

INDEX NO. 2058-5147

IN THE

SUNNYDALE COURT OF APPEALS

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In the Matter of WILLOW AND ANGEL ROSENBURG,

*Appellant,*

— *against* —

SUNNYDALE DEPARTMENT OF CHILD PROTECTIVE SERVICES

*Appellee,*

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*On Appeal from the State of Sunnydale  
Third of Appellate Division*

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BRIEF FOR APPELLANT WILLOW AND ANGEL ROSUNBERG

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TEAM 54

Attorneys for Appellant Willow and Angel Rosenberg

## **QUESTIONS PRESENTED**

1. Whether the Third Appellate Division erred in determining the Mother's failure to supervise Buffy constituted child neglect when she left Buffy under the Uncle's supervision knowing he had a firm parenting style.
2. Whether the Third Appellate Division erred in determining the Uncle was a "person legally responsible" for Buffy when the record was devoid of facts regarding the nature and extent of his caretaking responsibilities and he showed no complete interest in Buffy's well-being, and whether in such role, he inflicted excessive corporal punishment constituting child neglect when he resorted to physical force only after trying other methods of discipline.

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## STATEMENT OF THE CASE

### I. SUMMARY OF THE FACTS

**Background.** Willow Rosenberg (“the Mother”) has raised her 6-year-old daughter, Buffy, as a single parent since the child’s birth. R. at 7. Juggling two jobs, one during the weekdays and night shifts from Tuesday to Saturday, the Mother worked diligently to provide for Buffy and give her the best life she could. R. at 16. Despite the challenges she faced after losing both parents at age 17, the Mother has been supported by her brother, Angel Rosenberg (“the Uncle”) and her sister, Kendra (“the aunt”). R. at 7.

The aunt was Buffy’s main source of childcare until she passed away a year prior to this proceeding. R. at 7. Only then did Buffy’s childcare fall to the Uncle, as the Mother was still working the same hours at her two jobs to provide financially for Buffy. R. at 7. The Uncle spent time at the Mother’s apartment to watch Buffy but lived in a separate residence. R. at 7–8. While the Uncle picked up and dropped off Buffy at the bus stop, R. at 8, he did not help Buffy with her homework, help her participate in extracurricular activities, play with her, or talk to her much in general, R. at 19–20.

One day, Sunnydale County Child Protective Services (“the Agency”) received a call from Buffy’s school nurse, a mandated reporter, who observed bruising on Buffy’s chest and torso. R. at 8. The Agency initiated an investigation and determined there would be an imminent risk of harm to Buffy if she remained at home. R. at 8. The Mother consented to the Agency temporarily placing Buffy in foster care while the case was investigated. R. at 9.

**The mother.** The Mother, a resilient 28-year-old woman, has dedicated herself to Buffy’s well-being, as a single parent from the day Buffy was born. R. at 7. She maintains

an impeccably clean house, R. at 10, and enjoys Sundays playing with her daughter. R. at 7. The mother has a history of mental health issues that have been exacerbated by her sister's recent passing. R. at 12–13. She testified using her job as an escape and attributing her own challenges as obstructions in clearly seeing Buffy's discomfort and maladjustments after the loss of her aunt whom she spent a significant time with. R. at 13.

***The uncle.*** The Uncle testified that he never wanted kids, was not close to Buffy, despised having to take care of her, and did not view their relationship as anything similar to a parent-child relationship. R. at 14. He did, however, feel a responsibility to discipline Buffy because he felt no one else would teach her proper manners and she would often misbehave. R. at 14–15. The Uncle did not want his relationship with Buffy to resemble his own unhealthy relationship with his parents, so when Buffy first began misbehaving, he specifically used discipline in the form of harsh words. R. at 15. When that did not work, the Uncle tried time-outs in the closet, which he would lock so she did not escape. R. at 15. On two separate occasions, even though he did not want to, the Uncle used physical discipline against Buffy. One instance resulted in bruising near Buffy's ribs and trouble walking due to pain from her side. R. at 12. The Uncle found physical discipline was the only method that worked in teaching Buffy how to behave and listen to authority. R. at 15.

