

# **Exploring Family Court Act Section 1038**

Issues in Discovery and Evidence

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# **Family Court Act 1038 (a)**

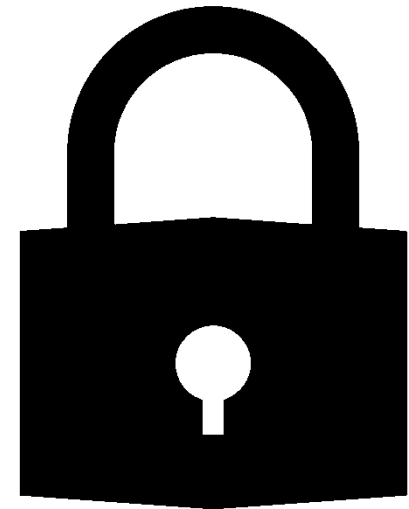
Each hospital and any other public or private agency having custody of any records, photographs or other evidence relating to abuse or neglect, upon the subpoena of the court, the corporation counsel, county attorney, district attorney, counsel for the child, or one of the parties to the proceeding, shall be required to send such records, photographs or evidence to the court for use in any proceeding relating to abuse or neglect under this article. Notwithstanding any other provision of law to the contrary, service of any such subpoena on a hospital may be made by certified mail, return receipt requested, to the director of the hospital. The court shall establish procedures for the receipt and safeguarding of such records.

# Requesting Reproductive Health Care Information

Effective 12/23/2024, Department of Health & Human Services has made it a requirement that persons seeking medical information attest that they are not seeing it for purposes of investigating a person's use of reproductive health care for possible prosecution

Attestation is to be filled out and signed by whoever is asking for records that may contain PHI

Attestation is not required if you have a signed HIPAA release



## Matter of Kayla S., 46 Misc.3d 747 (Bx. Cty Fam. Ct. 2014)

"One specific exception to HIPAA and the state statutes is build into the Family Court Act for article 10 abuse and neglect proceedings. Family Court Act Sec 1038(a) authorizes broad disclosure of privileged and confidential records and documents in an article 10 child abuse and neglect proceeding..."

"... is a significant safeguard against erroneous determinations s in such sensitive matters and helps to ensure that determinations affecting a child's welfare will be based on the most complete record possible."

People v. Salinas, 48 Misc.3d 791  
(Bx. Crim Ct. 2015)

"[T]his court finds that, even in the absence of a protective order, the Family Court Act and rules restrict discovery materials obtained in article 10 proceedings to use exclusively in those proceedings. (Family Ct Act sec.1038(a). It follows that those records cannot then be disclosed without court authorization."

# Family Court Act 1038 (b)

Pursuant to a demand made under rule three thousand one hundred twenty of the civil practice law and rules, a petitioner or social services official shall provide to a respondent or the child's attorney any records, photographs or other evidence demanded relevant to the proceeding, for inspection and photocopying. The petitioner or social services official may delete the identity of the persons who filed reports pursuant to **section** four hundred fifteen of the social services law, unless such petitioner or official intends to offer such reports into evidence at a hearing held pursuant to this article. The petitioner or social services official may move for a protective order to withhold records, photographs or evidence which will not be offered into evidence and the disclosure of which is likely to endanger the life or health of the child.

## Matter of Aidin, 149 A.D.3d 757 (2nd Dept 2017)

"The Family Court exceeded its authority in directing the DSS to produce discovery in a certain format in matters other than the instant matter (see generally Matter of John H. 56 AD3d 1024, 868 N.Y.S.2d 790), and therefore improperly directed the DSS to produce discovery material in paper format if requested in writing by receiving counsel in any matter before the court."

See also Matter of Cameron M., 161 A.D.3d 1156 (2d Dept 2018)

# Matter of J.J.D. v. M.D., 227 AD3d 441 (1<sup>st</sup> Dept 2024)

"Applying the appropriate statutory standard, we hold that, given Family Court's need to assess the mother's mental health, "the interests of justice significantly outweigh the need for confidentiality" of records from the remaining mental health treatment facilities."




