IN THE SUNNYDALE COURT OF APPEALS

ANGEL and WILLOW ROSENBURG, Appellant, -against- SUNNYDALE DEPARTMENT OF CHILD PROTECTIVE SERVICES, Appellee.	)	Index No.: 2058-5147

APPEAL FROM THE THIRD APPELLATE DIVISION

RESPONDENT-APPELLANT BRIEF
ANGEL and WILLOW ROSENBURG

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QUESTIONS PRESENTED

I. The Mother is a single parent working multiple jobs to support her daughter. While the Mother is at work she relies on her family to have an adult presence for her daughter which, after the loss of her sister, fell to her brother. Was the Mother's reliance on her brother to assist in childcare a failure to supervise her child?

II. The Uncle never viewed the relationship with his niece as a parent/child relationship, never wanted children, and was forced to care for his niece when there was no other option. While he did discipline her, routine corporal punishment is not excessive and does not constitute abuse or neglect. Was the Uncle a "person legally responsible" for his niece given the totality of the circumstances, and is routine discipline abuse or neglect?

STATEMENT OF THE CASE

Petitioners Willow Rosenburg ("Mother") and Angel Rosenburg ("Uncle") were accused of child neglect stemming from Buffy Rosenburg's ("Child/Niece") testimony to the Sunnydale County Child Protective Services ("Agency"). (R. at 3, 6.) Child neglect is a criminal offence defined as the failure of a parent or caretaker to provide needed food, clothing, shelter, medical care, or supervision to the degree that the child's health, safety, and well-being are threatened with harm.

On May 21, 2023, the Agency received a phone call from the Sunnydale Elementary School from Amy Madison ("Nurse"), the school nurse. (R. at 8.) The Nurse testified on May 21, 2023, that she saw the Child, who had difficulty walking with soreness and bruising on her left side, with prominence on her ribs. (R. at 8.) The Nurse testified that in questioning the Child about the origin of the bruising, the Child began to cry and said, "Please don't tell my uncle or he's going to get meaner." (R. at 8). Within 24 hours of the Nurse's phone call, the Agency conducted a brief investigation and concluded there was an imminent risk of harm to the Child if she remained in the home. (R. at 8.) The Agency called the Mother and notified her of their decision. (R. at 8.) The Mother agreed to place the Child into temporary foster care while the case was investigated further. (R. at 9.)

A petition was filed against the Mother and the Uncle, who then filed a joint Motion to Dismiss. (R. at 6.) Fact-finding hearings were held, and the Agency presented a Senior Caseworker ("Caseworker"), who visited the Mother's house and interviewed the Child and conducted an Article 10 § 3523 investigation. (R. at 9, 10.) The Caseworker reported that the Child complained of fearing the Uncle. (R. at 9.) The Child further alleged that the Uncle physically disciplined her on two occasions when the Child misbehaved. (R. at 11.) The Mother testified that due to her long

work hours she required support from her family since she was unable to be at home with the Child. (R. at 13.) After the death of the Mother's sister, Kendra, she often had to leave the Child with the Uncle for supervision. (R. at 7, 13.) In his testimony, the Uncle noted that his and the Mothers childhood was full of abuse and physical punishment, which did not compare to the Agency's allegations. (R. at 14.) The Uncle testified that he did not want to act ever be a parent in any capacity but agreed to help his sister give her child the best life possible and stressed his love for the Child as his niece. (R. 14.) The Uncle testified that he believed it was his responsibility to teach the Child proper manners and would have to use occasional physical discipline when oral discipline and timeouts did not work. (R. at 14.) However, the Uncle stated that he did not use excessive physical discipline, and preferred to refrain from any, because he did not want the Child to experience the violence he grew up with in his household. (R. at 15). After reviewing the testimony of both parties, the State of Sunnydale Family Court granted the Uncle and Mother's joint Motion to Dismiss and dismissed the petitions brought by the Agency. (R. at 21.)

On appeal, the State of Sunnydale Third Appellate Division reversed the lower court's decision. (R. at 23.) The Third Appellate Divison found that the Mother failed to supervise her child, and as such, had neglected her child. (R. at 23.) The court noted that the Mother was aware of the Child's intermittent explosive disorder and did not do enough to check in about the progress of the Child's school counseling. (R. at 26.) The Agency alleges the Mother allowed the Child to be hurt by not questioning an authoritative parenting style or checking in with the Child. (R. at 26.) The Third Appellate Division found the Uncle to be a "person legally responsible" of the niece and as such had the right to discipline the child as he saw fit. (R. at 28.) However, the court found that the Uncle's in the two occasions of physical discipline exceed the "excessive" threshold beyond any normal discipline and placed the child in severe emotional and physical harm. (R. at

28.) Ultimately, the Appellate Court reversed the lower court's decision and ruled in favor of the Agency. (R. at 29.) The court also ordered an Order of Protection to be granted against the Uncle, for the safety of the child. (R. at 29.) An appeal to this court was subsequently filed.

