

Index No.: 2058-5147

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**Court of Appeals**  
*of the*  
**State of Sunnydale**

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**WILLOW and ANGEL ROSENBURG,**

*Appellants,*

– against –

**SUNNYDALE DEPARTMENT OF CHILD PROTECTIVE SERVICES,**

*Appellee,*

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ON APPEAL FROM THE STATE OF SUNNYDALE  
THIRD APPELLATE DIVISION

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**BRIEF FOR APPELLANTS**

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COUNSEL FOR APPELLANTS

TEAM 82

DATED: JANUARY 17, 2024

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### **QUESTIONS PRESENTED**

- I. WHETHER: The State of Sunnydale, Third Appellate Division, correctly determined that Willow Rosenberg's failure to supervise her child constituted child neglect, as defined by Sunnydale Family Court Act section § 3523(f).
- II. WHETHER: The State of Sunnydale, Third Appellate Division, correctly determined that Angel Rosenberg 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 section § 3523(f).

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## **STATEMENT OF THE CASE**

### **I. Summary of the Facts**

Respondents Willow and Angel Rosenberg come before this court appealing the orders entered by the state of Sunnydale Third Appellate Division. R. at 29. The court found that Willow neglected her child, Buffy; ordered that Willow work with the Sunnydale Department of Child Protective Services (“Agency”) to get mental health treatment; found Angel (Buffy’s uncle) to be a person legally responsible for Buffy; found that Angel neglected Buffy; and entered an Order of Protection against Angel for Buffy’s safety. R. at 29. The Agency commenced a fact-finding hearing to investigate a possible child neglect claim against Willow and Angel. R. at 6. The subsequent information was revealed at this hearing.

Willow is a single mother working two jobs to support her six-year-old child, Buffy. R. at 7, 16-7. Willow lost both of her parents when she was 17, leaving only her sister, Kendra, and her brother, Angel, to help her out. R. at 7. Although a single mother, Willow always provided Buffy with adequate supervision while she was away at work. R. at 7. Kendra, Buffy’s aunt, watched her when Willow was at work. Recently, Kendra passed away leaving only Angel, Buffy’s uncle, to watch her. R. at 13-14. Even though Angel, known to have an authoritative parenting style, did not want to supervise Buffy full time, he was willing to help. R. at 13-14. Angel testified that “he never wanted children of his own and never felt a certain parental way towards Buffy . . .” R. at 24. Though Angel watched Buffy regularly, he maintained a separate residence. R. at 7. Buffy told the Agency that Angel never helped her with homework, never played with her, and rarely talked to her. R. at 10-11. Angel also could not bring Buffy to certain activities, like soccer practice. R. at 8.

Kendra’s death caused Willow’s and Buffy’s mental health to decline as they grieved their loss. R. at 10, 12-13. Willow testified that the deaths of her parents and her sister made her feel

depressed and tired and that Buffy's behavior worsened. R. at 13. Despite her hardships, Willow persevered and worked two jobs to support Buffy's well-being. R. at 13. Additionally, although Buffy missed her aunt, Buffy's behavior improved since Angel started watching her. R. at 13.

Buffy is a troubled child who was diagnosed with intermittent explosive disorder ("IED") for which she receives counseling at school. R. at 14. Buffy's outbursts worsened after her aunt's passing. R. at 10. She did not listen to authority figures and did not respond to verbal punishments or time out instituted by Angel. R. at 14-15. Although Angel did not want to use physical discipline, Buffy claimed he did on two separate occasions. R. at 15. First, she claimed that Angel hit her on the cheek with his hand. R. at 11. When asked about the bruise on her cheek, Buffy told Willow and the School Nurse the bruise resulted from getting hit while playing basketball. R. at 11-12. Second, she claimed that on a later date, Angel pushed her and kicked her in the side, resulting in another bruise. R. at 12. The School Nurse noticed Buffy limping at school, looked at Buffy's side, saw the bruise, and called the Agency. R. at 8. The Agency then conducted fact-finding hearings investigating Willow and Angel for child neglect.

After the fact-finding hearing, the Agency filed a petition under Article 10 of the Sunnydale Family Court Act alleging Willow neglected Buffy by failing to supervise her and subjecting her to neglect from Angel and that Angel neglected Buffy by inflicting excessive corporal punishment. R. at 6. Moreover, the Agency petitioned for Willow to be ordered to work with the Agency and begin their recommendations to start mental health treatment. R. at 7.

## **II. Nature of Proceedings**

***Family Court.*** The State of Sunnydale Family Court dismissed the Agency's petition against Willow finding that Willow's actions did not constitute neglect. R. at 17, 21. Additionally, the Family Court dismissed the Agency's petition and order of protection brought against Angel



because the court found that Angel is not a person legally responsible for Buffy as defined by Article 10 of the Family Court Act and therefore lacks jurisdiction over Angel. R. at 21. The Family Court's opinion begins in the record on page 6. R. at 6.

***Third Appellate Division.*** The State of Sunnydale Third Appellate Division found that the Family Court's analysis was not supported by a sound and substantial basis in the record and reversed the Family Court's decision. R. at 29. The Court found that Willow's actions constituted neglect and found Angel a person legally responsible and, as such, has committed neglect by inflicting excessive corporal punishment. R. at 29. The Appellate Division's decision begins in the record on page 22. R. at 22.

