No. 2058-5147

IN THE SUNNYDALE COURT OF APPEALS

WILLOW AND ANGEL ROSENBURG,

RESPONDENT-APPELLANT,

V.

SUNNYDALE DEPARTMENT OF CHILD PROTECTIVE SERVICES,

PETITIONER-APPELLEE.

ON WRIT OF CERTIORARI TO THE STATE OF SUNNYDALE, THIRD APPELLATE DIVISION

BRIEF FOR THE RESPONDENT-APPELLANT

Team 11
Dated: January 17, 2024

Counsel for Respondent-Appellant

QUESTIONS PRESENTED

I. Whether the Third Appellate Division correctly determined that a mother neglected her child by failing to supervise, when the mother allowed an uncle with an authoritative disciplinary style to care for the child, but the mother was unaware of the details of the uncle's methods.

II. Whether the Third Appellate Division correctly determined that an uncle is a person legally responsible for a child, and hence can be found to have neglected the child, when the uncle used physical corporal punishment to discipline the child on two occasions.

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STATEMENT OF THE CASE

1. Statement of Facts

Background. Respondent Willow Rosenburg (the "Mother") is a twenty-eight-year-old single mother. R. at 7. The Mother works two jobs—one at Sunnydale High School and one at Sunnydale's local waffle house. R. at 7. After her parents died, the Mother relied on her sister and her brother, Respondent Angel Rosenburg (the "Uncle"), to help take care of her child. R. at 7. When her sister died in 2022, the Mother began to rely solely on the Uncle for childcare, except on Sunday nights when spends quality time with the child. R. at 7. Sunday nights are the Mother's only nights off of work. R. at 7. The Uncle is currently in between jobs and living at a friend's apartment. R. at 8. He spends time at the Mother's apartment to watch the child and to coordinate her travel to and from the bus stop so that she can attend school. R. at 8. The Uncle has never been late to drop off or to pick up the child. R. at 8. However, the Uncle does not have a driver's license, so he is unable to bring the child to soccer practice or to her friends' houses. R. at 8.

The Mother. After her sister's passing, the Mother began to feel overwhelmingly depressed and tired. R. at 13. To provide for the child and to distract from the emotional distress of her daily life, the Mother picked up extra shifts at work. R. at 13. Given the Mother's busy schedule, the Uncle's supervision of the child was greatly appreciated. R. at 13. At the fact-finding hearing, the Mother testified that she was not in the proper mindset to interfere with the child's supervision. R. at 13. Although the Mother was aware that the Uncle's childcare style was authoritative, she was unaware of the details of his disciplinary method. R. at 13. Further, since the child's behavior has improved since the Uncle began supervising her, the Mother reasoned that the Uncle was a suitable caregiver. R. at 13.

The Mother and the Uncle were raised in a household that used physical punishment as a form of discipline. R. at 13. While the Mother understands the importance of discipline, she has vowed to never repeat her parents' punishment on the child. R. at 13. Given their family history, the Mother testified that she does not believe the Uncle would ever "seriously hurt [the child] on purpose." R. at 13. Furthermore, the child was recently diagnosed with intermittent explosive disorder and has become prone to angry outbursts and a disregard for authority. R. at 13–14. Since the Uncle began taking care of the child, the child has had less outbursts. R. at 14. The Mother hopes the Uncle can continue his supervision of the child because of the improvement she has seen in the child's behavior. R. at 14.

The Uncle. The Uncle struggles with anger issues stemming from the abuse he experienced as a child. R. at 14. These issues worsened after his sister's death. R. at 14. The abuse and physical punishment experienced by the Uncle during his childhood, however, far exceeds the allegations made against the Uncle by Petitioner Sunnydale Department of Child Protective Services (the "Agency"). R. at 14. The Uncle loves the child as his niece, but he has vowed to never have his own children. R. at 14. Although the Uncle despises taking extensive care of the child, he felt forced to interfere and help his sister. R. at 14. Given the child's behavioral disorder, the Mother's grueling work schedule, and the passing of his sister, being involved in the child's life is a challenge for the Uncle. R. at 14–15. However, he agreed to help his sister as she struggles with her mental health and is unable to supervise the child herself. R. at 13–14.

The Uncle not only helps the Mother by providing childcare, but he has encouraged the Mother to see a therapist regarding her mental health issues so that she can focus on caring for the child. R. at 13. Despite the Uncle's suggestions, the Mother has not been able to fit the appointments into her schedule. R. at 13. Since the Mother is unable to be present for the child,

the Uncle feels personally responsible for helping the child learn to behave. R. at 14–15. Generally, the Uncle uses words and time-outs to discipline the child. R. at 15.

Incidents Reported. On May 21, 2023, a nurse at Sunnydale Elementary School informed the agency that the child was injured and sore on her left side. R. at 8. The nurse observed a bruise on the left side of the child's ribs. R. at 8. The Agency launched an investigation and called the Mother, who was extremely upset. R. at 8. After filing a petition against the Mother and the Uncle, the Agency sent a caseworker to interview the child. R. at 9. The interview revealed that life had become more difficult for the child because of her aunt's death. R. at 10. Furthermore, the caseworker testified that the child is prone to severe and angry outbursts. R. at 10–11.

The child also told the caseworker that she has recently grown uncomfortable and scared around the Uncle. R. at 10. The child stated that the Uncle never helped her with homework or played with her, rarely speaking to her at all. R. at 11. Additionally, the child stated that the Uncle grew frustrated with her after she misbehaved or had angry outbursts. R. at 11. When the outbursts worsened, the Uncle would reportedly call the child names like "baby" and refer to her as a "nuisance." R. at 11. The child also told the caseworker that the Uncle would put her in long time-outs inside of a closet. R. at 15. Interactions between the child and the Uncle became physical on two occasions. R. at 11, 15. First, the child alleged that the Uncle hit her after she talked back to him. R. at 11. Second, three weeks after the first incident, the child had an outburst and reportedly told the Uncle that she wished he was dead. R. at 12. The child told the caseworker that the Uncle then pushed her and kicked her once on her side. R. at 12.