# **Family Court Act 1038 (c)**

A respondent or the child's attorney may move for an order directing that any child who is the subject of a proceeding under this article be made available for examination by a physician, psychologist or social worker selected by such party or the child's attorney. In determining the motion, the court shall consider the need of the respondent or child's attorney for such examination to assist in the preparation of the case and the potential harm to the child from the examination. Nothing in this section shall preclude the parties from agreeing upon a person to conduct such examination without court order.

# Family Court Act 1038 (c)

Any examination or interview, other than a physical examination, of a child who is the subject of a proceeding under this article, **for the purposes of offering expert testimony to a court regarding the sexual abuse of the child**, as such term is defined by section one thousand twelve of this article, may, in the discretion of the court, be videotaped in its entirety with access to be provided to the court, the child's attorney and all parties. In determining whether such examination or interview should be videotaped, the court shall consider the effect of the videotaping on the reliability of the examination, the effect of the videotaping on the child and the needs of the parties, including the attorney for the child, for the videotape. Prior to admitting a videotape of an examination or interview into evidence, the person conducting such examination or the person operating the video camera shall submit to the court a verified statement confirming that such videotape is a complete and unaltered videographic record of such examination of the child. The proponent of entry of the videotape into evidence must establish that the potential prejudicial effect is substantially outweighed by the probative value of the videotape in assessing the reliability of the validator in court. Nothing in this section shall in any way affect the admissibility of such evidence in any other court proceeding. The chief administrator of the courts shall promulgate regulations protecting the confidentiality and security of such tapes, and regulating the access thereto, consistent with the provisions of this section.



## Matter of Jessica R., 576 NYS2d 77 (Court of Appeals 1991)

"But in view of the fact that examinations by an adversary's expert will almost always present potential harm to the child as well as potential benefits for the respondent and the truth-finding process, the facts bearing on these issues should be developed in some depth before the court, in the exercise of its discretion, determines the appropriate balance."

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## Matter of Crystal A.A., 271 AD2d 771 (3rd Dept 2000)

"In child protective proceedings, the factors to be weighed may include, but are not limited to, the age of the child, the emotional and physical health of the child, the nature of the family relationship, the nature of the allegations at issue in the proceedings and the need of the respondent to obtain information from the child."

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# Depositions

## **Family Court 1038(d)**

Unless otherwise proscribed by this article, the provisions and limitations of article thirty-one of the civil practice law and rules shall apply to proceedings under this article. In determining any motion for a protective order, the court shall consider the need of the party for the discovery to assist in the preparation of the case and any potential harm to the child from the discovery. The court shall set a schedule for discovery to avoid unnecessary delay.

Q: Does counsel ask for depositions in CP cases?




# Depositions

- Their use in child protective proceedings?
  - FCA 1038 doesn't specifically say
  - Caselaw
  - Tips

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# Depositions


- Who?
    - CPS
    - Parent
    - Expert
    - Other witnesses?
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# Deposition


## *Practical Considerations*


- **Where is it found:** CPLR 3107
- **How?**
  - Notice of Deposition at least 20 days if conducted within the state
  - Leave of Court/Order for non-party witnesses CPLR 3101 (d), including experts where there are special circumstances CPLR 3101(d) (1) (iii),
- **Who pays?**
  - Party asking for the deposition
- **Where?**
  - Can it be online? Yes, upon stipulation or Court directive - CPLR 3113 (d)



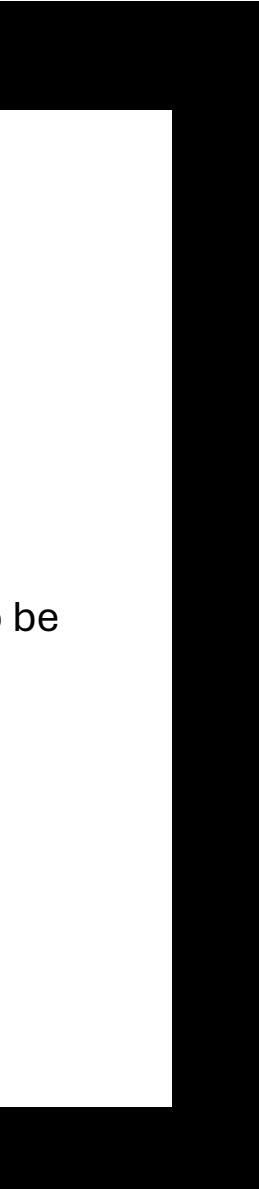


# Respondent Arguments for Depositions

- CPLR applies in absence of specific 1038 provisions
  - Legislative intent of FCA 1038 is to promote “liberal” discovery
  - CNNX notes not enough
  - Judge approval may not be required, good for settlement, examination of issues
  - Likely no cost to DSS
- 