SUMMARY OF THE ARGUMENT

The Mother's reliance on her brother, the Child's Uncle, for supervision of the Child does not constitute child neglect. The Mother supplies adequate food, clothing, shelter, and education that meets the standard of care for the Child. The Child is always supervised while the Mother is at work. The Mother's mental health issues, especially in a time of grief for the family, are not evidence of neglect, and should not be used against her in the Court's analysis. Expectations of a parent's involvement in their child's life is fluid based on each family's circumstances and a child's needs. Based on the totality of the circumstances in this case, the Court should view the Mother's situation with lenity. Recognizing there is no causal connection between the Mother's alleged lack of supervision and any alleged neglect. It is in the best interest of the Child to support this family in a time of need rather than punish them for their shortcomings.

The *Yolanda D*. factors, used to determine whether a party is a "person legally responsible" are narrow and prohibitive for consideration of the totality of the circumstances. Finding that a party is a "person legally responsible" should be done with caution as it implies that party has certain rights relating to that child. Examination of the totality of the circumstances, beyond the *Yolanda D.* factors, allows for a more just outcome. Each inquiry should be fact-intensive. Appellate judges at all levels have been critical of these factors and the tendency of some courts to find a party as a "person legally responsible" without pause. The Third Appellate Division incorrectly concluded the Uncle's discipline met the "excessive" threshold defined in the

Sunnydale statute. In review of similar cases, the Uncle's discipline does not meet what has historically been considered excessive corporal punishment. The discipline did not impair the Niece's emotional or physical health on a protracted basis.

This Court should find that the Mother did not fail to supervise her Child, and in turn there was no neglect. Determine the Uncle was not a "person legally responsible," and the factors to determine that need to be reviewed. Additionally, the Uncle's discipline was not excessive, the Niece's physical and emotional health were not impacted on a protracted basis. Therefore, she was not an abused or neglected child under the Sunnydale statute.

ARGUMENT

I.

A. The Mother's Actions did not Constitute Child Neglect.

1. Willow Rosenburg Supplies Adequate Food, Clothing, Shelter, and Education that Sufficiently Meets the Standard of Care for the Safety of Buffy.

Willow works hard for her daughter Buffy, providing for her with more than sufficient care. Determining the minimal standard of care involves a child-specific inquiry and there is no disagreement that special vulnerabilities must be considered when determining the applicable standard of care as said by the opposition. *Lester M. v. Navija M.*, No. 00578-06, 2006 NYLJ LEXIS 5582, at 6 (N.Y. Fam. Ct. Oct. 20, 2006) See also *Joelle M. v. Dept. of Child Safety*, 431 P.3d 595 (Ariz. Ct. App. 2018). When raising the expectation for parents from the minimal standard of care to match special vulnerabilities, the special vulnerability must first be identified. In *Lester M. v. Navija M.,* the special vulnerability was a three-year-old's multiple second and third-degree burns, and the add context of the parent's history of multiple child protective action

involving the child being burned. *Id* at 6. The minimal standard of care was raised to address the child's lack of medical attention for the burns. *Id.*

In reviewing what has been provided to Buffy, it is important to consider all the areas of Buffy's needs before identifying special vulnerabilities. First, considering shelter, Willow's home was determined to meet the minimal standard of care for the safety of the child according to the Sunnydale Family Court Act §3532 investigation. The home is described as well-kept by the caseworker. Willow, a single parent, works two jobs one at Sunnydale High School and the other at Sunnydale's Waffle House. Buffy always has an adult present and is not left alone while Willow works. Next, There is no indication that Buffy has gone without food, or clothing. Finally, when it comes to Buffy's education, the minimum standard has been raised to meet her special vulnerabilities. She goes to school where she sees a counselor to help with her intermittent explosive disorder. Buffy being diagnosed and provided with a service to help with her special vulnerability by six- years old is applaudable. Girls are typically undiagnosed until their preteens. Willow loves Buffy, and while their situation may be difficult at times, and even though the current state of their family is characterized by the recent loss of Buffy's beloved Aunt, Willow works hard to provide for Buffy.

The Agency would like to use Willow's mental health as evidence of her neglect of Buffy. This standard creates unjust consequences. A connection between the mother's mental health and it being the cause of the neglect would be required to make this assertion. In the *Matter of Robert W.* the mental health issues of the parent included suicidal attempts and prior psychiatric hospitalizations proven by a mental health evaluation. *Matter of Robert W. (Francine H.)*, 2011 N.Y.Misc. LEXIS 838 (N.Y. Fam. Ct. Mar. 3, 2011).

In the current case, Willow admits to struggling with her mental health. However, there is no official evaluation, and there is no indication that her mental health issues would result in her harming herself or her child. The Agency alleges Willow does not check in enough with her child about the multiple resources provided to Buffy because of Willow's mental health struggles, particularly after the death of Willow's sister, concluding this is a failure to supervise. However, applying this standard would create a dangerous precedent punishing parents who are momentarily struggling.

