To be Argued by
RICHARD M. HARTZMAN

NEW YORK SUPREME COURT

APPELLATE DIVISION : FIRST DEPARTMENT

In the Matter of the Commitment of
Guardianship and Custody of

EUGENE L., ROBERT L., AND JOSEPH L.,

Children Under the Age of 18 Years
Pursuant to § 384-b of the Social
Services Law of the State of New York.

New York County
Family Court
Docket Nos.
B-01455-57/03

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CARDINAL MCCLOSKEY SERVICES,
Petitioner-Respondent.

VIRGINIA L., Respondent-Appellant.

LAW GUARDIAN'S BRIEF
ON BEHALF OF THE CHILDREN

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PRELIMINARY STATEMENT

This appeal is being taken by respondent-appellant, Virginia L, from a Decision and Order dated April 13, 2004, in the New York County Family Court (S. Larabee, F.C.J.). The Decision and Order terminated respondent-appellant's parental rights and transferred guardianship and custody of the above named children, Eugene L., Robert L., and Joseph L., to petitioner-respondent and the Department of Social Services for purposes of adoption. The dispositional order followed a fact-finding order dated November 12, 2003, which concluded that appellant had permamently neglected the children. The Law Guardian maintains that the Decision and Order should be affirmed, except as to Eugene, for whom the dispositional order should be vacated and the matter remanded to the Family Court for a new dispositional hearing.

QUESTIONS PRESENTED

1. Was the Family Court's finding of permanent neglect by the appellant supported by clear and convincing evidence where the petitioner-respondent agency fully met its obligation to exert due diligence by having set up a trial-discharge of the children to appellant, and when it did not work out, continued to work with appellant in an effort to remedy the obstacles to reunification, and where the appellant failed to plan for the children by not cooperating with the efforts of petitioner-respondent, missing or coming late to visits with the children, missing medical and service plan appointments, refusing to sign medical consents, and showing little sign of understanding the condition of the children?

2. Was the Family Court's finding that appellant's parental rights be terminated in the best interests of Robert and Joseph supported by a preponderance of the evidence where the children have been in foster care for seven years except for a short trial discharge, are happy in their foster homes and have become attached to their foster parents, and where appellant lacks insight and empathy into the needs of the children, is unable to put their needs first, and where her visits with the children often devolve into chaos?

3. Did the Family Court accord appellant due process of law and not deny her right to cross-examination (a) when it allowed portions of the agency case records into evidence as a business record where appellant's attorney did not object to their introduction on that basis and failed to make any specific objections on the ground of hearsay despite the court's giving him leave to do so, and (b) when it precluded testimony and evidence which went beyond the scope of re-direct examination?

4. Do updated circumstances since the court's final determination warrant a remand for a new dispositional hearing for Eugene only but not for Joseph or Robert?

STATEMENT OF THE FACTS

Appellant Virginia L. is the birth mother of three boys, Eugene L., born on April 9, 1993, Robert L., born on October 21, 1995, and Joseph L., born on February 21, 1997, and one girl, Kimberly, born on January 27, 1989.[1]

This case arose out of circumstances which developed after the Family Court rendered findings of neglect against appellant with regard to the three boys and ordered them removed from appellant's home. The Family Court in the case at bar took judicial notice of the orders and findings in the prior neglect proceedings. (A7.)[2]

I. Prior neglect proceedings

Neglect proceedings were commenced by the Administration for Child Services (hereinafter "ACS") against appellant in Family Court in July, 1998, under Docket Nos. N-08698-8700/98. After a fact-finding hearing, the court, on March 8, 1999, rendered findings of neglect against the appellant to the effect that the appellant had engaged in excessive corporal punishment[3] and not

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[1] Upon information and belief, Kimberly is in the custody of her father (who is not the father of the three boys). She is not involved in the case at bar.

[2] References are to the proceeding on the following dates: A - September 23, 2003; B - October 27, 2003; C - November 12, 2003; D - January 26, 2004; E - March 10, 2004.

[3] Appellant's brief refers to police reports allegedly regarding these matters, which are not part of the record in this case. Appellant's brief states that they form the basis for a petition to terminate placement brought under the neglect proceeding, but that the petition was dismissed. There is thus no reason for this Court to give any consideration to such police (continued...)

provided adequate supervision to the children. In particular, (1) on or about July 23, 1998, appellant struck Eugene with a broom, resulting in a bruise to his face and ear; (2) for the prior two years Eugene had been intermittently absent from day care for periods up to two weeks, after which he returned with observable bruises; (3) Kimberly, who was at that time in appellant's custody, was observed to have unexplained linear welts on her buttocks and small circular burns on her upper thigh and buttocks; (4) appellant failed to provide the children with adequate supervision in that on more than one occasion she left the boys in the care of nine-year old Kimberly for extended periods of time; and (5) appellant had a long history with ACS and it predecessors. (Petition dated July 31, 1998, and Fact-Finding Order of Neglect dated March 8, 1999.)

Following a dispositional hearing, the Family Court, on August 25, 1999, ordered the boys to be placed in the custody of the social services agency and the appellant "to cooperate with all ACS services and referrals" including "regular casework counselling [sic] and visits", therapy for the children, and family therapy for the mother and children. There were to be no unsupervised visits between appellant and the children. (August 25, 1999 Disposition Order of Neglect.)

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[3](...continued)
reports: they are not part of the record; they failed to persuade the Family Court with regard to appellant's petition; and they have no direct relevance to the finding of permanent neglect in this case, as it is based on a time period occurring well after the incident or incidents which would have been the subject of the reports.

II. Petition to terminate parental rights

The three boys, Eugene L., Robert L., and Joseph L., came under the care and supervision of petitioner-respondent Cardinal McCloskey Services (hereinafter "agency") on or about August 28, 1998, pursuant to the neglect petitions. On February 11, 2003, the agency filed three petitions in the New York County Family Court, under docket numbers B-01455-03, B-01456-03, and B-01457-03, seeking to terminate the parental rights of appellant with respect to the three boys, alleging that they were permanently neglected.[4]

A. Fact-finding proceeding

A fact-finding hearing was held on three dates, September 23, October 27, and November 12, 2003. The hearing focused on events which occurred during the period of November 8, 2000 to December 4, 2001, a period of more than one year.

1. Admission of evidence at the fact-finding hearings

a. The agency's evidence

Agency case records were entered into evidence on September 23, 2003, as Petitioner's Exhibit "1" (hereinafter referred to as "Agency Ex. 1"). The records contain entries by case workers dated November 8, 2000 through December 4, 2001; a series of letters from the agency to appellant, dated December 4, 2000, May 11, 2001,

[4] The agency alleged that the appellant mother was unmarried at the time of and for at least six months subsequent to the birth of all three children, that the putative father's consent to adoption was not required by the Domestic Relations Law, and that he was not entitled to notice of the termination of parental rights.

October 16, 2001, October 19, 2001, November 8, 2001, November 9, 2001, and December 21, 2001 (two letters of that date); and two letters from the agency to Victor Montalvo, dated September 5 and November 8, 2001. These records and letters constitute the agency's entire affirmative case. (B4-5.) In addition, the agency had two agency case workers sworn in on the first two hearing days (A3, B3), Lorraine Rosa and Joan Labassiere, and the latter case worker on the third day. (C4.) They were available to answer questions regarding the case records but did not testify.

Appellant's attorney had been provided with a copy of the agency records prior to the September 23, 2003 court date. (A6, 11-12.) Since the appellant was not present in court that day due to knee surgery, her attorney requested that admission of the records into evidence be postponed to the next court date, when appellant would be present. (A5-6.) However, after the court suggested that there would be no prejudice, as Appellant's attorney could go over the records with her and raise specific objections at the next scheduled court date, appellant's attorney responded, "Fine, your Honor. If you wish to proceed." (A6.) Appellant's attorney also stated that he had "no objection to the highlights" which had been made in the case records by the agency's attorney. (A7.)

During the September 23 hearing, appellant's attorney made a "general objection" to the records, arguing that they "are replete with hearsay", while at the same time conceding that they "are

business records kept in the ordinary course of business." (A10.) The court responded that it would go through the agency records and determine what parts were admissible, what parts not admissible, and what parts of little probative value. The court also afforded appellant's attorney an opportunity to highlight the record in a different color than that used by the agency, and to raise specific objections on the next court date. In response, appellant's attorney withdrew the general objection, stating, "Fine, your Honor. I am content with you going through the records and determining what's probative and what's hearsay or not." (A10-11.)

On the following court date, October 27, 2003, appellant's attorney did not renew the earlier objection or raise specific hearsay objections, despite the opportunity which had been afforded by the court. Moreover, at the hearing, appellant's attorney was again provided with an opportunity, of which he availed himself, to highlight, in a different color, portions of the agency records that he wanted the court to focus upon. (B6-7.)

Rather, appellant's attorney moved to dismiss, claiming that the petitioner had not established a prima facie case. (B5-13.) As part of that motion, appellant's attorney again argued that there was hearsay in the records, and otherwise claimed that the records did not make a prima facie showing of permanent neglect. After argument by counsel from all parties, the court denied the motion. (B12-13.) The ruling with respect to appellant's prima facie motion has not been challenged by appellant in this appeal.

b. Appellant's evidence

Appellant Virginia L. entered a number of exhibits into evidence and presented for oral testimony herself and Sister Maria Therese Mulieri of the Catholic Charities Center. The documentary evidence consisted of a Casework Contact Grid (Exhibit "A"; entered in evidence, B14); progress records from July to December 2001 from appellant's therapist Victor Montalvo from New Beginnings Community Counseling Center (Exhibit "B"; entered in evidence, B15); two letters from Sister Mulieri dated April 10 and June 4, 2001, and a certificate of participation in a parenting program dated April 10, 2001 (Exhibit "C"; entered in evidence, B17 and C41); four consents for treatment and authorization to release information, signed by appellant and dated September 20, 2001 (Exhibit "D"; entered in evidence, B17).

The court did not allow into evidence case notes from February, 2002, a period after the year in question -- November 8, 2000 to December 4, 2001. (B18.) In rejecting these notes, the court characterized them as not relating to anything "other than the [appellant's] feelings about what was going on before." However, the court did not preclude their possible admission if they became relevant at another point in the proceeding. (B19.)

During the re-direct examination of appellant, her attorney sought to have her diary admitted into evidence and sought to elicit testimony about what she was doing on dates she missed appointments and about her participation in the children's care.

(C6-15.) The diary allegedly consisted "of everything that took place, all her appointments of that year [2001]". (C13.) Appellant stated that she found the diary after cross-examination was completed, upon which her attorney told her to bring it to court. (C8-9.) Its proffer as an exhibit was rejected by the court as new material which should have been offered on direct examination, and thus was not within the scope of proper re-direct examination. (C13-15.).