# Caselaw in support of Depositions in CPS Cases

- Grover S. case
  - John H. case
  - CPLR 3101 (a) (4) = “full disclosure, to be interpreted liberally” – Duffy v. Horton Memorial 66 NY 2d 473 (Court of Appeals)
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# Consider/ Discuss

If Court's liberalize depositions – should Counties/DSS/CPS consider deposing the parents when it would be in the child's best interest and appropriate legally?

What are some pros/cons/ideas?

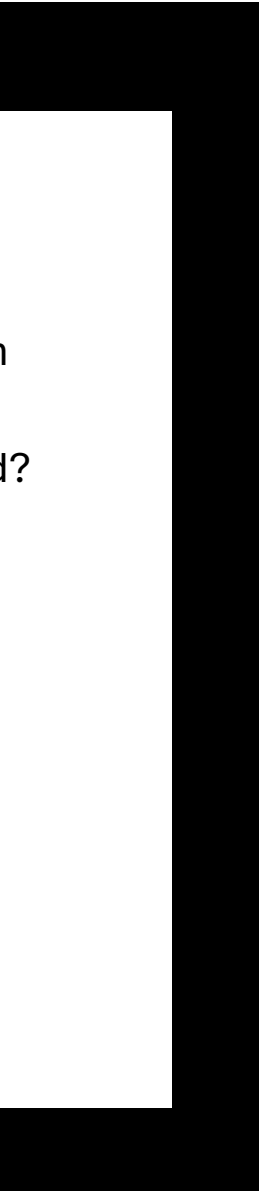
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# Arguments to Oppose Depositions

- After you are served, you may have to file for a **“Protective Order”** and/or **Motion to Quash**
- **We will discuss:**
  - CPLR 3103
  - FCA 1038
  - Article 10 is a Special Proceeding requiring leave of the Court for depositions and/or special circumstances to allow for a deposition (note, special circumstances is ALSO used in analyzing expert depositions).
  - Common Sense:
    - Depositions slow things down, and CPS cases are meant to be resolved expeditiously unlike civil proceedings which can take years or decades.
    - Whether opposing the deposition is in the child’s best interest



# Opposition to Depositions FCA 1038

- **1038:** Already provides the mechanism for discovery
  - How will the deposition affect the child?
    - Will this delay the proceedings?
    - Will the child be deposed (clear argument for harm)
    - Need of the party for discovery to assist in preparation v. **potential harm to the child** from discovery
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# Opposition to Depositions CPLR 3101

- **CPLR 3103 (a):** the Court may "make a protective order denying limiting conditioning or regulating the use of any disclosure device."
- **Reason:** Designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts.
  - **Arguments** (not limited to..)
    - Delay to the case
    - Effect on the child
    - Burden on CPS
    - Discovery is already significant (CNNX)
    - What will the deposition add (if anything)

# Opposition to Depositions Special Proceeding Argument

- **Child Protective Cases are Special Proceedings**
  - Matter of Amellia RR 112 A.D 3d 1083
  - Commissioner of Social Servs ex rel. R/S 170 Misc 2d 126
- In **Special Proceedings**: Unlike CPLR Article 31, which imagines a maximum disclosure of facts without judicial supervision, CPLR 408 requires "**Leave of the Court** shall be required for disclosure". See In re Shore: 109 AD 2d 842, 843.
- "Consequently, while it is now clear that the procedures for disclosure under CPLR 31 are available in CPS cases, utilization of those procedures is still **subject to judicial control**" R/S at 128-129

# Generally: Additional Arguments

- **“Special Circumstances”**: Vanessa R 148 A.D. 2d 989.: 4<sup>th</sup> department case in which the Court held that the “Family Court did not abuse its discretion in denying respondent’s pre-trial deposition of the mother and one of the **therapists**.....such depositions are not appropriate in child protective proceedings”.
- **Legislative history**: FCA 1038 although 1038 amendments are meant to broaden discovery, this broadening is not limitless – with the true intent being discovery of records. See Memo ins Support of Legislation – Bill A. 7486, CH. 724 Laws of 1989
  - Civil proceedings and lawsuits law YEARS – is this what we want for CPS proceedings?