## **II. NATURE OF PROCEEDINGS**

***Sunnydale Family Court.*** The Sunnydale Family Court granted a Motion to Dismiss filed by the Mother and Uncle. The Court refused to find the Mother committed child neglect. The Court also refused to find the Uncle was a person legally responsible for

Buffy because the record was devoid of facts regarding the nature and duration of the Uncle's caretaking responsibilities, and the Uncle's relationship with Buffy was not one resembling a parent-child relationship. R. at 19–21. The Agency appealed. R. at 22.

***Third Appellate Division.*** The State of Sunnydale Third Appellate Division reversed the Family Court's decision. R. at 29. The Court held that the Mother committed child neglect by failing to supervise Buffy and that the Uncle was a person legally responsible for Buffy's care and, in that role, inflicted excessive corporal punishment. R. at 29.

### **SUMMARY OF THE ARGUMENT**

This Court should reverse the Sunnydale Third Appellate Division's decision and find the Mother did not neglect Buffy by failing to supervise her and that the Uncle was not a "person legally responsible" for Buffy, and even if he was, did not inflict excessive corporal punishment.

First, the Mother was reasonable in leaving Buffy with the Uncle. The Mother works a significant number of hours during the week and weekend and, after her sister's death, turned to her brother to supervise her child in her absence. This is a common choice for childcare. Additionally, even though the Mother knew the Uncle had a stern parenting style, having such a parenting style does not lead to a reasonable inference that a child will be in danger under that supervision.

Second, the Uncle was not a "person legally responsible" for Buffy because the record did not establish he acted as the functional equivalent of a parent. His caretaking role only truly started after the aunt's death, and the record is devoid of facts regarding the nature, duration, and extent of his role. Additionally, the Uncle never helped Buffy with homework, helped her participate in extracurricular activities, played with her, or talked to her in general. He never wanted children and despised that he had to watch over Buffy in the Mother's absence. At best,



the record establishes the Uncle provided temporary supervision over Buffy, which is insufficient to find he acted as a “person legally responsible.

Even if the Uncle was a “person legally responsible” for Buffy, his actions did not constitute excessive corporal punishment. Evidence of physical marks does not per se establish excessive corporal punishment. The Uncle was very deliberate in his disciplining methods and only used physical force on two occasions after Buffy misbehaved. His actions did not rise to the statutory requirement for excessive corporal punishment constituting child neglect.

This Court should reverse the judgment of the Third Appellate Division.

### **ARGUMENT**

***Standard of Review.*** The State of Sunnysdale Third Appellate Division certified both questions to be heard on appeal. R. at 2. The questions before this Court are questions of law, and therefore the standard of review is de novo. *Brady v. Ottaway Newspapers*, 63 N.Y.2d 1031, 1032 (1984).

**I. THIS COURT SHOULD REVERSE THE LOWER COURT’S RULING AND FIND THE MOTHER PROVIDED ADEQUATE SUPERVISION FOR BUFFY BECAUSE THE MOTHER EXERCISED REASONABLE CARE IN LEAVING BUFFY WITH THE UNCLE, DESPITE KNOWING ABOUT HIS FIRM PARENTING STYLE.**

This Court should find the Mother’s failure to supervise Buffy did not constitute child neglect. To prove neglect as a result of no supervision, there must be proof Buffy was harmed or threatened with imminent danger of harm as a result of the mother’s failure to appropriately supervise the child. *Matter of Evelyn X*, 290 A.D.2d 817, 819 (N.Y. App. Div. 2002). The danger must be looming– not just likely–and there must be a link connecting the offensive parental conduct or failure to the impending threat. *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 369 (2004); N.Y. Fam. Ct. Act § 1012(f)(i)(2023). Additionally, Sunnysdale Family Court Act section 3523(f)

requires the child be in imminent danger, and knowing the Uncle has a more stern parenting style does not meet this standard. The Mother can only be held responsible for the Uncle's abusive or neglectful behavior if she knew or reasonably should have known that Buffy would be harmed. *Matter of Joseph DD*, 214 A.D.2d 794, 795 (N.Y. App. Div. 1995) (quoting *Matter of Robert YY [Mary ZZ]*, 199 A.D.2d 690, 692 (1993)).

