INDEX NO. 2058-2147

IN THE

SUNNYDALE COURT OF APPEALS

WILLOW and ANGEL ROSENBBURG,

***Appellants*,**

— against —

SUNNYDALE DEPARTMENT OF CHILD PROTECTIVE SERVICES,

Respondents.

On Appeal from the Sunnydale Third Appellate Division

BRIEF FOR APPELLANTS WILLOW AND ANGEL ROSENBURG

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QUESTIONS PRESENTED

I. Whether the State of Sunnydale, Third Appellate Division, correctly determined that Willow Rosenburg's failure to supervise her child constituted child neglect, as defined by Sunnydale Family Court Act § 3523(f).

II. Whether the State of Sunnydale, Third Appellate Division, correctly determined that Angel Rosenburg was in fact a "person legally responsible" for the subject child pursuant to § 3523(g) and whether in such role, he inflicted excessive corporal punishment upon the child constituting child neglect, as defined by the Sunnydale Family Court Act § 3523(f).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

STATUTES:

OTHER AUTHORITIES:

STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

Background. Willow Rosenburg ("the mother") is the single mother of her 6-year-old daughter, Buffy ("the subject child"). R. at 7. Willow's sister, Kendra ("the aunt"), and her brother, Angel ("the uncle"), helped take care of the subject child. *Id.* The aunt, the main source of childcare, passed away in 2022; the uncle then assumed primary childcare duties. *Id.* The uncle does not have a job nor a driver's license, preventing him from bringing the subject child to activities like soccer practice or play dates. R. at 8. The uncle usually walks the subject child to and from the bus stop on school days. *Id.*

The Agency's Testimony. On May 21, 2023, the Agency received a call from Sunnydale Elementary School's Nurse, who reported that the subject child had bruising throughout the left side of her torso and chest. *Id.* The Agency subsequently contacted the mother and completed an at-home inspection which showed that the mother's home met the minimum standard of care, but the mother's failure to supervise the subject child and the uncle's disciplinary measures did not. R. at 8, 10.

The Incidents Reported. The Agency Caseworker testified that the subject child reported her life becoming more difficult without the aunt and "started experiencing more severe and angry outbursts." R. at 10. The subject child reported that the uncle "never offered to help [her] with homework, play[] with her, or talked to her much." R. at 10-11. As the subject child's outbursts "started to get worse at home," the uncle, in response, used a variety of disciplinary measures including harsh words, temporary timeouts and physical discipline. R. at 11-12.

The Mother's Testimony. The mother knew the uncle was "authoritative" but noticed the subject child's behavior improved after the uncle assumed care. R. at 13. The mother testified that

her and her siblings' upbringing was strict and resulted in "physical punishment[,]" but vowed to not inflict the same punishment and believed the uncle would "never… hurt [the subject child] on purpose." *Id.* The mother knew the subject child was seeing a school counselor for "intermittent explosive disorder," which results in angry outbursts in defiance of all authority. R at 13-14.

The Uncle's Testimony. The uncle loves the subject child but does not view their relationship as one resembling a parent/child. R. at 14. Still, the uncle assumed childcare responsibilities to support the mother. *Id.* He primarily used harsh words and temporary timeouts as disciplinary measures. *Id.* Even though "he didn't want to" and "hated" doing it, he physically disciplined the subject child on two separate occasions, three weeks apart. R. at 11-12; 14.

II. NATURE OF PROCEEDINGS

Family Court. The Sunnydale Family Court found the mother exercised the minimum standard of care for the subject child, noting she did not know the extent of disciplinary measures used by the uncle. R. at 17. The Court found the uncle was not a "person legally responsible" ("PLR") for the subject child and thus lacked jurisdiction to consider the issue of excessive corporal punishment. *Id.*

Appellate Court. The State of Sunnydale Third Appellate Division Court decided the mother failed to supervise the subject child, thus neglecting the child, by allowing the subject child to be put in a place of physical impairment, resulting in unreasonable harm to her. R. at 25. The Court also determined the uncle was a PLR and further concluded that he inflicted excessive corporal punishment to the subject child. R. at 28.

SUMMARY OF THE ARGUMENT

The mother deeply cares for the subject child and works two jobs to financially support her. The Third Division erroneously concluded that the mother failed to supervise her child, thus

neglecting her. However, the Third Division fails to point to anything in the record tending to prove that the mother knew or should have known this conduct was occurring. In fact, the mother acted as a reasonably prudent parent by entrusting the subject child to the uncle after the aunt passed away. The mother surpassed the minimum standard of care required to negate a finding of neglect. She provided adequate housing, nutrition, ensured school attendance, coordinated proper supervision, and trusted an appropriate caregiver. While the mother may not have informed the uncle of the subject child's behavioral diagnosis, there was no indication on record that the behavioral diagnosis required a heightened standard of care. Additionally, the mother noticed that the subject child's behavior improved under the uncle's care.

Regardless of the foregoing, this Court has the power to enforce the "remedial, not punitive" purpose of the Sunnydale Family Court Act. Separating children from their homes increases the likelihood of various adverse outcomes (high rates of emotional, behavioral, and developmental problems; over-representation among welfare recipients, prison inmates, and the homeless). Instead of separating the family, this Court should instead order remedial measures it deems appropriate.