# Generally: Additional Considerations

- How adequate is the **Connections Record**?
  - Law requires CPS and supervisors to enter information accurately and timely
  - What will the deposition add?
  - Burden on CPS time
  - See Amelia RR 112 A.D. 3d 1083
- What is the **IMPACT** on the Child?
  - Delays: See Matter of Bartosz B. 187 A.D. 3d 894, 896 (2<sup>nd</sup> Dep't 2020), Matter of F.W. 183 A.D. 3d 276, 281, Matter of Emmanuel C.F. 230 A.D. 3d 997, 999
  - Are they asking for the child to be deposed?
- When did they **ask** for the deposition? Was there a delay?
  - See Campaign for Fiscal Equity v. State 265 A.D. 277 (1<sup>st</sup> Dep't 1999)
- Will the person to be deposed be a witness? Will they have an **opportunity to cross** this person at the trial?



## **Experts – CPLR 3101(d)**

Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.

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# Can your Expert be Deposed?

CPLR 3101(d): Expert Disclosure

Provide them timely

Be detailed (...in reasonable detail)

What facts or opinions will the use?

Summary of their testimony/opinion

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# Can your Expert be Deposed?

CPLR 3101(d) (1) (iii)

Further disclosure concerning the expected testimony of the expert ...may be obtained only by **Court Order** upon showing of **special circumstances** and subject to restrictions as to scope and provisions concerning fees and expenses....

So argue they must move for a **Court Order**  
**Parties can also depose their own experts**

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# Can your Expert be Deposed?

In re Eva B 160 A.D. 457 (1<sup>st</sup> Dept 1990)

**Padro v. Pfizer 269 A.D 2d 129 (1<sup>st</sup> Dep't  
2000)**

**In re Vanessa R. 148 A.D. 989: “absent  
special circumstances not present here,  
such depositions are not appropriate in  
child protective proceedings”**

# What might be a "special circumstance"?

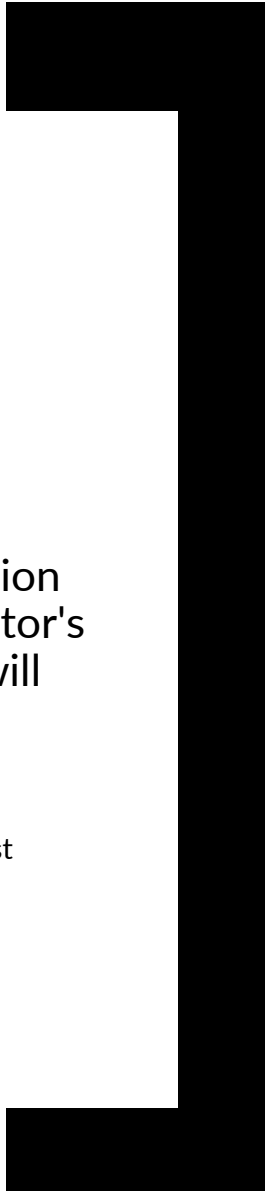
- Not established by just showing that the info sought is relevant...Brooklyn Floor v. Providence 296 A.D. 2d 520, 521-522 (2<sup>nd</sup> Dep't 2002)
- Must be extenuating Beauchamp v. Riverbay Corp., 156 A.D2d 172 (1st Dept 1989)
- "Such circumstances exist where physical evidence is 'lost or destroyed' or 'where some other unique factual situation exists' ... such as proof that 'the information sought to be discovered cannot be obtained from other sources.'" Matthews v. St. Vincent's Hosp. And Medical Ctr of New York, 6 Misc.3d 1009(A) (Sup. Ct. NY. Co 2004);

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# Special Circumstances Exist When...

“The father met his burden of demonstrating special circumstances warranting the grant of his motion to subpoena and depose ACS's expert medical witness, given ACS's failure to oppose the application and its concession that it does not know whether the doctor's testimony at the fact-finding hearing will support its allegations of child abuse.”

