

**Freeing a Child for Adoption I: Termination of Parental Rights
NYSCCC Annual Conference, May 8, 2010**

**TPR MANDATES UNDER ASFA
Margaret A. Burt, Esq.**

Health and safety of child is to be paramount concern.

Termination petitions **MUST** be filed for regarding all children in foster care where:

- Any foster child in care 15 out of the most recent 22 months (calculated as starting at time of finding of abuse or neglect or 60 days after temporary placement in foster care, whichever is sooner)
- Any foster child determined by court to be abandoned
- Any foster child whose parent has been criminally convicted of certain crimes

Termination of parental rights petitions **MUST** be filed for all children in the above situations **UNLESS**

- The child is in the care of a relative or
- The agency documents in the most recent case plan a “compelling reason” why it is not in the child’s best interests to have a termination petition filed. The compelling reason information may be made available to a court. “COMPELLING REASON” can include the following types of situations
- Child is in care on a PINS or JD order and the review of the specific facts and circumstances of the child’s placement demonstrate that the appropriate goal is either a return to the parent or guardian or independent living
- The child has a permanency goal other than adoption because of the best interests of the child such as a situation where the child’s therapist feel it would emotionally harmful to the child or where a safe return to a parent is imminent
- The child is 14 or older and will not consent to adoption
- There are insufficient legal grounds for a TPR
- The child is in care solely on an Article 10 and the disposition is still pending and a review of the specific facts and circumstances of the child’s placement demonstrate that the appropriate goal is discharge to parent or guardian
- The agency has not provided the services it deems necessary to attempt to reunify unless the services were not legally required.

If the agency is required to file the termination by the above rules but does not file, or if the court orders filing and agency does not file, the foster parents, without further order or the law guardian at court’s direction, may file a termination petition and the agency is then obligated to join the petition. The Judge can always order the agency to file a petition for termination.

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**Grounds for TPR in New York State
By Margaret A. Burt, Esq.
PROOF MUST BE “CLEAR AND CONVINCING”**

Abandonment:

- child must be in foster care or Article 10 court ordered direct care for more than 6 months
- in the most recent 6 months there was no meaningful contact or communication with child or agency or foster parent/ care provider
- parent was physically and financially able - presumed unless proof otherwise
- agency did not discourage or prevent contact - this can include parent who was court ordered to have no contact with child
- agency need not prove diligent efforts or attempts to contact parent

Permanent Neglect:

- child must be in foster care or Article 10 court ordered direct care for more than 12 months, even if there has not been an Article 10 disposition in place for 12 months OR child has been in care for 15 of the last 22 months
- during any particular 1 year continuous period, parent either failed to maintain contact with the child or failed to plan for the child’s future by failing to resolve the issues that resulted in the child being placed in and staying in care
- parent was physically and financially able to have contact and plan
- the agency did not discourage or prevent the parent from visiting or planning
- the agency offered diligent efforts to the parent to provide reunification consisting of visitation, services designed to assist the specific problems, transportation to visitation and services, planning with the parent, and information regarding the child’s progress
- the diligent efforts may be excused if
 - the court previously issued a “no reasonable efforts order” or
 - the efforts to reunite would have been detrimental to the child or
 - the parent was incarcerated and failed to respond on more than one occasion or
 - the parent failed for more than 6 months to keep the agency advised of address

Parental Mental Illness or Mental Retardation:

- child must be in foster care or Article 10 court ordered direct placement for more than 12 months
- parent is presently mentally ill or mentally retarded to the extent that they can not safely care for the child now and in the foreseeable future
- expert witness must be appointed, attempt to examine parent and must testify

Severe or Repeated Abuse:

- child must be in foster care or Article 10 court ordered direct placement – no minimum time period
- child was severely abused as found in Article 10 or as described in statute regarding criminal convictions or
- two family court adjudications of child abuse against parent in 5 years
- diligent efforts by agency as described above in permanent neglect with same four exceptions available such as a “No Reasonable Efforts” finding

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**PERMANENCY ALTERNATIVES TO
TERMINATION OF PARENTAL RIGHTS**

By Margaret A. Burt, Esq.

If A Child In Foster Care Is Not Going To Be Returning Home - What Are The Alternatives?

The answer often - traditional termination of parental rights procedures with goal of adoption

- final, safe, permanent
- not enough to simply be the right thing for the child law mandates that it can only happen with good casework, good legal work on part of agency
- can take years, more if agency and/or court allow suspended judgements or if appeals occur
- if child is close to or over 14 and does not want to be adopted - this option may not make sense

Are There Other Alternatives?

Traditional surrender by parents with goal of adoption

- final, safe, permanent
- often would include a subsidy for child
- could be quicker than TPR, although may take a long time for parent to come to decision, no appeal
- can't be mandated or required of parent
- if child is close to or over 14 and does not want to be adopted - this option may not make sense

Surrender by parents with conditions - adoption within the conditions

- safe, permanent
- may be shorter than TPR process, may take awhile to negotiate conditions, no appeal
- lingering questions on finality
- often would include a subsidy for child
- if child is close to or over 14 and does not want to be adopted - this option may not make sense

Court ordered custody

- ends agency's custody of child which may have good and bad points
- ends agency monetary support of child
- not permanent and custodian will have to deal with that themselves
- parent might be more willing to agree to this alternative than others so may be quicker
- allows parent to be able to maintain relationship and even obtain child back
- very easy to do if parent is in agreement, hard if parent is opposed

☑ Court ordered guardianship

- same advantages and disadvantages as custody plus often viewed by others as “more permanent” than custody
- can take a little longer than custody to get court order as requires a check of SCR

☑ Independent living

- really means growing up in foster care
- can be considered when none of above are viable
- child would continue to receive agency assistance and subsidy
- child would be assisted to learn to live as productive adult

☑ Adult custodial care situations

- really means growing up in foster care
- can be considered when none of above are viable
- child would continue to receive agency assistance and subsidy
- agency would help child transition into an appropriate adult placement

TPRs/Adoptions for Children Under Article 10 Custody Orders - “Dale P. Terminations”

By Margaret A. Burt, Esq.