Willow was given no indication of an issue from her daughter and there is no guarantee checking in more would have revealed any issues. The totality of the circumstances must be examined. Willow provides Buffy with resources to support her basic and special needs. Willow is open to and cooperative with Child Protective Services and indicated she is willing to take suggestions for help. Admitting to struggling with mental health as a parent, especially after the loss of a sibling, is not alone evidence of child neglect. This Court should reverse the finding against Willow for child neglect.

2. Willow Rosenburg Placing Trust in Her Brother to be Present for Buffy when She was Working was not a Failure to Supervise her Child.

Willow has limited options for supervision of Buffy while at work after the loss of her sister. Asking her brother to be present at her home does not consist of a failure to supervise her child. Willow was aware of the Uncle's authoritative parenting style and was never given any indication by Buffy that she should be concerned about the time spent with her Uncle.

a. Authoritative Parenting is not Evidence of Child Abuse.

Authoritative parenting is not evidence of abuse just because it is no longer the most common parenting style. It is not the job of the court to assume the role of a surrogate parent. *In re Hofbauer*, 419 N.Y.S.2d 936 (1979) (Deciding in the context of medical neglect the inquiry is not posed in absolute terms of whether the parent has made the "right" or "wrong" decision). The expectation of parents changes over time. Consequently, holding parents to certain styles of parenting creates an unjust bias. Across the world cultures parent differently, and the same is true in the United States as a heterogeneous society. "Supervision is uniquely a matter for the exercise of judgment." *Holodook v. Spencer* 36 N.Y.2d 35 at 50 (1974). Parents should be allowed to use their best judgment to support their child development. *Id.*

The Court should be looking only for the minimal requirements of parents to ensure the safety of the child. Even that expectation has differed through the years, it has before been said, "a parent has no legally enforceable duty to supervise his children." *Russo v. Osofsky*, 112 A.D.2d 926 (N.Y. App. Div. 1985) (citing 36 N.Y.2d at 35). The opposition argues that never questioning the authoritative style of parenting is evidence of her failure to supervise. However, the Mother was aware and supported authoritative parenting and believed it would help with her outbursts and help her learn right from wrong. There was good reason to think an authoritative approach was helping Buff. Authoritative parenting, while it may no longer be the most common today, is not alone a sign of abuse.

b. Willow was Never Put on Notice of Physical Discipline by the Uncle.

Where there are no specific supervision requirements, a pattern of behavior must be established before any inaction should be considered neglectful under failure to supervise. In the

Matter of United Helpers Care, Inc v. Molik, where there was no statutory or policy indicating a duty to supervise residents of a special needs facility there could not be neglect for a failure to supervise without notice. *Matter of United Helpers Care, Inc. v. Molik*, 164 A.D.3d 1029 (N.Y. App. Div. 2018) (analyzing Social Services Law § 488(1)(h), the lack of a requirement for staff to be present in the living room when residences were congregated). It wasn't until the center was "on notice" of the pattern of behavior exhibited by the resident after the third incident of sexual misconduct that it was considered a failure to ensure appropriate supervision that constituted neglect.

In the current case, the Mother was not on notice of the physical discipline from the Uncle, but only aware of the incident that resulted in the call to the Agency. When the Agency explained the situation, she was highly upset, and she consented for Buffy to be placed in foster care. Willow never had the opportunity to act in response to any disciplinary pattern before the call, and therefore should not be considered neglectful for failing to prevent any physical discipline by the Uncle. This court should reverse the order finding Willow to have committed child neglect; inaction should only constitute neglect where the party recognizes a risk.

3. There is No Causative Connection Between any Lack of Supervision and the Accused Neglect.

There is no evidence that Willow's action or omission resulted in an imminent danger to Buffy's physical, mental, or emotional condition. Inference of a risk is insufficient to find neglect. In *Christopher K*., when determining if the mother was neglectful the case was dismissed due to a lack of causal connection. *Matter of Christopher K*., 2007 N.Y. Misc. LEXIS 3893 (N.Y. Fam. Ct. 2007) (Deciding no power in the house, missed doctor appointments for the diabetic child and a

letter from medical providers stating the child has an imminent risk of hospitalization due to dangerously high glucose levels were not enough to show awareness of immediate danger for the children by the mother). Where there isn't any evidence of a connection between a parent's act or omissions and possible harm they cannot be responsible for any imminent danger. *Id.*

Here, Willow had no reason to think there was an imminent danger. Buffy had supervision throughout her day, and a counselor at school. Nor can it be proven that if she had checked in with Buffy more often, Willow would have been aware of this danger or able to prevent it. Buffy had already lied to Willow about her bruise from the Uncle's discipline. There is no indication Buffy wouldn't have lied if directly asked by her mother. Buffy was struggling to trust people and currently doesn't feel close to her Mother after the death of her beloved Aunt Kendra. There is no evidence Buffy made any attempts to tell her mom how she was feeling, and the school counselor Buffy was seeing multiple times per week did not indicate any trouble either.