2. Procedural History

The Agency filed a petition under Article 10 of the Sunnydale Family Court Act, alleging that the Mother and the Uncle neglected the child. R. at 6. The Mother and the Uncle filed a motion

to dismiss in response to the petition. R. at 6. A four-day fact-finding hearing was held in May 2023. R. at 6.

On June 7, 2023, the Sunnydale Family Court found that (1) the Mother did not commit child neglect, and (2) the Uncle is not a person legally responsible for the child under Article 10. R. at 21. Given the court's finding of a lack of jurisdiction, the trial court dismissed all other claims and petitions against the Uncle. R. at 21. Additionally, the trial court granted the Mother and Uncle's motion to dismiss. R. at 21. The Agency subsequently appealed. R. at 4.

The Third Appellate Division reversed the decision of the trial court, finding that the Mother committed child neglect and ordering her to work with the Agency toward finding mental health treatment. R. at 29. The Third Appellate Division also found that the Uncle is a person legally responsible for the child and committed child neglect. R. at 29. Accordingly, the Third Appellate Division mandated that an Order of Protection be granted against the Uncle. R. at 29.

SUMMARY OF ARGUMENT

This Court should reverse the decision of the Third Appellate Division because the evidence is insufficient to show that the Mother or the Uncle neglected the child, and the Uncle is not a person legally responsible for the child. First, the Third Appellate Division incorrectly held that the Mother neglected the child by failing to supervise because the record lacks sufficient evidence to meet the requirements of Article 10 of the Sunnydale Family Court Act. Under section 3523(f), a court must find neglect by a preponderance of the evidence. However, the Third Appellate Division failed to apply this standard. Furthermore, the Mother acted as a reasonable and prudent parent in providing the child with the Uncle's supervision, and the Third Appellate Division erred in finding an imminent presence of danger caused by the Mother's conduct.

Second, the Third Appellate Division erred in finding the Uncle to be a person legally responsible for the child because the Uncle does not meet the requisite factors. The Uncle's relationship with the child is not familial and is similar to that of a babysitter. Therefore, the Uncle does not act as a functional equivalent to a parent, and Family Court cannot exercise jurisdiction over him. Even if the Third Appellate Division incorrectly deems the Uncle to be a person legally responsible, his discipline of the child is not excessive corporal punishment, and he cannot be found to have committed neglect. Accordingly, the Third Appellate Division's finding of neglect on behalf of the Mother, finding of neglect on behalf of the Uncle, and Order of Protection against the Uncle should be reversed.

ARGUMENT

I. THE THIRD APPELLATE DIVISION ERRED IN FINDING THAT THE MOTHER NEGLECTED THE CHILD BECAUSE THE MOTHER DID NOT CAUSE ACTUAL OR IMMINENT HARM AND SHE DEMONSTRATED A MINIMUM DEGREE OF CARE.

The decision of the Third Appellate Division should be reversed as the Agency failed to show by a preponderance of the evidence that the mother neglected her child. Article 10 of the Sunnydale Family Court Act defines a neglected child as one less than eighteen years of age who has been harmed or is in imminent danger of harm as a result of the conduct of a parent or a person legally responsible for the child's care, including through the infliction of excessive corporal punishment or failure to properly supervise. Sunnydale Fam. Ct. Act § 3523(f). The laws of the State of Sunnydale are considerably similar to those of the State of New York. R. at 2; *see* New York Fam. Ct. Act § 1012.

Relevant here, section 3523(f) imposes two specific requirements for a finding of neglect: (1) actual impairment or imminent danger of impairment to "a child's physical, mental, or emotional condition," (2) which occurs as "a consequence of the failure of the parent . . . to exercise

a minimum degree of care in providing the child with proper supervision or guardianship." *Nicholson v. Scoppetta*, 820 N.E.2d 840, 844 (N.Y. 2004). Both requirements must be shown by a preponderance of the evidence. *In re Evelyn X*, 736 N.Y.S.2d 549, 551 (N.Y. App. Div. 3d Dept. 2002). Where the alleged failure of the responsible party is a lack of supervision, the court must evaluate the responsible party's behavior objectively. *Nicholson*, 820 N.E.2d at 846. Furthermore, "[a] finding of neglect should not be made lightly, nor should it rest upon deficiencies alone." *In re Daniel C*, 365 N.Y.S.2d 535, 539 (N.Y. App. Div. 1st Dept. 1975).

A. The Third Appellate Division Failed to Apply the Preponderance of the Evidence Standard and Its Finding of Neglect Does Not Meet This Appropriate Standard.

The Mother did not create actual impairment or an imminent danger of impairment by allowing the Uncle to supervise her child. Section 3523(f) requires evidence of actual physical, emotional, or mental harm to the child—or imminent danger of such harm—*as a result* of a responsible party's failure to exercise a minimum degree of care. Sunnydale Fam. Ct. Act § 3523(f) (emphasis added). These requirements ensure the court will not make determinations of neglect based upon whether certain parental behavior is desirable. *Nicholson*, 820 N.E.2d at 845–46. Instead, courts must focus on whether serious actual or impending harm exists. *Id.* Further, even when the relationship between a parent and a child is strained, the parent holds a fundamental liberty interest in caring for the child and "preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). This interest is not destroyed simply because a parent has not been a "model parent[]." *Id.*

1. The record lacks sufficient evidence of actual harm caused by the Mother because the alleged emotional impairment is not clearly attributable to the Mother's conduct.

