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Anita Rojas Carroll, left, and Kara Bellew. Courtesy Photo

EXPERT OPINION

Beyond 'Nicholson': A Step Forward for Protecting Victims of Domestic Violence

A discussion of the recent Second Department decision, 'Matter of Sapphire W.', regarding ACS' authority over non-respondent parents in child abuse and neglect matters, with an emphasis on how the decision impacts victims of domestic violence.

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Family Law

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In 1973, New York enacted the New York Child Protective Services Act, (CPSA) which codified a system for reporting, investigating, and providing services to children suspected of abuse or maltreatment.

Since the enactment of the CPSA, the Legislature, courts, and practitioners within the child welfare system have tried to balance the need to protect children from abuse and neglect with the need to protect the privacy and due process rights of parents.

Striking this balance, however, has proven particularly delicate, and often difficult, when it comes to parents who are *also* victims of domestic violence.

Unlike other parents, victims of domestic violence face the heightened scrutiny of the courts and child welfare agencies when their abusive partner resides in the home with their children. Although victims can no longer have their children removed from their care for "engaging" in domestic violence, until recently, they *could* be subject to ongoing ACS supervision even when they were *not* the subject of a child welfare investigation.

The Appellate Division, Second Department finally put an end to this practice in the *Matter of Sapphire W (Kenneth L),* 2025 Slip Op 00662 (2d Dept. 2025), in which it held that the Family Court Act does not authorize courts to place obligations on non-respondent parents in abuse and neglect matters where the respondent parent no longer resides in the home.

A Complicated History: Child Protective Services and Victims of Domestic Violence

In New York State, the agency tasked with investigations related to child abuse and neglect is the Office of Children and Family Services (OCFS). The New York City agency carrying out this role in the five boroughs is the Administration for Children's Services (ACS).

When ACS receives a report of potential abuse or neglect of a child, it has up to sixty days to complete its investigation and determine whether the allegation is "indicated" or "unfounded"—essentially, ACS must determine whether there is enough credible evidence to support the initial report that a child has been abused or neglected. Cases without sufficient credible evidence are deemed "unfounded," while cases with sufficient evidence are "indicated."

The parent who is the subject of the investigation is the "respondent." Often, there is also a "non-respondent parent"—a parent who is not the subject of the abuse or neglect allegation but is nonetheless involved in the investigation and/or court proceeding by virtue of residing with the child or having been present during the alleged act(s) of abuse or neglect. In New York, committing an act of domestic violence in front of a child is both a statutorily defined form of child neglect, and a criminal offense.

For years, victims of domestic violence faced the threat (both real and perceived) of having their children removed from their care and custody for having "engaged" in domestic violence in the presence of their

children, notwithstanding the fact that they were the targets of the abuse. The Second Circuit Court of Appeals addressed this issue in the landmark class action decision of *Nicholson v. Williams,* 203 F. Supp 2d 153 (E.D.N.Y 2002). In *Nicholson*, Shawrline Nicholson, a single mother of two young children, was viciously beaten by the father of one of her children, after she ended their relationship. Ms. Nicholson was taken to the hospital and left her children with relatives, only to learn that ACS had taken custody of her children without a hearing, claiming they were at imminent risk of harm as Ms. Nicholson had purportedly failed to protect them from witnessing the beating she endured at the hands of her former partner.

Ms. Nicholson, along with other domestic violence victims who had had their children removed as a result, filed suit separately in the United States District Court. Their cases were consolidated and converted to a class action against the state, OCFS, the City of New York, and ACS. The case reached the Second Circuit Court of Appeals, which unanimously held that a mother's inability to protect her children from witnessing abuse does not constitute neglect and therefore cannot be a sole basis for their removal from her care (the Court noted that while it used the term "mother," the holding applied to any parents or guardians of children).

Nicholson held it unlawful for ACS to find a parent to have committed neglect, and therefore remove children from a parent's care, on the sole basis of the parent "failing to protect" their children from exposure to domestic violence. However, it did *not* reach the question of whether it was permissible for ACS to subject non-respondent parents, namely victims of domestic violence, to continued oversight, even when the respondent parent no longer resided with the non-respondent parent and the child had never been removed from the home.

As such, ACS's practice of surveillance persisted, including without limitation, requiring consent to unannounced home visits, drug testing,

forced compliance with any "reasonable" service recommendations, and forcing cooperation" with ACS and the services it was recommending. This overreaching oversight, which disproportionately impacted families of color, constituted an invasion of personal privacy which was finally held to be unlawful in the *Matter of Sapphire W.*

'Sapphire W.'

In *Sapphire,* the subject mother was a victim of domestic violence, having been beaten by her child's father in the child's presence. ACS opened an investigation after the mother disclosed the incident to her therapist. ACS ultimately filed a neglect case against the father, alleging that he had neglected the child by having abused the mother in the child's presence.

The father did not reside with the mother and the child. In its petition against the father, ACS sought a temporary order of protection on behalf of the mother and the child and requested that the child be released to the mother's custody subject to ACS supervision.

In adjudicating ACS' petition, the Family Court ordered that the mother be placed under ACS supervision and directed her to cooperate with ACS by maintaining contact with ACS, permitting ACS to make announced and unannounced home visits, and accepting any "reasonable" referrals for services.

The Mother appealed, arguing that the Family Court Act did not authorize ACS or the Family Court to place her under ACS supervision or otherwise direct her to cooperate with ACS.

The Appellate Division, Second Department, agreed, and held that the Family Court had improperly placed her under the supervision of ACS and the court, and impermissibly directed that she cooperate with ACS.

In so holding, the Appellate Division, Second Department examined whether Sections 1017 and 1027 (d) (by reference) of the Family Court Act granted the authority to subject the mother to supervision by the court

and by ACS (as the Family Court is a court of limited jurisdiction, it cannot exercise powers that are not granted to it by statute).

The Appellate Division held that the plain language of Family Court Section 1017 (which sets out steps to be followed in determining the appropriate placement of the child when the child is initially removed from their home) *only* applies to scenarios where a child is removed from their home and released to a nonrespondent/noncustodial parent. In such a situation, it is necessary for the non-respondent parent to be under the jurisdiction of the court to ensure that they cooperate with the agency in various ways.

The Second Department held that Section 1017 does *not* grant the Family Court or ACS any authority over a non-respondent custodial parent where the child was never removed from the home, and the respondent parent resides elsewhere.

As such, in *Sapphire*, because the child was not removed from the home, already resided with the non-respondent parent, and the respondent parent did not live in the home at all, the Appellate Division held that the Family Court lacked the authority to place such directives upon the non-respondent custodial mother.

Conclusion

While the holding in *Sapphire* is not limited to protecting victims of domestic violence, it remedies a wrong that chiefly impacted them and led to their further victimization. With *Sapphire* striking down the overreaching practices of ACS as unlawful, the court has eliminated an intrusive policy which impeded the privacy rights of individuals who posed no threat to their children.

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N. Domestic violence

For the purposes of this section, "domestic violence" (DV) refers to a pattern of coercive control, which can include physical, psychological, sexual, economic, and/or emotional abuse, perpetrated by one person against an adult intimate partner with the goal of establishing and maintaining power and control over the partner. Importantly, not all domestic violence involves physical violence, although there may be an implied threat of physical violence. A violent argument between adult partners does not automatically equate to an imbalance of power between the partners, although it would certainly raise concerns.

Domestic violence can occur in all types of families. Domestic violence cuts across all socio-economic levels in society and can be present in same sex as well as heterosexual relationships.

There is significant overlap between the abuse and maltreatment of children and the presence of domestic violence in the caretaker's relationship. Various studies have found that in 30-60% of families where there is child abuse or maltreatment, there is also domestic violence.

While the presence of domestic violence in a household does not mean that the children in the home have been maltreated or abused, domestic violence is a safety factor, and a risk element for maltreatment and abuse. A DV offender's behaviors can negatively impact child safety, the overall family functioning and well-being. The impact of an offender's abusive behaviors can affect children socially, developmentally, physically, and emotionally, even if a child is not physically harmed. Therefore, CPS staff need to consider any domestic violence in their assessment of risk, and, if necessary, address it in some manner to sufficiently reduce overall risk to children in the home. To that end, it is important that CPS staff be knowledgeable about the dynamics of domestic violence, assess for domestic violence in all cases, even if domestic violence is not the presenting issue, and continue to assess for coercive control as the case remains open.

There are specific effects of domestic violence that may result from a child's exposure to it. These include:

- Increase in the risk of physical, emotional, and psychological harm
- Aggression and anti-social behaviors
- Fearful and intimidated behaviors
- Lower social competence
- Poor academic performance

Some factors that influence the impact of domestic violence on children are:

- The frequency and severity of the violence
- Proximity to the violence
- Whether the violence was recent or in the past
- Exposure to multiple forms of violence
- Age of the child
- Developmental stage when violence began
- Gender of the child
- Relationship with the offending adult

For a general overview of domestic violence, indicators, and strategies for investigating CPS cases involving DV, see the website: http://ocfs.ny.gov/main/dv/child_welfare.asp

1. Indicators of domestic violence

Domestic violence is not an allegation of abuse or maltreatment. Rather, domestic violence is a safety factor and a risk element, one that is present in a significant percentage of CPS reports. Therefore, whenever a CPS worker responds to a report of suspected child abuse or maltreatment, they must be alert to and sensitive to the presence of domestic violence. There may be indicators of domestic violence specified in the information contained in the narrative of the Intake Report of suspected child abuse or maltreatment received from the SCR or found in a review of prior SCR history. However, in many cases, the first indicators of domestic violence reveal themselves during the initial contact with either the reported family members or with other individuals who are in a position to assess the immediate risk to the children (See *Investigation/Assessment*, IV.D.1 – IV.D.3). In other cases, indicators of domestic violence may only be identified through a child welfare worker's ongoing contact with and assessment of the family during the provision of protective, preventive or foster care services, as the worker develops a better understanding of the offender's behaviors and how they are impacting overall family functioning and child safety.

The most important source of information about suspected domestic violence in a CPS case is the non-offending parent (NOP). However, the non-offending parent may not be ~~ready~~ safe or able to disclose the existence of domestic violence because of the DV offender's behaviors. A non-offending parent's fear of the DV offender, possible trepidation about how CPS staff might react regarding the non-offending parent's children, and/or possible shame of being a victim of domestic violence can impact their willingness or ability to disclose. It may take quite a long time for the non-offending parent to develop a trusting relationship with child welfare staff.

One strategy for developing a more trusting relationship with a non-offending parent is to display concern for the non-offending parent's safety and well-being along with the required CPS focus on the safety of the children in the home and their level of risk of harm.

A CPS caseworker may find one or more of the following indicators of domestic violence when visiting a home:

- The person suspected of being a victim of domestic violence offers inconsistent explanations for bruises, fractures, or other injuries on their body that are in various stages of healing. Common sites of injury include the face, head, chest, and abdomen.
- The person suspected of being a victim of domestic violence has "accidents" during a pregnancy. Domestic violence sometimes begins or increases when a person is pregnant.
- The person suspected of being a victim of domestic violence substantially delays seeking needed medical treatment.
- The person suspected of being a victim of domestic violence has a history of repeated accidents and emergency room visits. Emergency room visits are often made at different hospitals.
- The person suspected of being a victim of domestic violence feels sad, lethargic, or depressed and/or admits having thoughts of suicide.

- The person suspected of being a victim of domestic violence reports psychosomatic and emotional complaints (e.g., chest pain, choking sensation, hyperventilation, sleep, or eating disorders).
- The person suspected of being a victim of domestic violence is embarrassed and/or evasive when asked questions about an injury or abuse.
- The person suspected of being a victim of domestic violence exhibits anxiety and fear in the presence of their partner.
- The person suspected of being a victim of domestic violence offers apologies or explanations for their partner's behavior.
- The person suspected of being the offender will not allow the victim to speak freely or meet with caseworker alone.

2. Considerations for conducting a CPS investigation when there is domestic violence.

Like all CPS reports, CPS reports in which domestic violence is an element in the family home require CPS workers to use critical thinking skills. CPS workers should try to recognize any biases that they may have regarding domestic violence and to set them aside. It is important that they suspend judgment, try to develop as many hypotheses as possible, gather as much information about the offender's behaviors in order to better understand that the simplest solutions such as leaving the situation, calling the police, or getting an order of protection, are not the safest strategies for the non-offending parent or the children, and try to view the situation from the point of view of the family members. It is important that CPS recognize the limitations of their knowledge and draw upon available resources, as needed, such as a supervisor, a DV advocate, materials from ~~CPS~~ training on domestic violence such as a list of questions for Identifying DV, or some other resource.

Where there is a domestic violence expert co-located at CPS offices, CPS should always consult with such an expert when domestic violence is, is thought to be a factor in the family. Where the LDSS does not a have a DV co-location program, CPS should consider consulting with staff from a Domestic Violence program in the community if domestic violence is a factor in a case.

Conducting interviews

Domestic violence is an issue of power and control. Consequently, the DV offender may try to prevent the non-offending parent from speaking with CPS. The non-offending parent may be fearful of disclosing any acts that the DV offender may have taken against either children in the home or the victim.

It is best practice for CPS to complete an interview with the non-offending parent before speaking to children or the DV offender, if possible. This enables CPS to better engage and partner with of the non-offending parent and to assess and plan for danger and risks, as well as the non-offending parent's protective efforts. All interviews conducted with the adults during an investigation should be conducted separately.

When working with non-offending parents, CPS may find it helpful to reference resources found on the OCFS website at: http://ocfs.ny.gov/main/dv/child_welfare.asp.

Including the DV offender

CPS may be reluctant to engage the DV offender during a CPS investigation. However, to effectively assess safety and risk to children, it is necessary to view the family holistically. It is not possible to achieve meaningful change in a family if one member of the family is excluded from the process.

There are ways to effectively engage the DV offender in a CPS investigation. It requires finding a fine balance between engaging the DV offender while attending carefully to the safety of the children and the non-offending parent. It is best practice to have clear goals and focus on how a DV offender's behaviors are impacting their children and the overall family functioning. A DV offender's concern for their children is often a motivating factor for the DV offender to change their behavior. Identifying and building on strengths, such as wanting to be a good parent, can create an opportunity to talk about expectations for behavioral change.

When the DV offender is a person legally responsible for the child(ren) named in the report, the DV offender must be part of the investigative process and CPS must work to engage and interview the DV offender. Caseworkers may wish to refer to information provided by OCFS (http://ocfs.ny.gov/main/dv/child_welfare.asp) regarding working with DV offenders for more details and strategies:

- ~~*Helpful Things to Say or Ask an Offending Parent,* which can be found on the OCFS website at http://ocfs.ny.gov/main/dv/child_welfare.asp. Direct access at: http://ocfs.ny.gov/main/dv/Helpful%20Things%20to%20Say%20or%20Ask%20a%20DV%20Offender.pdf~~
- ~~*Practice Considerations for Locating and Engaging Fathers in Domestic Violence Situations* http://ocfs.ny.gov/main/dv/Locating%20and%20Engaginng%20Fathers.pdf~~

CPS should also refer to **Section H** of this chapter, which addresses working with law enforcement, if they have concerns about criminality or safety.

Cultural considerations

Victims of domestic violence who are undocumented face unique barriers, especially if their partner is a U.S. citizen or has some sort of legal status here. Often DV offenders use the non-offending parent's undocumented status to threaten them, e.g., "You will be deported. You will never see the children again." They may also use their status to isolate them by making them afraid to talk to other people or give them inaccurate information about what they can expect from police or others who might help them. Victims of domestic violence who are undocumented may be eligible for a visa that will enable them to remain in this country. Such persons MUST be referred to DV agencies for help getting connected to an immigration attorney who can help them through the process of applying for a U-Visa or with help for any kind of immigration issue.

When any family members in a family where there is domestic violence have Limited English Proficiency, it is especially important to obtain language assistance services to enable CPS to communicate with those individuals. People from different cultures sometimes have culturally based ideas that are integral to the existence of domestic violence in the family, and these and all other aspects of a CPS case cannot be addressed effectively by CPS without clear communication between CPS and family members.

3. CPS interventions when there is domestic violence

CPS is required to investigate reports of suspected abuse or maltreatment swiftly, to assess the safety of and risk to the child(ren) in the home, to identify existing impediments to safety and strengths that may mitigate the safety deficits, and to provide rehabilitative services to the child(ren) and the adults legally responsible for such child(ren) to prevent future abuse or maltreatment.

When domestic violence is present in a child abuse or maltreatment case, CPS must consider the existence of such violence to develop intervention strategies that will adequately protect the child(ren) in the home. The DV offender's use of coercive control and physical violence may impact the non-offending parent's ability to parent and protect the child(ren) in the home from those behavior choices. Consequently, CPS may need to use intervention strategies for families afflicted by domestic violence that are different from the intervention strategies used in cases where domestic violence is not a factor.

Whether there is domestic violence in the home or not, if CPS determines that the children in the home have been abused or maltreated, or are at risk of abuse or maltreatment, CPS must assess the risk to the children and develop an intervention plan for the safety of the children. The intervention plan will be case specific and consider the resources that are available locally. Where there is domestic violence, the non-offending parent may have previously developed and instituted safety strategies and other protective efforts to keep their children safe from the DV offender's behaviors. Always ask a survivor about what they have done in the past to help with their safety and the safety of the children. What was effective? What made the survivor feel less safe? This is the foundation for a collaborative safety plan. Those strategies may ~~should~~ be used as a resource in a formulating a CPS safety plan. CPS should also work with the non-offending parent on a DV safety plan. A DV safety plan should not include or be shared with the DV offender, and details of that plan should not be documented in the case record. The non-offending parent may not only be able to provide important information about their partner's behaviors and their past protective efforts which can strengthen such a plan. A non-offending parent may also be more likely to implement a plan they helped to design rather than one that is imposed. Where there is domestic violence in the home, to achieve safety for the children, it may be necessary for CPS to also work with the police and local domestic violence programs to address the child protective and domestic violence issues.

The intervention plan should be designed to eliminate the abuse or maltreatment of the children and include services aimed at addressing the conditions, including violence against the adult victims, that are jeopardizing the safety of the child(ren). Intervention plans must consider the DV offender's behaviors, and the non-offending parent's protective capacity in the context of those behaviors, to gain a clear understanding of the choices that the non-offending parent makes on behalf of themself and the child(ren) in the home. It is best practice to explore with the non-offending parent any strategies they used to protect the children prior to child protective involvement. CPS intervention strategy should strive to both protect the child(ren) *and* to protect and assist the abused adult.

It is important for CPS to realize that the non-offending parent's strategies may not make logical sense to CPS or be what CPS think should be done but should not be rejected outright because of that. CPS needs to maintain an open dialogue with the non-offending parent as a safety plan is developed. The non-offending parent is the expert in the situation and their knowledge of the offender's coercive behaviors and patterns of violence are critical to formulating a safety plan that helps keep the children safe.

