

No. 2058-5147

IN THE
State of Sunnydale
Court of Appeals

SUNNYDALE DEPARTMENT OF CHILD PROTECTIVE SERVICES,
Petitioner,

v.

ANGEL AND WILLOW ROSENBERG,
Respondent.

On Petition for Review from the Third Appellate Division, State of Sunnydale

BRIEF FOR RESPONDENT-APPELLEE

COUNSEL FOR RESPONDENT 74

QUESTIONS PRESENTED

1. Whether, pursuant to § 3253[f] of the Sunnydale Family Court Act, Willow's knowledge that her brother had an authoritative style of caretaking and that Buffy had seemed different after the passing of her aunt, is sufficient to find that Willow has failed to meet the minimum standard of care by allowing Angel to watch over her while at work.
2. Whether Angel Rosenberg is a "person legally responsible" for Buffy pursuant to § 3523(g) of the Sunnydale Family Court Act, and, if so, whether he inflicted excessive corporal punishment on Buffy amounting to neglect under § 3523(f).

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STATEMENT OF THE CASE

Willow Rosenberg is a 28-year-old woman who has raised her 6-year-old daughter, Buffy, as a single mother. R. 7. Willow grew up with financial difficulties, and despite being a single parent, has wanted to ensure her daughter never knows those same struggles. R. 16. To provide for her daughter, Willow works two jobs. For most of Buffy's childhood, Willow's sister, Kendra, supervised Buffy while Willow was at work. Willow's brother, Angel, would supervise Buffy only occasionally. R. 7. Because of his abusive upbringing, Angel does not want kids of his own. While he loves Buffy as his niece, he has always maintained a more distant relationship with her. R. 14. He testified that he assumed childcare responsibilities for Buffy out of love for his sister, whom he has been encouraging to seek therapy for help coping with the loss of her sister. R. 13.

When Kendra passed away in 2022, the vast majority of Buffy's childcare responsibilities fell to Angel. R. 7. Angel currently resides with a friend and is frustrated with his present situation: while he would do anything to help out his sister Willow, whose mental health issues have increased since her sister's death, he also never desired to be a child's primary caregiver. R. 14. Angel has been unemployed and living with a friend since 2021, and he does not own a car. Now, his responsibility for Buffy has frustrated his job search and career goals. R. 14. Furthermore, Buffy's life has changed drastically: due to a lack of transportation, she no longer participates in soccer or sees friends outside of school. This new isolation, coupled with Angel's unwillingness to form a close relationship with her, has made Willow feel sad and lonely. R. 10.

When Angel began supervising Buffy, he found it difficult due to her behavioral issues, which he partially attributes to Willow and Kendra's more lenient style of caretaking. Some of Buffy's behavior issues can be attributed to her Intermittent Explosive Disorder (IED), which

causes Buffy to have recurrent violent outbursts due to poor impulse control. R. 14. Angel felt it was his role to discipline Buffy, as he was frequently the only adult in the house. R. 14. At first, Angel tried to use harsh words and other nonphysical forms of discipline (like a one-hour-long time-out in a closet). However, he admitted to using physical force on two occasions. R. 8, 11. Willow testified that she knew Angel had an “authoritative style,” but believed he would never do anything to hurt his niece. R. 13. Angel has testified that he has struggled with anger issues in the past, but the details of these issues, and importantly, Willow’s awareness of them, were never established. There is no indication that Willow was ever aware of the harsh words or timeouts used on her daughter, and once the physical use of force against Buffy began, Willow was never told about this or witnessed it herself.

On the first occasion of physical force, where Angel allegedly punched Buffy in the face, Willow did take notice of a sign of harm. Willow saw a bruise on Buffy’s face and asked Buffy about what had happened. Buffy lied to her, saying that her face was bruised by a rebound basketball. R. 11. Almost a month later, Angel got physical with Buffy again. This time, he pushed Buffy down and kicked her in the ribs one single time after Angel refused to allow Buffy to go to a friend’s house and Buffy mumbled under her breath that she wished Angel had died instead of her Aunt Kendra. R. 12. Buffy had trouble walking and developed a bruise on her side. R. 12. The record indicates that Willow was unaware of this injury until the initiation of this suit.

Aside from these physical injuries, the record indicates no other harm to Buffy. Willow testified that Buffy has “seemed different” since her uncle had taken over her care, but believed this was a consequence of Buffy’s grief for her aunt. R. 13. Buffy has also been attending counseling sessions for her Intermittent Explosive Disorder, but it is unclear how these sessions have improved her behavior, if at all. R. 26. Willow testified that Angel taking over Buffy’s care

marked a turning point for Buffy, who is behaving better under his authoritative supervision. R. 13.

13. However, a case worker for the Agency reported that Buffy's outbursts had worsened. R. 10.

Upon being informed of what had occurred between Angel and Buffy, Willow was highly upset and consented to Buffy being temporarily placed in foster care. R. 8. However, she has also testified that she stands with her brother and hopes he continues to take care of Buffy in the future. R. 14.

SUMMARY OF THE ARGUMENT

Willow did not neglect Buffy. Buffy did suffer physical impairment but did not suffer emotional or mental impairment because her feelings of loneliness and being unloved did not rise to a level of severity that met clinical significance or limited her functionally. Although Buffy suffered minor physical impairment from her uncle's use of force, Willow was not neglectful in allowing Buffy to be cared for by him, because Angel was not an inappropriate caretaker nor a potentially abusive individual. Angel was not an inappropriate caretaker because he has shown himself to be a mentally competent person, and his financial struggles were remedied by Willow's earnings. Angel was not a potentially abusive individual to Willow at that time because she never witnessed the physical force, was never told of what was happening, and Buffy never displayed physical or behavioral signs of harm which should have uncovered the use of physical force. The only non-conflicted evidence of harm in Buffy is that, following the death of her aunt, she "seemed different" to Willow. R. 13. In the one instance where a physical sign of harm was present, Willow asked Buffy what had happened, but was told a reasonably believable lie.