Furthermore, Article 10 § 3523(f) defines “neglected child” as someone under the age of eighteen:

“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 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, including the infliction of excessive corporal punishment . . . .” N.Y. Fam. Ct. Art. 10 § 3523(f)(i)–(f)(i)(B).

To prove an act of neglect, one must overwhelmingly demonstrate that the child has been harmed or is in impending danger of being harmed and that said harm is a direct result of the parent's failure to use a minimum degree of care. *See Nicholson*, 3 N.Y.3d at 368.

In fact, Article 10 was written with the “deep concern” for accuracy in the “definition of child neglect [for fear of]. . . ‘unwarranted state intervention into private family life’” *Id.* Moreover, the parent must objectively fail to meet the lowest possible bar of care to establish a finding of neglect. *In re Jessica YY*, 258 A.D.2d 743, 744 (1999). The standard is not based on disagreeable parental conduct. *Nicholson*, 3 N.Y.3d at 369. Instead, “[t]he statutory test for neglect is ““minimum degree of care” –not maximum, not best, not ideal, –and the failure [to

exercise that degree of care] must be actual, not threatened.” *In re Andy Z.*, 105 A.D.3d 511,12 (1st Dep’t 2013) (quoting *Nicholson*, 3 N.Y.3d at 370).

However, sometimes a parents’ mental health can be a cause for a finding of neglect and termination of parental rights. In the case of *In Interest of B.P.*, the mother was in a relationship with an abusive partner who also harmed the kids. *In Interest of B.P.*, 207 Ga. App. 242, 243 (Ga. App. 1993). She herself had mental differences that prohibited her from intervening and protecting the children. *Id.* After being removed from the home, the children showed significant improvements. *Id.* The issue before the appeals court was whether the evidence presented supported the lower court’s ruling that her parental rights should be terminated. *Id.* at 242. As a result, the court found that she had engaged in passive abuse based on substantial and clear evidence. *Id.* at 245. The court reasoned that there was (1) “clear and convincing evidence” of parental wrongdoing and unfitness, (2) her failure to act and protect her children was the cause of the children’s harm, (3) the court found her incapable of independent living and having a tendency to make poor choices in companions, and (4) found that after weighing whether it would be in the children’s best interest to stay in the home or be removed based on factors such as a need for stability and security in the home that the evidence was overwhelming that the children should be removed. *Id.*

In the instant case, though the Mother was a busy, single parent who works nearly every day, she has never failed to ensure Buffy had supervision in her absence. R. at 7. The Uncle supervised Buffy before and after school for the past year and the aunt did so before then until she died in 2022 R. at 7. Thus, this issue comes down to whether the Uncle was an appropriate supervisor for Buffy. Nevertheless, the Mother did not fail to provide supervision for Buffy; therefore, this Court should not find the Mother neglected Buffy.

**A. The Mother exercised a minimum degree of care when she allowed the Uncle to watch Buffy in her absence because leaving a child in the care of one's family is a common and appropriate choice for childcare.**

In her absence, the Mother entrusted the Uncle to watch Buffy, and leaving children in the care of one's family is a common and appropriate choice for childcare. In fact, the Sunnydale Family Court stated, "... the caretaker was never inappropriate ...all individuals who would be expected to be appropriate caretakers and guardians for when the Mother was not present." R. at 17. Additionally, the Mother works a significant number of hours and sacrifices her time with Buffy to provide a financially stable and stress-free environment for her. R. at 16. To achieve this, this single mom turned to her family who was already fractured and traumatized by death. R. at 7, 13. Moreover, and as the State of Sunnydale Family Court highlights, this is the reality for many working single parents and does not equate to an omission of supervision. R. at 17. Therefore, the Uncle was an appropriate caretaker in the Mother's absence, so Buffy was never without appropriate supervision and was not knowingly in jeopardy of harm.

