



**LITIGATING ARTICLE TEN DOMESTIC VIOLENCE CASES**  
**POST-NICHOLSON: Advanced Techniques and Strategies**

**ESTABLISHING A DOMESTIC VIOLENCE CAUSE OF ACTION**

What is the applicable section of the law for a domestic violence cause of action?

FCA § 1012(f)(i) defines a “neglected child” as a child whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care (PLR) to exercise a minimum degree of care...in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm or a substantial risk thereof... by acts of similarly serious nature.

What components need to be proven by a preponderance of the evidence to establish a cause of action for domestic violence?

Evidence that the child’s physical, mental or emotional condition was impaired or that it was in imminent danger of becoming impaired AND that the injury or imminent risk of injury to the child was the result of her parent or person legally responsible for her care’s failure to exercise a minimum degree of care.

\*There must be a nexus established between the parent or PLR’s actions or lack thereof AND the harm or imminent risk of harm to the child. The risk must be near or impending not just possible. Nicholson v. Scoppetta 3 NY3d 357 (Ct. of Appeals, 2004)

**ESTABLISHING IMPAIRMENT TO THE CHILD: FACTORS TO CONSIDER TO DETERMINE THE THEORY OF THE CASE**

- Child’s Proximity to the Violence
- Evidence of the child being exposed to aftermath of the violence—injuries, arrests, broken objects
- Child’s Reactions and/or Emotional Response
- Child’s Attempts to Intervene or Protect the Survivor
- Threats of Violence/Accessibility to a Weapon
- Severity of Violence
- Frequency of violence
- Duration/History of violence



### "Zone of Danger"

If a child is present during the violence then the argument can be made that the conduct of the parent causing the harm places the child at imminent danger of physical, mental or emotional impairment.

Matter of Jubilee S. 149 AD3d 965 (2<sup>nd</sup> Dept., 2017) Court found neglect where the children witnessed the domestic violence, attempted to intervene and "ran and hid" due to fear, Court found that the child's out of court statements were sufficiently corroborated by the prior finding of neglected entered against the respondent for previously perpetrating acts of domestic violence in their presence.

Matter of Gary J., 154 AD3d 939 (2<sup>nd</sup> Dept., 2017) Neglect finding against a PLR for committing acts of domestic violence against the children's mother in their presence leading to them being "frightened."

Matter of Eric P. 155 AD3d 1041(2<sup>nd</sup> Dept., 2017) Finding of neglect entered where the father punched the mother while two of their children were in the same room, children expressed being scared of the father. Evidence established that the children's physical, mental, emotional condition was impaired or at risk thereof.

Matter of Cheyenne OO., 135 AD3d 1096 (3<sup>rd</sup> Dept., 2016) Neglect finding where the children were exposed to ongoing violence in the home due to the father perpetrating acts of violence against the mother including instances where he assaulted her causing excessive bleeding that the child attempted to stop with his own shirt. Children reported being frightened and sad, as well as happy now that the father had left the home.

Matter of Kaleb B., 119 AD3d 780 (2<sup>nd</sup> Dept., 2014) a preponderance of the evidence established that he neglected the children by, beating their stepmother with a stick, causing bruises to her abdomen, arm, thighs, and buttocks in their presence. The father's acts of domestic violence against the stepmother in the children's presence impaired, or created an imminent danger of impairing, their physical, mental, or emotional condition

Matter of Jayden B., 91 AD3d 1344 (4<sup>th</sup> Dept., 2012) The evidence established that the children were in imminent danger of emotional impairment based on the domestic violence in the home. The child's statements established that he had observed incidents of violence; child used dolls to act out the domestic violence that the father perpetrated against the child's mother. Witnesses included child care workers, neighbors, case worker and police; many described the child as emotional harmed by the exposure and when speaking about the incidents the child's demeanor changed significantly.

Matter of Shakil G., 110 AD3d 572 (1<sup>st</sup> Dept., 2013) father neglected children by engaging in acts of domestic violence in the youngest child's presence; older child became so frightened that he hyperventilated and required medical care.

Matter of Jadalynn HH., 93 AD3d 1112 (3<sup>rd</sup> Dept., 2012) Neglect via summary judgment where the father restrained the mother in a chair, screaming at her, and struck her in the face while he was holding the baby. Prior findings, evidence of violations of pending OOPs and criminal conviction presented with motion.