Also on re-direct examination of appellant, objection to her attorney's attempt to elicit testimony about the reasons for her having missed certain medical appointments was sustained as improper re-direct. Appellant had testified on cross-examination that she had no recollection regarding those appointments. (C6-7, B52-54.) Also objected to as "an entirely new direct examination" was a line of questions seeking to elicit testimony about appellant's participation in her child's care, month-by-month. The Law Guardian pointed out that appellant had the opportunity to spell out her participation during her direct testimony. The objection to the line of questions was sustained. (C9-12.)

2. Factual issues concerning the agency's efforts to effectuate reunification of appellant with the three children and appellant's failure to plan for reunification

a. Trial Discharge

The agency, in its efforts to promote the reunification of appellant with the three boys, arranged for a trial discharge of the boys from foster care to appellant. This began on or about

November 15, 2000. The agency's case records for November, 2000, show that it made careful plans in setting up the trial discharge. Among many other things, the agency held a meeting on November 13, 2000, between the appellant and putative father of the three children, and agency staff. At the meeting, appellant was made aware of the children's need for psychiatric, psychological and therapy services and was referred by the agency to the Roberto Clemente Family Guidance Clinic for psychological and psychiatric services. (Agency Ex. 1, 11/13/00.) At a home visit on the date of the trial discharge, appellant informed the agency that she would be taking Eugene to the Roberto Clemente Clinic for an assessment of his medication. (Agency Ex. 1, 11/15/00.)

At a subsequent home visit on December 5, 2000 by the agency case worker, the putative father, but not the appellant, was home with the three boys after school. When asked, the putative father said that Eugene had been taking his medication but he did not know where appellant had put the bottle of medicine because appellant "hides the bottle because it is dangerous to have med bottles where the children could find them." The case worker then spoke with appellant by telephone, asking where she was taking Eugene for medicine and therapy. Appellant said that she did not like the referral to Roberto Clemente and had made an appointment at Bellevue hospital for December 14. (Agency Ex. 1, 12/5/00.)

Appellant testified that, while her children were at home with her in November, 2000, they were well behaved and doing well in

therapy and school, except that Robert would act “very aggressive towards teachers and certain therapists.” (B21.) On cross-examination, appellant admitted that there was a problem during the period of the trial discharge, that Robert “would constantly punch me in the morning in my mouth – in my face – in my mouth, saying he didn’t want to go to school, that I am not his mommy, and telling me to ‘get away from me’. He was upset and angry, and I was wondering why my child was acting out like this.” (B39.) Appellant testified that she was also concerned about Eugene because he was falling asleep in school while he was on medication – Respidol. Appellant claimed that she took the children to Bellevue for these reasons, but that when she brought it to the attention of the pediatricians “they didn’t want to get into it.” (B39-41.)

Appellant testified on cross-examination that she took the children to Bellevue for psychiatric treatment during the trial discharge because she felt that the situation was not working at Roberto Clemente. She made this decision after they attended treatment at Roberto Clemente once or twice. Appellant testified that she felt uncomfortable at Roberto Clemente and wanted to be in control. She wanted some place “more professional, more up-to-date with medication and everything.” Appellant did not ask the case worker or the therapist at Roberto Clemente for assistance in transferring the family therapy to Bellevue, and had no idea how often she was supposed to go to Roberto Clemente. (B70-71.)

The trial discharge ended when ACS removed the children from

appellant's home on December 20, 2000. On a number of visits by ACS to appellant's home, she was not there with the children. More seriously, there were allegations of corporal punishment by the putative father at Bellevue Hospital on December 14, 2000. The agency records indicate that the putative father "smacked Robert in the back of his head while at Bellevue. (Agency Ex. 1, 12/21/00.)

Appellant failed to inform the agency of the events at Bellevue. According to the agency case records, she claimed that she did not inform the agency because she was scared that the children might be removed from her home. She denied abuse by the putative father, rather claiming that Robert hit the putative father. Appellant expressed her belief that it was wrong for ACS to remove the children. (Agency Ex. 1, 12/21/00.)

With regard to the incident at Bellevue Hospital, appellant asserted that she decided on her own to take the children there to be evaluated and obtain psychiatric treatment, as the situation "wasn't working" at "Clementine's Hospital" [sic]. They were accompanied by the putative father, who was described by appellant as "a friend of the family." Appellant testified that, while at Bellevue, she heard a loud sound, after which the putative father came towards her and said, "I got smashed in the mouth by Robert and my mouth is hurting. I think my tooth is loose and I have to leave." He left and the appellant "didn't know what happened." (B21-25.)

b. Agency service plan and related planning to reunite the family

Appellant denied on cross-examination that the agency gave her a set of requirements, a service plan, after the end of the trial discharge. (B45.) This is contradicted by the agency records, which show the agency's continuing efforts to work on a service plan with appellant.

Prior to the ending of the trial discharge, in a December 4, 2000 letter from the agency to appellant, she was invited to a meeting on December 19, 2000 to attend a Service Plan Review for the three children. (Agency Ex. 1.) Due to the disruption caused by the removal of the children, the meeting was rescheduled for December 28, 2000, at which time appellant attended. (Agency Ex. 1, 12/28/00.)

Case planning and the agency's attempt to work with appellant on the service plan continued through the year under consideration.

• April 9, 2001:[5] The agency case worker discussed case planning with appellant at the end of a parent-child visit. During the discussion, appellant denied telling Eugene "not to respect anyone" as he would be going home by June. Appellant said that she was not signing consents for services because she believed Eugene and Joseph do not need any. With regard to Robert, she said that her attorney advised her not to sign anything. Appellant expressed the opinion that the problem with Eugene and Joseph is that the

[5] These dates refer to the marginal event dates in the agency case records (Agency Ex. 1).

system has the children traumatized. The case worker explained to appellant that she is not ready to have the children returned to her because she is not cooperating with the agency and her visits are sporadic.

• May 11, 2001 letter from agency to appellant:[6] Appellant was invited to a meeting on May 22, 2001 for a Service Plan Review for Eugene. On the agenda was Eugene's adjustment to foster care, his school performance, and steps to bring about his discharge from foster care.

• May 22, 2001: Appellant attended the Service Plan Review at which medical issues were discussed. Appellant said that she preferred to have copies of the medical consents and discuss them with her attorney. The case worker gave her the copies. Appellant promised to attend Eugene's medical appointment scheduled for June 11, 2001.

• August 21, 2001: The agency case worker and behavioral specialist made a home visit to appellant and discussed the service plan including the children's special needs. Appellant was very defensive about the children's negative behavior and blamed the foster care system

• September 6, 2001: After appellant's visit with children at agency, the case worker and behavioral specialist met with her to discuss the service plan and advised her as to what was necessary to have the children returned to her –- individual parenting

[6] Letters are in Agency Ex. 1.

classes, continued family therapy, and involvement in the children's therapy.

• October 19, 2001 letter from agency to appellant: Appellant invited to a meeting on November 1, 2001 to review the service plan for Eugene.

• October 30, 2001: At a visit with children at the agency, appellant was reminded of the Service Plan Review scheduled for November 1. Appellant expressed confusion about the nature of the Service Plan Review whereupon the case worker provided appellant with an explanation.

• October 31, 2001: The agency left a telephone message for appellant reminding her of the November 1 Service Plan Review.

• November 1, 2001: Appellant left a message for the behavioral specialist saying she would be unable to attend the Service Plan Review because of a staff meeting at work.

• November 13, 2001: The agency's behavioral specialist telephoned appellant to discuss educational and medical concerns about the children.

• December 21, 2001 letter from agency to appellant: The agency noted that appellant did not attend a meeting scheduled for October 22, 2001 to review Robert's educational needs, nor on the rescheduled date of November 7, 2001. The letter discussed educational concerns for Robert and Joseph, a recommendation for medication for Robert for hyperactivity, and problems with Eugene's playing with the Gameboy.

c. Visits with the children

The agency scheduled regular visits between appellant and the children. These visits were scheduled to be held at the agency's facility and were supervised by agency staff, a social worker and/or behavioral specialist, in accordance with the court's directive. (August 25, 1999 Order of Disposition in the Neglect Proceeding.) The agency consulted with appellant regarding her work schedule and days off in its effort to assure consistent visitation. Nevertheless, appellant missed visits and arrived late.

Appellant testified that in 2001 she was working as a counter manager for Lord & Taylor in Scarsdale, that she gave the agency her work schedule, and that there came a time that she missed visits with the children because she worked late, had trouble with transportation, and her mother was ill. (B31-33.) However, she could not recall at what point in the year her mother was ill, nor the transportation routes. (B33-35.)

On cross-examination, appellant admitted that she would be as much as an hour late to visits with her children, visits which were scheduled for two hours. She claimed the delay was due to traffic. She claimed that she called every time she missed a visit or was going to be late. (B51-52.)

According to the agency case records (Agency Ex. 1), appellant missed or was late to visits at least as follows:

- January 18, 2001: Appellant did not show for visit with

children even though informed.

• February 15, 2001: Putative father came for visit with children, but without appellant, who he said was working.

• March 15, 2001: Appellant called to cancel visit.

• April 9, 2001: Case worker scheduled special visit for Eugene's eighth birthday. Appellant arrived a half-hour late. There was tension between appellant and the children during the visit. At end of session appellant wanted to discuss case planning with the case worker.

• June 4, 2001: Appellant came 20 minutes late for visit with children.

• June 26, 2001: Appellant arrived 45 minutes late for visit with children and immediately began arguing with foster parents in front of the children.

• July 16, 2001: Appellant was a hour late for visit with children. She said she was late because of her leg, as she was walking with a cane.

• August 16, 2001: Appellant telephoned agency to cancel visit, as she was working late and could not take time off.

• September 13, 2001: Appellant telephoned agency to cancel visit, due to traveling difficulties caused by World Trade Center attack on 9/11.

• November 19, 2001: Appellant cancelled November 20 visit with children, saying she was sick.

• December 4, 2001: Appellant left a scheduled two-hour visit

50 minutes early, saying she "needed air." This occurred after the agency's caseworker attempted to discuss problems concerning Eugene.

d. Family therapy

As the agency case records show, the agency encouraged appellant's continuation of family therapy with the children, sought reports from the family therapist, and even took the children to therapy sessions (Agency Ex. 1). Nevertheless, appellant's utilization of this service was inconsistent. She herself testified that she did not have family therapy in January, 2001. (C10.) Appellant's inconsistency is shown in the agency case records:

• January 24, 2001: Appellant denies that she has cancelled family therapy sessions.