Actual emotional or mental impairment involves situations where a child's psychological or intellectual functioning has been "substantially diminished." Sunnydale Fam. Ct. Act § 3523(f). Where emotional or mental harm is alleged, such impairment must be *clearly attributable* to the

alleged objectionable behavior of the responsible party. *Nicholson*, 820 N.E.2d at 845–46 (emphasis added). Therefore, not all objectionable parental behavior constitutes neglect. *In re Christopher K.*, 841 N.Y.S.2d 818, 15 Misc. 3d 1142(A), 2007 WL 1558863, at *2 (N.Y. Fam. Ct., May 30, 2007). Furthermore, under the objective standard, evidence of a responsible party's mental illness is insufficient alone to establish neglect. *In re Jesus M.*, 988 N.Y.S.2d 778, 779 (N.Y. App. Div. 4th Dept. 2014).

Here, the Agency fails to prove either that the Mother actually harmed the child or put the child in imminent danger of harm. First, the record is clear: all allegations of actual physical harm are attributable to the Uncle, not to the Mother. Second, the Agency's claims of emotional harm are not sufficiently attributable to the Mother's conduct. Section 3523(f) requires proof of a "substantially diminished" mental state that is "clearly attributable" to the responsible party. *See* Sunnydale Fam. Ct. Act § 3523(f). The Mother provided the child with supervision that, from her knowledge, was reasonably adequate under the circumstances. R. at 7, 14. Although the Mother's inability to spend more time with her child might be less than ideal, this does not prove by a preponderance of the evidence that the Mother clearly caused emotional harm. *See Nicholson*, 820 N.E.2d at 846. In fact, the child attributed her outbursts to the loss of her aunt and not to the Mother's alleged lack of supervision. R. at 10. The record further indicates that the child experienced mental struggles while under the Uncle's supervision, and these struggles were associated with the sudden and tragic loss of the child's aunt. R. at 10, 12–13. Even though the child alleges that the Mother failed to love and protect her, these sentiments are not conclusive evidence that the Mother clearly caused any substantial emotional harm. Accordingly, the Mother did not cause actual physical or emotional harm to the child.

2. The Third Appellate Division failed to show by a preponderance of the evidence that the Mother's conduct of allowing the Uncle to supervise the child caused imminent danger of impairment.

Where proof of actual physical, emotional, or mental impairment is lacking, section 3523(f) requires proof of an imminent danger of impairment. *Nassau Cnty. Dep't of Soc. Servs. on Behalf of Dante M. v. Denise J.*, 661 N.E.2d 138, 138 (N.Y. 1995). The alleged imminent danger of impairment must be "near or impending, not merely possible." *Nicholson*, 820 N.E.2d at 845. Therefore, to establish neglect the Agency must offer proof by a preponderance of the evidence that the child has "been harmed or threatened with harm." *Matter of Naticia Q.*, 599 N.Y.S.2d 759, 617–18 (N.Y. App. Div. 3d Dept. 1993). Where an agency offers evidence of only a possibility of danger, this burden of proof is not met. *See In re Afton C.*, 896 N.Y.S.2d 465, 466 (N.Y. App. Div. 2d Dept. 2010) (holding that the presence of a registered sex offender in the home is insufficient to establish imminent danger of impairment); *In re Javan W.*, 2 N.Y.S.3d 654, 656 (N.Y. App. Div. 3d Dept. 2015) (finding that leaving children alone overnight, while irresponsible, does not establish imminent danger of impairment).

Here, the Mother did not place the child in imminent danger of impairment by allowing the Uncle to supervise. Although the Mother was aware that the Uncle's disciplinary style was authoritative, she was not aware of the extent of such discipline. R. at 13. The Mother's awareness of the Uncle's authoritative style may establish a possibility of impairment, but it does not establish imminent or impending danger. *See In Re Afton C.*, 896 N.Y.S.2d at 466. Furthermore, the Mother was unaware of any threat of harm to the child as the Mother believed the Uncle would "never seriously hurt [the child] on purpose." R. at 13. The record is void of any allegations that the Mother was aware of the Uncle's anger issues or any previous incidences where the Uncle had

been violent. Therefore, there is insufficient proof to show by a preponderance of the evidence that imminent danger existed when the Mother allowed the Uncle to supervise her child.

B. The Mother Exercised a Minimum Degree of Care By Providing Her Child with Supervision that She Deemed Reasonably Appropriate Under the Circumstances.

Neglect did not occur here because the Mother exercised a minimum degree of care by providing her child with supervision which she perceived to be adequate under the circumstances. In order to find neglect, section 3523(f) requires that a responsible party fail to exercise a *minimum* degree of care, "not maximum, not best, not ideal." *Nicholson*, 820 N.E.2d at 846 (emphasis added). The inquiry is not whether a right or wrong decision was made. *Matter of Hofbauer*, 393 N.E.2d 1009, 1014 (N.Y. 1979). Instead, the standard is objective, and neglect is determined by what a reasonable and prudent parent would have done under the circumstances. *In re Jessica YY.*, 685 N.Y.S.2d 489, 491 (N.Y. App. Div. 3d Dept. 1999). Therefore, a parent may only be held accountable for the acts of another party if the parent objectively knew or should have known the child was faced with impairment. *Matter of Robert YY*, 605 N.Y.S.2d 418, 420 (N.Y. App. Div. 3d Dept. 1993).

1. The Third Appellate Division erred in finding neglect by the Mother because the proper standard of care is low and the Mother did not act grossly negligent.

