

To be Argued by:
EMILY S. WALL
(Time Requested: 10 Minutes)

**New York Supreme Court
Appellate Division – Second Department**

**Appellate
Case No.:**

In the Matter of
TAI-GI K. Q.-N. B.

HEARTSHARE ST. VINCENT'S SERVICES,

Petitioner-Respondent,

– against –

NADINE B.,

Respondent-Appellant.

BRIEF FOR RESPONDENT-APPELLANT

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Queens County Family Court Docket No.: [REDACTED]

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QUESTIONS PRESENTED

1. Did Petitioner prove by clear and convincing evidence that Nadine permanently neglected Tai-Gi by failing to plan for his future when, just nine months prior to the filing of the petition to terminate her parental rights, Nadine had completed her service plan, resulting in a trial discharge, when Nadine provided safe care for Tai-Gi during the trial discharge, and when Nadine made a realistic plan to take Tai-Gi into her full time care within a reasonable period of time?

The court below answered yes.

2. Did Petitioner prove by clear and convincing evidence that it exercised diligent efforts to reunify Nadine with Tai-Gi when it failed to offer Nadine any assistance during the trial discharge, despite her repeated requests, failed to inquire into the reasons that the trial discharge did not happen the way it expected prior to deeming it unsuccessful, and failed to make meaningful efforts to reunite the family after it deemed the trial discharge unsuccessful?

The court below answered yes.

PRELIMINARY STATEMENT

Nadine B. appeals from the order of the Queens County Family Court terminating her parental rights to her son Tai-Gi. Termination of a parent's rights is a "drastic step." In re Jamie M., 63 N.Y.2d 388, 394 (1984). As a result, the legislature has determined that it is only appropriate "when it is clear that the birth parent cannot or will not provide a normal family home for the child." Soc. Servs. Law § 384-b(1)(a)(iv). Petitioner HeartShare St. Vincent's Services ("HeartShare," "Petitioner," or "the agency") has not made that showing here.

By November of 2016, just nine months before the petition to terminate her parental rights was filed, Nadine had completed all the services that the family court ordered and that HeartShare, the foster care agency with responsibility for Tai-Gi, requested. In addition, she had obtained an apartment and had been having overnight visits with Tai-Gi for several months. In recognition of her progress, the family court ordered HeartShare to discharge Tai-Gi to Nadine on a trial basis.

Because the trial discharge began in the middle of the school year, Nadine was not at that time able to transfer Tai-Gi from the school in Brooklyn where he was attending kindergarten to the school near her home in Manhattan. In an effort to ensure that Tai-Gi would arrive at school on time and would not have to spend between an hour and a half to four hours on the train each day, Nadine worked out a plan with Tai-Gi's foster parent, [REDACTED] H [REDACTED], who was a long-time friend of

Nadine's and the legal guardian of Tai-Gi's sister, Teijah. Under this plan, Tai-Gi would spend weeknights at Ms. H■■■■'s home in Brooklyn so that Ms. H■■■■ could bring Tai-Gi to school each morning. Nadine would then pick Tai-Gi up from school each day and spend the afternoon with him. On the weekends, Nadine would bring both Tai-Gi and his sister to her home in Manhattan.

Nadine planned to enroll Tai-Gi in the school near her home the following school year. In April 2017, however, with a little more than two months remaining in the school year, HeartShare decided to end the trial discharge. Although the arrangement that Nadine and Ms. H■■■■ had put in place did not present any risk to Tai-Gi, HeartShare felt that it was a violation of the conditions of the trial discharge. Instead of trying to find a solution to the problem that would allow Nadine to take Tai-Gi into her full-time custody, HeartShare deemed the trial discharge unsuccessful and ended it.

After ending the trial discharge, HeartShare severely restricted Nadine's visits with Tai-Gi to one two-hour visit each week, supervised at the agency, without providing any explanation for why such restrictive visits were necessary. When these visits did not go well, due in part to the uncomfortable and unnatural setting, HeartShare recommended that the family receive visit coaching, but did not put this service in place for several months. HeartShare also recommended that Nadine re-engage in the services that she had completed before the trial

discharge, but did not explain how these services would assist her in overcoming the obstacles to reuniting with Tai-Gi.

Nadine was discouraged and frustrated, but she nevertheless continued to visit Tai-Gi at the agency and took steps toward engaging in the services that HeartShare recommended. She did not get a chance to complete these services, however, because HeartShare filed a petition to terminate her parental rights just a few months later, in August of 2017.

This Court should reverse the family court's order granting HeartShare's petition and terminating Nadine's parental rights for two reasons. First, HeartShare did not prove by clear and convincing evidence that Nadine failed to plan for Tai-Gi's future where Nadine completed her initial service plan, provided safe care for Tai-Gi during the trial discharge, and made a realistic plan to take Tai-Gi into her full time care within a reasonable period of time. Second, HeartShare did not prove by clear and convincing evidence that it met its obligation to exercise diligent efforts to reunify Nadine with Tai-Gi before seeking to terminate her rights when it failed to assist Nadine with overcoming the obstacles to taking Tai-Gi into her full time custody during the trial discharge and failed to make meaningful efforts to reunite the family after it deemed the trial discharge unsuccessful.

STATEMENT OF THE CASE

The Neglect Case

As a teenager, Nadine B. had two children, Teijah, born in 2010, and Tai-Gi, born in 2012 (Pet. Neglect Case; 3/2/18 Tr. 5). After Teijah was born, Nadine informally placed her in the care of her long-time friend, Ms. H [REDACTED] (Pet. Neglect Case; 2/15/18 Tr. 13–14). The following year, this arrangement was formalized when Ms. H [REDACTED] obtained legal guardianship of Teijah (Pet. Neglect Case; 2/2/18 Tr. 34–35). Shortly after Tai-Gi’s birth, Nadine also informally placed him in Ms. H [REDACTED]’s care (Pet. Neglect Case; 2/15/18 Tr. 13–14). After ACS learned of this arrangement, it filed a neglect petition against Nadine in Queens County Family Court, alleging that Nadine had not provided for Tai-Gi’s care or remained in contact with Ms. H [REDACTED] since placing Tai-Gi with her (Pet. Neglect Case). Pursuant to that petition, the family court remanded Tai-Gi to the Commissioner of ACS, who approved Ms. H [REDACTED] to serve as his foster parent (Order Directing Temporary Removal of Child).¹

In 2013, Nadine consented to a finding of neglect without admission pursuant to Family Court Act § 1051(a) (Order of Fact-Finding, Feb. 14, 2013), and the court entered an order of disposition placing Tai-Gi with the Commissioner

¹ The foster care agency with planning responsibility for Tai-Gi was initially St. Vincent’s Services, but later became HeartShare St. Vincent’s Services (2/15/18 Tr. 10–11).

of ACS (Order of Disposition, Mar. 15, 2013). The order of disposition required Nadine to enroll in and successfully complete a substance abuse treatment program, to submit to a mental health assessment and comply with the recommendations, to secure adequate housing for Tai-Gi, and to comply with any reasonable referrals by ACS or its contract agencies (Order of Disposition, Mar. 15, 2013).

Nadine Completes Her Service Plan

When Nadine was in her twenties, she began planning for Tai-Gi's return to her care. By May or June 2016, Nadine had completed her service plan and had done everything that the agency asked her to do (2/15/18 Tr. 17; 3/2/18 Tr. 6). She completed a substance abuse treatment program and was testing negative (Permanency Hearing Order, Nov. 5, 2015). She also completed a parenting class and engaged in mental health services (2/15/18 Tr. 16–17). At that time she began having unsupervised visits with Tai-Gi (2/15/18 Tr. 36; 3/2/18 Tr. 6).

By July of 2016, Nadine had also obtained stable housing in Manhattan and beds for both Tai-Gi and Teijah and began having overnight visits with Tai-Gi (2/15/18 Tr. 19, 21–22, 36). A few months later, the court ordered that Nadine have an extended five-night visit with Tai-Gi for the Thanksgiving holiday (Order, Nov. 22, 2016).

In November 2016, after Nadine completed her service plan and had several months of unsupervised overnight visits with Tai-Gi, the family court ordered HeartShare to discharge Tai-Gi to Nadine on a trial basis² (2/15/18 Tr. 17).

The Trial Discharge Conference and Expectations

In December 2016, HeartShare held a trial discharge conference pursuant to the family court's order (2/15/18 Tr. 41–42; 3/2/18 Tr. 8). Because the agency assumed that no school would have an opening for a transfer student in the middle of the school year, the agency's plan for Tai-Gi's schooling during the trial discharge was for him to remain in the school near Ms. H■■■■'s home in Brooklyn where he was attending kindergarten (2/15/18 Tr. 21, 54). This plan required Nadine to pick Tai-Gi up and take him to school each morning and to pick him up each afternoon and bring him to Ms. H■■■■'s home (2/15/18 Tr. 21). Nadine was to locate a new school for Tai-Gi by the following school year (2/15/18 Tr. 22).