Matter of Aliyah N., 171 AD3d 563 (1<sup>st</sup> Dept 2019)

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# What is NOT a "special circumstance"?

- Did not exist based on the novelty of the scientific evidence to be testified to where all parties were given access to all the expert's records regarding the plaintiff's diagnosis and treatment. Hallahan v. Ashland Chem. Co., 237 AD2d 697 (3d Dept 1997); see also Weinberger v. Lensclean, Inc., 198 AD2d 58 (1<sup>st</sup> Dept 1993)
- All material physical evidence was equally available for any party's expert to inspect, thus a deposition of plaintiff's expert was not warranted. Generali Ins. Co. Of Trieste and Venice v. Honeywell, Inc., 194 AD2d 442 (1st Dept 1993)



# Discovery Motions

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# Motion in Limine

- Motion made prior to trial
- Objections are made to information contained in records that will be entered into trial.
- Common objection is hearsay
- Allows the judge to rule on the objections prior to trial

# Videos into evidence

Matter of Mekayla S., 229 AD3d 1040 (4th Dept 2024)

"A video may also be authenticated, however, by '[t]estimony, expert or otherwise... establish[ing] that [the] video [ ] 'truly and accurately represents what was before the camera'. The foundation necessary to establish [authenticity] may differ according to the nature of the evidence sought to be admitted."

"Testimony of the FBI agency and the State Police detective authenticated the videos through circumstantial evidence of their 'appearance, contents, substance, internal patterns, and other distinctive characteristics.'"

# Motion to Preclude Evidence

- Can be filed by either side
- Filed to keep evidence from being admitted during trial
- Defense to Preclusion :
  - Evidence not in Parties' possession
  - Good faith effort made to obtain evidence

Kihl v. Pfeffer,  
92 N.Y.2d 118,  
700 N.Y.S. 2d  
87, 722 N.E.2d  
55 (1999)

“If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a ‘court may make such orders ... as are just,’ including dismissal of an action. Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully.”

# Frye Hearings

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The **Frye test** asks whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally. Frye holds that while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. It emphasizes counting scientists votes, rather than on verifying the soundness of a scientific conclusion

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Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 442

# Frye - Additional caselaw

A **Frye** hearing is necessary only if expert testimony involves "**novel** or experimental matters" (see *People v Byrd*, 51 AD3d 267, 274, 855 NYS2d 505 [1st Dept 2008], *lv denied* 10 NY3d 956, 893 NE2d 446, 863 NYS2d 140 [2008], citing *Parker v Crown Equip. Corp.*, 39 AD3d 347, 348, 835 NYS2d 46 [1st Dept 2007]). The application of a generally accepted technique, even though its application in a specific case was unique or modified, does not require a **Frye** hearing (see *Byrd*, 51 AD3d 267, 855 NYS2d 505; *Styles v General Motors Corp.*, 20 AD3d 338, 799 NYS2d 38 [1st Dept 2005]). The **Frye** test concerns only the acceptability and reliability of the scientific technique and not the "adequacy of the specific procedures used to generate the particular evidence to be admitted" (see *Wesley*, 83 NY2d at 422).

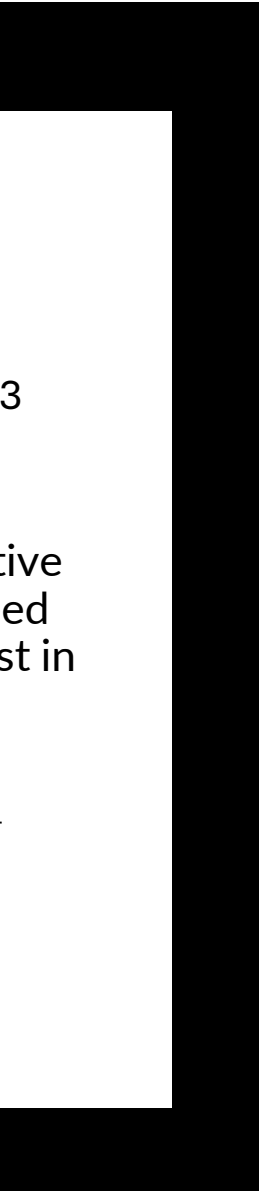
People v. Garcia, 39 Misc. 3d 482, 484

The question of whether specific contaminants cause physical injury does not present a **novel** scientific theory (see *Nonnon v City of New York*, 32 AD3d 91, 819 NYS2d 705 [2006], *affd* 9 NY3d 825, 874 NE2d 720, 842 NYS2d 756 [2007]). Therefore, the defendants are not entitled to a **Frye** hearing (see *Frye v United States*, 293 F 1013 [DC Cir 1923]).


