

**Freeing a Child for Adoption I: Termination of Parental Rights
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Mental Illness Terminations – Proof Issues

By Margaret A. Burt, Esq. • March, 2010

Termination of parental rights on the grounds of parent's mental illness is constitutional as it is not the parent's status that results in the termination but their inability to parent the child. Matter of the Guardianship and Custody of Nereida S., 57 NY2d 636, 454 NYS2d 61 (1982)

NYS statute properly balances the rights of children and parents Matter of the Custody and Guardianship of Ursula P., 108 Misc2d 181, 437 NYS2d 225 (Family Court, Kings County 1981), Matter of Daniel, 106 Misc 2d 370, 431 NYS2d 936 (Family Court, New York County 1980)

NYS Statute does not violate the federal Rehabilitation Act of 1973 Matter of Robert Scott T., 86 AD2d 748, 447 NYS2d 776 (4th Dept. 1982)

Experts

Statute requires court appointment of qualified licensed expert to do evaluation of parent. Expert must testify.

- Can be an expert who has worked for DSS in past Matter of Hannah C., 132 AD2d 659, 518 NYS2d 32 (2nd Dept. 1987)
- Expert can receive materials from DSS as long as standard procedures and tests are used and conclusion is reached in an objective manner Matter of Elizabeth "Q.", 126 AD2d 905, 511 NYS2d 181 (3rd Dept. 1987) but expert not required to review all the records Matter of Tyeshia 687 NYS2d 16 (1st Dept. 1999)
- Only one expert need be court appointed, defense is free to cross examine and may present their own expert Matter of Edward R., 123 AD2d 866, 507 NYS2d 647, (2nd Dept. 1986)
- Failure to have court appointed expert testify means no TPR – Matter of Robert M. PD., 818 NYS2d 277 (2nd Dept. 2006)- If no expert ordered or testified, no TPR – Matter of Shonica Ahalila S., 6/12/2007 (2nd Dept. 2007)

Expert's Evaluation

If parent refuses to submit, leaves or conceals, expert can testify based on other available info re parent.

- Parent has a right to have counsel present during the evaluation by the court appointed expert unless proof that presence would impair validity and effectiveness of eval. Matter of the Guardianship and Custody of Alexander L., 60 NY2d 329, 469 NYS2d 626 (1983)
- Defense attorney can not object to expert's questions or stop the examination, just an observer; recording or transcript of exam is not mandated Matter of Guardianship of Jose T., 126 Misc2d 559, 481 NYS2d 991 (Family Court, Kings County 1984)
- Court does not have to advise parent of right to have counsel present at the eval Matter of Rosemary ZZ., 154 AD2d 734, 545 NYS2d 948 (3rd Dept. 1989)

- Parent can not complain re attorney not attending unless the requested that attorney attend and can show that failure of attorney to attend created ineffective assistance of counsel **Matter of John Lawrence M.**, 142 AD2d 950, 531 NYS2d 149 (4th Dept. 1988); **Matter of Kevin R.**, 112 AD2d 462, 490 NYS2d 875 (3rd Dept. 1985)
- Agency attorney and law guardian may also have right to be present **Matter of Tanise B.**, 119 Misc2d 30, 462 NYS2d 537 (Family Court, Bronx County 1983)
- Law Guardian must ask to be present during evaluation or record not preserved **Matter of Lisa Marie S.**, 758 NYS2d 386 (2nd Dept. 2003)
- Court can order a second exam if first exam is inconclusive or was not timely. **Matter of Ronald F.**, 128 Misc2d 1023, 492 NYS2d 338 (Family Court, Kings County 1985); **Matter of Klaus K.**, 77 AD2d 568, 429 NYS2d 730 (2nd Dept. 1980), but may not order second exam where agency should have known that exam was flawed **Matter of Jennifer HH.**, 193 AD2d 850, 597 NYS2d 515 (3rd Dept. 1993)
- Other experts besides the court appointed one may testify and can be relied on to establish the needed proof **Matter of Karen Y.**, 156 AD2d 823 (3rd Dept. 1990); **Matter of Joy Cylinda C.**, 663 NYS2d 249 (2nd Dept. 1997)
- Court appointed experts records were admissible as records relied on to form the opinion **In Re Antonio Tyrone B.**, 298 AD2d 128, 747 NYS2d 232 (1st Dept. 2002)

