February 22, 2022

INDEPENDENT EXPERT REPORT

SUMMARY AND ANALYSIS
OF THE RECORD AND THE LAW PERTAINING TO IT
MONROE COUNTY FAMILY COURT #NA-01235-21: "CHILD ABUSE CASE"

In support of Respondent-Parents' Motion to Vacate ALL Orders & to Dismiss the Child Abuse/Neglect Petition

Sworn to be True,
under penalties of perjury

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February 12, 2021 (2:15 pm)
LDSS-2221A form of School Social Worker Tara O'Brien, whose existence is omitted by the CPS' "Investigation Progress Notes" and concealed by the February 16, 2021 petition

"I told [the Child] that we did need to just make sure she was safe and she again repeated that she was."

November 23, 2021 (4:30 pm)
"Family Services Progress Note" by CPS Caseworker Kathryn Resch

"[The Child] asked CW to explain why she was removed from her parents. CW noted that CW has previously had this conversation with [the Child] and we should focus on moving forward with her returning home to her parents. [The Child] continued to ask CW why she was removed. CW Linda asked [the Child] how she was feeling about going home. [The Child] stated that she is excited and denied having any nerves or negative feelings about going home. [The Child] reported she is safe with her parents and always have been safe with them. CW Linda asked [The Child] that if she ever does not feel safe with her parents, that she should share that with someone. [The Child] continued to repeat that she is and always will be safe with her parents."

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Exhibit R: CPS “Family Services Progress Notes”/print-out: 10/21/21 (290 pages) obtained by FOIL requests of respondent-parents

Exhibit S: CPS “Family Services Progress Notes”/print-out: 1/21/22 (143 pages) obtained by FOIL requests of respondent-parents

I.
Monroe County Supervising Family Court Judge Romeo's February 17, 2021 Order Must be Vacated, *as a Matter of Law*, and All Subsequent Proceedings are Void

The February 16, 2021 petition against respondent-parents [xx] had to be thrown out, *as a matter of law*, on its February 17, 2021 return date, with an order directing investigation of the petitioner, Monroe County Department of Human Services, Division of Social Services, and its counsel, the Monroe County Law Department, for fraud, misrepresentation, and other misconduct by their petition and proposed order. That their abuses occurred while Monroe County had an outside monitor in place for child protective services[1] reinforced the obligations of the Family Court and the court-appointed attorney for the child to take remedial action. What they each did, instead, perverting law, their duties, and wasting scores, if not hundreds, of thousands of taxpayer dollars, must now be the subject of wider investigation.

* * *

Family Court Act §1027(a)(1) could not be clearer and more unequivocal in stating:

> "In any case where the child has been removed without court order…the family court shall hold a hearing. Such hearing shall be held no later than the next court day after the filing of a petition to determine whether the child's interests require protection, including whether the child should be returned to the parent…, pending a final order of disposition and shall continue on successive court days, if necessary, until a decision is made by the court." (underlining added).

Despite this mandatory "shall" language requiring the holding of a hearing – reiterated by caselaw[2], treatises[3], the New York State Child Protective Services Manual[4], and the Seventh Judicial District's own website[5] – no hearing was held on February 17, 2021.

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[1] *See* Monroe County's March 9, 2020 press announcement "*Monroe County Hires the Bonadio Group to Monitor Child Protective Service*s" – and news reporting including: "*Outside monitor joins effort to assess Monroe County CPS*" (Democrat & Chronicle); "*Local consulting firm to monitor Monroe County Child Protective Services*" (News 10).

[2] Most importantly, *Nicholson v. Scoppetta*, 3 NY3d 357 (2004), a case certified to the New York Court of Appeals by the Second Circuit Court of Appeals, discussed at fn. 11, *infra* – and whose significance was further underscored by the issuance of a December 21, 2004 memo by the New York State Office of Children and Family Services. (see p. 3 thereof).

[3] *See, inter alia*, (1) McKinney's Consolidated Laws of New York Annotated, Judiciary-Court Acts, 9A-Part 1; (2) Callaghan's Family Court Law and Practice in New York, Vol. 2, chapter 12 (2021); (3) Carmody Wait 2nd, Vol. 19C (2021); (4) Law and the Family/New York, Vol 6 (1999) (Joel Brandes).

[4] *See* New York State Child Protective Services Manual, Chapter 9-G "Hearings after filing a petition for removal of a child".