A failure to exercise a minimum degree of care must be actual, not potential or threatened. *Nicholson*, 820 N.E.2d at 846. This standard imposes a lesser burden on the responsible party than an ordinary duty of care. *Dep't of Child. and Fams., Div. of Youth and Fam. Servs. v. T.B.*, 24 A.3d 290, 297 (N.J. 2011). Accordingly, a failure to meet a minimum degree of care requires a willful omission on behalf of the responsible party. *Matter of Sara X.*, 505 N.Y.S.2d 681, 682 (N.Y. App. Div. 2d Dept. 1986); *see G.S. v. Dep't of Hum. Servs., Div. of Youth and Fam Servs.*, 723 A.2d 612, 620 (N.J. 1999) ("we believe the phrase 'minimum degree of care' refers to conduct that is grossly or wantonly negligent, but not necessarily intentional.").

Courts will find a failure to meet a minimum degree of care as a result of improper supervision when a responsible party leaves a child in the care of an individual who the party knows to be abusive or neglectful. *See New Jersey Div. of Child Prot. & Permanency v. J.L.G.*, 160 A.3d 112, 122 (N.J. Super. App. Div. 2015) (holding that a mother's boyfriend neglected a child when he witnessed the mother hit the child with a spatula, understood the severity of the circumstances, and failed to intervene); *Matter of Aiden LL.*, 142 N.Y.S.3d 234, 236–37 (N.Y. App. Div. 3d Dept. 2021) (concluding that a responsible party failed to exercise a minimum degree of care when she permitted a family member to care for children even though she was aware of the family member's "emotional neglect and inadequate supervision").

However, courts rarely find that neglect has occurred where a responsible party is not aware of another supervising individual's physical abuse of a child. *See In re Lucien HH.*, 65 N.Y.S.3d 291, 295 (N.Y. App. Div. 3d Dept. 2017) (holding that a mother exercised a minimum degree of care when she left her children in the supervision of their father who she did not previously observe to exhibit any signs of aggression or physical injury); *Matter of Robert YY*, 605 N.Y.S.2d at 420 (finding that a mother acted objectively reasonable when she permitted a child's father to supervise the child and the child was injured, but there was no evidence of prior roughness or other physical risk to the child).

Here, the Mother's decision to allow the Uncle to supervise her child was in accordance with a minimum degree of care. As a single mother whose parents and sister have passed away, the Mother is forced to work two jobs and to seek external childcare. R. at 7. The Mother was unaware of the Uncle's disciplinary methods, and it would therefore have been irrational to leave the child unattended instead of leaving her in the care of the Uncle. *See In re Lucien HH*, 65 N.Y.S.3d at 295. Despite the challenges that arose after her sister's death, the Mother acted in

accordance with a *minimum* degree of care by ensuring her child had someone to oversee her travel to and from school. R. at 8. Since the Mother's mental health and busy work schedule prevent her from being able to supervise—and she had no knowledge of the Uncle's use of corporal punishment—she made the reasonable choice of allowing the Uncle to supervise. R. at 13. This choice is in accordance with the low minimum degree of care standard, even though it is not ideal. *See Nicholson*, 820 N.E.2d at 846. Therefore, the Third Appellate Division erred in finding that the Mother acted below a minimum degree of care.

2. The Mother acted reasonably in allowing the Uncle to supervise her child given the child's special vulnerabilities.

The minimum degree of care standard takes into account the special vulnerabilities of the child. *In re Victoria XX.*, 976 N.Y.S.2d 235, 238 (N.Y. App. Div. 3d Dept. 2013). Where a child has special vulnerabilities, the court should ask whether the party exercised the requisite degree of care in addressing the special needs of the child, "even when those needs may not seriously implicate general physical health." *Matter of Sayeh R.*, 693 N.E.2d 724, 728 (N.Y. 1997).

Here, the Mother reasonably believed that the Uncle's supervision would provide her child with the discipline the child needed, given her diagnosis with intermittent explosive disorder. R. at 13. While the Mother was aware of the child's special vulnerabilities, under the circumstances the Mother was not in the best position to handle the child's outbursts. *See* R. at 13–14. In fact, from the Mother's understanding, the child's struggles had improved since the Uncle began taking care of the child. R. at 14. Given the Mother's inability to supervise, she acted reasonably by allowing an adult with a stricter authoritative style to babysit her child because the child's disorder explicitly involves a disregard for authority. R. at 13. The Mother had no knowledge of any physical or emotional injury inflicted upon the child, and the Mother's commitment to working two jobs is evidence of the Mother's care and love for her child. R. at 16–17. Therefore, the Mother

acted in accordance with a minimum degree of care by allowing the Uncle to supervise her child, considering the child's special vulnerabilities.

II. THE UNCLE IS NOT A PERSON LEGALLY RESPONSIBLE FOR THE CHILD, AND EVEN IF THIS COURT INCORRECTLY FINDS HIM TO BE, HIS USE OF CORPORAL PUNISHMENT DOES NOT CONSTITUTE NEGLECT BECAUSE IT WAS NOT EXCESSIVE.

The Third Appellate Division erred in finding that the Family Court had jurisdiction over the Uncle in the child protective proceeding, and even if the Uncle is found to be a person legally responsible, the lower court's finding of neglect and Order of Protection against the Uncle should be reversed because his actions do not constitute neglect under section 3523(f).

A child protective proceeding can only be brought against a non-parent respondent if the individual is determined to be a "person legally responsible for a child's care [and they are] alleged to have . . . neglected such child." Sunnydale Fam. Ct. Act § 3523. A person legally responsible is defined as:

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

Sunnydale Fam. Ct. Act § 3523(g).