In some cases, an appropriate intervention plan may include offering the family various prevention services; however, services that do not recognize the power imbalance between the

adults may be ineffective and possibly dangerous to the adult victim. For example, standard marriage or couples counseling is not considered appropriate or safe as treatment for a domestic violence perpetrator and their victim. Treatment that consists of generalized anger management is also not appropriate for a DV offender.

Orders of Protection

If the domestic violence perpetrator poses an immediate risk to the child(ren) and the non-offending parent is willing to have the perpetrator removed from the home, the intervention strategy may involve helping the non-offending parent to initiate proceedings against the perpetrator in Family Court under Article 8 of the Family Court Act or to press criminal charges against the perpetrator. The non-offending parent may seek a temporary order of protection requiring the DV offender to remain away from the home or from the individuals in the family. If the non-offending parent does not want to or does not feel safe in pursuing such actions, but nonetheless is willing to have the perpetrator removed from the home, CPS itself could seek such a temporary order of protection from the Family Court under Article 10 of the Family Court Act (See *Family Court Proceedings*, IV.J.1 – IV.J.6). In fact, it may be a safer option for CPS to ask for a court order to remove the DV offender from the home than to have the non-offending parent request such an order. This strategy often focusses the DV offender's anger on CPS rather than on the non-offending parent, reducing the danger to the non-offending parent and other family members. Removing the abusive adult from the home will usually be less disruptive to the child(ren) than placing the child(ren) in foster care. Before taking this action, however, CPS should assess with the non-offending parent whether this course of action could place the non-offending parent and/or the children at an increased risk of harm.

The non-offending parent **cannot be held responsible** for enforcing an order of protection against the offender. N.Y. Family Court Act 168 as amended by New York Laws 2013, ch 480, sec. 4, Prohibits victims of domestic violence from being held in any way legally responsible for violation of an order of protection under which they are a protected party. If the non-offending parent and/or CPS believes that a temporary order of protection would not be effective in barring the perpetrator from the home, then the proposed intervention plan could involve an immediate referral of the non-offending parent and the child(ren) to a residential program for victims of domestic violence. However, non-offending parents should never be *forced* to leave, as this can increase the danger to children and to the non-offending parent. If the non-offending parent is resistant to leaving, CPS must try to initiate a discussion about the non-offending parent's thinking about it. CPS should try to address the non-offending parent's reasons, such as loss of income or needing transportation to a job if they would be leaving a vehicle behind, by working with the non-offending parent to develop strategies that may make leaving an option. If it is not safe to leave, other options should be investigated. It has been well established that, in situations of domestic violence, non-offending parents and their families are at the greatest risk while in the process of leaving an offender and immediately after leaving. To offer the intervention strategy of leaving to the non-offending parent, CPS needs to know what shelter services are available in the community and the LDSS's policies and procedures are for referring a non-offending parent to such services. If appropriate, a DV Safety plan can be developed with a non-offending parent to reduce risk to the child(ren) while the family remains intact. Please be aware that residential (and non-residential) domestic violence services are only provided on a voluntary basis, and such service providers will only serve the non-offending parent and the non-offending parent's children if the non-offending parent is voluntarily seeking such service. Domestic violence program services cannot be mandated by CPS or Family Court, and a non-offending parent's participation in these services, should they decide to participate, will not change the DV offender's behaviors or safety of the children.

It may be necessary to remove children from a parent, guardian, or other person legally responsible who is not actually inflicting harm on the children, if the perpetrators behaviors are so dangerous that the non-offending parent or other protective caregiver, is unable to take appropriate action(s) to protect the children from another person who is inflicting harm to the children. A removal may also be necessary if the risk of harm to the children is so immediate that CPS cannot, at the time, provide the non-offending parent any time to work on their own plan to separate the children from the abusive adult. If possible, and if it is consistent with protecting the safety of the children, CPS should not remove the child(ren) until the non-offending parent has been informed of the risk to the child(ren) caused by their remaining in the home under the present circumstances. CPS should also inform the non-offending parent that the primary role of CPS is to protect the child(ren). If the children are removed, CPS must also consider that the removal may create a threat to the non-offending parent's safety and work with that parent to address any such danger.

Whenever possible and taking into consideration the non-offending parent's preferred safety plan and reasons for that plan, CPS should explain to the non-offending parent the possible implications of actions that they may take, including the implications of the actions that the person may be unwilling or unable to take. If the child(ren) is removed from the home, that should not preclude CPS from maintaining involvement with the non-offending parent in an effort to develop a permanent safety plan for the child(ren) and the non-offending parent.

4. CPS determination decisions in relation to domestic violence

To make a determination that a parent or person legally responsible abused or maltreated their child, including in situations involving domestic violence:

- There must be impairment or immediate danger of impairment of a child's condition; *and*
- The parent must have failed to exercise a minimum degree of care; *and*
- There must be a link or causal connection between the failure to exercise a minimum degree of care and the impairment or the imminent danger of impairment of the child's condition.

The investigation of a report of suspected abuse or maltreatment involving a family with domestic violence issues must be conducted using the same standards and legal definitions as any other report of suspected child abuse and maltreatment.

Nicholson, et al. v. Scoppetta, et al.[34]

In the 2004 New York State Court of Appeals decision of *Nicholson, et al. v. Scoppetta, et al.*[35] (See **Chapter 14,** *Appendices*), the Court stated that ***when the sole allegation of neglect (i.e., maltreatment) is that the parent or other person legally responsible for a child allows the child to witness domestic violence against a child's caretaker, this alone does not constitute maltreatment and a report against a non-offending parent should not be indicated on this basis.*** The Court stated that for a finding of neglect, the following conditions must apply: there must be impairment of a child's condition, or imminent danger that the child

[34] For a more complete explanation of the implications of this decision for CPS, see 04-OCFS-LCM-22, *Summary of New York State Court of Appeals Decision, Nicholson, et al. v. Scopetta, et al.*

[35] *Nicholson v Scopetta*. October 26, 2004. Court of Appeals of New York.

will become impaired, *and* there must be a failure to provide a minimum degree of care, and these two circumstances must be connected.

- The Court wrote that impairment of mental or emotional condition means "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."
- The court also stated that imminent danger must be near or impending, not merely possible.
- The Court operationalized the term "minimum degree of care" by posing the question, "Would a reasonable and prudent parent have so acted under the circumstances then and there existing?" The Court concluded that, where there is domestic violence, a fact-based inquiry must be made based upon whether the non-offending parent exercised a minimum degree of care, acting in the manner of a reasonable and prudent parent. The inquiry must consider the severity and frequency of the violence and the resources and options available to the non-offending parent and must include consideration of the risks attendant to leaving, risks attendant to staying and suffering continued abuse, the risks attendant to seeking assistance through government channels, or that might be created by criminal prosecution of the offending parent, or by relocation. Furthermore, when applying the minimum degree of care standard to a situation in which a child is harmed or is at imminent risk of being harmed because of an incident and/or pattern of domestic violence, it would generally be the case that the offending parent should be a subject of the report since the battering and other forms of domestic violence are not the actions of a "reasonable and prudent" parent.

The Court gave two examples where a non-offending parent could be found to have neglected their child: one where the non-offending parent acknowledged the child knew of repeated violence and had reason to be afraid of the DV offender, yet the parent allowed the DV offender to return to their home several times; and another where the child was regularly or continuously exposed to extremely violent conduct between the parents and there was proof of the fear and distress felt by the child as a result of long exposure to the violence. However, the Court was clear that if the sole allegation is that the parent was abused (i.e., was a victim of domestic violence) and the child witnessed the abuse, but there is no evidence of impairment to the child, a determination of maltreatment could not be made.

5. Coordination in cases with domestic violence

a. *Law enforcement*

New York State Law (Criminal Procedure Law 140.10) requires police to makes an arrest when they have reasonable cause to believe that an order of protection has been violated or a felony or family offense misdemeanor has been committed by one family or household member against another. Regardless of whether an arrest is made, when a police officer responds to an alleged domestic violence incident, the officer is legally required to complete a Domestic Violence Incident Report (DIR). The report must document the officer's investigation and the alleged victim's statement and must immediately be given to the alleged victim. The police department is required to keep Domestic Violence Incident Reports for at least four years. CPS can access these from the police. Some LDSSs have direct access to a statewide register of all reports.

In re In N.C.M.

Supreme Court of New York, Appellate Division, First Department

June 10, 2025, Decided; June 10, 2025, Entered

Docket No. N-5470-2/21, Appeal No. 4563, Case No. 2024-02868

Reporter
2025 N.Y. App. Div. LEXIS 3604 *; 2025 NY Slip Op 03527 **; 2025 LX 189474

[1]** In the Matter of N.C.M. and Others, Children Under Eighteen Years Alleged to be Neglected. Christian A., Respondent-Appellant, Administration for Children's Services, Petitioner-Respondent.

Core Terms

neglected, preponderance of evidence, middle child, credibility, caseworker, impairment, apartment, broke, lock

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Dawne A. Mitchell, The Legal Aid Society, New York (Andrew T. Ford of counsel), attorney for the children.

Judges: Before: Moulton, J.P., González, Mendez, Pitt-Burke, Rosado, JJ.

Opinion

Order of fact-finding, Family Court, New York County (Maria Arias, J.), entered on or about April 10, 2024, which, after a hearing, determined that respondent neglected the subject children, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). The mother credibly testified that the respondent broke the lock to her apartment and proceeded to assault her while two of the children were in an adjacent room. Her account has ample support in the record both from the caseworker's regarding her observation of the broken lock in the mother's apartment, and the interview she conducted of the middle child. The out-of-court statements of the middle child that the respondent broke into the home, and struck the mother with an open hand was corroborated by the testimonial evidence of both the mother and the caseworker (*see Matter of Ymani C.D. [Peter J.D.], 217 AD3d 562, 563, 192 N.Y.S.3d 37 [1st Dept 2023]* **[*2]** ; *Matter of Jamya C. [Jermaine F.], 165 AD3d 410, 410, 82 N.Y.S.3d 715 [1st Dept 2018]*) and thus properly considered. The fact that the domestic violence occurred in close proximity to the two younger children permits an inference of impairment or imminent danger of impairment, even in the absence of evidence that the children were aware of it or emotionally affected by it (*see Matter of J.A. [Jermaine M.], 233 AD3d 428, 428, 223 N.Y.S.3d 52 [1st Dept 2024]*; *Matter of Athena M. [Manuel M.T.], 190 AD3d 644, 644, 136 N.Y.S.3d 740 [1st Dept 2021]*). There is no basis for disturbing the court's credibility determination (*see Matter of Irene O., 38 NY2d 776, 777, 345 N.E.2d 337, 381 N.Y.S.2d 865 [1975]*; *Matter of Elijah C., 49 AD3d 340, 852 N.Y.S.2d 764 [1st Dept 2008]*). Because respondent did not testify, Family Court was entitled to draw the strongest negative inference against him as the opposing evidence would allow (*see Matter of B.C. [Bernadette C.], 215 AD3d 584, 585, 188 N.Y.S.3d 34 [1st Dept 2023]*).

A preponderance of the evidence also supports the finding that respondent derivatively neglected the oldest child, though not at home at the time of the incident (*see Matter of Iscela G. [Lorenzo T.], 193 AD3d 521, 522, 141 N.Y.S.3d 840 [1st Dept 2021]*; *Matter of Autumn P. [Brandy P.], 121 AD3d 454, 455, 994 N.Y.S.2d 104 [1st Dept 2014]*).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: June 10, 2025

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Matter of Sapphire W. (Kenneth L.)

Supreme Court of New York, Appellate Division, Second Department

February 5, 2025, Decided

2023-10606, (Docket No. N-17879-23)

Reporter
227 N.Y.S.3d 624 *; 2025 N.Y. App. Div. LEXIS 695 **; 2025 NY Slip Op 00662 ***; 2025 LX 51498

[***1] In the Matter of ***Sapphire W.***. Administration for Children's Services, Respondent; Kenneth L., Respondent. Sharneka ***W.***, Nonparty Appellant.

Subsequent History: As corrected through Wednesday, June 11, 2025.

Prior History: SUMMARY

Appeal from an order of the Family Court, Kings County (Robert D. Hettleman, J.), dated August 31, 2023, in a proceeding pursuant to *Family Court Act article 10*. The order, insofar as appealed from, placed nonrespondent mother under the supervision of petitioner Administration for Children's Services and Family Court, and directed her to cooperate with petitioner in certain respects.

Core Terms

nonrespondent, family court, supervision, circumstances, directives, custody, quotation, marks, cooperate, removal, resides, provisions, neglect, child protective agency, doctrine of mootness, family home, proceedings, respects

Case Summary

Overview
Key Legal Holdings

- *Family Court Act § 1017*did not authorize the Family Court to subject the nonrespondent custodial mother to supervision by the Administration for Children's Services (ACS) and the court, or require her to cooperate with ACS, when the child was not removed from her home.
- *Family Court Act § 1027(d)*'s reference to *§ 1017(2)(a)(ii)* did not provide an independent basis to impose such directives on the nonrespondent custodial mother when the child was not removed from her home.

Material Facts

- ACS commenced a child neglect proceeding against the father, alleging he committed acts of domestic violence against the mother in the presence of their child.
- The mother was not named as a respondent, and the child resided exclusively with the mother.
- The Family Court placed the mother under ACS and court supervision and directed her to cooperate with ACS, despite the child not being removed from her home.

Controlling Law

- Family Court Act Article 10 (Child Protective Proceedings).
- *Family Court Act § 1017*(Temporary release of child).
- *Family Court Act § 1027(d)*(Hearing to determine child's interests require protection).

Court Rationale

The plain text of *Family Court Act § 1017* only permits imposing supervision and cooperation requirements on a nonrespondent parent when the child is removed from the home. Since the child was not removed from the mother's home, *§ 1017* did not authorize the directives against her. *Section 1027(d)*'s reference to *§ 1017(2)(a)(ii)* does not provide independent authority, as that reference incorporates the requirement in *§ 1017* that the child must be removed before imposing directives on a nonrespondent parent. The legislative history shows the child protection statutes aim to safeguard children while preserving parental rights and avoiding unwarranted state intervention into family life. Allowing such directives against a custodial parent when the child remains in that home would undermine this purpose.

Outcome
Procedural Outcome

The Appellate Division reversed the Family Court's order insofar as it placed the mother under ACS and court supervision and directed her to cooperate with ACS.

LexisNexis® Headnotes

Civil Procedure > ... > Justiciability > Mootness > Real Controversy Requirement

HN1 **Mootness, Real Controversy Requirement**

Under the mootness doctrine, a court is ordinarily precluded from considering questions which, although once live, have become moot by passage of time or change in circumstances. The power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal.

Civil Procedure > ... > Justiciability > Mootness > Evading Review Exception

Constitutional Law > ... > Case or Controversy > Mootness > Conduct Capable of Repetition

Constitutional Law > ... > Case or Controversy > Mootness > Great Public Concern

HN2 **Mootness, Evading Review Exception**

The exception to the mootness doctrine permits judicial review where the case presents a significant issue which is likely to recur and evade review. This exception is properly applied where there is (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues.

Civil Procedure > ... > Justiciability > Mootness > Evading Review Exception

HN3 **Mootness, Evading Review Exception**

The correct standard for applying the mootness exception is whether the issue typically—not necessarily—evades review.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

Family Law > ... > Custody Awards > Standards > Best Interests of Child

Governments > Courts > Authority to Adjudicate

HN4 **Jurisdiction Over Actions, Limited Jurisdiction**

The Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute. The Family Court may not issue a directive or decide a particular issue in the absence of any express grant of authority by statute. The Family Court's general parens patriae responsibility to do what is in the best interests of the children cannot create jurisdiction not provided by statute.

Governments > Legislation > Interpretation

HN5 **Legislation, Interpretation**

In interpreting a statute, a court should attempt to effectuate the intent of the Legislature. The clearest indicator of legislative intent is the statutory text, and the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereto. Where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used. However, an examination of the legislative history is proper where the language is ambiguous or where a literal construction would lead to absurd or unreasonable consequences that are contrary to the purpose of the enactment. Any statute or regulation must be interpreted and enforced in a reasonable manner in accordance with its manifest intent and purpose. A court should avoid a statutory interpretation rendering the provision meaningless or defeating its apparent purpose. A statute must be construed as a whole and its various sections must be considered with reference to one another.

Family Law > Delinquency & Dependency > Wards of Court

HN6 **Delinquency & Dependency, Wards of Court**

N.Y. Fam. Ct. Act 1017 sets out the steps to be followed in determining the appropriate placement of a child when the child is initially removed from his or her home. Upon determining that a child must be removed from his or her home and securing a report from the local commissioner of social services, the court must consider whether there is a non-respondent parent, relative or suitable person with whom such child may appropriately reside. Upon finding

that the child may appropriately reside with a non-respondent parent, the court may temporarily release the child directly to such non-respondent parent so long as he or she submits to the jurisdiction of the court with respect to the child. The order releasing the child to the nonrespondent parent shall set forth the terms and conditions that apply, which may include a direction for the nonrespondent parent to cooperate in making the child available for appointments with and visits by the child protective agency, including visits in the home and in-person contact with the child protective agency.

Family Law > Family Protection & Welfare > Children > Services

HN7 **Children, Services**

The relevant provisions of *N.Y. Fam. Ct. Act 1017* apply only when a court orders the removal of a child from his or her home and releases the child to the home of a nonrespondent and noncustodial parent. The provisions requiring the nonrespondent parent to submit to the jurisdiction of the court with respect to the child and to cooperate with the child protective agency in various ways are only triggered after the child is removed from the home.

Civil Rights Law > ... > Section 1983 Actions > Scope > Family Relations

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Family Law > Parental Duties & Rights > Duties > Care & Control of Children

Constitutional Law > Substantive Due Process > Scope

HN8 **Scope, Family Relations**

Freedom of personal choice in matters of family life is a fundamental liberty interest. A parent's interest in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests. Children have a parallel right to be reared by their parent. However, a parent's interest in family integrity is counterbalanced by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves.

Family Law > Family Protection & Welfare > Children > Proceedings

HN9 **Children, Proceedings**

N.Y. Fam. Ct. Act 10, which includes *N.Y. Fam. Ct. Act 1017* and which pertains to child protective proceedings, erects a careful bulwark against unwarranted state intervention into private family life. The child protective statutes of *N.Y. Fam. Ct. Act 1011* have a twofold purpose: to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being, while also providing due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his or her needs are properly met. The purpose of article 10 is to provide a mechanism to protect children while preserving parental rights.

Family Law > Family Protection & Welfare > Children > Proceedings

HN10 **Children, Proceedings**

The competing purposes of N.Y. Fam. Ct. Act 1011 make clear that the Legislature sought to strike a balance between protecting children through state intervention while simultaneously shielding private family life from such intervention when it is unwarranted.