• February 22, 2001: The Family Court ordered an increase of family therapy to a weekly basis if the therapist would agree.

• March 2 and 9, 2001: The family therapist reported that appellant had been cancelling "a lot" of therapy sessions. He would send a report when appellant resumed her weekly sessions.

• March 23, 2001: The agency case worker discussed with appellant her having cancelled family therapy sessions, and told her the agency cannot be responsible when she cancels those sessions.

• March 30, 2001: The family therapist again informed the case worker that appellant had been cancelling a lot of sessions and

cannot recommend unsupervised visits between appellant and the children. Agency case worker asked for a report listing the days appellant cancelled and the days she attended sessions.

• April 30, 2001: The agency case worker called the family therapist to request a progress report. The therapist informed the case worker that the appellant and putative father are attending family therapy sessions on a bi-weekly basis.

• July 16, 2001: The agency case worker called the family therapist to schedule family therapy. Therapist says that appellant has tendency to cancel and reschedule therapy sessions.

• August 6, 2001: The agency case worker took Eugene to a family therapy session.

• September 17, 2001: Appellant cancelled a family therapy session claiming she could not access her money due to the 9/11 attack on the World Trade Center.

• September 27, 2001: The agency case worker spoke with the family therapist regarding appellant's clinical status, her parenting style, and her relationship to her children. The case worker requested therapy reports from the family therapist.

e. Parental skills classes

On cross-examination, appellant admitted that the agency referred her for family therapy and followed up with the family therapist, that the agency followed up with her other therapist, Sister Mulieri, and that the agency referred appellant to parenting skills programs because the children were in "therapeutic foster

homes." (B45-48.)

Sister Mulieri testified that there were nine weekly two-hour parenting skill classes between February and April, 2001. (C44.)

Appellant admitted that after completing this course she did not believe she needed further parenting skills training, even though she agreed that more intensive parenting skills made sense because of her children's violent tendencies. (B48-49.). She refused to go to the parenting skills program through the remainder of 2001, because she and her attorney were going to court at the time. (B49-50.) She testified that she believed she did go to such a program in 2002, but not in 2001, the latter being the year under consideration. (B50.)

The agency made a number of efforts to have appellant take further parenting skills classes in 2001, but to no avail. On September 17, 2001, the agency case worker discussed individual parenting classes with appellant and discussed meeting with the behavioral specialist. Appellant refused to meet with the specialist. (Agency Ex. 1.) The agency reviewed its efforts and appellant's refusal to cooperate in an October 16, 2001 letter from agency to appellant. (Agency Ex. 1.) As noted in the letter, on September 20, 2001, at the time of a court appearance, appellant agreed to a referral for parenting skills, but on October 9, 2001, in a discussion with the agency social worker, appellant maintained that she did not have time for parenting classes, that she did not need them, and that they were not court ordered. The letter

further noted that appellant stated that she was being harassed and would not continue to speak about the matter, and that she insisted that she did not receive a voice mail message left her on October 5, 2001 from the agency, which had informed her about a meeting with the agency's behavioral health specialist on October 9, 2001. The letter went on to encourage appellant to participate in the parenting classes to facilitate return of the children to her care.

f. Appellant's individual therapy

Appellant's witness, Sister Marie Therese Mulieri, saw the appellant "practically every Thursday", forty-three times from November 8, 2000, through December 4, 2001, in individual therapy sessions. (C19-21.) She testified that a psychiatrist had diagnosed appellant as suffering from anxiety and that she worked with appellant on emotional issues concerning the children. (C19.) Sister Mulieri testified that initially, appellant was not able to clarify and express her needs, that she was aggressive, argumentative and paranoid. (C22-24.) The way she spoke to people "turned them off." (C24-25.) Sister Mulieri noted a shift, an improvement, in about March, 2001, with appellant becoming calmer and, through assertiveness training, more able to clarify her statements. (C21-23.) However, "there were ups and downs." (C26.)

g. Medical appointments and consents for the children

The agency continuously encouraged appellant's involvement in planning for needed medication for her children. Nevertheless she refused to cooperate, missing medical appointments and refusing to

sign medication consents.

For instance, at a February 22, 2001 court hearing, appellant was instructed to sign a consent for medication for Eugene but refused. (Agency Ex. 1.)

At an April 9, 2001 case planning conference, appellant was informed of a medical appointment on April 12, 2001 with regard to medication for Eugene. (Agency Ex. 1.) She did not attend. In a follow-up telephone call on April 25, 2001, by the agency case worker, appellant said that she was not be able to make the April 12, 2001 appointment because of work. The case worker informed appellant that another medical appointment was scheduled for April 26. When appellant said she could not make that appointment for the same reason as on April 12 – work, the case worker reminded her that the appointments were on her day off. After further discussion, the case worker asked for a pay stub, upon which appellant hung up the telephone. (Agency, Ex. 1.)

On cross-examination, when asked whether the agency case worker had offered appellant an opportunity to meet with Eugene's doctor on a number of occasions during the spring and early summer of 2001, appellant testified that she could not "recall that particular time." (B59.) She also could not recall that the case worker had invited her to the two appointments with the doctors, on April 12 and 26, 2001, but that she had not attended. (B59-60.). She did not recall receiving any messages or letters or phone calls about those appointments. (B64.) Questioned about being told about

the April 12, 2001 appointment with Eugene's doctor at a meeting with the agency case worker on April 9, 2001, appellant could not recall anything about the doctor, the appointment with the doctor, or the meeting. (B52-54.) Indeed, she claimed to have no recollection that she had said to the case worker that she was working on those days, nor that when the case worker confronted her with the fact that the appointments were on Thursdays, a day of the week which appellant had off from work at that time, appellant had hung up the telephone on the case worker. (B60-61.) Appellant blamed the fact that she had not been in contact with Eugene's doctor on a bad relationship with the agency's case worker. (B64.)

At the May 22, 2001 Service Plan Review, appellant promised to attend Eugene's medication appointment scheduled for June 11. (Agency Ex. 1.) Asked during cross-examination whether she was informed about the June 11, 2001 appointment with Eugene's doctor at the May 22, 2001 meeting, appellant responded that she was not informed. (B54-55.)

On July 13, 2001, during a visit with appellant, Eugene acted out. Appellant blamed this on the agency's changing his medication. She denied signing a medical consent for the change. The case worker reminded appellant that she had in fact signed a consent and had the right to call the doctor to express her concerns about the medication. Appellant refused to call the doctor but asked for a telephone to call her attorney. (Agency, Ex. 1.)

Appellant was cross-examined about the incident. When asked whether she blamed Eugene's behavior on his doctor during the July 13 visit, she testified, "I can't recall that year, I can't go back all the way in time. I can't answer that question." (B55-56.)

On November 14, 2001, medication reviews were held for Robert and Eugene with their doctor, agency personnel and foster parents present with the boys. Appellant was not present. (Agency Ex. 1.)

h. Non-cooperation with agency

Appellant's unwillingness to cooperate with the agency in taking the steps which would lead to reunification of the family is apparent in a number of ways in addition to what has already been described.

Sister Mulieri testified that on May 22, 2001, she was present at a meeting with appellant and the case worker, Ms. Mendoza, from the agency, and that the interaction between appellant and the case worker was "very strained, very stressed." (C36.) Sister Mulieri was aware that the agency was of the opinion that appellant was not cooperating with the agency during the year period from the end of 2000 to late 2001, but that appellant told her she was doing everything the agency asked her to do. (C47.)

Appellant, when asked on cross-examination whether she had a problem getting into disputes with case workers and foster parents in front of the children, blamed the agency and foster parents for pushing "upon me in front of my children." (B72.)

Appellant admitted that she had repeatedly been told not to

speak about the case with the children but denied allegations that she had nevertheless done so. (B66-68.) As an example contrary to her denial, at a March 29, 2001 visit with the children, appellant tried to speak secretly with them but the case worker intervened. When appellant complained, case worker explained that there is a court order requiring supervised visits. The case worker reminded appellant that she is not to discuss the case with the children, something she had been doing. (Agency Ex.1.)

Appellant claimed that agency case worker, Carmen Mendoza, would not give her information about the children's behavior problems or medication, or any information about the doctor who was seeing Eugene. (B35-37.) Sometime after the middle of 2001 a different case worker, Lisa Perez, was assigned to the case. Appellant claimed she had a good relationship with the new case worker. (B38.) Nevertheless, the agency records show that her unwillingness to cooperate with the agency continued.

At a June 13, 2001 court hearing, appellant was directed to sign consents for services for the children and was advised by the court that their return to her would be delayed if she did not sign. Appellant consented and said she would sign whatever needed to be signed. (Agency Ex. 1.) However, in a November 13, 2001 telephone discussion with the agency's behavioral specialist about educational and medical concerns, appellant said she would not sign any consents, as per her lawyer's advice. (Agency Ex. 1.)

In that same telephone conference, appellant requested an

opportunity to see psychological and psychiatric evaluations for Robert and Joseph. When the behavioral specialist tried to explain that the appropriate person to review the latter materials would be the children's doctor and that appellant could schedule an appointment with the doctor to review the materials with him, appellant hung up. (Agency Ex. 1.)

A November 9, 2001 letter from agency to appellant indicates another area of non-cooperation. The agency social worker asked appellant to reconsider her decision to not allow the children's paternal aunt to visit the children, as they should not be isolated from family members. She was also asked to schedule an appointment between her, the aunt, and the agency staff to discuss a visitation plan. There is nothing in the record to indicate a response from the appellant.

i. Appellant's denial of responsibility for the children's behavioral problems

Appellant's unwillingness to cooperate with the agency extended to her refusal to accept any degree of responsibility for the children's emotional and behavioral problems. The record is full of examples:

• June 4, 2001: Appellant told the agency case worker that it was not her fault that the children came back into foster care. When asked who was at fault, she responded, "I don't know because it is nothing against me."

• July 13, 2001: When Robert complained that appellant was keeping him from concentrating on the game he was playing,

appellant was furious and blamed the agency for everything that was happening to her children.

• July 26, 2001: Upon arriving for a visit with the children at agency, appellant falsely claimed that she had not been informed that the children were being transferred to the therapeutic foster care department. When the case worker explained that the children required more therapeutic intervention because of their emotional and behavioral needs, appellant stated that the children did not behave that way when at home, that the foster care system and their desire to come home is the cause of their needs. Appellant claimed that she never hit her children

• August 6, 2001: In a discussion with the case worker during a visit with the children, appellant again blamed the system for her children's plight.