In 1994, the New York State Court of Appeals held that a child who was placed out of the home with a friend of the mother’s under an Article 10 order could be the subject of a TPR petition filed by the agency. Here the child had been abandoned by the mother and the friend wished to adopt the child. The court ordered the agency to file an abandonment TPR and the agency argued that it could not do so as the child was not in foster care but only placed in the custody of the friend under the Article 10 supervision order. The Court found that moving the child from the direct placement to a certified foster home simply to justify the TPR was “unnecessarily circuitous” exaltation of form over substance and the court had the authority to order the TPR to be filed. **Matter of Dale P. 84 NY2d 72 (1994)**

Later that same year, the Third Department cited Dale P. and held that Chemung County Family court had authority to order DSS to file a permanent neglect petition where the child had been placed under the neglect dispositional order in the custody of friends under DSS supervision **Matter of Patricia HH. 613 NYS2d 276, 200 AD2d 115 (3rd Dept. 1994)**

In 2002, the Fourth Department again looked at this issue and indicated that Genesee County DSS had the right to bring a permanent neglect termination petition against a mother whose children had been in the custody of an aunt under DSS supervision. The court pointed out that the caseworker had told the mother that she could face a termination. **Matter of Hannah D. 292 Ad2d 867, 740 NYS2d 130 (4th Dept. 2002)**

Some counties do lots of Dale P. terminations, some do none and some will only do them if the Judge orders them. There is no legal mandate under ASFA to do them as the children are not in foster care. However, since Art. 10 placement orders can only be extended with perm hearings, a court could order DSS to file one. Most importantly, the county should consider doing one if that is what is in the child’s best interests. Carefully consider the option of adoption vs an ongoing - Article 6 custody or guardianship order for the child. Issues to consider would include monies and benefits, including day care and PA under each as well as the finality of an adoption. Also remember that under SSL 384-b 3(a) the Dale P termination results in an order placing the child in the guardianship of the resource who then must file an adoption petition privately. Are they ready, willing and able (\$) to do so? The law goes on to say that if they do not file the adoption in 6 months then the court is to place the child with the DSS. Who will monitor that? Are you prepared to deal with that? Consider if you want to offer to do the homestudy - would help them with \$ issues and you could monitor the finalization of the adoption.

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TPRs on Non-Admitting Parents
By Margaret A. Burt, Esq. 3/20/10

Matter of Travis Lee G., 169 AD2d 769, 565 NYS 2d 136 (2nd Dept. 1991)

- the landmark case, 2nd Department upholds Dutchess County Family Court order to terminate parental rights of mother to five year old son based on perm neglect - mother went to all therapy sessions and actively participated and visited child regularly but refused to acknowledge the truth of prior court findings of sex abuse regarding siblings of the son (findings in both NYS and other state) and experts testified that without admission no meaningful rehab could occur - failure to plan - note that she was told of need to admit repeatedly

Matter of Sonia H., 177 AD2d 575, 576 NYS 2d 165 (2nd Dept. 1991)

2nd Dept. affirms Queens County perm neglect TPR after child in care over ten years after severe physical abuse - mother made "token compliance" at therapy and counseling but continued to deny culpability or responsibility for injuries - child can not be safely returned - failure to plan

Matter of Crystal Q., 173 AD2d 912, 569 NYS 2d 775 (3rd Dept. 1991)

3rd Dept. affirms Chemung County Family Court TPR on both parents after sexual abuse findings - both parents attended counseling and continued to deny abuse - father then recently admitted and mother continued to deny - continual denial by mother and late admission by father render rehab attempts ineffective and children will not be safe - failure to plan on a timely basis

Matter of Richard DD., 175 AD 2d 340, 572 NYS 2d 418 (3rd Dept. 1991)

Otsego County Family Court TPR of both parents who had been found to have used excessive corporal punishment - parents had maintained visits and attended services while children were in foster care for two years but failed to ever acknowledge that they had used excessive and inappropriate corporal punishment - fact that the mental health services had been terminated due to the continued denials did not mean that the agency had provided diligent efforts

Matter of Tammy B., 185 AD2d 881, 587 NYS 2d 377 (2nd Dept. 1992)

2nd Dept. affirms Orange County Family Court finding of perm neglect where father had been adjudicated to have sexually abused daughter - he attended sexual offender treatment but would not admit - refusal to admit is failure to plan

Matter of Diana Crystal D., 200 AD 2d 365, 606 NYS 2d 186 (1st Dept. 1994)

1st Dept. found perm neglect where father continued to deny sex abuse after criminal conviction and due to denial had been dropped from several counseling programs

Matter of Kayte M., 210 AD 2d 835, 608 NYS 2d 711 (3rd Dept. 1994)

3rd Dept. upholds perm neglect TPR based on mother's continual denial of sex abuse - failure to admit caused her to be discharged from a treatment program

Matter of Beverly K., 623 NYS 2d 649 (3rd Dept. 1995)

3rd Dept. upholds Tioga County TPR on perm neglect based on both parents continuing to deny and refusal to attend counseling even though counseling program was willing to offer counseling to deniers and parents knew it

Matter of DSS v Kenneth D., 624 NYS 2d 455 (2d Dept. 1995)

2nd Dept. upholds Dutchess County TPR perm neglect - both parents continue to deny sex abuse - father attended therapy but failed to admit and gained “no insight” - mother failed to attend therapy and missed visits and UCRs

Matter of John F., 634 NYS2d 256 (3rd Dept. 1995)

3rd Dept. upheld Cortland County Family Court TPR where children had been in care two years due to father’s sexual abuse - father continued to deny and had been dropped from several programs - mother had several relationships all with men who had histories of sexual misconduct and was now back residing with denying father

Matter of Charlene “TT”, 217 AD2d 274, 634 NYS 2d 807 (3rd Dept. 1995)

-children were in care after a neglect finding - Tompkins County Family Court had dismissed sexual abuse allegations after no corroborative evidence of child’s out of court statements - in dispo order and in service plan parents were ordered to obtain counseling around sexual abuse issues - parents continued to deny any sexual abuse and DSS brought failure to plan TPR - 3rd Dept. reversed the TPR ruling that agency had not provided diligent efforts - since there never had been finding of sexual abuse or a criminal conviction or an admission, failure to admit and receive counseling for a problem which had never been adjudicated was not grounds for TPR

Matter of Michelle F., 635 NYS 2d 709 (3rd Dept. 1995)

3rd Dept. upheld TPR regarding eight children where parents had made some progress but refused to acknowledge the sexual abuse of some of the children - primary reason for placement had not been addressed - court also found that since there had been a finding of sexual abuse originally, agency was not obligated by diligent efforts to offer counseling that would accommodate the continued denial - also fact that agency never told mother that to leave sexually abusive and denying father would increase her chances of children returning to her was immaterial given that she refused to acknowledge the sexual abuse