At the conference, Nadine told the casework supervisor at the time, ■■■■ W■■■■ (“Ms. W■■■■”), that she would have trouble getting Tai-Gi to school in the morning because his school was in Brooklyn and she lived in Manhattan (3/2/18 Tr. 8). The trip between Nadine's home and Tai-Gi's school was normally forty-five minutes, but with frequent delays could take up to two

² When a child is discharged from foster care on a trial basis, or “trial discharged”, “the child is physically returned to the parent while the child remains in the care and custody of the local social services district.” Fam. Ct. Act § 1089(d)(2)(viii)(C).

hours (3/2/18 Tr. 29, 46). In response to her concern, HeartShare told Nadine that she would need a support system; Nadine informed the agency that Ms. H [REDACTED] would be her support system (3/2/18 Tr. 8–9, 34). Nadine and Ms. H [REDACTED] came up with a plan to have Tai-Gi spend weeknights at Ms. H [REDACTED]'s home so that Ms. H [REDACTED] could bring Tai-Gi to school each morning; Nadine would then pick him up from school each afternoon (3/2/18 Tr. 17–18, 23–24, 34–35). They informed HeartShare of this plan during the meeting (3/2/18 Tr. 31, 34).

The only service that HeartShare recommended for the family during the trial discharge was mental health treatment for Tai-Gi to address concerns raised by his teachers (2/15/18 Tr. 19). Although Nadine had never had Tai-Gi in her full-time care prior to the trial discharge, (2/15/18 Tr. 57; 3/2/18 Tr. 9), and the agency had expressed concern that she might not be ready for a trial discharge, (2/15/18 Tr. 18–19, 22–23), no services were put in place to assist Nadine during the trial discharge (2/15/18 Tr. 54). Agency case planner [REDACTED] M [REDACTED] stated that the agency does not typically put services in place during a trial discharge (2/2/18 Tr. 50).³

³ In the experience of the Center for Family Representation, foster care agencies frequently put preventive services in place when a child is discharged home on a trial basis. In fact, ACS has an office which provides support to foster care agencies, including referrals for preventive services, when a child is being trial discharged. See Intensive Preventive Aftercare Services for Child Welfare, NYC Administration for Children's Services, <https://www1.nyc.gov/site/acs/about/partners/sp/fcp.page> (last visited July 29, 2019).

At the trial discharge conference, Nadine requested preventive services because she understood that those services could help keep Tai-Gi from going back into foster care (2/15/18 Tr. 47, 54; 3/2/18 Tr. 15–16). HeartShare put Nadine on a waitlist for those services, but never put them in place (2/2/18 Tr. 44; 2/15/18 Tr. 47, 54; 3/2/18 Tr. 15).

The Trial Discharge Begins

On December 23, 2016, HeartShare officially trial discharged Tai-Gi to Nadine (2/15/18 Tr. 11). In accordance with the plan that Nadine and Ms. H■■■■ made at the meeting in December, during the trial discharge, Tai-Gi spent the night at Ms. H■■■■'s home on weeknights (3/2/18 Tr. 28). On those days, Ms. H■■■■ would take Tai-Gi to school in the morning and Nadine would pick him up from school in the afternoon and stay with him until Ms. H■■■■ got home from work (3/2/18 Tr. 17, 21, 28). Nadine acknowledged that, even though she had told agency workers that she spent the night at Ms. H■■■■'s home with Tai-Gi, she did not do so (3/2/18 Tr. 28, 36). On Fridays, Nadine would take Tai-Gi to her apartment in Manhattan where they would spend the weekend (3/2/18 Tr. 17, 28). On two or three occasions, Nadine took Tai-Gi to school on Monday; but, because the frequent train delays required them to leave before 6:00 a.m. to arrive at school by 8:00 a.m., she typically returned Tai-Gi to Ms. H■■■■'s home on Sunday nights (3/2/18 Tr. 17, 28–29).

Nadine testified that her plan during the trial discharge was to get Tai-Gi into a school closer to her home and to start working (3/2/18 Tr. 19). As a result, even though HeartShare had told Nadine that no school would have space for Tai-Gi in the middle of the school year, in January Nadine went to the school closest to her home to try to register Tai-Gi (2/15/18 Tr. 54; 3/2/18 Tr. 16). The school informed Nadine that there was no space for him and that she would have to come back in August (3/2/18 Tr. 16). No one from the agency assisted Nadine with getting Tai-Gi registered at a school in Manhattan or with obtaining busing from Nadine's home in Manhattan to the school in Brooklyn (2/15/18 Tr. 54). Ms. W█████ testified that no one did so because "[t]hat wasn't the agreement we made" (2/15/18 Tr. 54).

At the time of the trial discharge, Nadine was receiving cash assistance and food stamps for herself through public assistance (3/2/18 Tr. 10). She attempted to add Tai-Gi to her budget with public assistance but was unable to do so because he was still on Ms. H█████'s budget (2/15/18 Tr. 47–48; 3/2/18 Tr. 11). While HeartShare provided Nadine with a letter to give to public assistance, no one from the agency ever accompanied Nadine to public assistance to help get Tai-Gi added to her budget (2/15/18 Tr. 48) even though she notified them of the issue three or four times (3/2/18 Tr. 14).

Nadine also had difficulties with Tai-Gi's health insurance and, as a result, was unable to take him to mental health treatment (2/15/18 Tr. 20; 3/2/18 Tr. 13). Nadine notified the agency of this problem three or four times as well, but they did nothing to assist her with resolving the problem (3/2/18 Tr. 13–14).

HeartShare knew that Nadine was not employed at the time of the trial discharge, but never made any referrals for vocational training (2/2/18 Tr. 21–22; 2/15/18 Tr. 58). Ms. W [REDACTED] stated that “we do not refer for vocational training” (2/15/18 Tr. 58).

On February 17, 2017, HeartShare held a conference to talk about what supports could be put in place for the family after a report was called into the Statewide Central Register and was deemed unfounded⁴ (3/12/18 Tr. 6). Center for Family Representation (“CFR”) Social Worker Virginia Christ attended this meeting with Nadine (3/12/18 Tr. 6–7). Ms. W [REDACTED] and the case planner assigned to the case at that time attended on behalf of HeartShare (3/12/18 Tr. 7). The participants discussed that Ms. H [REDACTED] was still “very much involved with the family as a support” and that Tai-Gi was spending the night at Ms. H [REDACTED]'s home on weeknights while Nadine assisted with pick up and drop off to and from school (3/12/18 Tr. 7). Nadine informed the agency at this meeting that she was unable to

⁴ A report to the Statewide Central Register is deemed “unfounded” and sealed when an investigation into the report reveals no “credible evidence of the alleged abuse or maltreatment.” Soc. Servs. Law § 422(5)(a).

complete the intake for Tai-Gi's therapy due to issues with his health insurance (3/12/18 Tr. 7). Finally the agency stated that it would put preventive services in place to help strengthen the home environment (3/2/18 Tr. 15; 3/12/18 Tr. 7). The agency, however, never put these services in place (2/2/18 Tr. 44; 2/15/18 Tr. 47).

Home Visits During the Trial Discharge

During the trial discharge, HeartShare sought to conduct two home visits each month (2/15/18 Tr. 33; 2/2/18 Tr. 14). The first home visit was conducted on December 29, 2016, just a few days after the trial discharge began (2/15/18 Tr. 45). The agency also conducted two home visits in January 2017 (2/15/18 Tr. 47).

Ms. W [REDACTED] conducted a visit on February 24, 2017 (2/15/18 Tr. 26). During that visit, she observed a clean home, an adequate amount of food for the weekend, and clothes (2/15/18 Tr. 26–27). Ms. W [REDACTED] observed Tai-Gi and his sister in the bedroom playing video games and spoke with Tai-Gi about what he did in school that day (2/15/18 Tr. 26). At that visit, Nadine told Ms. W [REDACTED] that she and Tai-Gi sometimes spent weekends at Ms. H [REDACTED]'s home (2/15/18 Tr. 50–51).

Ms. M [REDACTED] became the case planner on Nadine's case on March 1, 2017 (2/15/18 Tr. 42–43). After being assigned to the case, Ms. M [REDACTED] attempted to do a home visit, but Nadine was unavailable because she and Tai-Gi were at Ms. H [REDACTED]'s home (2/2/18 Tr. 16, 18). Ms. M [REDACTED] had some

difficulty rescheduling the home visit and, for about a week, was not able to reach Nadine by phone (2/2/18 Tr. 16–18), possibly because Nadine’s phone was not working (3/2/18 Tr. 37–38, 44–45). Ms. M [REDACTED] did not attempt to reach Nadine or Tai-Gi through Ms. H [REDACTED] because she “didn’t have much knowledge of who the family foster parent was at the time” (2/2/18 Tr. 18). She discussed the matter with her supervisor, Ms. W [REDACTED], who attempted to call Nadine approximately three times but did not reach her (2/2/18 Tr. 17; 2/15/18 Tr. 30–31, 63).

