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The CLE roster should be FAXed to:

716 796-2142

Attention: Phyllis Keiffer

CASELAW UPDATE IN CHILD PROTECTIVE ISSUES

Reported Cases from July 2003- July 2004 (cites current as of July 2003)

Teleconference Agenda for September 28, 2004

By Margaret A. Burt, Esq.

I. GENERAL ABUSE and NEGLECT ISSUES

Matter of Catherine C., 307 AD2d 446, 761 NYS2d 727 (3rd Dept. 2003)

The plaintiff in this lawsuit is a mother suing Essex County DSS and a variety of mandated reporters for failure to report sex abuse to the SCR. The mother advised several mandated reporters in August of 2000 that her daughter had been sexually abused by the child's half brother, who was a teenager in middle school. While counseling was offered and provided to both the victim child and the perpetrating child, apparently no one called the SCR. About 5 months later, the mother discovered that the half brother was continuing to subject this child and two of her sisters to sexual abuse. At that point, the mother called the police. The mother thereafter sued claiming that since no mandated reporter, including the county, had called the hotline, the daughters had been further abused. The mother failed to file her notice on a timely basis and was seeking permission to file late. The respondents argued that she should not be allowed to file late as the claim itself was meritless. The respondents argued that since the half brother was not a "person legally responsible" as that term is defined under the Family Court Act, no mandated reporter was required to report sexual contact between minor siblings to the SCR.

The Third Department permitted the late filing of the claim. The Appellate Division found that the mandated reporters should have called the SCR. It is the SCR's job to decide whether to take the call or to refer it to the police. The mandated reporter should not assess whether the abuser would be considered a "person legally responsible" - that any reasonable cause to suspect that a child has been sexually abused should be reported. The SCR's obligation is to decide how the report is to be investigated. This decision has been appealed to the Court of Appeals.

Matter of Cory M., 307 AD2d 1035, 763 NYS2d 771 (2nd Dept. 2003)

The Second Department reversed a Queens County Family Court's refusal to hold 1028 hearing at the father's request. When the father asked for a 1028 hearing, he should have received one within 3 days of asking as long as he had not been present or had no counsel

representing him at any previous 1027 hearing. There is no “time limit” is asking for a 1028, the parent can make the request at any time.

Nicholson v Scopetta 344 F 3d. 154 (2d Cir 2003)

In this ongoing class action brought on behalf on battered women who claim to have had their children removed from them improperly by ACS, the Second Circuit reviewed the decision of the federal district court. They certified 3 state law questions to the NYS Court of Appeals. The decision was 2 to 1 with a very strongly worded dissent written by the Chief Judge. The majority found that the district court did not abuse its discretion in finding that in many of the cases the removal of the children had not been necessary and that ACS was overlooking removing the batterer instead of the child. ACS did not consider service options for the mother short of removal. The court concurred with the district court that the pattern of practice amounted to custom or policy. The court provided a six-month stay of the preliminary injunction to give ACS an opportunity to resolve the problems. (See SDNY case regarding the specifics of the injunction reported in my case law outline for 7/01-7/02 on page 7) The Second Circuit has asked the Court of Appeals to review 3 questions to clarify state law which include if the definition of neglect includes when a parent allows the child to witness domestic violence against the parent, if the definition of “danger” or “risk” to a child include witnessing domestic violence and does witnessing domestic violence suffice to justify a temporary removal of a child **(Note on 11/25/03 the NYS Court of Appeals accepted the certification of the three questions and the case is to be argued in early September!)**

Matter of Mariam C., NYLJ 2/18/04 at 23 (Family Court, New York County 2004)

The New York County Family Court made a finding that ACS had not made “reasonable efforts” to reunite a family as ACS and the foster care agency had refused to hold or reschedule a service plan review meeting. When the meeting was scheduled, the parents arrived with a social worker and a law assistant from their attorney’s office. As counsel for the agency was not available, the agency indicated that its representatives would not be willing to speak during the review meeting. When the parents objected to them not speaking, the conference was canceled and was not rescheduled. The parents had a right to have their representatives present with them for this important conference. The agency’s refusal to hold or reschedule the meeting was a failure to offer the family reasonable efforts.

Matter of Toni G., ___ AD3d ___, 777 NYS2d 741 (2nd Dept. 2004)

Nassau County Family Court granted a FCA §1022 request of DSS to remove a one-year-old child and placed the child in foster care. However, in response to the parent’s requests, the court then ordered the child to be removed from foster care and awarded the custody of the child to a relative over DSS objections. The County obtained a stay and

the Second Department reversed the lower court. The baby was in the hospital due to being malnourished. She weighed only 10 pounds at one year of age. DSS alleged that the parents had abused the baby. The parents argued for the child to be placed with relatives – a 20-year-old cousin and a grandmother. The court held an *ex parte* discussion with the relatives by telephone without counsel present and ordered that the child be placed with the relatives while the abuse case was pending. The parents were also to live in the same household. The Second Department found that no evidence was presented that the problems in the household had been resolved or that the relatives were suitable caretakers. The “safer course” would be to keep the child in foster care until the court could hold a fact finding on the abuse petition. The Second Department indicated that it had been 10 months since the stay had been granted so the fact finding should be held immediately. Further, the parents and other family members should have visitation and be involved in the child’s health care – although this order was not to be construed as having any bearing on the outcome of the abuse fact finding.

Matter of Diane H., 5 AD3d 770, 773 NYS2d 613 (2nd Dept. 2004)

In a Richmond County child abuse case, the mother claimed that Family Court should have adjourned her case until her criminal charges regarding the same matter were resolved. The Second Department found the issue unpreserved and “...in any event is, without merit.”

II. SEX ABUSE

Matter of Danielle L., 307 AD2d 294, 762 NYS2d 285 (2nd Dept. 2003)

A Suffolk County Family Court finding of abuse regarding one child and derivative neglect on the other was reversed by the Second Department. The agency alleged that the father had sexually abused the 16-year-old daughter. The child had made out of court statements about abuse but she refused to testify in court even though the court issued a judicial subpoena. There was no other corroboration of the child’s statements. Repetition of the out of court statements to others does not constitute corroboration.

Matter of Evan Y., 307 AD2d 399, 761 NYS2d 720 (3rd Dept. 2003)

The Third Department upheld a sex abuse finding against a Tioga County father. The seven-year-old boy made statements about being fondled. He also was sexually acting out, had sexual nightmares, was wetting the bed and had suicidal tendencies. The child’s therapist and a clinical social worker both testified. There was no objection to the clinical social worker’s expertise as a validator. She testified that the child’s behaviors were consistent with sexual abuse. There was also no objection to the child’s therapist’s

testimony that the child's behaviors were typical of sexually abused children. The father, who had previously neglected the child, did not testify or present any evidence. The court indicated that the "strongest inference" could be taken against him for his failure to offer any explanation.

In re Nicole B., 308 AD2d 412, 764 NYS2d 451 (1st Dept. 2003)

The First Department affirmed a Bronx County finding of abuse against a father and neglect against the mother. The child gave detailed and consistent out of court statements regarding sexual abuse by the father. The statements were corroborated by the child's psychologist and by a preliminary medical examination, which showed thinning of the hymeneal wall. The father failed to offer any defense.

The mother neglected the child in that she failed to cooperate with requests to have the child undergo a full medical examination when the preliminary examination showed signs of sexual abuse. Even after learning of the child's disclosures, the mother allowed the father back in the home in violation of an order of protection. The mother stated that she believed the father was innocent and that he should be allowed in the home.

Matter of Brittany K., 308 AD2d 585, 765 NYS2d 254 (2nd Dept. 2003)

The Second Department affirmed a Suffolk County Family Court finding of sex abuse against the father of a 4-year-old. The child's out of court statements were corroborated by an older brother's independent description of sexual conduct and well as by medical evidence. Further there was expert validation testimony of "classic" behavior. The child had age-inappropriate knowledge of sexual matters and she acted out sexually. Once the agency established a prima facie case, the burden shifted to the father to explain the child's injury and behavior. The father only offered self-serving denials and speculative accusations.

Matter of Yorimar K., 309 AD2d 1148, 765 NYS2d 283 (4th Dept. 2003)

The Fourth Department affirmed an Onondaga County Family Court finding of sexual abuse and derivative neglect. The child's out of court statements were properly corroborated by validation evidence. The expert testified that the child's behavior was consistent with that of other sexually abused children. A validator is not required to testify that the child is truthful and that there has in fact been sexual abuse. Further corroboration was presented by both the school psychologist and the CPS worker who testified, without objection, that the child had been abused and was truthful. Further the child demonstrated sex acts with dolls and had age-inappropriate sexual knowledge.