Davydov v Board of Mgrs. of Forestal Condominium, 185 A.D.3d 548, 550



# Protective Order


- Matter of Ameillia R.R., 112 AD3d 1083 (3d Dept 2013)
  - In an abuse or **neglect** case, "[i]n determining any motion for a protective order, the court shall consider the need of the party for the **discovery** to assist in the preparation of the case and any potential harm to the child from the **discovery**" (Family Ct Act § 1038 [d]).
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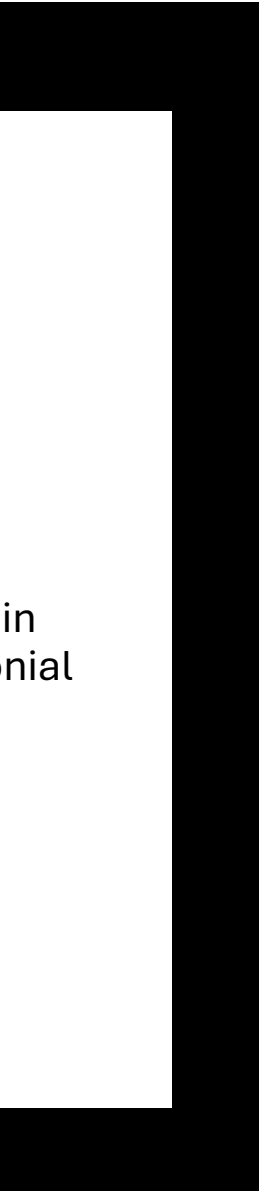
## Section 1038-a


Upon motion of a petitioner or attorney for the child, the court may order a respondent to provide nontestimonial evidence, only if the court finds probable cause that the evidence is reasonably related to establishing the allegations in a petition filed pursuant to this article. Such order may include, but not be limited to, provision for the taking of samples of blood, urine, hair or other materials from the respondent's body in a manner not involving an unreasonable intrusion or risk of serious physical injury to the respondent.



Matter of I.M.,  
77 Misc.3d  
1044  
(Bx. Fam Ct  
2022)

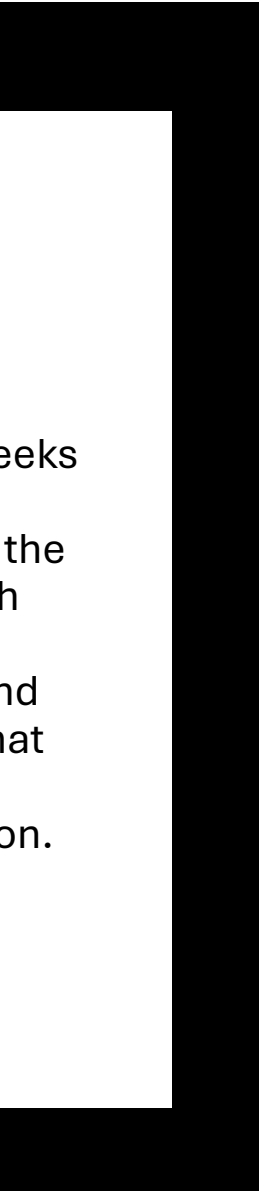
"Courts have not found probable cause in cases where the request for nontestimonial evidence was not related to the allegations."



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# Matter of Tyler S., 192 Misc.2d 728 (Kings County Fam Ct. 2002)

Family Court Act § 1038-a simply recognizes that when the government seeks to discover evidence by means which intrude upon a person's bodily integrity, the government action implicates the Fourth Amendment prohibition against unreasonable searches and seizures, and should be justified by probable cause that the evidence is reasonably related to establishing the allegations in the petition.

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