At a Term of the Family Court of the State of New York, held in and for the City of New York, County of Kings, 330 Jay Street, Brooklyn, New York on the day of January 26, 2012.

P R E S E N T:

HON. EMILY M. OLSHANSKY,
JUDGE

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In the Matter of a Proceeding :
Under Article 10 of the Family Court Act, :
:
C Children :
Children Allegedly Neglected by : Docket No.: NN-33551/10
: **DECISION AND ORDER**
EC :
:
Respondent :

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NOTICE:

PURSUANT TO § 1113 OF THE FAMILY COURT ACT, AN APPEAL MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 35 DAYS FROM THE MAILING OF THE ORDER TO THE APPELLANT BY THE CLERK OF THE COURT, OR 35 DAYS AFTER SERVICE BY A PARTY OR LAW GUARDIAN UPON THE APPELLANT, WHICHEVER IS EARLIER.

APPEARANCES:

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OLSHANSKY, J.:

The question presented in the instant case is whether a positive toxicology for marijuana and a respondent mother's admission to prior marijuana use are sufficient to establish neglect pursuant to Family Ct Act § 1012 (f) (i) (B) or § 1046(a) (iii). The Administration for Children's Services (hereinafter, "ACS") contends that they are. ACS asserts that the mother's repeated use of marijuana establishes a *prima facie* case of parental culpability and that a *prima facie* case is not rebutted by a showing that the children were never harmed or in danger of harm and were always healthy, well kept, clean and well fed. According to ACS, dismissal of the petition based on its failure to present any specific evidence of actual impairment or imminent danger of such impairment would constitute error as a matter of law.

Respondent mother disagrees. She contends that a newborn's positive toxicology for marijuana alone is insufficient to support a finding of neglect because the test result, in and of itself, does not prove that the child was physically, mentally or emotionally impaired, or in imminent danger of being impaired. She contends that relying solely on a positive toxicology for a neglect determination fails to make the necessary causative connection to all the surrounding circumstances that may or may not produce impairment or imminent risk of impairment in the newborn child.

Additionally, respondent mother asserts that the record is insufficient to establish a *prima facie* case since no evidence was elicited establishing the quantity, frequency or effect of marijuana use upon her or her ability to care for her children. She emphasizes that she never used or was under the influence of marijuana or any other drug while in presence of any of her children. She underscored that the older children were in the care of the maternal grandmother during these occasions.

Furthermore, citing the testimony of her expert witness, respondent mother contends that her occasional oral ingestion of marijuana was insufficient to satisfy the statutory requirements. Specifically, she asserts that her use did not result

in "a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality" (Family Court Act § 1046[a] [iii]). Accordingly, she argues that Family Court Act § 1046(a) (iii) is inapplicable and since no evidence was adduced establishing actual impairment or imminent risk of impairment to the newborn or any of her other children, dismissal is warranted. The Attorney for the Children supports respondent mother's assertions.

Procedural History

On November 8, 2010, the Administration for Children's Services (hereinafter,"ACS") filed petitions against respondent mother alleging that the six subject children were neglected children pursuant to Family Court Act §1012 (f) (I) (b). At that time, the youngest child was an infant and the oldest child was 16 years old. Five of the children were living in New York City and the oldest, child, QC, was living with her father in Washington, D.C. LC was born on September 5, 1997. EKC was born on January 30, 2001. ONC was born on January 1, 2002. AC was born on December 11, 2004 and IC was born on November 2, 2010.

The petitions alleged that respondent mother failed to provide the children with proper supervision and guardianship. Specifically, the petitions alleged that the school-age children were not enrolled in school in New York City until October 14, 2010. Additionally, the petitions alleged that respondent misused marijuana; that she gave birth to a baby, IC, on November 2, 2010 with a positive toxicology for marijuana and that she was not participating in a drug treatment program.

A fact-finding hearing was conducted before the Court on July 12, 2011, August 11, 2011 and November 10, 2011.

Petitioner's Case

ACS called two witnesses on their direct case, the caseworker, Tiffany Gentle, and respondent mother. In addition ACS introduced a number of documents into evidence. These included an oral report transmission (hereinafter "ORT") dated November 3, 2010 (Petitioner's #1 in evidence); an ORT dated November 4, 2010 (Petitioner's #2 in evidence); and the hospital records for the mother and the baby (Petitioner's #3 and #4 in evidence, respectively).

The hospital records introduced into evidence establish that respondent and the baby tested positive for marijuana on the day the baby was born. In all other respects the baby was born healthy and full-term. He weighed 3020 grams. He measured 49.5 cm. in length. His Apgar score was nine and he was born at "38 plus 6 weeks."

The records establish that the baby developed a "mild abdominal distension" when he was three days old. After x-rays were taken, doctors described his condition as a "non-obstructive bowel gas pattern." They diagnosed him "with presumed

sepsis" and treated him with antibiotics for seven days. As a result of the infection the baby was placed in intensive care. According to the documentary evidence "the infection was not related to the positive toxicology results" (see ORT called in by a social worker from Brookdale Hospital on November 4, 2010 [petitioner's #2 in evidence]).

The caseworker's testimony and progress notes establish that she visited the family's home on November 4, 2010. The maternal grandmother was caring for the four older children while their mother was in the hospital. The fifth and oldest child, QC, born on January 5, 1994, returned to Washington D.C., after coming to New York City briefly with her siblings when they relocated.

The caseworker observed that the home was neat and well equipped. She found appropriate sleeping arrangements, baby clothing, a crib, a bassinet, a play pen, toys and other baby provisions. She noted that none of the other children had any observable delays or disabilities and that they were all free from any marks or bruises.

The caseworker interviewed each of the four children separately. They ranged in age from six to 13. She described each of them as "very willing to share with [the caseworker] about [their] family." They all "appeared well-cared-for." None of them needed any medical attention. None of them had any observable or documented developmental delays or disabilities. None of them had ever been assessed for mental health treatment or counseling. None of them had ever seen their mother smoking marihuana or under the influence of any drug or alcohol.

The caseworker first interviewed the child AC, who was born on December 11, 2004. He reported that his family had just moved to New York. He said that his dad stayed behind in the old house when they moved. The caseworker noted that he was wearing a white shirt and blue pants and that he appeared well-cared-for.

He described his daily routine. He said that he eats breakfast in the morning and gets ready for school. He said that his mother or grandmother takes him to school. He said that after school he does his homework. He said that he then has a snack, watches television and eats dinner. He said that he has fun with his brothers and sisters. He said that they go out and watch movies and play games. He said his mother or his grandmother also take them out sometimes to do different things.

He said that when he misbehaves his mother does not let him watch television or sometimes she doesn't give him his snack. He said that he also sometimes gets sent to his room. He reported that he liked school and that he knew how to write his name.

The caseworker asked him if he ever saw his mother smoking. He said, "No." She also asked him if he was looking forward to his baby brother coming home and he said, "Yes," with a big smile. He took the caseworker to see his room and explained that he shared the room with his brother.

The caseworker also spoke with the child ONC, who was born on January 1, 2002. She also reported that her family had just moved to New York.

She said that all of her family members "get along good." She said that her mother and grandmother take them out and "they do stuff." She said they watch a lot of movies. She said that they play and watch television. She took the caseworker to her room and showed her what she and her sister do during their spare time.

She said that when she misbehaves her mother does not give her a snack. She said that she does not get in trouble very often. She said that her mother does not hit her.

She reported that she liked their new home because the girls had their own room and because they were close to school. She said that she liked school and that her favorite subjects were math and art.

In response to the caseworker's questioning, she said that she never saw her mother smoking. She said that she knows what drugs are and she knows they are bad for you. She said that she was excited about her baby brother and was looking forward to him coming home from the hospital.