Additionally, the uncle, despite providing childcare to the subject child, is not a PLR. First, the current PLR test is unwieldy and requires overly subjective judicial assessments. On the same set of facts, the Family Court and Third Division Court reached opposite conclusions. The test should be more reliable to further judicial efficiency, foreseeability, and uniformity. The proposed parental responsibility test, which focuses on what constitutes parenting functions, would better determine if a person is a PLR. If this Court chooses to keep the *In re Yolanda D*. test, it should require appellate courts to only consider the same factors as the lower court. Allowing appellate courts to consider different factors than lower courts affords little to no foreseeability or uniformity.

Lastly, even if this Court determines the uncle is a PLR, his disciplinary measures fail to rise to the severity of excessive corporal punishment. This is a legal determination that must be reached by considering the severity of the injury, developmental stage of the subject child, manner of discipline utilized, and the chronicity or pattern of discipline. The physical disciplinary measures were not excessive corporal punishment because they were isolated, infrequent, in direct response to the subject child's tantrums, and were not enacted with the intent to inflict harm.

ARGUMENT

Standard of Review. The State of Sunnydale Third Division Court certified both questions to be heard on appeal. R. at 29-30. The Sunnydale Court of Appeals reviews these cases de novo. Hector D. Lasalle, *FAMILY COURT APPELLATE HANDBOOK*, Office of Attorneys for Children 1, 9, https://nycourts.gov/courts/ad2/ pdf/AFC_App_Handbook.pdf.

I. THE THIRD DIVISION COURT INCORRECTLY FOUND THAT THE MOTHER NEGLECTED HER CHILD BECAUSE HER ACTIONS DO NOT QUALIFY AS NEGLECT UNDER SUNNYDALE FAMILY COURT ACT § 3523 AND IT IS FURTHER IN THE SUBJECT CHILD'S BEST INTEREST TO REMAIN WITH THE MOTHER.

Sunnydale Child Protective Services' claim that the mother neglected the subject child cannot be sustained because there is a lack of evidence that the mother's conduct met the necessary legal factors to separate her from her child.

Sunnydale's Family Court Act § 3523 substantially follows New York's Family Court Act § 1012. A finding of neglect requires that (1) "a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired," (2) "the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" and (3) "there must be a link or causal connection between the basis for the neglect petition and the circumstances that allegedly produce the child's impairment or imminent danger of impairment." *Nicholson v.*

Scoppetta, 3 N.Y.3d 357, 369 (2004) (*see* Sunnydale Fam. Ct. Act § 3523[f]). The minimum degree of care depends on "whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances… taking into account the special vulnerabilities of the child." *In re Victoria XX.*, 976 N.Y.S.2d 235, 238 (App. Div. 3d Dep't 2013) (quoting *Nicholson,* 3 N.Y.3d at 370). The minimum degree of care also considers whether the parent "knew or should have known of the circumstances which required action in order to avoid actual or potential impairment." *In re Alaina E.*, 823 N.Y.S.2d 227, 230 (App. Div. 3d Dep't 2006).

The Third Division Court concluded the mother "failed to supervise her child as she has allowed for her child to be put in a place of physical impairment[.]" R. at 25. However, this conclusion was rooted solely in its determination that the uncle was an inappropriate caregiver without analyzing the mother's knowledge of what the uncle's "authoritative style" entailed. R. at 25-26. Further, the Third Division Court does not state why the mother's level of knowledge satisfied the Sunnydale Family Court Act nor does the Court provide any authorities addressing the specific question of the level of knowledge. R. at 25-26. The mother's knowledge does not satisfy the "knew or should have known" requirement. *In re Alaina E.*, N.Y.S.2d at 230.

At the heart of the Third Division's decision is a disagreement over a factual determination made by the Family Court "which [shall] not be disturbed absent a sound and substantial basis in the record." *Id.* Therefore, the focus of this Court should be whether (1) a reasonably prudent parent would have known or should have known the details of the uncle's disciplinary philosophy and (2) if a reasonably prudent parent in the same situation would entrust their child with their adult brother for care. Further, this Court should utilize its powers through protective orders to ensure a healthy parent-child relationship in accordance with the Sunnydale Family Court Act.

A. The Mother Did Not Know nor Should she Have Known, as a Reasonably Prudent Parent, That the Subject Child Had Been Impaired or Was in Imminent Danger of Becoming Impaired.

The factual record unequivocally reflects that the mother had no knowledge of the uncle's degree of disciplinary measures. The minimum degree of care analyzes whether a reasonably prudent parent in similar circumstances "knew or should have known" of the alleged danger. *Id.* Although the mother had minimal knowledge of the uncle's "authoritative" caregiving style, neither the Family Court nor the Third Division state that an "authoritative style" equates to neglect. *In re Israel S.*, the court held that the Agency failed to prove a "father observed or knew of the mother's use of excessive corporal punishment" which occurred when the child was entrusted in the mother's care. *In re Israel S.*, 764 N.Y.S.2d 96, 98 (App. Div. 1st Dep't 2003). It found no neglect on the part of the father because the punishment took place outside his presence. *Id.* at 98. Inversely, *In re Allana S.* found neglect when a babysitter verbally abused children in the presence of their mother and the mother failed to prevent further incidents. *In re Alanna S.*, 939 N.Y.S.2d 476, 478 (App Div. 2d Dep't 2012). The present case is like that of *In re Israel S.*, as the mother did not witness any of the disciplinary measures. By not witnessing any disciplinary measures, the mother, as a reasonably prudent parent, could not question if said conduct was appropriate.