### **SUMMARY OF THE ARGUMENT**

This Court should reverse the State of Sunnydale Third Appellate Division's decision and find that there is a sound and substantial basis in the record that Willow's failure to provide supervision to Buffy does not constitute child neglect and reinstate the decision of the Family Court, finding that Angel is not a person legally responsible for Buffy. However, even if Angel is found to be a person legally responsible, his behavior did not suffice as neglect under the requirements of the Sunnydale Family Court Act and relevant case law.

The Family Court properly determined that the Agency failed its burden of demonstrating that Buffy was not physically or emotionally impaired. Buffy's bruises did not require medical attention or hospitalization. Similarly, Angel's supervision was not intrinsically dangerous and did not put Buffy in imminent danger of impairment. Moreover, the record lacks evidence Buffy is emotionally impaired by her fear of Angel.

Additionally, Willow did not fail to exercise a minimum standard of care in providing proper supervision to Buffy because Willow did not know, nor reasonably should have known,

about the alleged harm from Angel. Finally, Willow did not fail to exercise a minimum standard of care by not starting mental health treatment because Willow's mental health did not impair her parental judgment or her ability to provide adequate care for Buffy.

The Family Court properly determined that Angel was not a person legally responsible for Buffy. A person is legally responsible for a child when he or she behaves as the functional equivalent of a parent. Angel is not a person legally responsible for Buffy because he maintained a separate residence from her, provided little care for her, exerted little control over her environment, and claimed that he did not have a close relationship with her.

Alternatively, even if this Court agrees with the Appellate Division that Angel is a person legally responsible for Buffy, his conduct does not support a finding of neglect. Angel did not neglect Buffy because he did not impair her, place her in imminent danger of such impairment, or use excessive corporal punishment on her.

## ARGUMENT

### **I. THERE IS A SOUND AND SUBSTANTIAL BASIS IN THE RECORD THAT WILLOW DID NOT NEGLECT BUFFY.**

The Agency's petition does not have merit and the evidence adduced at the fact-finding hearing, as a matter of law, does not constitute neglect within the meaning of Sunnydale's Family Court Act § 3523(f). The Family Court's factual findings and credibility determinations are accorded great weight and must not be disturbed on review unless there is a lack of a sound and substantial basis in the record. *Matter of Joshua R.*, 188 N.Y.S.3d 247, 250 (App. Div. 3d Dept. 2023). The Family Court's findings only lack a sound and substantial basis if they are clearly unsupported by the record. *Matter of Wolfgang L.*, 133 N.Y.S.3d 96, 97 (App. Div. 2d Dept. 2020). Sound and substantial evidence is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." *Jonathan L. v. Poole*, 96 N.Y.S.3d 400, 401 (App. Div. 4th Dept. 2019).

The Family Court correctly found that the Agency failed to prove its burden to establish that Buffy's condition is impaired or in imminent danger of being impaired and that Willow did not exercise a minimum standard of care; therefore, this Court should reverse the Third Appellate Division's finding that Willow neglected Buffy. To establish neglect, the Agency bears the burden of proving, by a preponderance of the credible evidence, that (1) the child's physical or emotional condition was impaired or was in imminent danger of becoming impaired and (2) the actual or threatened harm results from the caretaker's failure to exercise a minimum degree of care in providing proper supervision by unreasonably allowing the child to be inflicted with harm or by other acts of similarly serious nature requiring the aid of the court. Sunnydale Fam. Ct. Act § 3523(f). *Nicholson v. Scopetta*, 820 N.E.2d 840, 845 (N.Y. 2004).

**A. The Agency failed to demonstrate that Buffy's condition is impaired or in imminent danger of becoming impaired.**

The evidence adduced at the fact-finding hearing does not demonstrate that Buffy's physical or emotional condition is actually impaired or in imminent danger of becoming impaired. The Agency bears the burden of proving by a preponderance of the credible evidence that the child's physical or emotional condition is placed in actual or imminent danger, as opposed to "what might be deemed as undesirable parental behavior." *Nicholson*, 787 N.Y.S.2d at 845. If the petition alleges that the child's condition is in imminent danger, the alleged danger cannot be "merely possible"; rather, the imminent danger must be impending. *Id.* In the absence of such credible evidence, this statutory requirement is not satisfied, and neglect is not established. *In re Shannon ZZ.*, 778 N.Y.S.2d 205, 206 (App. Div. 3d Dept. 2004).

**1. There is not sufficient evidence that Buffy is physically impaired within the meaning of Sunnydale's Family Court Act because she is not seriously harmed and does not need medical attention.**

Buffy's injuries referenced in the current petition do not rise to the serious physical impairment the Family Court Act was meant to protect. The Family Court Act requires that the failure to provide proper supervision to inflict serious physical impairment on the child, not just what might be deemed as undesirable parental behavior. *Nicholson*, 787 N.Y.S.2d at 845. Physical impairment is "a state of substantially diminished physical growth, freedom from disease, and physical functioning." *Jonathan L.*, 96 N.Y.S.3d 400 at 402. Evidence of bruising on a child resulting from physical contact, but not requiring any medical attention, is insufficient to establish physical impairment. *In re John O.*, 839 N.Y.S.2d 605, 606 (App. Div. 3d Dept. 2007). Similarly, minor injuries, not requiring medical attention, do not rise to the level of serious harm the Family Court Act was meant to protect. *In re Anthony PP*, 737 N.Y.S.2d 430, 431 (App. Div. 3d Dept. 2002) (no finding of physical impairment where a father dragged his son out of the car, scraping

his neck and knee, and throwing him on the ground); *Matter of Luke M.*, 597 N.Y.S.2d 679, 679 (App. Div. 1st Dept. 1993) (a parent slapping and choking their son did not physically impair to the son). The only evidence in the record of alleged physical impairment recounts two separate instances: the bruise on Buffy's cheek from Angel hitting her and the bruise on Buffy's side accompanied by limping from Angel kicking her. R at 11-12. Neither of these instances required medical attention or hospitalization. R. at 11-12. Although the nurse noticed and wanted to analyze Buffy's second bruise on her side, the nurse's medical attention was not required. R. at 24.