Matter of Jeaniya W., 96 AD3d 622 (1<sup>st</sup> Dept., 2012) father neglected child where, in the presence of his three-year-old daughter, he struck the mother in the face several times, breaking her nose, bloodying her face and causing several bruises.



Matter of Kelly A., 95 AD3d 784 (1<sup>st</sup> Dept., 2012) Neglect established where in the presence of the subject children, respondent engaged in an act of domestic violence against the children's father when she attacked him, hitting him over the head multiple times as he bent down to pick up the couple's one-year-old son. The attack rendered the father unconscious, and he awoke to the couple's six-year-old daughter crying and tending to his bleeding head wounds. When the caseworker subsequently spoke to the child about the incident, she would become "visibly upset and emotionally distraught."

Matter of Imena V., 91 AD3d 1067 (3<sup>rd</sup> Dept., 2012) Here, the evidence presented by petitioner established that the father engaged in repeated instances of domestic violence against the mother, many of which were witnessed by the children. The mother testified to an incident when the father pinned her to the floor against her will and, while on top of her, forcibly removed her clothes while at least two of the children were present in the room. Furthermore, caseworkers testified the children reported multiple acts of domestic violence within the home. One related that the father hit the mother in the face, threatened to kick her in the face and slammed her finger in a door, which caused the child to become scared and fear for her mother's safety. Another child reported the father "would not stop smacking his mom" and disclosed an incident where the father "punched" the mother into a wall, causing the child to intervene by attempting to push the father away from his mother.

Matter of Sabrina D., 88 AD3d 502 (1<sup>st</sup> Dept., 2011) neglect finding where the respondent threw a glass vase or fish bowl at the child's mother causing it to shatter near the child.

Matter of Ajay Sumert D., 87 AD3d 637 (2<sup>nd</sup> Dept. 2011) father hit the mother in the face so hard she could not move her jaw up and down or chew, two and a half year old present and crying during incident AND a month later respondent punched the mother while she was holding the child awhile threatening to kill her. Neglect supported by child's presence during the violence.

Matter of Kiara C 85 AD3d 1025 (2<sup>nd</sup> Dept., 2011) The evidence established that the father slapped the mother while the mother was holding the child, who was only a few weeks old, in her arms, thereby creating an imminent risk of impairing the child's physical, mental, or emotional condition. Moreover, additional evidence established a pattern of domestic violence and intimidation perpetrated by the father.

Matter of Michael WW 20 AD3d 609 (3<sup>rd</sup> Dept., 2005) Neglect finding entered where the respondent assaulted the mother in the presence of the children causing them to become visibly upset and frightened by his actions.

Matter of Shaylee R., 13 AD3d 1106 (4<sup>th</sup> Dept., 2004) father was neglectful where he assaulted the mother and she had red marks on neck and throat observed by the police, 5 year old said she was scared after she had witnessed parents fighting.

Matter of Jeremiah M 738 NYS 2d 585(2<sup>nd</sup> Dept., 2002) neglect found where the father committed acts of domestic violence against the mother in the presence of Jeremiah, and that while carrying Jeremiah, placed him at a substantial risk of harm.

In re Carlos M. 741 N.Y.S.2d 82 (2<sup>nd</sup> Dept., 2002) - There was a 12 year history of domestic violence that was witnessed by the children, and that often required intervention by the children. During the last incident one of the children saw respondent father beat their mother with a cooking pot. No expert testimony was required on impact.



In re Tami G., 619 N.Y.S.2d 222 (3<sup>rd</sup> Dept., 1994): 7 year old intervened to protect mother, 19 month old present and was in the immediate proximity of the respondent's acts of violence are placed in imminent and substantial risk of physical impairment.

### **Proximity**

Cases where the child is not physically present but our exposed to the violence due to being in close proximity to where the violence occurred. These cases frequently include evidence of the size of the apartment, proximity of one room to another within the home or the ability to see/hear one space while in another room.

In re Andru G. 156 AD3d 456 (1<sup>st</sup> Dept., 2017) upholds findings of neglect against the mother where the children were exposed to repeated incidents of domestic violence during which the children were in the apartment and in close proximity to violence even absent evidence that they were aware of or emotionally impacted by the violence. Note that there was one incident that occurred during a custody exchange, involving the mother and the child's father pulling on one of the children.