• August 21, 2001: During appellant's visit with the children, Eugene had a tantrum. The case worker suggested that appellant might be encouraging his tantrums. Appellant refused to discuss the matter and blamed new medication. The behavioral specialist then wanted to discuss a change in medication and the need for appellant's consent. Appellant refused to discuss this as well. When the case worker suggested that this was an example of not cooperating, the appellant left the visiting room.

• December 4, 2001: At visit with children, the case worker attempted to discuss Eugene's problematic behavior with appellant. Appellant responded, that Eugene "never acted this way while in her

care." After the case worker's further attempt tp discuss Eugene, appellant told her to write to her attorney.

On cross-examination, appellant testified that she believed her children's bad behavior during the year in question was because of the length of time they were in the foster care system, but that her visits with the children "were going fine" and she had no problems controlling the children at that time. (B56-58.)

3. The Court's Finding

The court made a finding of permanent neglect against appellant, based on the following oral decision (C56-60):

> JUDGE LARABEE: Well, first of all, I have to determine the credibility of the Witnesses and I do this based not just on my years of experience, but on my close observation, which is unique in this room, of the Witnesses and comparing their testimony not just with the other Witnesses in evidence, but also internally. And based upon my review of this evidence, I can only find that Ms. [L.]'s testimony is self-serving and not completely coherent and not -- certainly not completely credible. Her efforts today to rehabilitate her earlier testimony were completely incredible. When she first testified, she gave various excuses for either missing visits, missing doctor's appointments, being late, not cooperating. Sometimes she said it was her job, sometimes her mother was sick, sometimes she was covering for other people at work. She said she wasn't very good at traveling. She said she didn't know to travel. She said Ms. Mendoza wouldn't help her, wouldn't tell her anything about the children's doctors, and that's why she wasn't even talking to the doctors about medication for the children. She basically excused her inaction on either not getting along with the Case Worker or having other appointments or medical problems.
>
> I do find by clear and convincing evidence

that the Agency did exercise diligent efforts to try to work with her. And, in fact, they trial-discharged the children to her and set up a discharge plan, which they – they, the Court, and everyone in this room hoped would work and provide a safe and appropriate home for the children.

But it did not. And the reason it did not is that your client stopped cooperating. Even your client's Witness, Sister Marie Therese, testified that your client had many, many problems and that she clearly was a difficult client to work with. She was aggressive. She was paranoid. She was argumentative. And even Sister Marie Therese said that her progress over the year in question was up and down. It wasn't -- it's not that the situation was completely cured.

And Mr. Kafko [appellant’s counsel], your Witness, Sister Marie Therese, tried -- even she, who only saw your client with Ms. Mendoza for one office visit during the time in question, the Sister did not testify that Ms. Mendoza was hostile or in any way tried to sabotage your client's progress. Your Witness testified that your client was stressed and strained and afraid. But there is no evidence to indicate that the Agency was in any way responsible for this. Your client was offered regular visits, all kinds of mental health services, all kinds of counseling. Your client is -- appears to have a lot of potential. She appears to be certainly more educated or more intelligent than the -- than many of the parents who come from this Court. [sic] But nevertheless, that doesn't excuse her from her failure to cooperate with the diligent efforts that the Agency was offering to her through, first, one and then the second Case Worker. And as, I think, [the agency attorney] pointed out, even after the second Case Worker, Ms. Perez, came onto the case, your client's behavior didn't -- didn't -- didn't change all that much. She waited until the very last minute to take care of signing consents for the children's problems. And the children were having serious problems in school. These are not minor problems. They involve violence.

> They involve hurting other children. They involve hitting teachers. These were serious problems.
>
> She didn't go to the April Service Plan Review. She didn't go to the November Service Plan Review. Those are both in the year 2001,and those were during the period of time that the Agency was trying to work with her. So I do find that the Agency did exercise diligent efforts to try to keep the children home with your client. She did not follow through with any of that. And I do find by clear and convincing evidence that she has permanently neglected them for the time period required by the Statute.
>
> As [the Law Guardian] pointed out in her closing remarks, what happens as a result of this is going to be determined at the next phase of this Hearing, and most of your remarks were directed to that second phase of the hearing. And I have, by the way, reviewed all the documentary evidence before me in both colors, meaning both Petitioner's highlighted portions and those of the Respondent's. And, in fact, each -- each party is interested in having me consider quite a significant portion of the records. So I am also finding that there's no one else whose consent would be required. I'm going to set it down for a Dispositional Hearing.

B. Dispositional Hearing

Following the court’s finding of permanent neglect a dispositional hearing was held in Family Court on January 26 and March 10, 2004, to consider the best interests of the children in determining what course of action to take.

1. The Law Guardian’s Evidence

The Law Guardian introduced one exhibit into the record, Law Guardian’s Exhibit “A”, a psychiatric evaluation of one of the

children, Robert, conducted on January 7, 2004, at the agency. The report concluded that "Robert is showing significant gains in his current Therapeutic Foster Boarding Home," and recommended that "It is in his best interest to continue to live in the nurturing, supportive, caring, and therapeutic environment."

2. The Agency's Evidence

Lorell Rosa had been the agency's case worker for the L. family since June 2003. Ms. Rosa testified that appellant's three boys were in separate pre-adoptive homes. (D2-3.)

Ms. Rosa testified that Robert had been in a pre-adoptive home for three years, and was doing well. He is adjusted and very attached to his foster mother. The home is a two parent, non-kinship home with another child, a twelve-year old foster child. The foster mother is a housewife. The foster father works and provides enough income to support the child. Ms. Rosa described the interaction in the home as "very well." On her visits to the home, Robert "seems very happy, doing his homework very peaceful". (D6-7.)

Ms. Rosa testified that Robert has Attention Deficit Hyperactivity Disorder (hereinafter "ADHD"). The foster parents take him for routine checkups at the agency monthly, and outside the agency for vision, hearing, physicals, and routine medical treatment. They attend special training and support groups at the agency every month, and get other support from the agency. (D7.)

Robert receives therapy for his ADHD condition. (E15.) Ms.

Rosa, on her home visits, has not observed Robert acting out. Nor did he appear upset. He is very quiet and his foster parents are able to control his behavior, unlike appellant, who cannot control his behavior. (E17.) Ms. Rosa reported that Robert gets along well with the other foster child at the foster home. (E18.)

Joseph had been in a two parent, non-kinship pre-adoptive home, also for three years. The foster mother is a housewife and the foster father works, providing enough to support the child. They both wish to adopt. There is one other child in the home, an eleven-year-old foster child. Ms. Rosa testified that she visited the home and found it adequate for the child. Joseph is very attached to his foster mother, calling her "Mommy." He seems very happy whenever Ms. Rosa visits the home. (D7-9.) Although Joseph had been diagnosed with ADHD, his behavior had imporved to such an extent that his therapy was discontinued. (E19.)

Eugene had been in a one-parent non-kinship home for three years and was doing well.[7] (D3.) Ms. Rosa testified that Eugene has special needs, that he has ADHD and was also diagnosed as having "oppositional defiant disorder." (D5.) Eugene receives therapy and medication for his special needs caused by ADHD and Operational Defiant Disorder. (E13-14.) Eugene always takes his medication. (E7.) Ms. Rosa said she had not been told by anyone at Eugene's school that he had failed to take his medication. (E9.)

[7] The evidence reviewed here, with regard to Eugene, does not reflect the updated circumstances discussed below, but rather, the situation at the time of the dispositional hearing.

Ms. Rosa testified that appellant's plan since the filing of the termination petition was to have the children returned to her. Nevertheless, Ms. Rosa expressed the opinion that adoption would be in the best interests of the children because, when she supervised visits between the appellant and the children, the appellant could not control the children. They fight and are hurt. Robert throws chairs at appellant, and bites and kicks her. Ms. Rosa has to intervene, to supervise or to help because Robert is "out of control." (D10-11.) Typically whenever appellant would bring a toy to a visit, it would trigger a fight. (D18.)

Ms. Rosa testified that the children do not exhibit these behavioral problems in their foster homes. (D26.) Joseph and Eugene get along well in their foster homes and Ms. Rosa denied any hitting incident between Eugene and the older child in his foster home. (E5, 6-7.) Eugene and Joseph have unsupervised visits on weekends with the foster parents which go smoothly, but Robert and Eugene do not get along well. (D26.)

Ms. Rosa testified that appellant's interactions with Eugene were good compared to those with Robert and Joseph, and that she "is very attached to Eugene". The relationship with Joseph was good. The problems were usually with Robert, who has tantrums. (D35.)

On cross-examination, Ms. Rosa testified that appellant shows an interest in the children and is affectionate. (D36-39.) She is enrolled in some workshops about special needs. (E4.) Ms. Rosa

testified, however, that she has not observed any improvement in appellant's ability to control Robert, notwithstanding the training for parents of special needs children undertaken by appellant. (E17-18.)

Ms. Rosa testified that the appellant visited the children weekly, but that from July 2003 to the time of her testimony in January 2004, appellant had come late eight or nine times, sometimes half an hour late. (D10-11.)

Appellant would step out during most visits for 15 to 20 minutes to get something to eat. The visits were scheduled for two hours. (D14-15.) Ms. Rosa had suggested in October 2003 that appellant buy food before coming in. Appellant followed the suggestion a few times and then resumed leaving the visits to get food. Ms. Rosa considered this to be improper. She also considered improper appellant's behavior in leaving when the children were arguing, and threatening to take a time-out for herself if they did not stop. (D29-30.)

Ms. Rosa described difficulties between appellant and the children at a series of visits:

• July 31, 2003 - Appellant could not convince Eugene to turn off his gameboy and the two started arguing. Ms. Rosa intervened and was able to get him to turn it off by saying that he should finish the game and then turn it off. (D12.)

• October 6, 2003 - Robert refused to see appellant. (D13.)

• October 16, 2003 - Eugene started arguing with Robert over

a toy. Appellant said to the boys that she would have a “time-out” if they did not stop. She then went out to get a pizza and was gone for about a half hour. Robert threw a chair at Eugene and Ms. Rosa had to block it. (D13-14.)

• October 20, 2003 - appellant brought a cake and gift for Robert’s birthday. Eugene took Robert’s gift and had a tantrum, because he wanted the gift. Robert was “having a great time,” enjoying his birthday, playing with Joseph. But Eugene was upset and said to appellant “I hate you.” Appellant replied to Eugene, in front of the other two children, “Why are you acting like this, because I love you first, most of all.” (D15-16.) Appellant attempted to give Robert’s present to Eugene, but was prevented from doing so through the intervention of another agency case worker, who explained to appellant that she was acting inappropriately. (E19-20.)

