted to adopt her. The foster parents testified that the child acted out and had temper tantrums after extended visitation with the mother. The mother failed to prove that post termination contact was in the child's best interests.

Matter of Sean H., 74 AD3d 1837(4th Dept. 2010)

In upholding an Oneida County Family Court who revoked a mother's suspended judgment and terminated her parental rights, the Fourth Department concurred that the lower court had not erred in not ordering post termination *Kahlil S.* visitation. The mother failed to prove that it was in the children's best interests to have visits with her. The mother had only visited the children twice in the 8 months before the hearing. The lower court did not err in failing to take the testimony of the children about possible post termination visits. The court was well aware from evidence provided that the children loved their mother, missed her and wanted to visit her and the court did consider that in the decision to deny the visitation.

ADOPTION ISSUES

MF v KG NYLJ 4/27/10 at 43 (Family Court, Nassau County 2010)

An adoptive parent sought an order of protection against the birth mother of three of her adoptive children. She alleged that the birth mother was stalking the family and that she sent the adoptive mother letters, left a note in the mailbox, was following the children's school bus and photographing the children. The adoptive mother feared the birth mother would try to kidnap the children. The birth mother moved to dismiss. The Nassau County Family Court ruled that the parties had an

“intimate relationship” and that the allegations were also filed on behalf of the children who also had an “intimate relationship” with the birth mother.

Matter of Keenan R. v Julie L., 72 AD3d 542 (1st Dept 2010)

New York County Family Court denied a visitation petition filed by a biological brother to visit with his adopted twin sisters. On appeal, the denial of visitation was affirmed. The adoptive parents of the twins strongly objected to any visitation with the brother and provided evidence from an expert that the prospect of visitation was causing great anxiety for the twins. The possibility of post traumatic stress disorder existed and visitation would therefore not be in the twin’s best interests. There were no real familial bonds with the brother and the adoptive parents were the only family that the girls had ever known. The adoptive parents were fit parents making the decision they thought was best for their daughters and forced visitation would only exacerbate the girls’ anxiety.

MISCELLANEOUS

Cornejo v Bell NYLJ 1/7/2010 at 25 (2nd Cir dec’d 1/4/2010)

The Second Circuit affirmed the dismissal of a Section §1983 action involving the removal of a child. The mother sued ACS on behalf of her son who was removed from her care when the child’s brother died under circumstances that were reported as indicating Shaken Baby Syndrome. Months after his death, the medical experts concluded that the child had died due to a congenital heart defect. The Second Circuit held that ACS attorneys are entitled to absolute immunity as they perform functions analogous to a prosecutor. ACS caseworkers are not entitled to absolute immunity as they function like arresting police officers but in this case the caseworkers are entitled to qualified immunity as they actions were objectively reasonable given what they had been advised by the medical experts at the time of the removal. All the defendants have absolute immunity from state law malicious prosecution claims and as to state law claims of breach of duty, ACS lawyers are entitled to absolute immunity and caseworkers are entitled to qualified immunity in this case as they did not commit any willful misconduct or gross negligence.

McCabe v Dutchess County 72 AD3d 145 (2nd Dept. 2010)

The Second Department dismissed a civil lawsuit against foster parents and the County for damages a child suffered in a foster home. Given the responsibilities asked of foster parents, it would not be reasonable to hold them to such a high level of responsibility that they virtually must have their eyes on the child at all times to prevent accidents. The county also cannot be held liable as the although the

caseworker was aware of the child's attempts to climb out of his playpen, this did not put her on notice of that any dangerous conduct was occurring.

City of NY v Maul 14 NY3d 499 (2010)

The Court of Appeals upheld a class action certification to a group of developmentally disabled children who are or were in foster care in NYC and who allege that ACS and the state OMRDD do not provide timely services and allow young adults to age out without appropriate services.