HeartShare Deems the Trial Discharge Unsuccessful

Around the end of March, Ms. W [REDACTED] went to Tai-Gi’s school to attempt to make contact with him there (2/15/18 Tr. 30–31, 63). At the school, she spoke with Tai-Gi’s teacher and then called Ms. H [REDACTED] (2/15/18 Tr. 31–32). At this time she learned that Tai-Gi was still spending most nights at Ms. H [REDACTED]’s home (2/15/18 Tr. 50). HeartShare decided to deem the trial discharge unsuccessful and end it because Nadine had not complied with the agency’s plan for the trial discharge in that she had never taken Tai-Gi into her full-time custody (2/15/18 Tr. 55–56, 61).

HeartShare did not recommend any services to try to resolve the issue before deciding to end the trial discharge (2/15/18 Tr. 56). In explaining HeartShare’s decision not to try to assist Nadine to carry out the agency’s plan for the trial

discharge, Ms. W [REDACTED] testified both that “there’s no service that’s going to, that could be implemented to ensure that Nadine would take custody of her child” (2/15/18 Tr. 56) and that the agency “do[es] not attempt to keep a child in the home where there’s a safety risk” (2/15/18 Tr. 56). With regard to the latter statement, however, she did not specify what safety risk existed in this case.

In fact, HeartShare’s actions belie the suggestion that there was any safety risk, as the agency allowed the trial discharge to continue for several weeks after it decided to end it due to difficulty in scheduling a meeting about the trial discharge (2/15/18 Tr. 55–56; 2/2/18 Tr. 44). During this time, Ms. M [REDACTED] made an unannounced home visit where she observed both Tai-Gi and Teijah in the home with Nadine (2/2/18 Tr. 20, 21, 35, 43). This visit took place on March 31, 2017, and was the first time that Ms. M [REDACTED] had met Nadine in person (2/2/18 Tr. 20, 35). Ms. M [REDACTED] observed that there was sufficient food in the home and she spoke with Tai-Gi (2/2/18 Tr. 21, 43). She did not have any concerns about what she observed during this visit (2/2/18 Tr. 21, 49).

At the home visit, Ms. M [REDACTED] told Nadine that the agency had concerns about whether the trial discharge could continue because they had had difficulty getting in touch with her (2/2/18 Tr. 20–21). Nadine told Ms. M [REDACTED] that the reason why she had not been in contact with the agency was that she was busy with appointments, such as with public assistance (2/2/18 Tr. 21, 48–49). During the

home visit, Nadine told Ms. M [REDACTED] that because of the distance between her home and Tai-Gi's school, Tai-Gi sometimes spent the night in Brooklyn with Ms. H [REDACTED] (2/2/18 Tr. 23, 43).

HeartShare held a conference to end the trial discharge on April 20, 2017 (2/2/18 Tr. 16; 2/15/18 Tr. 55–56). Nadine was very upset during the conference and stated that she did not feel supported by the agency because the agency had never put in place the services she requested prior to the trial discharge (2/2/18 Tr. 37).

After the Trial Discharge

After the conference to end the trial discharge, HeartShare reduced Nadine's visits to one two-hour visit per week, supervised at the agency (2/2/18 Tr. 31; 2/15/18 Tr. 64). No evidence was presented about why the visits were reverted to supervised when Nadine had been having unsupervised overnight visits prior to the trial discharge and when the agency had not noted any safety concerns during the home visits that took place during the trial discharge.⁵ Nadine testified that the

⁵ ACS's policy on visits for families with children in foster care requires that visits be unsupervised "unless certain conditions are present, such as a court order for supervised visits and/or a reasonable basis to believe that a child may be at serious risk of physical and/or emotional harm or injury if visits are unsupervised." Administration for Children's Services, Policy and Procedures #2013/02, Determining the Least Restrictive Level of Supervision Needed During Visits for Families with Children in Foster Care (2013), available at <https://www1.nyc.gov/assets/acs/policies/init/2013/C.pdf>.

reduction in her visits was very frustrating and that she felt like the agency had given up on her (3/2/18 Tr. 21).

Both Tai-Gi and his sister, Teijah, attended these visits with Nadine (2/2/18 Tr. 32). During the visits on April 28 and May 2, 2017, Tai-Gi told his mother that he missed her and he loved her (2/2/18 Tr. 45). At the May 21, 2017 visit, the children appeared to be having a good time and were laughing energetically (2/2/18 Tr. 47). At some visits, however, Ms. M [REDACTED] noticed that Nadine had difficulty controlling the children's behaviors (2/2/18 Tr. 32). The children would often yell and scream and Nadine could not stop their behaviors from escalating (2/2/18 Tr. 32). Nadine testified that the agency visits were difficult because there were no toys or activities for the kids to engage in at the agency (3/2/18 Tr. 42).

As a result of her observations of the visits, about a month or so after the trial discharge failed, Ms. M [REDACTED] put in a request for a visiting coach (2/2/18 Tr. 31, 46). The visiting coach, however, was initially not available on the days of Nadine's visits (2/2/18 Tr. 31, 46). As a result, HeartShare did not put visit coaching in place until the end of August 2017 (9/18/18 Tr. 38–39).

In addition to visit coaching, after HeartShare deemed the trial discharge unsuccessful, the agency recommended that Nadine attend another parenting class and therapy (2/2/18 Tr. 29). Ms. M [REDACTED] referred Nadine to Bridging Access to Care in Brooklyn for parenting and therapy (2/2/18 Tr. 30–31). Nadine began a

parenting class in May of 2017, but did not complete it because the session was terminated (2/2/18 Tr. 48; 9/18/18 Tr. 32). Nadine, however, re-engaged and completed the class in November 2017 (9/18/18 Tr. 32–33; Respondent’s Exhibit A at Disposition).

Nadine did not permit anyone from HeartShare to visit her apartment after the trial discharge failed, but she did have contact with the agency case planner at the weekly visits (2/2/18 Tr. 31, 41–42 54–55).

On August 7, 2017, three and a half months after the agency ended the trial discharge, HeartShare filed a petition to terminate Nadine’s parental rights and to free Tai-Gi for adoption on the grounds of permanent neglect (Verified Pet.).

After the termination of parental rights petition was filed, Nadine continued to visit Tai-Gi weekly, supervised by an agency case planner (8/1/18 Tr. 17, 24–26; 9/18/18 Tr. 21). During these visits, Nadine demonstrated a “bonded engagement” with Tai-Gi (9/18/18 Tr. 23) and Tai-Gi told the case planner that he enjoyed visiting with his mother (8/1/18 Tr. 28, 30). Beginning in August of 2018, HeartShare allowed Nadine and Tai-Gi to have some supervised visits in the community rather than at the agency, which improved the quality of the visits (9/18/18 Tr. 61). In addition to the supervised visits, Nadine also spent time with Tai-Gi unsupervised when Ms. H [REDACTED] would call her and ask her to watch the kids

(9/18/18 Tr. 65). This happened about twice a month after the trial discharge failed (9/18/18 Tr. 65–66).

The Fact-Finding Hearing and Decision

The fact-finding on the petition to terminate Nadine’s parental rights was held on February 2, 2018, February 15, 2018, and March 2, 2018. HeartShare presented testimony from ██████ W█████, who was the casework supervisor on Tai-Gi’s case from approximately August 2013 until July 2017 (2/15/18 Tr. 9), and ██████ M█████, who was the case planner assigned to Tai-Gi’s case from March to November of 2017 (2/2/18 Tr. 14–15). Nadine testified on her own behalf and presented the testimony of CFR Social Worker, Virginia Christ. In addition, the family court took judicial notice of all prior orders in the underlying neglect proceeding (2/15/18 Tr. 15–16).

On May 30, 2018, the family court issued a Decision and Order After Fact-Finding in which it held that HeartShare met its burden of proving permanent neglect by clear and convincing evidence.

The Dispositional Hearing and Decision

The dispositional hearing took place over three days on August 1, 2018, September 18, 2018, and September 24, 2018. HeartShare presented testimony from ██████ M█████, who was the family’s case planner from August to November of 2017 (9/18/18 Tr. 18), and ██████ D█████ who was the case

planner from December 2017 through the time of the hearing (8/1/18 Tr. 6).

Nadine testified on her own behalf and called Ms. D [REDACTED]. At the dispositional hearing, Nadine submitted documentation of her completion of a parenting class at Realization Center on November 17, 2014 (9/18/18 Tr. 57; Respondent's Exhibit B), and her completion of a Chemical Dependence Treatment Program at Realization Center on February 20, 2015 (9/18/18 Tr. 57; Respondent's Exhibit C). She also submitted documentation of her completion of a second parenting class after the trial discharge failed (Respondent's Exhibit A).

On December 3, 2018, the family court entered a Decision After Dispositional Hearing in which it held that it would be in Tai-Gi's best interest to terminate Nadine's parental rights.