Matter of Isabella S., 154 AD3d 606 (1<sup>st</sup> Dept., 2017) Finding entered where the father choked the mother in front of the 6 year old and near the sleeping four month old. Court holds that a single instance of domestic violence may be a proper basis for a finding as long as it occurred in the presence of the child resulting in imminent danger of harm.

Matter of Zelda McM., 154 AD3d 573 (1st Dept., 2017) Court finds neglect where the respondent assaulted the child's mother while he was in the proximity. The mother's detailed testimony concerning repeated incidents of domestic violence was corroborated in part by the caseworker's testimony, photographs documenting injuries, and medical records relating to yet another incident of domestic violence

Matter of Naveah P., 135 AD3d 581 (1st Dept., 2016) The record shows that the children were subject to actual or imminent danger of injury or impairment of their emotional and mental condition from exposure to repeated incidents of domestic violence occurring in respondents' one-room home, in close proximity to the two young children.

Matter of Carmine G., 115 AD3d 594 (1<sup>st</sup> Dept., 2014) respondent neglected the subject child by engaging in a verbal and physical altercation with the child's mother while the child was present in the home and aware of what was transpiring. The caseworker's testimony that the child told her that he heard his parents yelling and engaging in a physical altercation was corroborated by the mother's injuries.

Matter of Angie G. 111 A.D.3d 404 (1st Dept., 2013) Court found that the proximity of the children's bedroom to the physical and verbal altercations that occurred in the kitchen placed the children in imminent risk of emotional and physical impairment.

Matter of Gianna CE., 77 AD3d 408 (1st Dept., 2010): The father neglected his 2 month old medically fragile infant when he repeatedly punched the mother in the face and head only 3 feet away from where the baby was laying.

### **Witnessing Aftermath**

The theory of these cases is that the child's physical, mental or emotional condition is impaired or is in imminent danger of becoming impaired, due to witnessing the after effects of the violence. These cases include evidence that



the child saw the injuries, helped clean up wreckage of the violence or witnessed the police response to the violence.

Matter of Moises G. 135 A.D.3d 527 (1<sup>st</sup> Dept., 2016) Neglect finding entered where the father stabbed the mother while the children were in another room; the children heard the mother screaming for help and the assault led to her being hospitalized for a month further evidencing impairment.

Matter of Kadyn J. 109 AD3d 1158 (4<sup>th</sup> Dept., 2013) The subject children, who were eight and nine years old, were present in the very small apartment and on the most recent occasion, the police responded to the apartment and observed wet blood in the common hallway of the dwelling that "looked like a trail" leading toward the mother's apartment. Inside that apartment, there was a "huge puddle" of blood. The children were in one of the two bedrooms with the door open, and the police officer testified that they had their eyes open and were watching television. The caseworker who interviewed the children testified that, although they stated that they slept through the entire incident, the children were traumatized by seeing the copious amount of blood and by being forced to clean it up the next day.

Matter of Crystal R., 2008 N.Y. Misc. LEXIS 7519 (N.Y. Sup. Ct., 2008) The Court held that the child's exposure to the aftermath of the domestic violence, including observing the injuries, bleeding and the survivor crying established emotional impairment or risk thereof. One time incident, outside presence of children, but where children witnessed aftermath, including one child cleaning blood off the front door and another seeing blood on mother's hair and hands; court finds the children "suffered based upon their witnessing the aftermath of the injury."

### **Emotional Harm**

Cases where there is proof of mental or emotional impairment to the child based on their exposure to domestic violence. Court's rely on statements made by the child about their feelings regarding the violence OR by evidence of their reactions to the violence by other persons present at the scene. There is no expert testimony needed for the Court to determine that the exposure caused the impairment to the child.

Matter of Tavene H., 139 A.D.3d 633 (1st Dept., 2016) Child's statement that she cried when she witnessed domestic violence and sibling stating he "did not like it" when the parents argued demonstrated impairment.

Matter of Andre K., 142 A.D.3d 1171 (2d Dept. 2016) Neglect found where the respondent threatened to kill and assault the mother in the presence of the child; children's statements that the incident caused them to be "afraid," "scared," and "upset" established impairment.

Matter of Serenity H., 132 A.D.3d 508 (1st Dep't 2015) The child's statement that she was frightened and saddened by witnessing the domestic violence and the police officer's testimony that the child "looked like she had been crying" and was "breathing very, very quickly, rapidly" is sufficient to demonstrate emotional impairment.