General Proof of Mental Illness

- Agency should be open in discovery matters in TPR cases and should allow parents counsel to view any records in advance that it intends to offer into evidence **Matter of Christina C.**, 185 AD2d 843, 856 NYS2d 990 (2nd Dept. 1992)
- Parent cannot be excluded from the court room unless knowing and intelligent waiver or compelling necessity **Matter of Daniel Aaron D.**, 49 NY2d 788, 426 NYS2d 729 (1980); **Matter of James W.**, 155 AD2d 381 (1st Dept. 1989)
- Court can ignore court appointed expert's testimony if examination was too brief, or too old **Matter of Dochingozi B.**, 57 NY2d 641 (1982), **Matter of Sylvia M.**, 82 AD2d 217, 443 NYS2d 214 (1st Dept. 1981)
- Court can take as some proof prior TPR on mental illness grounds and can take judicial notice of findings in neglect proceedings **Matter of Suzanne NY.**, 77 AD2d 433, 433 NYS2d 580 (1st Dept.); **Matter of Claudina Paradise DaMaris B.**, 641 NYS2d 643 (1st Dept. 1996)
- Diagnoses of a "personality disorder" sufficient re mental illness **Matter of Joseph ZZ.**, 666 NYS2d 827 (3rd Dept. 1997); **Matter of Natasha C.**, 199 AD2d 500, 606 NYS2d 35 (2nd Dept. 1994) **Matter of D.**, 703 NYS2d 537 (2nd Dept. 2000), **Matter of Mathew Z.**, 279 Ad2d 904, 720 NYS2d 566 (3rd Dept. 2001), **Matter of Anthony C.**, 280 AD2d 1000, 720 NYS2d 702 (4th Dept. 2001), **Matter of Joshua F.**, 291 Ad2d 742, 737 NYS2d 704 (3rd Dept. 2002), **Matter of Trebor UU.**, 295 AD2d 648, 743 NYS2d 605 (3rd Dept. 2002)
- Use of drugs as enhancing the mental illness **Matter of Virginia Denise R.**, 671 NYS2d 133 (2nd Dept. 1998); **Matter of Timothy Maurice B.**, 626 NYS2d 665 (Family Court, Bronx County 1995); **Matter of Aridyse Ashley J.**, 242 AD2d 438, 662 NYS2d 47 (3rd Dept. 1997)
- TPR appropriate where mother could parent when stable but had periods of decompensation when no meds **In Re Guardian ship of Shannon Monique W.**, 666 NYS2d 121 (1st Dept. 1997)