The caseworker also spoke with the child EKC, who was born on January 30, 2001. She reported that her family had just moved to New York. She said that her dad stayed behind when they moved. She said she didn't know why they had moved. She said that she was going to a new school and she wasn't sure if she liked it yet. She said that she liked where they were living because it was close to school and because she and her sister have their own room. The caseworker noted that she was wearing a white and blue dress and that she appeared well-cared-for.

KC described her daily routine. She said that she eats breakfast in the morning and gets ready for school. She said that her mother or grandmother takes her to school. She said that after school, she does her homework. After that she has a snack and plays until dinner time.

She said that her mother does not hit her. She said that when she misbehaves she gets sent to her room or her mother will not let her have snacks or sometimes she has to go to bed early. The caseworker noted that she was wearing a white shirt and blue pants and she appeared well-cared-for.

She said that she "gets along good" with her brother and sister. She said that her little brother sometimes bothers her but that he is fun to play with "most of the time." The caseworker asked her if she ever saw her mother smoking and she said, "No."

The caseworker also interviewed the child LC, who was born on September 5, 1997. He reported that his family had just moved to New York. He did not know why they had moved. He said that his dad still lived in Washington, D.C. He said that he hoped he would be able to go and visit his father for the holidays. He said that his older sister, QC, was living with their father in Washington, D.C. L reported that QC came with them when they first moved to New York City. He said that she only stayed a little while and that she then returned to Washington. He said that he liked living in Washington, D.C. better. He said that they had more space at their old house and that he also had more friends there. According to the caseworker, he was wearing blue jeans and a black shirt and he appeared well-cared-for.

L described his daily routine. He said that he shared a room with his brother. He said that he gets up and gets ready for school. He said that after school, he does his homework. He said that he then watches television until it is time to eat dinner. He said that he spends most of his time reading because he likes to read. He said that he watches movies with his brother and sisters. He said that they also go out sometimes to do things with their mother. He said that he helps the other children with their homework when they need it.

He said he liked school. He said that the schools in New York City were more advanced than the schools in Washington, D.C. He said everything he had been learning in his old school was already known to the children in New York City.

He said that he does not get in trouble very often. When he does, he said that he gets sent to his room for a while. He said that his mother does not hit the children.

In response to questioning, he said that he never saw his mother smoking or using drugs. When asked whether his mother drank, he said that he didn't know.

Respondent mother testified that prior to the filing of the petition she spent periods of time in New York City and in Washington, D.C. She testified that she was a minister and that she was registered in Washington, D.C. She testified that until 2009, the maternal grandmother resided in Washington, D.C. and that she was the children's primary caretaker. She testified that things began to change in 2009 when respondent's father, who lived in New York City, became ill. She testified that her mother then began spending longer periods of time in New York caring for him until he died. Her mother eventually found an

apartment in the Bronx and the children moved to New York City as well. The mother testified that she continued to travel between New York City and Washington, D.C. until the birth of the baby.

The mother testified that she occasionally used marijuana on holidays and during prayer. She testified that she did not smoke marijuana but that she drank it in tea or ingested it orally in the form of a paste. She testified that she started doing so approximately three years ago. She said that she had ingested marijuana approximately two weeks before the baby was born. She said that she had never used or been under the influence of marijuana when she was with the children.

At the conclusion of ACS's direct case, respondent moved to dismiss the petition for failure to establish a *prima facie* case. The Court reserved decision on the motion.

Respondent's case

Respondent introduced a number of documents into evidence. These included several pages of ACS's progress notes (Respondent's #A in evidence); Dr. Carl L. Hart's curriculum vitae (Respondent's #B in evidence); and the children's school records (collectively marked as Respondent's #C in evidence).

The school records introduced by the mother established that the children were attending school in Washington D. C., until they moved to New York City in the fall of 2010. The records from the Washington D.C. schools indicate that the school-aged children all attended school regularly and generally on time. The records indicate that the children performed at different levels in different subjects ranging from satisfactory to excellent. The records indicate that all of the children's immunizations were up-to-date. The records further establish that the children were registered for school in New York City as soon as possible after the family moved. Accordingly, ACS withdrew the allegations of educational neglect. Additionally, since the oldest child, QC, was living in Washington, D.C., ACS withdrew the petition alleging that she was a neglected child.

Respondent mother called Carl L. Hart, Ph.D., to testify. Dr. Hart was qualified as an expert in neuropsychopharmacology.

Dr. Hart received his Ph.D. in psychology and neuroscience. He completed a Postdoctoral Fellowship in Substance Abuse at the Department of Psychiatry, Columbia University. He completed additional Postdoctoral Fellowships in Substance Abuse at the Department of Psychiatry at Yale University and at the University of California.

Since then, he has taught, researched and written extensively on drug use, its effects, addiction and treatment. He is a tenured Associate Professor in Psychiatry at Columbia University and is the Director of Undergraduate Studies for the

Department of Psychology. He also serves as a research scientist at the Division on Substance Abuse, New York State Psychiatric Institute.

He has researched and written extensively on marijuana use, its effects, addiction and treatment. His publications in this area include the following: Foltin, R.W., Fischman, M.W., *Effects of Acute Smoked Marijuana on Complex Cognitive Performance*, 25 *Neuropsychopharmacology*, 757-765 (2001); Hart, C.L., Haney, M., Ward, A.S., Fischman, M.W., Foltin, R.W., *Effects of Oral THC Maintenance on Smoked Marijuana Self-Administration,* 67 *Drug and Alcohol Dependence*, 301-309 (2002); Hart, C.L., Ward, A.S., Haney, M., Comer, S.D., Foltin, R.W., Foschman, *Comparison of Smoked Marijuana and Oral Tetrahydrocannabinol in Humans*, *Psychopharmacology* (2002); Haney, M., Hart, C.L., Ward, A.S., Foltin, R.W., *Nefazodone Decreases Anxiety During Marijuana Withdrawal in Humans*, 165 *Psychopharmacology*, 157-65 (2003); Haney, M., Hart, C.L., Vosburg, S.K., Naser, J., Bennett, A., Zubaran, C., Foltin, R.W., *Marijuana Withdrawal in Humans: Effects of Oral THC or Divalproex*, 29 *Neuropsychopharmacology*, 158-170 (2004); Hart, C.L., Lynch, W.J., *Developing Pharmacotherapies for Cannabis and Cocaine Use Disorders*, 3 *Current Neuropharmacology*, 95-114 (2005); Hart, C.L., Haney, M., Vosburg, S.K., Comer, S.D., Foltin, R.W., *Reinforcing Effects of Oral-THC in Male Marijuana Smokers in a Laboratory Choice Procedure*, 181 *Psychopharmacology*, 237-243 (2005); Hart, C.L., *Increasing Treatment Options for Cannabis Dependence: A Review of Potential Pharmacotherapies*, 80 *Drug and Alcohol Dependence*, 147-159 (2005); Vadham, N.P., Hart, C.L., Roe, B., Colley, J., Haney, M., Foltin, R.W., *Substance Use and Psychosocial Outcomes Following Participation in Residential Laboratory Studies of Marijuana, Methamphetamine and Zolpidem*, 32 *American Journal of Drug and Alcohol Abuse*, 589-97 (2006); Vadham, N.P., Hart, C.L., van Gorp, W.G., Haney, M., Gunderson, E.W., Foltin, R., *Acute Effects of Smoked Marijuana on Decision-Making, as Assessed by a Modified Gambling Task, in Experienced Marijuana Users*, 29 *Journal of Clinical and Experimental Neuropsychology*, 357-364 (2007); Haney, M., Gunderson, E.W., Rabkin, J., Hart, C.L., Vosburg, S.K., Comer, S.D, Foltin, R.W., *Dronabinol and Marijuana in HIV+ Marijuana Smokers: Caloric Intake, Mood and Sleep*, 45 *Journal of Acquired Immune Deficiency Syndrome*, 545-554 (2007); Haney, M., Hart, C.L., Vosburg, S.K., Comer, S.D., Reed, S., Foltin, R.W., *Effects of THC and Lofexidine in a Human Laboratory Model of Marijuana Withdrawal and Relapse*, 197 *Psychopharmacology*, 157-168 (2008); Gray, K.M., Hart, C.L., Christie, D.K., *Upadhyaya HP Tolerability and Effects of Oral-Tetrahydrocannabinol in Older Adolescents with Marijuana Use Disorders Pharmacology,* 91 *Biochemistry and Behavior*, 67-70 (2008); Haney, M., Hart, C.L., Vosburg, S.K., Comer, S.D., Reed, S.C., Cooper, Z.D., Foltin R.W., *Effects of Baclofen and Mirtazapine on a Laboratory Model of Marijuana Withdrawal and Relapse*, 211 *Psychopharmacology*, 233-44 (2010); Hart, C.L., Ilan A.B., Gevins, A., Gunderson, E.W.,