The uncle does not have characteristics, personal history, or criminal convictions that would indicate he may inflict excessive corporal punishment or was an inappropriate caregiver. Thus, the mother, as a reasonably prudent parent, would entrust her daughter to the uncle or persons with similar attributes. *In re Jessica P.*, a mother was exposed to unwanted sexual advances by her stepfather and later entrusted her child to said individual which resulted in sexual abuse of the child. *In re Jessica P.*, 848 N.Y.S.2d 412, 413-14 (App Div. 3d Dep't 2007). The court found the

mother's conduct neglectful due to her knowledge of the stepfather's sexual history with children. *Id.* at 414. Here, the uncle did not display any signs that he would be anything other than a good caretaker for the subject child. *See In re Amber Gold J.*, 931 N.Y.S.2d 669, 671 (App Div. 2d Dep't 2011) (father left children in care of mother with known mental illness that affected ability to provide care); *In re Tylasia B.*, 901 N.Y.S.2d 84, 86 (App Div. 2d Dep't 2010) (caregiver intoxicated when trusted with children); *In re Alaina E.*, 823 N.Y.S.2d at 230 (children left unsupervised with known sexual predator).

The mother, as a reasonably prudent parent, would not have known, nor should have known, about the subject child's discomfort or anguish because the subject child did not disclose such to her. The Agency would rather punish this family than analyze the evidence available to determine if the mother should have been aware of the subject child's injuries on or before May 21, 2023. However, courts require evidence to show a parent did not meet the minimum standard of care. *In re Kevin T.*, 693 N.Y.S.2d 907, 911 (Fam. Ct. 1999) ("[w]hat the [Agency] disregards is the absence in the record of any evidence that the observable injuries indicated an immediate need of medical attention"). The Agency provides no reason to support the contention that the mother knew or should have known of a concealed injury or unreported discomfort and anguish. *See In re P. Child.*, 707 N.Y.S.2d 453, 455 (App. Div. 1st Dep't 2000) ("no showing that [father] had prior reason to know that the child was in danger, nor would it be proper to base a neglect finding upon his failure to take some action subsequent to the incident in question"). Therefore, the record does not support a finding that the mother failed to meet the minimum standard of care.

Other jurisdictions have recognized the same standard. *In re Welfare of T.P.*, the Minnesota Supreme Court reversed and remanded a termination of parental rights for neglect because "none of the district court's findings or conclusions specifically addresse[d] the 'knew or should have

known[.]'" *In re Welfare of T.P.*, 747 N.W.2d 356, 363 (Minn. 2008). The New Mexico Court of Appeals reversed a neglect finding because "none of the district court's findings" displayed that the mother "knew or should have known" of their child's injuries. *State ex rel. Children, Youth & Families Department v. Carmella M.*, 517 P.3d 284, 291 (N.M. Ct. App. 2022). The Illinois Court of Appeals remanded with instructions when a district court failed to state what evidence it used to establish a parent "knew or should have known that her selected babysitter was an unsuitable caregiver[.]" *In Interest of M.Z.*, 691 N.E.2d 35, 44 (Ill. App. Ct. 1998).

The Sunnydale Family Court determined that "[the mother] had no knowledge of the infliction of harm" and "that if she had known the child was suffering or felt uncomfortable, she would have addressed the situation immediately." R. at 17. In its reversal, the Third Division failed to qualify through a "sound and substantial basis" that the mother knew or should have known of the uncle's conduct. The mother had not seen the alleged conduct, was not informed of the subject child's anguish or discomfort, nor had any reason to suspect the uncle would act inconsistent with his positive attributes. Thus, the Family Court's factual findings should not be disturbed.

1. The mother acted as a reasonably prudent parent by entrusting her child to the uncle.

Because the aunt previously provided excellent care to the subject child, the mother believed the uncle would provide similar care. Courts have discussed the "length of time" parties have known each other and the "apparent closeness" of their relationship when examining whether someone may appear to be an appropriate caregiver. *Matter of Joseph "DD"*, 624 N.Y.S.2d 476, 497 (App. Div. 3d Dep't 1995); *see In re Kevin T.*, 693 N.Y.S.2d at 910 (court noted that "mother had no reason to believe that her husband of **two years** would injure their [child]") (emphasis added). The uncle asserted that he "loves" the subject child and "would do anything to help" the

mother. R. at 14. It can be inferred from the evidence that this was a strong family unit prior to the allegations of excessive corporal punishment, which would give the mother every reason to trust the uncle. Courts have gone as far to hold that a parent's significant other can be an acceptable caregiver even when an injury to a child results. *See In re Miranda O.*, 741 N.Y.S.2d 817, 818 (App. Div. 4th Dep't 2002) (mother's boyfriend neglected child in his care). Although the uncle's own childhood was "full of abuse," neither the mother nor the aunt ever exhibited actions that would cause the mother to think their childhood may influence how they discipline children. R. at 14. The mother, acting as a reasonably prudent parent, should have been able to rely upon her thirty-four-year-old brother to provide proper care for the subject child.