Angel is not a person legally responsible (PLR) for Buffy's childcare, and, even if he were, he did not neglect Buffy through the use of excessive corporal punishment. Angel is not a PLR because he never maintained a parent-like relationship with Buffy, does not control Buffy's

environment nor desire to exert control commensurate with that of a parent, and has never fostered a meaningful relationship with Buffy. While Angel is Willow's biological brother, these blood ties do not make him a PLR for Buffy, especially considering Angel's adamancy about never wanting children of his own. Additionally, the Sunnydale Family Court's determination that Angel is not a PLR and should be dismissed from the proceeding should be afforded deference.

Even if Angel was a PLR for Buffy, he did not neglect her via excessive corporal punishment because it cannot be proven, by a preponderance of the evidence, that Buffy was actually harmed, Buffy is in imminent danger by remaining under Angel's care, and that Buffy's lessened emotional state is attributable to Angel's parenting style. While a child's "special vulnerabilities" factor into determining whether corporal punishment is excessive, Buffy's violent tendencies and poor impulse control, as confirmed by her Intermittent Explosive Disorder diagnosis, explain Angel's perceived need to get physical with her on two separate occasions.

ARGUMENT

I. THE MOTHER'S ACTIONS DID NOT CONSTITUTE CHILD NEGLECT

Willow's actions did not constitute neglect. Sunnydale Family Court Act § 3523(f) defines a "neglected child" as a minor child whose physical, emotional, or mental state has been impaired or is in imminent danger of becoming impaired as a result of the failure of their parent, or any other PLR, to exercise a minimum degree of care by "unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment or by any other acts of a similarly serious nature requiring the aid of the court."

Matter of Robert W. (Francine H.), 927 N.Y.S.2d 819 (N.Y. Fam. Ct. 2011). This statute is not intended to implicate merely undesirable parental behavior. *In re Javan W.*, 2 N.Y.S.3d 654, 655

(N.Y. App. Div. 2015) (citing *Nicholson*, 3 N.Y.3d 357, 368 (2004)). Although not explicitly stated in § 3523(f), we may reasonably assume that the Petitioners must show neglect by a preponderance of the evidence since New York’s substantially equivalent statute employs this same standard. *N.Y. Family Ct. Act § 1046(b)(i)*.

A. Buffy Did Suffer Physical Impairment, but Not Emotional or Mental Impairment

In New York, physical impairment is defined as ‘a state of substantially diminished physical growth, freedom from disease, and physical functioning.’ *N.Y. Family Court Act § 1012(h)*. The case at hand does involve physical impairments such that Buffy was bruised on her side and had difficulty walking. R. 8. Impairment of emotions and mental condition is defined as “a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including ungovernability or habitual truancy...” *Sunnydale Family Court Act § 3523(h)*. Buffy has not faced substantially diminished psychological or intellectual functioning. The extent of Buffy’s emotional and mental impact from the changes in her care is limited to feeling “very lonely[,]” feeling unloved and a potential worsening of her emotional outbursts. These negative changes fail to reach the requisite level of severity.

For a finding of emotional or mental impairment, the severity of change often must rise to a clinically significant level or impair the child’s ability to function in life. In *Matter of Faridah W.*, the child described similar feelings of being uncared for. In that case, however, not only did the mother exhibit far greater disregard for her child, but the finding of emotional impairment was not predicated on the child’s subjective experience alone. *Matter of Faridah W.*, 579 N.Y.S.2d 377, 378 (N.Y. App. Div. 1992). Instead, relevant to the court's decision was a

psychological evaluation indicating the child was developing depression and beginning to miss therapy appointments as her depression developed. *Id.* Just as in *Matter of Faridah W.*, the objective worsening of a mental condition, as confirmed by a trained mental health professional, led to a finding of emotional impairment in *Matter of Joyce SS.*, 651 N.Y.S.2d 995 (N.Y. App. Div. 1996) (Emotional impairment from worsening depression, budding signs of borderline personality disorder, and risk of progression into psychopathology.)

Similarly, a common line of cases involves imminent threat of emotional impairment from a parent's failure to seek proper mental health care for their child where there is an objective diagnosis. *See, e.g., Matter of Junaro C.*, 536 N.Y.S.2d 109, 110 (N.Y. App. Div. 1988) (Parent did not take child to residential psychiatric treatment when strongly encouraged to do so by providers); *Matter of Jessica R.*, 657 N.Y.S.2d 164, 166 (N.Y. App. Div. 1997) (Medical provider observed severe hyperactivity and possible lead poisoning and parent refused to treat); *In re Paul B.*, 698 N.Y.S.2d 137 (N.Y. App. Div. 1999) (Mother refused to cooperate in a treatment program for child's developmental delays and special emotional needs); *Matter of Ijeoma O.*, 706 N.Y.S.2d 196, 197 (N.Y. App. Div. 2000) (Mother neglected child who was emotionally disturbed by failing to get needed mental healthcare). These cases all differ in that the substantial diminishment, or imminent threat thereof, rose to a clinically significant level as confirmed by a medical professional. Buffy's feelings of loneliness and lack of affection are saddening, but fail to meet a level of clinical significance supported by a mental health diagnosis.

Further, these feelings of loneliness and lack of affection have not resulted in detrimental functional changes to Buffy's life. The *noscitur a sociis* statutory canon of construction tells us that associated words bear on each other's meaning. N.Y. Family Court Act § 1012(h) and

Sunnydale Family Court Act § 3523(h) expand upon the meaning of “substantially diminished psychological or intellectual functioning” by listing factors for consideration. All enumerated factors address changes in the child’s ability to live a functional life. *See N.Y. Family Ct. Act § 1012(h); Sunnydale Family Court Act 3523(h)*. In *Matter of Faridah W.*, these functional changes were observed in the child’s halted attendance at therapy. *Matter of Faridah W.*, 579 N.Y.S.2d at 379. In *Matter of Leif Z.*, a neglected boy was driven to violence in his home from constant beratement. *Matter of Leif Z.*, 421 N.Y.S.2d 290 (N.Y. Fam. Ct. 1980).