Family Law > Delinquency & Dependency > Dependency Proceedings

HN11 Delinquency & Dependency, Dependency Proceedings

An Administration for Children's Services investigation, by its nature, intrudes upon the private lives of the parent and child to one degree or another and, at least on occasion, may be traumatic for both the child and the parent.

Family Law > Delinquency & Dependency > Dependency Proceedings

Governments > Legislation > Interpretation

HN12 Delinquency & Dependency, Dependency Proceedings

The legislation clarified the language of N.Y. Fam. Ct. Act 1017 by referring specifically to non-respondent parent, relative or suitable person as potential resources a court may consider after determining that a child must be removed from his or her home.

Family Law > Delinquency & Dependency > Dependency Proceedings

Family Law > Family Protection & Welfare > Children > Proceedings

HN13 Delinquency & Dependency, Dependency Proceedings

Pursuant to N.Y. Fam. Ct. Act 1027 (a)(i), N.Y. Fam. Ct. Act 1027 (a)(2), and N.Y. Fam. Ct. Act 1027 (a)(3), a hearing to determine whether the child's interests require protection must be held, or may be held, depending upon the circumstances. Upon such hearing, the court may, for good cause shown, release the child to his or her parent or other person legally responsible for his or her care, pending a final order of disposition, in accord with N.Y. Fam. Ct. Act 1017 (2)(a)(ii).

Family Law > Delinquency & Dependency > Dependency Proceedings

HN14 Delinquency & Dependency, Dependency Proceedings

N.Y. Fam. Ct. Act 1027 (d) does not provide an independent basis for a court to place a nonrespondent custodial parent under Administration for Children's Services supervision when the child has not been removed from that parent's home and the respondent parent resides elsewhere. By expressly referring to a subparagraph of N.Y. Fam. Ct. Act 1017, which only applies to a nonrespondent parent after the child is removed from the home, N.Y. Fam. Ct. Act 1027 (d) similarly only applies in such circumstances. This is not only the plain meaning of the statutory text, but it is also consistent with the Legislature's recognition that the reference to N.Y. Fam. Ct. Act 1017 within N.Y. Fam. Ct. Act 1027 (d) serves to establish the former statute as the authority for permitting a court to release a child to his or her parent during the pendency of an article 10 proceeding.

Family Law > Delinquency & Dependency > Dependency Proceedings

HN15 **Delinquency & Dependency, Dependency Proceedings**

N.Y. Fam. Ct. Act 1028 sets forth standards for conducting hearings to determine whether to return a child after his or her removal from the home.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Family Law > Delinquency & Dependency > Dependency Proceedings

HN16 **Procedural Due Process, Scope of Protection**

The removal of a child from the family home and the exclusion of a parent from that same home require equal showings of imminent risk, and both result in similar infringements on the constitutionally protected parent-child relationship. Both trigger the same due process protections.

Headnotes/Summary

Headnotes

Appeal - Matters Reviewable - Exception to Mootness Doctrine

1. In a Family Court Act article 10 proceeding arising from acts of domestic violence by respondent father against nonrespondent mother in the presence of the child, the issue of whether certain provisions of the Family Court Act authorize a court to subject a nonrespondent custodial parent to supervision by a child protective agency when the respondent parent resides elsewhere and the child is not removed from the home fell within the exception to the mootness doctrine and was preserved for appellate review. The issue presented was capable of repetition in other cases, and the appeal involved a phenomenon that would typically evade appellate review, since the type of temporary children's services supervision at issue would ordinarily only remain in effect for a limited time period. The mother's argument also presented a substantial and novel issue of statewide importance, which had not been the subject of prior appellate review. Moreover, the mother's argument was preserved for appellate review. Under the circumstances, the attorney for the child's objections to petitioner's proposed directives, which the mother adopted, were sufficient to alert Family Court to the relevant question and thus sufficiently preserved the legal issue for appellate review.

Parent, Child and Family - Abused or Neglected Child - Family Court's Authority to Subject Nonrespondent Parent to Supervision and Other Conditions

2. In a Family Court Act article 10 proceeding arising from acts of domestic violence by respondent father against nonrespondent mother in the presence of the child, Family Court improperly imposed directives upon the mother requiring supervision by petitioner child protective agency and the court and cooperation with petitioner, where respondent lived elsewhere and the child was not removed from her home with the mother. The relevant provisions of *Family Court Act § 1017* apply only when a court orders the removal of a child from his or her home and releases the child to the home of a nonrespondent and noncustodial parent. By the plain language of the statutory text, the provisions requiring a nonrespondent parent to "submit[ ] to the jurisdiction of the court with respect to the child" and "to cooperate" with "the child protective agency" in various ways (*Family Ct Act § 1017 [3]*) are only triggered after the child is removed from the home. Since the court never "determin[ed] that [the] child must be removed from . . . her home" (*Family Ct Act § 1017 [1]*), it did not have authority pursuant to *Family Court Act § 1017* to impose the challenged directives upon the mother no matter how well-intended the court's goals may have been. Moreover, *Family Court Act § 1017* did not apply indirectly to the circumstances presented by way of the reference within *Family Court Act § 1027 (d)* to *Family Court Act § 1017 (2) (a) (ii)*. By expressly referring to a subparagraph of

Family Court Act § 1017, which only applies to a nonrespondent parent in such circumstances after the child is removed from the home, *Family Court Act § 1027 (d)* similarly only applies in such circumstances.

Counsel: **[**1]** Family Justice Law Center, New York City (David Shalleck-Klein and Orrick, Herrington & Sutcliffe LLP [Naomi J. Scotten], of counsel), for nonparty appellant.

Muriel Goode-Trufant, Corporation Counsel, New York City (Rebecca L. Visgaitis, Josh Liebman, and Ingrid Gustafson of counsel), for petitioner-respondent.

Twyla Carter, New York City (Dawne A. Mitchell and Zoe Allen of counsel), attorney for the child.

Columbia Law School-Family Defense Clinic, New York City(Josh Gupta-Kagan and Neighborhood Defender Service of Harlem and others, amici curiae.

Saul Ewing LLP, New York City, (Michael S. O'Reilly and John A. Basinger of counsel), for Americans for Prosperity Foundation, amicus curiae.

Lara Flath, New York City (Kartik Naram of counsel), for Sanctuary for Families, and others, amici curiae **[**2]** .

New York Civil Liberties Union Foundation, New York City (Jessica Perry, Jenna Lauter, Gabriella Larios, Molly K. Biklen, and American Civil Liberties Union Foundation [Linda S. Morris, pro hac vice, Aditi Fruitwala, pro hac vice, and Anjana Samant] of counsel), for amici curiae New York Civil Liberties and others, amici curiae.

Judges: Chambers, J.P., Brathwaite Nelson and Dowling, JJ., concur.

Opinion by: VENTURA, J.

Opinion

PROCEDURAL SUMMARY

[*627] Appeal from an order of the Family Court, Kings County (Robert D. Hettleman, J.), dated August 31, 2023, in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, placed nonrespondent mother under the supervision of petitioner Administration for Children's Services and Family Court, and directed her to cooperate with petitioner in certain respects.

[*2] OPINION OF THE COURT**

Ventura, J.

This appeal presents this Court with the opportunity to decide an issue of first impression **[*628]** in New York involving the rights of nonrespondent parents in child neglect **[**3]** proceedings, to wit: whether the Family Court may place a nonrespondent custodial parent under the supervision of the Administration for Children's Services (hereinafter ACS) and the court, and direct the parent to cooperate with ACS in various ways, in circumstances where the respondent parent resides elsewhere and the child has not been removed from the nonrespondent parent's home. Considering, inter alia, the well-established "interest of a parent in the companionship, care, custody, and management of his or her children" (*Stanley v Illinois, 405 US 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 [1972]*) and the lack of any statutory authority permitting the challenged directives, we answer this question in the negative. Therefore, we conclude that, in this case, the Family Court improperly placed the mother under the supervision of ACS and the court, and directed her to cooperate with ACS in certain respects.

I. Background of the Proceeding

The father and the mother are the parents of a child born in 2022. In August 2023, ACS commenced this proceeding pursuant to Family Court Act article 10 against the father, alleging that he neglected the child by committing acts of domestic violence against the mother at her home in the presence of the child. In the petition, ACS asserted that the mother **[**4]** had previously contacted the police concerning domestic violence perpetrated against her by the father, and that the police returned to her home at a later date to conduct a wellness check. After the police left, the father, who was present in the home while the police were there, allegedly became physically and verbally aggressive with the mother, including by calling her names, slapping her, and forcibly ripping out some of her hair. In response to the mother's demand that he leave the home, the father allegedly urinated in a bathtub before departing. Shortly thereafter, the mother discussed the incident with a therapist, who reported it to ACS.

On the date ACS filed the petition, the Family Court held an initial conference. The mother, who was not named as a respondent, appeared at the conference, while the father did not. During the conference, ACS advised the court that the father "did not reside in the home" with the mother and the child, although he "would occasionally sort of show up." ACS requested that the court issue a temporary order of protection in favor of the mother and the child and against the father, while also seeking the child's "release[ ]" to the mother's custody **[**5]** under ACS's supervision. The attorney for the child objected to so much of ACS's request as sought supervision of the mother, who, by counsel, joined in the objection. The court advised the mother that she was "not accused of anything" but nonetheless granted ACS's request in full. By order dated August 31, 2023, the court, inter alia, placed the mother under the supervision of ACS and the court, and directed the mother to cooperate with ACS in certain respects. Specifically, the court required the mother to "maintain[ ] contact with ACS, permit[ ] [ACS's staff members] to make announced and unannounced visits to the home, and accept[ ] any reasonable referrals for services." The mother appeals.

II. The issue presented falls within the exception to the mootness doctrine and was preserved for our review.

Initially, although we agree with ACS's contention that the issues raised on this appeal have been rendered academic, we reject ACS's assertion that this appeal should be dismissed on that basis. On January 22, 2024, months after issuing the **[*629]** order appealed from, the Family Court issued an order of fact-finding and disposition that, among other things, awarded the mother sole legal and **[**6]** physical custody of the child. ***HN1*** "It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal" (*C.F. v New York City Dept. of Health & Mental Hygiene, 191 AD3d 52, 61, 139 N.Y.S.3d 273 [2d Dept 2020]* [internal quotation marks omitted]). "Under the mootness doctrine, a court is ordinarily precluded from considering questions which, although once live, have become moot by passage of time or change in circumstances" (*Matter of Angel S. [Sadetiana J.], 173 AD3d 1188, 1189, 101 N.Y.S.3d 650 [2019]* [internal quotation marks omitted]). Since the order of fact-finding and disposition resolved this proceeding and effectively terminated the directives challenged by the mother (*see Family Ct Act § 1088*), the issues raised on this appeal have been rendered academic (*see Matter of Abbygail G. [Christine Y.—Karen M.], 177 AD3d 878, 880, 115 N.Y.S.3d 40 [2d Dept 2019]*; *Matter of Angel S. [Sadetiana J.], 173 AD3d at 1189*; *Matter of Raven K. [Adam C.], 130 AD3d 622, 624, 13 N.Y.S.3d 469 [2d Dept 2015]*).

[*3]** Nonetheless, we agree with the mother and the attorney for the child that the exception to the mootness doctrine applies here. ***HN2*** "If academic, an appeal is not to be determined unless it falls within the exception to the doctrine that permits courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would otherwise be nonreviewable" (*Matter of Abbygail G. [Christine Y.—Karen M.], 177 AD3d at 880* [internal quotation marks omitted]). In other words, **[**7]** "[t]he exception to the mootness doctrine permits judicial review where the case presents a significant issue which is likely to recur and evade review" (*Matter of Darcy M. [Gethylee C.], 195 AD3d 719, 720, 145 N.Y.S.3d 389 [2d Dept 2021]*). Specifically,

> "[t]he exception to the mootness doctrine is properly applied where there is '(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues'"

(*Matter of Chang v Maliq M., 154 AD3d 653, 654, 61 N.Y.S.3d 632 [2d Dept 2017]*, quoting *Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714-715, 409 N.E.2d 876, 431 N.Y.S.2d 400 [1980]*).

[1] Here, the issue presented—whether certain provisions of the Family Court Act authorize a court in an article 10 proceeding to subject a nonrespondent custodial parent to supervision by a child protective agency when the respondent parent resides elsewhere and the child is not removed from the home—is "capable of repetition" in other cases (*Matter of Lucinda R. [Tabitha L.], 85 AD3d 78, 84, 924 N.Y.S.2d 403 [2d Dept 2011]*; *see Matter of Carmen R. v Luis I., 160 AD3d 460, 461, 74 N.Y.S.3d 37 [1st Dept 2018]*). The Family Court, Kings County, recently considered the issue and observed that, in article 10 proceedings, ACS regularly seeks "an order of protection against the respondent, and an order releasing the child to the non-respondent parent, with ACS supervision," in circumstances where "the child [resides] exclusively with the nonrespondent **[**8]** parent prior to ACS filing a case against the noncustodial, respondent parent" (*Matter of Danna T. [Miguel T.], 82 Misc 3d 723, 726, 207 N.Y.S.3d 367 [Fam Ct, Kings County 2024]* [internal quotation marks omitted]; *see* **[*630]** *Matter of A.B. [B.F.], 74 Misc 3d 1229[A], 164 N.Y.S.3d 807, 2022 NY Slip Op 50251[U], *1 [Fam Ct, Oswego County 2022]*). Although the issue was decided against ACS in that case, the court noted that, in its opinion, the relevant statute "ha[d] been misunderstood and misapplied in countless cases" (*Matter of Danna T. [Miguel T.], 82 Misc 3d at 725*). Further, this appeal involves a phenomenon that will typically evade appellate review, since the type of temporary ACS supervision at issue will ordinarily only remain in effect for a limited time period (*see Matter of Emmanuel B. [Lynette J.], 175 AD3d 49, 54, 106 N.Y.S.3d 58 [1st Dept 2019]*; *Matter of Elizabeth C. [Omar C.], 156 AD3d 193, 202, 66 N.Y.S.3d 300 [2d Dept 2017]*; *Matter of Anthony H. [Karpati], 82 AD3d 1240, 1241, 919 N.Y.S.2d 214 [2d Dept 2011]*). ***HN3*** We note that, contrary to the suggestion of ACS, "[t]he correct standard is whether the issue 'typically'—not 'necessarily'—evades review" (*Matter of Crawford v Ally, 197 AD3d 27, 32, 150 N.Y.S.3d 712 [1st Dept 2021]*, citing *Matter of Hearst Corp. v Clyne, 50 NY2d at 715*). The mother's argument also presents "a substantial and novel issue of statewide importance" (*Matter of Elizabeth C. [Omar C.], 156 AD3d at 202*), which "has not been the subject of prior appellate review" (*Matter of Anthony H. [Karpati], 82 AD3d at 1241*; *see Cellular Tel. Co. v Village of Tarrytown, 209 AD2d 57, 64, 624 N.Y.S.2d 170 [2d Dept 1995]*).

Moreover, contrary to ACS's contention, the mother's argument is preserved for appellate review (*see Matter of Victoria B. [Jonathan M.], 164 AD3d 578, 581, 82 N.Y.S.3d 504 [2d Dept 2018]*). Under the circumstances presented, the attorney for the child's objections to ACS's proposed directives, which the mother adopted, "were sufficient to alert [the Family] Court to the relevant question and [thus] sufficiently preserved the legal issue for appellate **[**9]** review" (*Geraci v Probst, 15 NY3d 336, 342, 938 N.E.2d 917, 912 N.Y.S.2d 484 [2010]*). We therefore reach the merits of this appeal.

III. The Family Court improperly imposed supervision and cooperation directives upon the mother.

A. The *Plain Text of Family Court Act § 1017* did not authorize the Family Court's directives.

HN4 "[The] Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute" (*Matter of Johna M.S. v Russell E.S., 10 NY3d 364, 366, 889 N.E.2d 471, 859 N.Y.S.2d 594 [2008]*; *see Matter of Capruso v Kubow, 226 AD3d 680, 682, 210 N.Y.S.3d 124 [2d Dept 2024]*). Stated otherwise, the Family Court may not issue a directive or decide a particular issue "in the absence of any express grant of authority by statute" (*Matter of Donald QQ. v Stephanie RR., 198 AD3d 1155, 1157, 156 N.Y.S.3d 467 [3d Dept 2021]*; *see Matter of Haber v Strax, 136 AD3d 911, 913, 25 N.Y.S.3d 310 [2d Dept 2016]*). Similarly, the Family Court's "general parens patriae responsibility to do what is in the best interests of the children . . . cannot create jurisdiction . . . not provided by statute" (*Matter **[***2]** *of Zavion O. [Donna O.], 173 AD3d 28, 35, 101 N.Y.S.3d 282 [1st Dept 2019]* [citation and internal quotation marks omitted]).

Here, although the Family Court did not set forth the statutory basis for its challenged directives, the parties focus on *Family Court Act §§ 1017* and *1027 (d)*, disagreeing as to whether these statutes provided the court with authority to subject the mother to supervision by ACS and the court, or authority to require her to cooperate with

ACS in various ways. As a result, we consider whether those statutes expressly authorized the court to issue those directives (*see* Matter of Zavion O. [Donna O.], 173 AD3d at 35; **[*631]** Matter of Haber v Strax, 136 AD3d at 913).

HN5 "It is fundamental **[**10]** that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (Patrolmen's Benevolent Assn. of City of N.Y. v City of New York, 41 N.Y.2d 205, 208, 359 N.E.2d 1338, 391 N.Y.S.2d 544 [1976]). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583, 696 N.E.2d 978, 673 N.Y.S.2d 966 [1998]; *see* Matter of Lisa T. v King E. T., 30 NY3d 548, 552, 69 N.Y.S.3d 236, 91 N.E.3d 1215 [2017]). "[***W***]here the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (Matter of D.L. v S.B., 39 NY3d 81, 87, 181 N.Y.S.3d 154, 201 N.E.3d 771 [2022] [internal quotation marks omitted]). However, "[a]n examination of the legislative history is proper 'where the language is ambiguous or where a literal construction would lead to absurd or unreasonable consequences that are contrary to the purpose of the enactment'" (Saul v Cahan, 153 AD3d 951, 952, 61 N.Y.S.3d 116 [2d Dept 2017], quoting Matter of Auerbach v Board of Educ. of City School Dist. of City of N.Y., 86 NY2d 198, 204, 654 N.E.2d 972, 630 N.Y.S.2d 698 [1995]). Indeed, "[a]ny statute or regulation . . . must be interpreted and enforced in a reasonable . . . manner in accordance with its manifest intent and purpose" (Matter of Sabot v Lavine, 42 NY2d 1068, 1069, 369 N.E.2d 1173, 399 N.Y.S.2d 640 [1977]). Thus, "'[a] court should avoid a statutory interpretation rendering the provision meaningless or defeating its apparent purpose'" (Matter of Carver v Nassau County Interim Fin. Auth., 142 AD3d 1003, 1008, 38 N.Y.S.3d 197 [2d Dept 2016], quoting Miglino v Bally Total Fitness of Greater N.Y., Inc., 92 AD3d 148, 157, 937 N.Y.S.2d 63 [2d Dept 2011], *affd* 20 NY3d 342, 985 N.E.2d 128 [2013]). "Finally, it is well settled that a statute must be construed as a whole and that its various sections must be considered with reference to one another" **[**11]** (Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities, 19 NY3d 106, 120, 968 N.E.2d 967, 945 N.Y.S.2d 613 [2012]).