B. The Subject Child's Harm Was Not in Connection to the Mother's "Objectionable Parent Behavior or Omission" Which is Required to Find That her Parenting Did Not Meet the Minimum Standard of Care.

The mother acted as a reasonably prudent parent in like circumstances. The mother need not act with the "best," "maximum," or even "ideal" standard of care, only the minimum. *Nicholson,* 3 N.Y.3d at 370. As the court did in *Nicholson* when it examined the circumstances of a battered mother, this Court must examine the mother's circumstances. *Id.* at 846. The mother's sister recently passed away, who in addition to being beloved by the subject child, provided childcare. R. at 7. The mother works two jobs, one during weekdays while the subject child is at school and another five nights a week when childcare is provided by the uncle. *Id.* The subject child has been diagnosed with intermittent explosive disorder that causes her to have "angry outbursts" where she is unable to listen to authority. R. at 12. However, under the uncle's care, the mother noticed the subject child had "significantly less outbursts" and attributed it to his style of caregiving. R. at 14. The mother knew the uncle took care of the subject child by performing basic tasks such as walking her to and from the school bus. R. at 8. Some factors of the minimum degree

of care are not at issue in this case, such as providing adequate housing, nutrition, and ensuring school attendance. *See Matter of Maureen G.*, 426 N.Y.S.2d 384, 384 (Fam. Ct. 1980) (example of minimum degree of care for nutrition). As previously discussed, the mother satisfied the factors of proper supervision and trusting an appropriate caregiver. Here, the minimum degree of care considers the subject child's special vulnerabilities.

The subject child's intermittent explosive disorder was being treated by the Sunnydale Elementary counselor. The record is absent any indication that disciplinary techniques or parenting styles should have changed due to the subject child's special vulnerability. In defining the minimum standard of care, courts examine the child's "special vulnerability" to determine whether a heightened degree of care is required. *Nicholson,* 3 N.Y.3d at 370. *In re Victoria XX*., the court concluded the guardian's standard of care was inadequate for a child with posttraumatic stress disorder based on testimony by the child's treating psychotherapist, who "asserted that [guardian's] disciplinary methods would have adverse effects on a child with posttraumatic stress disorder… because 'it would exacerbate the trauma that's already there' and confuse the child with regard to the appropriateness of violence." *In re Victoria XX.*, 976 N.Y.S.2d at 238-239.

Here, the Third Division does not rely upon any evidence from the Sunnydale Elementary counselor or a medical provider to support a heightened standard of care due to the subject child's diagnosis of intermittent explosive disorder. Yet again, the Third Division supplemented its opinion on factual determinations without providing the due deference to the Sunnydale Family Court as the trier of fact. *See In re Alaina E.*, 823 N.Y.S.2d at 230 (emphasizing that factual determinations "[shall] not be disturbed absent a sound and substantial basis in the record" by the appellate court). Therefore, this Court should conclude that, absent a sound and substantial basis in the factual record, the subject child's special vulnerability did not raise the minimum degree of

care. The mother met that standard as a reasonably prudent parent by supporting the subject child's treatment with the school counselor. Further, the mother observed improvement in the subject child's behavior under the uncle's care. This suggests the mother had no reason to inform the uncle of the subject child's special vulnerability as the care provided improved the subject child's behavior.

C. Instead of Punishing this Family, this Court Should Follow the Legislature's Intent and Public Policy by Ordering Remedial Measures.

Legislative intent behind identical New York statutes and the mother and subject child's deep care for each other supports a reversal of the Third Division. *In re Robert W.*, the court concluded that the Family Court Act of New York was "intended to be 'remedial, not punitive' in nature. [The Act's] purpose is subverted when it is used to punish parents in the matter of child protection." *In re Robert W.*, 2011 WL 798140, at *4 (N.Y.Fam.Ct., Mar. 03, 2011) (quoting *Matter of Diane P.*, 494 N.Y.S.2d 881, 885 (App. Div. 2d Dep't 1985). Under New York law, it is consistent with the Act's purpose for courts to dismiss neglect proceedings "even though there is sufficient evidence to support a finding of neglect where the court determines that 'its aid is not required on the record before it.'" *In re Robert W.*, 2011 WL 798140 at *4 (quoting N.Y. Fam. Ct. Act § 1051). Here, the evidence is insufficient to conclude that the mother neglected the subject child. In arguendo, even if the Court concludes there is sufficient evidence to sustain a finding of neglect, there is no evidence that separating the subject child from the mother is in the best interest of the child. On the contrary, the Sunnydale Family Court correctly concluded that a finding of neglect would cause "more irreparable harm and emotional damages than [the subject child] would face by staying home." R. at 17.