In the present case, the Mother had arranged for the Uncle to watch Buffy while she worked. R. at 7. Buffy testified through the caseworker that she felt life was harder with the Uncle because, unlike her late aunt, he did not take her to after-school activities, help her with homework, nor engage in conversation with her. R. at 10. It is clear from the record that the Uncle had several challenges such as lack of employment, transportation, and his own place to stay. R. at 7. The challenges listed might lead one to determine the Uncle is "unsuited to care for" Buffy, but even if that conclusion is true, it is not enough to conclude that the Mother committed child neglect by leaving Buffy in his care unless it is evident that she "knew or reasonably should have known that [Buffy] . . . was in danger." *Matter of Joseph DD*, 214 A.D.2d 794, 795 (N.Y. App. Div. 1995). The Mother "... had no knowledge of the infliction of

harm, and her attorney shared that if she had known the child was suffering or felt uncomfortable, she would have addressed the situation immediately.” R. at 17. Therefore, the Mother did not knowingly leave Buffy in harm’s way. The Mother also made a normal and rational decision to leave her child in her brother’s care, which is a choice many people make. Based on a reasonably prudent standard, there was no reason she should have known that Buffy would be in harm's way in the Uncle's care. Moreover, the danger that befell Buffy was not the direct result of the Mother’s choice in who should supervise her child. Thus, the Agency cannot prove by a preponderance of the evidence that the Mother’s choice in childcare resulted in Buffy being neglected.

**B. Despite the Mother knowing the Uncle had a contentious parenting style, leaving Buffy with him did not constitute neglect because she did not or should not have reasonably known Buffy was in imminent danger and had she known, she would have addressed the situation immediately.**

Though the Uncle’s known contentious parenting-style could have led to possible danger, when the Mother left Buffy in his care, danger was not imminent thus not satisfying Sunnydale Family Court Act § 3523(f). Here, knowing that someone has a more confrontational parenting-style does not reasonably lead to a conclusion that they will certainly harm children in their care. There is a variety of parenting-styles ranging from “gentle parenting” to militaristic parenting. However, nowhere on the spectrum is it expected that the child is in danger. Furthermore, many parents, especially single, hard-working parents, turn to family for childcare, which is what the Mother did here first with her late sister and then with her brother. R. at 7. The Uncle is a disciplinarian and knowing that the Uncle takes a stricter approach to parenting than herself does not rise to the level of negligence necessary for a finding of neglect under the statute at hand.

Having a rigid, even militaristic, parenting-style does not lead to a reasonable inference that a child will be in danger under that supervision. While it is certainly possible for the aggressive

parenting-style to be harmful to the child, it does not automatically put the parent on notice that they should have known harm would befall their child. Here, the Mother knew her brother had a more aggressive parenting style than that of her and her late sister's, but she believed his methods to be helping Buffy's behavioral issue rather than hurting her. R. at 13. Buffy was diagnosed with a disorder which was caused "recurrent behavioral outburst representing a failure to control aggressive impulses as manifested by...[v]erbal aggressions or physical aggression toward[s] property, animals, or other individuals, occurring twice weekly, on average, for a period of 3 months." R. at 14. As a result, Buffy was becoming a problem and, in the Mother's absence, was not receiving comparable discipline to ensure she did not suffer long-term consequences stemming from her actions. R. at 14. That is why the Uncle's more aggressive parenting style was seen as helpful as demonstrated by Buffy's marked improvement. R. at 15. While it is clear from the record that the Uncle suffered from his own mental health issues stemming from a traumatic childhood and was not completely comfortable being Buffy's caretaker as a result of his own experiences, R. at 14; however, there is no indication that the Mother knew how any of this affected him or Buffy. Moreover, despite the Mother's own mental health struggles, she ensured Buffy was provided for financially and always supervised, demonstrating that her personal issues did not lead her to neglect her child. R. at 12.

Unlike in *In Interest of B.P.*, the Mother's mental health is not so severe that she cannot live and provide for Buffy independently and she does not show a pattern of poor companion choices. Even the Agency found her home to be well-kept, R. at 10, and ensured all of Buffy's needs were met. R. at 16. Moreover, even though the Mother's mental health worsened after her sister's death, R. at 12, and did not heed her brother's suggestion of seeing a mental health professional, R. at 13, she is eager and committed to getting help to be a better mother and

achieve a better, more stable relationship with her daughter that she and Buffy both want. R. at 16. Furthermore, and as *In Interest of B.P.* explains, removing a child from their home requires a balancing analysis of whether removal will be beneficial to the child. *In Interest of B.P.*, 207 Ga. App. 242, 245. As it stands, Buffy already reported feelings of being unloved and uncared for, and the Family Court agreed that removing Buffy would irreparably worsen this (R. at 17). Therefore, removing Buffy from her home would not be in her best interest as the test requires.