Buffy, alternatively, has not been limited in her ability to function in life by her feelings of loneliness and need for care. Buffy’s school attendance is consistent, and she has been seeking help with her grief through a school counselor. R. 7. The number of these counseling sessions has been limited by Buffy’s difficulty trusting others, but Petitioners have failed to allege this has any nexus to Willow leaving Buffy to the care of her uncle. Likewise, although Buffy no longer participates in soccer, this is not a consequence of her feelings of loneliness. Rather, this is a consequence of Angel’s difficulty obtaining a car since the loss of his job. R. 8.

Finally, there is conflicting testimony as to the severity, frequency, and causation of Buffy’s outbursts since the loss of her aunt. The caseworker stated that Buffy’s outbursts have become more severe and frequent. R. 10. However, Willow has testified that Buffy’s behavior has improved, and her outbursts have become significantly less frequent R. 13-14. The standard of review in the present case is “abuse of discretion.” *In re Sarah S.*, 806 N.Y.S.2d 448 (Fam. Ct. 2005). If the lower court determined that Buffy’s outbursts had worsened, this would go directly to the element of emotional impairment and presumably have been discussed in finding that Willow did not neglect her child. Because this potential discrepancy went unaddressed, it would be improper to make a factual finding as to the conflicting testimony. Nevertheless, even if Buffy

is found to have suffered emotional impairment through a worsening of her intermittent explosive disorder, it cannot be shown that this is “clearly attributable” to Willow leaving Buffy with her brother. *Sunnydale Family Court Act* § 3523(h). The caseworker’s testimony acknowledged that this potential worsening began after Buffy’s aunt passed away, meaning that it is just as likely that grief is at the root of any negative behavioral changes.

B. Willow has not Failed to Exercise a Minimum Degree of Care for Buffy

Under New York law, “minimum degree of care” is a “baseline of proper care for children that all parents, regardless of lifestyle or social or economic position, must meet.” *Nicholson*, 3 N.Y.3d at 370. “Notably, the statutory test is “minimum degree of care”—not maximum, not best, not ideal—and the failure must be actual, not threatened.” *Id.* This standard accounts for the child’s special vulnerabilities. *In re Sayeh R.*, 91 N.Y.S.2d 306, 315 (1997).

Petitioners allege that Willow has not met her minimum degree of care by failing to provide adequate supervision and guardianship. *See* R. 6. Cases involving inadequate supervision and guardianship may involve children being left unattended, *Matter of Christopher K.*, 841 N.Y.S.2d 818 (N.Y. Fam. Ct. 2007), left with an inappropriate caretaker, *Matter of Ishmael D.*, 202 A.D.2d 1030, 1030–31 (N.Y. App. Div. 1994), or left with a potentially abusive individual. *Matter of Elizabeth G.*, 255 A.D.2d 1010, 1012 (N.Y. App. Div. 1998). In any case, “it is well settled” that a parent may only be held accountable for the acts of a caretaker if they ‘knew or should reasonably have known’ that the child was in danger.” *Matter of Robert YY. [Mary ZZ.]*, 199 A.D.2d 690, 692 (N.Y. App. Div. 1993) (quoting *Matter of Sara X.*, 122 A.D.2d 795, 796 (N.Y. App. Div. 1986)).

The relevant categories of neglect are those in which the child has been left with an inappropriate caretaker or potentially abusive individual. Petitioners have not alleged that Buffy

was left alone for extended periods. The Third Appellate Division has not explicitly established whether Willow “should reasonably have known that the child was in danger.” *Matter of Robert YY. [Mary ZZ.]*, 199 A.D.2d at 692. Instead, the court simply found that Willow “... *has allowed* for her child to be put in a place of physical impairment” for the sole reason that she “knew her brother had a more authoritative style[.]” R. 25 (emphasis added). This holding ignores reasonability and thereby raises the standard for removal beyond the “minimum degree of care” in contradiction to *Nicholson*. 3 N.Y.3d at 368, 370.

C. Angel was not an Inappropriate Caretaker

Angel has faced professional and life challenges since the COVID-19 Pandemic. After being laid off from full-time employment, he moved in with a friend. Unfortunately, returning to work has been difficult without a driver’s license. These facts, however, do not establish that Angel is an inappropriate caretaker. Cases finding a child was left with an inappropriate caretaker involve far more apparent and serious deficiencies in the suitability of the caretaker.

In *Matter of Joseph DD.*, the neglectful parent left their child at a caretaker's residence which lacked running water, a working refrigerator, a working stove, and a front door. *Matter of Joseph DD.*, 624 N.Y.S.2d 476, 477 (N.Y. App. Div. 1995). Additionally, the caretaker was uneducated, and her primary source of income was redeeming discarded cans and bottles. *Id.* The parent did not provide the caretaker additional funds to ensure her child’s care. *Id.* Buffy, in contrast, was supervised at her own home and, thanks to Willow’s tireless work at two different jobs, has always been financially provided for.

Other cases of inappropriate caretakers involved caretakers who were absent from the home for extended periods. *In re Charisma D.*, 981 N.Y.S.2d 522 (N.Y. App. Div. 2014) (Caretaker had to leave the child unattended from morning until afternoon to receive methadone

treatment.) In the present case, despite Angel's lack of a car, Buffy has maintained regular school attendance and is consistently picked up from the bus stop. No other allegations have been made that Buffy has ever been left unattended. R. at 8. Finally, inappropriate caretakers have been found where they are known to be regular users of drugs or are otherwise mentally debilitated, or have been previously held as an inappropriate caretaker by a court. *See, e.g., In re Charisma D.*, 981 N.Y.S.2d at 522 (Caretaker used and kept illegal drugs in the house, and received methadone treatment); *In re Lashina P.*, 859 N.Y.S.2d 443, 444 (N.Y. App. Div. 2008) (Caretaker had mild mental retardation); *In re James C.*, 47 A.D.3d 712, 712-713 (N.Y. App. Div. 2008) (Caretaker had a known history of drug abuse and was previously determined by the Administration for Children's Services to be an inappropriate caretaker); *In re Synovia G.*, 558 N.Y.S.2d 539 (N.Y. App. Div. 1990) (caretaker was addicted to crack cocaine); *In re M.*, 357 N.Y.S.2d 354 (N.Y. Fam. Ct. 1974) (caretakers were "shady characters and barflies").