"Family Court Act § 1017 ***HN6*** sets out the steps to be followed in determining the appropriate placement of a child when the child is initially removed from his or her home" (Matter of Paige G. [Katie P.], 119 AD3d 683, 684, 989 N.Y.S.2d 135 [2d Dept 2014]; *see* Matter of Lucinda R. [Tabitha L.], 85 AD3d at 86-87). Specifically, upon "determin[ing] that a child must be removed from his or her home" and securing a report from "the local commissioner of social services," the court must consider "whether there is a non-respondent parent, relative or suitable person with whom such child may appropriately reside" (Family Ct Act § 1017 [1] [a], [c] [i]; *see* Matter of Timothy GG. [Meriah GG.], 163 AD3d 1065, 1068, 81 N.Y.S.3d 311 [3d Dept 2018]; Matter of Paige G. [Katie P.], 119 AD3d at 684). Upon finding "that the child may appropriately reside with a non-respondent parent," the court may "temporarily release the child directly to such non-respondent parent" so long as he or she "submits to the jurisdiction of the court with respect to the child" (Family Ct Act § 1017 [2] [a] [ii]; [3]; *see* Matter of Emmanuel B. [Lynette J.], 175 AD3d at 59; Matter of Angel S. [Sadetiana J.], 173 AD3d at 1188). The order releasing the child to the nonrespondent parent "shall set forth the terms and conditions" that apply, which, as relevant to this appeal, "may include . . . a direction for **[*632]** [the nonrespondent parent] to cooperate in making the child available . . . for appointments with and visits by the child protective agency, including visits in the home and in-person contact with the child protective agency" (Family Ct Act § 1017 [3]; *see* Matter of D.L. v S.B., 39 NY3d at 90-91).

[2] Contrary to ACS's contention, Family Court Act § 1017 did not **[**12]** provide the Family Court with authority to subject the mother to supervision by ACS and the court, or to require her to "cooperate" with ACS in the manner directed in the order appealed from (*see* Matter of Danna T. [Miguel T.], 82 Misc 3d at 726-728). ***HN7*** Considering the "plain meaning" of the text and construing the statute's "various sections . . . with reference to one another" (Matter of Jefry H., 102 AD3d 132, 136, 955 N.Y.S.2d 90 [2d Dept 2012] [internal quotation marks omitted]), the relevant provisions of Family Court Act § 1017 apply only when a court orders the removal of a child from his or her home and releases the child to the home of a nonrespondent and "noncustodial parent" (Matter of D.L. v S.B., 39 NY3d at 91). By the plain language of the statutory text, the provisions requiring the nonrespondent parent, inter alia, to "submit[ ] to the jurisdiction of the court with respect to the child" and "to cooperate" with "the child protective agency" in various ways (Family Ct Act § 1017 [3]) are only triggered "[a]fter [the] child is removed from the home" (Matter of Emmanuel B. [Lynette J.], 175 AD3d at 59; *see* Matter of Paige G. [Katie P.], 119 AD3d at 684). Here, since the court never "determin[ed] that [the] child **[***4]** must be removed from . . . her home" (Family Ct Act §

1017 [1]), it did not have authority pursuant to *Family Court Act § 1017* to impose the challenged directives upon the mother, no matter how "well-intended" the court's "goals" may have been (*Matter of Zavion O. [Donna O.], 173 AD3d at 35*).

B. The legislative history supports the conclusion that **[**13]** the Family Court's directives were improper.

Although we need not review the legislative history of *Family Court Act § 1017* because the statutory text is unambiguous and a "literal construction" thereof does not "lead to absurd or unreasonable consequences that are contrary to the purpose of the [statute]" (*Saul v Cahan, 153 AD3d at 952* [internal quotation marks omitted]), the legislative history nonetheless supports our conclusion.

HN8 Since "the institution of the family is deeply rooted in this Nation's history and tradition," and it is the vehicle through which "we inculcate and pass down many of our most cherished values, moral and cultural" (*Moore v East Cleveland, 431 US 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 [1977]*), it has long been recognized "that freedom of personal choice in matters of family life is a fundamental liberty interest" (*Santosky v Kramer, 455 US 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 [1982]*). Indeed, "a parent's interest 'in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests'" (*Matter of F.**W.** [Monroe **W.**], 183 AD3d 276, 280, 122 N.Y.S.3d 620 [1st Dept 2020]*, quoting *Troxel v Granville, 530 US 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 [2000]*; *see Matter of Elizabeth C. [Omar C.], 156 AD3d at 203*). "Similarly, . . . children have a parallel right to be reared by their parent" (*Matter of F.**W.** [Monroe **W.**], 183 AD3d at 280* [alteration and internal quotation marks omitted]). Nonetheless, a parent's "interest in . . . family integrity . . . is **[*633]** counterbalanced by the compelling governmental interest in the protection of minor children, particularly **[**14]** in circumstances where the protection is considered necessary as against the parents themselves" (*Wilkinson v Russell, 182 F3d 89, 104 [2d Cir 1999]* [internal quotation marks omitted]).

HN9 Against those background principles, article 10 of the Family Court Act, which includes *Family Court Act § 1017* and which pertains to child protective proceedings, "erects a careful bulwark against unwarranted state intervention into private family life, for which its drafters had a deep concern" (*Matter of Jamie J. [Michelle E.C.], 30 NY3d 275, 284, 67 N.Y.S.3d 78, 89 N.E.3d 468 [2017]* [internal quotation marks omitted]). Therefore, "the child protective statutes of *Family Court Act article 10* have a twofold purpose: 'to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being,'" while also "'provid[ing] . . . due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his [or her] needs are properly met'" (*Matter of Elizabeth C. [Omar C.], 156 AD3d at 204*, quoting *Family Ct Act § 1011*). Stated more succinctly, the "purpose of article 10 [is] to provide a mechanism to protect children while preserving parental rights" (*id. at 209*).

HN10 The competing purposes of *article 10* make clear that the Legislature sought to strike a balance between protecting children through "state intervention" while simultaneously shielding "private family life" **[**15]** from such intervention when it is "unwarranted" (*Matter of Jamie J. [Michelle E.C.], 30 NY3d at 284* [internal quotation marks omitted]; *see Matter of Elizabeth C. [Omar C.], 156 AD3d at 204*). This makes sense, among other reasons, because a child protective agency's involvement with a family may itself have a negative impact on the parent or the child, even if it may be necessary in some circumstances to prevent or repair the effects of abuse or neglect. ***HN11*** An ACS investigation, by its nature, intrudes upon the private lives of the parent and child to one degree or another (*see Matter of Isabela P. [Jacob P.], 195 AD3d 722, 723, 149 N.Y.S.3d 539 [2d Dept 2021]*; *Matter of Anthony JJ. v Joanna KK., 182 AD3d 743, 744, 122 N.Y.S.3d 725 [3d Dept 2020]*) and, at least on occasion, may be traumatic for both the child and the parent (*see Matter of Duran v Contreras, 227 AD3d 1068, 1070, 213 N.Y.S.3d 105 [2d Dept 2024]*; *Matter of Daniel D. [Diana T.], 183 AD3d 727, 728, 121 N.Y.S.3d 913 [2d Dept 2020]*). Indeed, in testimony to a New York City Council committee in 2020, the then Commissioner of ACS acknowledged that, while the agency's work in responding to reports of abuse and neglect "may be an essential lifeline for children when they are being seriously harmed or at imminent risk of harm, the child protective response and investigation by its nature can be intrusive and traumatic for families" (Written Testimony of David A. Hansell, NY City Council, Comm on Gen Welfare, Oct. 28, 2020 at 6, available at

https://www.nyc.gov/assets/acs/pdf/testimony/2020/GWCommitteeHearing.pdf [last accessed Dec. 27, 2024]). Considering the intrusive and potentially traumatic impact of ACS involvement in a family's life, the disproportionate **[**16]** involvement of Black and Hispanic children in the child welfare **[***4]** system cannot be ignored (*see id.* at 2-6).

In any event, in furtherance of the goal of "safeguard[ing] the [child's] physical, mental and emotional well-being," *Family Court Act § 1017* "help[s] the child . . . maintain[ ] family ties and reduc[es] the **[*634]** trauma of removal" by placing him or her with a nonrespondent parent or "suitable relative" (*Matter of Harriet U. v Sullivan County Dept. of Social Servs., 224 A.D.2d 910, 911, 638 N.Y.S.2d 518 [3d Dept 1996]*; *see Matter of Richard HH. v Saratoga County Dept. of Social Servs., 163 AD3d 1082, 1083, 81 N.Y.S.3d 296 [3d Dept 2018]*). Notably, in 2015, the Legislature enacted sweeping legislation that amended various statutes, including *Family Court Act § 1017*, in order to provide nonrespondent parents with "greater participation in abuse or neglect proceedings," while "also expand[ing] the options available to Family Court judges" when "craft[ing] appropriate orders respecting the rights of non-respondent parents [and] assuring the safety and well being of children who are the subjects of the proceedings" (Assembly Mem in Support, Bill Jacket, L 2015, ch 567 at 7). ***HN12*** Among other things, the legislation "clarifie[d] the language of *Family Court Act § 1017* by referring specifically to 'non-respondent parent, relative or suitable person' as potential resources a court may consider after determining that a child must be removed from his or her home" (*id.* at 8).

Here, considering **[**17]** that *article 10* serves, in part, to enact procedures preventing unwarranted State intervention in family life, and that the relevant provisions of *Family Court Act § 1017*, in particular, serve to help the child maintain family ties while respecting the rights of parents (*see Matter of Jamie J. [Michelle E.C.], 30 NY3d at 284*; *Matter of Harriet U. v Sullivan County Dept. of Social Servs., 224 AD2d at 911*; Assembly Mem in Support, Bill Jacket, L 2015, ch 567 at 7), ACS's position is necessarily at odds with the statute's legislative purpose. The challenged directives constitute precisely the type of State intervention that the Legislature sought to avoid in circumstances when it is not warranted, particularly considering the impact ACS involvement can have on a child or a parent. It is also unclear how a nonrespondent custodial parent's rights would be respected by placing his or her parenting of a child under ACS supervision. Nor does interpreting *Family Court Act § 1017* in a manner that permits ACS supervision of a nonrespondent custodial parent in the circumstances presented help a child to maintain family ties, since the child is necessarily already in the custody of that parent in such circumstances.

C. *Family Court Act § 1027 (d)* Did Not Authorize the Challenged Directives

Further, the relevant provisions of *Family Court Act § 1017* did not apply indirectly to the circumstances presented by way of the reference **[**18]** within *Family Court Act § 1027 (d)* to *Family Court Act § 1017 (2) (a) (ii)*.

HN13 Pursuant to *Family Court Act § 1027 (a) (i)*, *(ii)*, and *(iii)*, a hearing to determine "whether the child's interests require protection" must be held, or may be held, depending upon the circumstances. "Upon such hearing, the court may, for good cause shown, release the child to his or her parent or other person legally responsible for his or her care, pending a final order of disposition, in accord with [*Family Court Act § 1017 (2) (a) (ii)*]" (*id. § 1027 [d]*).

Contrary to ACS's contention, even assuming the initial conference at issue constituted such a hearing, ***HN14*** *Family Court Act § 1027 (d)* does not provide an independent basis for a court to place a nonrespondent custodial parent under ACS supervision when the child has not been removed from that parent's home and the respondent parent resides elsewhere. Instead, by expressly referring to a subparagraph **[*635]** of *Family Court Act § 1017*, which, as previously stated, only applies to a nonrespondent parent in such circumstances "[a]fter [the] child is removed from the home" (*Matter of Emmanuel B. [Lynette J.], 175 AD3d at 59*), *Family Court Act § 1027 (d)* similarly only applies in such circumstances. This is not only the plain meaning of the statutory text, but it is also consistent with the Legislature's recognition that the reference to *Family Court Act § 1017* within *Family Court Act § 1027 (d)* serves to establish the former statute as the "authority" for permitting a court to "release a child **[**19]** to his or her parent" during the pendency of an article 10 proceeding (Assembly Mem in Support, Bill Jacket, L 2015, ch 567 at 9).

D. This Court's decision in Matter of Elizabeth C. (Omar C.) does not support ACS's position.

This Court's determination in *Matter of Elizabeth C. (Omar C.) (156 AD3d 193, 66 N.Y.S.3d 300 [2d Dept 2017])* does not warrant a different result. In that case, ACS accused the respondent father, who resided in a home with his children and the nonrespondent mother, of abusing and neglecting the children (*see id. at 196-197*). The father sought a hearing pursuant to *Family Court Act § 1028* to contest a temporary order of protection issued on the same day that ACS filed the petitions, which required **[***6]** him to stay away from the family home (*see Matter of Elizabeth C. [Omar C.], 156 AD3d at 196-197*). ***HN15*** Although *Family Court Act § 1028* sets forth standards for conducting hearings to determine whether to "return[ ] [a] child" after his or her "removal . . . from the home" (*id. § 1028 [a], [b]*), the father asserted "that his loss of the physical care and custody of the children incidental to his exclusion from the family home was the functional equivalent of a removal of the children, thereby entitling him to the heightened due process afforded by a *section 1028* hearing" (*Matter of Elizabeth C. [Omar C.], 156 AD3d at 197*). The Family Court disagreed, concluding that such a hearing is "only appropriate where . . . children have been physically **[**20]** removed from their residence" (*id. at 198*). On appeal, this Court reversed (*see id. at 205-210*). While recognizing "that the statutes within part 2" of article 10 of the Family Court Act "generally employ the term 'removal' in the context of physically removing the child from his or her home," this Court also noted that there was "no language in any of the statutes [that] expressly limit[ed] the due process protections they contain . . . only [to] situations involving . . . physical removal" (*id. at 205-206*). ***HN16*** "Since the removal of a child from the family home and the exclusion of a parent from that same home require equal showings of imminent risk, and both result in similar infringements on the constitutionally protected parent-child relationship," this Court "conclud[ed] that both trigger the same due process protections" (*id. at 207*).

Contrary to ACS's contention, our holding in that case does not lead to the conclusion that, in this case, the child was "removed" for purposes of *Family Court Act § 1017*, thereby permitting the Family Court to impose the challenged directives upon the mother. In *Matter of Elizabeth C. (Omar C.)*, this Court was focused on a different question than the one presented here: whether a custodial parent's exclusion from the family home triggers the hearing and **[**21]** due process requirements set forth in *Family Court Act § 1028*, even when the child is still residing at, and has not been removed from, the home. In this case, the question is instead whether *Family Court Act § 1017*—the **[*636]** relevant provisions of which require a noncustodial nonrespondent parent to, among other things, cooperate with a child protective agency upon assuming temporary custody after the child has been removed from the child's home—can be utilized to impose the type of directives at issue upon a custodial nonrespondent parent when an order of protection has been issued against a respondent parent who resides elsewhere, and when the child has not been removed from the nonrespondent parent's home. Notably, in *Matter of Elizabeth C. (Omar C.)*, this Court did not state that the circumstances presented involved an actual "removal" of the child, as that term is utilized in *Family Court Act § 1028*. Instead, we reasoned that

> "[t]he issuance of a full stay away order of protection excluding the father from the family home . . . [wa]s for all practical purposes akin to a physical removal of the children from his care and custody, . . . produc[ing] the same cessation in his contact with the children, and the same severance of his relationship with them, **[**22]** that an order removing the children from the family residence would bring about,"
>
> thereby involving the "same constitutional considerations" (*Matter of Elizabeth C. [Omar C.], 156 AD3d at 208-209*).

IV. The issue of the due process protections available to respondent parents is not before us.

To be clear, our conclusion that *Family Court Act §§ 1017* and *1027(d)* did not authorize the Family Court to impose the challenged directives upon the mother under the circumstances presented should not be construed as indicating that certain hearing and due process provisions of Family Court Act article 10 were unavailable to the father. That issue is not before us on this appeal, and we do not decide it.

V. Conclusion

Accordingly, the Family Court improperly placed the mother under the supervision of ACS and the court, and directed her to cooperate with ACS in certain respects.

In light of our determination, we need not reach the remaining contentions of the parties and amici curiae.

Accordingly, the order is reversed insofar as appealed from, on the law.

Chambers, J.P., Brathwaite Nelson and Dowling, JJ., concur.

Ordered that the order is reversed insofar as appealed from, on the law, without costs or disbursements.

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NEW YORK STATE | Office of Children and Family Services

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Administrative Directive

Transmittal:	17-OCFS-ADM-02-R1 ***Revised February 28, 2023***
To:	Local Departments of Social Services Commissioners Executive Directors of Voluntary Authorized Agencies
Issuing Division/Office:	Office of Strategic Planning and Policy Development
Date:	***Revised (R1): February 28, 2023***; Original Publication: April 13, 2017
Subject:	**Changes to the Family Court Act Regarding Child Protective and Permanency Hearings, Including Changes Affecting the Rights of Non-Respondent Parents**
Suggested Distribution:	Legal Staff Directors of Social Services Child Protective Services Supervisors Child Welfare Supervisors Foster Care Supervisors
Contact Person(s):	See Section VII.
Attachments:	None

Filing References

Previous ADMs/INFs	Releases Cancelled	NYS Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
			Family Court Act §§ 651, 1012, 1017, 1022-a, 1027, 1035, 1052, 1054, 1055-b, 1057, and 1089-a; DRL §240		

R1: This ADM is being revised and reissued on February 28, 2023 to update instructions for recording in CONNECTIONS when the disposition of a case is to release a child to a non-respondent parent. See Section V. Systems Instructions (#1).

I. Purpose

The purpose of this Administrative Directive (ADM) is to inform local social services districts (LDSSs) and authorized voluntary agencies about the provisions of Chapter 567 of the Laws of 2015 (Chapter 567), which revised the Family Court Act (FCA) and the Domestic Relations Law (DRL), particularly

regarding the participation of non-respondent parents[1] in proceedings conducted pursuant to Articles 10 (abuse and neglect hearings) and 10-A (permanency hearings) of the FCA (hereinafter referred to as Articles 10 and 10-A, respectively). Chapter 567 also includes numerous changes applicable to the available dispositions and placements of children who are subject to those proceedings.