Role, K., Colley, J., Foltin, R.W., *Neurophysiological and Cognitive Effects of Smoked Marijuana in Frequent Users*, 96 *Pharmacology, Biochemistry, and Behavior*, 333-41 (2010); Kirkpatrick, M.G., Haney, M., Vosburg, S.K., Comer, S.D., Foltin, R.W., Hart, C.L., *Zolpidem Does Not Serve as Reinforcer in Humans Subjected to Simulated Shift Work*, 112 *Drug and Alcohol Dependence*, 168-71 (2010); Hart, C.L., Powell, A.C., *Determining Cognitive Deterioration Requires Multiple Tests Administered on More Than one Occasion*, 64 *Psychiatry Clinical Neuroscience* 667 (2010); Fan, L., Hart, C.L., *A Call for More Care when Investigating the Cannabis-Psychosis Link*, 191 *Psychiatry Research* 84 (2011); Kober, H., Kross, E.F., Msichel, W., Hart, C.L., Ochsner, K.N., *Regulation of Craving by Cognitive Strategies in Cigarette Smokers*, 106 *Drug and Alcohol Dependence*, 52-5 (2011).[1]

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[1] His other publications are too numerous to list, however, during the last two years alone he has published the following: Kober, H., Mende-Siedlecki, P., Kross, E.F., Weber, J., Mischel, W., Hart, C.L., Ochsner, K.N., *A Prefrontal-Striatal Pathway Underlies Cognitive Regulation of Craving*, 107 *Proceedings of the National Academy of Science,* 14811-16 (2010); Colfax, G., Santos, G.M., Chu, P., Vittinghoff, E., Pluddemann, A., Kumar S., Hart, C., *Amphetamine-Group Substances and HIV*, 37 *The Lancet*, 458-74 (2010); Bedi, G., Foltin, R.W., Gunderson, E.W., Rabkin, J., Hart, C.L., Comer S.D., Vosburg S.K., Haney, M., *Efficacy and Tolerability of High-Dose Dronabinol Maintenance in HIV-Positive Marijuana Smokers: A Controlled Laboratory Study*, 212 *Psychopharmacology*, 675-86 (2010); Kirkpatrick, M.G., Gunderson. E.W., Perez, A.Y., Haney, M., Foltin, R.W., Hart, C.L. (in press), *A Direct Comparison of the Behavioral and Physiological Effects of Methamphetamine and 3,4 Methylenedioxymethamphetamine (MDMA) in Humans*, *Psychopharmacology* (2010); Kirkpatrick, M.G., Gunderson, E.W., Levin, F.R., Foltin, R.W., Hart, C.L., (under review) *Comparison of Intranasal Methamphetamine and D-Amphetamine Self-Administration by Humans*; Hart, C.L., Marvin, C.B., Silver, R., Smith, E.E. (under review) *Is Cognitive Functioning Impaired in Methamphetamine Users? A Critical Review*; Hart, C.L., Shytle, R.D., *Potential Pharmacotherapies for Cannabis Dependence*, In: B., Johnson, *Addiction Medicine: Science and Practice*, Springer: New York (2010); Hart, C.L., Ksir, C., *Drugs, Society, and Human Behavior*, 14th Ed., McGraw-Hill: New York (2010) (Textbook); Kirkpatrick, M.G., Hart, C.L., *The Subjective Effects of Cannabis* and Marvin, C.B., Hart, C.L., *Cannabis and Cognition*, In: J Holland, *The Pot Book: A Complete Guide to Cannabis,* Park Street Press, L Rochester, Vt. (2010); Marrone, G.F., Pardo, J., Krauss, R.M., Hart, C.L., *Amphetamine Analogs Methamphetamine and 3,4- Methylenedioxymethamphetamine (MDMA) Differentially Affect Speech*, 208 *Psychopharmacology*, 169-77 (2010); Vosberg, S.K., Hart, C.L., Haney, M., Rubin, E., and Foltin R.W., *Modafinil does not Serve as a Reinforcer in Cocaine Abusers*, 106 *Drug and Alcohol Dependence*, 233-36 (2010); Kopetz, C.E., Reynolds, E.K., Hart, C.L., Kruglanski, A.W., Lejuez, C.W., *Social Context and Perceived Effects of Drugs on Sexual Behavior Among Individuals who Use Both Heroin and Cocaine*, 18 *Experimental and Clinical Psychopharmacology*, 214-20 (2010). Dr. Hart also serves on the United Nations Reference Group for Intravenous Drug Use and HIV and the Global Conference on Methamphetamine Executive Program Committee. He has served on the National Institute of Health, Bio-behavioral Regulation, Learning and Ethnology Study Section. He is a member of the National Institute on Drug Abuse, African-American Researchers and Scholars Workgroup and is a member of the Board of Directors, Drug Policy Alliance.

Dr. Hart testified that THC is the primary active substance in marijuana or cannabis. He described how THC is absorbed and metabolized when it is smoked and compared it to the process that takes place when it is orally ingested. He testified that oral ingestion is a far less effective method of administering the drug than smoking it.

Dr. Hart explained that when marijuana is smoked it is heated and that this causes chemical changes that convert tetrahydrocannabinolic acid into its psychoactive form, THC. When smoked, the THC then enters the lungs where it is absorbed directly into the blood and transported to the brain.

Dr. Hart testified that the process is slower and far less efficient when marijuana is orally ingested. According to Dr. Hart, THC is insoluble in water and binds with numerous proteins in the digestive tract. Additionally, Dr. Hart testified that THC is not absorbed into the blood until it reaches the small intestines. As a result, he said that consuming marijuana orally, especially in the form of a tea, is a highly inefficient method of delivering THC in its psychoactive form.[2]

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Marijuana produces tetrahydrocannabinolic acid (THCA), an acid with the carboxylic group (COOH) attached. In its acid form THC is not very active. It is only when the carboxyl group is removed that THC becomes psychoactive. This occurs when marijuana is smoked and the THC is vaporized as hot air is drawn through the unburned material. Before the liquid THC and other cannabinoids reach their boiling point, they turn gaseous and the carboxyl group is released from the molecule as carbon dioxide and water vapor (Frieling, *Overview of Medical Marijuana in Colorado*, 40 Apr Colo. Law. 37, 39 - 42 [April 2011]; Cohen, *Medical Marijuana: The Conflict Between Scientific Evidence and Political Ideology*, Symposium: Drugs, Addiction, Therapy and Crime, 2009 Utah L. Rev. 35, 64 -65 (2009).