[5] *See* Seventh Judicial District's webpage entitled "Abuse and Neglect – Petition": https://ww2.nycourts.gov/courts/7jd/courts/family/case_types/neglect_and_abuse.shtml.

This was because, as revealed by the transcript (Ex. N-1),[6] Monroe County Supervising Family Court Judge Stacey Romeo withheld from the respondent-parents that the purpose of that day's proceeding was to hold a hearing so that she could determine whether their child should be immediately returned to them, and, if not unconditionally, then under what appropriate conditions. Even more egregiously is that Judge Romeo affirmatively misled the parents, stating that were she to commence a hearing it would probably delay by "several weeks" getting their daughter out of the foster care into which she had been placed and that the more expeditious route would be for them to agree to a plan by the county predicated on a petition of abuse and neglect, whose allegations they both denied.

Indeed, it was not until half-way through the proceeding that Judge Romeo even mentioned a hearing – and, when she did, she did not state its purpose or explain it in any way so that the respondent-parents might understand how valuable it was, vis-à-vis immediate return of the child, if not unconditionally, then upon conditions based on evidence produced at a hearing, as opposed to based on allegations of a petition to which they had had no due process.

February 17, 2021 transcript (N-1, pp. 12-13)

> Court: …The Court needs to know – typically the attorneys would let me know if this removal to foster care was acceptable to their clients. Otherwise the Court would begin an immediate hearing today. It may take several weeks to conclude that hearing given the Court's schedule, frankly but I would give you every possible court date between now and the conclusion, and it might only be for a few minutes of testimony each day unfortunately.
>
> But Miss Ricci who represents the county placed on the record a plan to possibly have the child removed out of foster care somewhat expeditiously possibly and placed back in father's care with parameters.
>
> Is that something that you are agreeable to today, ma'am?"

The balance of the transcript shows that "expeditiously" was of paramount concern to [the Mother]:

February 17, 2021 transcript (N-1, pp. 15- 22)

> [Mother]: … Okay. Now I'm understanding that expeditiously you are going to work on my daughter's case, and if I'm willing to move out of the house for sometime …and in the meantime my daughter will be placed with my husband during this time. Is that what you're stating?

[6] Respondent-parents purchased transcriptions of all court proceedings from the court stenographers present at those proceedings. The 26 transcripts are exhibits N-1 to N-26.

Court: So that would not be today. The county is going to look into that and try to do that expeditiously. I think that is the hope. We don't like to put children in foster care. If we have a safe alternative, then that – we try to do that.

So on a temporary basis, the child will be placed in foster care until such time as all those other pieces can be worked out so that the child can be returned home to the father.

Is that correct, Miss Ricci? I don't want to put words in your mouth.

Ricci: Yes, Judge. I know we have just started talking about this this morning, and so we would probably be seeking a different order or some additional terms of the order about mother leaving the home…

But, yes, that that is the start of our agreement, and we would insert the other terms as needed.

Court: All right.

[Mother]: I do have a question.

Court: Yes.

[Mother]: Can you please define what expeditiously means, like how long? What is the length and the duration of expeditiously?

Court: No. I don't think we have an answer to what expeditiously would mean. I think the county is going to begin working on that today. When we finish this court proceeding, her client is going to be working on that. I mean, I don't know if she can give any indication.

[Mother]: What is normal procedure? Like if it is not expeditiously done, what is the normal because I would like to compare to see what is the difference between expeditiously versus what is generally done..."

…

Ricci: …I think maybe just as a suggestion, I would be saying maybe just we can come back early next week, and we can – the caseworker certainly can talk with mother to see if she's indicating that she wishes to move out of the house or if she had definite planes.

Because we would want to have everything in place, so mother would need again need to be out of the home. And we're already making some calls to get some immediate, like crisis services in place so that we would – I'm thinking just at this point we would be looking at early next week as a suggestion.

Court: So what I'm hearing is if everyone is agreeable to the child being placed in foster care for less than a week, hopefully by Monday there could be a separate arrangement made whereby the child would be returned home.

[Mother]: Judge, I'm not agreeing my daughter being in the foster care. I am okay moving out…"

Court: Well, [Mother], I mean, we need to work on services. I guess that is not an issue for today because if you're not agreeable to foster care, I will bring this matter back a little bit later, and I would – it would probably be depending on what time I get done with my docket.

I do have a meeting this afternoon, Counsel, at four o'clock, and I could take testimony at 4 p.m. today.