II. Background

Chapter 567 was the result of a departmental bill advanced by the New York State Office of Court Administration (OCA) upon the recommendation of the Family Court Advisory and Rules Committee.

III. Program Implications

The following is a summary of some, but not all, of the changes enacted in Chapter 567.

1. Definitions of "parent," "relative," and "suitable person" were added to FCA §1012.
   a. Parent means a person who is recognized under the laws of the state of New York to be the child's legal parent.
   b. Relative means any person related to the child by blood, marriage or adoption, excluding parents, putative parents, and relatives of putative parents.
   c. Suitable person means any person who plays or has played a significant positive role in the child's life or in the life of the child's family.

2. FCA §1017 now requires that an LDSS, in its search for potential resources for a child who is temporarily removed, must also seek to identify, locate, and notify the following persons about the pendency of an Article 10 proceeding:
   a. Any non-respondent parents (not just those deemed "suitable")
   b. All relatives (not just "suitable" relatives), including, but not limited to, all those identified by a respondent or non-respondent parent or by a child over the age of five
   c. All suitable persons identified by a respondent or non-respondent parent

   The LDSS must report the findings of its search for a putative father to the court and to all interested parties, including the attorney for the child. The LDSS must also notify the persons whom it has located in writing of the pendency of the court proceedings and of their rights, as applicable, to seek the release or placement of the child, to provide free care, or to seek custody under Article 6. These notices are set by OCA through a uniform statewide rule. The notices are posted on the OCA website, at http://www.nycourts.gov/forms/familycourt/.

   The LDSS must conduct an investigation to locate any person who is not recognized to be the child's legal parent and does not have the rights of a legal parent under the laws of New York State, but who has filed an instrument with the state's Putative Father Registry acknowledging paternity of the child pursuant to section 4-1.2 of the Estates, Powers and Trusts Law; or who has a pending paternity petition for the child; or who has been identified as the child's parent by the child's other parent in a written sworn statement. The LDSS must report the results of its efforts to locate any putative father to the court and parties, including the attorney for the child.

[1] The Family Court Act defines "Respondent" in the following manner: "includes any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child." Therefore, a non-respondent parent is a parent who is *not* alleged to have abused or neglected his or her child.

The court must check New York's Sex Offender Registry, the registry of orders of protection, and previous Article 10 filings regarding any person who seeks to have the child under any FCA §1017 placement.

The court can order the LDSS to immediately begin an investigation of the home of a non-respondent parent to whom a child has been temporarily released or of a relative or suitable person with whom a child has been temporarily placed (described in more detail below in section IV).

3. Amendments to FCA §§ 651, 1017, 1052, and 1055-b now allow, but do not require, Family Courts conducting FCA Article 10 or 10-A hearings to jointly hear certain pending matters brought under FCA Article 6, as well as custody and visitation proceedings for a child of a marriage brought under DRL §240(1)(a) provided that if a motion is filed under section 240 of the DRL, the Supreme Court must refer the matter to the Family Court in order for the Family Court to jointly hear it. The Family Court must determine any such pending matter according to the rules of FCA Article 6 or DRL §240, as applicable.

4. Chapter 567 uses a new term, "release," to replace the term "custody and care," when referring to the temporary placement of a child during pendency of an FCA Article 10 hearing with a non-respondent parent, respondent parent, or legal custodian or guardian. While the law does not define this term, it appears to have the same meaning as placement, while inferring the unique relationship between a child and a parent, custodian or guardian.

5. Amendments to FCA §§1022-a and 1035 now require that
   a. at an FCA §1022 hearing, the court must inform a non-respondent parent of the allegations against the respondent(s).
   b. the court must inform non-respondent parents as well as respondent parents of their eligibility for appointed counsel under section 262.
   c. the notice of the pendency of a child protective proceeding provided by the LDSS must now advise the parent or parents, *including* non-respondent parents, of their right to counsel, including assigned counsel.

6. When a court temporarily releases a child to a non-respondent parent or places a child with a relative or suitable person pursuant to FCA §1017, the court may no longer place the person under supervision. However, the non-respondent parent, relative or suitable person must consent to submit to the jurisdiction of the court with respect to the child. A court order will specify the terms and conditions of the release or placement that are applicable to the person who will be caring for the child and to the LDSS, and any other social services agency, with respect to the child. The statute expressly authorizes the court to issue an order directing such parties to take various actions, including, but not limited to, ordering that they "cooperate in making the child available for court-ordered visitation with respondents, siblings and others and for appointments with and visits by the child protective agency, including visits in the home and in-person contact with the child protective agency, social services official or duly authorized agency, and for appointments with the child's attorney, clinician or other individual or program providing services to the child during the pendency of the proceeding."

7. Orders of Release

   Amendments to several sections of Article 10 change some of the court's **options available at disposition** with respect to the release or custody or guardianship of children and the supervision of respondent parents. The following provisions now apply to orders of release:

a. The court may release a child to non-respondents, including parents, legal custodians and guardians. However, the court may no longer release a child to a person legally responsible for the child who is not the child's parent or legal custodian or guardian.

b. The court may release a child to a respondent parent or place a respondent parent under supervision, or both.

c. All orders of release at disposition are limited in time to one year and may be extended for up to one additional year for good cause.

d. The court may not place a non-respondent person to whom the child is released under supervision. However, the court may order that any such person to whom the child is released must submit to the jurisdiction of the court with respect to the child, which may include requirements that the child be made available for visits with the respondent, siblings, and others, and for appointments and visits by the child protective agency or other social service agencies, the child's attorney, and clinicians.

e. In conjunction with the release of a child to a non-respondent, the court may also issue an order of supervision for a respondent parent, and/or may direct that the LDSS provide services to the respondent parent. Such orders are limited to a period of one year and may be extended once for up to one additional year for good cause.

f. When the court issues an order of release upon consent of the parties and the attorney for the child, the LDSS must submit a report to the court 60 days prior to the expiration of the order, unless otherwise ordered by the court. This is in addition to the previous requirement to submit a report no later than 90 days after the issuance of the order.

8. Custody and Visitation Petitions by Respondent and Non-Respondent Parents

a. Non-respondent parents

(1) Non-respondent parents seeking custody or visitation must do so by filing an Article 6 petition. The Family Court conducting the Article 10 or 10-A proceeding may, but is not required to, hear the Article 6 petition jointly with the Article 10 or 10-A proceeding. If it does hear the Article 6 matter, the court must use Article 6 rules to decide on the petition.

(2) In cases where custody or visitation for a non-respondent parent would be decided under DRL §240, the Family Court could hear the proceeding jointly with the Article 10 or 10-A proceeding, but only if the Supreme Court referred the matter to the Family Court. The provisions of the DRL must be applied in making the determination.

b. Respondent parents

(1) Respondent parents may now petition for custody or visitation of a child who is subject to an Article 10 or 10-A proceeding, pursuant to Article 6 or DRL §240 during the pendency of the Article 10 or 10-A proceeding. The court conducting the Article 10 or 10-A proceeding may, but is not required to, hear the Article 6 petition jointly. If such court does hear the Article 6 matter, the court must use Article 6 rules to decide on the petition.

(2) In cases where custody or visitation for a respondent parent would be decided under DRL §240, the Family Court may, but is not required to, upon referral from the Supreme Court, hear the custody proceeding jointly with the Article 10 or 10-A proceeding. In such cases, the rules pursuant to DRL §240 apply.

(3) If a respondent parent has filed a custody petition and *any party other than a parent* objects, to grant the petition the court must find either that the objecting party has failed to establish extraordinary circumstances or, if the objecting party *has* established extraordinary circumstances, that granting custody to the petitioning respondent parent would nonetheless be in the child's best interests.

(4) If a respondent parent has filed a petition and the *other parent objects*, to grant the petition the court must find only that granting custody to the petitioning respondent parent is in the child's best interests.

9. Custody, Guardianship, and Visitation by Relatives or Other Suitable Persons

This enacted legislation did not make any substantive changes to the law regarding the ability of relatives and suitable persons to seek visitation, custody, or guardianship of a child who is the subject of an Article 10 or 10-A proceeding during the pendency of such proceeding. However, if an Article 6 petition is filed by a relative or other suitable person seeking visitation, custody or guardianship of a child who is the subject of an Article 10 or 10-A proceeding during the pendency of such proceeding, the Family Court conducting the Article 10 or 10-A hearing may, but is not required to, hear the Article 6 petition jointly. If that court does hear the Article 6 matter, the court must use Article 6 rules to decide on the petition.

IV. Required Action

The following describes changes enacted by Chapter 567 that affect the responsibilities and activities of LDSSs and/or authorized voluntary agencies.

1. Locating Potential Placement Resources for Children Removed From Their Homes

a. When an LDSS searches to locate potential placement resources for a child removed from the home pursuant to FCA §1017, the LDSS must now attempt to locate

(i) *all* relatives of the child identified by all respondent and non-respondent parents (previously limited to *suitable* relatives identified by the listed parties) and any relative identified by a child over the age of 5 as playing or having played a significant role in their life, and

(ii) all suitable persons identified as such by any of the child's respondent and non-respondent parents (suitable person being defined as "any person who plays or has played a significant positive role in the child's life or in the life of the family").

b. The LDSS must also try to locate any person who is not recognized as a legal parent and does not have the rights of a legal parent under the laws of New York State but who has filed an instrument with the Putative Father Registry acknowledging paternity for the child pursuant to section 4-1.2 of the Estates, Powers and Trusts Law; or has a pending paternity petition for the child; or has been identified as a parent of the child by the child's other parent in a written sworn statement. The LDSS must report the results of its efforts to locate any putative father to the court and the parties, including the attorney for the child.

c. The LDSS must provide the report of the results of its efforts to locate non-respondent parents, relatives and suitable persons to the court and to the parties involved, including the attorney for the child.

d. As part of thorough record-keeping, the LDSS must document its efforts to locate potential placement resources and the results of its efforts in the CONNECTIONS case record.

2. Notifications

a. The LDSS must provide written notice to all non-respondent parents, relatives, and suitable persons located as potential resources for the child about the pendency of the Article 10 hearing.

These notices will be determined by the Uniform Rules of the Court (see http://www.nycourts.gov/forms/familycourt/) and, at minimum, must inform

(i) non-respondent parents of the opportunity to seek the temporary release of the child under Article 10 or custody under Article 6; and

(ii) relatives and suitable persons of the opportunity to seek to become foster parents or to provide free care under Article 10, or to seek custody (relatives) or guardianship (suitable persons) under Article 6.

3. Investigations Ordered by the Court

a. When a court temporarily releases or temporarily places a child with a non-respondent parent or with a relative or suitable person, the court may require the LDSS to begin an investigation of such person's home within 24 hours. The LDSS must report the results of the investigation to the court and the parties, including the attorney for the child. If the LDSS finds the home to be inadequate for the temporary release or placement, its report must include the reasons for that finding.

b. There is a similar requirement regarding the LDSS's report made following its investigation of a home when the court remands or places a child with the LDSS and directs the LDSS to have the child reside with a relative or suitable person. If the LDSS finds the home to be unqualified, and therefore cannot approve the person as a foster parent, the LDSS must report the *reasons* for its finding to the court and to the parties, including the attorney for the child.

4. Court-Ordered Supervision and Court-Ordered Services

a. In an Article 10 proceeding, a Family Court may no longer place a non-respondent parent under court-ordered supervision. However, the court may still issue orders requiring a non-respondent person to whom it releases, places, or remands a child to cooperate in making the child available for court-ordered visitation with respondents, siblings, and others, and for appointments with the child protective agency, including for in-person and in-home visits, and appointments with the child's attorney, clinical, or other individual or program providing services to the child. This enacted legislation did not change the provisions in FCA §1015-a that preclude the court from issuing an order requiring that any service or assistance be provided to the child and their family that is not authorized or required to be made available pursuant to the comprehensive annual services program plan then in effect.

b. If a court releases a child to a non-respondent parent, custodian, or guardian, either before or at disposition, and the court issues an order placing the *respondent* parent under the supervision of the child protective agency, the LDSS must adhere to any such order by providing the supervision and any services the court requires. Please see section V.2 of this document for information on how to address this scenario in CONNECTIONS.

c. The court may no longer place a person legally responsible for a subject child who is not the subject child's legal custodian or guardian under court-ordered supervision.

5. Reporting for Certain Orders of Disposition Issued Upon Consent

When a court issues an order of disposition releasing a child to a respondent parent, non-respondent parent, legal custodian, or guardian upon the consent of the parties and the child's attorney, or when it issues an order of supervision upon the consent of the parties and the child's attorney, the LDSS must provide a progress report to the court, the parties, and the child's attorney no later than 60 days prior to the expiration of the order, unless the court determines that the report

is not necessary. This report is in addition to the existing requirement to report to the court within 90 days of the issuance of the order.

V. Systems Implications

If LDSS staff need assistance or have questions regarding how to properly document in CONNECTIONS court-order information or any other information that results from this enacted legislation, they are urged to reach out to their OCFS regional office's CONNECTIONS implementation team. Contact information for these teams is at: http://ocfs.ny.gov/connect/contact.asp.

OCFS offers the following guidance to CONNECTIONS users regarding the documentation of information resulting from this enacted legislation, which should be implemented immediately:

1. Whenever the disposition of a case is to release a child to a non-respondent parent, the disposition must be recorded in CONNECTIONS as "Return to Non-Respondent Parent" (code 46A) and must not be recorded as "Return child to parent" (code 46) or "Return child to a relative" (code 48). This must be done irrespective of the role that the non-respondent parent played in the child's life before the Article 10 proceeding. In all instances, a non-respondent parent is to be identified as a non-respondent parent.

2. If, at the conclusion of an Article 10 or 10-A proceeding, a court orders that the child or children live with someone other than the respondent parent and also places the respondent parent under supervision, LDSS staff should close the Family Services Stage (FSS) and open a Family Services Intake (FSI), coding it as a COI (Court-Ordered Investigation). This will allow the LDSS to document progress notes on its supervision of that parent while eliminating the need for it to complete any Family Assessment and Service Plans and will facilitate reimbursement for services for the parent.

3. It is important that LDSSs use appropriate staff to read each court order in order to interpret the information correctly before entering the information into CONNECTIONS. Each case and each judge is different, and the orders are sometimes complicated. Furthermore, following the enactment of Chapter 567, some court orders issued at child protective proceedings may differ from those that were issued previously. Documenting court dispositions in CONNECTIONS correctly will help facilitate appropriate reimbursement for LDSSs.

If OCFS makes changes to CONNECTIONS to address the changes enacted by Chapter 567, including adding or changing codes, OCFS will inform field workers of such changes through the *CONNECTIONS Technical Bulletin*.

VI. Additional Information

OCA has revised several forms and notices used by LDSSs in conjunction with the court proceedings that follow the removal of a child from their home so that the documents comport with the provisions of the new law. LDSSs can access these forms on OCA's website: http://www.nycourts.gov/forms/familycourt/.

If an LDSS uses any locally created documents for any of the purposes described in this release, the LDSS must make any changes that are necessary so that the information on the document comports with the provisions of Chapter 567.

The LDSS must document in the child's case record its efforts to search for placement resources as well as all other activities it conducts and any reports it creates pursuant to the requirements described in this release.

VII. Contacts

Buffalo Regional Office - Amanda Darling (716) 847-3145
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Close to Home Oversight - Donte Blackwell (212) 383-7261
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VIII. Effective Date

The provisions of Chapter 567 went into effect on June 18, 2016. This ADM is effective immediately upon issuance.

/s/ Thomas R. Brooks, Esq.
Issued by:
Name: Thomas R. Brooks, Esq.
Title: Deputy Commissioner
Division/Office: Office of Strategic Planning and Policy Development

Matter of R.C. (D.C.--R.R.)

Supreme Court of New York, Appellate Division, First Department

March 27, 2025, Decided

Index No. NN-10177/19 V-00786/23, Appeal No. 3836, Case No. 2024-01609

Reporter
2025 N.Y. App. Div. LEXIS 1862 *; 2025 NY Slip Op 01859 **; 231 N.Y.S.3d 115; 2025 LX 50177

[1]** In the Matter of R.C., A Child Under Eighteen Years of Age, etc., D.C., Respondent-Appellant, R.R., Respondent-Respondent, Administration for Children's Services, Petitioner-Respondent.

Core Terms

neglect, family court, placement, putative father, foster care, disposition hearing, permanency hearing, returning, subject matter jurisdiction, writ of habeas corpus, circumstances, proceedings, permanency, rights

Case Summary

Overview
Key Legal Holdings

- Once the neglect petition against the mother was dismissed, the Family Court lacked subject matter jurisdiction to continue the child's temporary removal from the mother's care and placement in foster care.
- The failure of the Family Court to immediately return the child to the care of the mother after dismissing the neglect petition against her, as well as the subsequent protracted proceedings, violated the mother's due process rights.

Material Facts

- The Administration for Children's Services (ACS) filed a neglect petition against the mother and putative father shortly after the child's birth, alleging that the child was exposed to domestic violence.
- The putative father's paternity was never established.
- The child was temporarily removed from the mother's care and placed in foster care.
- The neglect petition against the mother was ultimately dismissed, but the child remained in foster care pending a dispositional hearing on the neglect case against the putative father.
- After the neglect petition against the mother was dismissed, the Family Court continued the child's placement in foster care and held protracted proceedings, including a dispositional hearing that lasted nearly a year and a half.

Controlling Law

- New York Family Court Act Article 10 (governing child abuse and neglect proceedings).
- Court of Appeals decision in *Matter of Jamie J. (Michelle E.C.) (30 NY3d 275)*.
- Due process principles under the U.S. Constitution and New York State Constitution.

Court Rationale

The Appellate Division held that once the neglect petition against the mother was dismissed, the Family Court lacked subject matter jurisdiction to continue the child's temporary removal from the mother's care and placement in foster care, relying on the Court of

Appeals' decision in Matter of Jamie J. The court reasoned that allowing the child's continued foster care placement after dismissal of the petition against the mother would violate the statutory scheme and safeguards established by Article 10 of the Family Court Act. Regarding the mother's due process rights, the court found that the Family Court's failure to promptly return the child to the mother after dismissing the neglect petition against her, as well as the subsequent protracted proceedings, violated her due process rights to raise her child without unwarranted state intervention.

Outcome
Procedural Outcome

The Appellate Division reversed the Family Court's order to the extent that it continued the child's placement in foster care, issued orders and findings pursuant to Family Court Act §§ 1089 and 1052, and dismissed the mother's habeas corpus petition. The matter was remanded to the Family Court for further proceedings, with a 5-day stay to allow for an orderly transition of the child back to the mother's care.