Matter of Jesus JJ., 636 NYS2d 507 (3rd Dept. 1996)

3rd Dept. upheld dismissal of TPR against mother where children were in care due to sex abuse finding but there had been no finding that either parent had committed the abuse, only that the parents had no adequate explanation for the physical evidence of sexual abuse - court found that mother had not been offered adequate opportunity to acknowledge that child had been abused due to counseling program which court found ineffective - concurring opinion would have found that as there had been no determination of who was responsible for the sexual abuse - TPR of mom for failure to admit was not appropriate (see father’s case below)

Matter of Tasha LL., 642 NYS2d 447 (3rd Dept. 1996)

3rd Dept. upheld TPR on mother for failure to plan as she intended to have father, who was criminally convicted of rape of one of four children, move back in with her when released from prison - mother’s involvement in counseling was minimal and poor and she vacillated and refused to acknowledge long history of sexual abuse of child

Matter of Jesus JJ., 649 NYS2d 61 (3rd Dept. 1996)

3rd Dept. upheld the TPR of father after children placed in foster care after finding of sexual abuse based on parent's inability to explain physical evidence with no finding as to actual perpetrator - here as opposed to mother's case (see above) the county did not ask father to "admit" the sexual abuse but to "acknowledge" that it had happened and that he had not kept child safe - father continued to deny physical proof and court finding and claimed conspiracy between agency, docs and court - failure to plan

Custody and Guardianship of Joe Alex F., 655 NYS2d 518 (1st Dept. 1997)

1st Dept. upheld TPR on mother whose young children came into foster care with unexplainable broken bones - mother continued to deny any physical abuse or offer any explanation - she also failed to complete psychotherapy and failed to separate from a violent paramour and gave birth to a third child in another state who was also the removed with a broken leg

Matter of Heather "E", 656 NYS2d 410 (3rd Dept. 1997)

3rd Dept. upheld TPR re mother's four children after findings of neglect and sexual abuse and criminal convictions of sexual abuse on both parents - mother continued to deny sexual abuse and although her IQ was 58, continued to deny that she should be involved in programs for sexual abusive or mentally limited parents - not failure of diligent efforts for DSS to offer these programs

Matter of Cheyenne "Q", 657 NYS2d 224 (3rd Dept. 1997)

3rd Dept. Upheld perm neglect - various issues including that mother refused to discuss or address sexual abuse issue

Matter of Jeannie "KK.", 657 NYS2d 231 (3rd Dept. 1997)

Even though no finding of sexual abuse, 3rd Dept. Upheld TPR based partially on mother's refusal to acknowledge that child believed that she had been sexually abused and work with her in counseling on this issue

Matter of Harlem Dowling o/b/o Kimberly Jean R., 660 NYS2d (2nd Dept. 1997)

Father had been found to have sexually abused child and continued to deny and failed to complete counseling

Matter of Billie Jean II., 662 NYS2d 637 (3rd Dept. 1997)

Father continued to deny that he needed services for substance abuse and domestic violence – defense was that agency had not offered help with child's reluctance to visit - 3rd Dept. Said no point in reviewing the defense given his ongoing denial of the problems that had caused the placement

Matter of Sadie K., 671 NYS2d 175 (3rd Dept. 1998)

3rd Dept. upheld Albany County TPR on sex abusing dad who continued to deny responsibility - was terminated from sex abuse program - court found that agency was not obligated to locate a sex abuser program that would accommodate his continued denial

Matter of Jesus II., 672 NYS2d 485 (3rd Dept. 1998)

Tompkins County TPR upheld where agency had created a service plan for a “passive sexual offender” - the mother - who continued to deny that her husband had sexually abused the children, continued to live with him and deny he was a risk to the children and had even become pregnant by him again

Matter of Ashley M., 683 NYS2d 304 (3rd Dept. 1998)

Chemung County willful violation of dispo order in a sex abuse was upheld even though father argued that he had been kicked out of sex abuse program because he failed to admit - claimed he had 5th amendment right to refuse to make statements regarding sexual abuse - 3rd Dept. Claimed no fifth amendment privilege in this context

Matter of Jeremy “KK”., 674 NYS2d 842 (3rd Dept. 1998)

TPR where father continued to deny drug problem

Matter of Jennifer “WW”., 687 NYS2d 487 (3rd Dept. 1999)

3rd Dept. affirmed an extension of placement where sex abusing father would admit to a “grave mistake” but not that his behavior with the children was sexual

Matter of Ester II., 681 NYS2d 876 (3rd Dept. 1998)

TPR of parent’s third child after findings of sexual abuse on older child and loss of two older children to TPR on denial, continued to deny and now TPRed on this subsequently born child

Matter of Michael W., 697 NYS2d 898 (4th Dept. 1999)

TPR appropriate as father continued to deny his domestic violence and anger control problems

Matter of Ashley “E”., 706 NYS2d 223 (3rd Dept. 2000)

TPR of mother in part due to her denial of mental health and anger control problems

Matter of Lisa “Z”., 717 NYS2d 730 (3rd Dept. 2000)

TPR of father appropriate where continued to deny after court finding of sexual abuse, county DSS not responsible to find him a sexual offenders or violence prevention program willing to accommodate “deniers”; limited mother placed in non offending parent treatment also grounds to TPR as she fails to clearly admit what father did, fails to acknowledge damage to child, fails to be able to identify signs of sexual abuse (mother granted suspended judgement due to relationship with child)

Matter of Kaitlyn “R”., 278 AD2D 881, 719 NYS2d 760 (3rd Dept. 2001)

TPR of mother where she would not admit sex abuse - mother had attended all programs she was sent to - did fully attend sex abuse treatment but would not acknowledge sex abuse; agency not required to find a program that will accommodate ‘denial’

Matter of Elijah “F”., 280 AD2D 720, 720 NYS2d 246 (3rd Dept. 2001)

TPR of mentally ill mother who refused to acknowledge her mental illness along with her failure to get treatment and create emergency plans for the child with relatives at times when mental illness is exacerbated

Matter of Edward “I”. 721 NYS2d 412 (3rd Dept. 2001)

TPR of mother who had been criminally convicted of homicide regarding one child and misdemeanor burning of another child - mother continues to deny her responsibility for these acts, did not avail herself of services