- Each element of the diagnoses need not be proven by clear and convincing proof **Matter of Melissa R.**, 209 AD2d 155 (1st Dept. 1994); expert need not even give specific mental illness suffered **Matter of Dylan K.**, 702 NYS2d 487 (4th Dept. 2000)
- Expert’s opinion can be based wholly on records **Matter of Donald LL.**, 188 AD2d 899, 591 NYS2d 876 (3rd Dept. 1992)
- Mother in remission is not currently mentally ill as required **Matter of Mark GG.**, 69 AD2D 311 (3rd Dept. 1979)but partial remission may not be enough to prevent TPR where mental illness long standing **Matter of Ebony Shaquiren C.**, 695 NYS2d 590 (2nd Dept. 1999)
- Court may consider child’s special needs **Matter of Natasha C.**, 199 AD2d 500, 606 NYS2d 35 (2nd Dept. 1993);**Matter of Anthony M.**, 56 AD3d 1124, 867 NYS2d 590 (4th Dept. 2008)
- Parent’s lack of insight into the seriousness of condition can be considered **Matter of PhilipR.**, NYLJ 10/24/00 (Family Court, Putman County 2000), **In Re Emmanuel B.**, 715 NYS2d 699 (1st Dept. 2000), **Matter of Robert XX** 290 AD2d 753, 736 NYS2d 199 (3rd Dept. 2002), **Matter of Joshua F.**, 291 AD2d 742, 737 NYS2d 704 (3rd Dept. 2002); **Matter of Tyler Shannara S.**, 38 AD3d 560, 832 NYS2d 576 (2nd Dept. 2007); **Matter of Tamaine William B.**, 38 AD3d 767, 832 NYS2d 622 (2nd Dept. 2007)
- Parent who has suffered brain injury has “mental condition” covered by statute and can have mental illness termination **Matter of Chance Jahmel B.**, 187 Misc2d 626, 723 NYS2d 634 (Family Court, Monroe County 2001)
- Court may consider that parent needs intensive supervision in a controlled setting to function **Matter of Theone AA.**, 724 NYS2d 39 (1st Dept. 2001)
- Records used by expert to form opinion may be admissible **In Re Antonio Tyrone B.**, 298 AD2d 128, 747 NYS2d 232 (1st Dept. 2002)
- Two experts agreed that mother was mentally ill, fact that they disagreed about what the mental illness was is not relevant **Matter of Damion S.**, 300 Ad2d 1039, 752 NYS2d 476 (4th Dept. 2002)
- Strongest inference against parent who will not testify **Matter of Damion, supra; Matter of Amanda Ann B.**, 38 AD3d 537, 832 NYS2d 59 (2nd Dept. 2007)
- Court can take into consideration the stress raising the children would have on severity of mother’s mental illness **Matter of Jon C.**, 305 AD2d 592, 759 NYS2d 756 (2nd dept. 2003)
- Expert can consider information and records from DSS – even though this could be seen as “biased” – only goes to weight not admissibility of opinion – **Matter of Donald W.**, 17 AD3d 728, 739 NYS2d 217 (3rd Dept. 2005)
- Court can consider a cognitive disorder which results in memory, attention and planning deficits as well as learning and reading disabilities and personality disorder as mental illness – **Matter of Roseanna X.**, 22 AD3d 993, 802 NYS2d 793 (3rd Dept. 2005)
- Court can consider pedophilia as part of mental illness - **Matter of Chelsea KK.**, 27 AD3d 821, 812 NYS2d 173 (3rd Dept. 2006); **Matter of Jenna KK.**, 50 AD3d 1216, 855 NYS2d 700 (3rd Dept. 2008); **Matter of Casey L.**, 12/24/09 (3rd Dept. 2009)
- Expert did not testify that parent’s mental illness was the reason they could not care for their children who had been put in care due to parental substance abuse – no TPR – **Matter of Arielle Y.**, 61 AD3d 1061, 876 NYS2d 529 (3rd Dept. 2009)

Foreseeable Future

- Expert proof must show that parent can not parent now **and** for foreseeable future **Matter of Hime Y.**, 54 NY2d 282, 445 NYS2d 114 (1981), **Matter of Shaneek Christal W.**, 122 AD2d 215, 504 NYS2d 748 (2nd Dept. 1986)
- Parent's history of failure to use treatment and medication can be relied on to conclude inability will continue **Matter of Vaketa "Y".**, 141 AD2d 892, 528 NYS2d 932 (3rd Dept. 1988); **In re Guardianship of Vera T.**, 80 AD2d 511, 435 NYS2d 598 (1st Dept. 1981); **Matter of Sheila S.**, 180 AD2d 687 (2nd Dept. 1992); **Matter of Jamie YY.**, 176 AD2d 1004 (3rd Dept. 1991); **Matter of August ZZ.**, 42 AD3d 745, 940 NYS2d 184 (3rd Dept. 2007)
- Expert's position that parent might be able to improve someday but not really foreseeable does not preclude TPR **Matter of Demetrius F.**, 176 AD2d 940, 575 NYS2d 552 (1991); **In Re Brett** 206 AD2d 595 (3rd Dept. 1994); **Matter of Joseph and April R.**, 191 AD2d 1034, 595 NYS2d 153 (4th Dept. 1993), **Matter of Shane P.**, 724 NYS2d 788 (3rd Dept. 2001)
- Mother's possible ability to parent 5-10 years in future not sufficient to prevent TPR **Matter of Jessica "SS".**, 651 NYS2d 693 (3rd Dept. 1996) - Possibility to parent after 3 more years of therapy not sufficient to prevent TPR particularly where parent did not testify that they would comply with treatment **Matter of Damion S.**, dec'd 12/30/02 (4th Dept. 2002) - mere possibility of improvement not sufficient defense - **Matter of Trebor UU** 295 AD2d 648, 743 NYS2d 605 (3rd Dept. 2002) – possibility to improve parenting skills in the future, not enough – **Matter of Evelyn B.**, 37 AD3d 991, 830 NYS2d 894 (3rd Dept. 2007); **Matter of Dominique R.**, 38 AD3d 211, 831 NYS2d 149 (1st Dept. 2007); mere possibility that mother may have a chance to be effective as a parent not enough – **Matter of Alexander James R.**, 48 AD3d 820, 853 NYS2d 136 (2nd Dept. 2008)
- Expert felt mother's condition was changeable and therefore prognosis difficult as symptoms were not always that bad but TPR appropriate as expert said unequivocally that children would always be at risk **Matter of Charles Emanuel M.**, 293 AD2d 477, 740 NYS2d 100 (2nd Dept. 2002)
- Since expert could not say if it would always be the case that father would not be able to care or if he might be able to care for child within a reasonable time even though he could not now, not enough to TPR - **Matter of Lina Catalina R.**, 21 AD3d 563, 800 NYS2d 589 (2nd Dept. 2005)