**2. Angel's supervision is not intrinsically dangerous and does not place Buffy's physical condition in imminent danger of impairment.**

Willow did not put Buffy's physical condition in imminent danger because placing Buffy under Angel's supervision is not intrinsically dangerous. To fall within the statutory definition of child neglect, the alleged imminent danger must be near or impending, not merely possible. *Nicholson* 787 N.Y.S.2d at 845. The Agency's allegation that Buffy is in imminent danger of physical harm from Angel is a mere possibility, not an impending danger. Because Willow worked two jobs to properly support Buffy, Willow had Angel supervise Buffy during the times she was home from school and Willow was at work. R. at 7. The mere decision to place Buffy under Angel's supervision does not create an impending danger. In *In re Evelyn X*, the court held that the evidence was insufficient to find that the mother leaving the child alone under the supervision of her husband while she was gone, was an impending danger to the child. 736 N.Y.S.2d 549, 552 (App. Div. 3d Dept. 2002). The husband's supervision, alone, was not intrinsically dangerous to the child. *Id.* However, a child's physical condition is placed at an imminent risk of potential impairment where the situation and circumstances are "intrinsically dangerous" without proper parental supervision. *Matter of Leah VV.*, 66 N.Y.S.3d 582, 583-84 (App. Div. 3d Dept. 2018).

This case is distinguishable from cases where a child was left alone without supervision in an intrinsically dangerous situation. For example, in *Matter of Leah VV*, a mother placed her 16-month-old child in imminent danger of physical impairment by leaving the child unattended in a filled bathtub for more than a few minutes. 66 N.Y.S.3d at 583-84. Similarly, in *In re Antonio NN*, a mother leaving her kids unsupervised for more than 15 minutes in their front yard abutted street placed them in imminent danger of physical impairment. 812 N.Y.S.2d 176, 178 (App. Div. 3d Dept. 2006). Willow's decision to place Buffy under Angel's supervision would be intrinsically dangerous if there were evidence that Angel had a violent tendency for violent acts, such as sexual assault or child molestation; however, that is not the case here. *See In re Michael B*, 13 N.Y.S.3d 196, 199 (App. Div. 2d Dept. 2015). Rather, Angel is a family member who, up until the allegations in the current petition, had always been able to give proper supervision to Buffy and was not intrinsically dangerous. R. at 17.

**3. The record lacks sufficient evidence that Buffy's emotional condition is impaired.**

Buffy's fear of Angel does not constitute an emotional impairment. Impairment of emotional condition is defined as "a state of substantially diminished psychological or intellectual functioning." Sunnydale Fam. Ct. Act § 3523(h). Factors illustrating emotional impairment include failure to thrive, control of aggressive or self-destructive impulses, ungovernability, or habitual truancy. *Id.* There is a lack of credible evidence in the record that Buffy's emotional condition has been impaired. Although the Agency alleges that Buffy fears Angel, the record does not support the contention that Buffy's psychological or intellectual functioning is diminished by her fear. R. at 24. His placing Buffy in time-out for an hour and causing her to fear future time-outs did not cause emotional impairment. R. at 11. Where a child resides in a psychologically unsafe environment, which tampers "with their entire perception of reality," a child's emotional condition

is impaired or imminently in danger of being impaired. *William O v. Cristina P*, 632 N.Y.S.2d 259, 262 (App. Div. 3d Dept. 1995) (holding that a child was emotionally impaired where parent performed acts of ritualistic satanic abuse on him, resulting in psychotic delusions).

Similarly, there is no viable evidence any impairment in Buffy's emotional condition is "clearly attributable" to Willow's actions. Because of Buffy's IED, coupled with the impact of her aunt's recent passing, the Third Appellate Division should not have concluded Buffy was emotionally impaired by the actions of Willow. Due to the uncertainties arising in determining the origin of emotional impairment, the legislature, in crafting § 3523, purposely included that such alleged emotional impairment "must be clearly attributable to the unwillingness or inability of the respondent" of failing to supervise the child. Sunnydale Fam. Ct. Act § 3523(h); *Nicholson*, 820 N.E.2d 840, 845-6. Individuals with IED have repetitive behavior outbursts, illustrating a failure to control aggression, self-destructing impulses, and ungovernability. (citing to Jennifer R. Fanning et al. *History of childhood maltreatment in Intermittent Explosive Disorder and suicidal Behavior*; JOURNAL of PSYCHIATRIC RESEARCH (Volume 56, 2014)). Moreover, the cause of IED is unknown and risk factors for IED in children include genetic (family history of impulsive aggressive behavior increases chances by 44-72%), biological (lower levels of serotonin), and environmental factors (experiencing one or more traumatic events during childhood).<sup>1</sup> Each of these factors can be attributable to another cause besides Willow: Angel stated he has similar angry behavior to Buffy, indicating Buffy could have received IED genetically. R. at 14. Additionally, the record indicates Buffy's behavior shifted because of her despair and missing her late aunt. R. at 10. A