Matter of A.R., 309 AD2d 1153, 764 NYS2d 746 (4th Dept. 2003)

The Fourth Department reversed Monroe County Family Court's dismissal of derivative actions in this matter. DSS alleged that the mother's boyfriend sexually abused one child and derivatively abused the others and that the mother had neglected one child and derivatively neglected the others. The lower court, while finding that the older child had been abused and neglected, dismissed the derivative allegations regarding the younger children.

The oldest of these three children described being sexually abused by the mother's boyfriend over a 4-year period. This statement was sufficiently corroborated. The middle child described an incident when the boyfriend entered her bedroom at night and stroked her back and stomach. This incident was independently corroborated by the older child who stated that the boyfriend had told her that he was going to try to have sex with the middle child and asked the oldest child to be a lookout. The court found that based on the extent of the sexual abuse of the oldest child and the attempted sexual abuse of another child, the boyfriend had not only abused the oldest child but also had derivatively abused the younger two children. The Appellate Court also found that it was not inappropriate for the court to take judicial notice of a prior PINS adjudication regarding one of the children.

The mother was neglectful of all three children in that she refused to believe them when they disclosed the abuse and told the investigator that "nothing" that he could show her or say to her would ever make her believe that her boyfriend had abused one of the children. The mother allowed the boyfriend back in the home within a week although the child protective worker had told her that he could not be in the home. She knew that the children were in imminent danger of being sexually abused by her boyfriend and demonstrated a fundamental defect in her understanding of the duties of parenthood.

Matter of Ashley B., 2 AD3d 1402, 768 NYS2d 915 (4th Dept. 2003)

An Oneida County father abused his stepdaughter and derivatively neglected his own 2 daughters. The mother neglected all three daughters. The Fourth Department found that the Family Court had not abused its discretion in denying the father's motions to have the stepdaughter examined by an expert of his choosing. It was also not an abuse of discretion to deny the father's motion to reopen the fact finding after the close of proof based on the father's claim that the stepdaughter had given an inconsistent statement after the fact finding. Lastly it was not "improper bolstering" to allow the police officer to repeat the child's out of court statements.

Matter of Dylan Y., 4 AD3d 643, 772 NYS2d 137 (3rd Dept. 2004)

The Third Department affirmed an abuse finding by Chemung County Family Court. In this matter, the 6 year old boy told his mother and his stepfather that his father had inserted a pencil in his rectum while they were in a closet at the father's house. He also said that his father had showed him a movie with naked men and children. The child's out of court statements were corroborated by a "highly qualified, board-certified pediatrician" who specialized in child abuse. The child's *in camera* testimony also corroborated the out of court statements.

Matter of Shavar B., ___AD3d___, 776 NYS2d 503 (2nd Dept. 2004)

An expert in pediatrics with a specialty in child abuse properly corroborated a Queens County child's out of court disclosure of sexual abuse. Although the child may have later recanted, this did not mandate setting the abuse finding aside.

Matter of Sabrina M., 6 AD3d 759, 775 NYS2d 96 (3rd Dept. 2004)

The Third Department affirmed a sex abuse finding from Broome County Family Court. The respondent lived with his wife, 2 stepdaughters and a child in common. The older stepdaughter told her mother that the husband had touched her "private part". The mother left the home with the children. The child then also disclosed at a Child Advocacy Center that on at least 3 occasions the stepfather had pulled down her clothing and touched her "private parts". She also disclosed that he had on 2 occasions exposed himself to her and had shown her pornographic magazines. The other stepdaughter confirmed that the older sister was alone with the stepfather when the incidents had taken place. The older child testified, unsworn and *in camera*. The stepfather was not present but his attorney did cross-examine the child. On appeal, the court found that the child's out of court statements were corroborated and that the father had not objected to being excluded from chambers during the child's testimony. The court also concurred with the derivative finding on the other two children.

III. Physical Abuse

In Re Damen M., 309 AD2d 569, 765 NYS2d 347 (1st Dept. 2003)

The First Department affirmed Bronx County Family Court's finding of abuse regarding a two-month-old infant's burns. The child had 1st and 2nd degree burns over 20% of her body. The agency produced medical proof that the burns were due to immersion in scalding water and that no medical treatment was sought for the child for 1-2 days after she had been burned. The parents presented an engineer at the time of the dispositional hearing that testified that the apartment had a faulty hot water valve which might cause hot water to surge out of the tap even after it had been turned off. The court however

found that the child's burns would not have been caused by a sudden surge of hot water. Further, the tap would not surge if the cold water tap were also on. Lastly, it was not ineffective assistance of counsel for the parents' attorney to admit in summation that they had medically neglected the child as that finding was unavoidable.

Matter of Alijah C., 1 NY3d 375, 774 NYS2d 483 (2004)

The Court of Appeals ruled for the first time that a deceased child could be the subject of an abuse proceeding in Family Court. The Court reviewed a case from Chemung County and changed the case law in this area. In this matter, the mother had left her 6-month-old infant in a bathtub in a foam bath seat. She had gone outside to look for her 6 and 2 year old. Although there was another person in the home, she did not ask that person to watch the baby. When she returned, the child was face down in the water and he died 4 days later. Chemung County DSS filed an abuse and a severe abuse case regarding the deceased child and a derivative neglect on the two siblings. The mother admitted to the neglect of the older children. However, she moved to dismiss the abuse as to the deceased child, citing precedent that since a court could no longer protect a deceased child, a finding as to that child was not warranted. The lower court dismissed the abuse and severe abuse petition on the deceased baby. The law guardian appealed the dismissal and the Appellate Division affirmed. On appeal to the Court of Appeals, the dismissal was reversed. DSS argued that it was important in the post-ASFA environment to make a finding on a deceased child so that, if necessary, a "repeated abuse" termination could later be brought if she abused her other children in the next 5 years. The Court agreed with that argument and also said that the definition of child abuse and severe abuse clearly contemplated a deceased child. Further, a judicial determination of the facts and circumstances of the child's death may be significant in future litigation. The court ruled that a petition regarding a deceased sibling should be allowed as it ensures the safety of the surviving sibling. The petition was restored.

NOTE: The petition regarding the siblings should have been filed as a derivative severe abuse – not as derivative neglect. Then the agency would have had the option of a "no reasonable efforts" finding as to the 2 siblings and also the option of filing an immediate severe abuse termination petition if warranted.

Matter of Shanave C., 2 Misc.3d 887, 774 NYS2d 622 (Family Court, Kings County 2004)

A Brooklyn Judge had little trouble finding a father to be abusive where he murdered the children's mother and their grandmother. The 3 children were present in the family home and cowered and prayed for their mother as the event occurred. The father was facing murder charges and may have been mentally incompetent. The children were clearly at risk of serious physical injury due to the father's violent, crazed beating and strangling of the two women while the children were present. The eldest child had opened the door to let her grandmother in to try to help her mother who was being beaten, only to have the grandmother killed as well. The children were also at emotional risk due to observing the

violent scene – the eldest had to pass the naked dead body of her mother and dead grandmother to let the police into the home. Further, the children were at emotional risk due to being deprived of their mother and grandmother. The court said this was abuse – not merely neglect – due to the protracted impairment that a child suffers due to a homicide based on domestic violence

Matter of Edwin L., 2004 NY Misc. LEXIS 678, dec'd 6/3/04 (Family Court, Kings County 2004)

The Kings County Family Court made a finding of severe abuse where the mother caused bilateral rib fractures, bilateral retinal hemorrhages, a subdural hemotoma and a skull fracture to the child. The mother was criminally convicted for Second-Degree Assault. The court also granted a “no reasonable efforts” order under FCA §1039-b and ruled that ACS did not have to offer services for reunification. The court commented that the burdens of proof in the area of no reasonable effort motions are still unclear but that ACS had proven clearly and convincingly that it was not in the child’s best interest to make reasonable efforts toward reunification. The court also noted that the child was in a pre-adoptive home with his sister. The mother had many problems and had not availed herself of services

On the other hand, the court refused to grant a motion for summary judgement of abuse toward the father, finding that an issue of fact existed. Although the father had plead guilty to reckless endangerment first degree and endangering the welfare of the child, there had been no detailed plea allocution in criminal court. In Family Court, the father denied that he had injured the baby. In contrast, the mother had admitted to shaking and dropping the baby.