Matter of Cassandra “JJ”. 284 AD2d 619, 725 NYS2d 467 (3rd Dept. 2001)

Mother would not admit her boyfriend had sexually abused children, resistant to counseling, tried to have child interviewed by private detective during visitation to try to prove sex abuse had not occurred - TPR granted

In Re Joseph Emmanuel N. 292 AD2d 295, 740 NYS2d 300 (1st Dept. 2002)

TPR where mother would not acknowledge that boyfriend's (she continues to live with) - behavior caused children to be placed - agency not required to formulate another plan that to accommodate her denial - suspended judgment not appropriate where she will not acknowledge problem or leave boyfriend

In Re Venus Melody RW. 4 AD3d 182, 771 NYS2d 650 (1st Dept. 2004)

Mother would not acknowledge abuse and sex abuse and so no effective treatment - TPR

Matter of Rena Elaine M. 22 AD3d 493, 803 NYS2d 657 (2nd Dept. 2005)

TPR where mother will not acknowledge bf's sex abuse of child

In Re Iris Shawntelle Marie C. 22 AD3d 328, 804 NYS2d 299 (1st Dept. 2005)

Agency need not offer a denial treatment that accommodates denial

Matter of Vivian OO 34 AD3d 1084 (3rd Dept. 2006)

Mother would not acknowledge injury or sex abuse of child by father – TPR

Matter of Kimberly C. 37 AD3d 192, 829 NYS2d 84 (1st Dept. 2007)

Parents repeatedly denied that they had a DV problem and needed counseling - failed to gain insight although attended counseling, would not accept responsibility - also denied substance abuse – TPR of both

Matter of Amy B. 37 AD3d 600, 830 NYS2d 294 (2nd Dept. 2007)

Father and mother denied sex abuse – cannot simply deny all culpability or responsibility for conduct that the court had concluded happened – TPR on both

Matter of James X. 37 AD3d 1003, 830 NYS2d 608 (3rd Dept. 2007)

Father denied sex abuse, would not go into treatment, refuses to accept responsibility, TPR

Matter of Arelis Jasmin L. 39 AD3d 433, 835 NYS2d 108 (1st Dept. 2007)

Mother refuses to believe children were sexually abused by uncle and refuses to accept responsibility - TPR

Matter of Gloria Melanie S. 1/10/08 (1st Dept. 2008)

Father refused to acknowledge sex abuse; agency not required to find a program that would accommodate his denial

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“Expedited” or “Accelerated” Adoption Proceedings By Margaret A. Burt

Since 1992, adoptive parents have been permitted to file an adoption petition for a child who is the subject of a termination action even though the termination action has not yet been concluded. DRL 112(8) The adoptive parents can file all the court paperwork necessary for the adoption and the agency is free to begin home studies and procedures for subsidies, even though the child is not yet freed. While the termination matter is pending, the Judge is not to be informed that an adoption petition has been filed - apparently so that this fact would not affect his or her judicial decision on the termination. If and when the child is freed by the Judge, the adoption filing is then “revealed” to the Judge and the adoption can proceed in a more expeditious or accelerated fashion. The local agency is not actually allowed to “consent” to the adoption until the child has been freed and the time period has passed for any notice of appeal. If the termination is appealed, the agency is not supposed to consent to the adoption until the appeal is resolved NYCRR 421.19 (5)(i)

If a child is surrendered, the adoptive parents can also proceed immediately to file an adoption petition. If they had filed the adoption petition during the termination proceeding and the termination is resolved with a surrender, the adoption could immediately proceed.

After a Judge accepts the surrender of a foster child, he or she is then supposed to inquire if anyone is seeking to adopt the child. The Judge could then be informed that in fact there has been an adoption petition filed and the court can set a schedule to complete whatever maybe necessary to finalize the adoption. SSL 383-c

Filing the adoption petition while the termination is still pending is sometimes referred to as an “expedited” or an “accelerated” adoption. It might make sense to do a “semi-accelerated” adoption in some instances where the adoption petition is prepared in advance and filed immediately upon the freeing of the child by the surrender or upon the passing of 30 days after the termination order if no notice of appeal has been filed.

The advantage to considering an accelerated adoption is that it creates faster permanency for the child and allows the adoptive family to end the governmental involvement of the agency in their family lives. There is a savings of foster care money and a savings in caseworker time. Less court time is spent on “freed child” reviews. The adoption would stay with the Judge who had handled the termination or surrender allowing for continuity of the case - including as to such issues as the court’s rulings regarding the legal status of the father.

In some cases, there may be disadvantages to doing accelerated adoptions. A birth parent may be more likely to file an appeal of a termination, if they become aware of the quick processing of the adoption. If the agency feels the adoptive family could benefit from some supervision and services before the actual finalization, there is less time for that. If the child would not be eligible for an adoption subsidy but for 12 months in care with the same family and that deadline has not yet been reached, it may be to the advantage of the adoptive family to wait.

There are very few expedited adoptions being done in New York State despite the fact that this law has existed for over a dozen years. In many cases, it may be simply be that people are not aware of this possibility. A significant concern has been the issue of the appeal. If the agency is not supposed to “consent” to the adoption until the time for all appeals is finished and if the court can not finalize an adoption in which the agency has not “consented” - what benefit would there be to filing an accelerated adoption if there was any chance of an appeal? However, many cases are resolved with surrenders in this state and default orders on terminations are not appealable - so matters of this sort may well benefit from consideration of a “semi-accelerated” adoption. Some adoption attorneys are unwilling to do “accelerated adoptions” of foster children until the child has clearly been freed and there is no possibility of appeal since the state will not reimburse an attorney for the filing an adoption that does not result in a finalization! Some counties have benefitted from a discussion among the relevant parties - including the local adoption bar - about the possibility of handling some cases in this accelerated fashion.

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**WHAT DOES A CASEWORKER HAVE TO DO WHEN THE PARENT
OF A FOSTER CHILD IS MISSING OR IS IN JAIL?**

**DILIGENT EFFORTS FOR MISSING
AND INCARCERATED PARENTS**

Margaret A. Burt

2003

- **Diligent efforts for missing parents requires the caseworker to** document looking for them diligently. When a child is on foster care, both parents must have a service plan that the caseworker is working on diligently. For a missing parent, the service plan might be for the caseworker to “identify” or “locate” parent. If the parent is located, the agency caseworker must provide them services and visits. If the parent is not located and the child’s goal is changed to adoption, there may be an abandonment TPR and a diligent search will have to be documented for the service of the petition. This diligent search for serving the petition will be that much simpler due to the caseworker having been looking for the parent.