Persons legally responsible are the functional equivalent of parents. *In re Trenasia J.*, 32 N.E.3d 377, 379–380 (N.Y. 2015). Under Sunnydale statute, persons legally responsible can use corporal punishment as long as it is not excessive. Sunnydale Fam. Ct. Act § 3523(f). Furthermore, persons legally responsible have a constitutional right and a privilege to use physical force to discipline children in order to maintain discipline or promote the child's welfare. *Ginsberg v. State of New York*, 390 U.S. 629, 639 (1968); *In re Anastasia L.D.*, 978 N.Y.S.2d 347, 349 (N.Y. App. Div. 2d Dept. 2014).

A. Family Court Does Not Have Jurisdiction over the Uncle Because He Is Not a Person Legally Responsible Under Section 3523(f).

Family Court cannot properly exercise jurisdiction over the Uncle because he does not qualify as a person legally responsible for the child. Whether an individual meets Article 10's definition of a person legally responsible is a fact-intensive inquiry. *In re Trenasia J.*, 32 N.E.3d at 380 (citing *Matter of Yolanda D.*, 673 N.E.2d 1228, 1231 (N.Y. 1996)). The factors to be considered include: (1) "the frequency and nature of contact between the child and respondent," (2) "the nature and extent of the control exercised by the respondent over the child's environment," (3) "the duration of the respondent's contact with the child," and (4) "the respondent's relationship to the child's parent(s)." *Matter of Yolanda D.,* 673 N.E.2d at 1231. These factors are not exhaustive, and the weight accorded to each is decided by the court and dependent on the circumstances of the case. *Id*. In addition to this factor-based inquiry, the court in *In re Trenasia J.* stated that "[A]rticle 10 should not be construed to include persons who assume fleeting or temporary care of a child such as a supervisor of a playdate or an overnight visitor or those persons who extended daily care of children in institutional settings, such as teachers." 32 N.E.3d at 380 (citing *Matter of Yolanda D.*, 673 N.E.2d at 1231).

1. The Uncle is not a person legally responsible for the child because his relationship with the child is limited in nature.

The first factor considers the frequency and nature of contact between the child and the respondent. *Matter of Yolanda D.,* 673 N.E.2d at 1231. Here, the Uncle's contact with the child only began because of the death of the child's aunt and the Mother having no other option for childcare. R. at 7. Although the Uncle has regular contact with the child while the Mother is at work, the Uncle does not live with the child. R. at 7. Even when he was dismissed from his job, the Uncle chose to move in with a friend instead of living with the Mother and the child. R. at 7. Additionally, the Uncle was reluctant to take on childcare duties for the child and he limited contact

to only what his sister needed to get through a difficult time. R. at 14. There are no facts to suggest that the Uncle visited the child's home outside of his duties to babysit the child while the Mother was at work. R. at 7. Furthermore, the Uncle did not cultivate a particularly close or familial relationship with his niece. R. at 14; *cf. Matter of Yolanda D.*, 673 N.E.2d at 1232 (finding an individual to be a person legally responsible where the individual characterized the relationship with the child as "close" and regularly visited the home to attend parties outside of his normal, bi-weekly supervision); *Matter of Erika H.-J*, 188 N.Y.S.3d 700, 704 (N.Y. App. Div. 2d Dept. 2023) (finding an individual to be a person legally responsible when she treated the child as her own); *In re Jaiden M.*, 87 N.Y.S.3d 166, 168 (N.Y. App. Div. 1st Dept. 2018) (finding an individual to be a person legally responsible when the individual stated he considered the child to be his son).

Moreover, there are no facts to suggest that the Uncle ever permitted the child to stay overnight at his apartment or watched the child overnight at the Mother's home. *Cf. Matter of Yolanda D.* 673 N.E.2d at 1232 (finding an uncle to be a person legally responsible where he provided shelter, which is a typical parental function, by allowing his niece to regularly stay at his residence). Therefore, while the Uncle did have regular contact with the child, the nature of the contact was as limited as possible to help the Mother by providing emergency supervision. *See* R. at 8, 14. The Uncle did not extend contact beyond what was necessary to support the Mother and did not cultivate a parental relationship with the child. *See* R. at 8, 14. Thus, the evidence shows that the Uncle does not meet the first factor.

The second factor is the nature and extent of the control exercised by the individual over the child's environment. *Matter of Yolanda D.*, 673 N.E.2d at 1231. Even though the Uncle babysat the child after school, he did not help her with homework, play with her, or talk to her frequently. R. at 11. The Uncle testified that "he [is] not particularly close" to the child and "did not view his

relationship with her as one resembling a parent/child relationship." R. at 14; *see Matter of Yolanda D.*, 673 N.E.2d at 1232. Furthermore, the Uncle travels to the Mother's home to watch the child, and therefore has less control over the environment and is not geographically isolating the child from her own home. R. at 7. This is distinguishable from *Matter of Yolanda D.*, where the uncle supervised the child overnight in his home, geographically distancing the child from their home. 673 N.E.2d at 1232. Here, the Uncle's supervision of the child is limited to minimal care before and after school. R. at 8. Accordingly, the record shows that the second factor is also not met.

The third factor considers the duration of the individual's contact with the child. *Matter of Yolanda D.*, 673 N.E.2d at 1232. Even though the Uncle cannot afford to live on his own, he still does not live with the child. R. at 7. The Uncle's babysitting of the child began after the death of his sister last year. R. at 7; *cf. In re Kevin N.*, 980 N.Y.S.2d 382, 382 (N.Y. App. Div. 1st Dept. 2014) (holding that an individual was a person legally responsible for a child where he had a seven-year relationship with the mother and he purportedly lived at their residence part-time); *In re Keoni Daquan A.*, 937 N.Y.S.2d 160, 161 (N.Y. App. Div. 1st Dept. 2012) (finding an individual to be a person legally responsible for a child when they were a long-time boyfriend of the mother and regular visitor to the home, helping the children with homework and bringing them to doctor appointments). Here, the Uncle only interacted with the child before and after school. R. at 7. Therefore, the record does not indicate that the third factor is met.