The Sunnydale Family Court's conclusion is supported by research in the field. In *Redefining the Baseline: Reasonable Efforts, Family Preservation, and Parenting Foster Children*

in New York, it was determined that "[r]emoval and placement in foster care may have a worse impact on the child than neglect . . . Just as neglect can contribute to cognitive, social, and emotional problems, removal may also cause emotional problems by disrupting a child's ability to bond with his or her caregiver." Rebecca Bonagura*, Redefining the Baseline: Reasonable Efforts, Family Preservation, and Parenting Foster Children in New York*, 18 Colum. J. Gender & L. 175, 196 (2008). Further, "removal of children from their families for neglect is not appropriate except in the **most compelling circumstances**." Andrea Charlow, *Race, Poverty, and Neglect*, 28 Wm. Mitchell L. Rev. 763, 781 (2001) (emphasis added). Here, the subject child is already suffering from the emotional effects of the aunt's death. Removing her from her home and family would have greater adverse effects on her mental and emotional condition. *See* Andrea Charlow*, Race, Poverty, and Neglect,* 28 Wm. Mitchell L. Rev. 763, 781-83 (2001) (*"*[c]hildren in foster care exhibit high rates of emotional, behavioral and developmental problems" and "[f]urther, children who "age out of the system" (reach the age of majority while in foster care) are "over-represented among welfare recipients, prison inmates and the homeless[]").

However, the Court has the power and opportunity to order remedial measures that provide the stable relationship this family desires. In seeking a remedial solution, the Court may impose an Order of Protection under Sunnydale Family Court Act § 3526. Alternatively, because Sunnydale's statutory scheme mirrors that of New York, an order could be issued for the mother to work with the Agency to remedy specific issues. (N.Y. Fam. Ct. Act § 1054). Here, the Court's orders could include: (1) the uncle no longer having contact with the subject child; (2) the uncle no longer having contact with the subject child without the presence of a parent; (3) requiring the mother to seek mental healthcare; (4) requiring the subject child to seek professional mental healthcare; (5) requiring the mother to find new childcare or alternatively stay home with the

subject child; and/or (6) requiring the family to have continued contact and check ins with the Agency. The aforementioned solutions could relieve the Court's fears of potential future neglect and repair the family's relationship. Therefore, this Court should act in the subject child's best interest by ordering remedial measures to improve the familial relationship.

II. The Third Division Court Incorrectly Determined that the Uncle is a "Person Legally Responsible" for the Subject Child.

The uncle is not a PLR for the subject child as the evidence properly demonstrates that the extent of his responsibility is not analogous to that of a parent nor the functional equivalent of a parent. *In re Jessica C.*, 505 N.Y.S.2d 321, 325 (Fam. Ct. 1986). This Court may give great deference to a lower court's findings and determinations when such is supported by a "sound and substantial record basis." *In re Isabella E.*, 149 N.Y.S.3d 646, 650 (2021) (citing *In re Raelene B.*, 116 N.Y.S.3d 787, 790 (2020)). Under the totality of the circumstances in the present case, this Court must reverse the Third Division Court's decision as it improperly analyzed the uncle's role and responsibilities.

The Third Division Court exceeded the scope of Article 10 when it unlawfully intervened in the relationship between the uncle and the subject child. *See In re Jessica C.*, 505 N.Y.S.2d at 324; *see also* N.Y. Fam. Ct. Act § 1013. Article 10 only affords the judiciary a due process procedure in circumstances wherein the state may exercise its *parens patriae* power to protect a child. *Id.* It is only through this power that a state "may intervene in the parent-child relationship or its functional equivalent within a family setting." *Id.* Although the Legislature enacted Article 10 to safeguard children "from a parent or other person legally responsible for his or her care," Article 10 does not "protect a child against any and all dangers produced in society." *Id.* (emphasis removed).

A. The judicial factor test utilized in determining whether the uncle meets the functional equivalent of a parent standard is inefficient, unpredictable and creates discord among courts.

Historically, when making PLR determinations, courts have applied two distinct yet closely related threshold tests, known as the common law doctrine of *loco parentis* and the functional equivalent of a parent standard. *In re Yolanda D.*, 88 N.Y.2d 790, 796 (1996). Although both tests involve separate inquires, both require a court to make an initial determination as to the respondent's intent regarding the duration of care for a child. *Id.* In the present case, the common law doctrine of *loco parentis* could only be utilized if the uncle "intend[ed] to assume the responsibility to support and care for the [subject] child on a **permanent basis**." *Id.* (emphasis added). Alternatively, the functional equivalent of a parent standard would apply only if the uncle intended to assume temporary care of the subject child. *Id.* Based upon the factual record and the subsequent testimony provided by the uncle, he intended to provide temporary care to the subject child so that the mother would be able to maintain her employment status. R. at 7. Thus, both lower courts correctly held that the PLR determination in the present case should be made based upon the application of the functional equivalent of a parent standard.

For this Court to determine whether the uncle acted as the functional equivalent of a parent, it must engage in a "discretionary, fact-intensive inquiry" regarding his contact with the subject child. *In re Yolanda D.*, 88 N.Y.2d at 796 (1996). At a minimum, this Court must examine

> [1] the frequency and nature of the contact between [the uncle and the subject child], [2] the nature and extent of the control exercised by [the uncle] over the [subject] child's environment, [3] the duration of [the uncle's] contact with the [subject] child, and [4] [the uncle's] relationship to the [subject] child's parent(s).