- **Diligent efforts for incarcerated parent requires the caseworker to:**
 - Find out what appropriate services available at the prison - assist in obtaining them
 - Contact by caseworker regarding service plans
 - Contact by the caseworker about child’s status
 - Visits - get detailed court order and if and how jail visits/contact will occur
 - Tell parent that it is important that non foster placement resources for child are found
 - Look for and evaluate non foster placements resources for the child, give parent info
 - Advise that foster care is not a viable plan where parent incarceration long-term
 - Consider if a “no reasonable efforts motion” might be appropriate
 - Remember “2 letter” rule - if incarcerated parent fails to respond more than once, caseworker need not continue to attempt efforts

Failure to provide these diligent efforts for parents who are missing or incarcerated. may mean a child can not be freed for adoption in a situation in which that is what is in the child’s best interests!

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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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**QUESTIONS FOR THE EXPERT
AT A MENTAL ILLNESS TPR TRIAL**

By Margaret A. Burt

Credentials:

- education, training, college, med school, internship, residency, license
- special training, a specialty?, board certified?
- hospital staff or teaching positions
- publications, lectures, memberships, previous testimony as expert

Current Experience Level:

- description of current practice
- number and type of patients seen
- particular experience with this type of mental illness and/or parenting evals

Involvement with Parent:

- how and when
- how many times seen
- what is proper way to perform such an eval? medically accepted procedures?
- describe eval - interviews, records reviewed, tests performed

Diagnoses

- based on eval and records, did you reach an opinion within a reasonable degree of medical certainty that parents suffers from a mental illness?
- what is your opinion?
- get expert to describe in detail specifics relied on that formed opinion such as particular behaviors, statements, test results, etc
- how does this mental illness impact ability to parent?
- get expert to describe in detail specifics relied on to form opinion that parenting can not occur w/o risk of neglect or abuse

Treatment:

- medically acceptable possible treatments?
- medication?
- opinion re treatment potential regarding this parent's ability to safely care for this child?(add any conditions that child suffers into question)
- can parent maintain self safely?

Permanence:

- do you have an opinion w/in reasonable degree to medical certainty that the will be substantial improvement in parent's mental health?
- do you have opinion w/in reasonable degree of medical certainty that child would be a risk of abuse or neglect if placed with parent in the foreseeable future?

Conclusion: w/in reasonable degree of medical certainty:

- afflicted with a mental disease or condition?
- what mental disease or condition?
- is it manifested by a disorder or disturbance in behavior, feeling, thinking or judgment?
- is the behavior, feeling, thinking or judgement of this parent affected to such an extent that this child would not be adequately cared for if placed in the care of the parent?
- conclude that parent can not presently and for the foreseeable future provide proper, safe and adequate care for this child?

**Sample Instructions to Experts in Mental Illness
and Mental Retardation TPR Cases
By Margaret A. Burt**

You have been assigned by the court to evaluate a parent who is the subject of a termination of parental rights proceeding. DSS will provide you with a full summary of the case within 10 days that will include the court petition, and mental health or historical records that are available, and a case summary of DSS involvement. You must complete an evaluation of the parent and submit a written report to the court. The attorney representing the parents is entitled to attend any evaluation sessions and the other attorneys may also choose to attend. If any attorney is present, they should not interfere in any way with the course of the evaluation. The law provides for a waiver of all privileges regarding your evaluation, so you do not need to obtain any releases from the parent. Please inform DSS immediately if the parent fails to attend the evaluations or refuses to communicate and cooperate with you. The court is expecting this report within the next 60 days. If the case goes to trial, you may be called as a witness and the attorney calling you will speak with you at that time. The following are areas that the court is expecting your report will address:

1. Is the parent mentally retarded/ currently mentally ill as that is defined in law?

Mental Retardation - A subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if the child were placed in or returned to the custody of the parent, the child would be in danger of becoming neglected.

Mental Illness - A mental disease or condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that if the child were placed in or returned to the parent, the child would be in danger of becoming neglected

If in regards to this definition, you would like further definition of the meaning of “neglect”, please contact the DSS attorney involved in the case.

2. Is the parent presently unable, due to the extent of the mental retardation/ mental illness, unable to provide properly adequate care and supervision to the child?

The issue is whether the parent can provide safe full time care for the child if the child lives in the parent’s home. This is to be assessed without extraordinary measures - such as a 24 hours a day assistant in the home with the parent. The issue is to be addressed taking into account the age, developmental level and any special needs of the child in question.

If you would like more information regarding the child’s specific situation, please contact the DSS attorney in the case.

3. Is the parent likely to remain unable to care for the child in the foreseeable future due to the extent of the parent’s mental retardation/ mental illness?

In making this assessment you may consider current services available to persons who are mentally retarded/ mentally ill but you are not to consider experimental or hypothetical measures. You may rely on the parent’s history of past cooperation or improvement or lack thereof to draw conclusions about any future prognosis. In the future, given your evaluation and prognosis, do you believe that the parent will be able to safely care full time for the child in the parent’s home without extraordinary measures such as 24 hour a day assistance?

**Freeing a Child for Adoption I: Termination of Parental Rights
NYSCCC Annual Conference, May 8, 2010**

DSS Issues Regarding Suspended Judgments on TPRs

By Margaret A. Burt

- All parties can agree to one or Judge can order it over any or all parties objections as part of disposition if Judge concludes a suspended judgement is in child's best interests
- Have a good agency policy in place on what kinds of cases SJs are appropriate, make sure agency agrees with attorney that the case is appropriate for an SJ and what that will actually mean re casework

Should you agree to one before TPR? Issues to consider and discuss include:

- Do you think parent should have a further chance to make it?
- Are there proof problems in the TPR?
- How long will the TPR take to try?
- Can you get the parent to waive any appeal of an SJ violation?
- Would it be to any advantage to agree to a short period of SJ?
- Can you get parent to stipulate that TPR happens unless they return case and prove compliance?
- How specific can you make the terms?
- Can you limit/end any responsibility that the caseworker be required to do diligent type efforts?
- Is on-going visitation going to be a problem for the child?
- How do the potential adoptive parents feel about this? will they hang in there?
- Can you clarify that any violation of terms - even technical - can be brought back on violation?
- Clarify the rights of both the parents, do notice if notice father!