Any change in behavior in Buffy could have been easily seen as grief by Willow, who was struggling with the loss of Kendra herself. Willow has cooperated and tried to do what is best for her entire family. Had Willow been aware sooner of how Buffy was feeling or that she was suffering, she would have addressed the situation immediately. Willow's actions have always had the best interest of Buffy in mind and there is not enough evidence to show any connection between her actions or omissions and any possible abuse. This court should reverse the Third Appellate Division, and reinstate the Family Court decision.

B. Buffy's Best Interest is to Remain with her Mother, They Have a Special Bond and Love Each Other.

This is a family suffering great loss from the passing of parents and sister. They need support to help raise Buffy and should be given that support over taking Buffy away from her

family. Buffy feels unloved and forcing her to live with anyone other than her Mother for any extended period would increase that feeling. Buffy and her family have not had a chance to come together and allow the Mother to check in and see what needs to be changed for Buffy. Buffy is not in imminent danger with her Mother, who has taken immediate action to ensure Buffy is treated correctly and has the resources she needs. The Mother is willing to work on her mental health to be better for Buffy.

When deciding if the Child should return home to her mother and uncle's care, this Court should consider the child's best interests. In *Matter of Wunika A. (Wilda G.)*, the Kings County Family Court found that the harm of continued removal was greater than any risk of a return home and it was in the best interests of the children to be released back to the legal care and custody of their parents. *Matter of Wunika A. (Wilda G.)*, 58 Misc 3d 564 (N.Y.Fam. Ct. 2017). The Mother has testified that she will address the problems Buffy has with her feelings of not being loved and also her relationship with her Uncle. The Uncle has testified that he never wanted to use physical discipline. There is no reason to expect Buffy is in any danger after the Uncle is told to no longer use any physical discipline. Buffy is not in any imminent risk with her family.

If imminent risk to the child might be eliminated by other means besides separation from the Mother and the Uncle, such as providing social services to the family, these avenues should be explored first. Buffy lost her aunt, and in turn her mental health worsened. Surely it would be an injustice to take a grieving child away from the only family she has left by a protective order or otherwise. The Child should be placed in the care of her family, where they can supervise her properly, and work through this current matter in a way that shows her they all love and care for her. One of the primary objectives of the New York Family Court is adherence to the One Family, One Judge principle. By removing the Child from her family, the opposite of the Court's objective

would be achieved, and it would not be in the best interest of the child. This Court should reverse Third Appellate Division decision, and reinstate the decision of the Family Court, allowing this family to be together again.

II.

A. The Non-Exhaustive Factors of *Yolanda D.* are Narrow and Prohibitive for Consideration of the Totality of the Circumstances.

The Third Appellate Division fails to consider the entire situation in its application of the *Yolanda D.* factors. "Determining whether a particular person has acted as the functional equivalent of a parent is a discretionary, fact-intensive inquiry which will vary according to the *particular circumstances* of each case." *In re Yolanda D*., 651 N.Y.S.2d 1, 4 (1996) (emphasis added). Factors for consideration include "the nature and extent of the control exercised by the respondent over the child's environment, the duration of the respondent's contact with the child, and the respondent's relationship to the child's parent(s)." *Id*. "[These] are *some* of the variables which should be considered and weighed by a court in determining whether a respondent fits within the catch-all category of [§3523(g)]." *Id* (emphasis added). "*The factors listed here are not meant to be exhaustive*, but merely illustrate some of the salient considerations in making an appropriate determination. The weight to be accorded each factor will, of course, be dependent on the circumstances of the particular case." *Id* (emphasis added).

The instruction from the *Yolanda D.* Court is clear. Consideration beyond these factors, and of the entire record is necessary to effectuate justice. Because the *Yolanda D.* Court provides non-exhaustive factors, jurisdictions following that precedent should consider a totality of the circumstances as the fifth factor. The Third Appellate Division does not extend its gaze beyond the

factors when considering whether the Uncle is a "person legally responsible" for the Niece. Because the totality of the circumstances were not considered, a just resolution has not been reached.

1. Finding a Party as a "Person Legally Responsible" Should be Done with Caution.

Assigning a non-parent, or someone not legally appointed guardian, of a child extends both the rights and liabilities of that person. "A person who is deemed legally responsible for the care of a child is invested not only with responsibilities, but with certain rights." *Matter of Erica H.-J. (Tarel H.—Eric J.)*, 216 A.D.3d 954, 965 (N.Y. App. Div. 2023) (dissent). Those include the right to have the child released to them, to obtain an order of protection on the child's behalf, notification if the child is taken into custody, and have the child released into their care. *Id*. "A finding that a party qualifies as a person legally responsible for the care of a child should be made with circumspection." *Id*.