In the following visit in November there was another fight over toys at which time appellant explained to Robert that he needed to share with Eugene, “[t]hat Eugene needed to be catered to”. (E20-21.) Ms. Rosa testified that appellant tells Robert that he needs to share, but if Eugene does not want to share, she lets him get his way. (D33.)

• November 13, 2003 - Eugene and Robert were arguing over toys. They threw a toy at each other, but instead hit Ms. Rosa in the eye. Appellant told Eugene to apologize, which he did, but they started arguing again. Appellant then threatened to take away

Robert's toy if he did not learn to share, upon which he stood up and overturned the table, knocking all the toys down. Eugene and Joseph started crying and Robert started throwing chairs at appellant. She tried to restrain him but he kicked her, bit her, and hit her. Ms. Rosa had to call for support as appellant "cannot handle it." (D17-20.)

• December 18, 2003 - appellant said to Robert that, "You're going to go home with me." The boy "started crying hysterically" saying he did not want to return but wanted to stay with his foster parent. Every time she would mention it, Robert would start crying. (D22-23.)

• January 22, 2004 - the visit was going well until Robert and Eugene started arguing over a Gameboy. Appellant tried to stop the argument, triggering Robert to start hitting appellant, kicking and biting her. (D24-25.)

• January 29, 2004 – Joseph became upset with a toy brought by appellant, and he started crying and throwing things on the floor. Ms. Rosa had to intervene. Problems with the toys continued through the visit and at the end Joseph said, "I don't want to come here any more". (E22-23.)

Ms. Rosa testified that the appellant was accompanied by a friend named Phil on three visits between the two dispositional hearing dates, i.e., between January 26 and March 10, 2004. Phil appeared to be unknown to the children. At the first visit, he told the children that he would take them to Yankee Stadium and

museums. The children said they wanted to return to appellant because of the fun things they were going to do. (E10-12.) The second time Phil came, Joseph said a "bad word." Phil started shouting at him, "You are not supposed to be saying bad words to me. . . . This is what you learn in the Foster homes?" Appellant told Ms. Rosa that she brought the man to the visits because she "just wanted. . .to bring him." (E12.)

On cross-examination, Ms. Rosa testified that other visits since she had been assigned to the case in June, 2003, "basically went well." During the July 31, 2003 visit, Ms. Rosa did not observe appellant doing anything improper. On October 6, 2003, when Robert said he did not want to see appellant, she did not do anything to provoke him. (D27-28.)

Appellant has attended medication appointments for the children, but at the time of Ms. Rosa's testimony in March 2004, appellant had missed the last two appointments, saying that she was sick. Also, she had not returned some medical consents to Ms. Rosa. (E5.)

On cross-examination, Ms. Rosa testified that the appellant's apartment is neat and reasonably clean. (D36.) Appellant lives alone and is not married as far as Ms. Rosa knows. (D36.) Ms. Rosa did not recall appellant using drugs and had not seen her drunk or drinking alcohol. (D37.) Ms. Rosa was not aware of any criminal record of appellant's. (D37.) Ms. Rosa testified that appellant told her she has her own business – something about music

production. (D38-39.)

3. Appellant's Evidence

Appellant Virginia L.'s case consisted of her testimony and two exhibits. Exhibit "F" is an undated intake letter from the Jewish Board of Family and Children's Services to appellant, for an appointment on March 1, 2004. Appellant's Exhibit "G" consists of two letters from February and March, 2004, indicating her enrollment and attendance at parenting skills workshops.

Appellant testified that if the children were to come home, she would enroll Eugene in "District 45" school on 23rd and First Avenue, a school for children with special needs, in September, 2004. Robert and Joseph would be enrolled at Saint Joseph's, a Catholic school across the street from where she lives. (E24-25.) She was considering continuing to have the children see Mr. Dada at Cardinal McCloskey Services for their medication. Robert would be placed in therapy at the Jewish Board for Family and Children, rather than his then current placement at "Esther Child Guardians",[8] because the former is closer to home. (E25-26.) Joseph and Eugene would also be placed in therapy at the Jewish Board. Eugene was then currently receiving group and individual therapy at Cardinal McCloskey Services and counseling at P.S. 75. She would continue to use the behavioral health counselor at Cardinal McCloskey. (E27.) Appellant herself was seeking therapy at the Jewish Board, having been through intake on March 1 and 3,

[8] This is apparently a reference to the Astor Child Guidance Center.

2004. She was seeking therapy to “talk out my frustrations and feeling about my children”. (E27-29.)

Appellant testified that Eugene was taking Respidol for “disruptive behavior”, Concerta to “control his hyper-activity”, and Depacol for “anger/mood disorders.” Robert is on Concerta when he goes to school, and Eridol for hyperactivity. The agency psychiatrist was also considering prescribing Depacol for him. All three children were seeing the psychiatrist for medication. (E30-32.)

Appellant testified that she felt ready to care for all three of the children. (E61, 65.) When asked whether the children have significant special needs, appellant testified that “I can’t say that they are having these needs. . .this is what the agency is saying. If I had my own doctor to evaluate these children, then I would say yes. Right now, I didn’t get the chance – an opportunity to do so.” (E62, 64.) Appellant denied being told of the children’s special needs several years before, and displayed no understanding of the reason why therapy had been prescribed for them. (E66-69.) Appellant did not believe that the children’s special needs were being addressed by their foster parents. (E64.)

Appellant testified that she was taking a 12-session course on specialized parenting skills for children with ADHD. She also attended three workshops about children with special needs. She was taking the courses “To brush myself up with my parental skills” because of the children’s special needs. (E32-35, 66.)

Appellant testified that visits with the children in the past month (before March 10, 2004) were going well, that they were getting better than before. (E46, 53.) Appellant claimed that the children are not acting out, no longer having tantrums, throwing things, attacking each other. (E54, 57.) However, appellant conceded that Eugene had a tantrum on February 21 or 26, about two weeks before the hearing. (E59.) When pressed to say whether Robert bit her on February 26, appellant first conceded that he was trying but missed, and then claimed that she could not recall whether he tried to bite her. (E50-60.) Nor could appellant recall whether Eugene got up and left the visit on February 26, or whether Joseph had a tantrum at the visit the week before. (E60.) Appellant then conceded that the children act out, claiming that it was because they wanted to return home to appellant. (E61.)

With respect to the scene during the visit for Robert's birthday party in October 2003, appellant denied that the disruption had anything to do with Eugene wanting Robert's present, saying instead that the problem was about the birthday cake, and that the caseworker intervened over the cake, not the toy. (E69-70)

Appellant had been making visits to the children's schools since early 2004, and claimed to have been told that Eugene on occasion was not given his medication. (E47-50.)

Appellant testified that she was on worker's compensation and expected to return to her security job shortly. In the meantime she was working "off-the-books" at a Japanese restaurant. (E44.)

Appellant testified that she was not taking drugs or drinking alcohol, nor did she have a criminal record. (E45-46.)

Appellant testified that her relationship with the putative father of the three boys had ended in August 2002, that they had not spoken to each other since then; but she did not know why that had happened. (E52.)

4. The Court's Ruling

The court concluded after the dispositional hearing that the best interests of the children mandate that appellant's rights be terminated and the children's custody and guardianship be transferred to the Commissioner of Social Services and the agency for purposes of adoption. (Family Court Findings of Fact, Conclusions of Law, and Order.)

5. Update

Robert and Joseph remain in their respective foster homes and they desire to be adopted by their foster parents.

Eugene, who is now twelve years old, has been moved to a therapeutic foster home which is not a pre-adoptive home. He has expressed a desire to be with his biological family. There is currently no adoptive resource for him.

ARGUMENT

POINT ONE

THE FINDING OF PERMANENT NEGLECT WAS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE OF THE AGENCY'S DILIGENT EFFORTS TO ENCOURAGE AND STRENGTHEN THE PARENT-CHILD RELATIONSHIP AND APPELLANT'S FAILURE TO PLAN FOR THE CHILDREN BY NOT COOPERATING WITH THE EFFORTS OF THE AGENCY, MISSING OR COMING LATE TO VISITS WITH THE CHILDREN, MISSING MEDICAL AND SERVICE PLAN APPOINTMENTS, REFUSING TO SIGN MEDICAL CONSENTS, AND SHOWING LITTLE SIGN OF UNDERSTANDING THE CONDITION OF THE CHILDREN.

Social Services Law §384-b(7)(a) provides, in relevant part, that a "'permanently neglected child' shall mean a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship." A determination of permanent neglect is warranted if the parent either failed to maintain contact or failed to plan. Matter of Star Leslie W., 63 N.Y.2d 136, 142-43 (1984); Matter of Orlando F., 40 N.Y.2d 103, 110 (1976).

In the instant case, clear and convincing evidence established that appellant permanently neglected Joseph, Robert, and Eugene by failing successfully to address any component of the service plan which was established by the agency to prepare appellant for

reunification with the children. The record showed that the agency endeavored to assist appellant in effectuating the service plan and developing a meaningful parent-child relationship, but that these diligent efforts were undermined by appellant's inability or unwillingness to accept planning responsibilities, and her failure to cooperate with the agency. Accordingly, the fact-finding ruling should be affirmed.

A. The Agency Exerted Diligent Efforts to Encourage and Strengthen the Parent-Child Relationship

The threshold inquiry in a permanent neglect proceeding is whether the child care agency discharged its statutory duty to exert diligent efforts to encourage and strengthen the parental relationship. S.S.L. §384-b(7)(a); Matter of Jamie M., 63 N.Y.2d 388, 390 (1984); Matter of Sheila G., 61 N.Y.2d 368, 373 (1984). "Diligent efforts" are defined in S.S.L. §384-b(7)(f) as

> reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:
>
> (1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;
> (2) making suitable arrangements for the parents to visit the child.. . . ;
> (3) provision of services and other assistance to the parents . . . so that problems preventing the discharge of the child from care may be resolved or ameloriated;
> (4) informing the parents at appropriate intervals of the child's progress, development and health . . . .

Whether the agency has exerted diligent efforts to satisfy its

statutory obligation remains "subject to the rule of reason." Matter of the O. Children, 128 A.D.2d 460, 464 (1st Dept. 1987). The agency "is not charged with a guarantee that the parent succeed in overcoming his or her predicaments. Indeed, an agency that has embarked on a diligent course but faces an utterly uncooperative or indifferent parent should nevertheless be deemed to have fulfilled its duty." Sheila G.,61 N.Y.2d at 385; see also Matter of Star Leslie W., 63 N.Y.2d 136, 144 (1984). In diligently attempting to strengthen the parental relationship, the child care agency must "mold its efforts in the context of and in recognition of a parent's individual situation." Matter of Anita PP., 65 A.D.2d 18, 22 (3rd Dept. 1978). See also, Matter of Ronald YY., 101 A.D.2d 895, 897 (3rd Dept. 1984). The agency's efforts must be "designed to remedy the obstacles barring family reunification." Matter of Star A., 55 N.Y.2d 560, 564 (1982).