Matter of Damaris Makiela O., 2004 NY Misc. LEXIS 769, NYLJ 6/18/04 at 19 (Family Court, Kings County 2004)

Kings County Family Court made a summary judgement derivative finding of abuse and severe abuse regarding a newborn where the mother had severely abused another child 7 months before this one was born. The older infant had suffered rib fractures and intercranial bleeding as a result of the mother shaking, dropping and squeezing him over a 3-month period. The mother had plead guilty to Assault Second Degree in connection with that incident and Family Court had made a summary judgement finding that this first child was severely abused. (See case above) The court then found the newborn was derivatively severely abused as 7 months later was proximate in time. In the 7 months since the first incident, the mother had failed to follow through with services offered or to make any meaningful progress in her psychiatric treatment or to take her medications. The court made a FCA §1039-b “no reasonable efforts” finding and excused ACS from responsibility to offer services for reunification for this second child as well

IV. Educational Neglect

Matter of Collin Q., 307 AD2d 639, 762 NYS2d 528 (2nd Dept. 2003)

The Second Department found a constitutional question moot in this Warren County educational neglect matter. The agency alleged that the parents of the child were not properly “home schooling” the child in that over the last 3 years in that the parents were not filing quarterly reports and individualized home instruction information. The Warren County Family Court issued a temporary order that the parents had to enroll the child in a public, private or parochial school. The parents appealed the temporary order as unconstitutional. However, as the parents admitted to neglect while the appeal was pending, the court found that the issue of ordering the child into an out of home school was moot.

Matter of Mary M., 2004 NY Misc. LEXIS 456, dec’d 4/21/04 (Family Court, Nassau County 2004)

The child was educationally neglected in that she missed 150 days of school, her grades had declined and she was not going to be permitted to pass onto the next grade. The parents claimed that the school was inadequate and that the teachers harassed the child but the mother never made any appointment to speak with the school about these alleged problems. Although the child had emotional and educational problems that attending school would have helped, the parents would not send her to school. The court drew a negative inference regarding the father who did not testify. The child’s doctor did not advise that the parents keep the child out of school. While the case was pending the child did attend school and improved significantly.

V. Domestic Violence as Neglect

In re Dominique A., 307 AD2d 888, 764 NYS2d 37 (1st Dept. 2003)

New York County Family Court’s finding of neglect against the mother of three children was reversed on appeal. The mother had a violent relationship with the father. She asked him to leave her home in 1996. She obtained an order of protection against him at that point but failed to renew it after it had run out even though she had a violent encounter with him in 1997. She indicated that she did not renew the order of protection as he had “stopped bothering” her. In 1998 he entered her apartment when she was there with her 3-year-old. The other children were out of town with a grandmother. The mother attempted to leave and also attempted to call the police but could not do so. She realized it was “going to be violent” and she put the hysterical 3-year-old in another room and closed the door. The court found that although she had used poor judgement in not changing her locks and in failing to renew the order of protection, she had not subjected the children to imminent danger. In fact she took measures to shield the children from being witnesses to the domestic violence. The experienced caseworker in this matter

testified that she did not think that a neglect finding against the mother was indicated and found the allegations against the mother to be “unsubstantiated”.

Matter of Antonia QQ., 1 AD3d 841, 767 NYS2d 297 (3rd Dept. 2003)

The Third Department affirmed Tompkins County Family Court’s decision that a father was neglectful of his own child and three other children in the household. The court found that a series of incidents of domestic violence against the children’s mother formed a “pattern of continuing violence” which put the children at risk. Although some of the incidents were remote in time - some in excess of four years - there was also recent evidence of domestic violence. The respondent father did not object to the agency offering orders of protection from other counties into evidence.

Matter of Katlyn GG., 2AD3d 1233, 770 NYS2d 204 (3rd Dept. 2003)

The Third Department agreed with Columbia County Family Court that a mother had neglected her two daughters. The mother was aware that her boyfriend had been found to have neglected his own children and was limited to supervised contact with them. She was also aware that an order of protection had been issued against him regarding his ex-wife. She was aware that he had spent time in jail and that he had acted out angrily with his ex-wife. The mother was present when this boyfriend had engaged in a verbal confrontation with her ex-husband and threatened to kill him in front of the children. Lastly, in response to the altercation with her ex-husband, she was aware that the Family Court had issued an order of protection that the boyfriend was to have no contact with her children. In spite of all this, the respondent mother continued to reside with the boyfriend and permit him to have contact with her children. Even at trial, the mother testified that were it not for the current order of protection, she would continue to allow the boyfriend to have access to the children. She apparently refused to acknowledge the threat he posed to her children.

Matter of Jessie A., 4 AD3d 764, 772 NYS2d 431 (4th Dept. 2004)

A Wayne County Family Court finding of neglect was affirmed on appeal to the Fourth Department. The father’s violent abuse of the mother while she held one child resulted in mental and emotional impairment of both children.

VI. Mental Illness as Neglect

Matter of Ann Marie SS., 309 AD2d 659, 760 NYS2d 782 (3rd Dept. 2003)

A Madison County mother who had untreated mental health issues neglected her 5-month-old infant. The Third Department agreed with Family Court that the mother’s mental illness put the child at imminent risk of neglect. The caseworker had originally allowed the mother to stay with a friend for the weekend with the understanding that the

child could not be left alone with the friend who did not know how to care for the child. The mother left the child alone with the friend and he called the police. The child was found in a “fully saturated” diaper and the child’s diaper bag had an 8’ to 10’ meat cleaver in it along with a trigger lock. The police were aware that the mother had a .22 caliber rifle and that she had made threats. While at Family Court, the mother made bizarre statements about the police breaking into her apartment and healthcare workers threatening her with guns. She carried on in court with rambling diatribes and inappropriate giggling and laughter. Although various evaluators offered different opinions as to the nature of her mental illness, she clearly had an untreated mental illness that posed a threat of neglect to this baby. The child was placed in the custody of relatives and the mother’s visitation was to be supervised. She was to receive parenting counseling and substance abuse and mental health evaluations.

In re Pedro C., 1 AD3d 267, 767 NYS2d 578 (1st Dept. 2003)

A Bronx County mother was found intoxicated late at night on the street far from her home with her two-year-old child. She was loud and hostile and behaved bizarrely when the police intervened. Although the child did not actually suffer any injury, the First Department concurred with the lower court that this action demonstrated that the parent’s judgement was strongly impaired in that she exposed the child to a risk of harm. The behavior constituted neglect.

Matter of Miyani M., 4 AD3d 430, 771 NYS2d 354 (2nd Dept. 2004)

The Second Department affirmed a Kings County finding of neglect against the father of the child. The mother had severe mental illness and could not care for the child. The father lived with the mother and was “either unwilling or unable to recognize the danger that the mother posed.”

VII. “Dirty House”

In re Shavon H., 1 AD3d 123, 766 NYS2d 208 (1st Dept. 2003)

New York County Family Court found a father to be neglectful and placed the children in care. The First Department affirmed on appeal. The father had not provided medical care for one child who had a kidney infection. The house had missing bathroom fixtures that resulted in boiling hot water pouring continually from a hole in the wall. There was an “asbestos-like substance” also coming out of the wall and cockroaches in the kitchen sink. There were very few furnishings and no eating utensils or drinking glasses. The home was not safe or sanitary. Although there were gaps in the trial transcript, the Appellate Court found that this did not prevent a meaningful appellate review.

Matter of Jessica DiB., 6 AD 3d 533, 775 NYS2d 69 (2nd Dept. 2004)

The Second Department affirmed a neglect finding against a Westchester mother. The apartment was in deplorable condition and unsanitary. There was little or no food and the children were hungry. The bathtub plumbing did not work and the children were dirty and smelled. The oldest child was not dressed warmly enough for school and was frequently late. She would complain of being tired and fall asleep at school, where she was doing poorly.

VIII. Drugs in the Home

In Re Roy R. Jr., 6 AD3d 213, 774 NYS2d 321 (1st Dept. 2004)

A New York County mother neglected her children by repeatedly allowing the father back in the home despite his drug abuse and violence. Two of the three children had seen the father use drugs many times. Drugs were in ready access and on one occasion the children had ingested them. The children's out of court statements on these issues were corroborated by each other and were consistent. The children repeated the information to a social worker. The mother made statements to an Assistant District Attorney that were consistent with the children's statements.