ARGUMENT

In enacting Social Services Law § 384-b “the legislature has placed primacy on the right of parents to raise their children and the desirability of children to be with their natural parents.” In re Jamie M., 63 N.Y.2d at 394. Regardless of how long a child has been in foster care, “the drastic step of severing parental rights for neglect can only be taken when there has been compliance with the statute.” Id. In a petition to terminate a parent’s rights on the ground of permanent neglect, the statute requires that the foster care agency prove, by clear and convincing evidence, that the parent failed, for a period of a year or more, “substantially and continuously or repeatedly to maintain contact with or plan for the future of the child . . . notwithstanding the agency’s diligent efforts to encourage and strengthen the parental relationship.” Soc. Servs. Law § 384-b(3)(g)(i), (4)(d), (7)(a).

Here there can be no dispute that Nadine maintained contact with Tai-Gi throughout the time period in question. Prior to the trial discharge she had unsupervised day and then overnight weekend visits with Tai-Gi (2/15/18 Tr. 36; 3/2/18 Tr. 6). During the trial discharge she had daily contact with him. Not only did she spend each weekend with Tai-Gi, but she cared for him each weekday afternoon from the end of the school day until Ms. H [REDACTED] arrived home from work (3/2/18 Tr. 17, 21, 28). After HeartShare deemed the trial discharge unsuccessful,

Nadine attended the visits that the agency offered her once a week at the foster care agency (2/2/18 Tr. 31; 2/15/18 Tr. 64).

With regard to the remaining two elements of a permanent neglect finding, HeartShare has not met its burden of proof. HeartShare did not prove that Nadine failed to plan for Tai-Gi's future. Nor did HeartShare prove that it exercised diligent efforts to encourage and strengthen the parental relationship before seeking to terminate Nadine's parental rights.

I. HEARTSHARE DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT NADINE FAILED TO PLAN FOR TAI-GI'S FUTURE FOR A PERIOD OF AT LEAST A YEAR

A parent's obligation "to plan for the future of the child," is defined as taking "such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent." Soc. Servs. Law § 384-b(7)(c). A parent need not successfully reunify with the child during the relevant time period in order to fulfill the requirement to plan as long as the parent is making progress toward achieving that goal within a reasonable period of time. See, e.g., In re Legend S., 156 A.D.3d 438, 439 (1st Dep't 2017) (holding that parents' failure to obtain adequate housing, without more, was insufficient to support a finding of permanent neglect); In re Donovan R., 10 A.D.3d 398, 399–400 (2d Dep't 2004) (finding that agency had not demonstrated failure to plan where respondent did not attend all

services offered to her and missed some appointments, but successfully completed other programs and showed improvement).

In determining whether a parent failed to plan for the future of the child, the parent's compliance with services offered by the agency is relevant. See Soc. Servs. Law § 384-b(7)(c). Perfect compliance with the agency's service plan, however, is not required. See In re Winstoniya D., 123 A.D.3d 705, 707 (2d Dep't 2014) (finding that mother's relapse and inconsistent attendance at mental health treatment did not establish failure to plan where she consistently visited children and substantially complied with services); In re Austin C., 77 A.D.3d 938, 939 (2d Dep't 2010) (finding that mother's failure to meet with the agency worker at least monthly and her failure to continue counseling after she had been discharged did not establish failure to plan where mother visited children and substantially complied with services).

HeartShare did not demonstrate by clear and convincing evidence that Nadine failed to plan for Tai-Gi's future where she completed her initial service plan prior to the trial discharge, she took on progressively more responsibility with regard to Tai-Gi, moving from unsupervised day visits to extended overnight visits, she provided safe care for Tai-Gi during the trial discharge, and she made a plan for taking Tai-Gi into her full time custody within a reasonable period of time.

A. As of November 2016, Nadine had successfully planned for Tai-Gi's future by completing her service plan and obtaining suitable housing, resulting in the family court's order that Tai-Gi be trial discharged to her

HeartShare has not met its burden of proving that Nadine failed, for a period of a year or more, to plan for Tai-Gi's future, when, during the first few months of the twelve months prior to the filing of the petition to terminate her parental rights, she undisputedly fully complied with her service plan and took on progressively more responsibility for Tai-Gi. See In re Legend S., 156 A.D.3d at 439 (holding that agency failed to prove permanent neglect when the period during which the parents allegedly did not comply with the service plan was less than one year).

At the time the family court ordered the trial discharge, approximately nine months prior to the filing of the petition to terminate Nadine's parental rights as to Tai-Gi, Nadine had fully complied with the family court's dispositional order and had done everything that HeartShare asked her to do (2/15/18 Tr. 17, 36; 3/2/18 Tr. 6). She completed a drug treatment program (Permanency Hearing Order, Nov. 5, 2015). She also completed a parenting class and engaged in therapy (2/15/18 Tr. 16–17). In addition, she obtained suitable housing and beds for the children (2/15/18 Tr. 19, 21–22).

In addition, between May and November of 2016, Nadine took on progressively more responsibility for Tai-Gi. She went from having unsupervised

day visits with Tai-Gi (2/15/18 Tr. 36; 3/2/18 Tr. 6), to overnight visits (2/15/18 Tr. 19, 21–22, 36), to an extended overnight visit for the Thanksgiving holiday (See Order, Nov. 22, 2016). As a result of her progress, the family court ordered the agency to begin a trial discharge (2/15/18 Tr. 17).

B. During the trial discharge, Nadine continued to make progress toward taking Tai-Gi into her full time care

Between December 2016 and April of 2017, when the trial discharge was in effect, Nadine continued to make progress toward taking Tai-Gi into her full-time care. During this time period she sought out additional services for herself, attempted to get Tai-Gi into mental health services, made an appropriate plan for Tai-Gi’s school attendance, provided safe care for Tai-Gi at all times, and made a realistic plan to take him into her full-time care by June 2017.

1. Nadine attempted to engage in services during the trial discharge

Although HeartShare had not recommended that Nadine engage in any services for herself during the trial discharge (2/15/18 Tr. 19), Nadine requested that the agency put preventive services in place because she understood that those services could help keep Tai-Gi from going back into foster care (2/15/18 Tr. 47, 54; 3/2/18 Tr. 15–16). This request demonstrates Nadine’s insight concerning areas where she might need additional support. See In re Legend S., 156 A.D.3d at 439 (holding agency did not meet its burden of demonstrating a that mother failed to gain

insight into behavior that led to child's removal where mother completed all mandated services and sought out additional services). Despite Nadine's request for these services, however, HeartShare never put these services in place (2/2/18 Tr. 44; 2/15/18 Tr. 47).

Nadine also attempted to take Tai-Gi to individual therapy during the trial discharge, but was unable to do so due to a problem with his medical insurance (2/15/18 Tr. 20; 3/2/18 Tr. 13). She informed HeartShare of this problem, but the agency did not assist her to resolve it (3/2/18 Tr. 13–14; 3/12/18 Tr. 7).

2. Nadine made an appropriate plan for Tai-Gi's school attendance

Nadine made an appropriate plan for Tai-Gi's school attendance for the remainder of the school year in which he was trial discharged. Although the plan was not the one HeartShare had devised, it was a reasonable solution to the challenge of getting Tai-Gi to school in a different borough. Having Tai-Gi spend weeknights at Ms. H■■■■'s home allowed Tai-Gi to get to school on time without having to spend hours each day on the subway (3/2/18 Tr. 29, 46). Furthermore, the plan did not pose any kind of safety risk to Tai-Gi as HeartShare had approved Ms. H■■■■ to care for Tai-Gi.

The family court's finding that Nadine had agreed to transfer Tai-Gi to a school closer to her home in Manhattan in preparation for the trial discharge

(Decision and Order After Fact-Finding at 11) was contrary to the evidence presented at the fact-finding. The evidence demonstrated that the plan for the trial discharge had been for Tai-Gi to remain in his current school and for Nadine to locate a new school by the next school year (2/15/18 Tr. 21–22). In fact, HeartShare specifically told Nadine that she would not be able to transfer Tai-Gi to a different school in the middle of the school year and that turned out to be true (2/15/18 Tr. 54).

The arrangement that Nadine made with Ms. H■■■■ to have Tai-Gi spend weeknights at Ms. H■■■■'s home did not signal a regression to the behavior that led to Tai-Gi's placement in foster care, as the family court found (Decision and Order after Fact-Finding at 11), but, in fact, demonstrated Nadine's progress since she originally placed Tai-Gi in Ms. H■■■■'s care. Nadine did not simply drop Tai-Gi off at Ms. H■■■■'s home and fail to return for him, as the original neglect petition alleged, but instead worked with Ms. H■■■■ as her support system to come up with a plan that worked for both of them.