Matter of Celeste O. 119 AD3d 586 (2<sup>nd</sup> Dept., 2014) Neglect established by evidence that the respondent perpetrated acts of domestic violence against the children's mother while the children were "nearby" and were "frightened."

In re Madison M. 123 AD3d 616 (1<sup>st</sup> Dept., 2014) upholds a neglect finding based on respondent's acts of domestic violence against the children's mother, noting that the police observations that the children were crying demonstrates that their emotional well-being had been, or was in danger of becoming, impaired by the altercation they witnessed.



Matter of Krystopher D'A. 121 A.D.3d 484 (1st Dept., 2014) Court found neglect based on the child's statements about his observation of the domestic violence and the survivor's testimony. The child's statement that he was frightened by the altercation between his parents demonstrates that he was at imminent risk of emotional and physical impairment.

Matter of Amodea D. 112 AD3d 1367(4<sup>th</sup> Dept., 2013) The testimony presented at the fact-finding hearing established that one child witnessed, and the other was in proximity to, a physical altercation between the parties wherein the father kicked the mother in the face and placed his hands around her neck to prevent her from breathing. The child who witnessed the altercation told a caseworker for petitioner later that day that she was "very sad and scared" upon seeing the mother's bloodied face after the altercation, and both children indicated to the caseworker that they were afraid of the father.

Celine O., 68 A.D.3d 1373 (3<sup>rd</sup> Dept., 2009) Physical violence outside of children's presence but children heard arguments/yelling and saw mother's injuries, feared for her safety.

Matter of Lonell J. 242 AD3d (1<sup>st</sup> Dept., 1998) Court found that expert testimony is not needed to establish emotional harm of the nonverbal children due to witnessing domestic violence; testimony of the case worker was sufficient to establish an impact on the children.

#### **Severity of the Violence/One Time Incidents**

Cases where there is an isolated incident of domestic violence but the severity of the violence was such that it placed the child at imminent risk of physical, emotional and mental impairment. Frequently these cases include incidents where the parent murdered, threatened to murder the survivor or brandished a weapon.

Matter of Allyerra E., 132 AD3d 472 (1<sup>st</sup> Dept., 2015) Neglect finding entered against the father, court rejected argument that a single incident was not enough for a finding stating that where a parent's judgment was strongly impaired and the child was exposed a finding is proper.

Matter of Jared S., 78 AD3d 536 (1<sup>st</sup> Dept., 2010) Father perpetrated acts of domestic violence against the children's mother and threatened to kill one of the children by placing two knives at the child's throat. A single act of domestic abuse it was sufficient where the parent's judgment is strongly impaired and the risk of harm to the child is high.

Matter of Shiree G., 74 AD3d 1416 (2<sup>nd</sup> Dept., 2010) Here, given the caseworker's testimony regarding the children's terrorized response--screaming, hysterically crying and reaching for the mother-- to the incident of domestic violence instigated by respondent against the mother, a sound and substantial basis supports Family Court's conclusion that respondent's actions endangered the well-being of the children.

Matter of Errol S., 66 A.D.3d 579 (1st Dept., 2009) Respondent threatening mother with a firearm while one of the children slept nearby and the other was present established a cause of action for neglect.

Matter of Emily I., 50 AD3d 1181 (3<sup>rd</sup> Dept., 2008) Abuse finding entered where the mother shoots the father while father is holding 4 year old daughter, mother stated to the father prior to firing that she would shoot him even if child was harmed as a result.

Matter of Shanaye C., 774 N.Y.S2d 622 (Fam. Ct. Kings, 2003) finding against father when children in and out of room when father fatally assaulted mother and grandmother



Matter of H/R Children, 302 A.D. 2d 288 (1<sup>st</sup> Dept., 2003) Finding of neglect based on one time incident of father punching and kicking mother. (Note: Finding reversed re: mother, one time incident *not* sufficient against survivor parent)

### **Intervention by a Child**

Cases where the child attempts to intervene in the violence to protect the survivor. Evidence that that child was physically harmed during the intervention is not needed.

Matter of Nah-Ki B., 143 A.D.3d 703, (2<sup>nd</sup> Dept., 2016) Neglect finding entered where children were injured while attempting to intervene during the respondent's assault of the mother.