Matter of Shannon ZZ., ___AD2d___, decd 6/3/04 (3rd Dept. 2004)

In the context of a private custody matter, the court directed that the custodial mother remove two men, who allegedly smoked marijuana, from her home. The court ordered the child to stay with the father until there was proof that the men had moved out of the mother's house. Columbia County DSS brought a neglect action against the mother alleging that she had hit the child's father, that she had allowed the two men to use drugs in her house and that she allowed them to stay in the house after the court ordered them out. In response to the neglect petition, the mother admitted that she hit the father on his arm, that the two men had smoked marijuana in her home and that she had not removed them from the home in response to the order in the private custody case. The Family Court found her to be neglectful and changed custody to the father with supervised visitation to the mother. On appeal, the Third Department reversed. The facts admitted by the mother do not constitute child neglect. There was no evidence that the child witnessed or was even aware of the incident in which the mother hit the father on his arm. The information was that this was an isolated slap and not excessive force. There was no evidence that the child ever witnessed the marijuana smoking, was exposed to "contaminated" air or was at risk in any way while these men were under the influence. There was not even any evidence that they had smoked marijuana when the child was in the home. Although she violated the court's order to immediately remove the men in the private custody case, there is no evidence that her failure to do this caused or threatened

any harm to the child. The violation of an order of protection in a private custody case is not neglect per se. The court ordered a restoration of the private custody matter and ordered the court to “reconsider” the limitations on mother’s visitation.

In re Michael R., 309 AD2d 590, 765 NYS2d 358 (1st Dept. 2003)

The First Department agreed with the New York Family Court that the respondent in this matter had neglected his children. He stored heroin in the children’s clothes hamper, sold heroin out of the family home and packaged the heroin in the presence of his 9-year-old son. He was ultimately convicted for possession. By placing the children in proximity to narcotics and the dangerous activity of trafficking in drugs, he placed the children in imminent danger of their physical, mental and emotional well being.

Matter of Paul J., 6 AD3d 709, 775 NYS2d 373 (2nd Dept. 2004)

The Queens County mother in this matter packed and sold cocaine in the presence of the children. She had 78 packets of crack cocaine in her possession. By placing her children near the drug and near the dangerous activity of drug sales, she neglected them. Also, the home was unsanitary, unsafe and there was insufficient food.

IX. General Neglect

Matter of Ziaire M., 309 AD2d 935, 766 NYS2d 98 (2nd Dept. 2003)

The Second Department agreed with Queens County Family Court that a mother had neglected her infant. The child was born with a positive toxicology for marijuana. The mother repeatedly and habitually used marijuana and failed to participate in drug treatment. The child was placed with grandparents.

Matter of Brent HH., 309 AD2d 1016, 765 NYS2d 671 (3rd Dept. 2003)

The Third Department had a mixed response to this neglect appeal from Otsego County involving three children who were the subjects of these proceedings. Two of the children lived full time with their grandmother who was their legal guardian. The mother’s boyfriend also lived in the home. A third subject child was the cousin to the other two and this child resided with his mother but visited the grandmother’s home regularly. The facts were not in dispute. The grandmother’s boyfriend broke the arm of the non-resident grandchild over an incident in which that child had been accused of attempting to molest another child. The boyfriend also hit and kicked this visiting grandchild’s mother when she tried to intervene. The boyfriend was criminally charged over the incident. Otsego County brought both the grandmother and her boyfriend to

Family Court alleging abuse and neglect of all three children. The court found both respondents had neglected all three children but the Appellate Court did not fully agree..

On appeal, the Third Department found that the boyfriend was not a person legally responsible for the visiting grandchild whose arm he had broken. This child did not live with the boyfriend and the grandmother. Although this child visited regularly, the child's mother was always present during these visits. The child had never been left in the grandmother's care when the boyfriend was present and prior to the incident, the boyfriend had never assumed any parental role toward the child. The fact that he attempted to discipline the child on this one occasion was not enough to make the boyfriend a person legally responsible. The Appellate Court also found that the grandmother did not neglect this visiting grandchild. There was apparently no evidence that she could have anticipated the boyfriend's behavior and no evidence that she failed to protect this child after the incident.

However, the Appellate Court did agree that the boyfriend had neglected the two children who lived in the grandmother's home. The court found that these children were "derivatively neglected". The boyfriend had seriously injured a child (albeit one he was not legally responsible for) and also hurt the child's mother (the children's aunt) in front of at least one of the children. The other child could have potentially seen the incident. He did not protect these two children, whom he was legally responsible for, from witnessing his violence. The grandmother also neglected these two children as she minimized her boyfriend's actions toward the third child and took no steps to protect the resident grandchildren from him after he had broken their cousin's arm. She stated that she saw no need for any services to modify the boyfriend's behavior.

Matter of Russell B., 1 AD3d 832, 767 NYS2d 499 (3rd Dept. 2003)

A Broome County mother and her boyfriend neglected her three children. The Third Department agreed with the lower court that they had not responded appropriately upon learning that the young teenage brother was having sexual contact with his sisters. The children corroborated each other that the boyfriend had observed them "playing married". Although there may have been inconsistencies regarding which sister the brother was engaged in sex play with and how many times the boyfriend had observed it, the children's statements that the boyfriend had observed the sex play were reliable. Further the boyfriend had watched porn movies with one of the children. Both respondents had medically neglected the children and the home was cluttered and dirty.

Matter of Kortney C., 3 AD 3d 532, 770 NYS2d 758 (2nd Dept. 2004)

A Queens County caretaker was found to have neglected a 7-month-old baby who had sustained a spiral fractures to the femur. The respondent claimed the child fell off the changing table and that she then caught the child by her arm or her stomach before she hit the floor. Although the respondent did call for help when the child continued to cry, she

did not tell the parents or the hospital about the alleged fall. The emergency room doctor testified that the injury could only have been caused by intentional infliction of a twisting force to the leg. The medical expert who testified said the injury could only have happened accidentally if the caretaker had caught the child by the leg mid-air or if the child had fallen on the leg

Matter of Tylena S., 4 AD2d 568, 771 NYS2d 592 (3rd Dept. 2004)

A Chenango County mother filed a private visitation modification alleging that the father had violated an order regarding the 6 and 8-year-old children. Chenango County DSS also filed a neglect petition against the mother and her boyfriend alleging that the mother's boyfriend had drunk beer in front of the children in violation of a prior order of protection and that he had exposed the children to pornographic magazines. The Family Court dismissed the visitation petition as well as the neglect allegations against the mother but made a neglect finding against the boyfriend that was affirmed on appeal.

The children had claimed in statements to the police that they were sitting on the couch with their mother and her boyfriend and he was looking at a "Playboy type" magazine. He showed them perhaps 10 photos in the magazine as the mother attempted to cover the children's eyes and swat the magazine away. The children described the pictures as naked girls with their "privates spread" apart. A certified social worker testified about the possible deleterious effects of exposing the children to such material. The children gave consistent statements to the social worker and gave unsworn had happened and the boyfriend did not testify. This behavior was neglect on the boyfriend's part.

However, the drinking of beer in front of the children, even though in violation of a prior order of protection, was not neglect as there was no proof that it impacted the children. Violation of an order of protection is not neglect per se and there were no allegations made that the abuse of alcohol resulted in neglect or that it was even to the point of intoxication.

The boyfriend also raised the issue that his lawyer had jointly represented him and the mother. The Appellate Court said that the best practice would have been to advise the parties on the record of the potential for conflict and of the right to separate counsel. Here, however, there was no dispute between the mother and the boyfriend about what had happened so a reversal is not necessary. The Third Department did find that Family Court had erred in not holding a dispositional hearing even though no objection was raised at the time. A dispositional hearing is statutorily required and should be held unless there is a clear waiver. The matter was remitted for either a hearing or a waiver of same.

Matter of D. J., NYLJ 5/14/04 at 25 (Family Court, Orange County 2004)

Orange County Family Court made a derivative finding of neglect regarding a mother who had recently relocated from North Carolina. The derivative finding was based on the fact that she had previously lost her parental rights to 5 other children in North Carolina after an incident in which she attempted to throw her baby off a bridge. She had also been found to have neglected her children in 1998 and had plead guilty to a felony charge of child abuse involving serious injury to a child.