LexisNexis® Headnotes

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

Family Law > ... > Termination of Rights > Involuntary Termination > Neglect

HN1 **Children, Abuse, Endangerment & Neglect**

A child's exposure to domestic violence is not presumptively neglect as against the abused parent, is not presumptively grounds for removal of a child from the abused parent's care and that in many instances removal may do more harm to the child than good.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

Family Law > Child Custody > Jurisdiction

HN2 **Children, Abuse, Endangerment & Neglect**

Family Court's jurisdiction terminates upon dismissal of the original neglect or abuse petition.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

HN3 **Reviewability of Lower Court Decisions, Preservation for Review**

A court's lack of subject matter jurisdiction is not waivable and may be raised at any stage of the action. The court may, on its own motion at any time when its attention is called to the facts, refuse to proceed further and dismiss the action.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

Family Law > ... > Termination of Rights > Involuntary Termination > Neglect

HN4 **Children, Abuse, Endangerment & Neglect**

N.Y. Fam. Ct. Act 1011 has a twofold purpose: to establish procedures to protect children from injury or mistreatment and safeguard their well-being, and to provide due process for determining when the state may intervene against a parent's wishes on behalf of a child. This recognizes that a child protective agency's involvement with a family may have a negative impact, even if necessary to address abuse or neglect.

Evidence > Burdens of Proof > Preponderance of Evidence

Family Law > Family Protection & Welfare > Children > Proceedings

HN5 **Burdens of Proof, Preponderance of Evidence**

Protections in child welfare proceedings include the parent's right to notice of claims, higher standards for evidence admissibility at fact-finding hearings, and the child protective agency's burden to prove neglect by a

preponderance of evidence under N.Y. Fam. Ct. Act 1031, N.Y. Fam. Ct. Act 1035, and *N.Y. Fam. Ct. Act 1046 (b)*.

Family Law > ... > Custody Awards > Standards > Best Interests of Child

Family Law > Delinquency & Dependency > Dependency Proceedings

HN6 **Standards, Best Interests of Child**

Permanency hearing determinations are based not on the elevated imminent harm standard of *N.Y. Fam. Ct. Act 1011*, but in accordance with the best interests and safety of the child under *N.Y. Fam. Ct. Act 1086*.

Family Law > Child Custody > Custody Awards > Nonparents

HN7 **Custody Awards, Nonparents**

The extraordinary circumstances test applies when a nonparent individual seeks custody of a child over the parent's objection.

Constitutional Law > Bill of Rights > Fundamental Rights

Family Law > Parental Duties & Rights > Duties > Care & Control of Children

Family Law > Child Custody > Child Custody Procedures

HN8 **Bill of Rights, Fundamental Rights**

Parental rights are among the oldest and most fundamental rights, guaranteed by State and Federal Constitutions. When the state seeks custody of a child over a parent's objection, it must follow the requirements of *N.Y. Fam. Ct. Act 1011*, which provides protection against unwarranted state intervention into private family life.

Counsel: **[*1]** Andrew J. Baer, New York, for appellant.

Muriel Goode-Trufant, Corporation Counsel, New York (Mackenzie Fillow and Melanie T. West of counsel), for Administration for Children's Services, respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the child.

Judges: Dianne T. Renwick. Ellen Gesmer Martin Shulman LlinÉt M. Rosado Kelly O'Neill Levy. Opinion by Gesmer, J. All concur. Renwick, P.J., Gesmer, Shulman, Rosado, O'Neill Levy, JJ.

Opinion by: Gesmer

Opinion

Respondent D.C. appeals from an order of the Family Court, New York County (Keith E. Brown, J.), entered on or about January 24, 2024, which, following a dispositional hearing on the neglect case against respondent putative father, continued the child's placement in foster care until the conclusion of the next permanency planning hearing rather than returning the child to respondent mother, and dismissed the mother's petition for a writ of habeas corpus.

Gesmer, J.

Respondent D.C. appeals from an order of the Family Court, New York County (Keith E. Brown, J.), entered on or about January 24, 2024, which, following a dispositional hearing on the neglect case against respondent putative father, continued the child's **[*2]** placement in foster care until the conclusion of the next permanency planning hearing rather than returning the child to respondent mother, and dismissed the mother's petition for a writ of habeas corpus.

Gesmer, J. On August 21, 2019, approximately two weeks after R.C. was born, the Administration for Children's Services (ACS) filed a petition alleging that R.C. resided with the mother, the putative father lived elsewhere, and that the mother and putative father had neglected the child.[1] By order dated January 13, 2020, following an ex parte hearing pursuant to *Family Court Act article 10, § 1027*, Family Court ordered the temporary removal of the child from the mother's care for her purported failure to "enforce" the order of

[1] The putative father's name does not appear on the child's birth certificate, and he has not signed an acknowledgment of paternity. The mother testified that she believed he was the child's father. According to the mother's appellate counsel, his paternity petition was dismissed when he failed to appear.

protection against the putative father,[2] and scheduled a date for a permanency hearing pursuant to *Family Court Act article 10-A, § 1089*. The child has remained in foster care pursuant to that temporary placement with the same non-kinship foster family ever since.

On April 19, 2022, over two and one-half years after the petition was filed, the putative father consented to a finding of neglect against him. Family Court commenced a fact-finding trial on the neglect petition against the mother on the same day. During and prior to the hearing, **[*3]** the mother was only permitted visits with R.C. subject to various conditions imposed by ACS. On June 6, 2022, Family Court found that ACS had failed to prove by a preponderance of the evidence that the mother had neglected the child. Accordingly, the court dismissed the petition as to the mother pursuant to *Family Court Act article 10, § 1051(c)*. The mother's attorney asked that the child be released to the mother's care, noting that she was now a nonrespondent parent and had no neglect charges pending against her. The court did not return R.C. to her mother's care, but rather issued an order that day permitting the mother to have unsupervised visits, without imposing any of the conditions previously required of her. It noted that there was a "very strong possibility" that the court "might be returning [the child] to [her mother]," unless ACS demonstrated "extraordinary circumstances." The court then scheduled the dispositional hearing on the neglect case against the putative father to begin on July 15, 2022. Although the putative father did not appear, the dispositional hearing continued for another 16 months, during which the child remained **[**2]** in foster care and the mother continued to visit her. On January 25, 2023, the **[*4]** mother filed a writ of habeas corpus, which Family Court consolidated with the neglect proceeding.

On January 24, 2024, Family Court issued the order appealed from, which decided the disposition on the petition against the putative father, made permanency hearing determinations, and dismissed the mother's habeas petition. Specifically, the court continued the child's placement in foster care pending the next permanency hearing; approved the permanency goal for R.C. of "return to parent" with concurrent planning for adoption; directed the foster care agency to refer the mother for intensive mental health services, monitor her compliance with those services, and arrange for visitation between the mother and the child; and ordered the putative father to engage in services, including a batterer's accountability program and parenting class. In addition, the court dismissed the mother's writ of habeas corpus petition on the basis that the child was not "wrongfully detained by ACS. [She] has been removed from her mother's care pursuant to court order." Although ACS had never filed another neglect petition against the mother, the court relied on evidence about incidents involving the mother **[*5]** that occurred after the date of the petition and after dismissal of the petition against her, even though the dispositional hearing only purported to concern the neglect petition as to the father. The mother now appeals. At no time did ACS move to amend the petition against the mother while it was pending against her, nor did the agency file a new neglect petition against her despite proffering evidence of incidents which had occurred after the date of the petition.

Initially, we decline to dismiss the appeal as moot based on the reported issuance of a subsequent permanency hearing order. The determination not to return the child to the mother based on findings that the child would be at significant risk of neglect if returned to her, may indirectly affect the mother's status in future proceedings (*see Matter of Tristram K., 25 AD3d 222, 228, 804 N.Y.S.2d 83 [1st Dept 2005]*; *Matter of Durgala v Batrony, 154 AD3d 1115, 1117, 62 N.Y.S.3d 594 [3d Dept 2017]*). Furthermore, for the reasons discussed below, we find that Family Court Acted in excess of its subject matter jurisdiction in continuing the child's placement in foster care and holding further permanency hearings after the article 10 petition was dismissed as against the mother, rather than returning the child to the mother's care.

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[2] The petition alleged that the father had punched the mother in the child's presence and that the mother had told a caseworker that he had been violent with her in the past, including during her pregnancy with R.C. Family Court had issued an order of protection directing the putative father to stay away from the mother and R.C. Thus, the mother's inability to "enforce" the order of protection against the putative father became the basis for R.C.'s removal from her mother's care for virtually R.C.'s entire life. That result, particularly to the extent that the child remained in foster care even after the petition asserting the child's exposure to domestic violence as the basis for alleged negligence was dismissed against the mother, was directly contrary to the landmark decision of the Court of Appeals over two decades ago (*Nicholson v Scoppetta, 3 NY3d 357, 375, 820 N.E.2d 840, 787 N.Y.S.2d 196 [2004]*). *Nicholson* held, inter alia, that ***HN1***[↑] a child's exposure to domestic violence is not presumptively neglect as against the abused parent, is not presumptively grounds for removal of a child from the abused parent's care and that "in many instances removal may do more harm to the child than good" (*id. at 375*).

The mother argues that Family Court lacked subject **[*6]** matter jurisdiction to continue the child's placement in foster care because the putative father has not been adjudicated the child's father. We reject that argument but find that Family Court lacked subject matter jurisdiction to continue R.C.'s foster care placement for the reasons articulated in *Matter of Jamie J. (Michelle E.C.) (30 NY3d 275, 67 N.Y.S.3d 78, 89 N.E.3d 468 [2017])*, in which the Court of Appeals held **[**3]** that ***HN2***[↑] "Family Court's jurisdiction terminates upon dismissal of the original neglect or abuse petition" (*id. at 284*).

HN3[↑] The "court's lack of subject matter jurisdiction is not waivable, but may be raised at any stage of the action, and the court may . . . on its own motion . . . at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action" (*Matter of Brian L. v Administration for Children's Servs., 51 AD3d 488, 500, 859 N.Y.S.2d 8 n 6 [1st Dept 2008]* [internal quotation marks and citation omitted], *lv denied 11 NY3d 703, 894 N.E.2d 1198, 864 N.Y.S.2d 807 [2008]*).

Here, once the neglect petition against the mother was dismissed, Family Court lacked subject matter jurisdiction to continue the child's temporary removal from the mother's care and placement in foster care (*Jamie J., 30 NY3d at 284-285*). Accordingly, it should have immediately returned the child to the mother's care and terminated the child's foster care placement. It erred when it determined that it could hold permanency hearings based on the pending **[*7]** neglect petition against the putative father, since the child was not removed from his care, but from the mother's.[3] Indeed, there is no evidence in the record that the child ever resided with the putative father and no indication that he ever sought custody of the child.[4]

Furthermore, we find that the failure of Family Court to immediately return the child to the care of the mother after the dismissal of the neglect petition against her—as well as the subsequent protracted proceedings, including the dispositional hearing, which lasted nearly a year and a half—violated her due process rights (*see Quilloin v Walcott, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 [1978]*; *Jamie J., 30 NY3d at 282*; *Matter of **Sapphire W.** (Kenneth L.), AD3d , 2025 N.Y. App. Div. LEXIS 695, 2025 NY Slip Op 00662, *5 [2d Dept 2025]*; *Matter of Elizabeth C. [Omar C.], 156 AD3d 193, 204, 66 N.Y.S.3d 300 [2d Dept 2017]* [failure to provide a parent with a prompt hearing following a child's removal may violate procedural due process]). ***HN4***[↑] The purpose of *Family Court Act article 10* is twofold: It was designed not only to "establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being," but also "to provide a due process of law for determining when the state, through its family court, may intervene **[*8]** against the wishes of a parent on behalf of a child so that his [or her] needs are properly met" (*Jamie J., 30 NY3d at 282*, quoting *Family Ct Act § 1011*). "This makes sense, among other reasons, because a child protective agency's involvement with a family may itself have a negative impact on the parent or the child, even if it may be necessary in some circumstances to prevent or repair the effects of abuse or neglect" (***Sapphire W.**, 2025 NY Slip Op 00662, *3*). Although ***Sapphire W.*** concerns a different section of the Family Court Act than that at issue here, it issued a holding which is highly relevant to this case when it stated that the challenged order "constitute[s] precisely the type **[**4]** of state intervention that the Legislature sought to avoid in circumstances when it is not warranted" and violated the

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[3] Had the court promptly returned the child upon dismissal of the neglect proceeding against the mother, there would have been no reason to hold a permanency hearing, which is only held while a child is in foster care (*Jamie J., 30 NY3d at 283*).

[4] Family Court relied on a Second Department case, *Matter of Sabrina M.A. (Yana A.—Marcus S.) (195 AD3d 709, 145 N.Y.S.3d 376 [2d Dept 2021])*, which affirmed Family Court's order continuing the child's foster care placement until the next permanency hearing or further order of the court over the objection of the nonrespondent father. However, *Sabrina M.A.* is distinguishable. There, the child had been temporarily removed from the respondent mother's care and placed in foster care and the neglect petition against the mother was still pending when the father, who lived out of state and had little relationship with the child, intervened in that proceeding. We note that the father had requested a hearing pursuant to *Family Court Act § 1028* for release of the child to his care, but that request was not before the Second Department on appeal. We do not view *Sabrina M.A.* as contravening the Court of Appeals' holding in *Jamie J.* that Family Court does not retain subject matter jurisdiction over a child's temporary placement in foster care once the *Family Court Act article 10* petition has been dismissed against the parent from whose care the child was temporarily removed. To the extent that it does, we decline to follow it. We note that *Sabrina M.A.* relied on *Matter of Eric W. (Tyisha W.) (110 AD3d 1000, 973 N.Y.S.2d 746 [2d Dept 2013])*, a case decided before *Jamie J.* and before the 2015 amendments to article 10 of the Family Court Act, which recognized the rights of nonrespondent parents in article 10 cases (*see* L 2015 Ch 567; *Matter of **Sapphire W.** (Kenneth L.), AD3d , 2025 N.Y. App. Div. LEXIS 695, 2025 NY Slip Op 00662, *4 [2d Dept 2025]*).

rights of the mother, a nonrespondent custodial parent (*2025 N.Y. App. Div. LEXIS 695 at *17*).

At the dispositional hearing in this case, Family Court improperly accepted into evidence documents and testimony concerning the mother's mental health status after the date of the neglect petition and after the neglect petition against her had been dismissed and then used it to support continuing the child's foster care placement. Approving that procedure "would permit a temporary order issued **[*9]** in an ex parte proceeding to provide an end-run around the protections of article 10" (*Jamie J., 30 NY3d at 284-285*). ***HN5***[↑] These protections include the parent's right to notice of the claims against them (*Family Court Act §§ 1031*, *1035*), the higher standard for evidence admissible at a fact finding hearing, and ACS's burden to prove neglect by a preponderance of such evidence (*Family Court Act § 1046[b]*). Moreover,

HN6[↑] "[p]ermanency hearing determinations are based not on the elevated imminent harm standard of *article 10*, but in accordance with the best interests and safety of the child under article *10-A* . . . . Allowing a separate jurisdictional expressway for the placement of a child to substitute for the manner in which *article 10* expects that threshold determination to be reached would subvert the statutory scheme" (*Jamie J., 30 NY3d at 285* [internal quotation marks and citation omitted]).

Family Court rejected the mother's argument that it was required to find extraordinary circumstances in order to continue the child's placement in foster care. We concur with that result, but for a different reason than that articulated by Family Court. ***HN7***[↑] The extraordinary circumstances test applies when a nonparent individual seeks custody of a child over the parent's objection (*see Bennett v. Jeffreys, 40 NY2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 [1976]*). However, this case deals with the state's **[*10]** intervention in "the child's rights as well as the parents' rights to bring up their own children . . . . ***HN8***[↑] Those rights are among our oldest and most fundamental and are not only provided by statute, but also guaranteed to parents and children by our State and Federal Constitutions" (*Jamie J., 30 NY3d at 279-280* [citations omitted]). Where the state seeks custody of a child over a parent's objection, it must follow the requirements of *article 10*, which "erects a careful bulwark against unwarranted state intervention into private family life, for which its drafters had a deep concern" (*id. at 284* [internal quotation marks omitted]).

The matter is remanded to Family Court for proceedings in accordance with this order. The matter is further stayed for five days so that the parties may arrange an orderly transition. Should ACS believe that events occurred after the neglect petition against the mother was dismissed which constitute neglect, the agency is free to file a new neglect petition against the mother.

We have considered **[**5]** the mother's remaining arguments and reject them.

Accordingly, the order of the Family Court, New York County (Keith E. Brown, J.), entered on or about January 24, 2024, which, following a dispositional hearing on **[*11]** the neglect case against respondent putative father, continued the child's placement in foster care until the conclusion of the next permanency planning hearing rather than returning the child to respondent mother, and dismissed the mother's petition for a writ of habeas corpus, should be reversed to the extent that it continued the child's placement in foster care, issued orders and made findings pursuant to *Family Court Act §1089*, issued orders and made findings as to the mother pursuant to *Family Court Act § 1052*, and dismissed the mother's habeas petition, and otherwise affirmed, without costs, the matter remanded to the Family Court for further proceedings in accordance with this order, and stayed for five days following entry of this order so that the parties may arrange an orderly transition and take any other appropriate steps.

Order, Family Court, New York County (Keith E. Brown, J.), entered on or about January 24, 2024, which, following a dispositional hearing on the neglect case against respondent putative father, continued the child's placement in foster care until the conclusion of the next permanency planning hearing rather than returning the child to respondent mother and dismissed the mother's habeas petition, **[*12]** unanimously reversed, to the extent that it continued the child's placement in foster care, issued orders and made findings pursuant to *Family Ct Act § 1089*, issued orders and made findings as to the mother pursuant to *Family Ct Act § 1052*, and dismissed the mother's habeas petition, and otherwise affirmed, without costs, the matter remanded to the Family Court for further proceedings in accordance with this order and stayed for five days following entry of this order so that the parties may arrange an orderly transition and take any other appropriate steps.

Opinion by Gesmer, J. All concur.

Renwick, P.J., Gesmer, Shulman, Rosado, O'Neill Levy, JJ.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 27, 2025

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K. W. v. The City of New York

24-3042

US Court of Appeals for the Second Circuit

April 16, 2025, Filed

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24-3042

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CORPORATE DISCLOSURE STATEMENT

Pursuant to *Rule 26.1 of the Federal Rules of Appellate Procedure*, amici curiae certify that none of the amici has a parent corporation or publicly held corporation that owns ten percent or more of its stock or membership interests.

Dated: April 16, 2025 By: /s/ Eugénie Iseman

E UGÉNIE I SEMAN

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INTEREST OF AMICI CURIAE[1]

Amici are non-profit legal organizations that represent children in and at risk of entering the foster system, and other advocates for the rights of children writing in support of Plaintiffs-Appellants.