Finally, this proceeding has remained focused on Buffy's physical impairment. This impairment bears no relation to Angel's finances, residence, or means of transportation. The only consequences of Angel's difficulties in his personal life are that Buffy has not been able to continue playing soccer and has had trouble spending time with friends. R. 8. If Petitioners were to now rely on these consequences to argue mental and emotional impairment, it would go preposterously beyond the minimum degree of care owed to a child "regardless of lifestyle or social or economic position" to find Willow neglectful for leaving Buffy with a caretaker that lacks transportation. *Nicholson*, 3 N.Y.3d at 370.

D. Angel was not a "Potentially Abusive" Individual

As previously mentioned, the Third Appellate Division decided based on Willow's knowledge that Angel had an "authoritative style" that she had "allowed for her child to be put in

a place of physical impairment[.]” R. 25. Although not specifically categorized as a case of inadequate supervision for leaving the child with a potentially abusive individual, this is the most relevant line of cases. Again, prior findings that a caretaker was a potentially abusive individual have involved far more serious failures of the parent to protect the child from harm.

In many cases, the parent was directly informed of abuse by the child or another adult but continued to allow the abusing caretaker to watch over the children. *See, e.g., Matter of Elizabeth G.*, 255 A.D.2d at 1012; *In re Jennifer G.*, 261 A.D.2d 823 (N.Y. App. Div. 1999); *In Re Derrick*, 859 N.Y.S.2d 855, 857 (N.Y. App. Div. 2008); *In Re A.R.*, 764 N.Y.S.2d 746, 748 (N.Y. App. Div. 2003); *In re Amanda RR*, 740 N.Y.S.2d 485, 486 (N.Y. App. Div. 2002); *Matter of Daniel DD*, 142 A.D.2d 750 (N.Y. App. Div. 1988). In other cases, the parent lived with the abusive caretaker and saw the abuse firsthand. *See, e.g., Matter of Sharnetta N.*, 120 A.D.2d 276, 277 (N.Y. App. Div. 1986); *Matter of Kim HH*, 239 A.D.2d 717, 719 (N.Y. App. Div. 1997); *Matter of Trina Marie H.*, 422 N.Y.S.2d 659, 660 (1979).

In less clear cases, where a child exhibited clear behavioral signs of distress, this has led courts to decide that a parent neglectfully left their child with a potentially abusive individual. *See, e.g., Matter of Elizabeth G.*, 255 A.D.2d at 1011; *In re Jennifer G.*, 261 A.D.2d at 823; *Matter of Sharnetta N.*, 120 A.D.2d at 277. Likewise, neglect has been found where a parent was aware of physical evidence indicating harm but failed to inquire into the cause or ignored a clear possibility that the harm resulted from abuse. *See, e.g., Matter of Eric J., Jr.*, 223 A.D.2d 412, 413 (N.Y. App. Div. 1996) (Mother knew that eight-year-old child had unexplained vaginal discharge and older sibling exhibited promiscuous behavior toward the child); *Matter of Tania J.*, 147 A.D.2d 252, 257-258 (N.Y. App. Div. 1989) (Mother knew of medical evidence indicating sexual abuse, including gonorrhea, but continued to allow unsupervised caretaking

from the only male who had access to the child); *Matter of Scott G.*, 124 A.D.2d 928, 929 (N.Y. App. Div. 1986) (Mother failed to ask child about sexual abuse despite observing vaginal irritation).

Finally, a parent may be held liable for neglect where they have never been informed of abuse and the child shows no signs of distress, but the caretaker has a known history of abuse, violence, erratic behavior, or mental illness. *In re Lakshmi G.*, 110 A.D.3d 640, 641 (N.Y. App. Div. 2013) (caretaker was known to experience hallucinations, and threw the child to the pavement after a hallucination convinced her the child was “possessed”); *In re Olivia C.*, 97 A.D.3d 910, 912 (N.Y. App. Div. 2012) (caretaker had a pending criminal charge for sexually abusing his daughter); *Matter of Kasey C.*, 182 A.D.2d 1117, 1118 (N.Y. App. Div. 1992) (caretaker was a convicted sexual abuser who denied the prior crime, refused to seek treatment and kept the tools used in his prior abuse); *Matter of Carrie R.*, 549 N.Y.S.2d 230, 231 (N.Y. App. Div. 1989) (caretaker would get angry and threaten to hit the child).

The facts of this case, or rather the lack thereof, unambiguously show that Willow has not failed to protect her child from a potentially abusive individual. First, neither Buffy nor any adult ever informed Willow of what had been going on. Once Willow was finally apprised of what had been going on, she was “highly upset” and allowed for Buffy's temporary placement into foster care. R. 8. Second, Willow never witnessed the uncle’s actions firsthand. Third, Buffy did not show clear behavioral or physical signs which would reasonably lead a parent to discover abuse. Fourth, Angel did not have a known history of abuse or violence, and his “authoritative style” and “anger issues” cannot be categorized as erratic behavior or mental illness making him a potentially abusive individual. It is the third and fourth factual distinctions that warrant elaboration.