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<sup>1</sup>*Intermittent Explosive Disorder: Symptoms and Causes*, CLEVELAND CLINIC, (May 20, 2022), <https://my.clevelandclinic.org/health/diseases/17786-intermittent-explosive-disorder>.

child can only endure strong emotions briefly and they may choose to avoid their overwhelming feelings, leading to angry outbursts and misbehavior that may not be recognized as grieving.<sup>2</sup>

When, as in this case, multiple factors cause a child's emotional impairment, there must be more evidence causally connecting the parent's behavior with the resulting child's emotional impairment. *See Matter of Theresa CC*, 576 N.Y.S.2d 937, 938 (App. Div. 3d Dept. 1991) (expert psychologist studies, therapist opinions, and neighbor testimony were needed to establish a causal connection between parent behavior and a child's emotional impairment). Unlike cases where courts have found a child's emotional impairment clearly attributable to a parent, the Agency has failed to produce expert testimony or psychological testing supporting its contention that Buffy's emotional impairment is due to Willow's actions. *Id.* Although expert testimony is not a requirement, courts stress that it would be "unjust to fault a parent too readily" for being the cause of emotional impairment. *Nicholson*, 820 N.E.2d at 846.

**B. Willow met the minimum standard of care in providing proper supervision because she did not know, nor should have known, about actual or potential harm to Buffy, and Willow's failure to obtain mental health treatment did not impair her parental judgment.**

The record shows that Willow met her minimum standard of care in providing proper supervision to Buffy. A parent's standard of care is an objective standard: whether a reasonable and prudent parent would have acted, or failed to act, under the circumstances then and there existing. *Nicholson*, 820 N.E.2d at 846. The New York Court of Appeals emphasizes that "the statutory test is a minimum degree of care—not maximum, not ideal—and the failure must be actual, not threatened." *Id.* A parent may fail this standard of care if she knew or reasonably should have known her child was in danger and failed to protect them; however, the Agency must prove

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<sup>2</sup>BEREAVEMENT: REACTIONS, CONSEQUENCES, and CARE 100 (Marian Osterweis et al., 1st ed. 1984)



by a preponderance of the evidence that the parent knew or reasonably should have been aware of the alleged danger. *Matter of Alana H.*, 85 N.Y.S.3d 108, 110 (App. Div. 2d Dept. 2018). The Agency also bears the burden of proving that the child’s exposure to serious or potential harm is “a consequence” or “causally attributable” to the parent’s standard of care. *Sunnydale Fam. Ct. Act* § 3523(h); *Nicholson*, 820 N.E.2d at 845-6.

**1. The Agency failed to demonstrate that Willow knowingly and unreasonably allowed Angel to harm Buffy or that she should have known about the possibility of such harm.**

The Agency failed to demonstrate that Willow knew of Angel’s use of physical discipline on Buffy. A parent who has no prior knowledge of another’s propensity to inflict harm cannot be at fault for choosing to place their child under that person’s supervision. *Matter of Alana H.*, 85 N.Y.S.3d at 110. There is not sufficient evidence Willow had prior knowledge of any possible risk of danger of leaving Buffy in the care of Angel. The Third Appellate Division should have distinguished this case from cases where the record was supported by credible evidence that the parent(s) had prior knowledge that the person supervising their children had a propensity to inflict harm. Credible evidence supporting a parent had prior knowledge of a person’s propensity to inflict harm includes knowledge of a person’s prior conviction of a violent crime or prior violent acts towards the child or other family members. *In re Michael B.*, 13 N.Y.S.3d at 199 (the mother allowed a family member to supervise her son alone knowing the family member had sexually abused her son previously); *In re Carlos M.*, 741 N.Y.S.2d at 84 (App. Div. 2d Dept. 2002) (the mother had prior knowledge of father’s domestic violence toward their children, but she failed to protect him).

Further, there is no evidence in the record that Willow reasonably should have known Angel would use physical acts to discipline Buffy. Before the Agency’s current petition, Angel had not harmed Buffy or put her in a situation that created a risk of injury when he previously watched

Buffy. R. at 17. The Third Appellate Division was incorrect to use the fact that because Angel had an “authoritative style” when it came to parenting Willow should have assumed Angel would use physical discipline. R. at 13. Such evidence is merely an inference that there was a possible risk Willow should have been aware of. A mere inference of a possible risk is insufficient to establish fault. *Matter of In re Christopher K.*, No. NN-15060/15062-06, 841 N.Y.S.2d 818, 15 Misc. 3d 1142(A), 2007 N.Y. Slip Op. 51110(U), 2007 WL 1558863, at \*5 (Fam.Ct., May 30, 2007). Similarly, because there is insufficient evidence that Willow should have been aware of Angel’s use of physical discipline, Willow cannot be at fault for failing to inquire or investigate into Angel’s methods. When the record shows insufficient evidence that a parent should have known about the dangers or potential dangers of leaving their child under a caretaker’s supervision, the parent’s lack of inquiry or investigation of the caretaker is not unreasonable. *Matter of Joseph DD*, 624 N.Y.S.2d 476, 478 (App. Div. 3d Dept. 1995).