Consequently, Buffy's unfortunate injury was not the direct result of the Mother's failure to provide supervision but was rather the product of mismanaged mental health and trauma, R. at 14; therefore, falling short of the standard in Family Court Act §1012(f)(i). Therefore, the Mother's decision to leave Buffy in the Uncle's care despite knowing that he had a more aggressive parenting style did not rise to the level of reasonable knowing of imminent danger necessary for a finding of neglect based on a lack of supervision by a preponderance of the evidence. It follows, then, that the Mother did not neglect Buffy and that Buffy should not be removed from her home.

**II. THIS COURT SHOULD REVERSE THE LOWER COURT'S RULING BECAUSE THE UNCLE WAS NOT A PERSON LEGALLY RESPONSIBLE FOR BUFFY AND, EVEN IF HE WAS, HIS ACTIONS DID NOT AMOUNT TO EXCESSIVE CORPORAL PUNISHMENT CONSTITUTING CHILD NEGLECT.**

This Court should reverse the lower court's ruling and hold in favor of the Uncle. A child protective proceeding may be brought under Article 10 of the Sunnydale Family Court Act against "any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child." § 3523(a). The Act further defines "person legally responsible" as

"the child's custodian, guardian, or any other person responsible for the child's care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child." § 3523(g).

A “neglected child” includes a child less than 18 years of age whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of the parent or other “person legally responsible” for the child to exercise a minimum degree of care by unreasonably inflicting harm, or a substantial risk thereof, including the infliction of excessive corporal punishment. § 3523(f). Because there is insufficient evidence in the record to establish the Uncle was a “person legally responsible” for Buffy, and because the Uncle’s actions did not rise to excessive corporal punishment constituting child neglect, the lower court’s decision must be reversed.

**A. This Court should find the Uncle was not a “person legally responsible” for Buffy because the record is devoid of facts regarding the nature and extent of the Uncle’s caretaking responsibilities to establish he acted as the functional equivalent of a parent.**

This Court should find the Uncle was not a “person legally responsible” for Buffy. In order for an individual to be a “person legally responsible,” and thus a proper respondent in a child protective proceeding, the court must find the individual acted as the functional equivalent of a parent in a familial or household setting during the relevant period of time. *In re Yolanda D.*, 88 N.Y.2d 790, 795 (1996). Determining whether an individual acted as the functional equivalent of a parent is a discretionary, fact-intensive inquiry, in which courts will weigh factors such as the frequency and nature of the contact between the individual and child, the nature and extent of control exercised by the individual over the child’s environment, the duration of the individual’s contact with the child, and the individual’s relationship with the child’s parent(s). *In re Yolanda D.*, 88 N.Y.2d at 796. “Persons legally responsible” do not include individuals who assume fleeting or temporary care of a child. *Id.*

A proper determination of whether an individual acted as the functional equivalent of a parent, and thus was a “person legally responsible,” requires a well-developed factual record of the nature and extent of the individual’s caretaking responsibilities. *Matter of Trenasia J. (Frank J.)*, 25 N.Y.3d 1001, 1006 (2015) (citing *In re Yolanda D.*, 88 N.Y.2d at 796). In *In re Yolanda D.*, the uncle housed his niece when she visited him every other week, visited the mother’s home to attend birthday parties, was regularly in the same household with his niece, and regarded his relationship with his niece as close and



familial. *In re Yolanda D.*, 88 N.Y.2d at 800. Affirming the lower court’s decision, the Court held the uncle was a “person legally responsible” for his niece because there was an adequate record basis for finding he performed traditional parental roles and thus acted as the functional equivalent of a parent. *Id.*