Matter of Joseph and Amber L., NYLJ 6/17/04 at 20 (Family Court, Richmond County 2004)

The Richmond County Family Court made a finding of medical neglect regarding a 10-month-old who had ingested a large amount of a grandmother's high blood pressure pills. The mother of the baby left the baby and her twin 2-year-olds alone in a room while she used the bathroom. When she returned, the twins had opened the grandmother's pill bottle and some pills were spilled, one appeared to have been "dented". The mother did not see any pills in the baby's mouth and the baby appeared to be fine. She called her pediatrician and poison control. Poison control recorded the phone call wherein she was told to take the baby to the emergency room immediately as the medication could cause a serious delayed reaction. At least 5 times during the recorded phone call, she was told to take the child to the emergency room and was told at least 3 times to call for an ambulance. She did neither but did tell the child's father later what had happened. When the father checked, the child was vomiting and convulsing and they rushed the child to the hospital. The baby later died at the hospital due to the large amount of the medication they had been ingested. The court made derivative findings regarding the twins.

Matter of Jeannette LL., __AD3d__, 770 NYS2d 209 (3rd Dept. 2003)

The Third Department reviewed a fair hearing decision involving a Chemung County adoptive mother. The mother had lost a fair hearing to "unfound" an indicated report and had brought an Art. 78 proceeding. The Appellate Division concurred that the report should remain indicated.

The mother had adopted a child from South America. This child was now 12 years old and the mother had another pre-adoptive 12 year old in the home as well. A report was made concerning an incident where the police found the adopted child outside in the rain being harassed by other children. The child was soaked, crying and shivering and was being hit by a group of children. The mother was in the house and was aware of what was happening. The child said that her mother was verbally abusive to her, called her derogatory names, degraded her and expressed regret that she had been adopted. The child said the mother threatened to send her back to South America. The mother told the police that she "couldn't deal" with the child and asked the police to take the child away.

The mother admitted that she had told the other children that they had permission to “beat the shit” out of her adopted daughter if the girl threw rocks at the other children but she claimed that she had told the adopted daughter to come in the house when the other children had in fact begun to hit her. Witnesses said that the child had been left outside for several hours and was being tormented by the children in the neighborhood and that the mother had simply watched. The hearing office found that the mother had engaged in a “pattern of persistent and pervasive verbally abusive behavior” and that the mother was “ineffective” and “inappropriate” in response to the incident involving the neighborhood children. The Third Department agreed that the mother’s behavior warranted an indicated report. They also ruled that it was appropriate for the hearing officer to admit into evidence a letter from a mental health worker regarding statements that had made by the other child about the family problems. Hearsay is admissible in a fair hearing and the other child’s statements were relevant to the situation.

Matter of Jocelyne J., ___AD2d___, dec’d 6/14/04 (4th Dept. 2004)

The Oneida County respondents in this matter had adopted a child in Haiti in 1997 and then sent the child back to Haiti after “raising her as a daughter for 3 years”. At their request, the Haitian courts “terminated” the adoption in 2001. They also sought to “surrender” the child in the Oneida County courts. DSS brought a neglect petition alleging that they had sent the child back to Haiti and made no arrangements for how the child would be returned to their care and custody, thereby caused the child much emotional harm. The court found that the respondents were still “persons legally responsible” under FCA Art. 10 even though they may not now be her “legal” parents due to the Haitian court action. The child suffered impairment of her emotional health by being returned to Haiti and abandoned by the respondents after having been adopted for 3 years. The Fourth Department concurred in the neglect finding but did reverse the finding of derivative neglect on a second child. The action the parents engaged in did not show any “reliable indicators” of a risk to the second child.

X. Dispositional Issues

Matter of Marcy RR., 2 AD3d 1199, 770 NYS2d 200 (3rd Dept. 2003)

Schuyler County Family Court placed a mother under DSS supervision after she admitted to neglecting her seven children. At the time of the finding, the children had been placed in three different relative’s homes, none of which was a foster family. Several relatives petitioned for custody of the children. Under an Article 6 order, the court gave joint custody of the children to the mother and the grandfather with physical residency to the grandfather. He lives in Georgia.

The parents were both granted visitation and the grandfather was ordered to open a preventive file with his local social services agency. The Law Guardian appealed the disposition to the Third Department arguing that the court should have placed the child

under an Article Ten order. The Law Guardian argued that the custodial placement with the grandfather should be done under Article Ten. It would then be limited to a year placement as per FCA 1055 and NYS would retain jurisdiction and DSS would have to provide services to the family.

The Appellate Division pointed out that the problem is that ICPC would have to be used if the placement was under the Article 10. The approval for this would take 4-6 months and while that was going on the children would have to be removed from the relative placements and placed in a multitude of foster homes. Although it would be ideal for the NYS court to retain jurisdiction and for the agency to directly oversee the services to the family - this would have to come at a cost of many months and separation of the children from relatives and each other. The Family Court choose the better to the two less than ideal choices and “crafted the best possible” disposition for the children.

Matter of Bobbjean P., dec'd 3/31/04 (Family Court, Monroe County)

In a Monroe County Family Court case that was reported widely in the press, the court found both a mother and a father to have neglected their newborn baby due to ongoing use of drugs. The mother had 4 children in total and they were all in foster care. As part of the disposition, the court ordered that the mother “...shall not get pregnant again until and unless she has actually obtained custody and care of Bobbjean and every other child of hers who is in foster care and who has not been adopted.....” The court also ordered that the father shall not “...father any other child...” The court found that the parents should not have other children which will have to be cared for at the public expense until they are able to care for the children that they already have. Parents do not have a constitutional right to have an unlimited number of children who they then neglect and who have to be raised at the public expense.

Matter of Brandon K., 2 AD3d, 768 NYS 2d 914 (4th Dept. 2003)

The Fourth Department ruled that Erie County Family Court had authority under FCA 251(a) to order the respondent in an Article 10 matter to submit to a psychological evaluation to effectuate a proper disposition.

Matter of Samuel Diaz v Joseline Santiago, NYLJ 6/25/04 at 33 (2nd Dept. 2004)

Family Court granted Article 6 custody of children to a father after it held a combined dispositional hearing with a pending Article 10 abuse petition against the mother. The mother argued on appeal that the court should have held a separate hearing on the father's Article 6 request for custody and that the “combined” hearing included hearsay and did not include forensic evaluations of the father and the children. The Second Department

found that the mother had not preserved these issues but commented that they found the arguments without merit.

Matter of Joseph B., 6 AD2d 822, 774 NYS2d 822 (2nd Dept. 2004)

A Queens father was alleged to have sexually abused his child. While the fact-finding was pending, he was convicted of criminal charges from the same incident. The court found that he was collaterally estopped regarding the issue of the abuse and then ordered the children into the care of the mother. The court also issued a stay away order of protection against the father until the children were 18 years old. The father argued on appeal that the court should have held a dispositional hearing. The Second Department agreed, although it also ruled that since the one child was now over 18, the issue was moot as to her. The court returned the case to the lower court to hold a dispositional hearing regarding the other child who was still less than 18. The court indicated that a dispositional hearing should be held at least to ascertain if the child might need some services

Matter of Lillian C., ___AD2d___, 777 NYS2d 683 (2nd Dept. 2004)

A neglect petition was filed in Queens County Family Court against a mother and a boyfriend. The court found him to be a person legally responsible. The court dismissed the petition against him while also issuing an order of protection that he was to stay away from the child until she was 18 years old. The Second Department found that the order of protection was proper. The order of protection was “in assistance” to the dispositional order on the mother. FCA § 1056(1) The boyfriend was undermining the mother’s authority and had a negative influence on the child. He engaged in controlling behaviors.

XI MISCELLANEOUS

Matter of Rosario WW v Ellen WW., 309 AD2d 984, 765 NYS2d 710 (3rd Dept. 2003)

In this private custody case, the Third Department continues its line of cases in which it rules that the out of court statements of children regarding abuse or neglect are admissible in private custody and visitation cases as they are in FCA Art. 10 cases.

In Re Tyrone G. v Lucretia S., 4 AD3d 205, 771 NYS2d 645 (1st Dept. 2004)

A Bronx County private custody matter was affirmed by the First Department. The court denied a father’s request for custody and awarded custody to the mother, giving substantial weight to the father’s unfounded allegations of abuse.

Matter of Krista L., ___AD3d ___, dec'd 6/3/04 (3rd Dept. 2004)

The Third Department reviewed a private visitation case from Madison County. The mother had brought a petition to modify the father's visitation, claiming that he had sexually abused the child. Madison County DSS also brought a sex abuse petition against the father but lost the fact-finding hearing. The Article 10 petition was dismissed but the parties to the private visitation matter stipulated the record of the Article Ten matter into evidence in their matter. The court ended father's visitation at the mother's request and issued an order of protection that he not have contact with the child until she is 18 years old. The father appealed. The Third Department found that the court had authority under FCA§ 656 to issue a "no contact" order against a parent. There was no collateral estoppel bar on the issues due to the dismissal of the Article 10 matter as the mother and DSS are different parties with different interests.