Matter of Clarence S., 135 A.D.3d 436 (1<sup>st</sup> Dept., 2016) Neglect finding entered where child injured while intervening in an effort to "save" his mother.

Matter of Cori XX., 145 AD3d 1207 (3<sup>rd</sup> Dept. 2016) Neglect found where the respondent injured the child causing bruising to her arm in an effort to stop her from calling 911. Child had to flee the home with the mother in order to escape the respondent who chased them while they ran to a neighbor's home to report the incident to the police.

Matter of Gianna O., 123 AD3d 1168 (3<sup>rd</sup> Dept. 2014) Respondent pushed child while child was attempting to intervene in a "huge fight" where the respondent was intoxicated, yelling at the pregnant mother, and forced her to get on her hands and knees to retrieve keys the respondent had thrown. Additional evidence presented that the respondent was verbally abusive towards the mother once she gave birth. Children stated they did not feel secure in the home with the father.

### **Exclusionary Hearings**

Matter of Elizabeth C. 156 AD3d 193 (2<sup>nd</sup> Dept., 2017) Court finds that the respondent father is entitled to a 1028 hearing on the issue of the modification of an order of protection excluding him from the family's home and allowing for supervised visitation only.

### **SURVIVOR PARENT AS A RESPONDENT**

The impairment or risk thereof to the child must be "clearly attributable to the unwillingness or inability of the parent or other person legally responsible for the child's care to exercise a minimum degree of care." The determination to name the survivor as a respondent must be made on a case by case basis; alternatives should be thoroughly explored. The cause of action for failure to protect a child must specifically delineate both the potential risk of harm and the ways that the survivor failed to exercise a minimum degree of care in responding to that risk of harm. These cases frequently include evidence that the survivor fails to report violations of orders of protection by the offending parent, where the survivor takes steps to conceal the offending parent residing in the home in violation of pending orders of protection or the survivor declines safety planning, services or shelter aimed at alleviating the risk of harm to the child.

Matter of Ruben G., 132 AD3d 761 (2<sup>nd</sup> Dept., 2015) The evidence presented at the fact-finding hearing included medical records containing an admission by Claudia G. to an emergency room social worker that the children witnessed Leon T. physically abusing her, moreover, Claudia G.'s admission to the emergency room social worker that Leon T. subjected her to domestic violence in view of the children, together with evidence that social workers



had developed a reasonable safety plan which she did not follow while continuing to share a home with Leon T. and the children, established a prima facie case of neglect against Claudia G. based upon her failure to protect the children from Leon T.'s domestic violence.

Matter of Serenity H., 132 AD3d 508 (1<sup>st</sup> Dept., 2015) The record also shows that the impairment to the child's emotional health was clearly attributable to respondent's unwillingness or inability to exercise a minimum degree of care to protect her daughter from the harmful effects resulting from domestic violence, including respondent's denial that the father was committing domestic violence against her, her multiple refusals to receive domestic violence services and her failure to enforce the order of protection. Impairment to the child established by the police officer's observation of her as well as statements that she was frightened and saddened by witnessing the violence.

Matter of Justin A. 133 AD3d 1106 (3<sup>rd</sup> Dept., 2015) Neglect found where the mother admitted that the father physically abused her and called her derogatory names in front of the children, further she admitted that both children were afraid of the father and that the younger child was afraid to go to school as he feared his father would kill his mother. Despite this, the mother rejected services and safety planning thereby continuing to expose the children to the father's violence and placing them at risk of physical, mental and emotional harm.

Matter of Valentino R., 128 AD3d 562 (1<sup>st</sup> Dept. 2015) mother neglected her children by failing to protect them from the father's domestic violence, there were orders of protection against the father and she allowed him access to the home and children; the mother's claim that she thought the order of protection had expired was not credible to the Court. The father's domestic violence included threatening the mother and the children with a knife and a cleaver; the children were afraid of the father demonstrating emotional harm.

Matter of David M., 119 AD3d 800 (2<sup>nd</sup> Dept., 2014) the evidence that the mother had continued to reside with the stepfather despite the recurring pattern of his violence against her in the child's presence and without regard for the impact of the violence on the child, and had even rejected shelter and domestic violence services made available to her, established that she had neglected the child by failing to exercise a minimum degree of care in preventing him from being mentally or emotionally harmed. The mother testified that her relationship with the stepfather had been characterized by a pattern of domestic violence, and that the stepfather had engaged in acts of physical abuse against her on several occasions in the child's presence. A caseworker testified that the child told her that he had witnessed the stepfather engage in domestic violence against the mother on multiple occasions, and that he was scared by these incidents and afraid for the mother. The child's therapist also testified that the child had made such statements to her and had exhibited symptoms of trauma and fear in discussing the stepfather's presence in the home.