Dr. Hart testified that oral consumption can cause similar effects as smoking it but he stated that the effects are delayed and mitigated due THC's water insolubility, binding to other proteins and its slower absorption from the digestive tract. Dr. Hart testified that, as a result, ingesting marijuana orally is less likely than smoking it to produce intoxication. Dr. Hart testified that there are numerous other factors that would contribute to the degree of intoxication that a particular user would experience after orally consuming of marijuana. These include but are not limited to the specific amount of marijuana ingested, the concentration of THC in the particular marijuana ingested, the frequency of use, body weight and the user's level of activity. Dr. Hart testified that experienced users are less likely than inexperienced users to experience intoxication after ingesting small quantities of the substance.

Dr. Hart testified that he could not predict whether respondent's prenatal oral consumption of marijuana during the last month of her pregnancy could have had any effect on the fetus she was carrying. He said that he would need more information about respondent to be able to answer that question including the specific amount of marijuana ingested, the concentration of THC in the particular marijuana ingested, the frequency of use and respondent's body weight. He testified that although smoking marijuana can create some potential risk to a developing fetus, the risk presented by cigarette smoking is more serious.[3] He also testified that alcohol consumption during pregnancy poses a far greater risk to a developing fetus than either marijuana or cigarettes.

At the conclusion of the fact-finding hearing, respondent -- with the support of the Attorney for the Children -- moved to dismiss the petition. ACS opposed the motion. For the reasons more fully set forth herein, the Court grants the motion and dismisses the petition as to respondent mother.

Legal Analysis

Actual or Imminent Danger of Physical, Emotional or Mental Impairment to the Child

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Marijuana and tobacco smoke are very similar and the effects of marijuana smoking are similar to the effects of tobacco smoking. Marijuana smoke contains many of the same carcinogenic components identified in tobacco smoke (see Grey, *Medical Use of Marijuana: Legal and Ethical Conflicts in the Patient/Physician Relationship*, 30 U. Rich. L. Rev. 249, 252 -253 [1996]; Cohen, *Medical Marijuana: The Conflict Between Scientific Evidence and Political Ideology, Symposium: Drugs, Addiction, Therapy, and Crime*, 2009 Utah L. Rev. 35, 64 - 65 [2009] Pfeifer, *Smoking Gun: The Moral and Legal Struggle for Medical Marijuana*, 27 Touro L. Rev. 339, 359 [2011]).

The Family Court Act defines a "neglected child" as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent to exercise a minimum degree of care in providing the child with proper supervision or guardianship, by ... misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions...provided, however, that where the respondent is voluntarily and regularly participating in a rehabilitative program, evidence that the respondent has repeatedly misused a drug or drugs or alcoholic beverages to the extent that he loses self-control of his actions shall not establish that the child is a neglected child in the absence of evidence establishing that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired" (Family Court Act § 1012 [f] [i] [B]).

The first statutory element requires proof of actual or imminent danger of physical, mental or emotional impairment to the child (*see Matter of Nassau County Dept. of Social Servs. [Dante M.] v Denise J.*, 87 NY2d 73, 78-79 [1995]). This prerequisite to a finding of neglect ensures that the Family Court, in deciding whether to authorize state intervention, focuses on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior.

The statute does not define "impairment," however, it defines "[i]mpairment of emotional health" and "impairment of mental or emotional condition" to include "a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including incorrigibility, ungovernability or habitual truancy; provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child" (Family Ct Act § 1012 [h]; ***Nicholson v Scoppetta***, 3 NY3d 357, 370 - 371 [2004]).

Actual harm is more readily apparent and may be proven through expert medical or psychological testimony or by factual evidence. However, "imminent danger" of impairment is a more elusive concept. "Imminent danger of impairment" to a child is an independent and separate ground on which a neglect finding may be based (*Dante M.*, 87 NY2d at 79). The Court of Appeals has underscored that in determining "imminent danger," the focus must be on harm or potential harm to the child, rather than what may be deemed undesirable parental behavior. Additionally, the Court of Appeals has cautioned that the potential harm "must be near or impending, not merely possible" (*Nicholson v Scoppetta, 3 NY3d at 369).*

In a child protective proceeding based on allegations of substance abuse, ACS can attempt to satisfy its burden of proof with respect to actual or imminent danger of physical, mental or emotional impairment in one of two ways. First, ACS can attempt to establish a *prima facie* case pursuant to Family Court Act § 1046 (a) (iii).[4] Second, it can introduce evidence proving that the parent's substance abuse resulted in actual or

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Family Court Act § 1046 (iii) provides that proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child except that such drug or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program.

imminent danger of impairment to the physical, mental or emotional condition of the child pursuant to Family Court Act § 1012 (f)(i)(B). Notably, however, both Family Court Act § 1046 (a)(iii) and § 1012 (f)(i)(B) require a threshold showing of serious and ongoing substance abuse. Additionally, since the purpose of article 10 is to protect children from serious harm or potential harm -- not punish parents for what may be deemed undesirable behavior -- impairment or imminent risk of impairment remains an absolute prerequisite of a finding of neglect. The Court of Appeals has underscored that in determining "imminent danger," the focus must be on harm or potential harm to the child, rather than what may be deemed undesirable parental behavior.

Where ACS seeks to prove neglect under Family Court Act §1012(f)(i)(B), it must actually prove that the children's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of the parent to provide proper supervision or guardianship, by misusing a drug or drugs. Where, ACS seeks to prove neglect under Family Court Act § 1046 (a) (iii), it must establish that the parent has engaged in serious and ongoing substance abuse to the extent outlined in the statute. If ACS succeeds in establishing a prima facie case, then FCA § 1046 (a) allows the court to draw a permissible inference of impairment or imminent risk of impairment[5] (*Matter of Philip M.*, 82 NY2d 238, 246 [1993]; *In re Miranda HH.*, 80 AD3d 896, 897 [3d Dept 2011]). The inference is evidentiary and rebuttable, whether by respondent's testimony or by any other evidence in the case (*Matter of Philip M.*, 82 NY2d at 243 – 245, *citing People v Leyva*, 38 NY2d 160, 167 [1975]; *Dermatossian v New York City Transit Auth*, 67 NY2d 219, 226 [1986]).

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A statutory presumption is a deduction or an inference that the court may draw from facts found or otherwise established during the trial. The Legislature have been somewhat loose in their use of the word "presumption" when an inference is clearly what is intended, thus leading to a good deal of unnecessary confusion. Permissible inferences, based on specified underlying facts which must first be proved before the inference may be drawn, should be carefully distinguished from those rules of jurisprudence which operate simply to place the burden of proof or which describe basic value judgments of the judicial system (as the rule that defendants are "presumed innocent until proven guilty"). It is only such rules, rather than statutorily authorized inferences, which carry a requirement that the finder of fact be told that, if it finds the facts in doubt, it must follow the "presumption" (*People v Leyva*, 38 NY2d 160, 169 [1975])

Notwithstanding ACS's assertions to the contrary, proof of a *prima facie* case does not create a "presumption" of imminent risk or neglect. A presumption is binding on the court, unless rebutted. A *prima facie* case simply creates shifts the burden of going forward to the respondent, however, the burden of proving child maltreatment always remains with ACS (*Matter of Philip M.*, 82 NY2d at 244-245). The respondent may then present proof challenging the *prima facie* case if she chooses, or rest and permit a decision on the merits on the strength of petitioner's case (*In re Christian Q.*, 32 AD3d 669, 671 [3d Dept 2006]; *Matter of Philip M.*, 82 NY2d at 244-245; I*n re Jaiden T.G.*, 89 AD3d 1021 [2d Dept 2011]). Proof of a *prima facie* case does not necessarily satisfy ACS's ultimate burden of proof (*In re Ashley RR.*, 30 AD3d 699, 700 - 701 [3d Dept 2006]; *Matter of Christian Q.*, 32 AD3d 669); nor does it compel a finding in accordance with that inference.