What if you think Judge is going to order SJ during your TPR dispo but you oppose one?

- Statute and caselaw say it is a best interests decision - tons of good cases to cite, be ready and armed!
- It's about what is best for child - not if parent "deserves" another chance or more time
- Heap on the proof about good adoptive home - put them on the stand - get emotional
- If no adoptive home - get good adoption worker to spell out great efforts and positive vibes - MAKE SURE this is already happening - you have ASFA reg requirement that you engage in reasonable efforts to locate adoptive home as soon as TPR filed
- Go "long view" - make sure court sees how long parent has already had to solve problems
- Amount of time child away from parent and bonded, happy in other setting is key

Violations?

Bring it back right away, don't wait until end of SJ period

Amend if more violations before hearing

Insist caselaw be followed -be armed - tech violations are enough, violations of "spirit" are enough, hearsay is admissible, preponderance level is enough, no other hearing needed

CASELAW ON SUSPENDED JUDGEMENTS ON TPRs
By Margaret A. Burt, Esq. • March, 2010

If the parties do not agree to a suspended judgment, should the court order one?

NO: Court Should Not Order Suspended Judgment

- Not where parent in jail for more than 3 years - **Matter of Joseph Jerome H.**, 224 AD2d 224, 637 NYS2d 401 (1st Dept. 1996)
- Not where not as able as foster parents to care for child's special needs - **Matter of Tiffany A.**, 242 AD2d 709, 662 NYS2d 796 (2nd Dept. 1997)
- Not where parent continued to deny problems and was sporadic in visits - **Matter of Sonny HB.**, 249 AD2d 940, 672 NYS2d 579 (4th Dept. 1998)
- Not where children had been in care since birth and were bonded to foster parent, no meaningful relationship with parent - **In Re Albert E.**, 259 AD2d 315, 686 NYS2d 421 (1st Dept. 1999), **Matter of Marie J.**, 307 AD2d 265, 762 NYS2d 263 (2nd Dept. 2003), **In Re Martin PJS.**, 2 AD3d 106, 767 NYS2d 607 (1st Dept. 2003), **In Re Alfonso D.**, __AD3d__, 785 NYS2d 59 (1st Dept. 2004), **In Re Christopher Jamar V.**, __AD3d__, 785 NYS2d 80 (1st Dept. 2004)
- Recent efforts not good enough if long time in care - **Matter of Rodney D.**, 276 AD2d 333, 714 NYS2d 52 (1st Dept. 2000), **Matter of Ada MR.**, 306 AD2d 920, 760 NYS2d 802 (4th Dept. 2003), **In Re Shania Tatiara A.**, 309 AD2d 1310, 767 NYS2d 65 (1st Dept. 2003) **Matter of Donovan R.**, 10AD3d 398, 781 NYS2d 658 (2nd Dept. 2004), **In Re Andre Thomas M.**, 11 AD3d 325, 782 NYS2d 735 (1st Dept. 2004), **In Re Charles Curbelo C.**, 12 AD3d 270, 784 NYS2d 541 (1st Dept. 2004), **Matter of Rochon Lela D.**, 37 AD3d 311, 830 NYS2d 125 (1st Dept. 2007), **Mattre of Jada Serenity H.**, 60 AD3d 469, 874 NYS2d 113 (1st Dept. 2009)
- Not where mother had long history of drug use that would take even longer to resolve and children bonded to foster family who wished to adopt - **Matter of Atiba Andrew B.**, 275 AD2d 320, 712 NYS2d 560 (2nd Dept. 2000)
- Not where parent still did not admit child had been abused, where it may take 2-3 years before child could safely be returned - **Matter of Kimberly B.**, 285 AD2d 982, 726 NYS2d 829 (4th Dept. 2001)
- Not where mother had over 3 years left to serve in jail, no relative, foster parent who wanted to adopt had child for over 5 years - **In Re Andres Efrain C.**, 290 AD2d 257, 736 NYS2d 23 (1st Dept. 2002)
- Not where mother had failed consistently to attend counseling - **In Re Yvonne Cecilea Y.**, 293 AD2d 423, 740 NYS2d 860 (1st Dept. 2002)
- Not where mother had no realistic plan to find a job or housing; no presumption that a return is in child's best interests **In Re Travis Devon B.**, 295 Ad2d 205, 743 NYS2d 498 (1st Dept. 2002); no realistic plan **In Re Darzell Levar D.**, 6AD3d 239, 774 NYS2d 332 (1st Dept. 2004), **In Re Tyreese H.**, 4 AD3d 208, 772 NYS2d 51 (1st Dept. 2004) **Matter of Brendan S.** 39 AD3d 1189, 834 NYS2d 602 (4th Dept. 2007)

- Mere enrollment in a drug program does not require court to grant a suspended judgement **In Re Chanelle H.**, 297 Ad2d 610, 747 NYS2d 363 (1st Dept. 2002), **Matter of Fatima G.**, 64 AD3d 652 (2nd Dept. 2009) ; no longer using drugs is not enough **In Re Rutherford Roderick T.**, 4 AD3d 213, 772 NYS2d 49 (1st Dept. 2004); completing drug program after termination filed is not enough **Matter of Alexis SD.**, 7AD3d 359, 776 NYS2d 287 (1st Dept. 2004), e
- Not where mother had long history of drug use and mental illness **Matter of Yusef P.**, 298 AD2d 968, 748 NYS2d 120 (4th Dept. 2002), **Matter of Donovan W.**, 56 AD3d 1279, 868 NYS2d 451 (4th Dept. 2008)
- Not where parent will be in jail for more than a year - **In Re Caresse Solonge E.**, 298 AD2d 173, 749 NYS2d 215 (1st Dept. 2002)
- Not where parent unlikely to change behavior - **Matter of Susan C.**, 299 AD2d 943, 749 NYS2d 761 (4th Dept. 2002)
- Not where parent failed over a lengthy time to fix problems - **In Re Jennifer R.**, 300 AD2d 13, 749 NYS2d 880 (1st Dept. 2002); **Matter of Thelonius B.**, 299 AD2d 775, 751 NYS2d 99 (3rd Dept. 2002)
- Not even where there was positive visitation where father failed to complete treatment for over 2 years and the child had spent whole life with foster parents who wished to adopt- **Matter of Brandon OO.**, 302 AD2d 803, 754 NYS2d 593 (3rd Dept. 2003)
- Not where mother had been largely noncompliant with service plan and child wants to be adopted **Matter of Arianna OO.**, 29 AD3d 1117, 814 NYS2d 779 (3rd Dept. 2006)
- Not where mother had been inconsistent in visitation and did not participate meaningfully in children’s counseling even though mother had financial and transportation problems **Matter of Danielle N.**, 817 NYS2d 841 (4th Dept. 2006)
- Not where court wanted to give mother a “final chance” – supposed to be only if in child’s best interests and not where mother had long history of drug abuse and relapses, child’s visits not good, child in care since birth with foster parents who want to adopt. **Matter of Brian C.**, 32 AD3d 1226, 820 NYS2d 838 (4th Dept. 2006)
- Not even where mother had made “exemplary efforts” and completed her service programs, went to children’s medical and counseling sessions and went to every visits where mother was still “incapable of properly caring” for children’s special needs – **Matter of Kenneth D. Jr.** 32 AD3d 1231, 821 NYS2d 698 (4th Dept. 2006)
- Not where mother always relapsed when she got unsupervised visits even though currently now sober and even though no adoptive home for child at present – **Matter of Raine QQ.**, 51 AD3d
- Not where child has no meaningful relationship with the mother and does not want to be reunited with her - **Matter of Anthony E.**, 59 AD3d 929, 872 NYS2d 762 (4th Dept. 2009)
- no where mother still lives in abusive relationship with father, fails to do services, does not visit - **Matter of Chandel B.**, 61 AD3d 546, 877 NYS2d 63 (1st Dept. 2009)