Lentini v Page 5 AD3d 914, 773 NYS2d 472 (3rd Dept. 2004)

A Chenango County father brought a lawsuit against an emergency room nurse for calling in a report to the hotline. The custodial mother of the 6 year old boy brought the child to the emergency room with a serious cut to his ring finger that had occurred when the child had visited his father. The nurse felt that the father should have brought the child to the emergency room when he had been cut and she reported the father to the hotline for medical neglect. Chenango County DSS investigated and unfounded the report. The father sued and the nurse made a motion for summary judgment under SSL § 419, which grants qualified immunity to mandated reporters who report in good faith. The Third Department concurred that there was no proof of bad faith to overcome the statute's presumption of good faith. Although the nurse did not have actual or conclusive proof of maltreatment, she did have reasonable cause to suspect. The father's claim that other medical personnel did not echo her concerns is not enough to overcome the motion for summary judgement. The nurse was entitled to the good faith immunity despite the allegation that the plastic surgeon claimed in uncertified, unsworn medical records that the father's initial reaction was appropriate and the allegation that the emergency room doctor and the radiologist did not think there had been any maltreatment.

DERIVATIVE NEGLECT OR ABUSE
CASELAW REVIEW for Teleconference on September 28, 2004

By Margaret A. Burt, Esq. (cites current as of July 2004)

What is it? FCA 1046(a) i

Proof of the abuse or neglect of one child is admissible as evidence on the issue of the abuse or neglect of any other child in the care of the respondent. Where one child who was the legal responsibility of the respondent was abused or neglected, the court may determine that another child who was the legal responsibility of the respondent is at risk of abuse or neglect

What kind of action toward the target child can result in a derivative finding regarding other children?

Sex Abuse? Probably always

Physical Abuse? Most likely

Excessive Corporal Punishment? Maybe, if repeated or if refuse counseling B maybe not if a one time incident

Emotional Abuse or Neglect? Quite possible

MAKE SURE TO CAREFULLY DETERMINE IF IT WAS DERIVATIVE SEVERE ABUSE AND PLEAD IT CORRECTLY!

SEX ABUSE

Matter of Rosheda S., 183 AD2d 770, 586 NYS2d 522 (2nd Dept. 1992)

Stepfather's sexual abuse of 11 year old girl demonstrates his failure to understand duties of parenthood which put his own 4 year boy at risk and the 4 year old is therefore derivatively neglected.

Matter of Michael V., 83 NY2d 178, 608 NYS2d 940 (1994)

The Court of Appeals ruled that all the children were abused where the parent was convicted criminally of sexually abusing one.

Matter of Philip M., 186 AD2d 462, 589 NYS2d 31 (1st Dept. 1992)

Where two children were sexually abused, three other siblings were derivatively abused.

Matter of Douglas E., 191 AD2d 694, 594 NYS2d 800 (2nd Dept. 1993)

Dutchess County Family Court dismissed a derivative neglect petition concerning the 7-year-old brother of a 10-year-old sister. The Appellate Division reversed. The father had admitted sexually abusing the 10-year-old girl. While the abuse of one child does not per se compel a derivative finding, where the primary neglect or abuses evinces such a fundamental defect in the parent's understanding of the duties of parenthood as in this case, the court should infer that other children will be at substantial risk of imminent impairment and therefore derivatively neglected.

Matter of Kelly M., 196 AD2d 538, 601 NYS2d 160 (2nd Dept. 1993)

Brother is derivatively neglected when he stays awake and watches, at sister's request, father raping and sodomizing the sister.

Matter of Patricia J., 206 AD2d 847, 616 NYS2d 123 (4th Dept. 1994)

Son was derivatively neglected where father had massaged 8-year-old daughter's buttocks and vagina.

Matter of Joanne W., 210 AD2d 328, 620 NYS2d 402 (2nd Dept. 1994)

Mother derivatively neglected an older brother when she allowed younger child to be sexually abused and continued to allow that child contact with the abuser.

Matter of Eric J., 223 AD2d 412, 636 NYS2d 762 (1st Dept. 1996)

All children neglected where mother failed to respond and protect one daughter from being sexually abused by a brother.

Matter of Rhiannon B., 237 AD2d 935, 654 NYS2d 537 (4th Dept. 1997)

Three brothers derivatively neglected where mother should have known of 14-year-old daughters sexual abuse by stepfather.

Matter of Lindsey H., 178 Misc. 2d 566, 679 NYS2d 802 (Family Court, Orange County 1998)

Summary judgement derivative neglect finding as to sibling where 13 year old had given sworn statement as to sexual abuse and father had given sworn statement admitting.

Matter of Denise GG., 254 AD2d 582, 678 NYS2d 821 (3rd Dept. 1998)

Father's guilty plea in sex abuse criminal charges regarding 12 year old results in also finding derivative abuse and neglect for 2 younger siblings.

Matter of Russell B., 257 AD2d 707, 683 NYS2d 625 (3rd Dept. 1999)

Two siblings of a nine-year-old are derivatively neglected where father sexually abused child.

In re Roland T., 261 AD2d 143, 689 NYS2d 493 (1st Dept. 1999)

Daughter derivatively neglected where mother sexually abused stepson.

In Re Nathaniel TT., 265 AD2d 611, 696 NYS2d 274 (3rd Dept. 1999)

Younger sibling derivatively neglected upon sexual abuse of older child.

Matter of Kaitlyn R., 267 AD2d 894, 700 NYS2d 533 (3rd Dept. 1999)

Mother's sexual abuse of 6-year-old son merits derivative neglect findings regarding the siblings.

Matter of Melissa L., 276 AD2d 856, 714 NYS2d 154 (3rd Dept. 2000)

Twelve year old boy and ten year old girl were derivatively neglected based on sexual abuse of 14 year old girl. Actions showed a fundamental lack of understanding of appropriate parental behavior. One incident of sexual intercourse occurred as the two younger children knocked on the bedroom door and another occurred as the rest of the family had a cookout in the backyard.

Matter of Rosemary F., 262 AD2d 1036, 691 NYS2d 849 (4th Dept. 1999)

Father derivatively neglected 9-year-old son where he sexually abused 7-year-old daughter.

Matter of Mary S., 279 AD2d 896, 720 NYS2d 568 (3rd Dept. 2001)

Six year old son derivatively neglected where mother allowed paramour access to an 11 year old handicapped girl after learning that paramour was sexually abusing girl. Boy had also witnessed some of the sex acts.

Matter of Martha Z., 288 AD2d 706, 732 NYS2d 717 (3rd Dept. 2001)

Ten-year-old sister derivatively neglected where 12 year old sexually abused by father.

Matter of Krystin M., 294 AD2d 577, 742 NYS2d 575 (2nd Dept. 2002)

Mother did not prevent her boyfriend from sexual abusing her 5 year old B sibling therefore derivatively neglected.

Matter of Shaun X., 300 AD2d 772, 751 NYS2d 631 (3rd Dept. 2002)

Boyfriend sexually abused his girlfriend's son - "beyond dispute" that this means he derivatively neglected his own daughter who he had also left alone while having sex with the boy

Matter of Amanda L., 302 AD2d 1004, 754 NYS2d 494 (4th Dept. 2003)

Sexual abuse of 7 year old by father, derivative abuse findings re 2 siblings

Matter of AR 309 AD2d 1153, 764 NYS2d 746 (4th Dept. 2003)

Boyfriend sexually abused oldest of three children, other two children are derivatively abused - overturned lower court who had dismissed the derivative on the younger children

Matter of Marino S. 100 NY2d 361, 763 NYS2d 796 (2003)

Court of Appeals clearly holds that two siblings are **derivatively severely abused** where one sibling was raped by mother's boyfriend and mother did not prevent it and did not seek immediate medical attention for child who was severely injured in the rape – also appropriate to make a "no reasonable efforts" ruling regarding all of the children

Matter of Sabrina M., 6 AD3d 759, 775 NYS2d 96 (3rd Dept. 2004)

Stepfather sexually abused stepdaughter, other stepdaughter and child in common both derivatively abused.

PHYSICAL ABUSE

Matter of Eli G., 189 AD2d 764, 592 NYS2d 412 (2nd Dept. 1993)

Siblings of a child beaten by father with an electrical cord are derivatively abused. There is a reasonable inference of ongoing danger for all the children because the incident was not isolated and because the father attempted to justify his discipline method.