Matter of Anthony FF. 105 AD3d 1273 (3<sup>rd</sup> Dept., 2013) finds sufficient evidence of neglect, rejecting the mother's contention that this was a case where the sole allegation was that she had been the victim of domestic abuse witnessed by the children. Although the mother's husband apparently instigated the incident and acted violently toward the mother, there was evidence that the mother wielded a baseball bat and chased her husband and struck him with the bat. Following the incident, the mother minimized her husband's conduct and attempted to have charges against him dropped, placed partial blame for the incident on the children, permitted her husband in her residence and around at least one of the children in violation of a court order, and instructed the child to keep the husband's presence a secret.



Matter Diamond Tyneshia B., 109 AD3d 740 (1<sup>st</sup> Dept., 2013) The finding of neglect is supported by a preponderance of the evidence; the record shows that there was an extensive history of domestic violence between the mother and father, including an incident in which the father broke down a door and hit the mother in front of the child, causing the child to tell the father to "stop." Further, there is unrefuted evidence that the mother repeatedly exposed the child to the risk of witnessing such violence by allowing the father to either visit or reside with them, despite the existence of an order of protection against him.

Chelsea M., 876 NYS2d 222 (3<sup>rd</sup> Dept., 2009) Finding of neglect against the mother where it was established that the father had assaulted her, had a severe drinking problem and threatened to kill her in the presence of the children leading to the issuance of an OOP on her behalf. Despite her knowledge of the father's alcohol abuse and violent tendencies, the children's exposure to the domestic violence, and the order of protection issued at her request, respondent testified that the father should return home and took steps to conceal the father's continued drinking in order to facilitate his return to the household.

Xavier II., 872 NYS2d 561 (3<sup>rd</sup> Dept., 2009) Finding of neglect against the mother based on her failing to comply with the safety plan, service referrals, maintain the stay away OOP and continued to expose the children to the PLR after he grabbed her by the neck, pulled her hair and assaulted her while she was holding the two and half year old.

Matter of Shalyse W.W., 63 A.D.3d 1193 (3<sup>rd</sup> Dept., 2009) where the Court upheld a finding of neglect despite the survivor's recantation of the incident while testifying at the fact finding; the Court found the totality of the evidence established a cause of action.

In Matter of Shalyse WW., 879 N.Y.S.2d 644 (3<sup>rd</sup> Dept., 2009) Finding against survivor parent who permitted the abuser to have contact with children despite knowledge of existing orders of protection and knowledge (as the survivor) of incidents of domestic violence in presence of children.

Paul U., 785 NYS2d 767 (3<sup>rd</sup> Dept., 2004) Finding against the survivor who attempted to place the child in the permanent custody of an individual who she not only knew to be violent, but who was directed to stay away from the child pursuant to protective orders that respondent herself had requested. Given respondent's violation of the orders of protection and her knowledge of the father's violent history, we conclude that there is a sound and substantial basis to support Family Court's finding that the child was in imminent danger of impairment as a result of respondent's failure to exercise a minimum degree of care

### **USING HEARSAY EVIDENCE AT ARTICLE TEN FACT FINDINGS**

#### ***Sirois Hearings***

In the event that the survivor is unwilling to testify due threats, harassment or any other inappropriate actions of the respondent it is possible that the survivor's prior out of court statements can be introduced in evidence by seeking a *Sirois* hearing. At a *Sirois* hearing you must be able to prove that there is a distinct possibility the survivor is unwilling to testify due to misconduct by the respondent or at the respondent's direction; the standard of proof varies by jurisdiction but given these are civil proceedings coupled with FCA 1046 there is a strong argument that the standard is a preponderance of the evidence. If successful, the Court will allow the survivor's hearsay statements to be introduced in evidence and the respondent's right to object will be forfeited. You will be able to use the survivor's statements at fact finding without their appearance in court.