YES, Court Should Consider Suspended Judgment

- Court should consider where mother was making progress, good frequent visits and no one to adopt children **Matter of Jelissa Ninette.** 233 AD2d 874, 649 NYS2d 613 (4th Dept. 1996)

- Although “close call”, court should grant suspended judgment where parent making efforts, involved in services, no problems since the perm neglect, foster parents not interested in adopting, court ordered terms to require parent to resolve issues **Matter of Zachary CC.**, 301 AD2d 714, 753 NYS2d 561 (3rd Dept. 2003)
- Court should consider where mother had sought treatment and actively participated and therapist testified that she had made progress in insight and skills and child was bonded to mother and had good interaction In **Re Christian Lee R.**, 779 AD3d 483 (1st Dept. 2004)
- Court should have ordered one where mother had made great progress in completing service plan even though she was often late and missed visits, had income, housing, completed parenting sand was cooperative **Matter of Shaquill Dywon M.**, 50 AD3d 1142, 856 NYS2d 670 (2nd Dept. 2008)
- Court should have ordered one where mother had been recently making progress, ended relationship with bad father, very remorseful, recently cooperative, good quality visits, no adoptive home
- Court should have done a suspended judgment for the father where he had made recent efforts and children are older and do not want to be adopted

What Happens When There Is A Violation?

DO NOT WAIT FOR THE END HEARING

If respondent fails to comply with the terms of the suspended judgment, an order to show cause or a motion must be filed alleging the violation – if you wait until the final report date, it will be too late to seek a TPR!!! . There should be clear statements of the acts or omissions alleged. The court holds the hearing and may then modify, revise or revoke the order of suspended judgement. The court can only grant one extension of a suspended judgement for another year if it finds there are “exceptional circumstances”.

Standard Of Proof? Preponderance Of Evidence That One Or More Terms Has Been Violated

- **Matter of Gerald M.**, 112 AD2d 6, 490 NYS2d 398 (4th Dept. 1985)
- **Matter of Jennifer T.**, 224 Ad2d 843, 638 NYS2d 219 (3rd Dept.. 1996)
- **Matter of Ericka LL**, 256 AD2d 1037, 683 NYS2d 323 (3rd Dept. 1998)
- **Matter of Robert T.**, 270 AD2d 318, 704 NYS2d 436 (4th Dept. 2000)
- **Matter of Alka H.**, 278 AD2d 326, 718 NYS2d 598 (2nd Dept. 2000)
- **Matter of Rebecca F.**, 286 AD2d 985, 730 NYS2d 918 (4th Dept. 2001)
- **Matter of Caitlin H.**, 287 AD2d 715, 732 NYS2d 84 (2nd Dept. 2001)
- **Matter of Veronica W.**, 289 Ad2d 1055, 735 NYS2d 848 (4th Dept. 2001)
- **Matter of Francisco Anthony CF.**, 305 NY2d 410, 758 NYS2d 501 (2nd Dept. 2003)
- **Matter of Michael C.**, 4 AD3d 423, 771 NYS2d 397 (2nd Dept. 2004)
- **In Re Onelio Olvein Elijah Onalis Santiago C.**, 13 AD3d 95, 785 NYS2d 453 (1st Dept. 2004)
- **Matter of Gracie YY.**, 34 AD3d 1053, 825 NYS3d 303 (3rd Dept. 2006)
- **Matter of Crystallyn L.**, 6/5/2007 (2nd Dept. 2007)
- **Matter of Michael Phillip T.**, 44 AD3d 1062, 845 NYS2d 790 (2nd Dept. 2007)
- **Matter of Jessica J.**, 44 AD3d 1132, 843 NYS2d 708 (3rd Dept. 2007)
- **Matter of Darren V.**, 61 AD3d 986, 878 NYS2d 171 (2nd Dept. 2009)
- **Matter of Dennis A.**, 7/2/09 (4th Dept. 2009)

Hearsay Is Admissible

- Matter of Robert T., 270 AD2d 318, 704 NYS2d 436 (4th Dept. 2000)
- In Re Ferdinand V., 277 AD2d 715, 717 NYS2d 59 (1st Dept. 2000)
- Matter of Veronica W., 289 AD2d 1055, 735 NYS2d 848 (4th Dept. 2001)

Order does not lapse while violation litigated – this is by statute now – old cases on it:

- Matter of Edward Earl A., 224 AD2d 701, 638 NYS2d 969 (2nd Dept. 1996)
- SS v Rufelle B., 156 Misc2d 410, 593 NYS2d 401 (Kings County Family Court 1992)

Suspended Judgment order does not automatically contain same prior dispo orders – should specifically include those prior terms if needed in the suspended judgment order -Matter of Melissa G., 306 AD2d 919, 762 NYS2d 316 (4th Dept. 2003)