Matter of H and J Children 209 AD2d 525, 619 NYS2d 65 (2nd Dept. 1994)

Siblings are derivatively neglected where 22 month old has spiral fracture.

Matter of C. Children 207 AD2d 888, 616 NYS2d 644 (2nd Dept. 1994)

Siblings were derivatively neglected where mother's explanation of target child's burn injury was not consistent with medical proof that child had non-accidental immersion burns, permanent scarring, loss of some use of the hand.

In Re Erick C., 220 AD2d 282, 632 NYS2d 126 (1st Dept. 1995)

Two siblings were at imminent risk where parents failed to provide adequate explanation for injuries to a five-month-old who suffered bruises, swollen foot, broken toe.

Matter of Eric CC., 237 AD2d 655, 653 NYS2d 983 (3rd Dept. 1997)

One year old is derivatively neglected due to extent of injuries to 6-week-old sibling

In Re Pierre M., 239 AD2d 533, 657 NYS2d 185 (1st Dept. 1997)

Excessive corporal punishment of 15 year old that resulted in scalp laceration was abuse and siblings were also derivatively abused. Mother continued to use extreme discipline and had seriously impaired judgement and parenting skills.

Matter of Brittney C., 242 AD2d 533, 661 NYS2d 670 (2nd Dept. 1997)

Physical abuse of infant results in derivative neglect of older sister given impairment of parent's judgement.

Matter of Keith M., 181 Misc2d 1012, 697 NYS2d 823 (Family Court, Erie County 1999)

Physical abuse of one child resulting in a criminal conviction for First Degree Assault as well as a severe abuse finding in Family Court also results in a derivative abuse finding regarding a sibling and court issued a “no reasonable efforts” order regarding both children

In Re Quincy Y., 276 AD2d 419, 714 NYS2d 293 (1st Dept. 2000)

Sibling of a burned child was derivatively neglected. Child had not been given medical attention and second-degree burns became infected.

Matter of Sharonda S., 301 AD2d 532, 752 NYS2d 898 (2nd Dept. 2003)

8 month old baby with broken leg - abused by mother who can not explain- 2 siblings are derivatively neglected

Matter of Marc A., 301 AD2d 595, 754 NYS2d 45 (2nd Dept. 2003)

7 year old girl with round burn on shoulder blade like a cigarette; no good explanation by parents - abuse and derivative neglect of 2 sibs

NEGLECT

Matter of Brian A., 190 AD2d 31, 593 NYS2d 31 (1st Dept. 1993)

Sibling is derivatively emotionally neglected where mother failed to get medical attention for a child, which resulted in child losing sight in one eye. She failed to provide minimal care and failed to accept responsibility for how her behavior effected the children.

Matter of Alena O., 220 AD2d 358, 633 NYS2d 127 (1st Dept. 1995)

Eight-month-old is derivatively neglected where mother stuck nine-year-old sibling with a belt. Child had bruises all over body and this was not an isolated incident. Father had not intervened although aware of excessive corporal punishment.

Matter of Jennifer O., 231 AD2d 429, 647 NYS2d 10 (1st Dept. 1996)

All six children neglected where excessive corporal punishment used on 2 of them and proof of prior incidents.

Matter of Jennifer Q., 235 AD2d 827, 652 NYS2d 829 (3rd Dept. 1997)

Younger siblings derivatively neglected due to poor judgment in ongoing discipline of older siblings.

Matter of Jessica R., 230 AD2d 108, 657 NYS2d 164 (1st Dept. 1997)

Two siblings B 11 and 13 B derivatively emotionally neglected where mother had Ainfected@ these children with idea that 2 year old target child was possessed by evil spirits.

Matter of Shawn BB., 239 AD2d 678, 657 NYS2d 239 (3rd Dept. 1997)

Two siblings derivatively neglected where 6 year old was victim of excessive corporal punishment on a repeated basis and custodians had been unwilling to accept counseling regarding discipline methods.

Matter of Brandiwell K., 247 AD2d 931, 668 NYS2d 790 (4th Dept. 1998)

Mother=s failure to intercede when boyfriend beat child also resulted in three other children being derivatively neglected.

Matter of Deandre T., 253 AD2d 497, 676 NYS2d 666 (2nd Dept. 1998)

Sibling derivatively neglected where older child had witnessed domestic violence.

Matter of Chad V., 265 AD2d 607, 695 NYS2d 764 (3rd Dept. 1999)

Sibling is derivatively neglected based on mother=s educational neglect of older child.

Matter of Ruthanne F., 265 AD2d 829, 695 NYS2d 831 (4th Dept. 1999)

Siblings of a 2-year-old were derivatively neglected based on younger child being placed in a straightjacket-like device at night. Older children were not permitted to comfort child as he cried.

Matter of Peter C., 278 NY2d 911, 718 NYS2d 551 (4th Dept. 2000)

Mother failed to prevent boyfriend from sexually abusing two children and two other siblings were also derivatively neglected based on her impaired parental judgment

Matter of Tammy II v Jeffery II, 295 NY2d 657, 742 NYS2d 727 (3rd Dept. 2002)

Older brother derivatively neglected by father's treatment of younger brother. Father had placed urine soaked underwear in mouth of younger boy B Ademoralizing and humiliating” and did not properly attend to child=s wetting problem.

Matter of Dareth O., 304 NY2d 667, 758 NYS2d 372 (2nd Dept. 2003)

Excessive corporal punishment and educational neglect of child also means derivative neglect as to sibling as mother demonstrates lack of understanding of parental responsibility

Matter of Christina BB., 305 AD2d 735, 759 NYS2d 560 (3rd Dept. 2003)

Father punished 6th grade girl by yelling, calling her a bitch and a whore, struck her in the face twice, bloody lip and bruise to cheek - held knife to her throat and threatened to slit her throat - neglect to child and derivative to younger children as they watched - reflected fundamentally flawed parenting

Matter of Brent HH., 309 AD2d 1016, 765 NYS2d 671 (3rd Dept. 2003)

Custodial grandmother's boyfriend was derivatively neglectful of two children living in his and grandmother's home where boyfriend broke arm of a visiting child and kicked that child's mother - even though boyfriend was not a person legally responsible for the visiting child

In Re Rayshawn R., 309 AD2d 681, 765 NYS2d 872 (1st Dept. 2003)

Custodial grandmother was neglectful of child where she knew and did not protect child from mother who used corporal punishment – sibling was derivatively neglected.

Matter of Jason G., 3 AD3d 340, 769 NYS2d 889 (1st Dept. 2004)

Second child derivatively neglected where mother used excessive corporal punishment on older child - caused bruises that required medical attention once and a noticeable bruise over eye at another time - no defense to the derivative that mother allegedly hit older child in response to that child hurting younger child

Matter of Samantha B., 5 AD3d 590, 773 NYS2d 450 (2nd Dept. 2004)

Three siblings derivatively neglected by both mother and father where father had used excessive corporal punishment on other child and neither parent had sought medical care for another child who fell down the stairs – these incidents show fundamental defect in understanding of parental duties

Matter of D.J. NYLJ 5/14/04 at 25 (Family Court, Orange County 2004)

Mother was derivatively neglectful of child where previously she had lost parental rights to 5 other children in North Carolina

What about cases involving a DECEASED SIBLING? Are the other children derivatively neglected/abused? YES, and consider carefully if it should be a derivative severe abuse petition!

In Re William D., 198 AD2d 40, 603 NYS2d 825 (1st Dept. 1993)

Where mother killed one child by beating about the head, all five siblings are derivatively abused.

In Re Jorela L., 222 AD2d 282, 635 NYS2d 584 (1st Dept. 1995)

Four siblings of dead three-month-old were derivatively neglected although they had no injuries. Deceased infant had broken bones and parent=s explanation was inadequate.

Matter of Stephanie WW., 213 AD2d 818, 623 NYS2d 404 (3rd Dept. 1995)

Siblings of deceased child are derivatively neglected even though court can not make a finding on a deceased child. (note that Court of Appeals has now ruled otherwise on deceased child being abused)

Matter of Tia C., 225 AD2d 766, 640 NYS2d 143 (2nd Dept. 1996)

One year old is at risk due to father=s murder of 6 week old.

Matter of Charlesia J., 281 AD2d 482, 721 NYS2d 786 (2nd Dept. 2001)

Sibling of deceased 20 month old is derivatively neglected. Mother was unable to adequately explain fatal injuries to sibling.