Children's Rights is a national advocacy organization committed to improving the lives of children who are in or impacted by government systems.

Through advocacy and legal action, Children's Rights investigates, exposes, and combats violations of the rights of children, and holds governments accountable for keeping kids safe, healthy, and supported. For 30 years, Children's Rights has achieved lasting, systemic change for hundreds of thousands of children across more than 20 jurisdictions throughout the United States.

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[1] All parties have consented to the filing of this brief. ***Fed. R. App. P. 29(a)(2)***. No counsel for any party authored this brief in whole or in part, and no person other than amici or their counsel contributed money that was intended to fund the preparation or submission of this brief. ***Fed. R. App. P. 29(a)(4)(E)***.

The Children's Defense Fund ("CDF") is a national advocacy organization working at the intersection of well-being and racial justice for children and youth through advocacy, community organizing, direct service, and public policy. CDF includes a New York State office, which conducts advocacy related to child welfare policy.

Juvenile Law Center fights for rights, dignity, equity, and opportunity for youth. Juvenile Law Center works to reduce the harm of the child welfare and justice systems, limit their reach, and ultimately abolish them so all young people can thrive. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center's legal and policy agenda is informed by--and often conducted in collaboration with--youth, family members, and grassroots partners. Since its founding, Juvenile Law Center has filed influential amicus briefs in state and federal courts across the country to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are consistent with children's unique developmental characteristics and human dignity.

Founded in 1977, the National Association of Counsel for Children ("NACC"), is a 501(c)(3) non-profit child advocacy and professional membership association that advances children's and parent's rights by supporting a diverse, inclusive community of child welfare lawyers to provide zealous legal representation and by advocating for equitable, anti-racist solutions co-designed by people with lived experience. A multidisciplinary organization, its members primarily include child welfare attorneys and judges, as well as professionals from the fields of medicine, social work, mental health, and education. NACC's work includes federal and state level policy advocacy, the national Child Welfare LawSpecialist attorney certification program, a robust training and technical assistance arm, and an amicus curiae program. Through the amicus curiae program, NACC has filed numerous briefs promoting the legal interests of children in state and federal appellate courts, as well as the Supreme Court of the United States. More information about NACC can be found at www.naccchildlaw.org.

The National Center for Youth Law ("NCYL") is a private, non-profit law firm that uses the law to help children achieve their potential by transforming the public agencies that serve them. NCYL's priorities include ensuring that children and youth have the resources, support, and opportunities they need to live safely with their families in their communities and that public agencies promote their safety and well-being. NCYL represents youth in cases that have broad impact and has extensive experience using litigation to enforce the rights of young people in foster care.

Collectively, amici have a substantial interest in ensuring that children are not harmed by unjust separation from their families.

SUMMARY OF ARGUMENT

Amici submit this brief to assist the Court in understanding the enormous harm children suffer when separated from their parents. Amici respectfully argue that courts must recognize and specifically weigh this harm in upholding a child'sFourteenth Amendment right to family integrity and Fourth Amendment right to be free of unreasonable seizures.

Defendants unlawfully removed a newborn child, K.A., from his father, K.W., shortly after birth and kept them separated for nearly three years, without ever naming his father as a respondent or alleging that he was unfit to care for K.A. The district court erred in concluding that K.A.'s separation from his father for the crucial first three years of his life was justified. As discussed in Plaintiffs- Appellants' brief, Defendants violated both K.A. and K.W.'s due process rights to family integrity, a liberty interest which is reciprocal between parent and child. Br.

for Pls.-Appellants 15, 45, Dkt. 64. Amici write to further detail the child's rights and urge this Court to reverse the district court's analysis of Defendants' broad and years-long infringement on K.A.'s liberty interest in his relationship with his father. This prolonged, unnecessary separation resulted in tremendous harm to K.A. and violated his fundamental right to live with his family under the Fourteenth Amendment. The district court should have applied "strict scrutiny" instead of the "shocks the conscience" standard to separation policies that infringe on a child's Fourteenth Amendment substantive due process right to family integrity.

In addition, Defendants' removal of K.A. violated his rights under the Fourth Amendment. The district court applied the standard requiring an imminent risk ofharm to support emergency extra-judicial removals under the Fourth Amendment incorrectly. If allowed to stand on appeal, the decision below sets a bad precedent, creating the risk of

serious harm for many children who may be unnecessarily separated from their families in similarly unjustified circumstances.[2]

ARGUMENT

I. Children Suffer Lifelong Trauma and Harm When They Are Separated from Their Families

Extensive research demonstrates that children experience long-lasting trauma and harm when separated from their families and placed into the foster system. Even infants suffer trauma when they are deprived of physical contact with their parents, adversely affecting their ability to form attachments.[3] Pre-verbal children in particular experience distress from parental separation, leading tonegativity and aggression.[4] Separation into the foster system often propels a child into a mental health crisis causing "toxic stress,"[5] interfering with the child's health and well-being, and resulting in negative behaviors and decreased abilities to regulate stress.[6] Research confirms that the toxic stress caused by separating children from their parents, particularly when the children are placed in the foster system, irreparably disrupts children's brain architecture and has substantial adverse effects on the trajectory of their lives, even if they are later reunified with their parents.[7]

Separation from one's family, and the resulting interference with a child's ability to form attachments, adversely affects a child's emotional and social maturity. The trauma harms children's academic performance, behavior, confidence and self-esteem, social adjustment, and coping skills.[8] Even children who experience short-term stays

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[2] This amicus brief addresses a child's rights to family integrity and to be free of unreasonable seizures, and the harms children suffer when these rights are not upheld. Amici endorse Plaintiffs-Appellants' other arguments set forth in their appeal, see Br. for Pls.-Appellants, but do not address those issues here.

[3] See, e.g., Shanta Trivedi, The Harm of Child Removal, *43 N.Y.U. Rev. L. & Soc. Change 523, 528-30 (2019)* (physical contact has crucial health benefits for infants; removed newborns suffer attachment stress and worse outcomes); Shefaly Shorey et al., Skin-to-Skin Contact by Fathers and the Impact on Infant and Paternal Outcomes: An Integrative Review, 40 Midwifery 207, 215 (2016) (multiple scientific studies found skin-to-skin contact between fathers and newborns regulates infants' breathing and stress). The Supreme Court has recognized infants separated at three days old suffer loss. *Santosky v. Kramer, 455 U.S. 745, 760 n. 11 (1982)*. The Second Circuit credited expert testimony that young children "are especially vulnerable to these [separation] stresses." *Nicholson v. Scoppetta, 344 F.3d 154, 163 (2d Cir. 2003)*; see also *id. at 174*.

[4] Kimberly Howard et al., Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families, 13 Attachment & Hum. Dev. 5, 5-8, 20-21 (2011).

[5] See Colleen Kraft, AAP Statement Opposing Separation of Children and Parents at the Border, American Academy of Pediatrics (May 8, 2018), https://perma.cc/25QX-B2ZA (family separation causes toxic stress, which "can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health"); Toxic Stress, Harvard University Center on the Developing Child, https://developingchild.harvard.edu/key- concept/toxic-stress/ ("[R]esearch has demonstrated that supportive, responsive relationships with caring adults as early in life as possible can help prevent or reverse the damaging effects of toxic stress response.").

[6] William Wan, What Separation from Parents Does to Children: `The Effect Is Catastrophic,' Wash. Post, June 18, 2018, https://perma.cc/7N85-CLEP; Andrew Garner et al., Preventing Childhood Toxic Stress: Partnering with Families and Communities to Promote Relational Health, Pediatrics, Aug. 2021; Jack P. Shonkoff et al., Early Childhood Adversity, Toxic Stress, and the Impacts of Racism on the Foundations of Health, 42 Ann. Rev. Pub. Health 115, 115-17 (2021) (toxic stress permanently impairs infants' learning, physical health, behavioral health, and mental health).

[7] Johayra Bouza et al., Soc'y Rsch. Child Dev., The Science Is Clear: Separating Families Has Long-Term Damaging Psychological and Health Consequences for Children, Families, and Communities (2018), https://www.srcd.org/briefs-fact-sheets/the-science-is-clear; see Paul Chill, Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings, *41 Fam. Ct. Rev. 457, 457-59 (2003)*.

[8] Vivek Sankaran et al., A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families, *102 Marq. L. Rev. 1161, 1166-69 (2019)*; Dolores Seijo et al., Estimating the Epidemiology and Quantifying the Damages of Parental Separation in Children and Adolescents, Frontiers Psych., Oct. 2016, at 1-2, 6; Hector Colon-Rivera et al., Am. Psych. Ass'n,

in foster placement suffer trauma that negatively impacts development.[9] Young children who undergo removal into the foster system suffer "feelings of abandonment, rejection, worthlessness, guilt, and helplessness."[10] These children have worse lifelong behavioral and mental health outcomes, lower earnings, and greater likelihood of arrest and addiction than even maltreated children who remain at home.[11]

The longer a child remains separated from their family, the greater the potential for harm. Separated children's prolonged exposure to toxic stress harms the immune system, decreases learning and memory, and leads children to act out and struggle with school, relationships, unemployment, low earnings, and health issues.[12]

Children exposed to placement changes, instability, and separation from their families--harms inherent to the foster system--typically suffer continued toxic stress, over and above the trauma caused by the initial separation, with severe consequences to their mental health and development.[13] Separation from family while in the foster system exacerbates attachment issues and causes behavioral problems that perpetuate placement instability.[14] Children who endure placement instability face a higher risk of low self-esteem, poor school performance, distrustin guardians and adults, and suicidal thoughts.[15] Studies also show that these long- term harms caused by removal can result in child welfare involvement and removals for future generations.[16]

Accordingly, removing a child from their home and family should only happen in the most compelling and relatively rare circumstances, where the harm of removal is outweighed by the greater harm that is likely to result if the child is not removed.[17] To minimize prolonged trauma, any separation should be as short as possible.

Separation of Immigrant Children and Families (2018), https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents- Policies/Policies/Position-Separation-of-Immigrant-Children-and-Families.pdf; Jane Brennan, Emergency Removals Without a Court Order: Using the Language of Emergency to Duck Due Process, *29 J.L. & Pol'y 121, 147-49 (2020)*.

[9] *Vivek S. Sankaran & Christopher Church, Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care, 19 U. Pa. J.L. & Soc. Change 207, 211-12 (2016)*; Brennan, supra note 8, at 147-49; see also Sankaran et al., supra note 8, at 1165.

[10] Rosalind D. Folman, "I Was Tooken": How Children Experience Removal from Their Parents Preliminary to Placement into Foster Care, 2 Adoption Q. 7, 11 (1998).

[11] Brennan, supra note 8, at 149; Catherine Lawrence et al., The Impact of Foster Care on Development, 18 Dev. & Psychopathology 57, 59-60 (2006); Joseph J. Doyle, Jr., Child Protection and Child Outcomes: Measuring the Effects of Foster Care, 97 Am. Econ. Rev. 1583, 1607 (2007); Joseph J. Doyle, Jr., Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care, 116 J. Pol. Econ. 746, 747, 766-67 (2008); William Nielsen & Timothy Roman, Ecotone Analytics, The Unseen Costs of Foster Care: A Social Return on Investment Study 5, 12, 19 (2019).

[12] Nielsen & Roman, supra note 11, at 7, 14; Johan Vanderfaeillie et al., Children Placed in Long-Term Family Foster Care: A Longitudinal Study into the Development of Problem Behavior and Associated Factors, 35 Child. & Youth Servs. Rev. 587, 587-88, 591 (2013).

[13] Carolien Konijn et al., Foster Care Placement Instability: A Meta-Analytic Review, 96 Child. & Youth Servs. Rev. 483, 484 (2019); Trivedi supra note 3, at 545; Yvonne A. Unrau et al., Former Foster Youth Remember Multiple Placement Moves: A Journey of Loss and Hope, 30 Child. & Youth Servs. Rev. 1256, 1263-64 (2008); Chill, supra note 7, at 462.

[14] Konijn et al., supra note 13, at 484; Marc A. Winokur et al., Systematic Review of Kinship Care Effects on Safety, Permanency, and Well-Being Outcomes, 28 Rsch. on Soc. Work Prac. 19 (2015); *Sankaran & Church, supra note 9, at 237*.

[15] Unrau et al., supra note 13, at 1263-64; Konijn et al., supra note 13, at 484; Daniel J. Pilowsky & Li-Tzy Wu, Psychiatric Symptoms and Substance Use Disorders in a Nationally Representative Sample of American Adolescents Involved with Foster Care, 38 J. Adolescent Health 351 (2006).

[16] See Jane Marie Marshall et al., Intergenerational Families in Child Welfare: Assessing Needs and Estimating Permanency, 33 Child. & Youth Servs. Rev. 1024 (2011).

[17] Mical Raz & Vivek Sankaran, Opposing Family Separation Policies for the Welfare of Children, 109 Am. J. Pub. Health 1529 (2019) ("[A]part from extreme cases of imminent physical harm to children, the family unit is the preferable place for children to grow and thrive."); see Trivedi, supra note 3, at 526.

II. Children Have a Fundamental Constitutional Right to Remain with Their Families

A child has a fundamental constitutional right to live with their family and remain free from the trauma and harm that would result from unnecessary separation imposed by the state. A child's constitutional right to family integrity is grounded in the Fourteenth Amendment's Substantive Due Process Clause.[18] TheSupreme Court has described the right to family integrity as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville, 530 U.S. 57, 65 (2000)*; see also *Santosky, 455 U.S. at 753* (holding that parents and children share an interest in preventing termination of their relationship);

Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) ("the sanctity of the family . . . is deeply rooted in this Nation's history and tradition"); *Duchesne, 566 F.2d at 825* ("[T]he most essential and basic aspect of familial privacy [is] the right of the family to remain together without the coercive interference of the awesome power of the state."); *Kia P. v. McIntyre, 235 F.3d 749, 759 (2d Cir. 2000)* ("[C]hildren have a parallel constitutionally protected liberty interest in not being dislocated from the emotional attachments that derive from the intimacy of daily family association.").[19]

As with other fundamental rights, government interference with a child's right to remain with their family is subject to strict scrutiny. This means government agencies cannot separate a child from his family in the absence of "compelling circumstances." And even then, the intrusion must be "narrowly tailored" to serve the state's interest in protecting the child's health and well-being.

See, e.g., *Washington v. Glucksberg, 521 U.S. 702, 721 (1997)* (Due process "forbids the government to infringe . . . 'fundamental' liberty interests at all, nomatter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.") (quoting *Reno v. Flores, 507 U.S. 292, 302 (1993))*; *M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996)*; *Kia P., 235 F.3d at 758*;

Zablocki v. Redhail, 434 U.S. 374, 388 (1978); *Quilloin v. Walcott, 434 U.S. 246, 255 (1978)* (concluding it would be unconstitutional "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."); *Moore, 431 U.S. at 499*.

Courts in this Circuit regularly apply strict scrutiny when evaluating whether agency policies have deprived plaintiffs of their substantive due process right to family integrity under the Fourteenth Amendment. "In considering theconstitutionality of the policy or practice of a state agency rather than the specific acts of individual officers, it is appropriate to apply the higher standard and stricter analysis that is applied to legislation." *Nicholson v. Williams, 203 F. Supp. 2d 153, 243-45 (E.D.N.Y. 2002)* (applying strict scrutiny to New York's Administration for Children's Services' ("ACS") practice of removing children because their mothers had suffered domestic violence, and finding this violated mothers' and children's substantive due process rights); see also *United States v. Myers, 426 F.3d 117, 126 (2d Cir. 2005)* (applying strict scrutiny to a supervised release condition that required a father to obtain authorization before spending time alonewith his child); J.S.R. by & through *J.S.G. v. Sessions, 330 F. Supp. 3d 731, 741 (D. Conn. 2018)* (applying strict scrutiny to federal policy causing family separation); *Joyner by Lowry v. Dumpson, 712 F.2d 770, 777-78 (2d Cir. 1983)* (stating the Second Circuit applies strict scrutiny to state actions that intrude on family integrity); *Bernal v. Fainter, 467 U.S. 216, 219 (1984)* (when considering a law's constitutionality, courts must evaluate whether the law "advance[s] a compelling state interest by the least restrictive means").

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[18] A child's right to family integrity is reciprocal to their parent's right to family integrity. *Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977)*; Br. for Pls.-Appellants 15, 45.

[19] Except where noted, all internal quotation marks and citations have been omitted.

The City's policies caused K.A.'s unnecessary, harmful, and prolonged separation, and these policies require strict scrutiny. Policies include widespread informal "governmental `custom[s].'" *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978)*; see, e.g., *Russo v. City of Bridgeport, 479 F.3d 196, 212 n.15* (2d Cir. 2007); *Braxton/Obed-Edom v. City of New York, 368 F. Supp. 3d 729, 739 (S.D.N.Y. 2019)*; *Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 130 n.10 (2d Cir. 2004)*. ACS's customs of making emergency removals when imminent danger does not exist,[20] and failing to make any reasonable efforts to reunify after removal, caused K.A.'s years-long separation from his father. Validating the district court's errors would condone the removal and separation policies ACS employed in this case.

This Circuit has found ACS policies exist when workers remove many children per year on the same basis and without imminent risk of harm. *Nicholson, 344 F.3d at 165-66*. Over the past 15 months, ACS engaged in pre-filing emergency removals for about half of all children separated each month.[21] These practices have persisted for years: in 2018, ACS sought emergency removals in "nearly half" of all separations, often without imminent danger, which comprised almost exclusively of non-white children.[22] An internal audit found ACS "staff are not incentivized or supported to develop sufficient evidence to meet" the "imminent risk of harm" standard.[23] Additionally, this practice "targets Black and brown parents" with a "different level of scrutiny" and treats them "as if they are not competent."[24] These policies especially harm Black children, who face over half of all emergency removals but comprise less than a quarter of the childpopulation.[25] Nothing in the complaint here indicates that imminent danger existed here. JA17-47. *As in Nicholson, 344 F.3d 154*, the emergency removal practices ACS used to remove K.A. followed a policy of subjecting children--anddisproportionately subjecting Black children--to emergency removals without showing imminent danger.

For removal policies to respect family integrity, before separating a child, a foster agency must consider all potential alternatives and resources that can be provided to keep the family together. See, e.g., *Nicholson, 344 F.3d at 163*; *Tenenbaum v. Williams, 193 F.3d 581, 595 (2d Cir. 1999)*. Removals are permitted only when they are the least restrictive means of safety. See *Nicholson v. Scoppetta, 116 F. App'x 313, 1-2 (2d Cir. 2004)* (The trauma of removal weighs against emergency removals except in "rare circumstance[s] in which the time would be so fleeting and the danger so great" that it cannot "be mitigated by reasonable efforts to avoid removal.").