Moreover, Willow exercised a minimum standard of care even though she did not investigate Angel’s supervision of Buffy after noticing the first bruise on Buffy’s cheek. Buffy testified that she told both Willow and the school nurse the bruise resulted from a self-induced act of playing basketball. R. at 12. The record indicates Willow did not know Buffy was lying. Rather, the record supports that it was reasonable for Willow to believe Buffy’s explanation of the bruise since Buffy used to play sports. R. at 8, 17. Although evidence adduced at a fact-finding hearing is viewed in favor of the Agency, when a parent testifies at a fact-finding hearing, reviewing courts give deference to the Family Court’s credibility determinations and findings. *Matter of Joshua R.*, 188 N.Y.S.3d at 250. Thus, the Third Appellate Division’s decision to draw a strong inference against Willow is wrong since Willow testified and gave a reasonable explanation for why she did not know about the true cause of the bruise. Also, Willow should not have known Buffy was lying

about the source of the bruise. An ordinary layperson cannot be expected to know or reasonably should know whether the bruise was intentionally inflicted or from an accident. *Matter of Alana H.*, 85 N.Y.S.3d at 666. (expert testimony that a layperson would not be able to distinguish between an intentional infliction of harm and a bruise caused by a fall).

**2. Willow's failure to receive mental health treatment does not constitute a failure to exercise a minimum standard of care of providing proper supervision.**

Willow's failure to receive mental health treatment for herself does not constitute a failure to exercise the required care for Buffy. The record is not supported by sound and substantial evidence Willow's mental health issues rise to the level of serious behavior that requires court. A parent's behavior requires court intervention when a parent's judgment is so strongly impaired that it exposes their child to the risk of serious harm. In other words, a parent's behavior due to mental health issues must be causally connected to the alleged actual or potential harm to the child. *Matter of Geoffrey D.*, 71 N.Y.S.3d 556 (App. Div. 2d Dept. 2018).

The record fails to establish that Willow's mental health issues strongly impair her judgment or her ability to care for Buffy. Although Willow has been feeling down since losing Kendra, she still works overtime to provide for Buffy and give her a better childhood than her own. R. at 13, 16. Willow does not leave Buffy unsupervised without proper caretaking and Willow did not know of the possible harm from Angel's parenting style. R. at 17. In *In re Trinity E.*, the court held a parent's mental health issues and their failure to obtain treatment for it resulted in the parent leaving the child with a caretaker the parent knew was unsuitable. 27 N.Y.S.3d 758, 760 (App. Div. 4th Dept. 2016). Here, Willow's mental health did not put Buffy's well-being at risk by having Angel supervise Buffy. Whether Willow has mental health issues or not, Willow still would need Angel to supervise Buffy since she must work two jobs to provide Buffy with financial security. R. at 16.

Moreover, Willow's lack of mental health treatment does not constitute a failure of her standard of care as Willow acknowledges her exhaustion and sadness and said she was willing to receive treatment. R. at 13, 17. A parent who has a history of mental illness, resulting in expended hospitalizations fails to exercise a minimum standard of care in providing proper supervision where the record indicates resistance to treatment and lack of insight into their illness. *In re Naomi S.*, 933 N.Y.S.2d 1, 2 (App. Div. 2d Dept. 2011). It cannot be said Willow lacks insight into her illness, or that she is resisting treatment. Although Willow has not received mental health treatment, only two months have passed since the Family Court's findings, and Willow promises she will get treatment. R. at 16. Moreover, the goal of Article 10 of the Family Court Act is meant to be remedial in nature, not punitive. *Matter of Robert W.*, 2011 NY Slip Op 50304(U), ¶ 9, 30 Misc. 3d 1231(A), 1231A, 927 N.Y.S.2d 819, 819 (Fam. Ct. May 3, 2011). This is a case where Willow is doing her best to provide an adequate life for her child despite enduring multiple losses of other family members. Willow has never left Buffy unattended without proper supervision, and, despite her hardships, Willow continues day-to-day to provide Buffy with an adequate life. R. at 16-17.

If Willow is punished with a finding of neglect and is ordered to seek mental health treatment, it will diminish her ability to financially support Buffy. Willow's time spent in treatment will inevitably cut into her work hours and could cost her one of her indispensable jobs. This Court should not set a precedent of questioning parental suitability any time a parent suffers loss. It should be wary of indirectly causing harm to children through punishing the parent. Article 10 is not meant to punish behavior a court finds undesirable but to protect children from danger. *Nicholson*, 820 N.E.2d at 845. The purpose of Article 10 is undermined when courts use it as a channel to "punish parents in the name of child protection." *Matter of Robert W.*, Slip Op 50304(U) at ¶ 9.

**II. ANGEL IS NOT A PERSON LEGALLY RESPONSIBLE FOR BUFFY AND AN ORDER OF PROTECTION AGAINST HIM FOR NEGLECTING BUFFY IS INAPPROPRIATE.**

The Agency's claim against Angel is improper because he is not a person legally responsible for Buffy. Article 10 of Sunnydale statutes requires a respondent to a Child Protective Proceeding be "any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child." Sunnydale Fam. Ct. Act §3523(a). Therefore, the subject of any abuse or neglect claim in Sunnydale must be a person legally responsible for the claim to proceed. The statute defines a person legally responsible as "the child's custodian, guardian, or any other person responsible for the child's care at the relevant time." Sunnydale Fam. Ct. Act §3523(g). Furthermore, Angel did not neglect Buffy. As referenced earlier, to establish neglect, the Agency must show, by a preponderance of evidence, that the child's physical, mental, or emotional condition was impaired or imminently threatened, and the harm to the child is due to a failure to exercise a minimum degree of care by a person legally responsible. Sunnydale Fam. Ct. Act § 3523(f)(i); *Nicholson*, 820 N.E.2d at 845. This Court should reverse the Third Appellate Division's order because Angel is not a person legally responsible, and his conduct did not arise to neglect.