The Uncle has made it clear. He does not want to be a "person legally responsible" for his Niece. He is not particularly close to his Niece. The Uncle made a promise to himself that he would never have children. He even despised the fact that he had to take care of his Niece. And most importantly, he does not view his relationship with her as a parent/child relationship. When a person does not want to have an obligation to a child that is not theirs, does not feel close to the child, and does not view it as a parent/child relationship, a court should not statutorily prescribe them as a functional parent.

Without the unfortunate passing of the Uncle's wife, he would never have to consider whether he was a "person legally responsible" for his Niece. While literally trapped by circumstance, the Uncle has been branded with this label. The connotations associating a "person

legally responsible" to parenthood or guardianship do not define the relationship that the Uncle has with his Niece. He had no intention, or desire, to assume a parental role. The responsibilities imbued on the Uncle by the Third Appellate Division do not reflect his intention, purpose, or the reality of the relationship. Therefore, this Court should reverse the Third Appellate Division decision, and reinstate the decision of the Family Court.

2. Examining Cases Beyond the *Yolanda D.* Factors Allows for a More Just Outcome.

Application of balancing factors inherently constrains judges to those factors when making a decision, even when the court recognizes the factors to be non-exhaustive. The *Yolanda D.* factors are non-exhaustive, but illustrative of salient considerations. 651 N.Y.S.2d at 4. Because the inquiry is fact-intensive, the purpose of the inquiry should look to the totality of the circumstances. The factors should be considered as a starting point.

Admittedly, the Uncle is present at the Mother's residence on a regular basis. Supervision of his Niece was limited to ensuring she got on and off the bus safely and supervising her until the Mother returned from work. He never offered to assist his Niece with homework, play with her, or talk to her much at all. While the frequency of their contact could be sufficient for the first *Yolanda D.* factor, the nature of the contact is atypical of a parent/child relationship. This situation is more akin to supervision.

The second *Yolanda D.* factor weighs the "nature and extent of control exercised by the respondent over the child's environment." 651 N.Y.S.2d at 4. The Third Appellate Division does not address this factor in their decision. The Uncle does not reside with the Mother and is only at the Mother's home when he is supervising his Niece. There is no indication from the record that he

ever had lived with the Mother or the Niece. The record does not indicate that any chores, decorating, caretaking, or other activities of a typical home resident are performed by the Uncle. The Uncle does not have domain over the environment and is merely there is a supervisory role.

The Third Appellate Division avoids the third factor, which considers "the duration of the respondent's contact with the child." *Id*. The Uncle and Mother's sister Kendra passed away at some point in 2022. Prior her passing, Kendra was the primary childcare provider for the Niece. Following this tragic event, the supervision of the Niece fell on the Uncle because the Mother had no one else to help her. Trapped by circumstance, the Uncle has supervised the Niece for at least a year. Because there is no alternative for the Mother, this factor should carry little weight. It can be suggested that the factor was avoided because of the death of Kendra, "shoehorning" the Uncle into supervision without alternative, and therefore the factor does not matter.

Finally, assigning value to the biological relationship between the Uncle and the Mother creates a legal fiction of the Uncle's responsibility for the child. Under the fourth factor, considering "the respondent's relationship to the child's parent(s)," the Third Appellate Division reasons that "in most circumstances with family members, even if they do not live directly in the house with the child, they are considered persons legally responsible." (R. at 25.) This logical leap fails to work in tandem with the other factors, and most importantly the totality of the circumstances. Assigning the Uncle as a "person legally responsible" based on the biological relationship with the Niece sets a broad authority for the Family Court. No threshold is given.

A reviewing court needs to look beyond the factors of *Yolanda* D. Determination of a whether a person is a "person legally responsible" needs to focus on the totality of the circumstances. The Uncle does not consider his relationship with the Niece as a parent/child relationship. He has never wanted children of his own. He acts in a mere supervisory role for his

Niece because there is no one else who can. This situation arose because his sister passed away, and the Mother has no one else to watch the Niece. The Mother does not have the financial stability to afford a babysitter for the Niece. The Uncle does not live in the home with the child. This is a situation which no one wanted. The totality of the circumstances shows that the Uncle never intended to be a "personal legally responsible," but the Mother only has the Uncle to rely on.

The State of Sunnydale Court of Appeals should reverse the Third Appellate Division and reinstate the Family Court decision that the Uncle is not a "person legally responsible" for his Niece.

3. Dissenting Opinions in Recent Cases Demonstrate that Judges Have Been Critical of the Reasoning by Courts when Assigning a "Person Legally Responsible".