In contrast to the record in *In re Yolanda D.*, which was replete with evidence to establish the uncle acted as the functional equivalent of a parent, the record in *Matter of Trenasia J.* lacked critical details essential to the fact-intensive inquiry necessary to find the uncle was a “person legally responsible.” *Matter of Trenasia J.*, 25 N.Y.3d at 1007 (Rivera, J., dissenting). Although the majority in *Matter of Trenasia J.* found the uncle was a “person legally responsible” for the subject child, the dissent astutely pointed out that the record was devoid of facts regarding the nature of the uncle’s caretaking responsibilities, especially given the mother’s testimony that she left care of the child by default to the uncle only when the aunt was unavailable. *Id.* at 1006, 1009. The dissent also noted there was no evidence the uncle cultivated a parental bond with the child, but instead that he only provided temporary supervision when the mother was absent, and a person who assumes fleeting or temporary care of a child such as a supervisor is not a “person legally responsible.” *Id.* at 1004–05. Where the record lacks critical details as to the nature and extent of an individual’s contacts and responsibilities necessary to elevate them to the functional equivalent of a parent, the court must find the individual was not a “person legally responsible.” *Id.* at 1009; *see also In re Faith GG.*, 179 A.D.2d 901, 902 (1992) (holding an individual was not a “person legally responsible” for a child’s care where the record reflected the individual maintained a separate residence and occasionally watched the child in her mother’s absence but provided no further detail regarding the nature and extent of the individual’s child-caring duties).

Evidence that an individual merely took some part in meeting a child’s daily needs, without evidence of a “full and complete interest in the well-being and general welfare” of the child so as to intend to fully assume a parental role, is not enough to establish the individual acted as the functional equivalent of a parent. *People v. Myers*, 201 A.D.2d 855, 856 (1994) (affirming the lower court’s ruling that the defendant was not a “person legally responsible” where there was merely evidence that the defendant took some part in the child’s daily life by providing financial support and babysitting because

such evidence was insufficient to establish the individual intended to fully assume a parental role “with the concomitant obligations to support, educate, and care for the child on an ongoing basis”); *see also In re Jessica C.*, 132 Misc.2d 596, 604 (1986) (finding the individual was not a properly named respondent because serving as a babysitter, without evidence of repeated child-caring services resembling a parental form of involvement, was insufficient to establish the individual was a “person legally responsible”).

In the instant case, there is insufficient record evidence to establish the Uncle acted as the functional equivalent of a parent. Similar to the case in *Matter of Trenasia J.*, the record here is devoid of facts regarding the nature and duration of the Uncle’s caretaking responsibilities, especially given that Buffy’s aunt had always been in charge of the childcare when the Mother was absent. While the nature of the Uncle’s contact with Buffy was to watch her in the Mother’s absence, it only started when the aunt passed away just a year prior to this proceeding and the Mother had no choice. R. at 7. While the Uncle dropped off and picked up Buffy from the bus stop, R. at 8, as noted in *Myers*, meeting a child’s needs without a “full and complete interest in the well-being and general welfare” of the child is insufficient to establish the individual acted as the functional equivalent of a parent.

Here, the record does not reflect that the Uncle had a “full and complete interest in the well-being and general welfare” of Buffy, so as to establish he was a “person legally responsible for her care.” Similar to the individual in *In re Faith GG.*, the Uncle lived in a separate residence from Buffy and the Mother. R. at 7. Additionally, the Uncle never helped Buffy with her homework, helped her participate in extracurricular activities, played with her, or talked to her in general— all traditional parental functions that would suggest he had an interest in supporting, educating, and caring for Buffy on an ongoing basis. R. at 19–20. Additionally, the relationship between the Uncle and Buffy was not a close and familial relationship akin to the one that the court in *In re Yolanda D.* found significant in determining the uncle acted as the functional equivalent of a parent. In fact, the Uncle never wanted kids, was not close to Buffy, despised having to care for her, and did not view their relationship as anything similar to a parent-child relationship. R. at 14. These facts are insufficient to establish the Uncle acted as the functional equivalent of a parent, a determination necessary to find he was a “person legally responsible” for Buffy.

The lower court notes that the Uncle felt a responsibility to discipline Buffy. R. at 28. However, Buffy was diagnosed with intermittent explosive disorder, where Buffy was prone to having angry outbursts where she would not listen to authority, R. at 13–14, and thus the Uncle’s sense of responsibility likely stemmed from a need to get Buffy to listen to him.