**A. Angel is not a person legally responsible for Buffy.**

The neglect claim against Angel is improper because he is not a person legally responsible for Buffy. To qualify as a person legally responsible, the accused individual must serve as the functional equivalent of a parent. *Matter of Yolanda D.*, 673 N.E.2d 1228, 1231 (N.Y. 1996). A person may be deemed legally responsible for a child even if the care is temporary. *Id.* Courts consider factors like the respondent's "frequency and nature of [ ] contact," "nature and extent of the control exercised . . . over the child's environment," "duration of . . . contact with the child," and "relationship to the child's parent(s)." *Id.* Angel is not a person legally responsible for Buffy

because he did not behave as the functional equivalent of a parent. He also maintained a separate residence and provided little care to her.

Angel is not a person legally responsible because he did not behave as the functional equivalent of a parent. *See Matter of Yolanda D.*, 673 N.E.2d at 1231. In *Matter of Yolanda D.*, the New York Court of Appeals found that the child's uncle was a person reasonably responsible because he was a regular visitor at her residence, had control over the child's environment, and had a close relationship with her parents. *Id.* at 1232. Although the uncle contended that he was not the person legally responsible because he was not the legal guardian of the child, the Court clarified that the catch-all provision of the statute expanded its reach beyond legal guardianship. *Id.* at 1230. The Court added that "the common thread running through the various categories of persons legally responsible for a child's care is that these persons serve as the functional equivalent of parents." *Id.* at 1231. Moreover, it rejected the argument that functional equivalency only applied to individuals assuming permanent responsibility to care for the child. *Id.* "[A] person may act as the functional equivalent of a parent even though that person assumes temporary care or custody of a child." *Id.* The determination was a "fact-intensive inquiry which will vary according to the particular circumstances of each case." *Id.* The Court concluded that the uncle was a person legally responsible as either a custodian or "other person responsible" for the child because he regularly visited the child's household, regarded his relationship with the child as close and familial, and hosted the child for multiple overnight stays during the relevant time. *Id.*

Angel did not exert sufficient control over Buffy's home which supports a finding that he is not a person legally responsible for her. *See In re Leticia TP*, 885 N.Y.S.2d \*1, \*4 (Fam. Ct. 2008). The Kings County, New York Family Court found that the child's grandfather was a person legally responsible in *In re Leticia TP*. *Id.* at \*1. In this case, the grandfather argued that he did not

live in the same residence because he lived in the upstairs portion of the home, and the mother and subject children lived in the basement. *Id.* at \*3. The court disagreed, finding the separation of the living quarters by a door was not sufficient to establish separate residences. *Id.* Accordingly, the court determined that the grandfather “exercised a significant amount of control over the environment of the subject children . . .” *Id.* The grandfather also disciplined the children “when they misbehaved and admonished them to behave and listen to their mother.” *Id.* The court concluded that because the grandfather had directly supervised the children, maintained daily contact with them, and exercised control over their environment, he was a person legally responsible for them. *Id.* at \*4.

The fact that there is no evidence that Angel provided care for Buffy beyond watching or disciplining her weighs against a finding that he is a person legally responsible for her. *See In re Brent HH.*, 765 N.Y.S.2d 671, 674 (App. Div. 3d Dept. 2003). The New York Supreme Court Third Department Appellate Division held that a finding of neglect could not be sustained against the boyfriend of the child’s grandmother because there was not sufficient evidence to support his person legally responsible status. *Id.* at 674. In *In re Brent HH.*, the boyfriend pushed the child down - breaking his arm - while attempting to discipline him. *Id.* at 673. The court applied the factors from *Matter of Yolanda D.*, to determine whether the boyfriend fit within the catch-all category of person legally responsible. *Id.* at 674. The child did not reside with the boyfriend and visited frequently but never without his mother. *Id.* While the boyfriend attempted to discipline the child, the court held that “[w]ithout evidence that the boyfriend rendered any care for this child or otherwise assumed a parental role,” it could not find that he was a person legally responsible for the child. *Id.*

The fact that Angel was a regular member of Buffy's household is not sufficient to establish that he is a person legally responsible for Buffy. *See Matter of Austin JJ*, 648 N.Y.S.2d 727, 728 (App. Div. 3d Dept. 1996). In *Matter of Austin JJ*, the New York Supreme Court Third Department Appellate Division held that the child's grandmother was not a person legally responsible for the child even though she lived in the same household as the child. *Id.* Moreover, the court concluded the caseworker's testimony that the mother and grandmother "took care of" the child was not dispositive. *Id.* at 729. Similarly, the Third Department Appellate Division found a great-grandmother was not a person reasonably responsible in *Matter of Anthony YY*, 608 N.Y.S.2d 580, 581 (App. Div. 3d Dept. 1994). Although the great-grandmother was a "regular member of the child's household" and had babysat the child twice, the court held there was not sufficient evidence to support a finding that she was a person legally responsible for the child. *Id.*

This Court should place considerable significance on whether Angel lives in the same residence as Buffy when determining whether he is a person legally responsible for her. *See Matter of Faith GG*, 578 N.Y.S.2d 705, 706 (App. Div. 3d Dept. 1992). The Third Department Appellate Division again found that an individual was not a person legally responsible in *Matter of Faith GG*. *Id.* The court distinguished this case from its previous decision where it found that the mother's live-in boyfriend was a person legally responsible. *Id.* Instead, because in *Matter of Faith GG*, the mother's boyfriend maintained his own residence, occasionally watched the child in the mother's absence, and rarely stayed at the child's household overnight, the court held that the boyfriend was not a person legally responsible for the child. *Id.*