The limited *Yolanda D.* factors have allowed courts to statutorily assign "person legally responsible" status even though the connection is attenuated. "[Person legally responsible] should not be construed to include persons who assume fleeting or temporary care of a child such as a supervisor . . . or those persons who provide extended daily care of children in institutional settings." *Matter of Trenasia J. (Frank J.)*, 25 N.Y.3d 1001, 1004-1005 (2015) (citing *Yolanda D.* at 4-5). "[E]ven where the party is a member of the same household as the child, the party will not be found legally responsible if there is no proof that the party "acted in a parental role." *Erica H.-J.*, 216 A.D.3d at 965 (dissent). See generally *Matter of Zulena G. (Regilio K.)*, 107 N.Y.S.3d 99 (2nd App. Div. 2019) (demonstrating that supervision of a child is not the functional equivalent of a parent).

The dissenting opinion of *Trenasia J.* demonstrates a willingness of judges to review the late 1900's precedent of *Yolanda D.* analysis of a "person legally responsible." In that case,

Yolanda went for a sleepover at her aunt's house. 25 N.Y.3d at 1003. The mother expected the aunt to be the main supervisor of the child. *Id* at 1005. Frank J., the uncle, was expected to supervise the child if the aunt was not there. *Id* at 1005-6. The majority found that the uncle was a "person legally responsible" for the child, but the dissenting judge disagreed. *Id* at 1007. Specifically, the majority failed to consider the uncle's actual responsibilities for the child. *Id*. The facts establish that there was no relationship between the uncle and the niece that mirrored a parent/child relationship. *Id* at 1008. The biological connection between the uncle and the niece is not determinative, and if it was, there would be no need to analyze the other *Yolanda D.* factors. *Id* at 1009.

Similar to the *Trenasia J.* dissent, the Third Appellate Division fails to consider the actual responsibilities of the Uncle in this case. Those responsibilities are minimal. Supervision while the Mother is at work, and making sure the Niece gets to and from the bus stop on time. The record is void of a litany of responsibilities imposed by the Mother on the Uncle. If this Court affirms the Third Appellate Division it will expand the definition of "person legally responsible," and it will be difficult to cabin in. Creating precedent that relies on such attenuation will allow a broad range of possible, court assigned, responsibilities to constitute statutory liability. A mere supervisor cannot reach the intimate level of a parent/child relationship.

Similarly, the dissenting opinion in *Erica H.-J.* grapples with the majority's willingness to find a "person legally responsible" merely through the person's connection with the parent. The respondent, girlfriend of Erica H.-J.'s father, appealed the Family Court's decision that she was a "person legally responsible." 216 A.D.3d at 956. The child stayed overnight at the father's home, with the respondent present, and was returned to the natural mother the next evening. *Id* at 954. The majority accepted the Family Court's reasoning that the respondent was a "person legally responsible" when the abuse occurred under the theory of res ipsa loquitor. *Id* at 956. The dissent

rebuked the decision, criticizing the willingness of the Court to assign statutory liability so easily against the respondent. *Id* at 965. Specifically, that the respondent's supervision of the child was "fleeting" and she did not exercise control over the child's environment. *Id* at 964. Further, a finding that a person is legally responsible should be made with circumspection. *Id* at 965. Attenuation between situational temporary supervision and finding a "person legally responsible" should give a court pause. *Id.*

As with the *Erica H.J.* dissent, assigning the Uncle as a "person legally responsible" for the Niece should be done with circumspection. The Uncle was a mere supervisor who did not live in the same household as the Niece. Bound by circumstance, the Uncle's supervision is fleeting. Failure to consider the totality of the circumstances has led to injustice. Looking beyond the rigid factors of *Yolanda D*. is a necessity as the analysis requires a fact-intensive inquiry. The *Yolanda D.* Court explicitly states that "the factors listed here are not meant to be exhaustive." 651 N.Y.S. at 4. By limiting the scope of the inquiry to the factors a court's decision is arbitrary. This Court should reverse the decision of the Third Appellate Division and reinstate the decision of the Family Court.

B. The Lower Court Incorrectly Concluded the Uncle's Discipline Met the Excessive Corporal Punishment Threshold Defined in New York Statutory Law.

Under New York law, "a single incident of excessive corporal punishment may suffice to sustain a finding of neglect. *Matter of Thaddeus R. (Gabrielle V.)*, 198 AD3d 901, 902 (N.Y. App. Div. 2021). Here, the discipline used by the Uncle was not excessive corporal punishment when observing this case in its entirety. Corporal punishment is defined as "the deliberate infliction of physical pain by hitting, paddling, spanking, slapping, or any other physical force used as a means

of discipline." *Harrison v Harrison*, 2020 N.Y. Misc. LEXIS 7841 (N.Y. Sup. Ct. Oct. 20, 2020). One must have used excessive corporal punishment to violate New York law. Furthermore, "there must be evidence in the record that a child's emotional health was impaired on a protracted basis." *In re Johannah "QQ"*, 266 AD2d 769, 770 (N.Y. App. Div. 1999). Admittedly, the Uncle used means of physical force when disciplining his niece. In New York, corporal punishment is allowed as a means of discipline. However, the force used by the Uncle clearly does not reach the threshold of "excessive" as used in Sunnydale Statute §3523(f)(i)(B), and the Child did not suffer emotional distress.