People v Texidor 71 AD3d 1190 (3rd Dept. 2010)

In reviewing sexual abuse criminal convictions, the Third Department ruled that a Clinton County CPS worker was not an agent for law enforcement such that testimony regarding statements made to her were admissible. The caseworker interviewed the defendant about a month after his arrest in connection with her CPS investigation of the same issues. There was no one from law enforcement with her and the defendant did not ask for his lawyer to be present.

Child Welfare Legislation for 2010

Margaret A. Burt, Esq.
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OH NO!!!

Not more stuff to DO???

BUT..... We don't have enough:

- money
- time
- workers
- judges
- lawyers



There is **good** news - most of this will provide more options and more options is almost always better

Don't worry so much - BE HAPPY

- More options for courts and agencies to offer and assist children and families!
- MORE OPTIONS + GOOD DECISIONS = BETTER OUTCOMES FOR CHILDREN AND FAMILIES

OK.....tell me what we got

- Kinship Guardianship Assistance Program- Chpt. 58 Laws of 2010
- Parental Incarceration/Residential Substance Abuse Treatment **MAY** be a compelling reason to justify not filing a TPR and some wording changes in perm neglect grounds – Chpt. 113 Laws of 2010
- Restoration of Parental Rights in some situations where freed child not adopted – Chpt. 343 Laws of 2010
- Multiple Trial Discharges and Voluntary Replacements in Foster Care for 18-21 year olds – Chpt 342 of Laws of 2010

Also – some other stuff

- Statutes everywhere must use phrase “attorney for the child” instead of “law guardian” as of April 14 2010
- Local districts must make info on “child only grants” and other services available to relative caregivers who are caring for children outside of foster care
- DRL § 110 modified to allow two unmarried intimate partners to adopt or gender neutral “spouses” and “married couples” as opposed to “husband” and “wife”

Subsidized Kinship Guardianship



Kinship Guardianship – New SSL §458

Will allow RELATIVES to APPLY to local districts for ongoing monetary assistance payments outside of foster care or adoption – then move the court to be appointed as a guardian

- Must be a relative who has child as a fully certified or fully approved foster parent
- Must be with relative for a minimum period of time
- Must fit the criteria for this to be the appropriate permanency for the child

What kind of cases will have this option?

Child must be under 21 and have been placed in **foster care before 18** – must be foster care, not an Art. 6 or Art. 10 direct custody arrangement – but can be a foster care under an **Art. 10, a voluntary under SSL or a PINs or a JD placement**

Foster parent of the child **must be related, by any degree**, to the child by blood, marriage or adoption and must be the child's **FULLY CERTIFIED or APPROVED** foster parent for over **6 months** before any application

Art. 10 - the FF and 1st PH must be completed, all others, 1st PH must be completed

Must first APPLY to the local district

- LOCAL DISTRICT MUST APPROVE FIRST – Court **cannot order until after** local district's approval of the assistance payments
- Local District must consider:
 - ❖ Return home or adoption not appropriate for child – there are “compelling reasons” why these are not in child's interests
 - ❖ Child has strong attachment to relative and relative has strong commitment to permanently care for child

Local District :

- ❖ Child has been consulted - over 18 must consent
- ❖ Cannot consider the financial status of the relatives
- ❖ Cannot have already applied to the court (may be VERY helpful to know if court will eventually agree)
- ❖ Must have had criminal record check of all in home over 18 , SCR checks here and in other states for last 5 years
- ❖ THAT THIS IS IN CHILD’S BEST INTERESTS

If DSS/ACS approves, what does relative “get” with this assistance payment?