In this case, Angel is not a person legally responsible for Buffy, in part, because he maintained a separate residence. R. at 7. While he did visit Buffy's household often, there is no evidence in the record that Angel stayed overnight or exercised substantial control over Buffy's



environment. Like the respondent in *In re Leticia TP*, Angel disciplines Buffy and regularly watches her, but unlike in *In re Leticia TP*, he does not live in the same residence. 885 N.Y.S.2d at \*4. The court in *In re Leticia TP* found that “the presence in the home *combined* with additional factors . . . [wa]s sufficient to determine whether a person [wa]s acting as a functional equivalent of a parent.” *Id.* at \*3 (emphasis added). Additionally, unlike in *Matter of Yolanda D.*, there is no evidence that Buffy stayed overnight with Angel at his residence. 673 N.E.2d at 1231. There, the Court noted that “by permitting [the child] to stay overnight in his home, appellant provided shelter, a traditional parental function, in an area geographically distant from the child’s own household.” *Id.* at 1232. This case more closely mirrors *Matter of Faith GG*, where the court found that because the respondent maintained a separate residence and watched the child occasionally, he was not a regular member of the household; therefore, he was not a person legally responsible. *Matter of Faith GG*, 578 N.Y.S.2d at 706. While Angel watches Buffy more often than the respondent in *Matter of Faith GG*, the fact that he maintained a separate residence weighs against finding him to be a person legally responsible.

While the Third Appellate Division erroneously relied on Angel’s “significant contact” on the “majority of his days” to support finding him a person legally responsible, other courts have held regular contact to be insufficient. R. at 27; *Matter of Anthony YY*, 608 N.Y.S.2d at 581 (finding that his great-grandmother was not a person legally responsible although she was a regular member of the household because there was insufficient evidence that she acted in a parental role); *Matter of Austin JJ*, 648 N.Y.S.2d at 728 (holding that his grandmother was not a person legally responsible where she lived with the child and was a regular member of the household). Without evidence of additional contact between Angel and Buffy (like her sleeping over at his residence),

discipline and regular visits alone are not sufficient to support finding he is a person legally responsible for her.

Furthermore, Angel is not a person legally responsible for Buffy because he did not behave as the functional equivalent of a parent. Buffy said that Angel had never helped her with her homework, never played with her, and rarely talked to her. R. at 10-11. While he may not have engaged in those parental tasks, the Agency may argue that Angel behaved as the functional equivalent of a parent by agreeing to take over her childcare. R. at 27. However, courts have found childcare to be an insufficient basis to establish functional equivalency to a parent. *Matter of Anthony YY*, 608 N.Y.S.2d at 581 (babysitting the child multiple times was insufficient); *Matter of Faith GG*, 578 N.Y.S.2d at 706 (occasionally watching the child was insufficient); *Matter of Austin JJ*, 648 N.Y.S.2d at 729 (testimony that the grandmother “took care of” the child was insufficient). The record is replete with evidence that Angel did not provide the functional equivalent of parental care. As noted by the Family Court, he did not help Buffy with her homework, help her participate in extracurricular activities, spend quality time with her, or provide her with parental affection. R. at 19-20. Angel testified that “he never wanted children of his own and never felt a certain parental way towards Buffy . . .” R. at 24. His testimony indicates that, unlike the uncle in *Yolanda D.*, he did not regard his relationship with Buffy as close or familial. R. at 14.

The Third Appellate Division incorrectly focused on the fact that Angel disciplined Buffy as a “convincing reason” that he acted as the functional equivalent of a parent. R. at 29. However, the court in the *In re Brent HH*, found that discipline was an insufficient basis to find a respondent acted as the functional equivalent of a parent. 765 N.Y.S.2d at 674. Rather, the court reasoned that the individual must render some care or assume another parental role to satisfy the requirement. *Id.* Angel only monitored and disciplined Buffy. R. at 14. Consequently, without undertaking some

parental role beyond childcare duties or discipline, Angel did not behave as the functional equivalent of a parent.

**B. Even if this Court finds that Angel is a person legally responsible for Buffy, he did not neglect her because he did not physically, mentally, or emotionally impair her by using excessive corporal punishment on her.**

Angel did not neglect Buffy because he did not physically, mentally, or emotionally impair her, or place her in imminent danger of such impairment. A person legally responsible neglects a child when he or she uses unreasonable physical force while attempting to administer discipline. *Matter of Jeremiah J.*, 114 N.Y.S.3d 455, 457 (App. Div. 2d Dept. 2019). However, the New York Court of Appeals clarified that a finding of neglect does not include merely “what might be deemed undesirable parental behavior.” *Nicholson*, 820 N.E.2d at 845. There must also be a causal relationship between the basis for the neglect claim and the circumstances producing the child’s impairment or imminent danger of impairment. *Id.* Article 10 of the Sunnysdale Family Court Act defines mental or emotional impairment as “a state of substantially diminished psychological or intellectual functioning.” Sunnysdale Fam. Ct. Act. §3523(h). The statute measures the degree of diminished functioning through consideration of factors such as “failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior . . .” *Id.* Further, the “impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.” *Id.* Angel did not physically, mentally, or emotionally impair Buffy, and he did not engage in excessive corporal punishment.