In re Anthony S., 280 AD2d 302, 720 NYS2d 137 (1st Dept. 2001)

Although cause of death not proven, injuries to deceased child show there was abuse of that child before death and siblings are derivatively abused.

Matter of Alijah C., 1 NY3d 375, 774 NYS2d 483 (2204)

The Court of Appeals ruled that a deceased child could be found to be an abused and a severely abused child where mother had admitted that the siblings were derivatively neglected. NOTE: The siblings in this matter should have been alleged to be derivatively severely abused as per **Marino S.**

Matter of Joseph and Amber L., NYLJ 6/17/04 at 20 (Family Court, Richmond County 2004)

Siblings are derivatively neglected where mother did not respond properly to infant ingesting some high blood pressure medication which ultimately led to baby's death

What about AFTER BORN? - children born after a sibling was abused or neglected – should a petition be brought regarding the newborn? Carefully consider bringing petition where prior findings were close in time, or where it was a very serious event or where other children still in foster care - Might even be summary judgement!

Matter of Shawnmanne CC., 244 AD2d 662, 664 NYS2d 175 (3rd Dept. 1996)
Newborn is derivatively neglected where born after the murder of a sibling. Child had been born two months before father convicted for criminally negligent death of older child. Two other siblings already in care.

Matter of Baby Girl W., 245 AD2d 830, 666 NYS2d 346 (3rd Dept. 1997)
Newborn is derivatively neglected where father had been criminally convicted of homicide for other child two years earlier. Previous conduct demonstrated significantly impaired parental judgement that was proximate in time to the second child=s birth and no treatment was been completed in the meantime.

Matter of Daequan FF., 243 AD2d 922, 663 NYS2d 400 (3rd Dept. 1997)
New born is derivatively neglected where three older children were found to have been neglected just months before birth. Three older children are in care and parents have not yet made progress on issues.

Matter of Baby Girl S., 174 Misc2d 682, 665 NYS2d 809 (Family Court, Bronx County 1997)
Child born just three months after neglect finding on older child due to mother=s mental health problems is derivatively neglected **by summary judgment**

Matter of Kimberly H., 242 AD2d 35, 673 NYS2d 96 (1st Dept. 1998)
New born should be removed where three older children had been removed due to excessive corporal punishment a month before this child was born. **Imminent risk should be presumed** here unless mother can demonstrate that it does not exist.

Matter of Esther II., 249 AD2d 848, 672 NYS2d 483 (3rd Dept. 1998)
Newborn is derivatively neglected where born four months after two older children freed for adoption. Older children had been abused and mother had ongoing impairment of judgement as court had ruled in recent TPR.

Matter of Mikayla B., 180 Misc 2d 554, 690 NYS2d 397 (Family Court, Kings County 1999)
Newborn might be derivatively neglected where mother found guilty three years earlier to abusing a child and causing her to go blind and have permanent brain damage. No summary judgement but agency must prove that mother has not resolved problems in the meantime.

Matter of Krystal J., 267 AD2d 1097, 700 NYS2d 340 (4th Dept. 1999)

Newborn is derivatively neglected where born just days after TPR of older child.

Matter of Tiffany AA., 268 AD2d 818, 702 NYS2d 413 (3rd Dept. 2000)

Newborn is derivatively neglected where child born 7 weeks after mother started serving jail sentence for assault on stepchildren. Mother also had her parental rights terminated to three children several years earlier.

Matter of Falcon EE., 269 AD2d 711, 703 NYS2d 569 (3rd Dept. 2000)

Child born after respondent had sexually abused 2 year old was derivatively neglected.

In Re F. Children 271 AD2d 249, 707 NYS2d 32 (1st Dept. 2000)

Two siblings and a third born afterwards were derivatively abused based on the physical abuse of a one-year-old that resulted in broken bones.

Matter of Baby Boy W., 283 AD2d 584, 724 NYS2d 494 (2nd Dept. 2001)

New born was derivatively neglected where born two months after incidents in original neglect. Time period was short and the burden shifted to the parents to show that the problems that gave rise to the original neglect had been resolved. Underlying neglect was that two loaded guns had been found in an 18-month-old child's bedroom as well as crack cocaine in full view in the kitchen.

Matter of Stephani FF., 296 AD2d 606, 744 NYS2d 722 (3rd Dept. 2002)

Newborn is derivatively neglected where shortly before child's birth parents had consented to neglect finding as to three older children.

Matter of D=Anna KK 299 AD2d 761, 751 NYS2d 326 (3rd Dept. 2002)

Newborn is derivatively neglected and a no reasonable efforts order is issued where older four siblings were in process of being freed for adoption when child born. There was a long-term pattern of abuse and neglect that had not been remedied when fifth child was born. As the four older children had actually been freed for adoption after this newborn's fact finding hearing and before the dispositional hearing, a no reasonable efforts order could be issued regarding the newborn.

Matter of Cassandra C., 300 NY2d 303, 750 NYS2d 322 (2nd Dept. 2002)

Child born four months after sexual contact and nude photos taken (and put on Internet) of older sibling is derivatively neglected. Respondent failed to show that the conditions that led to the underlying abuse no longer existed.

Matter of Hannah UU., 300 AD2d 942, 753 NYS2d 168 (3rd Dept. 2002)

New born is derivatively neglected where child was born 2 months after neglect finding regarding mother=s 3 year old. Mother had ongoing mental health problems and had attempted suicide. **Summary judgement** allowed as to the newborn as it had only been 8 weeks since the finding even though mother had begun efforts to work on her mental health problems.

Matter of Justice and Justin T., 305 AD2d 1076, 758 NYS2d 732 (4th Dept. 2003)

Mother has derivatively neglected (should be abused!) newborn twins who were born while mother was on parole for 1989 manslaughter conviction where she had killed her 10 month old baby by twice slamming baby=s head against a wall – mother had been getting services when she killed the 10 month old

Matter of Damaris Makiela O., 3 Misc3d 1108A, 2004 NY Misc. LEXIS 769, NYLJ 6/18/04 at 19 (Family Court, Kings County 2004)

Newborn baby is derivatively severely abused by **summary judgement** where mother had severely abused a sibling seven months before birth of this child – seven months is proximate in time and no evidence that mother had followed through on any treatment in the meantime– the court had ordered “no reasonable efforts” on first child and did so on this one as well

Are there any cases where the court refused to do a derivative? Yes, but they are very few- should consider always at least pleading the derivative

Matter of Joseph P., 215 AD2d 486, 626 NYS2d 522 (2nd Dept. 1995)

An incident of excessive corporal punishment to one child that left marks and bruises is not derivative neglect as to older sister.

Matter of Daniella HH., 236 AD2d 715, 654 NYS2d 200 (3rd Dept. 1997)

Mother not neglectful of 2 year old although had neglected one year old. One year old had health problems and was diagnosed as failure to thrive. Family Court must consider derivative but need not find it where two-year-old had no problems and mother had not demonstrated such an impairment of parental judgment as to risk neglect for the older child. There was a strongly worded dissent B mother had previous indicated report on 2 year old, had failed to follow up with services in past and had asked caseworker to remove the older child as she had feared her own inability.

Matter of Samuel Y., 270 AD2d 531, 703 NYS2d 591 (3rd Dept. 2000)

Two-year-old sibling was not derivatively neglected based on one time incident of mother striking 10 month old in face.

Matter of Ijemo O., 271 AD2d 691, 706 NYS2d 196 (2nd Dept. 2000)

Siblings were not derivatively neglected based on mother=s failure to get mental health care for emotionally disturbed child. No evidence that the other children were at risk of neglect.

Matter of Christina P., 275 Ad2d 783, 713 NYS2d 743 (2nd Dept. 2000)

Son was not derivatively neglected by mother who had neglected 6-year-old daughter by allowing her to sleep in same bed as mother’s boyfriend and boyfriend sexually abused six-year-old.

Matter of Isaiah Keith B., 306 AD2d 343, 760 NYS2d 675 (2nd Dept. 2003)

Newborn not derivatively neglected as two prior findings on older children were Atoo remote@ in time and although 3rd finding was only 3 months before this child was born, that concerned an Aisolated incident@

Matter of Jocelyne J., ___ AD3d ___, 778 NYS2d 393 (4th Dept. 2004)

Sibling not derivatively neglected where parents had sent adopted child back to Haiti and made no arrangements for child to be returned – the action that the parents engaged in did not show any “reliable indicators” of risk to the second child.