Holtzman vs Hellenbrand 92 AD2d 405 (2<sup>nd</sup> Dept., 1983) laid out the standard for a *Sirois* hearing: Whenever the People allege specific facts which demonstrate a distinct possibility that a criminal defendant's misconduct has induced a witness' unlawful refusal to testify at trial OR has caused the witness' disappearance or demise, the People shall be given the opportunity to prove that misconduct at a hearing. At the hearing the burden shall be upon the People to prove the defendant's misconduct by clear and convincing evidence AND upon a finding by the Court on the issue of the defendant's misconduct, the defendant will be deemed to have waived any objection to the admissibility of the witness' prior testimony and it may be admitted as direct evidence against the defendant at trial.

People v. Geraci 85 N.Y.2d (Ct. of Appeals, 1995) Circumstantial evidence can be used in whole or in part to prove that a witness' unavailability was caused by the defendant. Given the inherent stealthy nature of witness tampering, there will be nothing more to rely upon than circumstantial proof. In light of the public policy interests against this behavior, it would be unrealistic and unnecessarily rigid to adopt a formula that would make it impossible to establish the necessary foundation in so many cases. The Court further stated that its review of the testimony at the *Sirois* hearing would be limited to whether the facts and inferences that logically flow from the evidence establish that the witness' unavailability was procured by the defendant OR someone acting on his behalf.

People v. Cotto 92 N.Y.2d 68 (Ct. of Appeals, 1998): *Sirois* can be used to admit both sworn testimony and unsworn out of court statements. Court noted that statements were shown to have indicia of reliability as they were made to two separate individuals who both testified and were subject to cross-examination at separate times AND there was no evidence presented that the witness had a motive to change his initial story to the police.

People v. Encarnacion 87 A.D.3d 81 (1<sup>st</sup> Dept., 2011) held that testimony from the witness' mother that the defendant repeatedly called the house AND called the witness on her cell phone threatening to harm her was sufficient to admit her out of court statements. No need for tape recorded conversations or for the witness to hear both sides etc. The inference was drawn by the Court.

In New York the respondent's "**misconduct**" is defined broadly and includes:

- Intimidation by defendant's relatives, confrontation by defendant's attorney at a meeting and bribery People v. Geraci 85 N.Y.2d (Ct. of Appeals, 1995)
- Improper use of relationship by the defendant –52 year old pastor accused of sexual abuse used power over 12 year old victim to obtain recantation People v. Johnson 93 N.Y.2d 254 (Ct. of Appeals, 1999)
- Proof of long term controlling domestic violence relationship People v. Byrd, 51 A.D.3d 267(1<sup>st</sup> Dept., 2008)
- Excessive phone messages directing victim not to testify People v Jernigan 41 A.D.3d 331 (1<sup>st</sup> Dept., 2007)
- Threatening phone calls from prison People v. Major 251 A.D.2d 999 (4<sup>th</sup> Dept., 1998)

People v. Turnquest the People argued that even though the witness planned to voluntarily appear at the trial and was to testify at the trial, her testimony would be false effectively making her "unavailable" to the People. The Court found "unavailability" is not limited to physical but to the practical sense which can include silence or the witness' attempt to recant their prior statements and offer a completely different account of the events. Misc. 329 (Sup. Ct. Queens, 2012)



### **Admissibility of Survivor's Statements in Medical Records**

People v Ortega 15 NY3d 610 (Ct. of Appeals, 2010) in a prosecution for assault and related crimes, references in the survivor's medical records to "domestic violence" and the development of a safety plan were admissible under the business record exception to the hearsay rule. How a person was injured can be relevant to treatment and diagnosis, including whether that assault was the result of domestic violence. It is relevant for purposes of treatment and diagnosis that the survivor's assault was at the hands of a former boyfriend, and that entry comes into evidence.

People v Greenlee 70 AD3d 966 (2nd Dept., 2010) Entries that the survivor's attackers were friends of her former boyfriend, who were attempting to prevent her from testifying against the former boyfriend in a domestic violence proceeding were admissible because those facts were likely relied on by hospital personnel in developing a discharge plan to ensure the survivor's safety.

Matter of Dolan, 35 Misc.3d 781 (Sup. Ct. Nassau, 2012). In Dolan, the Court found that statements made by the patient's son and current treatment providers, that the patient was "suicidal" and non-compliant with treatment, were admissible because "the statements were relevant for the hospital to diagnose, treatment (sic) and ultimately develop a discharge plan for the respondent". Although this decision is not controlling, this case may be considered persuasive where non-patient statements are important to proving a fact or facts at trial.