The record is replete with evidence of diligent efforts on the part of the agency to assist appellant in working towards the goal of reunification with her three boys. As the Family Court noted in its ruling, the agency trial-discharged the children to appellant in November, 2000, and set up a discharge plan, which it hoped would work and provide a safe and appropriate home for the children. When the trial-discharge did not work out and the children were returned to foster care, the agency continued to work with appellant in an effort to remedy the obstacles to reunification. The agency set up a service plan for the appellant

and scheduled regular meetings to discuss planning. Agency case workers set up regular visits for appellant with the children, provided needed supervision for those visits, and intervened to encourage positive interaction between appellant and the children. The agency referred appellant for family therapy, stayed in regular communication with her therapist, and even accompanied her to some of her appointments. The agency referred her for parenting skill classes. When appellant failed to benefit from the classes, she was again referred in September and October of 2001. The agency kept appellant informed of medical appointments. The flow of letters from the agency to appellant and her family therapist show that it continued to encourage the appellant's cooperation and progress, and that it remained committed to working with her towards reunification with the children throughout the period in question.

These efforts by the agency fully satisfied its statutory duty to exert diligent efforts to reunite the family. See, In re Avery Curtis Foster Joe D., 306 A.D.2d 276 (2nd Dept. 2003) (agency exercised diligent efforts where it, inter alia, provided the mother with referrals to parenting skills classes, court-ordered psychiatric evaluations, and regularly scheduled family visits with her children); In re Tabitha BB., 304 A.D.2d 875 (3rd Dept. 2003) (offering mother a parenting aide, a psychological evaluation, weekly supervised visitation with her child, anger management counseling, instruction in parenting, and recommendations regarding counseling as a victim of domestic violence, was sufficient to

support finding that agency made diligent efforts); In re Luno Scott A, 292 A.D.2d 602 (2nd Dept. 2002) (diligent agency efforts consisted of, inter alia, providing the father with parenting skills classes, psychiatric evaluations, and counseling, scheduling regular bi-weekly two-hour visits with the children, providing him with housing services, and informing him of the children's progress); In re Evsoreen Jadwiga S., 284 A.D.2d 229 (1st Dept. 2001) (diligent efforts consisted of arranging regular visitation, suitable housing procurement and alcohol and parenting skills counseling); In re Jowell Lateefra B., 271 A.D.2d 366 (1st Dept. 2000), lv. to app. den., 95 N.Y.2d 760 (agency expended the requisite diligent efforts where it arranged visitation and recommended services); In re Tasha Monica B., 156 A.D.2d 247 (1st Dept. 1989) (agency exerted diligent efforts by developing a plan, making arrangements for visitation, informing parent of children's progress and providing services and other assistance).

B. Appellant Failed to Cooperate with the Agency or Plan for the Children's Future

While the agency has the duty to exercise diligent efforts to encourage and strengthen the relationship between parent and child, the parent has the duty to maintain contact with and "substantially plan" for the future of his or her child. Social Services Law §384-b(7)(c) defines a parent's responsibility to plan as

> to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The

> plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent.

See, Matter of Star Leslie W., 63 N.Y.2d at 140; Matter of Orlando F., 40 N.Y.2d 108, 109-110 (1976); Matter of Aisha J., 182 A.D.2d 498 (1st Dept.), app. den., 80 N.Y.2d 759(1992). Although the law does not mandate consummation of the parent's plan, the parent must "take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. S.S.L. §384-b(7)(c); Matter of Jones, 59 Misc. 2d 69, 73 (Fam. Ct. N.Y. Co. 1969).

In planning for a child's future, the parents "at a minimum . . . . must take steps to correct the conditions that led to the removal of the child from their home." Matter of Leon RR., 48 N.Y.2d 117, 125 (1979)("The statute requires that [parents] formulate a feasible plan not only for the future of the child but for themselves as well"); Matter of David S., 218 A.D.2d 798, 799 (2nd Dept. 1995) ("This parental obligation necessarily includes addressing and overcoming specific personal and familial problems which initially endangered or proved harmful to the child, and which may in the future endanger or possibly harm the child"). In determining whether a parent has planned for the future of the

child, the court may consider the parent's failure to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to the parent by the agency. S.S.L. §384-b(7)(c); Matter of Michael Anthony Vincent J., 253 A.D.2d 619 (1st Dept.), app. dism'd, 92 N.Y.2d 1026 (1998); Matter of Nyasia Shawnta F., 232 A.D.2d 334 (1st Dept. 1996); Matter of William J., 228 A.D.2d 315 (1st Dept.1996).

Appellant in the case at bar failed to attend service plan review conferences and medical appointments. She missed visits with the children or arrived late, offering excuses which the court found to be self-serving. She refused to sign medical consents for almost a year, doing so only after a court appearance. Although she made some progress in her therapy, it was inconsistent – up and down. Although she completed a parental skills course, the agency found it necessary to refer her for a follow-up course, a referral with which she resisted complying for several months, and not until after the year under consideration. Appellant admitted that there was stress and tension between her and the agency, but as the court found, "there is no evidence to indicate that the Agency was in any way responsible for this." (C58.) The court was unconvinced by appellant's attempt to place blame on the agency, finding appellant's testimony to be "self-serving and not completely coherent and not -- certainly not completely credible". (C56.) In short, evidence is lacking that the appellant tried to cooperate with the agency or to develop a plan which could lead to her

children being reunited with her.

In a case most instructive for the instant one, Matter of Douglas H., 1 A.D.3d 824, 825 (3rd Dept. 2003), lv. to app. den., 2 N.Y.3d 701, even though the birth mother was found – in contrast to appellant here – to have cooperated with the agency, nevertheless the Court upheld a finding of permanent neglect for reason similar to those in this case:

> [T]he record reflects that respondent indeed participated in and cooperated with the programs and services offered by petitioner, attended service plan reviews and all of the scheduled visitations and experienced some improvement in her interactions with her son. The record also reflects, however, that respondent made only marginal progress overall by, inter alia, inconsistently applying the knowledge and benefits she obtained from the services provided, arguing with various service providers and professionals, acting inappropriately in the child's presence, degrading the foster parents and interfering with their role as such, refusing to accept the reality that she was the parent of a special needs child (believing instead that the child's problems would magically disappear if he simply were returned to her home), demonstrating an inability to control her anger at "the system" and refusing to acknowledge that she bore any responsibility for the child's removal from her home. Under these circumstances, there is more than ample support for Family Court's conclusion that respondent failed to articulate a realistic plan for the child's return. Accordingly, we have no quarrel with Family Court's finding that respondent permanently neglected her son.

As in Matter of Douglas H., appellant in the case at bar (1) refused to accept the reality that her children have special needs, believing that the system is at fault and that their problems would

magically disappear if the children were returned to her home, (2) demonstrated an inability to control her anger at “the system”, (3) refused to acknowledge that she bore any responsibility for the children’s removal from her home, (4) inconsistently applied the knowledge and benefits she obtained from the various services provided to her, and (5) argued with service providers and professionals, even hanging up on them. But appellant differs from the parent in Matter of Douglas H. in a way that forcefully argues for the result reached by the court below: she has not cooperated with the programs and services offered by the agency, failing to attend service plan reviews and medication appointments, missing or coming late to scheduled visitations, and often failing to provide needed consents, seeking instead to involve her attorney in an adversarial stance.

In In re Latasha W., 268 A.D.2d 340, 341 (1st Dept. 2000), this Court upheld a finding of permanent neglect where the parent failed to cooperate with agency's efforts to schedule planning sessions, where she was not consistent with her scheduled visitations with the child, and did not provide any plausible reasons why she was unable to appear on the scheduled dates. In holding that there was clear and convincing evidence of the parent’s failure to plan, this Court stated: “We see no reason to disturb the court's determination that respondent's testimony as to her whereabouts was incredible”.

The parent’s failure to cooperate in In re Latasha W. is all

too similar to appellant's failure to cooperate in the case at bar – inconsistent visits with the children, implausible reasons for not appearing on scheduled dates, failing to cooperate with the agency's efforts to plan and address problems. Also similar is the court's finding appellant's testimony to be self-serving and incredible. In sum, the finding of permanent neglect by the court below is amply supported by the record and by the case law.

C. Appellant's Claim That the Children Were Wrongfully Removed from Her Care Is Totally Irrelevant and Otherwise Has No Basis in the Law

Appellant not only raises a red herring which is irrelevant to the case at bar, but mis-states the facts and mis-cites case law and statute in making the specious argument that the children were improperly removed from appellant's care after the failure of the trial discharge, in violation of Article 10 of the Family Court Act. Moreover, appellant's argument is self-contradictory.

Appellant correctly concedes that "[b]ecause the children had been discharged to appellant on a trial basis she was not permitted any review by the court regarding the propriety of the children's removal from her care." Yet, appellant turns this upside down, concluding that review is required by Article 10 of the Family Court Act, citing no provision from that Article which would require review under the circumstances. In fact, when there has been an informal trial discharge of children to their parent(s), no court intervention is necessary for the agency to end that trial discharge.

Appellant mis-states the facts in asserting that the agency removed the children upon the report of violence against Robert by the putative father. Rather, it was ACS which removed the children. The agency was only informed subsequently. In any case, upon such an event, the agency has no obligation to investigate the circumstances of the removal, as wrongly argued by appellant, but only to continue in its efforts to develop the conditions which might enable children to be reunited with their parent(s), or if it concludes that cannot be done, to take such action as it deems prudent, such as to commence a proceeding to terminate parental rights.

The case cited by appellant, Nicholson v. Scopetta, 3 N.Y.2d 357 (2004), has no bearing on the case at bar, or even appellant's otherwise specious argument. Nicholson v. Scopetta involves questions concerning the power to remove a child pursuant to Article 10 of the Family Court Act where the child has witnessed domestic violence against a parent. That is not the case here. Moreover, Nicholson v. Scopetta involves no issue concerning the removal of children from the parental home after an informal trial discharge.

Appellant's argument is nothing more than a fictional device to distract this Court from the real relevance of the trial discharge and its ending – that it was a significant part of the agency's diligent efforts to effectuate a reunification of appellant with the children, and that appellant failed to create

the circumstances for this to occur.