ACS also has a policy of not making reasonable efforts to reunite families.

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[20] The imminent danger standard applies to emergency removals under the Fourth Amendment, as discussed in Section III.

[21] N.Y.C. Admin. for Child.'s Servs., Flash Report: March 2025 (2025), https://www.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2025/03.pdf (showing between 42.2% and 61.2% of removals were pre-filing emergency removals).

[22] Yasmeen Khan, Family Separation in Our Midst, W.N.Y.C., Apr. 17, 2019, https://www.wnyc.org/story/child-removals-emergency-powers/; see Ctr. for N.Y.C. Affairs, Watching the Numbers: COVID-19's Continued Effects on the Child Welfare System 3-5 (2023), https://bit.ly/3R2OPGI (finding that in 2018 and in 2022, about half of ACS foster care admissions involved emergency removals).

[23] N.Y.C. Admin. for Child.'s Servs., Draft Racial Equity Participatory Research & System Audit: Findings and Opportunities, 27 (2020), available at https://www.bronxdefenders.org/wp- content/uploads/2022/11/DRAFT_NIS_ACS_Final_Report_12.28.20.pdf (hereinafter Draft ACS Audit).

[24] Id. at 14-15; Andy Newman, Is N.Y.'s Child Welfare System Racist? Some of Its Own Workers Say Yes, N.Y. Times, Nov. 22, 2022, https://www.nytimes.com/2022/11/22/nyregion/nyc-acs- racism-abuse-neglect.html.

[25] NYCLU, Racism at Every Stage: Data Shows How NYC's Administration for Children's Services Discriminates Against Black and Brown Families (2023), https://www.nyclu.org/report/racism-every-stage-data-shows-how-nycs-administration- childrens-services-discriminates.

Foster agencies have a statutory obligation under federal and New York law to use "reasonable efforts" to avoid a child's separation from each parent, and to promotefamily reunification promptly where separation has occurred. *42 U.S.C. § 671(a)(15)(B)*; *N.Y. Soc. Serv. Law §§ 358-a(1)(a)*, (3)(a); see also N.Y. Soc.

Serv. Law §§ 384-b(1)(a)(i)-(iii), 131(3) (forbidding poverty-based separation and requiring services). Even when an agency has a compelling reason to intervene, if it does not make required reasonable efforts prior to and after separating a child from a presumptively fit parent, it does not engage in a narrowly tailored intervention. Therefore, prior to removal, the agency must attempt to address any risk without removal and articulate its efforts to avoid separation to the court. *N.Y. Fam. Ct. Act §§ 1022(a)(iii), 1027(b)(ii)*; *42 U.S.C. § 672(a)(2)(A)(ii)*; see also *Nicholson, 116 F. App'x 313 at 2*. After removal, the agency must make reasonable efforts to reunify the family, to ameliorate the problems that caused removal, and to encourage the parent-child relationship. *N.Y. Soc. Serv. Law § 384-b(7)(f)*. This obligation to make reasonable efforts requires the relevant agencies to proactively address the underlying cause of a child's dependency case.[26]

However, ACS has a policy of making conclusory representations of "reasonable efforts" without actually providing resources to support familyreunification. For instance, ACS's internal report found the agency has not developed systems to ensure that the agency makes reasonable efforts to reunify.[27]

There is no indication that the agency complied with its statutory obligations to use reasonable efforts to avoid separation from K.W. and to speedily reunite K.A. with his father. Indeed, the district court did not identify a single agency effort to avoid separating K.A. from his father. Yet, the district court pointed to at least one boilerplate representation to the family court that reasonable efforts supposedly had been made, without specifying what those efforts were or how they supported the father or son. SPA6. ACS's harmful policies encourage workers to present boilerplate representations that they made reasonable efforts without specifying what those efforts were or providing any evidence of narrowly tailored efforts to the court. Accepting the district court's evaluation of reasonable efforts would reinforce ACS's policy of presenting boilerplate, conclusory statements that efforts had been made without actually making reasonable efforts to reunite families. This ACS policy further indicates that the ACS worker's removal practices were not narrowly tailored here.

Moreover, ACS's policies allowed the caseworkers here to file for removal without naming the non-respondent parent and to continue not naming that parent for years. These policies block non-respondent parents like K.W. from legal recourse to vindicate their right to family integrity. In affirming this behavior, the district court condoned ACS's broad policies allowing the City to take a child from any fit parent whenever allegations exist against the other parent.

Because Defendants acted pursuant to policies, the district court should have applied the "strict scrutiny" standard to K.A.'s family integrity claim, rather than the "shocks the conscience" standard. Indeed, the Second Circuit has only used the "shocks the conscience" standard to evaluate whether the "specific act of individual officers" violates substantive due process. *Nicholson, 203 F. Supp. 2d at 243*; see, e.g., *Southerland v. City of New York, 680 F.3d 127, 151-2* (2d Cir.

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[26] See, e.g., Emma Monahan et al., Chapin Hall, Economic and Concrete Supports: An Evidence- Based Service for Child Welfare Prevention (2023); Yasmin Grewal-Kök, Chapin Hall, Flexible Funds for Concrete Supports to Families as a Child Welfare Prevention Strategy 1 (2024); Susan P. Kemp et al., Engaging Parents in Child Welfare Services: Bridging Family Needs and Child Welfare Mandates, 88 Child Welfare 101, 118-20 (2009); see also *N.Y. Fam. Ct. Act § 1017(a)*.

[27] Draft ACS Audit, supra note 23, at 27. In New York, even though courts rubberstamp agencies' boilerplate reasonable efforts claims, ACS follows policies that do not meet its statutory and constitutional responsibilities in the first place. Josh Gupta-Kagan, Filling the Due Process Donut Hole: Abuse and Neglect Cases, *10 Conn. Pub. Int. L.J. 13, 27 (2010)*; Annie E. Casey Foundation, Advisory Report on Front Line and Supervisory Practice 47-48 (2000) (finding reasonable efforts rarely addressed in New York City).

2012); *Tenenbaum, 193 F.3d at 600*. In contrast, the challenged conduct here was pursuant to agency policies and practices which the government officer followed.

These practices are governed by strict scrutiny. Even if the "shocks the conscience" standard applies, the facts recited by the district court reflect an unjustified, harmful separation that should be considered "shocking, arbitrary, and egregious" to any reasonable person. SPA17 (quoting Southerland, 680 F.3d at127, 152).[28] K.A.'s case and claims meet and should be allowed to proceed under either standard.

III. Children Have a Fourth Amendment Right to Be Free from Unreasonable Government Seizures

The harm of separation and the right to family integrity inform the narrow and strict standard for removals under the Fourth Amendment. Just as the government's actions must be narrowly tailored before interfering with the child's right to family integrity, the government must meet a similarly high bar for removing the child without a court order. It is well-established that in order to conduct an emergency removal, the Fourth Amendment requires that there be "exigent circumstances." *Tenenbaum, 193 F.3d at 602*; *Southerland, 680 F.3d at 150*; *Schweitzer v. Crofton, 560 F. App'x 6, 10 (2d Cir. 2014)*. The Circuit has defined "exigent circumstances" narrowly, requiring the government to show that the child is at immediate risk of harm in the time it would take to get a court order.

See *Southerland v. Woo, 44 F. Supp. 3d 264, 276 (E.D.N.Y. 2014)*, aff'd, 661 F.

App'x 94 (2d Cir. 2016) (affirming the district court's holding that under theFourth Amendment, an emergency removal is unconstitutional unless the child faces "immediate danger"); *Tenenbaum, 193 F.3d at 604-605*; see, e.g., *Schweitzer, 560 F. App'x at 11* (requiring the child face an "immediate threat to safety" for the emergency removal to comply with the Fourth Amendment); *Doe ex rel. Doe v. Whelan, 732 F.3d 151, 156 (2d Cir. 2013)* (same). This high and strict standard must necessarily reflect and incorporate the well-established harms of a child's separation from a parent. See supra Section I.

IV. The Separation of K.A. from His Father Did Not Come Close to Meeting Constitutional Standards

Finally, the district court order reflects no legitimate basis for separating K.A. from his father, even if the statements that the district court improperly cherry-picked and relied on from the family court record could be accepted as true.[29] As established above, the Fourteenth Amendment requires the state engagein narrowly tailored intervention, which would at a minimum involve ACS instituting policies that follow its legal mandate to make reasonable efforts both before separating a parent and child and to reunify after separation. The Fourth Amendment requires the state to find an imminent risk of danger in the time it would take to get a court order before conducting an emergency removal. Here, ACS failed to identify an imminent risk of harm, let alone a risk that reasonable efforts could not have mitigated. Nothing indicated that K.A. had been abused or otherwise harmed prior to removal, or that he would

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[28] Defendants' unjustified rupture of K.A.'s relationship with his father at such a vulnerable age--undermining the parent-child bond during K.A.'s formative early years without concern for the lifelong impact on K.A.--shocks the conscience. First, ACS removed newborn K.A. from his caring non-respondent father based on previous allegations against his mother (regarding different children), without any allegations against the father or indication of harm to K.A. Then, despite the known harm of early and prolonged separations, ACS continued to separate K.A. from his father for three years and made his father navigate numerous hurdles to prove his parental fitness--still without ever making formal allegations against him or finding him unfit.

[29] The district court credited statements from the family court record that cannot be accepted as true to rebut the complaint's allegations. A court may take judicial notice of a document filed in another court "not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Glob. Network Commc'ns, Inc. v. City of New York, 458 F.3d 150, 157 (2d Cir. 2006)*. The district court's erroneous use of family court materials for the truth of their contents is particularly concerning given the relaxation of hearsay rules in family court proceedings such as K.A.'s. See *N.Y. Fam. Ct. Act § 1046*; 10 Law and the Family New York § 77:85 (2024 ed.) ("[A]n exception to the hearsay rule has been created in cases involving allegations of abuse and neglect of a child."). The fact that the complaint "allege[d] facts related to or gathered during a separate litigation [did] not open the door to consideration, on a motion to dismiss, of any and all documents filed in connection with that litigation." *Goel v. Bunge, Ltd., 820 F.3d 554, 560 (2d Cir. 2016)* (relying on materials not "integral" to the complaint improperly transforms the Rule 12(b)(6) inquiry into a "summary- judgment proceeding . . . featuring a bespoke factual record, tailor-made to suit the needs of defendants").

have been at risk of harm had he remained with his father instead of being separated for three years. Although the court discussed at length K.A.'s mother's alleged inability to care for her children (apparently related to her mental illness), this has no bearing on the ability of K.A.'s father to act as a responsible parent. E.g., *In re Telsa Z., 71 A.D.3d 1246, 1250-51 (3d Dep't 2010)* (family court violated due process by removing children from their mother when only their father was accused of abuse); see also *In re Sapphire W., 2025 N.Y. Slip Op. 00662, 9 (2d Dep't 2025)* (recognizing that family court violated due process by subjecting non-respondent parent to agency supervision).[30]

K.A.'s father acknowledged paternity at the hospital the moment K.A. was born, and cared for him until ACS took K.A. from his arms. Throughout the separation, K.A.'s father demonstrated his "full commitment to the responsibilitiesof parenthood by com[ing] forward to participate in the rearing of his child." *Lehr v. Robertson, 463 U.S. 248, 261-62 (1983)*.[31]

Indeed, the day prior to removing K.A., Defendant Amar Moody entrusted K.W. to care for him at home overnight. After Moody conducted a home visit, including inspecting K.W. and the home, he chose to leave K.A. in K.W.'s custody without identifying any risks to K.A., and without conducting an emergencyremoval or seeking a removal order. The fact that Moody determined that K.A. could safely remain in his father's custody for a full night shows that he could not have believed K.A. faced imminent danger. It also shows that if Moody had any reservations about K.A.'s safety, he had ample time to seek a court order. Further, when K.W. brought K.A. to the office the following day, there is no indication (from either the complaint or the additional facts recited by the district court) that ACS identified any risk--much less imminent danger--that had developed since the previous day when K.A. was allowed to remain at home. But ACS nonetheless removed K.A., without seeking a court order and despite the lack of imminent danger, in keeping with its policy of regularly conducting such warrantless "emergency removals." Beyond the initial removal, the prolonged separation was also not justified by any reasons given by the district court. There was no reason to keep K.A. away from his father simply because K.W. allegedly had an ongoing relationship with K.A.'s mother at the time of the initial removal, or because the mother was present at some visits between K.A. and K.W. K.A.'s mother was determined to have neglected her prior children; nothing in the district court order demonstrates that K.A. or his siblings were subjected to physical abuse or that the mother's mere presence presented a risk of danger. SPA27. Absent actual physical abuse, it is nearly always in a child's best interest to maintain a relationship with their parent,even when their parent is unable to care for them. *Garmhausen v. Corridan, No. 07-CV-2565, 2014 WL 12861097, at *7, *10 (E.D.N.Y. Aug. 1, 2014)* (noting the "presumption that visitation

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[30] Courts across the country have found it improper to subject a non-respondent parent to supervision on the ground that the other parent was the subject of an investigation. See *In re Sanders, 852 N.W.2d 524, 537 (Mich. 2014)* (maltreatment by one parent did not authorize agencies to invade the other parent's rights, because "due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship"); *People ex rel. United States, 121 P.3d 326, 327 (Colo. App. 2005)* (maltreatment findings against one parent could not be used to require the other parent to comply with treatment plan); *In re Parental Rights as to A.G., 295 P.3d 589, 596 (Nev. 2013)* (court could not require a non-respondent father to comply with a case plan to reunify with child).

[31] The complaint shows K.A.'s father's commitment to being a responsible parent. See, e.g., JAI7-47 ¶ 22 (acknowledging paternity at birth and taking K.A. home from hospital); id. ¶¶ 23- 28 (communicating with ACS regarding K.A.'s wellbeing, allowing them into his home, and carrying K.A. to ACS upon request); id. ¶ 68 (clearly and repeatedly objecting to K.A.'s removal, proactively seeking K.A.'s return, and immediately indicating that he would comply with necessary measures for reunification); id. ¶¶ 69, 73 (filing for paternity pro se twice); id. ¶¶ 71, 75-76, 79-81, 108-111 (complying with various "service plans," including completing multiple parenting courses, and submitting to inspections and supervision despite being confirmed K.A.'s father and never being named a respondent); id. ¶¶ 117-123 (using every opportunity to expand visitation with K.A., having to prove himself worthy of unsupervised visits with and custody of his child). Children with involved fathers benefit from improved emotional regulation, academic achievement, and social development, yet many foster agencies fail to engage fathers as caregivers. Michael W. Yogman & Amelia M. Eppel, The Role of Fathers in Child and Family Health, in Engaged Fatherhood for Men, Families, and Gender Equality: Healthcare, Social Policy, and Work Perspectives 15 (Marc Grau Grau et al. eds., 2022); Why Should Child Protection Agencies Engage and Involve All Fathers?, Casey Family Programs (Jan. 3, 2024), https://www.casey.org/father-engagement-strategies/#:~:text=Fathers%20play%20a%20critical%20role,are%20separated%20from%20thei r%20family.

between the child and the noncustodial parent is in the best interests of the child" and "[p]arents generally have a duty to foster and protect the child's relationship with the other parent"), R&R adopted, No. 07-CV- 2565, 2014 WL 12861098 (E.D.N.Y. Aug. 20, 2014).[32]

The three-year separation also cannot be justified by the court's observation, based erroneously on family court records, that K.W.'s apartment was small, that K.A. allegedly returned from certain visits with a wet diaper, and that K.W. supposedly tested positive for marijuana use on occasion. SPA11. E.g., *Termination of Parental Rts. Proceeding Lakeside Fam. & Child.'s Servs. v. Conchita J., 10 Misc.3d 1060(A), 2005 WL 3454328, at *9 (Fam. Ct. 2005)* (parent must have "a home . . . to go to" but "[i]t doesn't have to be a palace [or] . .

. a certain size apartment"); *In re Milagros A.W., 9 N.Y.S.3d 676, 677 (2d Dep't 2015)* (father's delay in changing his newborn's soiled diaper did not establish neglect); *In re Kiana M.-M., 997 N.Y.S.2d 723, 724-25 (2d Dep't 2014)* (father allowing child to soil herself in a diaper rather than taking her to restroom was "not a sufficient basis to support a finding of neglect"); In re Gina R., 180 N.Y.S.3d745, 747 (4th Dep't 2022) (mother's marijuana use could not establish neglect without separate finding that the child was impaired or at imminent risk of impairment); *In re Nassau Cnty. Dep't of Soc. Servs. v. Denise J., 87 N.Y.2d 73, 79 (N.Y. 1995)* (newborn's positive toxicology report was not enough to find neglect even against birthing parent).

New York courts have repeatedly recognized that removal requires a finding of serious harm or risk of serious harm and cannot be justified merely by "what might be deemed undesirable parental behavior." *In re Kiana M.-M., 997 N.Y.S.2d at 724* (quoting *Nicholson v. Scoppetta, 3 N.Y.3d 357, 369 (2004)*); see also *In re Jamie J. (Michelle E.C.), 30 N.Y.3d 275, 286-87 (N.Y. 2017)* (holding that one of the only "constitutionally permissible" reasons to separate parent and child would be a showing of "persisting neglect") (quoting *In re Marie B., 62 N.Y.2d 352, 358*

(N.Y. 1984)).

Thus, the district court failed to identify any imminent risk justifying the initial, extra-judicial removal of K.A. under the Fourth Amendment. Based on the facts in the complaint, there were no "compelling circumstances" justifying K.A.'s removal and the long deprivation of his fundamental constitutional right to remain with his family under the Fourteenth Amendment. Further, Defendants' actions were certainly not "narrowly tailored."

CONCLUSION

Children like K.A. suffer tremendous and long-lasting harm when unnecessarily separated from their parents. A child's constitutional right to family integrity provides an important safeguard against this harm, as does the high bar for emergency removals under the Fourth Amendment. The district court's erroneous decision should be reversed, and this case should be allowed to proceed.

Dated: April 16, 2025 Respectfully submitted, By: /s/ Eugénie Iseman

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 6,494 words and uses a proportionally spaced typeface of 14-point Times New Roman font.

Dated: April 16, 2025 By: /s/ Eugénie Iseman

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CERTIFICATE OF SERVICE

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[32] Social science literature finds that children's outcomes improve when families are kept intact whenever safely possible. E.g., Susan L. Brooks & Ya'ir Ronen, The Notion of Interdependence and Its Implications for Child and Family Policy, 17 J. Feminist Fam. Therapy 23, 33 (2008).

I hereby certify that, on April 16, 2025, I caused the foregoing to be electronically filed with the Clerk of the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All counsel in this case are registered CM/ECF users and will be served by the appellate CM/ECF.

Dated: April 16, 2025 By: /s/ Eugénie Iseman

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