Matter of A.M. 44 Misc. 3d 514 (N.Y. Fam. Ct., 2014) statements made by a third person providing health-related information for the purpose of treatment are intrinsically reliable for purposes of this hearsay exception. This is true whether the declarant is a family member, an acquaintance, a caseworker, another treatment provider, or even a person on the street who might have observed something relevant to a patient's condition, so long as the statement is made directly to a medical provider in response to questions about the patient's condition.

### **PARALLEL CRIMINAL PROCEEDINGS**

#### **Sealed Criminal Proceedings**

Criminal Procedure Law § 160.50 addresses the sealing of records of criminal proceedings after a termination of the criminal action in favor of the accused. A motion can be made requesting the record remain unsealed if the interests of justice require.

Harper v. Angiolillo 89 NY2d 761 (Ct. of Appeals, 1997) Court held that CPL § 160.50 does not define all "records and papers relating to the arrest and prosecution," supporting the conclusion that "bright line rules are not wholly appropriate in this area." Further, Courts have found that not all evidence used at the criminal trial or stemming from the criminal case are "sealed;" if they are not integral to the defendant's "arrest and prosecution" an argument could be made that they are still admissible in subsequent proceedings. In re Dondi 63 NY2d 331 (2<sup>nd</sup> Dept. 1984) quoting Hynes v. Karassik 47 NY2d 659 (Ct. of Appeals, 1979.)

Matter of Anonymous 95 A.D.2d 763(2<sup>nd</sup> Dept., 1983) stating that a tape recording procured during the investigation into the respondent's activities was not part of "all official records and papers" sealed pursuant to CPL § 160.50 quoting Hynes v. Karassik 47 NY2d 659 (Ct. of Appeals, 1979.)



Matter of Caroline K. 55 Misc. 3d 352(N.Y. Fam. Ct., 2016) finding that 911 tapes are considered “sealed,” pursuant to CPL§ 160.50 in that they are “records and papers relating to the arrest and prosecution,” and given that the criminal proceeding was dismissed public policy requires that they remain sealed.

Matter of Samantha R., 55 Misc. 3d 338 (N.Y. Fam. Ct. 2016) Respondent's motion to strike an officer's testimony was denied because the sealing statute did not prevent the officer from testifying from his independent memory of the events. The officer had an independent recollection of the events when she responded to the domestic violence incident between respondent and the mother.

Matter of T.P. 51 Misc. 3d 738 (N.Y. Fam. Ct. 2016.) Finding that a police officer’s testimony is stricken due to refreshing his recollection with documents from a sealed criminal matter including the complaint, arrest reports, domestic incident reports and his memo book. The Court did find that the memo book was not considered sealed pursuant to CPL § 160.50 and that it also would be permissible for the officer to refresh his recollection using ACS records or any other records relating to the underlying incident.

### **Grand Jury Testimony: Sharing Orders & Motions for Disclosure**

Grand jury testimony is sealed, however there are mechanisms by which you can obtain the transcripts or recordings. Pursuant to Criminal Procedure Law §190.25(4), the ADA on the criminal case can get an order from the criminal court judge to share the grand jury testimony or in the alternative FCLS can petition the Criminal Court by motion for disclosure of the grand jury testimony on notice to all of the other parties to the Family Court and Criminal Court proceedings.

People v Robinson, 98 N.Y.2d 755, (Ct. of Appeals, 2002). As a threshold matter, a party seeking disclosure of grand jury minutes had to establish a compelling and particularized need for them, and only then did a court have to balance various factors to assess, in its discretion, whether disclosure was appropriate under the circumstances presented; this two-step procedure comported with the requirements of due process.

Friedman v. Rice, 134 AD3d 826 (2<sup>nd</sup> Dep't., 2015) Section 190.25(4)(a) directs that the Court may authorize persons who are not specifically authorized by statute, to independently examine the evidence obtained by a grand jury. A party seeking disclosure of grand jury materials under CPL 190.25(4)(a) must establish a compelling and particularized need for them, and the Court must then assess whether disclosure is appropriate under the circumstances presented.

Gold v. Quinones, 37 A.D.2d 618 (2<sup>nd</sup> Dept., 1971) recognized the right of a party in Family Court to utilize Grand Jury testimony for the purposes of preparing for the cross examination and confrontation of witness that will or may testify before the Family Court.