Id. PLR determinations have proved to be inconsistent as no factor is dispositive and the weight given to each factor is "dependent [upon] the circumstances of [a] particular case." *Id.*; *see also* Alexsis Gordon, *Redefining the Standard: Who Can be a Person Legally Responsible for the Care*

of a Child Under the Family Court Act?, 33 Touro L. Rev. 517, 525-26 (2017). Because a PLR determination authorizes this Court to exercise its own discretion, this Court is permitted to consider additional factors so long as "the purpose of the inquiry [being made] remain[s] constant." *Id.*

Fundamentally, a PLR determination is solely reliant upon a court's subjective assessment of a respondent's conduct in relation to a set of non-exhaustive factors. *See* Gordon, supra at 537. Despite the incessant use of the factors as dictated *In re Yolanda D.*, PLR decisions issued by lower courts lack uniformity because of their reliance upon an individualistic "commonsense approach" in determining what modes of conduct qualify as adequate childcare. *Id.* at 518; 537. Courts have often acknowledged that the reasoning behind PLR determinations vary from case to case. *Compare In re Jonah B.*, 85 N.Y.S.3d 597, 599-600 (App. Div. 2d Dep't 2018) (holding "the maternal grandmother was a person legally reasonable for the children [as she] came to the parents' home every day and slept over regularly."), *with In re Robert J.*, 580 N.Y.S.2d 894 (App. Div. 4th Dep't 1991) (holding grandfather to be a PLR despite providing extensive hours of childcare outside of the parental home). However, the admission of such flaw is incorrectly rooted in the belief that it is the differentiating facts of each case which prevent courts from rendering consistent judicial opinions. The record before this Court is unaltered, yet both the Sunnydale Family Court and the Third Division Court rendered contrasting opinions. R. at 20; 28. Thus, the lower courts' PLR determinations demonstrate the unworkability of the judicial test established in *In re Yolanda D.* Therefore, this Court should supplant its existing factor test with a more reliable analysis for the purposes of (1) judicial efficiency, (2) foreseeability and (3) uniformity among the lower courts.

1. *The Court should utilize a parental relationship test in determining whether a respondent's conduct satisfies the functional equivalent of a parent standard.*

The functional equivalent of a parent should not be defined by the frequency, duration or location of childcare provided by a respondent. Rather, the standard should require courts to objectively analyze whether a respondent performs the same labor and provides the same fundamental childcare equivalent to that of a parent. For example, a parenting function may be seen as a respondent performing "[a] task that serves the direct or day-to-day needs of a child." *Parenting Function*, Black's Law Dictionary (11th ed. 2019). Furthermore, "[p]arenting functions include providing necessaries, making decisions about the child's welfare, and maintaining the family residence." *Id.*

Other jurisdictions have formulated and applied an objective parenting function analysis when determining whether a party to litigation, who is not a legal parent of the child, has essentially become the functional equivalent of a parent. *Cf. Matter of Adoption of L.O.F.*, 62 V.I. 655, 666 (2015) ("Granting an adoption in favor of a [person] who already serves as the child's functional parent … furthers the child's best interests."). Although this type of analysis has been frequently used in cases regarding parental rights, the same would prove beneficial in abuse and neglect cases as it provides a more accurate measurement of a respondent's conduct. The Sunnydale Family Court and Third Division Court both recognized that the uncle did not intend to provide permanent care to the subject child. Thus, this Court's subsequent analysis should not be focused on determining what type of conduct satisfies the definition of "temporary care" but whether the temporary care provided to the subject child is equivalent to that found in a parent-child relationship.

In 1987, when analyzing domestic relationships, the Washington State Legislature defined what constitutes parenting functions. Wash. Rev. Cod Ann. § 26.09.004. A parenting function is defined as

> aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child. Parenting functions include:
>
> (a) Maintaining a loving, stable, consistent, and nurturing relationship with the child;
> (b) Attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, healthcare, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;
> (c) Attending to adequate education for the child, including remedial or other education essential to the best interests of the child;
> (d) Assisting the child in developing and maintaining appropriate interpersonal relationships;
> (e) Exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and
> (f) Providing for the financial support of the child.

Id. Implementing the factors as set forth by the Washington State Legislature ("parental relationship test") would reduce variance amongst court decisions and would establish judicial precedent rooted in uniformity. The current test established by *In re Yolanda D.* does not ensure the protection of a respondent's due process rights in which the New York State Legislature aimed to define. *See In re Jessica C.*, 505 N.Y.S.2d 321 (Fam. Ct. 1986); *see also* N.Y. Fam. Ct. Act § 1013. Article 10 only permits courts to intervene within a parent-child relationship or its functional equivalent. *Id.* Courts are not permitted to exercise jurisdiction over adult-child relationships "unrelated to the family context." *Id.* Thus, a court should not focus its analysis on determining whether the frequency and duration of an adult-child relationship is comparative to that of a parent-child relationship, but whether the degree and type of care provided is proportional.

2. When utilizing a parental relationship test, the Court would find that the uncle did not undertake any parental responsibility for the subject child and thus is not the functional equivalent of a parent.

Under a parental relationship test, the uncle is not the functional equivalent of a parent because he did not (1) create nor maintain a nurturing relationship with the subject child; (2) attend

to the subject child's daily needs; (3) attend to the subject child's educational needs; (4) assist the subject child in developing and maintaining interpersonal relationships; (5) exercise judgment regarding the subject child's welfare; nor did he (6) provide any financial or other supportive contribution to the family residence.