Agency Efforts

- Diligent efforts are not required **Matter of Jammie C.**, 149 AD2d 822, 540 NYS2d 27 (3rd Dept. 1989); **Matter of Demetrius F.**, 176 AD2d 940, 575 NYS2d 552 (1991)
- Extraordinary services such as 24 hour child care are not the measure **Matter of Kevin "R".**, 112 AD2d 462, 490 NYS2d 875 (3rd Dept. 1985); **Matter of Karen Y.**, 156 AD2d 823 (3rd Dept. 1990)
- Agency is not required to show that it engaged in diligent efforts to assess the abilities of the parent to improve parenting **Matter of Male W.**, 308 AD2d 518, 764 NYS2d 842 (2nd Dept. 2003)

Does court have to appoint a guardian ad litem?

- Court should appoint a guardian ad litem if parent is incapable of defending her rights **Matter of Daniel Aaron D.**, 49 NY2d 788, 426 NYS2d 729 (1980)

- Court is not required to appoint a guardian at litem if parent does not need one to understand what is occurring **Matter of Philip R.**, 293 AD2d 547, 740 NYS2d 421 (2nd Dept. 2003)
- No evidence that a GAL was needed given that mother was able to assist in her defense - **Matter of Justice and Justin T.**, 6/10/05 (4th Dept. 2005); **Matter of Dominique M.**, 5/14/09 (1st Dept. 2009)

Disposition

- Court does not have to hold a dispositional hearing, can consider long term foster care but is not required to do so **Matter of Joyce T.**, 65 NY2d 39, 489 NYS 705 (1985); **Matter of Kevin “R”.**, 112 AD2D 462, 490 NYS2d 875 (3rd Dept. 1985) **matter of Karyn Katrina D.**, 6/20/05 (2nd Dept. 2005)
- Lack of identified adoptive home for child not sufficient to prevent TPR **In Re Roselyn Mercedes F.**, 657 NYS2d 8 (1st Dept. 1997); **Matter of Tvesha W.**, 687 NYS2d 16 (1st Dept. 1999)
- Slight hope for improvement does not merit a long term foster care placement **Matter of Naticia Q.**, 640 NYS2d 334 (3rd Dept. 1996)
- Suspended judgment is not a statutory alternative **Matter of Dionne W.**, 710 NYS2d 574 (4th Dept. 1999); **Matter of Charles FF.**, 44 AD3d 1137, 844 NYS2d 455 (3rd Dept. 2007)
- Where court chooses to hold a dispositional hearing, it should do so right away - delaying it makes no sense where court has ruled that condition will exist for the foreseeable future **Matter of Paul WRM** 291 AD2d 919, 737 NYS2d 907 (4th Dept. 2002)

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