The Family Court is always required to weigh all the evidence in the record before making a determination (*Matter of Philip M.*, 82 NY2d at 244; *In re Ashley RR.*, 30 AD3d at 700—701). While the court may find neglect after a *prima facie* case is established, it is never required to do so (*In re Ashley RR.*, 30 AD3d at 700; *In re Christopher Anthony M.*, 46 AD3d 896, 902 [2d Dept 2007]; *Matter of Philip M.*, 82 NY2d at 246; *In re Miranda HH.*, 80 AD3d at 897 [3d Dept 2011]).

The Court also rejects the assertion by ACS that a *prima facie* showing can only be rebutted by evidence that the parent is regularly and voluntarily participating in a drug treatment program. There are many degrees of parental drug and alcohol use and abuse. Not all require treatment or support an inference that the parent has harmed their children or placed them at imminent risk of harm. An inference of impairment is only warranted where the parent is involved in regular or continuous drug (or alcohol) abuse that so substantially impairs their judgment or ability to function that future neglect is imminent (Besharov, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 29A, Family Ct Act § 1012 [1998 Ed]; *see e.g., Matter of Anastasia G.,* 52 AD3d 830, 830 - 831 [2d Dept 2008] [the father's admission that he used drugs was insufficient to support a neglect finding since ACS failed to elicit any testimony establishing the type of drugs he used, the duration, frequency, or repetitiveness of his drug use, or whether he was ever under the influence of drugs while in the presence of the child; absent evidence of repeated drug use by the father or that the subject child had been impaired or was in imminent danger of impairment, the fact that the father was not enrolled in a drug treatment program was insufficient to establish a *prima facie* case]; *In re Anna F.*, 56 AD3d 1197 [4th Dept 2008] [Child Protective Services failed to establish that the children's physical, mental or emotional conditions had been impaired or were in imminent danger of becoming impaired where the father admitted that he occasionally drank alcohol or used drugs while caring for the children after they went to sleep since there was no evidence of repeated misuse of drugs or alcoholic beverages]; *In re Shaun B.*, 55 AD3d 301, 303 [1st Dept 2008], *lv denied* 11 NY3d 715 [2009] [the neglect finding was

manifestly erroneous where it was based on respondent's admission that she smoked marijuana and was not participating in a drug treatment program since there was no evidence establishing when or how often respondent smoked marijuana and there was no evidence of a link or causal connection between respondent's use of marijuana and the circumstances that allegedly produced the child's impairment or imminent danger of impairment]; *In re Jarrod G.*, 73 AD3d 503, 504 [1st Dept 2010] [the Family Court improperly found that the father had neglected his children based on his past substance abuse and mental illness since the evidence did not establish a link or causal connection between his behavior and the circumstances that allegedly impaired the children or placed them in imminent danger of becoming impaired]).

The Causal Connection between the Parents' Alleged Misconduct and the Circumstances that Produced the Risk of Impairment

The second statutory element requires proof of a link or causal connection between the parent's conduct and the impairment or imminent danger of impairment to the child (*see* FCA §1012[f][I]; [h]). This requirement reflects the Legislature's recognition that the source of emotional or mental impairment -- unlike physical injury -- may be murky, and that it is unjust to fault a parent too readily. The Legislature, therefore, specified that such impairment must be "clearly attributable" to the parent's failure to exercise the requisite degree of care (Family Ct Act § 1012 [h]; *Nicholson v Scoppetta,* 3 NY3d at 369 [2004]; *Matter of Linda E.*, l43 AD2d 904 [2d Dept l988] [evidence was insufficient to establish a link or causal connection where the child's emotional disorder was not attributable to respondent's parenting]; *In re Jayvien E.*, 70 AD3d 430, 435-436 [1st Dept 2010]).

After considering this statutory element, the Court of Appeals held that a newborn's positive toxicology for cocaine is insufficient, in and of itself, to support a finding of neglect because the test result does not prove that the child has been physically, mentally or emotionally impaired, or that he is in imminent danger of becoming impaired in a manner clearly attributable to the parent's failure to exercise the requisite degree of care (***Nassau County Dept. of Social Services on Behalf of Dante M.***, 87 NY2d 73, 78-79 [1995]).[6] The Court reasoned, "[r]elying solely on a positive toxicology result for a neglect determination fails to

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See also ***In re Jessica YY.***, 258 AD2d 743 [3d Dept 1999] [parent's past history of alcohol and drug abuse and her failure to fully participate in a parenting education program are insufficient to establish neglect where the child was born without any health problems or special needs and no evidence was presented demonstrating that the parent's prenatal conduct presented any risk of harm to the child]; ***Matter of Milland***, 146 Misc 2d 1 [Fam Ct, New York County 1989] [mother's prenatal conduct alone cannot be the basis of a finding of neglect without a showing of a specific detriment to the newborn child; mother's prenatal conduct must be connected to a post-birth risk of harm to the child to support a finding of neglect]).

make the necessary causative connection to all the surrounding circumstances that may or may not produce impairment or imminent risk of impairment in the newborn child" (*Id*).

The Court explained that before an infant's positive toxicology could support a neglect finding, ACS would have to introduce additional evidence to establish the causal connection between the parent's drug use and the impairment or imminent danger of impairment. The Court emphasized that a presumption of risk cannot be used as a substitute for evidence to establish the requisite connection between parental misconduct and the alleged harm or risk of harm to the child (*Matter of Afton C.*, 17 NY3d at 10; *Nicholson,* 3 NY3d at 368 – 371, 375).

The Court noted that the positive toxicology in conjunction with other evidence could establish the requisite link and support a neglect finding. In *Dante M.*, the Court noted that in addition to the baby's positive toxicology for cocaine, he had also been born prematurely with a low birth weight. Furthermore, he required a specialized level of care and spent his entire hospital stay in the Neonatal Intensive Care Unit. After discharge from the hospital, the baby required a high degree of follow-up care at a special high-risk clinic. The mother also had a history of being unable to care for her children because of her drug use, she had been observed under the influence of cocaine during her pregnancy and she failed to testify. Consequently, the Court of Appeals concluded that the mother's use of cocaine during her pregnancy, considered in conjunction with her prior, demonstrated inability to adequately care for her children while misusing drugs, provided an adequate basis to find, that the child was in imminent danger of impairment.[7]

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Applying similar reasoning appellate courts in California have repeatedly reversed findings of neglect based on parental marijuana use where there was no evidence establishing a connection between such use and actual or a substantial risk of harm to the children (s*ee e.g., In re David M.*, 134 Cal App 4th 822, 827-833, 36 Cal Rptr 3d 411, 414 - 418 [Cal App 4th Dist 2005] and *Jennifer A. v Superior Court* (117 Cal App 4th 1322, 1333-1347, 12 Cal Rptr 3d 572 [Cal App 4th Dist 2004]; *In re Aliyah G.*, 2011 WL 3190697, 8 [Cal App 2d Dist]). In *David M.*, the appellate court held that the Family Court erred by entering a finding of neglect since there was no evidence tying the mother's marijuana use to actual harm or a substantial risk of serious harm to the children. Although the mother tested positive for marijuana at the birth of her youngest child, that child was healthy and showed no signs of withdrawal from any controlled substances. The older child was loved, healthy and well-cared for. The parents had obtained regular, appropriate medical care for the older child from the time of his birth. The home was clean and contained all necessary provisions. The worker never spoke to anyone who had seen the mother use drugs during her pregnancy or had seen her in possession of drugs or drug paraphernalia. There was no evidence of a specific risk of harm to either child from the mother's substance abuse. The Court wrote that even if subsequent reports from the baby's foster parent that he experienced tremors and muscle stiffness were true, there was no evidence that these symptoms were caused by the mother's use of marijuana. Applying similar reasoning in *Jennifer A. v Superior Court*, the appellate court held that the Family Court erred in finding that the mother's one positive test for marijuana and one positive test for alcohol created a substantial risk of detriment to the children's physical or emotional well-being. The worker never saw the mother under the influence of drugs or alcohol and the worker testified that the mother did not have a drug problem that affected her parenting skills. There was no evidence linking the mother's marijuana or alcohol use to her parenting skills or judgment. There was no evidence that she had ever used any drugs other than alcohol or marijuana or that she ever drank alcohol or smoked marijuana in the presence of the children. There was no history of mental illness or incarceration. There was no evidence of clinical substance abuse, no testimony from a medical professional and no report of a clinical evaluation