Suspended Judgment MUST contain actual and specific terms – can not violate if no terms! -
Matter of Lavante Nytara Ashanti M., 6 AD3d 617, 775 NYS2d 80 (2nd Dept. 2004)

Court can consider continued violations of the suspended judgment alleged to have occurred after the end of the suspended judgment period - Matter of Craig L., 2 AD3d 1461, 769 NYS2d 770 (4th Dept. 2003)

Court should not consider violations that occurred after the filing of the petition in the fact finding on the violation but could if in the separate dispo - Matter of Christian Lee R., 38 AD3d 235, 831 NYS2d 153 (1st Dept. 2007)

“Diligent Efforts” By Agency During Suspended Judgment Need Not Be Proven In A Violation

- Matter of Fard Saleem G., 297 AD2d 677, 747 NYS2d 107 (2nd Dept. 2002)
- Matter of Bryan W., 299 AD2d 929, 749 NYS2d 347 (4th Dept. 2002)
- Matter of Ronald O., 43 AD3d 1352, 842 NYS2d 801 (4th Dept. 2007)
- Matter of Carolyn F., 55 AD3d 832, 866 NYS2d 298 (2nd Dept. 2008)

Where perm neglect finding was on consent, appeal of violation of suspended judgment does not bring up issue of diligent efforts - Matter of Bryan W., 299 Ad2d 929, 749 NYS2d 347 (4th Dept. 2002)

Court can condition the suspended judgment on parent returning case and proving compliance-
Matter of Wendy F., 273 AD2d 927, 708 NYS2d 793 (4th Dept. 2000)

Separate Dispo Hearing Not Required - Court Decides Dispo In The Violation Hearing Itself – AS LONG AS “BEST INTERESTS” Is Considered

- Matter of Melinda B., 258 AD 2d 927, 685 NYS2d 526 (4th Dept. 1999)
- Matter of Brendan A., 278 AD2d 784, 722 NYS2d 929 (4th Dept. 2000)
- Matter of Shavira P., 283 AD2d 1027, 723 NYS2d 919 (4th Dept. 2001)
- Matter of Caitlin H., 287 AD2d 715, 732 NYS2d 84 (2nd Dept. 2001)
- Matter of Christyn Ann D., 26 AD3d 481, 811 NYS2d 94 (2nd Dept. 2006)
- Matter of Melissa M., 36 AD3d 919, 827 NYS2d 676 (2nd Dept. 2007)
- Matter of Seandell L., S 57 AD3d 1511, 870 NYS2d 662 (4th Dept. 2008)

Can bring the violation even though the order not yet written or served - Matter of W. Children 226 AD2d 385, 640 NYS2d 235 (2nd Dept. 1996)

Compliance after violation filed may not be enough – can still TPR if in child’s best interests- **Matter of Katarina B.**, 284 Ad2d 1016, 727 NYS2d 671 (4th Dept. 2001)

Even compliance with the suspended judgment may not be enough if TPR is still in child’s best interest - **Matter of Saboor C.**, 303 Ad2d 1022, 757 NYS2d 192 (4th Dept. 2003)

Parent would not allow worker to enter home for random testing for alcohol use – violation of suspended judgment – **Matter of Dessa F.**, 12/28/06 (3rd Dept.), would not submit to random drug testing – **Matter of Tyshawn Jaraind C.**, 36 AD3d 564, 828 NYS2d 387 (1st Dept. 2007), **matter of Eric Jule C.**, 39 AD3d 346, 834 NYS2d 525 (1st Dept. 2007)

Even though not adoptive home for the child, freeing for adoption opens up the child’s chances of being adopted and therefore should be freed where father violated terms of the suspended judgment - **Matter of Valentino G.**, 36 AD3d 439, 827 NYS3d 54 (1st Dept. 2007)

Violation of the “spirit” of the order, or simple compliance but with not demonstrable change can mean TPR

- **Matter of Kenneth A.**, 206 AD2d 602, 614 NYS 2d 472 (3rd Dept. 1994)
- **Matter of Jennifer VV.**, 241 AD2d 622, 659 NYS2d 940 (3rd Dept. 1997)
- **Matter of Ryan V.**, 243 Ad2d 865, 662 NYS 2d 861 (3rd Dept. 1997)
- **Matter of Jonathan P.**, 283 AD2d 675, 724 NYS2d 213 (3rd Dept. 2001)
- **Matter of Sklar NN.**, 284 AD2d 595, 725 NYS2d 473 (3rd Dept. 2001)
- **Matter of Travis A.**, 4 Ad3d 632, 772 NYS2d 393 (3rd Dept. 2004)
- **Matter of Mercedes L.**, 12 AD3d 1184, 785 NYS2d 267 (4th Dept. 2004)
- **Matter of Giovanni K.**, 12/30/2009 (4th Dept. 2009)

If not strict compliance to terms, a violation will usually result in TPR

- **Matter of Lisa Sue C.**, 220 AD2d 477, 632 NYS2d 2d 197 (2nd Dept. 1995)
- **Matter of Jeremy P.**, 213 Ad2d 1034, 624 NYS2d 325 (4th Dept. 1995)
- **Matter of Nicole OO** 262 AD2d 808, 691 NYS2d 676 (3rd Dept. 1999)
- **Matter of Daryl H.**, 272 AD2d 935, 708 NYS2d 662 (4th Dept. 2000)
- **Matter of Angela LL.**, 287 AD2d 823, 731 NYS2d 288 (3rd Dept. 2001)
- **Matter of Nikkas T.**, 42 AD3d 1226, 820 NYS2d 838 (4th Dept. 2006)
- **Matter of Crystallyn L.**, 6/5/2007 (2nd Dept. 2007) –would not tell agency his address
- **Matter of Dennis A.**, 7/2/09 (4th Dept. 2009) – each violation separate is trivial but as a whole is a lack of commitment and inability to make progress

Where parent did not strictly comply, court can still decide to give another chance, extend the time period and not TPR - **Matter of Amber AA** 301 AD2d 694, 754 NYS2d 387 (3rd Dept. 2003), **Matter of Shdell Shakell L.**, 51 AD3d 1027, 858 NYS2d 779 (2nd Dept. 2008)

Where parent incapable of adequate care, court can decide to TPR - **Matter of Diedre S.**, 169 AD2d 578, 564 NYS2d 432 (1st Dept, 1991)

Parent must show extraordinary circumstances to extend the suspended judgment period – **Matter of Jonathan J.**, 47 AD3d 992 (3rd Dept. 2008)