POINT II

THE FAMILY COURT PROPERLY TERMINATED APPELLANT'S PARENTAL RIGHTS TO ROBERT AND JOSEPH WHERE A PREPONDERANCE OF THE EVIDENCE AT THE DISPOSITIONAL HEARING ESTABLISHED THAT FREEING THE CHILDREN FOR ADOPTION WAS IN THEIR BESTS INTERESTS AND GAVE THEM THE BEST CHANCE FOR PERMANENCE AND STABILITY.

At a dispositional hearing, the court must consider only the best interests of the children. F.C.A. §631. There is no presumption that those interests will be served by placement of the children with the natural parent. F.C.A. §§625, 631; Matter of Star Leslie W., 63 N.Y.2d 136 (1984); Matter of Tiffany A., 242 A.D.2d 709 (2d Dept.1997); Matter of Natajha Starr M., 204 A.D.2d 232 (1st Dept.), app. den., 84 N.Y.2d 806 (1994). Nor is there a presumption in favor of a suspended judgment, even if the parent has made, by the time of the dispositional hearing, strides towards rehabilitation. See Matter of Tiffany A., 242 A.D.2d 709; Matter of Amanda R., 215 A.D.2d 220 (1st Dept.), app. den., 86 N.Y.2d 705 (1995). Only the best interests of the child, unaffected by appellant's status as a biological parent, governs the dispositional decision.

In the case at bar the best interests of Robert and Joseph plainly mandate that they be freed for adoption.[9] With the exception of a trial discharge to the appellant that failed after

[9] The changed circumstances regarding Eugene are discussed below in Point IV of the Argument.

just over one month, they have been in foster homes for seven years – most of their lives. For the past three years they have been in stable pre-adoptive foster homes. They have adjusted well and have bonded closely with their respective foster parents, and both children have given indications that they no longer wish to see their mother. Although they are in separate homes, this was necessary due to their special needs.

Both boys have been diagnosed as having Attention Deficit Hyperactivity Disorder ("ADHD") and have received therapy and been on medication for their condition. However, Joseph's therapy for ADHD was discontinued, as he has improved and it was felt that he no longer needed it. The foster parents for both children have regularly tended to the boys' special needs.

In contrast, appellant lacks insight and empathy into the needs of her children, is unable to put their needs first, and is unlikely to ever gain insight into their needs. She is unwilling to recognize that the children have significant special needs, saying she would only accept that conclusion if diagnosed by her own doctors. Appellant believes the children's behavioral problems would magically disappear if only they were reunited with her.

Appellant asserts that she is ready to care for the children, believing that her visits with the children are improving in the face of tantrums, kicking and biting, and fights over toys, behavior which does not occur with the children's foster parents. In fact, appellant's visits with the children often devolve into

chaos, with appellant unable or unwilling to set limits for the children. Moreover, appellant has shown marked and ongoing disparate treatment of the children to their detriment, and the agency case worker has had to intervene to stop arguments and physical fights. When the situation becomes difficult, appellant takes a "time-out" for herself, not the children, leaving the visits for a break. Despite the serious problems appellant has in relating to the children, she maintains that she has once again enrolled in parenting workshops only to "brush up" on her "skills". Though appellant claims to have a plan for the children should they be returned to her, it is unrealistic to conclude that she can adequately meet their special needs.

As well understood by the courts, in circumstances like those in the case at bar, freeing the children for adoption by caring and nurturing foster parents will best serve their interests. See, Matter of Douglas H., 1 A.D.3d 824, 825 (3rd Dept. 2003), lv. to app. den., 2 N.Y.3d 701 (termination was in child's best interests where mother's conduct during visitations with the child precluded such visitations from progressing beyond the supervised level, and the child, who had been in foster care for some time, demonstrated a need to have sense of permanency); In re Deborah I., 6 A.D.3d 771 (3rd Dept. 2004)(termination was in children's best interests where it was apparent that mother continued to lack basic parenting skills and her impairments had not improved, the children had bonded with the foster family, with whom they had lived for over

two-and-one-half years, and the foster parents planned to adopt the children); In re Onelio Olvein Elijah Vidal Ondalis Santiago C., 13 A.D.3d 95 (1st Dept. 2004)(termination was in child's best interests where mother had not met the basic parental obligation to provide a suitable home for the child, and the caseworker's testimony established that child's long-term foster home was a happy one in which the child's needs, some of them involving special medical care, were met); In re Pearl M.A., 13 A.D.3d 141 (1st Dept. 2004)(termination of father's parental rights, upon finding of permanent neglect, was in child's best interests where father had not developed positive, meaningful relationship with child, and child had been living with nurturing foster parent since infancy).

The evidence and the case law fully support the conclusion reached by the court below. The termination of appellant's parental rights and the freeing of Robert and Joseph for adoption must be affirmed.

POINT III

APPELLANT WAS NOT DENIED DUE PROCESS BY THE COURT'S EVIDENTIARY RULINGS.

A. Appellant did not preseve any objection to the admission of the agency case records into evidence, an admission into the record which was neverthless proper

Appellant challenges the admissibility of the agency's case records, arguing that no foundation was laid for their admission, and that they are "replete with hearsay". (Appellant's Brief, p. 36.) Appellant's challenge must fail for two reasons: first, no such objections were raised in the court below which have been

preserved for challenge on appeal; and second, the court below in any event did not err in allowing the agency's case records into evidence.

The only objection raised by appellant with respect to the admission of the case records during the proceeding below was with regard to hearsay – and that objection was withdrawn. Appellant did not interpose an objection with regard to a failure to lay the foundation for the entry of those records. Indeed, her attorney conceded that they were business records kept in the ordinary course of business. Rather than objecting to the admission of the agency case records, appellant moved to dismiss, claiming that the petitioner had not made out a prima facie case. As part of that motion, appellant again argued there was hearsay in the records, and otherwise claimed that the records did not make out a prima facie showing of permanent neglect. After argument by counsel from all parties, the court denied the motion. That ruling has not been challenged by appellant in this appeal and no other objection regarding the admission of the agency case records was raised in the court below.[10]

It is axiomatic that a party must object to the admissibility of evidence at trial if the objection is to be preserved for appeal. See, People v. Fleming, 70 N.Y.2d 947 (1988). This principle has been invoked in criminal cases involving business

[10] A detailed description of the colloquy on these matters is in Section II.A.1.a. of the Statement of the Facts, supra.

records admitted under the hearsay exception of CPLR 4518. People v. Thompson, 199 A.D.2d 637 (3rd Dept. 1993). In the case at bar, the general objection with regard to hearsay in the agency case records was withdrawn, and no subsequent objection – general or specific – was made. Thus, there is no evidentiary issue preserved for appeal.

In any event, the admission of those records was not objectionable, as the Family Court's ruling conformed to the standards articulated by the Court of Appeals in Matter of Leon RR, 48 N.Y.2d 117 (1979). In Leon RR, the Court of Appeals reversed a Family Court finding of permanent neglect in part because the court admitted into evidence the entire case record concerning the family in question. Like the case at bar, the parents' attorney had objected to hearsay contained in the agency records, although, unlike the case at bar, the objection was not withdrawn. However, in reversing, the Court of Appeals made clear that the real problem it had with the evidentiary ruling of the lower court was not so much that the agency records were admitted in toto, but that – unlike the case at bar – insufficient notice and opportunity to examine the records and investigate had been afforded to the parents:

> In this case, petitioner was under a statutory duty to maintain a comprehensive case record for Leon containing reports of any transactions or occurrences relevant to his welfare (Social Services Law, § 372; 18 NYCRR 441.7 [a]), thus satisfying this aspect of the business records test (see Kelly v Wasserman, 5 NY2d 425, 429).

* * * *

> As a matter of fundamental fairness, then, before such a massive document is sought to be introduced into evidence, the proponent, normally as a matter of good practice, should give his adversary notice of that intention sufficiently far in advance of trial to allow the opponent an opportunity to investigate (Meyer, Should Notice be a Prerequisite to Use of Prima Facie Evidence, 19 NYLF 785, 788-790). If notice is not given, upon timely application the court, in its discretion, may properly grant a reasonable continuance so that the opponent may at least acquaint himself with the contents of the document.

48 N.Y.2d at 123-24.

It is plain that the Court of Appeals did not intend mechanical reversals when agency records are admitted. As the court noted, notice in advance of trial, or a reasonable continuance so an adversary can acquaint him or herself with the contents, is considered "good practice". This was clearly understood by the Court in Matter of Melanie Ruth JJ, 76 A.D.2d 1008, 1009-1010 (3rd Dept. 1980), in which it held that the "mere admission of the entire case file" does not by itself constitute reversible error:

> Respondent also argues that the introduction into evidence at the fact-finding hearing of the department's entire case file on her family was reversible error. We disagree. As we recently noted in Matter of Lisa Ann U. (75 AD2d 944), the mere admission of the entire case file does not automatically warrant reversal. In those instances in which the entire case file is admitted, "fundamental fairness" will not be violated when a respondent has an opportunity to examine the file, either prior to or during the trial (Matter of Leon RR, 48 NY2d 117, 123-124).

> Respondent's attorney in this proceeding appears to have had an opportunity to examine the case records prior to the fact-finding hearing as Matter of Leon RR (supra) requires. Counsel's examination of witnesses during the hearing displayed a close familiarity with the case file and on numerous occasions he made direct references to specific pages in the file. Additionally, Family Court afforded respondent's attorney the opportunity to make specific objections to any portion of the case record (see Matter of Lisa Ann U., supra, p 945).

See, Matter of Rosemary D., 78 A.D.2d 889 (2nd Dept. 1980), in which the holding of Melanie Ruth JJ was followed by the Second Department.

The practices articulated in Leon RR and Melanie Ruth JJ were followed in all essential respects in the case at bar. Appellant's attorney had an opportunity to examine the case records prior to the fact-finding hearing. Upon admission into evidence and before any testimony, the hearing was adjourned for over a month, affording appellant and her attorney further opportunity to examine the records. As in Melanie Ruth JJ, appellant's attorney displayed a close familiarity with the case records. The court afforded appellant's attorney an opportunity to highlight those portions of the case records which he considered important – in a color which would make the highlights immediately recognizable – an opportunity of which he availed himself on the reconvened date. Finally, as in Melanie Ruth JJ, at the time of admission into evidence, the court advised appellant's attorney that he would be afforded a further opportunity to make specific objections to those portions of the

agency records which he considered improper hearsay when the hearing reconvened. That he did not do so is no fault of the court.

The Family Court in the case at bar fully complied with the standards and practices involved in the admission of agency case records into evidence at fact-finding proceedings. The court made a proper evidentiary ruling and appellant was fully accorded due process.