establishing a pattern of substance abuse leading to clinically significant impairment or distress]; ***In re Aliyah G.***, 2011 WL 3190697, 8 [Cal App 2d Dist] [the evidence was insufficient to support a finding that the father's use of cocaine, marijuana and alcohol caused the children to suffer or put them at substantial risk of suffering, serious harm where none of father's drug tests were positive for cocaine and although he admitted to drinking alcohol, he stated that his drinking was not excessive and he tested positive for alcohol only once. None of the children reported that the father's drinking or marijuana use adversely affected his ability to care for them and two of the children said that the father did not drink or use marijuana around them]; c*ompare*, *In re Alexis E.*, 171 Cal App 4th 438, 452–453, 90 Cal Rptr 3d 44 [Cal App 2d Dist 2009] [the mere use of marijuana by a parent, without more, will not support a finding of risk, however, here the father's use of marijuana supported a finding because he used around his children and it had a negative effect on his demeanor towards them]; *In re Jeremiah L.*, 2011 WL 3964653, 7 [Cal App 2d Dist] [the children were at substantial risk of serious harm due to the father's domestic violence and marijuana use]; *In re Elijah F.*, 2011 WL 3652740, 4 [Cal App 2d Dist] [in spite of the baby's healthy condition at birth, the mother posed a risk of harm to him and the findings were supported by substantial evidence where the mother repeatedly used marijuana during her pregnancy, she failed to take her medication for schizophrenia, she physically abused her older child and had a positive toxicology for marijuana the day the baby was born]; *In re Nicholas B.*, 2003 WL 122651 [Cal App 1st Dist] [the evidence supported a finding that the three children were at substantial risk of suffering serious harm where the mother used marijuana and methamphetamine during her pregnancy with her infant son, received minimal prenatal care, had a long history of drug abuse, the toddler was dirty, had severe diaper rash, and had not received immunizations since she was two months' old, the mother was unable to keep a clean, and orderly household and she and the father were in an ongoing, violent relationship and he acknowledged that he frequently used marijuana and was regularly under its influence when the children were in his care]).

Dante M. and its progeny establish that parental misconduct is insufficient to establish neglect absent evidence establishing that the impairment or imminent danger of impairment is clearly attributable to the parent's failure to exercise the requisite degree of care. *Dante M.* and its progeny also establish that a presumption of risk cannot be used as a substitute for proof that the alleged harm or risk of harm to the child is "clearly attributable" to the parent's misconduct (*see e.g.*, ***Nicholson v Scoppetta***, 3 NY3d 357, 368 – 371, 375 [2004]; *Matter of Afton C.*, 17 NY3d 1, 10 [2011]).

In ***Nicholson v Scoppetta*** (3 NY3d at 357-358), for example, the Court of Appeals held that evidence that a parent had been a victim of domestic violence and that the children had been exposed to such violence, without more, was insufficient to establish neglect. The Court held that a neglect finding can only be entered where a preponderance of the evidence establishes that the children are actually or imminently harmed as a result of the parent's failure to exercise minimal care (*Id.* at 371 - 372).

In *Nicholson*, the Court rejected the conclusion that the parent had failed to exercise a minimum degree of care and that the children were harmed as a result. The Court noted that not all children exposed to acts of domestic violence suffer harmed as a result. The Court also noted that not all victims of domestic violence are neglectful parents. The Court emphasized that a finding of neglect required proof of a causal connection between the parent's actions and the circumstances that allegedly produced the impairment. According to the Court, a finding of neglect based solely upon the exposure of the children to acts of domestic violence "read an unacceptable presumption into the statute, contrary to its plain language." The Court concluded that "plainly more is required for a showing of neglect under New York law" (*Id.* at 370 - 371).

Based on similar reasoning, the Court of Appeals in *Matter of Afton C.* (17 NY3d 1 [2011]), vacated findings of neglect that had been entered against a father on behalf of his five children holding that the nature of his criminal misconduct was not of sufficient magnitude to support a finding without extraneous proof of harm or a risk of harm. Specifically, the Court held that the father's conviction of rape in the second degree, engaging in sexual intercourse with a person less than 15 years of age, patronizing a prostitute under 17 years of age and the fact that he was an untreated level three sex offender, without more, did not warrant a neglect finding since there was no evidence that his actions inflicted harm, or a substantial risk of harm to his own children or that their physical, mental or emotional condition was in imminent danger of becoming impaired.

In *Afton C.*, the Family Court found that the father's behavior created a substantial risk of harm to the children because he was a convicted sex offender and that he, therefore, posed a risk of harm to the public at large. Additionally, the Family Court noted that the father's testimony demonstrated a "lack of candor, a shortage of insight into his own behavior and an attempt to

avoid responsibility for the illegal acts involving minors" (*Id.*, 17 NY3d at 8). The Family Court also found that the father's failure to voluntarily obtain treatment demonstrated an impaired level of parental judgment which created a substantial risk of harm to any child in his care.

The Appellate Division, Second Department reversed holding that "[t]he mere fact that a designated sex offender resides in the home is not sufficient to establish neglect absent a showing of actual danger to the subject children." The Court of Appeals affirmed rejecting the argument that the father's status as a sex offender convicted of crimes involving minors was sufficient to establish that he posed a danger to his own children. The Court rejected the suggestion that an untreated sex offender residing with his children is presumably a neglectful parent.

The Court stated that the Sex Offender Registration Act (SORA) assessment was not designed to ascertain whether the offender met the Family Court Act's definition of neglect. The Court indicated that even if a level three SORA assessment were evidence of likely recidivism, Child Protective Services failed to prove that the father's crimes endangered his children.

The Court again emphasized that a presumption of risk cannot be used as a substitute for evidence to establish the necessary causal connection between parental misconduct and the alleged harm or risk of harm to the children. The Court noted that such bare allegations do not meet the Family Court Act's requirement for proof by a preponderance of the evidence of actual or imminent harm as a result of the parent's failure to exercise a minimal degree of care (*Matter of Afton C.*, 17 NY3d at 10; *citing Nicholson,* 3 NY3d at 370 - 371).

The Court stressed that Child Protective Services failed to present evidence, expert or otherwise, demonstrating a link or causal connection between the basis for the neglect petition and the circumstances that allegedly produced the risk of impairment. In other words, CPS failed to show how respondent's criminal conduct posed a risk of harm to his own children (*Matter of Afton C.*, 17 NY3d at 10 - 13). The fact that respondent's crimes involved victims younger than 18 was deemed insufficient to establish that he breached a minimum duty of parental care or posed a near or impending harm to his children. The Court added that although respondent was evasive and, in the Family Court's view, lacked candor or insight into his behavior, that was insufficient to fill the evidentiary gap and prove the statutorily required elements (*Id.*).

1. Parental Failure to Exercise a Minimum Degree of Care

The third statutorily required element requires proof that the parent failed to exercise a minimum degree of care "by misusing a drug or drugs." The court must evaluate parental behavior objectively

and determine whether a reasonable and prudent parent have so acted, or failed to act, under the circumstances then and there existing.

A minimum degree of care is a "baseline of proper care for children that all parents, regardless of lifestyle or social or economic position, must meet" (*Nicholson v Scoppetta*, 3 NY3d at 370). Since the drafters of Article 10 wished to avoid unwarranted state intervention into private family life and since the purpose of the statute is to protect children from serious harm or potential harm the statutory test is a minimum degree of care "not maximum, not best, not ideal and the failure must be actual, not threatened." (*Id*.).