Nadine's ability to turn to her support system for assistance with childcare should be seen as a strength rather than a detriment. African American women, like Nadine and Ms. H■■■■, have a long tradition of caring for children through cooperative networks. See Nicole L. Sault, *Many Mothers, Many Fathers: The*

Meaning of Parenting Around the World, 36 Santa Clara L. Rev. 395, 406 (1996) (noting that “among African-American families . . . people share parental responsibilities as a network of kin in a community”); Dorothy E. Roberts, The Genetic Tie, 62 U. Chi. L. Rev. 209, 271 (1995) (noting that “Black women have a rich tradition of caring for other women’s children” through cooperative networks). Such networks can help families survive with limited resources. See Lois E. Horton, Lessons From African American History, 10 DePaul J. Health Care L. 85, 95 (2006). The evidence in this case demonstrates that Nadine and Ms. H■■■■’s relationship is a cooperative one in which each provides childcare support for the other. Not only does Ms. H■■■■ provide care for Tai-Gi, but Nadine also provides care for Teijah, of whom Ms. H■■■■ is the legal guardian (See 2/2/18 Tr. 20, 43; 2/15/18 Tr. 26; 9/18/18 Tr. 65–66).

3. At all times during the trial discharge, Nadine provided safe care for Tai-Gi

The record demonstrates that Nadine provided safe care for Tai-Gi throughout the trial discharge. No suggestion has been made that Tai-Gi spending weeknights at Ms. H■■■■’s home presented a risk of harm to Tai-Gi where HeartShare had approved Ms. H■■■■ to care for Tai-Gi. Nor is there any evidence to suggest that Tai-Gi was ever unsafe while in the care of Nadine. In fact, workers from

HeartShare observed Tai-Gi at Nadine's home on several occasions and never raised any concerns regarding the care that Nadine was providing to Tai-Gi.

When HeartShare conducted visits to Nadine's home during the trial discharge, agency staff observed the home to be appropriate and expressed no concerns about Nadine's care of Tai-Gi. The first home visit took place less than a week after the trial discharge began and two additional home visits were conducted in the month of January (2/15/18 Tr. 45, 47). At a home visit in February, agency supervisor Ms. W [REDACTED] observed both Ta-Gi and Teijah in the home and noted that the home was clean, there was an adequate amount of food for the weekend, and the children had clothes (2/15/18 Tr. 26–27). At a home visit in March, case planner Ms. M [REDACTED] observed both children in the home and did not have any concerns (2/2/18 Tr. 20, 21, 35, 43).

The family court's finding that scheduling home visits became a problem immediately after the trial discharge began (Decision and Order After Fact-Finding at 4), is not supported by the record. As noted above, the agency conducted a home visit shortly after the trial discharge began in December and two in January (2/15/18 Tr. 45, 47). In addition to the February home visit (2/15/18 Tr. 26–27), the agency had another contact with Nadine in February at a meeting that took place at HeartShare (3/12/18 Tr. 6–7). It was only in March, when a new caseworker was

assigned to the case (2/15/18 Tr. 42–43), that Nadine was out of contact with HeartShare, and then only for approximately one week (2/2/18 Tr. 17–18). After this brief period, the agency case planner was able to conduct a successful home visit on March 31, 2017 (2/2/18 Tr. 20, 35).

The family court’s finding that Nadine attempted to conceal from HeartShare “the fact that she was not providing primary care for the child” (Decision and Order After Fact-Finding at 11) was also not supported by the record. The record reflects that Nadine told the agency on several occasions that Tai-Gi was spending school nights with Ms. H [REDACTED] (2/2/18 Tr. 23, 43; 3/2/18 Tr. 31, 34; 3/12/18 Tr. 7).

Nor does the record support the court’s underlying assumption that Nadine was not providing primary care for Tai-Gi. The fact that Nadine made an arrangement with a friend to provide childcare for Tai-Gi during a portion of the week does not change the fact that she was primarily responsible for Tai-Gi’s care during the trial discharge. The evidence demonstrates that Nadine cared for Tai-Gi on weekends and weekday afternoons (3/2/18 Tr. 17, 21, 28). While Nadine acknowledged that she did not spend the night at Ms. H [REDACTED]’s home on weeknights, as she told the agency she did (3/2/18 Tr. 28, 36), she never testified, as the family court found (Decision and Order after Fact-Finding at 7), that Ms. H [REDACTED] was actually the one to pick the child up from school.

4. *Nadine made a realistic plan to take Tai-Gi into her full-time care within a reasonable period of time*

Although Nadine did not take Tai-Gi into her full-time parental care during the trial discharge, she made a plan to do so within a reasonable time period. Nadine had no intention of relying on Ms. H■■■■ to provide child care on weeknights indefinitely. The arrangement she made with Ms. H■■■■ simply allowed Tai-Gi to finish out his school year in the school that he had been attending in Brooklyn. In June, when the school year ended, Nadine would have been able to take Tai-Gi into her full-time care. The following school year, Nadine planned to register him at the school close to her home (3/2/18 Tr. 19). This plan was realistic because the school had indicated that Nadine could come back to register Tai-Gi in August (3/2/18 Tr. 16). Nadine never got the chance to implement this plan, however, because the agency deemed the trial discharge unsuccessful and removed him from her care altogether.

C. After HeartShare deemed the trial discharge unsuccessful, Nadine continued to maintain contact with the agency and attempted to engage in the services that the agency recommended

After the agency deemed the trial discharge unsuccessful in April 2017, Nadine continued to plan for Tai-Gi's future by substantially complying with her service plan. See In re Winstoniya D., 123 A.D.3d at 707 (finding that agency did

not establish failure to plan where mother consistently visited children and substantially complied with services). She attended the visits scheduled by the agency (2/2/18 Tr. 31–32). The agency referred Nadine for parenting and therapy (2/2/18 Tr. 30) and, although it is unclear how soon after the trial discharge failed the referral was made, Nadine got in contact with the service provider and was able to at least start parenting by June of 2017 (2/2/18 Tr. 48). HeartShare also made a referral for a visiting coach. That service was not put in place prior to the filing of the petition to terminate Nadine’s parental rights, not because of any failure on Nadine’s part, but due to the visit coach’s unavailability on the days of the scheduled visits (2/2/18 Tr. 31).

While Nadine did not allow the agency worker into her home after the trial discharge failed (2/2/18 Tr. 41–42 54–55), the failure to permit home visits is insufficient to demonstrate a failure to plan where Nadine was otherwise compliant with services and visits. See In re Austin C., 77 A.D.3d at 939 (mother’s failure to meet with the agency worker at least monthly did not establish failure to plan where mother visited children and substantially complied with services). Furthermore, Nadine did see the agency worker weekly at the agency supervised visits (2/2/18 Tr. 31; 2/15/18 Tr. 64).

Even if Nadine failed to plan for Tai-Gi's future between the end of the trial discharge and the filing of the petition to terminate her parental rights, this period of time was only four months, not the twelve months required for a finding of permanent neglect. Soc. Servs. Law § 384-b(7)(a); see In re Legend S., 156 A.D.3d at 439 (finding dismissal of petition alleging permanent neglect appropriate where "the period of alleged noncompliance was shorter than the statutory one-year period"); In re Anna Marie G., 29 A.D.3d 992, 994 (2d Dep't 2006) (finding family court erred in determining that parent permanently neglected child where there was "no evidence that two of the three elements of the petitioner's service plan for the father had been in place for periods of at least a year").

II. HEARTSHARE DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT IT EXERCISED DILIGENT EFFORTS TO REUNIFY NADINE WITH TAI-GI BEFORE SEEKING TO TERMINATE HER PARENTAL RIGHTS

The requirement that a foster care agency exercise diligent efforts before seeking to terminate a parent's rights is founded in "the strong public policy that before the State may terminate parents' rights it must first attempt to strengthen familial ties." In re Sheila G., 61 N.Y.2d 368, 383 (1984). The question of whether the agency has exercised diligent efforts is a "threshold consideration" that must be reached before any consideration of "whether the parent has upheld his or her obligations to" the child. Id. at 385–386. The threshold requirement reflects the reality that, in light of the agency's superior position to the parent, the agency's efforts, or lack thereof, "may have a profound practical effect on what later may be viewed as the success or failure of the parents' efforts to plan for the future of the child." Id. at 382.

To fulfill its requirement to exercise diligent efforts, the agency must "determine the particular problems facing a parent with respect to the return of his or her child and make affirmative, repeated, and meaningful efforts to assist the parent in overcoming these handicaps." Id. at 385. To make affirmative efforts, the agency must proactively identify the obstacles preventing reunification and assist the parent in overcoming those obstacles. See In re Shiann RR., 285 A.D.2d

762, 763–65 (3d Dep’t 2001) (finding that agency did not exercise diligent efforts where it, *inter alia*, identified anger as a primary handicap of respondent, but “failed to establish any plan or service specifically designed to address this problem”). To be meaningful, the agency’s efforts must be “tailored to the needs of the individual situation,” In re Maria Ann P., 296 A.D.2d 574, 575 (2d Dep’t 2002), and “the plan ultimately adopted by the agency must be realistic,” In re Charlene TT, 217 A.D.2d 274, 276 (3d Dep’t 1995). Finally, although “the agency is not charged with a guarantee that the parent succeed in overcoming his or her predicaments,” In re Sheila G., 61 N.Y.2d at 385, when the agency’s initial efforts are not successful at resolving the problems facing the parent, the agency is not permitted to give up on the parent, but must investigate the reasons for the lack of success and make additional efforts to address those problems, see In re Charmaine T., 173 A.D.2d 625, 625–26 (2d Dep’t 1991) (finding that the agency failed to exercise diligent efforts when agency “made neither further arrangements nor any attempts to discover why the mother ended her participation” in program to which agency had referred her).