B. Appellant was not improperly denied a right to cross-examine evidence presented against her

Appellant erroneously argues, on the basis of Crawford v. Washington, 541 U.S. 36 (2004), that she was denied her due process rights – that, insofar as petitioner-respondent relied solely on the portions of the agency case records entered into the record and did not present any witnesses to offer oral testimony, she did not have an opportunity to confront the evidence presented against her.

As with the issue concerning the introduction of the agency case records, this is an issue which was not raised in the court below. The criminal cases cited in the previous section of the Argument, People v. Fleming, 70 N.Y.2d 947 (1988), and People v. Thompson, 199 A.D.2d 637 (3rd Dept. 1993), both involved issues concerning the right to confront witnesses. Nevertheless the Courts in both cases declared that the issue would not be addressed because it had not been preserved below for appeal. That is so here as well. It should not be considered by this Court.

But even if it were to be considered, the argument is

erroneous, firstly because the reliance on Crawford is misplaced. The Supreme Court made clear that its ruling does not apply to the business records exception to the hearsay rule, 541 U.S. at 55, 75. This limitation in Crawford was expressly recognized in a New York case, People v. Rogers, 8 A.D.3d 888, 892 (3rd Dept. 2004). Rogers, as Crawford, was a criminal case, so that the Sixth Amendment right to confrontation was directly applicable. Nevertheless, the Appellate Division held that the business records in question – hospital records and a sexual assault information sheet – were admissible and not subject to the Sixth Amendment right of confrontation. If the Sixth Amendment right is not applicable to business records in a criminal case, a fortiori, it is not applicable in the case at bar.

Secondly, Crawford and the Sixth Amendment right to confront do not apply in termination of parental rights proceedings. See, 10 N.Y. Practice, N.Y. Family Court Practice § 4:59; Matter of Nicole V., 71 N.Y.2d 112, 117, 524 N.Y.S.2d 19, 518 N.E.2d 914 (1987) ("Because the accused parent is not subject to criminal sanctions in a child protective proceeding, the Legislature has provided that the usual rules of criminal evidence do not apply"); Matter of Linda S., 148 Misc. 2d 169, 560 N.Y.S.2d 181 (Fam. Ct. 1990); In re April C.,___ Cal. Rptr. 2d ___, 2005 WL 1760957, Cal. App. 2 Dist., 2005 ("Crawford has no application here because the Sixth Amendment right of a criminal defendant . . . does not extend to parents in state dependency proceedings").

Thirdly, there is nothing in the law which precludes a party from resting its case solely on documentary evidence. Moreover, it should be noted that petitioner-respondent had two agency case workers sworn in on the first two hearing days (A3, B3), and one on the third day of the fact-finding hearing. (C4.) Though the agency was not required to present those case workers as witnesses to provide testimony, they were available to be called for questioning with regard to the contents of the case records.

Appellant's argument is without merit.

C. The court properly refused to consider evidence outside the relevant one-year period specified by S.S.L. 384-b

Appellant, in asserting that the Family Court "improperly precluded [her] from offering relevant testimony and evidence during the hearing by refusing to consider evidence outside of the one year period relied on by petitioner", cites no supporting case law in support of this proposition and the Law Guardian is aware of none. The evidence which seems to be in question are case notes from February, 2002, which is after the year in question - November 8, 2000 to December 4, 2001. (B18.) In rejecting these notes, the court characterized them as not relating to anything "other than the [appellant's] feelings about what was going on before." Moreover, the court did not preclude their possible admission if they became relevant at another point in the proceeding. (B19.)

Appellant has not shown that the exclusion of these case notes was in any way in error or somehow prejudicial to her. The same is true for any testimony which may have been precluded. The argument

should not even be considered by this Court.

D. The court below properly exercised its discretion in precluding new evidence during Appellant's re-direct testimony regarding missed appointments and visits, as it was beyond the scope of re-direct examination

During the re-direct examination of appellant, her attorney unsuccessfully sought to have her diary admitted into evidence, and unsuccessfully sought to elicit testimony about what she was doing on dates she missed appointments and about her participation in the children's care.[11] (C6-15.) The exclusion of the diary and testimony as new material which should have been offered during direct examination was well within the parameters of settled case law. Moreover, even were there some question as to the court's exercise of its discretion in the context of Family Court termination proceedings, any error in the court's exercise of its discretion was harmless error.

In the case cited by appellant, People v. Buchanan, 145 N.Y. 1 (1895), the Court of Appeals stated that the scope of re-examination is within the discretion of the trial court, that it be related to the cross-examination, and that it cannot extend to new matter:

> The re-examination of a witness is, largely, in the discretion of the court. The proper limitations upon it are that it shall relate to the subject-matter of the cross-examination and bear upon the question at issue. He cannot be asked as to new matter.

[11] A detailed description is in Section II.A.1.b. of the Statement of the Facts, supra.

145 N.Y. at 24.

In Hutchinson v. Shaheen, 55 A.D.2d 833, 834 (4th Dept. 1976), the court explained that proper rebuttal testimony during re-examination does not include new material and is not contradictory or corroborating evidence of facts already presented, but rather evidence denying a fact which has been endeavored to be proved:

> A party holding the affirmative of an issue is bound to present all the evidence on his side of the case before he closes his proof and may not add to it by the device of rebuttal evidence (Marshall v Davies, 78 NY 414). He may not hold back some evidence and then submit it to bolster his case after defendant has rested, for rebuttal evidence is not contradictory or corroborating evidence of facts already presented but "evidence in denial of some affirmative fact which the answering party has endeavored to prove" (p 420).

In the case at bar, the affirmative fact proved on cross-examination was that appellant could not recall why she had missed appointments during the year in question. The precluded testimony on re-direct examination was not about her inability to recall, but an attempt to elicit new evidence about her reasons for the missed appointments.

Appellant's reliance on People v. Torres, 42 N.Y.2d 1036 (1977) is misplaced. In that case a portion of grand jury testimony by the witness was introduced by the prosecution on cross-examination to impeach the witness. The Court of Appeals ruled that introduction of another part of the grand jury testimony on redirect examination was permissible for the purpose of

explaining or clarifying the previously introduced portions. 42 N.Y. 2d at 1037. In the case at bar, the appellant repeatedly testified that she could not recall the reason why she missed appointments and visits with her children. At best, re-examination could cover a clarification or explanation as to why she could not recall the reasons for missing her appointments and visits. But the attempt to introduce testimony about those reasons on a subsequent hearing date, and after review of a diary which was not in evidence and which appellant sought to introduce in evidence on re-examination, was an attempt to introduce new evidence. It was within the court's discretion to preclude this new matter.

Moreover, even were it considered proper to relax the normal rules of evidence in Family Court termination proceedings, as argued by appellant, in the instant case the court's ruling not to do so is harmless error. CLPR 2002. Under the harmless error doctrine, "[e]rrors in the admission or exclusion of evidence will be considered harmless if the reviewing court is satisfied that the result would have been the same even if the evidence had not been improperly admitted or excluded. . . Where evidence has been improperly excluded, the Appellate Division may conclude that even if it had been admitted it would not have been sufficient, when considered with the other evidence admitted, to establish the fact sought to be proved.." Weinstein, Korn & Miller, NY Civil Practice ¶ 2002.02.

In the case at bar, the evidence which was excluded would at

best have been appellant's self-serving explanations for her missing or coming late to visits with her children and to medical appointments for her children. That she missed and came late to visits and appointments is undisputed. The evidence proferred would have thus concerned, not the fact that appellant missed and came late to visits, but the explanation of such; and the court's acceptance or rejection of her explanations would hinge on her credibility. The court below specifically found appellant's effort to rehabilitate herself on re-direct examination to be "completely incredible" (C56-57):

> I can only find that [Ms. L's] testimony is self-serving and not completely coherent and not -- certainly not completely credible. Her efforts today to rehabilitate her earlier testimony were completely incredible. When she first testified, she gave various excuses for either missing visits, missing doctor's appointments, being late, not cooperating. Sometimes she said it was her job, sometimes her mother was sick, sometimes she was covering for other people at work. She said she wasn't very good at traveling. She said she didn't know to travel. She said Ms. Mendoza wouldn't help her, wouldn't tell her anything about the children's doctors, and that's why she wasn't even talking to the doctors about medication for the children. She basically excused her inaction on either not getting along with the Case Worker or having other appointments or medical problems.

There is no reason to conclude that the proferred evidence would have been sufficient to alter the court's view of appellant's attitude and credibility. The result would have been the same. Thus, the error, if there was any at all, was harmless error, not justifying a reversal of the court's determination.

POINT IV

DUE TO THE CHANGE IN EUGENE'S FOSTER CARE SITUATION AND THE EXPRESSION OF HIS CURRENT DESIRES, THE COURT SHOULD REMAND FOR A NEW DISPOSITIONAL HEARING, BUT ONLY WITH RESPECT TO EUGENE, NOT ROBERT OR JOSEPH

Since the dispositional hearing, Eugene, who is now twelve-years old, has been moved to a therapeutic foster home which is not a pre-adoptive home. He has expressed a desire to be with his biological family, and there is currently no adoptive resource for him.

Appellate courts will, in unusual situations, remand parental rights cases to the Family Court for new dispositional hearings in view of new circumstances which have arisen during an appeal. Matter of Michael B., 80 N.Y. 2d 299 (1992). Where several children are involved, a remand may be directed for some, but not all of the children, when the circumstances warrant. In the Matter of Marc David D., et al, __ A.D.3d__, 2005 WL 1750590 (2nd Dept. 2005).

Given the change in circumstances and the real possibility that an adoptive placement will not be found for Eugene, this Court should vacate that part of the order which terminated appellant's rights to Eugene and remit the matter to the Family Court for a new dispositional hearing for Eugene.

As for the other two children, Robert and Joseph, appellant offers nothing more than pure speculation. They remain in their respective foster homes and still desire to be adopted by their foster parents. Unlike the situations in the cases cited by

appellant, there is no indication that appellant has undergone positive change. In the absence of evidence of positive change, there is no reason to revisit the Family Court's conclusion that adoption is in the best interests of Robert and Joseph. There are no new circumstances regarding those two boys which warrant consideration by this Court or remand for a new dispositional hearing for them.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE FACT-FINDING ORDER SHOULD BE AFFIRMED, AND THE DISPOSITIONAL ORDER MODIFIED TO THE EXTENT OF REMANDING TO FAMILY COURT FOR A NEW DISPOSITIONAL HEARING FOR EUGENE ONLY.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR §600.10(d)(1)(i)

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