- Relative can now move the court for the guardianship status and if court grants it, child exits foster care and relative will continue to get a monthly payment for the child
- Relative will get up to \$2,000 to pay for one-time expenses of guardianship proceeding
- Relative becomes child’s sole guardian – local district and court end involvement with child

QUESTIONS

- Can the one-time expenses include legal fees and can they be paid directly to the lawyer like in adoptions? YES
- Some districts only pay up to 75% of the subsidy for adoptions by adoptive families of certain means – can districts choose to do that as well with these guardianships? YES
- If the local district denies a relative’s request for this option, can the relative do anything? YES – they will have a limited fair hearing right with OCFS
- Could we do this for a freed child? YES, - combine with a Permanent Guardianship

MORE QUESTIONS

- **Will these kinship guardianships provide medical insurance?** YES – if IV- E then would cover, or if guardian cannot provide insurance, then district shall
- **When would the guardianship assistance payment start?** Once there is an agreement between the district and the relative, it will start when the court orders the guardianship and the child is discharged from foster care
- **How long would they get the money?** Until the child is 18, except if the child was 16 or older when it was granted , then to age 21 as long as the child is in school, employed, in a program to prepare for employment or medically cannot. Money would stop if guardian no longer had legal authority such as if the guardianship was revoked or suspended or if the guardian was no longer supporting the child
- **Any other services?** YES – independent living services, education and training vouchers

What are the legal procedures after the district approves the payments?

- FCA §1055-b adds the ability of a relative to file for guardianship as per SCPA Art. 17
- FCA § 661 (C) – If the child’s perm goal under an Art. 10 or Art. 10-A is referral for legal guardianship, then the relative files in front of the court that has been handling the case and it can be consolidated with the dispo or the next PH
- SCPA § 1702 -7 clarifies same if done in Surrogate Court

Court Decision

FCA §1055-b and FCA §1089-a will require Judge to consider child ‘s best interests including:

- ❖ Permanency goal of the child – that there is a compelling reason why return home and adoption are not appropriate for the child
- ❖ Relationship between child and relative
- ❖ DSS/ACS has approved guardianship assistance payments
- ❖ FF and 1st perm hearing are completed
- ❖ Will be a safe and permanent home
- ❖ Must consult with the child, if 14 or over must ask their preference, if over 18 must have their consent

Court Procedure

- Can be in the dispo or perm hearing – remember if in the dispo, the 1st perm hearing must also have been completed
- If parents do not consent – must be extraordinary circumstances, if any other party does not consent, then best interests (remember that DSS/ACS would have already consented in that they approved the assistance payments)

Also in the order:

- Court **MUST** order that ACS/DSS and child’s attorney be notified and be made parties to any and every subsequent proceeding to modify the guardianship
- FCA §1089(a) Court **MAY NOT** order anything further under the Art. 10 – so no supervision or services can be ordered for the guardian or the parents or respondents (guardian may be eligible for preventive but court cannot order district to provide)

THIS IS AN IMPORTANT CONSIDERATION!

What exactly is this new guardianship power?

- Guardian has right to physical custody of the child and the right to “make decisions, including issuing any necessary consents, regarding the child’s protection, education, care and control, health and medical needs”
- Can we do a “loaded” order like with Art. 6?
- Do parents still have parental rights? Can they still seek visitation and can they move to modify/cancel this guardianship in the future?

The answer seems to be YES to all these questions

How does it stack up against adoption?

- More money for adoptive parent in two ways- unless child over 16, guardianship payments will stop at 18 and adoption goes to 21, also adoption means the tax REFUND of \$13, 170 (per child) – this would mean lots of money if child is younger or multiple children
- Perhaps more “coverage” if caretaker dies having adopted as subsidy can be preserved – maybe this will be clarified
- Depending on circumstances, “getting to” an adoption may take a lot longer than a guardianship
- Parent still has rights with guardianship – for visitation, to petition to get child back
- Guardian gets “free” lawyer, almost always true for adoption as well

How does it stack up against Art. 6 custody?

- More likely to get more money with guardianship (unless parents are well off and the custody comes with child support)
- Probably the same re the parent being able to “undo it” or to keep seeking changes in visitation
- Court must have notice, party provisions placed in all guardianship orders – only a possibility in custody orders
- Probably about the same as to what the caretaker “gets” – maybe a bit more clarity in the law about what the guardianship is - altho this could be equalized if the court order are well written
- Caretaker gets a “free” lawyer to help them do the guardianship – very likely they would have to pay for lawyer themselves or do it themselves with custody
- In both, the court cannot “order” supervision or services to anyone but both may be eligible for preventive

Anything else? When can we start?