The trial court’s determination in this case that HeartShare exercised diligent efforts to reunite Nadine and Tai-Gi lacked a sound and substantial basis in the record where the agency’s efforts were not affirmative, meaningful, or repeated. In particular, the agency failed to assist Nadine during the trial discharge with

services aimed at addressing the challenges she would face in taking Tai-Gi into her full-time care for the first time, failed to develop a feasible plan regarding Tai-Gi's school attendance during the trial discharge, failed to investigate the reasons why the trial discharge had not happened the way the agency expected, failed to make any attempts to resolve these issues before deeming the trial discharge unsuccessful, failed to offer services aimed at addressing the reasons that the trial discharge was unsuccessful, and failed to offer meaningful visitation after the trial discharge ended.

A. HeartShare failed to make affirmative efforts to assist Nadine with the transition of Tai-Gi to her home because it did not make an appropriate plan for Tai-Gi's schooling, did not put any services in place to assist Nadine even though she requested them; and did not offer any assistance when Nadine encountered problems.

When the family court ordered a discharge of Tai-Gi to Nadine on a trial basis, the agency had the responsibility to create a plan for the trial discharge that would give Nadine a realistic chance of succeeding. See In re Austin A., 243 A.D.2d 895, 898 (3d Dep't 1997) (finding agency did not exercise diligent efforts where agency's plan provided "no realistic chance of assisting respondent in obtaining [the child's] return"); In re Charlene TT, 217 A.D.2d at 276. Instead, the agency's failure to create an appropriate plan and failure to assist Nadine during the trial discharge almost ensured that Nadine would be unsuccessful.

The agency failed to develop a feasible plan for Tai-Gi's school attendance during the trial discharge. The agency's plan involved Nadine traveling from Manhattan to Brooklyn and back twice each day, a trip that, under the best conditions required forty-five minutes each way, but with the frequent delays could take up to two hours one way (3/2/18 Tr. 29, 46). When Nadine expressed concern about this plan, the agency's only response was that she would need a support system (3/2/18 Tr. 8–9, 34), a solution which did not allow her to develop the independence from the foster parent that the agency felt she needed. The agency further discouraged Nadine from changing Tai-Gi's school and did not offer any assistance with that process (2/15/18 Tr. 54).

The agency also failed to put services in place to assist Nadine with the transition of Tai-Gi to her home. Although Ms. M [REDACTED] claimed that the agency "typically" does not have services in place during a trial discharge (2/2/18 Tr. 50), several factors evinced a need for services in these particular circumstances. First, Nadine had never cared for Tai-Gi on a full-time basis before (2/15/18 Tr. 57; 3/2/18 Tr. 9). Second the agency felt that she was not ready to care for him on a full-time basis (2/15/18 Tr. 18–19). And third, Nadine herself requested that the agency put services in place (2/15/18 Tr. 47, 54; 3/2/18 Tr. 15–16). Notwithstanding these indications that services were needed to assist Nadine

during the trial discharge, the agency failed to put services in place for Nadine (2/15/18 Tr. 54).

Finally, HeartShare failed to assist Nadine when she encountered problems with Tai-Gi's benefits during the trial discharge. Courts have frequently recognized that assistance with public benefits is a component of diligent efforts. See, e.g., In re Commitment of Denaysia Shantel C., 266 A.D.2d 109, 110 (1st Dep't 1999) (agency arranged for respondent's receipt of public assistance); In re Guardianship of Alexander, 127 A.D.2d 517, 519 (1st Dep't 1987) (agency offered to escort respondent to public assistance office and referred her to an agency which assists individuals seeking public assistance). In this case, however, HeartShare offered no assistance to Nadine beyond providing her with a letter regarding the trial discharge (2/15/18 Tr. 48), even though Nadine informed the agency on several occasions that she was having difficulty with Tai-Gi's health insurance and with adding Tai-Gi to her public assistance budget (3/2/18 Tr. 13–14).

B. HeartShare made no effort to determine why the trial discharge had not happened the way they expected or to resolve the issues preventing Nadine from taking Tai-Gi into her full time custody before ending the trial discharge.

When an agency's plan for reunification is not successful, the agency must inquire into the reasons for the lack of success and attempt to remove the obstacles to the parent's successful completion of the plan. In re Shiann RR., 285 A.D.2d at

763–65 (agency failed to make diligent efforts when it, *inter alia*, failed to inquire into the reasons for the child’s unruly behavior after visits before terminating the respondent’s unsupervised visitation); In re Charmaine T., 173 A.D.2d at 625–26 (agency did not exercise diligent efforts when it failed to inquire into why the mother stopped participating in program to which she was referred by the agency and failed to make another referral).

In this case, when the agency’s staff learned that the trial discharge had not happened according to the plan they developed at the trial discharge conference (2/15/18 Tr. 61), they made no efforts to discover the reasons for what they deemed to be Nadine’s noncompliance with the agency’s plan or to put services in place to address the issues before declaring the trial discharge a failure (2/15/18 Tr. 56). Ms. W [REDACTED] testified that “there’s no service that could be implemented to ensure that Ms. [B.] would take custody of her child” (2/15/18 Tr. 56). But Ms. W [REDACTED]’s apparent belief that any efforts would have been futile does not excuse the agency from making diligent efforts. See In re Star A., 55 N.Y.2d 560, 565 (1982) (agency’s failure to refer respondent to appropriate psychiatric care was not excused because it believed that any efforts it might have made would have been futile in light of respondent’s resistance).

Although Nadine was not truthful with agency workers about spending the night at Ms. H [REDACTED]’s home (3/2/18 Tr. 28, 36) and was out of touch for

approximately one week during the trial discharge (2/2/18 Tr. 17–18), she was not utterly cooperative or indifferent such that the agency could be deemed to have fulfilled its duty without making further efforts. See In re Guardianship of Star Leslie W., 63 N.Y.2d 136, 144–45 (1984) (“An agency which has tried diligently to reunite a mother with her child but which is confronted by an uncooperative or indifferent parent is deemed to have fulfilled its duty.”). Parents have been found to be utterly uncooperative and indifferent when they refuse or only sporadically participate in services, see, e.g., In re Guardianship of Etajawa A., 304 A.D.2d 477, 477 (1st Dep’t 2003) (respondent attended only four therapy sessions and never attended a parenting class); In re Byron Christopher Malik J., 309 A.D.2d 669, 669 (1st Dep’t 2003) (respondent refused to attend parenting and drug treatment), when they miss a substantial portion of the visits scheduled for them, see, e.g., In re Guardianship of Etajawa A., 304 A.D.2d at 477 (respondent attended less than half of scheduled visits); Nassau Cnty. Dep’t of Soc. Servs. on Behalf of James M. v. Diana T., 207 A.D.2d 399, 401 (2d Dep’t 1994) (respondent’s visitation was minimal and sporadic), or when they do not stay in regular contact with the agency, see, e.g., In re Byron Christopher Malik J., 309 A.D.2d at 669 (mother did not respond to agency letters or attend conferences); Comm’r of Soc. Servs. v. Debra S., 241 A.D.2d 453, 454 (1997) (mother had sporadic contact with agency). Unlike those parents, Nadine remained in contact with the agency, with the

exception of a one-week period in March, maintained regular contact with Tai-Gi, and substantially complied with all the services recommended by the agency.

C. After failing the trial discharge, HeartShare failed to offer Nadine meaningful visitation with Tai-Gi and failed to offer services addressed at overcoming the obstacles to reunification.

As part of its obligation to make diligent efforts, an agency is required “to schedule regular and meaningful visits with the child.” In re Sheila G., 61 N.Y.2d at 384; see also Soc. Servs. Law § 384-b(7)(f) (defining “diligent efforts” to include “making suitable arrangements for the parents to visit the child”). The statutory requirement that the agency make suitable arrangements for visits refers “not only to the physical space for visits, but also the nature, duration, and quality of the visits.” In re MHP, 45 Misc. 3d 1224(A) (Fam. Ct. Kings Cnty. 2014). An agency which unduly restricts visits has not met its obligation to schedule meaningful visits. See In re Shiann RR, 285 A.D.2d at 764 (finding agency did not make diligent efforts where, *inter alia*, it limited respondent to supervised visitation and scheduled visitation for less than two hours per week).

In this case HeartShare unduly restricted Nadine’s visits after the trial discharge by permitting her only one two-hour visit per week, supervised at the foster care agency (2/2/18 Tr. 31; 2/15/18 Tr. 64). Such a restriction was unwarranted where Nadine had been having unsupervised contact with Tai-Gi since approximately May of 2016 (3/2/18 Tr. 6) and unsupervised overnight

contact with him since July of 2016 (2/15/18 Tr. 36). During this nearly one-year period, no safety concerns had been raised which justified reverting the visits to supervised visits. HeartShare gave no explanation at all for why it decided to revert to supervised visits; in fact, the best available explanation is the one that Nadine supplied: that the agency gave up on her (3/2/18 Tr. 21).