The Instant Case

Consideration of these factors in light of the facts at bar leads this Court to conclude that the allegations of neglect must be dismissed since ACS has failed to establish the requisite elements of neglect by a preponderance of the evidence.

Respondent's positive toxicology for marijuana and her admission to orally ingesting it at other unspecified times, in unspecified quantities, at unspecified intervals, prior to the birth of the baby, when the older children were in the care of their maternal grandmother, are insufficient to establish a *prima facie* case pursuant to Family Court Act § 1046[a] [iii]). Additionally, ACS's failure to introduce any evidence that respondent's marijuana use resulted in harm or an imminent risk of harm to any of the children renders the proof insufficient to sustain a finding of neglect pursuant to Family Court Act § 1012 (f)(i)(B).[8]

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The cases involving findings of neglect based on marijuana abuse are clearly distinguishable from the facts at bar. For example, *In re Arthur S.* (68 AD3d 1123, 1123 - 1124 [2d Dept 2009]), a parent's admission to the long-term use of illegal drugs, positive test for various drugs, arrest for marijuana possession shortly after being released from a treatment program, non-compliance with treatment to the extent she was asked to leave the program, refusal to submit to drug testing, failure to meaningfully treat her addiction and history of erratic behavior in the home established a prima facie case which was not rebutted by a showing that the children were not in danger and were always well kept, clean, well fed. *In re Jocelyn S.* (30 AD3d 273 [1st Dept 2006]), the Family Court's neglect determination was based on a positive toxicology and the mother's admission that she had been using both marijuana and cocaine for more than five years. In addition, respondent did not receive any prenatal care and admitted having abused drugs on at least two occasions while pregnant, including the date of delivery resulting in both the mother and child testing positive for both marijuana and cocaine. In *Matter of Keira O.* (44 AD3d 668 [2d Dept 2007]), the neglect petition was improperly dismissed where it was alleged the that mother had been using heroin since she was 14 years old and had admitted using heroin during the last trimester of pregnancy. On three occasions the mother, who was enrolled in a treatment program, tested positive for cocaine and opiates. The Family Court had previously found that the mother neglected the infant's older sibling based, in part, on her drug use. Additionally, the order of disposition entered in the prior matter directed the mother to complete drug treatment program and a proceeding to terminate the mother's parental rights to the older child was pending. In *In re Taisha R.* (14 AD3d 410 [1st Dept 2005]), there was evidence that the mother regularly used marijuana while pregnant with a younger child and while caring for both of her children, often to calm herself after an argument with the children's father. She was not enrolled in a drug treatment program and told the older child not to tell anyone about the father's repeated acts of domestic violence that were causing the child to experience fear and distress. In *In re Theresa J.*, (158 AD2d 364 [1st Dept 1990]), the mother tested positive for cocaine while she was in the hospital to deliver the child. She admitted that she used cocaine "once in a while," including the night before she delivered the child and she told the social worker that she was not in a drug treatment program, but that she was amenable to entering one. In *In re Lah De W.* (78 AD3d 523 [1st Dept 2010]), the Family Court's finding that mother neglected all five of her children was supported by a

Proof of neglect under both Family Court Act § 1046(a) (iii) and § 1012 (f)(i)(B) require a showing of serious and ongoing substance abuse. Casual or occasional use, standing alone, will not suffice.

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preponderance of the evidence that established that the children were at imminent risk of harm due to the mother's inadequate supervision, her continued use of marijuana even after the neglect petition was filed, and her failure to bring the children for several scheduled medical appointments. Additionally, the records from the shelter where the mother and her children resided showed that she had, on several occasions, left her children, then ages 14, 11, six, five, and one, unattended and permitted them to ride the subway late at night without her.

Proof of a *prima facie* case requires evidence that the parent repeatedly misused a drug to such an extent that it caused a "substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality" (Family Court Act § 1046 [a][iii]). In the instant case, ACS succeeded in establishing that respondent used marijuana on more than one occasion. ACS failed, however, to establish that respondent's occasional oral consumption of marijuana would ordinarily have resulted in the level of impairment outlined in the statute (*see e.g., Matter of Anastasia G.*, 52 AD3d 830, 830 - 831 [2d Dept 2008] [respondent's admission that he used drugs was insufficient to establish a prima facie case since no evidence was elicited establishing the type of drugs he used, the duration, frequency, or repetitiveness of his drug use or whether he was ever under the influence of drugs while in the presence of the child]; *In re Anna F.*, 56 AD3d 1197 [4th Dept 2008] [although respondent admitted that he occasionally drank alcohol or used drugs while caring for the children after they went to sleep, there was no evidence that he used drugs or alcohol to the extent required to establish a prima facie case]).

As respondent's expert testified, due to THC's water insolubility, the fact that it binds to proteins in the digestive tract and that it is absorbed so slowly in the small intestines, the method of administration used by respondent was relatively ineffective in terms of delivering THC to the brain. Significantly, ACS failed to offer any evidence -- expert or otherwise -- to rebut Dr. Hart's testimony.

Accordingly, ACS's attempt to establish a *prima facie* case was defeated by evidence that respondent's substance abuse did not rise to the level contemplated by the statute. ACS failed to introduce sufficient proof to support an inference that respondent harmed her children or placed them at imminent risk of harm. Such an inference is not warranted where, as here, the evidence fails to establish that respondent is not involved in regular or continuous drug abuse that so substantially impaired her judgment or ability to function that future neglect is imminent (*see* Besharov, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 29A, Family Ct Act § 1012 [1998 Ed]).

Moreover, even if ACS *had* established a *prima facie* case that would not have created a conclusive presumption of imminent risk or neglect. It would not have satisfied ACS's ultimate burden of proof (*In re Ashley RR.*, 30 AD3d at 700 - 701; *Matter of Christian Q.*, 32 AD3d 669) or compelled a finding in accordance with that inference. It would simply have shifted the burden of going forward to respondent to present proof challenging the *prima facie* showing (*In re Christian Q.*, 32 AD3d at 671; *Matter of Philip M.*, 82 NY2d at 244-245). While this Court could find neglect if ACS had established a

prima facie case, it would not have been required to do so (*In re Ashley RR.*, 30 AD3d at 700; *In re Christopher Anthony M.*, 46 AD3d at 902; *Matter of Philip M.*, 82 NY2d at 246).

Even if ACS had succeeded in establishing a *prima facie* case, the Court would find that respondent rebutted any permissible inference of impairment by showing that there never was any actual or imminent risk of harm to the physical mental or emotional condition of the children -- let alone a risk of harm that was clearly attributable to any acts or omissions on respondent's part. Since the purpose of article 10 is to protect children from serious harm or potential harm -- not punish parents for what may be deemed undesirable behavior -- a *prima facie* case can -- at least under the circumstances present here -- be rebutted by evidence establishing that the children were never harmed or placed at imminent risk of harm. There is no substance abuse exception to this general rule and if the Legislature had intended to create such an exception, they would have done so explicitly.

To the extent that ACS *failed* to make a *prima facie* showing, proof of neglect required ACS to establish by a preponderance of the evidence that the children's physical, mental or emotional condition were impaired or placed in imminent danger of becoming impaired in a manner "clearly attributable" to respondent's repeated misuse of marijuana (Family Court Act § 1012 f][i][B]). In other words, ACS was required to establish that respondent's drug use was causally connected to the children being in a state of substantially diminished psychological or intellectual functioning as demonstrated by their failure to thrive, inability to control their aggressive or self-destructive impulses, inability to think or reason or by acting out or misbehaving to the extent that they are incorrigible, ungovernable or habitually truant (Family Ct Act § 1012 [h]).