- OCFS is to do annual reports
- Cannot start until feds approve this (for IV-E purposes) and until **April 1, 2011**
- How is it being paid for? Federal funds will supply IV-E and medical insurance if child eligible, any non-federal funds needed were not described in the bill and that appears to be why we must wait until April 1, 2011

TPR and Incarcerated/Inpatient Parents



Chapter 113 Laws of 2010 currently in effect!

- Provides a new reason that a local district may choose not to file a TPR at 15/22 months as well as some things court must consider if TPR filed
- Local district need not file against a parent even though the 15 month time frame has arrived if the parent is or was incarcerated or in an inpatient facility for substance abuse
- The described parent's situation is not a defense to a filed TPR, this only provides a reason for a district to choose not to file what they would otherwise be legally obligated to file

AND...

At the 15 month mark, the district can choose not to file a TPR if:

- The incarceration/inpatient status is a significant factor for why child is in foster care **AND**
- The parent has a meaningful role in the child's life based on letters, phone calls, visits and communication with the child, has worked with the agency and other persons in the child's life to comply with the service plan and worked on the relationship and it is in child's best interests to have parent remain in child's life **AND**
- There is no other compelling reason

Does it change the TPR grounds?

- It does not add any new grounds or take away any old grounds
But TPR grounds of perm neglect have been affected:
- In perm neglect TPRs the court is to consider any “particular constraints” and “special circumstances” that limited the family contact or availability of services
- Also , in the context of the exception to the requirement of diligent efforts proof in perm neglect TPRs, where there is an exception when a parent has not advised an agency where they are living for a 6 months period, the court MAY consider “particular delays or barriers” that parents may have had in letting agencies know where the parent is located
- Haven’t courts always done that? It may take case law to discern if this is a significant change.

Could court order this exception?

- No statute or current case law that court can order an agency NOT to file a TPR and this is not a defense – although can make court’s position clear by ordering specific goal
- Court can direct agency to “undertake steps to aid in completing” an assessment re the use of the exception – the agency is supposed to be gathering info on this possible exception from various individuals
- Could become an issue in a litigated PH

Anything else in this bill?

- OCFS is to prepare information regarding parent’s legal rights in these situations and local districts must provide this to parents and where possible this should include information on services available in the community where the parent will return
- SSL § 409-e allows consultation on service plan reviews to be done by video/teleconferencing
- The service plan must reflect the special circumstances and needs of the family if a parent is incarcerated or an inpatient for substance abuse

Restoration of Parental Rights



Restoration of Parental Rights

- Chapter 343 Laws of 2010 – Effective 11/11/10
- Allows Family Court to reinstate the parental rights of a parent after a TPR and return the child to the custody and guardianship of a birth parent or parents – new FCA § 635- 637

WOW! When would the court be able to do that?

- TPR was over **2 years earlier** and was on abandonment, mental illness, mental retardation or permanent neglect
- Child is **at least 14**, still in foster care and does not have a goal of adoption
- **Clear and convincing proof** that it is in the child's best interests—presented by the person petitioning for the restoration

Would everyone have to agree to such a motion?

- The child, the parent, the child's attorney, the agency and the court in most cases (not clear if both parents would have to agree)
- The child's attorney, the agency with custody of the child or the respondent parents could file the petition to restore and everyone else must be served as well as the respondents' prior attorneys
- **Court can do it over the district's objection where person filing motion proves clearly and convincingly that the district is withholding its consent without "good cause"** (no further definition)

Restoration of Parental Rights

- Case continues with the court that had been doing PHs of child or Judge who did TPR, same attorneys if possible
- The original findings of fact remain
- Court would have option of “provisionally” granting the restoration for a period of 6 months with mandated agency supervision, reports
- Could apply to cases where TPR occurred more than 2 years ago as of 11/11/10
- In PHs on freed child, court could “recommend” that a petition be considered