The restrictive nature of the visits hampered their quality. HeartShare did not present any evidence that Nadine had difficulty controlling the children in her prior unsupervised visits or while the children were home with her during the trial discharge period. Concerns about Nadine's ability to control the children were only raised after her visits were moved to the agency (2/2/18 Tr. 31, 46), where the lack of toys or other activities in which the children could engage resulted in their being more difficult to control (3/2/18 Tr. 42).

In scheduling such restrictive visits, HeartShare failed to make diligent efforts to help Nadine overcome the obstacles that it felt prevented her from taking Tai-Gi into her full time care. HeartShare deemed the trial discharge unsuccessful in large part, if not entirely, because Nadine had not taken on as much caretaking responsibility for Tai-Gi as the agency had expected her to. Visits supervised at the agency did not give Nadine the opportunity to overcome this limitation by developing her comfort and ability to care for Tai-Gi on her own.

HeartShare also failed to offer any other meaningful assistance with overcoming this limitation and moving toward reunification. The visit coaching that the agency recommended was not put in place until after the petition to terminate Nadine's rights was filed (2/2/18 Tr. 31, 46; 9/18/18 Tr. 38–39). While the agency recommended that Nadine take another parenting class and re-engage in therapy (2/2/18 Tr. 29), it presented no explanation for how these services, which Nadine had already engaged in, would help her overcome the obstacles to her reunification with Tai-Gi.

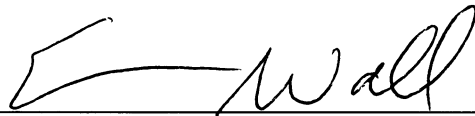
In short, the agency's efforts during this time period aptly illustrate the observation of the Court of Appeals in In re Sheila G., that "indifference by the agency may greatly serve to impede a parent's attempts at reunification." 61 N.Y.2d at 381. In this case, HeartShare's indifference to Nadine's reunification with Tai-Gi, as expressed through its failure to schedule meaningful visits or make meaningful efforts to assist Nadine during this time period, prevented Nadine from making progress toward reunification. This indifference is far from the diligent efforts that the statute requires before an agency can seek to terminate a parent's relationship with their child.

CONCLUSION

The evidence presented by Petitioner does not meet the high burden which must be met before a court can take the “drastic” step of permanently ending the relationship between a parent and child. For this reason and for the other reasons stated herein, the family court’s order terminating Nadine’s parental rights as to Tai-Gi should be reversed.

Dated: New York, New York
 August 1, 2019

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Emily Wall", written over a horizontal line.

EMILY WALL

Center for Family Representation, Inc.

Certificate of Compliance
Pursuant to 22 NYCRR § 1250.8(j)

This brief was prepared on a computer. A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

According to the word count of the word processing system used to prepare the brief, the total number of words in the brief, inclusive of point headings and footnotes and exclusive of the signature block and pages containing the table of contents, table of authorities, proof of service, certificate of compliance or any authorized addendum containing statutes, rules, regulations, etc., is 10,321.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of

TAI-GI K. Q.-N. B.

HEARTSHARE ST. VINCENT'S SERVICES.,
Petitioner-Respondent.

NADINE B.,
Respondent-Appellant.

Appellate Division
Docket No.:

Queens County
Family Court
Docket No.:

STATEMENT PURSUANT TO C.P.L.R. 5531

1. The Family Court docket number is [REDACTED]
2. The full names of the original parties are Tai-Gi K. Q.-N. B., Nadine B., and HeartShare St. Vincent's Services.
3. This action was commenced in the Family Court of the City of New York, Queens County.
4. This action was commenced on August 7, 2017, by the filing of a petition for an order committing the custody and guardianship of the subject child to the petitioner.
5. This is a proceeding to commit custody and guardianship of the subject child to the petitioner pursuant to Social Services Law § 384-b.

6. The appeal is from an order of the Family Court, Queens County (Costanzo, J.F.C.), dated January 14, 2019.

7. The appeal is on the original papers.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE LEGAL AID SOCIETY
JUVENILE RIGHTS

2019 FEB -8 PM 2:56

In the Matter of the Application of:

HEARTSHARE ST. VINCENT'S SERVICES,
Petitioner-Appellee

NOTICE OF APPEAL

Family Court Docket No.:

Petition Pursuant to Section 384-b of
The Social Service Law For the Custody of:

TAI-GI B.,
Subject Child

NADINE B.,
Respondent-Appellant.

PLEASE TAKE NOTICE that the Respondent NADINE B. hereby appeals to the Appellate Division, Second Department, of the Supreme Court of the State of New York, from a Termination of Parental Rights Order of the Queens County Family Court (Costanzo, D.), dated and entered on January 14, 2019 (annexed hereto as **Exhibit A**), and from each and every part of said Order as well as from the whole thereof.

Dated: February 8, 2019
Queens, New York


MICHELE CORTESE, ESQ.
CENTER FOR FAMILY REPRESENTATION
89-14 Parsons Blvd., 2nd Floor
Jamaica, NY 11432

BY: Vasilios Stotis
VASILIOS STOTIS, ESQ.
Attorney at Law
(646) 761-9591

QUEEN'S RECEIVED
FEBRUARY 8, 2019
2019 FEB -8 PM 3:01

TO: CLERK OF THE FAMILY COURT
151-20 Jamaica Avenue, 5th Floor
Jamaica, NY 11432


WINGATE, KEARNEY AND CULLEN
Attorney for Petitioner-HEARTSHARE ST. VINCENT'S SERVICES
45 Main Street, Suite 1020
Brooklyn, NY 11201


LEGAL AID SOCIETY
Attorney for the Child
Juvenile Rights Division
153-01 Jamaica Avenue
Jamaica, NY 11432

CORPORATION COUNSEL
NYC DEPARTMENT OF LAW – APPEALS DIVISION
100 Church Street, 4th Floor
New York, NY 10007

EXHIBIT A

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
In the Matter of the Petition of

HEARTSHARE ST. VINCENT'S SERVICES

NOTICE OF ENTRY

for an order committing to it the guardianship and
custody of

Docket No. [REDACTED]

TAI-GI [REDACTED]

a dependent child.

RECEIVED
SUPERIOR COURT
2019 FEB -8 PM 3:01

-----X
SIRS:

PLEASE TAKE NOTICE that the FINDINGS OF FACT, CONCLUSION OF LAW &
ORDER OF COMMITMENT of which the within is a true and accurate copy was duly entered
and filed in Queens County Family Court located at 151-20 Jamaica Avenue, Jamaica, New York
11432, in the office of the Clerk of this Court on January 14, 2019.

Dated: Brooklyn, New York
January 22, 2019

Yours, etc.

[REDACTED]

WINGATE, KEARNEY & CULLEN, LLP
Attorneys for the Petitioner-Respondent
45 Main Street, Suite 1020
Brooklyn, New York 11201
(718) 852-5900


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SUPERIOR COURT
2019 FEB -22 PM 1:01

8:33 - 2:37

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SUPERIOR COURT
2019 FEB -22 PM 1:01

To: Commissioner of Social Service
of the City of New York
150 Williams Street, 5th Fl.
New York, New York 10038

Vasilios Stotis, Esq.
The Center for Family Representation
89-14 Parsons Blvd, 2nd Floor
Jamaica, New York 11432


Legal Aid Society
151-02 Jamaica Avenue
Jamaica, New York 11432

At the Family Court held in and for the County of Queens at the Courthouse located at 151-20 Jamaica Avenue, Jamaica, NY 11432, in the County of Queens and the State of New York, on the 14 day of JANUARY, 2018

JAN 14 2019

P R E S E N T:

HON. DIANE COSTANZO
Judge of the Family Court

-----x

In the Matter of the Petition of

HEARTSHARE ST. VINCENT'S SERVICES

for an order committing to it the guardianship and custody of

TAI-GI [REDACTED]

a dependent child.

Docket No. [REDACTED]

**FINDINGS OF
FACT, CONCLUSIONS
OF LAW, & ORDER OF
COMMITMENT**

-----x

THE NEXT PERMANENCY HEARING DATE IS JUNE 13, 2019 AT 10:30 A.M. IN PART 10.