E. Buffy's Behavioral and Physical Signs of Distress are Insufficient for a Finding of Neglect

Willow testified that Buffy had “seemed different” since Angel had taken over childcare, but reasonably believed this was rooted in grief over Buffy’s aunt. R. 13. The record does not indicate that Buffy presented the clear signs of severe emotional distress found in prior cases, such as suicidality or panicked anxiety. *See, e.g., Matter of Elizabeth G.*, 255 A.D.2d at 1011; *In re Jennifer G.*, 261 A.D.2d at 823; *Matter of Sharnetta N.*, 120 A.D.2d at 277. Where some less severe behavioral changes are present, but a reasonable alternative explanation to abuse is accepted by the parent, this is insufficient to find the parent was neglectful. *See In re Zachary MM.*, 276 A.D.2d 876, 880 (N.Y. App. Div. 2000) (A child crying or acting more irritable from physical injuries would be similar to the behavior of a colicky infant.)

Buffy did at one point have a bruise on her face which Willow was presumably aware of. R. 12. However, the record implies that Willow did inquire into this injury but was lied to by Buffy. *Id.* As opposed to many cases where physical signs of abuse led to a finding of neglectfully leaving a child in the care of an abusive adult, this bruise was not a clear sign of abuse. In contrast, in *Matter of F. Children* and *Matter of Tania J.*, a small child had a sexually transmitted disease and physical signs of sexual assault; injuries which had no other reasonable explanation aside from abuse. *Matter of F. Children*, 178 A.D.2d at 246; *Matter of Tania J.*, 147 A.D.2d at 259. Here, the injury was much less dubious. Buffy, who has an interest in sports, told her mother she was bruised by a rebound basketball. This case is more similar to *In re Lucien HH.* 155 A.D.3d 1347 (N.Y. App. Div. 2017).

In *In re Lucien HH.*, the mother left her child with its father. The father, unbeknownst to the mother, had fractured the child's bones on more than one occasion. The court found that the mother was not neglectful in leaving the child with her father. The relevant facts to the court's

finding are mirrored in the present case. Before noticing the first physical sign of abuse, the mother “had not noticed anything unusual or concerning...” *In re Lucien HH.*, 155 A.D.3d at 1350. When the mother did eventually notice the redness and swelling caused by the father’s abuse, she reasonably believed that there was an innocent explanation. *Id* at 1352. Further, the mother “was cooperative throughout the investigation” and when she discovered the abuse “became visibly upset and cried.” As a final similarity, the court in *In re Lucien* acknowledged that they were making this determination even though the mother knew the father was angry with the children but overlooked the seriousness of his emotional state. *Id* at 1350.

F. Angel has No History of Abuse, Violence, Erratic Behavior, or Mental Illness

To begin, Angel has no history of violence or abuse. He has served as a caretaker along with Kendra without incident for the last 5 years. This conclusively disqualifies a finding of neglect under the precedent of *In re Olivia C.* where neglect was found for leaving a child with a caretaker who had a known history of violence or abuse.

Next, imposing liability on Willow for neglectfully leaving Buffy with a caretaker who has a known history of erratic behavior or mental illness would be equally unfounded. Angel testified that he had “always struggled with anger issues[,]” R. 14, but the record does not at all inform the court of the details of these supposed struggles, or indicate Willow’s level of awareness as to them. This critically bare testimony, especially as compared to the facts of *In re Lakshmi G.* and *Matter of Carrie R.*, is entirely insufficient to show that Angel was known to have erratic behaviors or mental illness. Importantly, what little insight the record provides into Angel’s mental state is positive. Angel, sympathetic to Willow’s grief, recommended to her that she seek the help of a therapist to deal with her problems; insight that indicates a sensitivity to psychological wellness and a soundness of mind. R. 13.

II. ANGEL ROSENBERG IS NOT A PERSON LEGALLY RESPONSIBLE FOR BUFFY AND SHOULD BE DISMISSED FROM THE PROCEEDING.

Angel is not a PLR for Buffy under the Sunnysdale Family Court Act § 3523(f) (“SFCA”).

A PLR is defined as “the child’s custodian, guardian, or any other person responsible for the child’s care at the relevant time.” *SFCA* § 3523(f). A PLR *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” and hinges on whether someone acted as the child’s “functional parental equivalent.” *Id.*; *In re Yolanda D.*, 651 N.Y.S.2d 1, 2 (1996).

This is a fact-specific inquiry that affords great deference to the Family Court’s judgment, which *must* be upheld unless its credibility lacks a “sound and substantial basis” in the record.

Montgomery Cty. Dep’t of Soc. Svcs. v. Michael N. (in re Andreja N.), 169 N.Y.S.3d 408, 411 (N.Y. App. Div. 2022); *Matter of Elijah AA. (Alexander AA.)*, 89 N.Y.S.3d 812, 814 (N.Y. App. Div. 2023). Angel’s circumstances make clear he is not a PLR and should be dismissed from this child protective proceeding. *Matter of Jonah B. (Riva V.)*, 85 N.Y.S.3d 597, 59 (N.Y. App. Div. 2018).

A. Angel Did Not Assume the Role of “Functional Parent Equivalent” Under Court-Proscribed Factors

Courts use the following factors to help determine an individual’s PLR status: (1) the frequency and nature of contact between respondent and child, (2) the nature and extent of control exercised by the respondent over the child’s environment, (3) the duration of respondent’s contact with the child, and (4) respondent’s relationship to the child’s parent(s), as well as any other relevant factors. *Matter of Trenasia J. (Frank J.)*, 10 N.Y.S.3d 162, 164 (2015). Angel did not assume the role of Functional Parent Equivalent because he (1) never pretended to act parental with Buffy, (2) does not control, nor desires to control, Buffy’s environment, (3) has

not had meaningful, parent-like contact with Buffy, (4) does not have a relationship with Buffy's mother that indicates responsibility for childcare.