1. The Discipline Used by the Uncle Did Not Meet the Threshold of Excessive Corporal Punishment Under New York Law.

Under New York law, the discipline used by the Uncle did not meet the threshold to be classified as "excessive corporal punishment." There is no clear definition of excessive in Sunnydale Statute §3523, however, there must be an assumption made that the circumstances of the punishment must be considered when determining if it is excessive.

First, this Court should turn to the opinion in *Matter of Yahmir G. (Tanisha N.)*, 2015 N.Y. Misc. LEXIS 3061 (N.Y. Fam. Ct. Aug. 7, 2015). Ultimately, the Bronx Court denied the 1028 motion to return the children home from foster care. However, this Court should refer to the analysis used by the lower court when they concluded that kicking a child in the shoulder did not qualify as excessive corporal punishment. Although the court found credible evidence of the mother kicking her child, there was no basis for finding the discipline was excessive. There was no testimony regarding the amount of force used, the number of kicks, whether it was intended for the shoulder, or what was done or said at the time of the incident. Under those circumstances,

excessive corporal punishment could not be supported by a preponderance of the evidence. *Id* at 9.

Similarly, when the Niece visited the school nurse on May 23rd, 2023, there was no testimony regarding her injury.[1] She experienced soreness on her left side and when her shirt was lifted, the Niece had a yellow bruise that took up all of the left side of her chest and torso area and was especially prominent on her ribs. *Yahmir G.* is not binding authority, and this Court should disregard the Bronx court's opinion. However, the Bronx Court's analysis should be followed in this case. Corporal punishment is not excessive if it cannot be supported by a preponderance of the evidence. Like *Yahmir G.*, there is not enough testimony here to find that the discipline used by the Uncle was excessive. Despite her bruises being clearly visible, there is no testimony able to describe the force used to produce the Niece's injuries. If this Court were to disregard the rationale used in *Yahmir G*., this incident still would not reach the excessive threshold established in New York. This episode of discipline by the Uncle is isolated, and there has not been an established pattern of excessive corporal punishment.

In the opinion of *In re J.E.*, 2022 N.Y. Misc. LEXIS 502 (N.Y. Fam. Ct. Feb. 7, 2022), the Bronx court found that the petitioner failed to meet their burden in proving that the respondent

[1] While not directly at issue in this appeal, the Family Court erred when overruling the objection to the Nurse's testimony regarding the Niece's injury. FRE803(4) is an exception to hearsay, allowing statements that are made for – and reasonably pertinent to – medical diagnosis or treatment; and describes medical history; past or present symptoms or sensations; their inception; or their general cause. However, the rule has been interpreted to exclude statements from medical professionals that do not concern diagnosis and treatment. See *Williams v. Alexander*, 309 N.Y. 283 (1955) (instructing that narration of the accident causing the injury is not germane to diagnosis or treatment.); see also *United States v. Tome*, 61 F.3d 1446 (10th Cir. 1995) (identifying the assailant is unnecessary for diagnosis or treatment); *Green v. Cleveland*, 83 N.E.2d 63 (OH Sup. Ct. 1948) (recording statements describing the cause of an accident is not the business of a medical provider); *Giles v. California*, 554 U.S. 353, 376 (2008) (holding statements to physicians are excluded by hearsay rules). The Niece's statement to the nurse should have been excluded.

mother neglected her child by a preponderance of the evidence. When "previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect. "Any other evidence tending to support the reliability of the previous statements, including, but not limited to the types of evidence defined in this subdivision shall be sufficient corroboration." *Id* at 4 (quoting Family Court Act (FCA) §1046 (a)(iv)). Corroboration of a child's out-of-court statement may come in proof that the parent abused or neglected one of his other children; proof that injuries would not ordinarily be sustained but for acts or omissions of the parent; proof of substance abuse by the parent; hospital or agency reports; evidence of the emotional health of the parent; admissions by the parents, even if recanted; and medical diagnosis of the child among others. *Id*. (referencing *In re Nicole V*., 71 N.Y.2d 112 (1987)).

The Niece told the Caseworker that her Uncle struck her in the cheek with a closed fist for talking back to him, and if anyone asked about her injuries, she was to tell that they came from a basketball game. Furthermore, the Niece states that she did not tell anyone about the incident due to fear of retaliation from her uncle. Like *In re J.E*., there was no corroborated evidence that could prove the Uncle was responsible for these injuries. Not only did the Niece fail to notify the proper authority of her injuries, but there is also no proof that there were bruises or marks from the alleged contact she received from her Uncle. This uncorroborated statement given by the Niece should be rejected by this Court and should not be found to establish a pattern of excessive corporal punishment by her uncle.