(a) The uncle did not create nor maintain a nurturing relationship with the subject child.

The uncle testified that he "did not view his relationship with [the subject child] as one resembling a parent/child relationship." R. at 14. Despite the fact that he admits to loving the subject child, he did not provide her with any degree of parental affection as he did not "play[] with her, or talk[] to her much." *Id.* at 11; 14; 20. It is reasonable to infer from the factual record that his affection for the subject child stems from a mere familial connection rather than a direct bond with her. Thus, the uncle did not create nor maintain a nurturing relationship.

(b) The uncle did not attend to the subject child's daily needs.

The factual record does not indicate whether the uncle provided the subject child with meals, personal hygiene assistance or healthcare necessities. Rather, the factual record plainly demonstrates the limit and extent of his supervisory role. Thus, it is reasonable to infer from the factual record that he did not attend nor contribute to the subject child's daily needs.

(c) The uncle did not attend nor contribute to the subject child's educational needs.

The uncle "never helped the [subject] child with homework," and the factual record does not indicate whether he participated in parent-teacher conferences or communicated with school administration. R. at 19. Although he escorted the subject child to and from the bus stop every day, this illustrates his role in a supervisory capacity rather than in promoting her education. *Id.*

(d) The uncle did not assist the subject child in developing and maintaining interpersonal relationships.

The uncle did not "play with her, [] talk[] to her much," take her to soccer practice, or facilitate playdates. R. at 8; 11. By failing to engage in routine activities, he did not aid the subject child in a way that enhanced her relationships with others, developed her socialization skills, or furthered her understanding of verbal and non-verbal communication.

(e) The uncle did not exercise judgment related to the subject child's welfare.

The uncle did not select the school the subject child attended, the meals she ate, the clothes she wore, the friends she associated with, the extracurricular activities she participated in, when she bathed or when she slept. Any disciplinary measures he took are insignificant when compared to the mother's contributions, as she was the primary decisionmaker regarding the subject child's welfare. The mother—not the uncle—ensured her child had adequate supervision and access to school mental health services. R. at 7; 10.

(f) The uncle did not provide any financial contributions to the subject child.

Throughout the duration in which the uncle provided childcare to the subject child, he was unemployed and without a driver's license. R. at 8. Therefore, there is nothing in the record to suggest that he made any sort of financial contribution to the family residence.

B. Alternatively, if this Court elects to reaffirm the judicial factor test established In re Yolanda D., it should restrict an appellate court's review to the factors weighed by family courts.

The judicial factor test established *In re Yolanda D.* aims to weigh the "salient considerations" of a particular case based upon its unique circumstances. *In re Yolanda D.*, 88 N.Y.2d 790, 796 (1996). Thus, the test grants family courts discretion to select factors when determining a respondent's PLR status. Given the discretionary nature of the fact-intensive inquiry, family courts are best suited to apply the judicial factor test established *In re Yolanda D.* Family courts can better assess the credibility of testimony, the character of an environment, the

genuineness of the parties' relationships, and the appropriate weight of each factor. As exhibited in this case, allowing reviewing courts to reapply a new set of factors to the same set of facts leads to inconsistent and unpredictable outcomes. Moreover, it disrupts the finality and efficiency of the judicial system. Therefore, an appellate court's review of a PLR determination should be restricted to the factors a family court considered.

Here, the Third Division Court erred when it reversed the Sunnydale Family Court's PLR determination. More specifically, it improperly considered and weighed a new set of factors, despite the Family Court's role as the fact finder. R. at 27-8. To allow appellate courts to access the degree of flexibility offered by the judicial test established *In re Yolanda D.* leads to an unlimited possibility of outcomes based upon the factors judicial officers subjectively select and weigh at each level of review.

III. IF THIS COURT DETERMINES THAT THE UNCLE IS A "PERSON LEGALLY RESPONSIBLE" FOR THE SUBJECT CHILD, HIS DISCIPLINARY MEASURES DID NOT CONSTITUTE EXCESSIVE CORPORAL PUNISHMENT.

This Court must not render moral judgment upon the uncle as to whether his disciplinary measures are acceptable. Rather, this Court is tasked with making a legal determination as to whether his conduct constituted a pattern of excessive corporal punishment.

Persons who are deemed "legally responsible for the care of [a child] 'have a right to use reasonable physical force against [the] child in order to maintain discipline or to promote the child's welfare.'" *In re Myiasha K.D.*, 146 N.Y.S.3d 298, 301 (App. Div. 2d Dep't 2021). However, unreasonably inflicting harm, including excessive corporal punishment, constitutes neglect. N.Y. Fam. Ct. Act § 1012 (f)(i)(B). Courts typically examine four broad categories to determine whether a PLR's disciplinary measures amount to excessive corporal punishment: (1) the severity of the injury incurred; (2) "the age and developmental stage of the child"; (3) the manner of discipline

utilized; and (4) the "chronicity" or "pattern" of discipline. *See* Doriane Lambelet Coleman et. al., *Where and How to Draw the Line Between Reasonable Corporal Punishment and Abuse*, Law & Contemp. Probs., Spring 2010, 107, 130-33.