1. Angel's Relationship with Buffy was Never Parental

Angel is not close to Buffy and has never wanted children of his own. R. 14. Unlike in *In re Yolanda D.*, where an uncle was deemed a PLR after testifying that his relationship with his niece was "close and familial," Angel's testimony made clear that he is not close with Buffy, nor does he regard their relationship as parental. 651 N.Y.S.2d at 2. Nor does Angel view himself, Willow, and Buffy to be a "family unit." While his concern for Willow's emotional well-being motivated him to temporarily assume a bigger role in Buffy's life, he never viewed Buffy warmly. R. 14. *Cf. Matter of Marjorie P. (Gerardo M. P.)*, 198 N.Y.S.3d 215, 217 (N.Y. App. Div. 2023) (respondent PLR considered his brother's family and himself "one big family.").

Angel's actions and Buffy's testimony underscore that Angel has never "parented" Buffy. The Third Appellate Division emphasized that Angel "dropped and picked up [Buffy] from school... [and] reprimand[ed] [her] over grades and other school manners" as evidence that he is a PLR, claiming Angel's perceived need to discipline Buffy as most compelling. R. 28. However, that Court merely stated that these are things "that a parental equivalent would do" without further explanation. R. 27. Babysitters, teachers, and other individuals who assume "fleeting or temporary" care of children and are not considered PLRs often help children with schoolwork, supervise them when legal guardians are unavailable, and discipline them.¹ Angel's historically distant relationship with Buffy indicates that his present, heightened role in her life is more akin to that of an extended babysitter. *Compare* R. 7 ("Willow attests that... Kendra... was

¹ See Zippia, *What Does A Babysitter Do?* (Aug. 22, 2023), <https://www.zippia.com/baby-sitter-jobs/what-does-a-baby-sitter-do/>.

Buffy's main source of childcare."); and *Matter of Elijah AA. (Alexander AA.)*, 189 N.Y.S.3d at 814 (respondent PLR "assisted the mother during her pregnancy" and "always planned to care for the child upon its birth...").

Buffy herself does not view Angel as parental. She told her caseworker that "the Uncle had *never* offered to help [her] with homework, played with her, or talked to her much, in general." (emphasis added) R. 11. She also told the Uncle that she wished he had died instead of her Aunt Kendra. R. 11, 12 Backtalk and conflict between Angel and Buffy are not dispositive of Angel's lack of PLR status, but the record is devoid of affirmative evidence that Buffy considered Angel as serving a parental role. *Cf. Matter of Ramsey H. (Benjamin K.)*, 953 N.Y.S.2d 693, 694 (N.Y. App. Div. 2012) (abused child called respondent "daddy" and exhibited other behaviors indicating parent-child relationship).

2. Angel Does not Control the Child's Environment nor Does he Desire to Exert Control

Courts heavily weigh an individual's control over a child's environment in determining PLR status. While babysitters found regularly within a household romantic partners of a child's custodial parent sometimes exercise environmental control commensurate to that of a parental equivalent, Angel has never done so. *See In re Jessica C.*, 505 N.Y.S.2d 321, 322 (Fam. Ct. 1986) ("PLR" does not include those unrelated to the family context performing childcare services outside of the household."). Angel has never resided in Buffy's apartment nor considered the dwelling his home. R. 7. While Angel spent a "great deal" of time at Willow's apartment, the record lacks indicia that Angel effectively lived there, or spent enough time there to control the environment therein. R. 7.

Angel's situation falls short of the environmental control exercised by respondents deemed PLRs in other circumstances. In *Matter of Gary J. (Engerys J.)*, a mother's live-in

boyfriend and father of two children in the same household was a PLR for the Mother's two older children. 62 N.Y.S.3d 499, 501 (N.Y. App. Div. 2017). Angel's situation is more analogous to *Matter of Zulena G. (Regilio K.)*, where the appellant deemed *not* a PLR was a cousin of the subject children who "resided with them for a period of time" but never exercised parent-like control over the environment, despite performing household chores "for the benefit of the entire family" and supervising subject child from time to time. 107 N.Y.S.3d 99, 101 (N.Y. App. Div. 2019).

Importantly, Angel has never desired to exert control over Buffy's home environment. When Angel lost his job due to the COVID-19 pandemic in 2021, he chose to move in with a friend instead of Willow, Kendra, and Buffy. R. 7. Angel's frequent visits to Willow's after Kendra's death do not amount to assumption of parental responsibilities. In *Matter of Marjorie P. (Gerardo M. P.)*, the children's paternal uncle was deemed a PLR because he resided in the same apartment with the children for *five years*, freely accessed the bedroom and common areas, and controlled the children's behavior with commands or the promise of gifts. 198 N.Y.S.3d at 217. Here, the record indicates that Angel has only *reacted* to Buffy's behavior and does not seek to proactively control how she spends her time. *See* R. 10. (Angel never helps Buffy with homework or plays with her).

The two environmental control cases on which the Third Appellate Division relied involve circumstances vastly different from those at present. In *In re Yolanda D.*, the child's maternal uncle was deemed a PLR because the child frequently visited the uncle *at his apartment* and *slept overnight* at his home several times. 88 N.Y.2d at 797. Similarly, in *People v. Carroll*, the respondent stepmother-deemed-PLR hosted the fatally abused child at her home and stood *in loco parentis* during the period when the child was fatally abused. 93 N.Y.2d 564, 570 (1999).

These cases share a common thread that Angel's situation lacks: their incidents occurred at the PLR's primary residence. Angel visiting Buffy's residence to occasionally supervise her is fundamentally different, and therefore should not amount to environmental control typically exercised by a parent. This, in tandem with Angel and Buffy's respective statements about their lack of closeness, also reveals that the duration of Angel's meaningful contact with Buffy (another factor considered by courts in PLR determinations) is brief or nonexistent. *See In re Jessica C.*, 505 N.Y.S.2d 321, 322 (Fam. Ct. 1986) (respondent regularly took care of the subject child for 15 months and on some days for up to 8 hours but was not a PLR).