In its *In re Anthony C*., 201 A.D.2d 342 (N.Y. App. Div. 1994). opinion, the Appellate Division 1st Department ruled in favor of the law guardian and against the parents when there was sufficient evidence presented to prove neglect by a preponderance of the evidence. There was

evidence of scarring caused by admitted infliction of corporal punishment with a belt, which indicated a pattern of corporal punishment that exceeded the threshold of reasonableness and constituted conclusive evidence of impairment. *Id*.

Looking at the present facts, there is not enough credible evidence that can establish a pattern of the Uncle abusing the Niece. It has been shown that her testimony regarding the alleged bruise she received by her Uncle cannot be corroborated. While there is evidence of her ribs being bruised, this is only a single example of discipline being administered and the severity of said punishment is indeterminable. Furthermore, there are no permanent marks or impairments that inflict the Niece. This is analogous to *Anthony C.* and gives this Court a roadmap of how its decision should be structured. When viewing this case in its entirety, it is clear there is not enough credible evidence against the Uncle to prove the corporal punishment administered met the excessive threshold.

2. The Uncle's Discipline Did Not Impair His Niece's Emotional Health on a Protracted Basis.

Under New York law, the evidence contained in the record does not support a claim of neglect due to the Niece's emotional health being impaired on a protracted basis. "A neglected child is one less than 18 years of age whose physical, mental or emotional condition has been impaired as a result of the failure of the parent 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." *In re Johannah "QQ"*, 266 A.D.2d 769 (N.Y. App. Div. 1999) (quoting FCA §1012(f)(i)). The Appellate Court affirmed the lower court's decision and found a father guilty of neglect when he hit his child with a belt on an

on-going basis and inflicted several bruises. *Id.* Again, this Court should not focus on the ultimate opinion of the Appellate Court, instead this Court should focus on the rationale used regarding the child's mental health.

In *Johannah*, the Appellate Court references FCA §1912 (e), which says that a child is abused within the meaning of the statutory definition if a Family Court has found a parent had inflicted or allowed to be inflicted physical injury on the child which "causes … protracted impairment of emotional health." *Id*. The Family Court found that the child's ill feelings toward her father constituted protracted impairment to her emotional health. However, the Appellate Court came to the opposite conclusion and noted that while their relationship was "undoubtedly poor", there was no evidence in the record that the daughter's emotional health had been impaired on a protracted basis. *Id*.

"Protracted" should be given its dictionary definition and read to mean "to prolong in time or space." *Meriaam-Webster Dictionary (2022)*. Using this definition, the Niece's emotional health was not impaired on a protracted basis. The Niece and her Uncle's relationship began to suffer as time continued, and it seems that both parties became frustrated with one another. In her statement to the Caseworker, the Niece said she was going through an uncomfortable experience with him and recently became very scared of her Uncle. This fear is undoubtedly an example of a feeling that could impair a child's mental health. Despite these facts, this Court should pay attention to the language used in the Niece's statement on page 10 of the record. The Niece tells the Caseworker that her fear of her uncle was recent, which does not align with the conditions defined in New York Law, i.e., not protracted. Using the analysis of the *Johannah* court, this Court should find that the Niece's mental health was not impaired on a protracted basis. While the methods of discipline are disputable, this issue is not. There is not enough evidence provided in

the record to indicate that the Niece's mental health was impaired on a protracted basis. In light of the present evidence, it is clear that the Uncle's discipline did not qualify as "excessive corporal punishment" under Sunnydale Statute §3532(f)(i)(B) and this Court should disagree with the lower court's conclusion.

CONCLUSION

This Court should reverse the Third Appellate Division decision in this case and reinstate the decision of the Family Court. This Court should find that the Mother has properly supervised her Child. Parental expectations are fluid, and this situation should be viewed with lenity. There is no causal connection between the alleged lack of supervision and the abuse or neglect alleged against the Uncle. Any familial separation is not in the best interest of the Child.

It should also be found that the *Yolanda D.* factors are narrow and prohibitive of review under the totality of the circumstances. Under an expanded review, the Uncle is not a "person legally responsible" under the Sunnydale statute. Additionally, the discipline administered by the Uncle was not excessive. Because it was not excessive the Uncle did not abuse or neglect the Child for the purpose of the statute.

Therefore, this Court should reverse the Third Appellate Court decision, and reinstate the Family Court decision. The Mother did not fail to supervise her Child and the Uncle was not a "person legally responsible" for his Niece and did not abuse or neglect her. Should this Court decide to uphold the Third Appellate Division decision, we ask that the case be remanded to the Sunnydale Family Court for further proceedings to allow Respondents to enter a plea in abeyance so this family can be provided the social services it needs.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent-Appellant Brief was served upon the following on this 17th day of January, 2024:

Sunnydale County Child Protective Services

Respectfully Submitted,

/s/ Cordelia Chase

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