Angel did not engage in “excessive corporal punishment” because he did not display a pattern of unreasonable physical discipline, he did not cause injuries requiring medical attention, and it was an isolated incident. The New York Family Court Act defines excessive corporal punishment as the use of physical force that is unreasonable or excessive. N.Y. Fam. Ct. Act §

1012(4)(e) (McKinney 2021). A finding of neglect due to excessive corporal punishment does not require a finding of physical, emotional, or mental impairment. *Id.* However, a sole instance of excessive corporal punishment, resulting in a minor physical injury is not sufficient to support a finding of neglect. *In re Jerrica J.*, 770 N.Y.S.2d 171, 173 (App. Div. 3d Dept. 2003).

Angel did not engage in excessive corporal punishment because he did not exhibit a pattern of unreasonable physical force. *See In re Deivi R.*, 890 N.Y.S.2d 52, 53 (App. Div. 1st Dept. 2009). In *In re Deivi R.*, the New York Supreme Court First Department Appellate Division held that the child's father engaged in excessive corporal punishment. *Id.* The father regularly hit the child "in the back with a belt which produced a red mark that lasted for a week and punched him in the face." *Id.* Additionally, the father hit the child in the face on several occasions in front of the child's peers. *Id.* The mother testified that the father's violence increased over time. *Id.* The regularity of the punishment inflicted, and the escalation of the punishment over time supported a finding that the father had engaged in excessive corporal punishment. *Id.*

Angel did not engage in excessive corporal punishment because the injuries caused by the punishment did not require medical treatment. *See Matter of Tarahji N.*, 153 N.Y.S.3d 598, 602 (App. Div. 2d Dept. 2021). In *Matter of Tarahji N.*, the New York Supreme Court Second Department Appellate Division found that a mother's corporal punishment was excessive for one of her children but not for another. *Id.* The court found that evidence of "a single instance in which the mother hit Amir's arm with a belt to discipline him" was not enough to support a finding of excessive corporal punishment. *Id.* The court held that the agency needed to provide evidence establishing a pattern of excessive corporal punishment by the mother. *Id.* However, the court held the mother did inflict excessive corporal punishment on her daughter. *Id.* Evidence in the record showed that the mother had struck the child multiple times and bit the child's finger, creating

injuries that required medical treatment. *Id.* Although the injuries arose from a single instance of punishment, the punishment necessitated medical treatment, and thus, a finding of excessive corporal punishment was warranted. *Id.*

Angel's isolated incident of excessive corporal punishment does not mandate a finding of neglect. *See In re Anthony PP*, 737 N.Y.S.2d at 431. In *In re Anthony PP*, the court found that the father's behavior did not arise to neglect when he dragged his son out of a car by his shirt collar and threw him to the ground. *Id.* The court held that an isolated incident of excessive corporal punishment "which resulted in minor physical injuries to the child," did not warrant a finding of neglect. *Id.* Moreover, the court was not persuaded that prior occasions on which the father lost his temper and yelled at the child indicated a pattern of excessive corporal punishment. *Id.* While the court noted that it did not condone the inappropriate behavior by the father, more evidence was required to support a finding of neglect. *Id.* at 432.

In this case, Angel did not display a pattern of excessive corporal punishment. There are only two recorded instances of physical force applied: where Buffy claimed that Angel hit her in the face and where Buffy claimed that Angel pushed and kicked her once in the side. R. at 11-12. While the behavior, taken as fact, was an unreasonable application of physical force, the evidence is insufficient to establish a pattern. Unlike the father in *In re Deivi R.*, Angel in this case did not regularly utilize unreasonable physical force to punish Buffy. Rather, both instances were isolated incidents like those in *In re Anthony PP*. Similarly, Angel's prior punishments do not establish a pattern of excessive corporal punishment. While the record suggests that Angel engaged in verbal admonishment and placed Buffy in a locked room on a few occasions, the court in *In re Anthony PP* found such behavior did not establish a pattern of excessive corporal punishment. R. at 11-12; *In re Anthony PP*, 737 N.Y.S.2d at 431.

Further, the injuries resulting from Angel's punishment were not serious and did not require medical attention. In the absence of a pattern of excessive corporal punishment, courts will find neglect arising from a single incident that caused injuries requiring medical attention. *Matter of Tarahji N.*, 153 N.Y.S.3d at 602. While the record suggests that the injuries sustained from Angel's kick affected Buffy's gait, the Nurse did not think the injuries warranted medical attention. R. at 12. Although the Nurse noted that Buffy had bruising on the left side of her torso and chest from the kick, there is no indication that the damage extended beyond soreness that affected her gait as she walked. R. at 8. Moreover, there is no indication that Buffy sustained any permanent or lasting physical injury that required medical intervention. To sustain a finding of neglect due to an isolated incidence of excessive corporal punishment, courts require a more serious injury. Unlike in *Matter of Tarahji N.*, where the mother bit the child's finger creating an injury necessitating medical treatment, the injuries caused by Angel were minor. This case closely resembles *In re Anthony PP*, where the court found that an isolated incident of excessive corporal punishment that resulted in minor injuries, did not constitute neglect. *In re Anthony PP*, 737 N.Y.S.2d at 431.

### **CONCLUSION**

This Court should reverse the Third Appellate Division's decision and find Willow did not neglect Buffy and Angel is not a person legally responsible for Buffy nor did he use excessive corporal punishment on her.