3. Angel's Family Ties to Willow Do not Make him Automatically Responsible for Buffy's Childcare

Angel being Buffy's uncle doesn't automatically make him responsible for her care. This is underscored by N.Y. Family Ct. Act § 1012(g), which is textually identical to Sunnyvale's PLR statute. New York's Assembly Speaker assuaged concerns that § 1012(g) was overbroad by emphasizing that it was intended to "give the Family Court jurisdiction over cases in which a paramour is responsible for the abuse or neglect of a child."² The Court in *In re Jessica C.* (holding long-term babysitting not a PLR) understood that New York's PLR statute "is not intended to protect a child against any and all dangers produced in society." 505 N.Y.S.2d at 324. As such, Angel should not be legally responsible for Buffy's care.

B. The Family Court's Determination that Angel is not a PLR Should be Given Deference, Given the Totality of the Circumstances

PLR determinations are "discretionary, fact-intensive inquir[ies]" which will vary according to the particular circumstances of each case. *Matter of Trenasia J. (Frank J.)*, 10 N.Y.S.3d at 166. Family Courts' findings and determinations are awarded "great weight " on appeal because such courts "had the opportunity to observe the demeanor of the witnesses" and

² Statement by bill's sponsor, Assembly Speaker Perry Duryea, Jr., in a letter to Governor, May 25, 1972, Bill Jacket, L 1972, Ch 1015.

make certain determinations accordingly. *Matter of Natalee M. (Nathan M.)*, 66 N.Y.S.3d 58, 59 (App. Div. 3rd Dept. 2017); *Matter of Jaden J. (Ernest C.)*, 964 N.Y.S.2d 632, 634 (App. Div. 2nd Dept. 2013). In the present matter, the Third Appellate Division concedes that the lower court cited the correct case law and applied the appropriate factors in making its determination. R. 25, 26. While the Third Appellate Division disagrees with the Family Court’s analysis, a mere difference in opinion does not indicate that the Family Court abused its discretion, or that its determinations lacked a “sound and substantial basis in the record.” *Matter of Elijah AA. (Alexander AA.)*, 189 N.Y.S.3d at 814.

III. ANGEL DID NOT NEGLECT THE CHILD BY EXCESSIVE CORPORAL PUNISHMENT

Proving neglect via excessive corporal punishment (*SFCA* § 3523(f)) requires proving, by the preponderance of the evidence, (1) actual or imminent danger of physical, emotional, or mental impairment to the child, and (2) that the child’s impairment is a consequence of the PLR’s failure to exercise a *minimum* degree of parental care. (emphasis added) *Matter of Afton C.*, 926 N.Y.S.2d 365, 366 (2011); *Nicholson*, 787 N.Y.S.2d at 200. This is a highly discretionary, fact-intensive inquiry that considers the particular circumstances of each case, including the “special vulnerabilities” of the child in question. *In re Sayeh R.*, 670 N.Y.S.2d 377, 378 (1997). Often, a court’s determination hinges on whether it believes its aid and intervention are required. *In re Danielle M.*, 542 N.Y.S.2d 525 (N.Y. App. Div. 1st Dept. 1989).

A. No Pattern of Actual Harm or Imminent Danger to the Child

A parent has the right to use reasonable force to discipline a child and/or promote the child’s welfare when they see fit. *Matter of Matthew M.*, 970 N.Y.S.2d 271, 273 (App. Div. 2nd Dept. 2013). Angel’s use of force does not constitute neglect, especially in light of Buffy’s

violent tendencies and Intermittent Explosive Disorder (IED) diagnosis, because the preponderance of the evidence doesn't establish actual or imminent harm to the child. *Matter of Afton C.*, 926 N.Y.S.2d at 369. While Angel's conduct towards Buffy was undesirable on certain occasions, it does not amount to statutory neglect via excessive corporal punishment under the high bar established by N.Y. Family Ct Act § 1046(b)(i) ("any determination that the child is an abused or neglected child must be based on a preponderance of evidence").

First, Angel's actions do not constitute a pattern of neglect or abuse since he only got physical on two isolated occasions. *See In re Anthony "PP"*, 737 N.Y.S.2d 430, 431 (App. Div. 3rd Dept. 2002) (no neglect where no *pattern* of corporal punishment; respondent's anger issues insufficient evidence of neglectful tendencies); *c.f. In re Asia B. v. Gregory H.*, 699 N.Y.S.2d 88, 89 (App. Div. 2nd Dept. 1999) (neglect found where respondent hit a nonviolent child on the head repeatedly to "let her know I'm her father," resulting in imminent risk of protracted disfigurement). Angel also emphasized his use of physical force against Buffy was a last resort, underscoring no pattern of neglect. *C.f. In re Jerrica J.*, 770 N.Y.S.2d 171, 173 (App. Div. 3rd Dept. 2003) (respondent adamantly defended her physically harmful actions and stated, "I'm not neglectful.")

Second, Buffy's Intermittent Explosive Disorder (IED) explains Angel's decision to discipline via physical force. The Third Appellate Division cited *In re Sayeh R.*, which held that a child's "special vulnerabilities" should be considered in determining the correct "minimum standard of care." However, the facts of that case - which involve a child with depressive, not violent, tendencies - are inapplicable to Buffy's situation. 670 N.Y.S.2d at 381. Buffy's IED makes her a physical threat to both herself and others, explaining why Angel felt physical discipline was the only option. R. 14. *See In re Corey Mc.*, 889 N.Y.S.2d 647, 648 (App. Div.

2nd Dept. 2009) (respondent mother did not neglect son who was prone to violent outbursts when she hit him on face with heel of her shoe, bloodying his nose); *see also Matter of Crystal S. (Elaine S.)*, 902 N.Y.S.2d 623, 624 (App. Div. 2nd Dept. 2010) (neglect finding reversed because record indicated child was “out of control.”).