The fourth factor considers the relationship of the individual to the child's parents. *Matter of Yolanda D.*, 673 N.E.2d at 1231. The existence of a familial connection is not enough to meet the fourth factor. *In re Trenasia J.*, 32 N.E.3d at 381. Accordingly, this Court should not give "undue influence" to the relationship between an uncle and his niece and instead should question the "normative-based assessment" of what constitutes a family. *In re Trenasia J.*, 32 N.E.3d at 383

(Rivera, J., concurring). Here, the relationship between the Uncle and the child only began out of the Mother's dire need for childcare after the death of the Mother's sister. R. at 7. The Uncle testified that he did not have a close personal relationship with his niece despite their blood relationship. R. at 14; *cf. In re Jaiden M.*, 87 N.Y.S.3d at 168 ("respondent provided financial support for the eldest child, whom respondent . . . admitted he considered to be his son, and that the eldest child often referred to respondent as 'daddy.'"). The Uncle was the Mother's last resort, and he had little contact with the child when the Mother or any other caretaker was available. R. at 15. This is unlike the relationship in *Matter of Yolanda D*., where the uncle was a regular visitor who attended birthday parties, visited family members, and hosted overnight stays of the niece at his own home. 673 N.E.2d at 1232. Therefore, the record does not indicate that the fourth factor is met.

2. This Court should give weight to the purpose of Article 10 and find that the Uncle is only a temporary caregiver.

The factors relied upon by the Third Appellate Division are not dispositive of whether an individual constitutes a person legally responsible. *In re Trenasia J.*, 32 N.E.3d at 379–80. In *In re Trenasia J.*, the court acknowledged that "temporary" caregivers such as playdate supervisors or teachers should not be considered persons legally responsible. *Id.* (citing *Matter of Yolanda D.*, 673 N.E.2d at 1232). A temporary caregiver is analogous to a babysitter, and "a babysitter is not a [person legally responsible] because [their] job is to temporarily care for the child until the parent returns, but the parent does not relinquish control to the babysitter." 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, 532 (2017) [hereinafter *Redefining the Standard*].

Here, the Uncle acts as a babysitter to the child, not the functional equivalent of a parent, and thus, not a person legally responsible. The Mother did not relinquish any parental duties to the

Uncle when she was home with the child—the Uncle's duties to supervise the child ended when the Mother returned from work. R. at 14. His care of the child after school was temporary, and he did not take over additional responsibilities as a parent would. R. at 14. The Uncle did not bring the child to her soccer practice, he did not help her with her homework, and he stated that he did not have an interest in being a father figure to the child. R. at 7, 11, 14. The Uncle's role was to supervise the child when the Mother was at work, and only then was he responsible for making sure that she behaved. R. at 14. Therefore, the Uncle's discipline of the child is consistent with that of a babysitter, and not that of a parent.

Thus, the Third Appellate Division's decision gave undue weight to the Uncle's interest in teaching the child to behave. Even temporary supervisors of children are expected to correct misbehavior under their care. *Redefining the Standard*, at 535. A temporary caregiver does not become the functional equivalent of a parent simply because a responsible party has allowed them to act as a babysitter. *Redefining the Standard*, at 532. Here, holding the Uncle to be a person legally responsible is contrary to the purpose of Article 10. The Third Appellate Division ignored this statutory purpose and incorrectly included the Uncle in the definition of a temporary caregiver. *See In re Trenasia J.*, 32 N.E.3d at 379–80. Accordingly, the Third Appellate Division erred in finding that the Uncle is a person legally responsible for the child.

B. Even if the Uncle is Found to Be a Person Legally Responsible His Discipline Does Not Constitute Neglect Because It Is Not Excessive Corporal Punishment.

Even if this Court finds that Family Court has jurisdiction over the Uncle, the Uncle's corporal punishment of the child does not constitute neglect because it was not excessive. A person legally responsible is the functional equivalent of a parent. *Matter of Yolanda D.*, 673 N.E.2d at 1231. The Supreme Court has recognized the parental right to discipline as a constitutional right and has held that parents have "authority in their own household to direct the rearing of their

children." *Ginsberg*, 390 U.S. at 639. However, parents do not have an unlimited license to use physical force and parental physical force must be measured against an objective standard of reasonableness to determine if it is excessive. *Matter of Rodney C.*, 398 N.Y.S.2d 511, 514 (Fam. Ct. 1977) (citing Restatement (Second) of Torts § 150 (1965)).

As long as it is not excessive, corporal punishment is allowed in Sunnydale. Sunnydale Fam. Ct. Act § 3523(f)(i)(B). "While losing one's temper does not excuse striking and injuring one's child, one such event does not necessarily establish . . . neglect." *In re P. Child.*, 707 N.Y.S.2d 453, 455 (N.Y. App. Div. 1st Dept. 2000). Absent statutory guidance, courts define "excessive" by applying common usage and understanding of the term. *See e.g.*, *Dep't of Child. and Fams., Div. of Youth and Fam. Servs. v. K.A.*, 996 A.2d 1040, 1044–45 (N.J. 2010). For example, courts have defined excessive as "going beyond what is proper and reasonable." *Id.* (citing *Webster's II New College Dictionary* 390 (Margery S. Berube ed., 1995)).

1. The Uncle's use of physical force to discipline the child was reasonable and not excessive because it was to promote the child's welfare.