The verified petition of HEARTSHARE ST. VINCENT'S SERVICES praying that an order be made committing the custody and guardianship of the above-named child jointly to the Petitioner and the COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK pursuant to the provisions of Section 384-b of the Social Services Law of the State of New York and authorizing the Petitioner or COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK to consent to the adoption of said child by a suitable person or persons, having been duly filed in this Court on August 7, 2017 and jurisdiction having been obtained over the parties;

AND the COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK having appeared by written notice of his appearance,

AND, the Petitioner having appeared by its attorneys WINGATE, KEARNEY & CULLEN, LLP, by [REDACTED];

AND, the Summons and Petition having been duly served upon the Respondent Mother, NADINE B [REDACTED], as appears by affidavit of service duly filed herein; and CENTER FOR FAMILY REPRESENTATION by VASILIOS STOTIS, ESQ. having been assigned to represent her herein and the Respondent Mother and the Attorney for the Respondent Mother having appeared in this proceeding;

AND, the Court having assigned THE LEGAL AID SOCIETY by [REDACTED], ESQ., to represent the child and the Attorney for the Child having appeared in this proceeding;

AND, the matter having come before the Court for Fact-finding on February 2, 2018, February 15, 2018, March 2, 2018 which Fact-finding concluded on March 12, 2018 and the Court having issued a Decision at Fact-finding entering a finding of permanent neglect on May 30, 2018; and then having commenced a dispositional hearing on August 1, 2018 which hearing concluded on September 24, 2018, and the Court having issued a Decision at Disposition on December 3, 2018 and a Supplemental Decision After Fact-Finding on December 21, 2018; and the Respondent Mother having appeared with her attorney VASILIOS STOTIS, ESQ. for the fact-finding and dispositional hearings, and [REDACTED], having appeared on behalf of the child for said proceedings; and the Petitioner having appeared by its attorney for said proceedings; the Court having heard the evidence introduced thereon, the Court makes the following findings of fact and conclusions of law by clear and convincing evidence.

FINDINGS OF FACT

1. That TAI-GI [REDACTED] is a destitute and dependent child who has been in the care of the Petitioner, an authorized agency, for more than one (1) year prior to the institution of this proceeding.
2. That TAI-GI [REDACTED] was born on [REDACTED], in the City

and State of New York, County of Queens to NADINE [REDACTED]
[REDACTED], and whose birth is recorded by Certificate Number 1 [REDACTED]
as appears by a copy of the child's birth certificate. The child's birth certificate lists
[REDACTED] as the mother of the child and does not list anyone as the
father of the child.

3. That at the time of the birth, Respondent Mother was not legally married.
4. That the mother of the child is NADINE B [REDACTED], Respondent herein.
5. That no male person acknowledged paternity nor has any male been adjudicated the father. No male person has registered with the Putative Father Registry acknowledging paternity of the child. No one is or was living openly with the child and the mother at any time and holding himself out to be the father of the child.
6. That on or about February 14, 2012, the child was placed with the Commissioner of Social Services by the Queens County Family Court ([REDACTED]) That on or about on or about June 14, 2013, the Commissioner of Social Service transferred the child's placement to HEARTSHARE ST. VINCENT'S SERVICES for foster care, which benefits the child is now receiving.
7. The Court finds that notwithstanding the Agency's diligent efforts, that the Respondent Mother, NADINE [REDACTED], failed for a period of more than one (1) year since the time the child was placed in the care and custody of the Petitioner and/or the Commissioner of Social Services, substantially and continuously and repeatedly, to plan realistically for the future of the subject child although physically and financially able to do so resulting in the permanent neglect the subject child pursuant to SSL Section 384-b(7)(a) and Family Court Act

Section 6

8. That Despite the Petitioner Agency's efforts to assist the Respondent Mother to ameliorate the issues which led to the child's placement tailored to her individual situation, and referrals to services including mental health services, parenting classes and regular visits, monitoring her progress, arranging visitation, assessing her interaction with the child, securing housing and provisions for the home, scheduling conferences, planning for a trial discharge and attempting to monitor the trial discharge, the Respondent Mother was inconsistent with visiting, there was no evidence that she was successfully discharged from therapy or that she completed a second parenting program deemed necessary by the Petitioner Agency and the Respondent Mother failed to gain insight or benefit from the services in which she did engage, so that the child could be safely discharged from foster care. Respondent Mother also failed to formulate and act to implement feasible and realistic plans for the child's future and has never taken custody of the child even under a trial discharge, choosing to rely on the foster mother as the child's primary caretaker and custodian,
9. The Court finds after having conducted a dispositional hearing pursuant to Family Court Act Section 611 that it is the best interests that the subject child, TAI-GI [REDACTED], be freed for adoption. The subject child has been well cared for by the same foster parent since shortly after his birth in 2012; is deeply bonded with his biological sister who also resides in the home under a guardianship order and despite the Petitioner Agency's diligent efforts to effectuate reunification, the Respondent Mother failed to actively plan for her child. The Respondent Mother

failed to articulate any legal or persuasive basis for the Court to dismiss the petition despite the finding, nor was there any evidence to conclude that allowing the Respondent Mother time under a suspended judgment would change the status quo, but instead, would only prolong permanency,

10. That the Petitioner presented a plan of adoption for the child that would be in the best interests of the child.

CONCLUSIONS OF LAW

ADJUDGED, that the Respondent Mother, NADINE [REDACTED], has permanently neglected the subject child within the meaning of Sections 384-b of the Social Services Law of the State of New York; and it is further

ADJUDGED, that there is no other person whose consent is required or to whom notice is required for the adoption of said child pursuant to Section 111 of the Domestic Relations Law; and it is further

ADJUDGED, that the best interests of the child require that the custody and guardianship rights of the Respondent Mother, NADINE [REDACTED] over the child be permanently terminated pursuant to Section 384-b of the Social Services Law of the State of New York.

NOW, on motion of WINGATE, KEARNEY & CULLEN, LLP, attorneys for the Petitioner, it is

ORDERED, that it is in the best interests of the child to be freed for adoption and that the guardianship and custody rights of the child be committed jointly to HEARTSHARE ST. VINCENT'S SERVICES and COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK; and it is further

ORDERED, that the custody and guardianship rights of NADINE [REDACTED], over the subject child, TAI-GI [REDACTED], are permanently terminated and said rights are transferred jointly to HEARTSHARE ST. VINCENT'S SERVICES and the COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK and it is further

ORDERED, that HEARTSHARE ST. VINCENT'S SERVICES and the COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK be and either hereby is empowered and authorized to consent to the adoption of said child by a suitable person or persons, subject to the customary approval and order of a court of competent jurisdiction; and it is further

ORDERED, that the consent of NADINE [REDACTED] to the adoption of the said child hereby is dispensed with and said adoption can proceed without the same and without further notice to her; and it is further

ORDERED, that written notice of the adoption and any future court proceedings regarding this child be served upon the ATTORNEY FOR THE CHILD, and THE COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK until the child is adopted; and it is further

ORDERED, that inquiry has been made as to whether any foster parent, parents with whom the child resides, or any relative, or any other person seeks to adopt the child, and such inquiry has determined that the current foster parent(s) seek(s) to adopt the child, and it is further

ORDERED that the COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK or HEARTSHARE ST. VINCENT'S SERVICES shall forthwith advise the pre-adoptive foster parent(s) of his/her/their right to file an adoption petition in a Court of competent jurisdiction; and further advise the pre-adoptive foster parent(s) as to all necessary supporting

documents, and it is further

ORDERED, that the Court having conducted the First Freed Child Permanency Hearing on December 21, 2018; and it is further


ORDERED, that pursuant to Family Court Act Section 1089(a)(1) a Permanency Hearing concerning the child will be held on June 13, 2019 and that further timely permanency hearings concerning the child shall be scheduled Family Court Act Section 1089(a); and it is further

ORDERED, that a certified copy of this Order be filed for recording at the Office of the County Clerk in accordance with the provisions of Section 384-b of the Social Services Law; and it is further

ORDERED, that within thirty (30) days of this Order that a copy of this Order with Notice of Entry will be served upon the Attorney for Respondent Mother, Attorney for the Child and the Commissioner of Social Services of the City of New York.

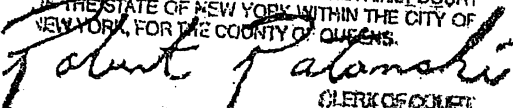
Dated: JAN 14 2019

ENTER

 **DIANE COSTANZO**
~~HON. DIANE COSTANZO~~
JUDGE
Judge of the Family Court

PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL MUST BE TAKEN WITHIN THIRTY DAYS OF RECEIPT OF THIS ORDER BY APPELLANT IN COURT, THIRTY-FIVE DAYS FROM THE MAILING OF THE ORDER TO THE APPELLANT BY CLERK OR THE COURT OR THIRTY DAYS AFTER SERVICE BY THE COURT, A PREVAILING PARTY OR ATTORNEY FOR THE CHILD UPON THE APPELLANT, WHICHEVER IS EARLIEST.

PLEASE TO VERIFY THAT THIS IS A
TRUE COPY OF **ORDER**
MADE IN THE MATTER DESIGNATED IN SUCH COPY
AND SHOWN BY THE RECORDS OF THE FAMILY COURT
OF THE STATE OF NEW YORK WITHIN THE CITY OF
NEW YORK, FOR THE COUNTY OF QUEENS.


CLERK OF COURT

JAN 16 2019