Neglect findings based on actual harm usually require proof of harm greater than Buffy’s “yellow, beginning to turn purple” single bruise.³ R. 8. In *Matter of Rodney C.*, a seven-year-old boy with emotional difficulties was found neglected because the respondent made him strip down to his underwear and then beat him repeatedly, leaving 26 “patently visible” marks on his body. 398 N.Y.S.2d 511 (Fam. Ct. 1977). In *Matter of Matthew M.*, a mother struck her daughter with a belt *numerous times*, causing *multiple* marks on her back and arms. 970 N.Y.S.2d at 273. In *Matter of Aaliyah Q. v. Rodney R.*, respondent bit child’s fingers repeatedly, breaking skin. 865 N.Y.S.2d 714, 716 (App. Div. 3rd Dept. 2008). Finally, in *Matter of Joseph C. v. Anthony C.*, a child was forced to hold himself in a push-up position and kneel on uncooked grains of rice for hours. 931 N.Y.S.2d 44, 46 (App. Div. 1st Dept. 2011).

The preponderance of the evidence similarly fails to demonstrate that Buffy is in imminent danger of injury or impairment. First, Angel testified that physical force was a last resort, suggesting that Angel is self-aware and not unnecessarily violent. R. 15; *see In re Corey Mc.*, 889 N.Y.S.2d at 648 (mother’s remorse at isolated use of physical force factored into court finding no neglect). Angel’s admittedly hot temper does not establish imminent harm to Buffy, especially absent a clear pattern of abuse. R. 15. *See In re Anthony PP*, 737 N.Y.S.2d at

³ While the Family Court’s determination that the Nurse’s testimony about Buffy’s bruise is credible, the Nurse’s description of the bruise as “yellow, beginning to turn purple” calls into question her medical expertise, as bruises turn yellow, not purple, as they heal. *See Medical News Today, What do the colors of a bruise mean?* (Accessed Jan. 9, 2024), <https://www.medicalnewstoday.com/articles/322742>

431(proof that respondent lost his temper occasionally does not constitute a basis for neglect); *c.f. Matter of Joseph O.*, 813 N.Y.S.2d 213, 214 (App. Div. 2nd Dept. 2006) (respondent had previously been arrested for endangering the welfare of a minor).

Other circumstantial evidence indicates that there is no imminent harm to Buffy. Willow and Buffy's residence was found to be well-kept and safe, suggesting a stable home environment R. 10.; *c.f. Matter of Katie R.*, 673 N.Y.S.2d 792, 794 (App. Div. 3rd Dept. 1998) (unsanitary living conditions in the home supported a finding of neglect). Additionally, Willow trusts Angel's ability to supervise Buffy and testified that he "would never seriously hurt Buffy on purpose." R. 13.

B. The Child's Emotional Impairment is Unrelated to Angel's Conduct

Excessive corporal punishment constitutes neglect only when a child's impairment is "clearly attributable" to the unwillingness or inability of a respondent to exercise a minimum degree of care toward the child. *N.Y. Fam. Ct. Act § 1012*. While Buffy's emotional health deteriorated after the death of her Aunt Kendra, her worsened mental state cannot be attributed to Angel's care. Willow testified that since Angel began taking care of Buffy, she has had significantly fewer outbursts. R. 14. While Buffy's case worker testified that Buffy's outbursts had gotten more severe, her testimony linked the increased severity to Kendra's death, not Angel's parenting. R. 10. While Buffy resents Angel's increased presence in her life and has let him know as such, lashing out is typical for a child grieving the death of a loved one (Kendra) and cannot be fairly attributed to Angel's parenting style.⁴ With no testimony nor psychological

⁴ When children lose loved ones, their anger is often misdirected at those closest to them. Angel, as the individual who spends the most time with Buffy, therefore logically bore the brunt of Buffy's misdirected frustration regarding her Aunt Kendra's death. See Good Grief, *CHILD GRIEF STAGES – THEY'RE NOT THE 5 YOU THINK* (Mar. 9, 2021), <https://good-grief.org/child-grief-stages-theyre-not-the-5-you-think/>

evaluation linking the inadequacies of Angel's parenting to Buffy's outbursts and comments, her behaviors are not "clearly attributable" to Angel's conduct. *See Matter of John O. v. Sharon Q.*, 839 N.Y.S.2d 605, 606 (N.Y. App. Div. 2007) (identical evidentiary deficiencies deemed insufficient to establish causation in neglect proceeding).

CONCLUSION

Willow is a hard-working single mother trying to ensure that her daughter, Buffy, is well provided for; all while grieving significant personal losses in her life. For five years her sister, and sometimes her brother, helped take care of Buffy. When her sister passed away, additional childcare responsibilities fell to Angel, her brother. Although Willow knew that Angel had an authoritative style of caretaking, there was no other well-established cause for concern.

While Willow pushed through her grief over her sister's death to continue providing for Buffy, Buffy and Angel struggled to adjust to their new status quo, especially because Buffy's violent tendencies and poor impulse control led Angel to escalate his disciplinary tactics, from harsh words to short timeouts in a locked closet to two instances of physical violence. However, Willow cannot be held liable for Angel's actions because she could not have reasonably known that Buffy was in danger. *Matter of Robert YY. [Mary ZZ.]*, 199 A.D.2d at 692.

Additionally, while Angel's conduct towards Buffy was certainly undesirable on certain occasions, it is not legally actionable because he is not a personal legally responsible (PLR) for Buffy's care as defined by § 3523(g) of the *Sunnydale Family Court Act*. Angel never wanted kids of his own, never acted as Buffy's "functional parental equivalent," and always maintained

a degree of distance between himself and his niece. Angel's openness about these things, as well as the Family Court's determination that he is not a PLR, should be afforded great deference.

Even if Angel were legally responsible for Buffy's care, his conduct does not amount to neglect via excessive corporal punishment because Angel's actions don't constitute a pattern of neglect, Buffy suffered minimal actual harm as a result of Angel's discipline, and Buffy is not in imminent danger of future harm. While Buffy's behavior has shifted recently, her new demeanor is not Angel's fault. Rather, Buffy is mourning the death of her beloved aunt Kendra and is coping in developmentally appropriate ways.