Persons legally responsible have a right to use reasonable physical force against a child to maintain discipline or to promote the child's welfare. *In re Anastasia L.D.*, 978 N.Y.S.2d at 349. The Agency has the burden of proving that the Uncle's actions constitute neglect and must do so by establishing a preponderance of the evidence. *Nicholson*, 820 N.E.2d at 847.

A child's caretaker may use reasonable physical force for the purpose of discipline. *See* N.Y. Penal Law § 35.10 (McKinney) ("[a] parent, guardian or other person . . . may use physical force, but not deadly physical force, upon such person when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person."). Where a parent's use of physical force is inappropriate, but not excessive, courts will not find neglect. *See In re Corey Mc.*, 889 N.Y.S.2d 647, 648 (N.Y. App. Div. 2d Dept. 2009); *In re Chanika B.*, 874

N.Y.S.2d 251, 252 (N.Y. App. Div. 2d Dept. 2009); *In re Amanda E.*, 719 N.Y.S.2d 763, 764 (N.Y. App. Div. 3d Dept. 2001); *In re Anastasia L.D.*, 978 N.Y.S.2d at 349. Courts also consider the purpose of the punishment when determining neglect. *See Matter of Damon S.*, 587 N.Y.S.2d 355, 356 (N.Y. App. Div. 2d Dept. 1992) (finding strict punishments enforced for failure to complete chores to be reasonable when they were used to train and educate children, and to preserve discipline).

Here, the Uncle engaged in reasonable discipline of the child to promote her welfare and to promote better behavior. *See* R. at 14–15. The child acted out excessively and was becoming a "problem-child." R. at 13–14. The Uncle testified that there was no way to reprimand the child or teach her without implementing corporal punishment. R. at 15. Although the Uncle hated using physical force, his method of discipline was the only method that worked in teaching the child to behave and listen. R. at 15. Additionally, because of the abuse the Uncle suffered as a child, he was conscious to avoid excessive or inappropriate disciplinary methods. R. at 14–15. The Uncle did not want his relationship with the child to resemble his own, admittedly unhealthy, relationship with his parents. R. at 14. Furthermore, the Uncle promoted the child's welfare by walking her to and from the bus stop everyday so that she could attend school. R. at 8. The Uncle's authoritative style was reasonably necessary to discipline the child because her disorder is explicitly characterized by severe anger issues and a disregard for authority. R. at 13; *see Matter of Damon S.*, 587 N.Y.S.2d at 356. The Uncle's discipline of the child was never done with intent to harm, it was to promote her welfare and encourage good behavior. R. at 15, 26.

a. The incidents reported were isolated and the record indicates no pattern of excessive punishment with intent to harm.

Courts look for "patterns" to determine if corporal punishment is excessive, and thus, constitutes neglect. *See Matter of Bonnie FF.*, 197 N.Y.S.3d 753, 756 (N.Y. App. Div. 3d Dept.

2023) (finding neglect where respondents had a ten-year history with the agency and numerous reports). Alternatively, courts will not find neglect where reported incidents are isolated and not part of a "pattern of excessive force*." Matter of Grayson S.*, 175 N.Y.S.3d 825, 830 (N.Y. App. Div. 4th Dept. 2022) (holding that neglect could not be established in an isolated incident of a father striking his child where petitioner failed to prove a pattern); *accord In re Anthony PP.,* 737 N.Y.S.2d 430, 431 (N.Y. App. Div. 3d Dept. 2002) (holding that, while there was proof that a father lost his temper on prior occasions and screamed, there was no neglect because there was no pattern of corporal punishment); *In re Christian O.,* 856 N.Y.S.2d 612, 613–14 (N.Y. App. Div. 1st Dept. 2008) (finding no neglect where a father kicked his son in an isolated incident and corporal punishment had not been used regularly prior).

In addition to looking at patterns, courts will consider intent when determining neglect. *See In re Anastasia L.D.*, 978 N.Y.S.2d at 349; *Matter of Myiasha K.D.*, 146 N.Y.S.3d 298, 300 (N.Y. App. Div. 2d Dept. 2021). In *In re Anastasia L.D.*, a father allegedly hit his child with a belt after she refused to give him her cell phone, causing bruises. 978 N.Y.S.2d at 349. The court ruled that the claims of neglect were without merit because the father did not intend to hurt his daughter and there was no pattern of excessive corporal punishment. *Id*. Similarly, in *Matter of Myiasha K.D.*, the court determined that an agency failed to establish that the actions of a child's uncle—held to be a person legally responsible—rose to a level of neglect when he inappropriately struck his niece on her arm, leaving a bruise. 146 N.Y.S.3d at 298. The court also found insufficient evidence that the uncle intended to hurt his niece or that the uncle exhibited a pattern of excessive corporal punishment. *Id*.

Here, the Uncle's discipline of the child was not excessive because he did not exhibit a pattern of punishment or an intent to harm. First, the Uncle's verbal frustration toward the child

cannot be considered excessive corporal punishment. *See In re Anthony PP*, 737 N.Y.S.2d at 431. The record is void of any allegation that the Uncle showed a pattern of excessive corporal punishment or a pattern of excessive force. Prior to 2022, the Uncle had never used physical discipline to punish the child. R. at 15. The Uncle began with verbal warnings, then resorted to time-outs. R. at 15. Since the child's outbursts worsened, on "two *separate* occasions," the Uncle became physical with the child as a form of discipline, even though he did not want to. R. at 15 (emphasis added). Notably, the two incidents were over three weeks apart. R. at 15. Further, during the two incidents where excessive corporal punishment is alleged, the Uncle struck the child once each time out of frustration. R. at 15. This is distinguishable from cases where a parent inflicted "numerous" blows on a child. *See In re Matthew M.*, 970 N.Y.S.2d 271, 273 (N.Y. App. Div. 2d Dept. 2013); *Matter of J. Child.*, 628 N.Y.S.2d 644, 645 (N.Y. App. Div. 1st Dept. 1995).