Although the Uncle’s contacts with Buffy may have been significant since the aunt passed away, the Uncle did not cultivate a relationship resembling a child-parent relationship and instead only provided temporary supervision when the Mother was absent and had no other choice. Because the Uncle was not a “person legally responsible,” the Court may not exercise jurisdiction over him and a child protective proceeding and, as such, must reverse the lower court’s ruling.

**B. Even if the Court finds the Uncle was a “person legally responsible” for the Buffy, his actions did not constitute child neglect because evidence of physical marks does not per se constitute excessive corporal punishment and he resorted to physical punishment only after trying other methods of discipline.**

The Uncle did not inflict excessive corporal punishment upon Buffy. While the use of excessive corporal punishment constitutes child neglect, parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child’s welfare. *Matter of Cheryale B. (Michelle B.)*, 121 A.D.3d 976, 977 (2014). When physician discipline is used, evidence of physical marks does not per se constitute excessive corporal punishment. *See Matter of Wunika A. (Wilda G.)*, 65 N.Y.S.3d 421, 424 (N.Y. Fam. Ct. 2017).

In determining whether an individual’s actions constituted excessive corporal punishment, courts consider whether the individual regularly inflicted physical force upon the child. *See Matter of Wunika A.*, 65 N.Y.S.3d at 424. *See also Matter of Crystal S.*, 74 A.D.3d 823, 824 (2d Dept. 2010) (refusing to find an individual inflicted excessive corporal punishment even where a mother, in a single incident, held the child’s arms very tightly causing swelling and a scratch as the result of the child’s repeated refusal to obey household rules); *Matter of Chanika B.*, 60 A.D.3d 671, 672 (2d Dept. 2009) (refusing to find an individual inflicted excessive corporal punishment even where a father slapped the child and caused her nose to bleed after she disobeyed him because there was no evidence of repeated physical discipline);

*Matter of Alexander J.S. v. Davis S.*, 72 A.D.3d 829, ### (2d Dept. 2010) (refusing to find excessive corporal punishment even where a father pulled his child's shirt and caused her to fall to the floor, spanked her on the buttocks, and injured her wrist after she disobeyed instructions because there was no evidence he regularly used excessive force or intended to injure her); *Matter of Anthony PP.*, 291 A.D.2d 687, 688 (3d Dept. 2002) (refusing to find excessive corporal punishment even where a father used physical force on one occasion by pulling his child out of the car by his shirt, throwing him on the ground and scraping his knee). In *Matter of Wunika A.*, the parents began disciplining their children with timeouts and written lessons, and only resorted to physical force, including spanking and use of a belt, for more serious infractions. *Matter of Wunika A.*, 65 N.Y.S.3d at 424, 426. Finding the use of a deliberate system of consequences for their children's misbehavior significant, the court refused to hold the parents inflicted excessive corporal punishment constituting child neglect. *Compare Id.* at 424 with *People v. Carroll*, 93 N.Y.2d 564, 566 (1999) (finding a stepmother inflicted excessive corporal punishment when she witnessed, but did not report, the father repeatedly punch the child, throw her into a wall, push her onto the floor, and cover her body with bruises, lacerations, abrasions, and hemorrhages, eventually leading to her death).

The instant case is similar to the aforementioned cases where the court properly dismissed neglect petitions because the individuals' actions did not rise to the statutory requirement for excessive corporal punishment. Similar to the parents in *Matter of Wunika A.*, the Uncle used a deliberate system of punishment to discipline Buffy when she misbehaved. He first used discipline in the form of harsh words. R. at 15. When words did not work, he put her in time-outs in the closet, which he would lock so she did not escape. R. at 15. Only after trying these non-physical forms of discipline did the Uncle resort to physical discipline, even though he did not want to. R. at 15. The Uncle found physical discipline was the only form that worked in teaching Buffy, who suffered from a disorder that caused her to burst out and reject authority, how to behave. R. at 15. While this discipline resulted in physical marks, R. at 12, the Uncle's actions did not rise to the level of physical discipline exercised in *Carroll*. Therefore, this Court should find the Uncle did not neglect Buffy.

## **CONCLUSION**

Appellant Mother and Uncle respectfully request that this Court reverse the decision of the Sunnydale Third Appellate Division.

Respectfully submitted,

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Attorneys for Appellant