No such showing has been made in the instant case. Rather, ACS asserts that respondent's marijuana use placed the children's physical, mental or emotional condition in imminent danger of becoming impaired. ACS has, however, failed to establish that the alleged imminent risk of harm is "near or impending, not merely possible" (*Nicholson v Scoppetta, 3 NY3d at 369). It failed to prove that the* alleged risk is "actual, not [simply] threatened." It failed to show that the alleged risk is one of "serious harm" to the children or that the risk is "clearly attributable" to respondent's use of marijuana (*Nicholson v Scoppetta*, 3 NY3d at 369 [2004]; *Matter of Linda E.*, l43 AD2d 904 [2d Dept l988]; *In re Jayvien E.*, 70 AD3d 430, 435-436 [1st Dept 2010]). Moreover, ACS has failed to show how a neglect finding would serve the

purpose of article 10, *e.g.*, to protect children from serious harm or potential harm (*Nicholson v Scoppetta*, 3 NY3d at 370).

By relying solely on respondent's marijuana use for a neglect determination, without demonstrating any specific risk of harm to the children, ACS has also failed to make the necessary causative connection to all the surrounding circumstances necessary to support a finding of imminent risk. Absent such a showing, a finding of neglect cannot stand (*see Matter of Afton C.*, 17 NY3d 1 [reversing a neglect finding against a parent who was an untreated level three sex offender who had been convicted and incarcerated for rape in the second degree, engaging in sexual intercourse with a person less than 15 years of age and patronizing a prostitute under 17 years of age]; *Matter of Dante M.*, 87 NY2d 73 [reversing a neglect finding based solely on the fact that a parent gave birth to a baby with a positive toxicology for cocaine]; ***Nicholson v Scoppetta***, 3 NY3d 357 [reversing neglect findings against parents based on the determination that they had "permitted" their children to be exposed to repeated acts of domestic violence]; *In re Shaun B.*, 55 AD3d 301, 303[1st Dept 2008], *lv denied* 11 NY3d 715 [2009] [although respondent admitted that she smoked marijuana and was not participating in a drug treatment program there was no evidence establishing when or how often respondent smoked marijuana and there was no evidence of a link or causal connection between respondent's use of marijuana and the circumstances that allegedly produced the child's impairment or imminent danger of impairment]; *In re Jarrod G.*, 73 AD3d 503, 504 [1st Dept 2010] [the Family Court improperly found that the father had neglected his children based on his past substance abuse and mental illness since the evidence did not establish a link or causal connection between his behavior and the circumstances that allegedly impaired the children or placed them in imminent danger of becoming impaired]).

In fact, entering a finding of neglect based on respondent's positive toxicology for marijuana and her admission to orally ingesting it on prior occasions, would require the Court to presume that respondent's actions placed the children at imminent risk of impairment. As the Court of Appeals has emphasized, a presumption of risk cannot be used as a substitute for evidence to establish the necessary causal connection between parental misconduct and the alleged risk of harm to the children (*Matter of Afton C.*, 17 NY3d at 10; *Nicholson*, 3 NY3d at 368 – 371, 375). To enter a finding under such circumstances, the Court would be required to "read an unacceptable presumption into the statute, contrary to its plain language." In the words

of the Court of Appeals "plainly more is required for a showing of neglect under New York law" (*Id*. at 370 - 371).

The evidence adduced in the instant case establishes that all of the children were, in fact, thriving in their mother's care. IC was not born prematurely. He did not have a low birth weight. He did not have any withdrawal symptoms. He did not require a specialized level of care as a result of his mother's actions. He was admitted to the hospital's Intensive Care Unit as a result of an "infection [that] was not related to the positive toxicology results" (*see* Petitioner's #2 in evidence, the ORT dated November 4, 2010 from Brookdale Hospital]).

IC was born at "38 plus 6 weeks." He weighed 3020 grams. He measured 49.5 cm. in length. His Apgar score was nine. Additionally, he and his mother were well-bonded and she demonstrated appropriate parenting skills. After his discharge from the hospital, the baby did not require follow-up care at a special high-risk clinic or any place else. IC's brothers and sisters were anxiously waiting with their grandmother at home for the arrival of their baby brother. Additionally, unlike the mother in *Dante M.*, respondent in the instant case testified during the fact-finding hearing and submitted to cross-examination.

Respondent has no prior child protective history or history of being unable to care for her older children because of her drug use or any other reason. To the contrary, the older children, who ranged in age from 6 - 13 were loved, healthy and well cared for. They were also well behaved, forthcoming, friendly, well dressed, well fed and their medical, educational and recreational needs were being met. None of them had any observable or documented developmental delays or disabilities. None of them had ever been assessed for mental health treatment or counseling. None of them had ever seen their mother smoking marijuana or under the influence of any drug. The home was clean and contained all necessities for the baby and the older children.

The mother never used or was under the influence of marijuana while in the presence of the children. Neither the children nor the caseworker ever saw the mother drinking or under the influence of alcohol. Neither the children nor the caseworker ever saw any evidence of drugs or drug paraphernalia in the home. The caseworker never spoke to anyone who had seen the mother use drugs during her pregnancy or had seen her in possession of drugs or drug paraphernalia. Neither the caseworker nor anyone else offered any testimony linking the mother's marijuana use to her judgment or parenting skills. The caseworker never sought a removal of the baby or the older children after the positive toxicology.

There was no history of mental illness, incarceration or a substance abuse problem affecting her parenting skills. No evidence was presented to establish that the mother displayed signs of clinical substance abuse. No medical professional

diagnosed the mother as having a substance abuse problem, no medical professional testified for ACS at the hearing, and there was no testimony of a clinical evaluation.

Here, ACS failed to call an expert although such a witness might have been able to establish that prenatal exposure impaired the baby's physical, mental, or emotional condition or created an imminent danger of such impairment so as to satisfy Family Court Act § 1012(f)(i)(B) or that it signified that the mother drug use was sufficient to trigger a *prima facie* case under Family Court Act § 1046(a)(iii). Nor did ACS present evidence, expert or otherwise, demonstrating a link or causal connection between the mother's marijuana use and the circumstances that allegedly produce the risk of impairment.

A newborn's positive toxicology for marijuana along with the mother's admission to prior marijuana use is insufficient to support a finding of neglect because the test result coupled with the admission, fail to establish that the baby or the baby's older siblings were physically, mentally or emotionally impaired or placed in imminent danger of becoming impaired. Relying solely on the positive toxicology and respondent's admission to support a neglect determination fails to make the necessary causative connection to all the surrounding circumstances that allegedly produced the impairment or imminent risk of impairment.

Additionally, the record is insufficient to establish a *prima facie* case since no evidence was adduced establishing the quantity, frequency or effect of marijuana use upon respondent or her ability to care for the children. There is no indication that respondent ever used or was under influence of marijuana or any other drug while in presence of any of her children. In fact, respondent's marijuana use took place prior to the birth of the baby when the children were in the care of their maternal grandmother.

Furthermore, the unrebutted testimony of respondent's expert witness established that respondent's occasional oral ingestion of marijuana was unlikely to have resulted in the level of impairment required by the statute. Specifically, respondent's expert testified that respondent's use would not ordinarily have produced "a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality" (Family Court Act § 1046[a] [iii]). Accordingly, Family Court Act § 1046(a) (iii) is inapplicable and, since no evidence was adduced establishing actual impairment or imminent risk of impairment to the newborn or any of the other children, the requirements of Family Court Act § 1012 (f) (i) (B) have not been met and dismissal of the petitions is, therefore, warranted.

For each of the forgoing reasons, it is

ORDERED, that pursuant to Family Court Act §1051 (c), facts sufficient to sustain the petitions have not been established and the petitions are, therefore, dismissed.

DATED: January 26, 2012 E N T E R:

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EMILY M. OLSHANSKY, J.F.C.