Trial discharges of youth and voluntary return to care



Trial discharges of youth and voluntary return to care

- Chapter 342 Laws of 2010 – effective 11/11/10
- Allows:
 - ❖ Family Court to order ongoing and repeated “trial discharges” of youth over 18 until age 21 with their consent
 - ❖ Allow youth between 18 and 21 who within the last 24 months had been discharged from foster care at their own request, to move to be returned and replaced in foster care – ACS/DSS must notify youth of this right if they do leave after 18 – NEW FCA § 1091

What would be the reason to do ongoing trial discharges?

- Some youth still need assistance and supervision but are not willing to actually physically stay in a foster care setting – DSS/ACS still has care and custody but child not in a foster care setting
- Keeps the door open for the youth to return to the foster care setting without any “replacement” process
- A trial discharge may maintain IV-E status in some circumstances
- Some courts have been doing these for awhile and have found them quite helpful
- Will not work if youth will not consent, can’t be forced

Under what circumstances could a youth voluntarily return to care?

- A youth who has left care after age 18 as he/she would not consent to remain
- The youth is not yet 21 and has been out of care for less than 24 months
- Youth makes motion or brings OTSC and can have help of former attorney who will continue to represent
- DSS/ACS can also do a motion or an OTSC with the youth’s consent

Voluntary return to care

- Court finds compelling reason that youth has no reasonable alternative to foster care, youth consents to go to educational or vocational program and return is in child’s best interests
- Both youth and local district consent to youth’s return **EXCEPT court can do it over local district objection if court finds local district is “unreasonable” in its refusal to consent, must make a finding in writing – unreasonable is simply defined as the court making the findings required to make youth eligible**
- **Court can order the return to care to be immediate if compelling reason why that is in youth’s best interests**
- Court must set up and do PHs again
- NOTE – currently it seems unlikely that youth’s replacement would be IV-E eligible but stay tuned as this may change!

Voluntary return to care

- If youth has left and been voluntarily returned once and then leaves again, youth can make a second motion to return a second time but not again and if it is the second time, the court must make all the same findings again and must consider the youth's compliance with the court's previous order including the participation in an educational or vocational program
- Definition of "destitute child" will include a youth who has been returned to foster care
- Definitions for mandated preventive services will include a youth who has left foster care between 18 and 21 and for whom preventive services may help avoid a return to foster care

When could we do these things?

- Many courts do ongoing trial discharges now but this law would clarify that they are permitted as of 11/11/10
- The voluntary return to care provision would also be effective 11/11/10 and would seemingly apply to youth who had previously refused to remain in care if they otherwise qualify

Seems like lots of new stuff

- Yes – lots of child welfare legislation did pass this year although a very significant amount of funding was cut to local districts which may affect these new laws
- Watch for more forms and regs from OCFS and new court forms as well as changes from OCA !!
- **REMEMBER: MORE OPTIONS + GOOD DECISIONS = BETTER OUTCOMES FOR CHILDREN AND FAMILIES!**

Continuing Legal Education Credits Instructions

The CLE attendance roster and evaluation form is attached.

For your convenience, you may mail the CLE roster and evaluation in the same envelope you use for regular rosters and evaluations.

****Note: ONLY THE FIRST 80 REQUESTS FOR CLE's WILL BE HONORED****

For live viewing the submission deadline for CLE rosters is November 29, 2010.

For taped viewing the submission deadline for CLE rosters is December 20, 2010.

Rosters received after these dates will NOT be eligible for CLE credit.

Thank you,

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NYS Office of Children and Family Services/BT
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“Updates in Legal Issues in Child Protective Services”

Trainer: **Margaret Burt**

Location Site: _____

Date: October 20, 2010

Time: 1pm - 4pm

*You must sign in and provide a mailing address to receive a certificate of attendance. Certificates will be mailed to the address provided below. **PLEASE PRINT CLEARLY!***

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