Lower courts have previously held that an isolated altercation did not necessarily amount to excessive corporal punishment even when a parent struck his child "with a belt several times[,]" causing the child's body to bruise. *In re Anastasia L.D.*, 978 N.Y.S.2d 347, 349 (App. Div. 2d Dep't 2014). *In re Anastasia L.D.*, a fourteen-year-old child refused to relinquish her cellphone upon her father's request. *Id.* The father attempted to confiscate the child's cellphone because she had been "cutting school." *Id.* The child refused her father's demand and "charged at him." *Id.* In response to the child's outburst, the father struck the child with his belt repeatedly. *Id.* Even though the court did not condone the father's behavior, it recognized that the punishment did not amount to neglect. *Id.* In making its determination, the court found that the factual record did not "demonstrate a pattern of excessive corporal punishment." *Id.* Nor did the evidence sufficiently prove that the father intended to hurt the child. *Id.*

Conversely, lower courts have recently held that the degree and force of discipline imposed upon a child constitutes excessive corporal punishment and therefore neglect, when the evidence shows that a "child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired." *In re Balle S.*, 147 N.Y.S.3d 292, 293-94 (App. Div. 4th Dep't 2021). *In re Balle S.*, the child was accused of running away. *Id.* In response to the child's conduct, the father "whooped [her] ass" and struck her repeatedly with a phone charger cord and a rubber tube **to inflict harm on her**." *Id.* (emphasis added). The court held that although "the [child's] injuries did not require medical attention [it did] not preclude a finding of neglect based upon the infliction of excessive corporal punishment." *Id.* It reasoned that the father's conduct was that of

excessive corporal punishment because "the [child's] mental, or emotional condition was impaired, inasmuch as she had marks on her body, was in great pain, and was afraid of [her] father." *Id.*

The case now before this Court is more akin to that of *In re Anastasia L.D.*, 978 N.Y.S.2d 347 (App. Div. 2d Dep't 2014). When examining the uncle's motivation behind the disciplinary measures utilized, the factual record demonstrates that his conduct was not intended to inflict harm upon the subject child but was merely in response to her tantrums. R. at 15. If the Third Division Court correctly recognized that the uncle is a PLR, then "he [has] the constitutional right to discipline the child as he sees fit." R. at 28. Although the subject child "ha[s] been diagnosed with 'intermittent explosive disorder' … [which made her] prone to having angry outbursts where she **wouldn't listen to any kind of authority**[,]" the uncle was not aware of her diagnosed behavioral condition. R. at 13-14; 26 (emphasis added). Thus, this Court should not be "inclined to classify [the uncle's] disciplinary measure[s] as [excessive corporal punishment]" as he could not have known that his conduct did not hold any "disciplinary value because the [subject] child [**may**] lack[] the capacity to understand its purpose." *See* Coleman et. al., *supra* (emphasis added).

The Agency testified that the subject child "started experiencing **more severe** and angry outbursts after her Aunt died" and that the outbursts "started to get **worse** at home." R. at 10-11 (emphasis added). For example, on numerous occasions the subject child's outbursts included verbal aggression when she told the uncle "that she hated him … wished that he would disappear" and wished that he was dead. R. at 11-12. The uncle initially attempted to discipline the subject child through the use of words; however, he later turned to the use of temporary time-outs when the subject child's behavior did not improve. R. at 15. Although he was hesitant to use any form of physical discipline, his hand was forced when the subject child continued to exhibit extreme disrespect. *Id.*; *see also In re Amanda E.*, 719 N.Y.S.2d 763, 764-65 (App. Div. 3d Dep't 2001)

(holding that despite the father slapping his child "across the face with an open hand during the course of an argument … the circumstances under which the [discipline] occurred and the isolated nature of the father's … conduct " did not constitute excessive corporal punishment); *In re P. Child*, 707 N.Y.S.2d at 455 ("While losing one's temper does not excuse striking and injuring one's child, one such event does not necessarily establish abuse or neglect. Cases involving parents who purposefully and with forethought impose severe, injurious corporal punishment in response to perceived misbehavior … are inapposite.").

Similar to the father *In re Anastasia L.D.*, the uncle's use of physical discipline was atypical and was not "a pattern of excessive corporal punishment." *In re Anastasia L.D.*, 978 N.Y.S.2d at 349. He did not intend to inflict harm on the subject child unlike the father in *In re Balle S.*, whose conduct was found to be excessive corporal punishment. *In re Balle S.*, 147 N.Y.S.3d at 293-94.

Thus, when "drawing the line between reasonable physical discipline and unlawful physical abuse" this Court can find, without condoning the behavior, that the punishments the uncle imposed upon the subject child did not constitute excessive corporal punishment. *See* Coleman et. al., *supra* at 129. The disciplinary measures at issue were isolated, infrequent, and the direct result of the subject child's behavioral outbursts. R. at 12. Therefore, the uncle's conduct does not "indicate[] a pattern of corporal punishment that exceeds the threshold of reasonableness." *Matter of Anthony C.*, 607 N.Y.S.2d 324, 325 (App. Div. 1st Dep't 1994).

CONCLUSION

Appellants Willow and Angel Rosenburg respectfully request this Court to reverse the decision of the Sunnydale Third Appellate Division.

Respectfully submitted,

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Attorneys for Appellants Willow and Angel Rosenburg