Second, similar to both *In re Anastasia L.D.* and *Matter of Myiasha K.D.*, the Uncle's actions do not demonstrate a pattern of excessive corporal punishment or an intent to harm his niece. *See* R. at 15. Prior to the incidents reported, the Uncle had only disciplined the child in a verbal manner. R. at 15. The Uncle never intended to hurt the child, and he testified that not only did he not want to use physical measures to discipline the child, but he "hated it." R. at 15. There is no evidence of a pattern of excessive corporal punishment or intent to hurt the child. Thus, the Third Appellate Division erred in finding that the Uncle inflicted excessive corporal punishment.

b. Case law does not support the Third Appellate Division's finding of neglect by the Uncle.

A punishment will be deemed excessively harsh when it is inflicted with "malice" or "wickedness of motive." *Morse v. Frederick*, 551 U.S. 393, 416 (2007) (Thomas, J., concurring). In determining whether corporal punishment used in schools is excessive, a court looks at "whether the force applied caused injury so severe, was so disproportionate to the need presented, and was

so inspired by malice or sadism . . . literally shocking to the conscience." *Bisignano v. Harrison C. School Dist.*, 113 F.Supp.2d 591, 600 (S.D.N.Y. 2000) (quoting *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980)).

There have been numerous instances when New York courts have ruled against child protective agencies where guardians used forms of discipline more extreme than those at issue in the instant case. *See In re Nicholas W.*, 936 N.Y.S.2d 450, 451 (N.Y. App. Div. 4th Dept. 2011) (finding that an agency failed to establish neglect when a father struck his son in the face); *In re Chanika B.*, 874 N.Y.S.2d at 252 (finding no neglect where a father slapped his child in the face, causing her to bleed); *Matter of Wunika A.*, 65 N.Y.S.3d 421, 424 (N.Y. Fam. Ct. 2017). In *Matter of Wunika A.*, the court did not find neglect where parents used a "deliberate system of consequences" to punish their children. 65 N.Y.S.3d at 424. These consequences included time-outs and progressed to physical force for more serious infractions. *Id.* Further, the court found that even the occasional use of a belt to discipline children did not amount to the statutory requirement of "excessive corporal punishment," where there had been no prior reports of abuse. *Id.*

Here, the child had severe and angry outbursts, often talked back to the Uncle, and exhibited a disregard for authority. R. a 10, 14. The Uncle was not intending to harm the child or inflict punishment on her for sadistic reasons; he was trying to improve her behavior and teach her. R. at 15. Given the child's behavioral problems, the Uncle disciplined the child in an authoritative manner to help her. R. at 26. The Uncle was not aware of the child's specific diagnosis. R. at 26. He never received a warning of her intermittent explosive disorder, and his authoritative style was never discouraged because the child's behavior was improving. R. at 13, 25–26. The Third Appellate Division's finding strays from case law and is therefore incorrect because the Uncle's discipline was not excessive.

2. The Third Appellate Division erred in finding neglect because the record does not show by a preponderance of the evidence that the child's impairment is clearly attributable to the Uncle's discipline.

Per section 3523(f), a neglected child is one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired." Sunnydale Fam. Ct. Act § 3523(f). In order to establish neglect, the impairment must be "clearly attributable" to a responsible party's failure to exercise a minimum degree of care. *Nicholson*, 820 N.E.2d at 845–46. The standard requires proof by a preponderance of the evidence. *Id.* at 847. Further, courts have recognized that "it is unjust to fault a parent too readily." *In re Shyrelle F.*, 941 N.Y.S.2d 794, Misc. 3d 1232(A), 2011 WL 6141669, at *2 (N.Y. Fam. Ct., Oct. 27, 2011).

Here, there is insufficient evidence that the child suffered the requisite impairment of her physical, mental, or emotional well-being to support a finding of neglect against the Uncle. The Mother has reported that the child's behavior has improved since the Uncle began taking care of her. R. at 14. The Mother testified that ever since the Uncle started babysitting, the child "had significantly less outbursts." R. at 14. After seeing improvements in the child's behavior, specifically her intermittent explosive disorder, the Mother testified that she wanted the Uncle to continue to take care of the child. R. at 14. The Mother, as evidenced throughout the record, is a loving and caring mother and would not advocate against the well-being of her child. R. at 10–14.

Furthermore, the child's emotional distress is "clearly attributable" to the tragic passing of her aunt, not to the actions of the Uncle. R. at 10. Not only did life become "increasingly more difficult" for the child after her aunt's death, her severe and angry outbursts also started at this point. R. at 10. The Third Appellate Division erred in determining that the child's emotional well-being was caused by the Uncle and not by other factors such as her aunt's death and the recent intermittent explosive disorder diagnosis. *See* R. at 10, 13–14. Furthermore, a finding of neglect and an Order of Protection against the Uncle will be a harmful disruption to the child's life and

will negatively affect her well-being, thus inflicting the exact type of impairment that this Court intends to avoid. Accordingly, this Court should reverse the decision of the Third Appellate Division and find that the Agency failed to prove neglect by a preponderance of the evidence.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court reverse the decision of the Third Appellate Division and hold that (1) the Mother did not neglect the child; (2) the Uncle is not a person legally responsible for the child; and (3) even if the Uncle is a person legally responsible for the child, his discipline of the child did not constitute neglect. Alternatively, Respondent asks this Court to remand the case back to the trial court to consider all relevant factors and weigh the evidence under the preponderance of the evidence standard.