[Mother]: Judge, I have a video of my daughter. She was crying.

Court: Ma'am, I need to move on. If you're not agreeable to – and I don't mean to be disrespectful, but if you're not agreeable to foster care, I do need to hold a hearing today, and that hearing would commence at 4 p.m.

Counsel, I would expect everybody to return back at 4 p.m.

Reed: Judge, if I could just be heard, I might be able to clarify a couple things for [the Mother].

So obviously my client's position is, as I indicated to Miss Ricci, is that the child should be returned. So I think that he's agreeable to allowing her to remain in foster care until Monday until we can get things sorted out.

I think that in light of the petition, the allegations in the petition, I think my client is peripherally involved, we would be requesting a hearing otherwise, but he is amenable to waiving a 1027 if we can set things in place for him to get the child back on Monday.

If the mother is agreeable to that, to essentially waiting until Monday to try to see if we can get things set up for her to return home to the father, then we might be able to waive a 1027 hearing today.

[Mother]: Could my husband at least see my daughter, Judge, because I don't know what kind of trauma – we are not harmful, Judge. We are not likely really going to do any harm to [our child], and –

Court: Hang on a minute, ma'am. Go ahead Miss Ricci.

Ricci: I would be willing to offer visits to both parents between now and then. I didn't mean they would have no contact until next week.

There was a telephone contact. We asked it not to be video contact. It became a video contact, but we can certainly – I can talk with Miss Reed and mother outside to give her the number to contact to get started on some visits.

We do not oppose visits. That's fine. But they need to be supervised between now and Monday. If we can't come to an agreement, nobody has lost any rights at this point, but so that would be our proposal.

[Mother]: I agree to this if at least my husband – I want my daughter to see one of us. If he doesn't –

Court: He can see both of you.

[Mother]: Yes, I would be very happy.

Court: Ma'am you are agreeing to her being placed in foster care on a temporary basis. We would return Monday. It would be virtual on Monday.

[Mother]: Judge.

Court: 9 a.m.

[Mother]: I just have a question. So from now until like Monday, are we going to be doing expeditiously or –

Court: No. They are going to be starting looking into everything so that we'll hopefully have – and I can't promise we're going to have an answer on Monday – but if we don't we will know what we need to find out on Monday. Okay?

Reed: Judge.

Court: Go ahead, Miss Reed.

Reed: If the department and I can come to an agreement and set everything in motion prior to Monday, would it be possible to have the child moved to my client's home before then?

Court: I think we need a lot of things in an order that I'm not prepared to put in an order today. So everyone just return virtually Monday at 9 a.m.

> …
> If everybody… I need to put some things on the record…
>
> I do need to make certain findings on the record based upon the allegations that were contained here today.
>
> I did hear that both respondents are waiving the right to a 1027 and reserving their right to a 1028.
>
> The Court will place the child in foster care. I do find the continuation of the child in the home of the respondents would be contrary to the child's best interests based upon the allegations – again, merely allegations, but I do need to make these findings – the allegations of inappropriate touching of the child by the mother and an awareness of that touching by the father, as well as an order of protection the Court believes would not eliminate the risk to the child at the present time based upon the fact that the parents are the sole caretakers of the child in the home presently without services being in place in the home.
>
> I also find that the department has exercised reasonable efforts prior to today's application by attempting to make a safety plan for the child.
>
> Again, I would expect if the child – if there's any potential of the child being returned to the father on Monday, that we have a complete order in place prior to that happening. We can go over that on Monday, as well.
>
> The Court will make sure that the word allegedly is in the appropriate places, Ms. Reed, and the Court will sign the removal order.
>
> All right? Monday 9 a.m. sharp virtually. Okay?"

As reflected by the transcript (Ex. N-1), Judge Romeo cited no law for taking a waiver of the §1027 hearing from the respondent-parents**.** Nor did she explain or give advance warning that she would convert their consent to the temporary continuation of their daughter in foster care to a court-ordered placement in foster care, accompanied by findings based on a petition (Ex. C) whose allegations they denied and as to which §1027 not only required a hearing, but required same as a predicate for findings to support an order.

On top of this, she did not comply with the mandatory requirements of subsections (d) and (e) of Family Court Act §1033-B entitled "Initial appearances; procedures". Subsection (d) states:

> "In any case where a child has been removed, the court <u>shall</u> advise the respondent of the right to a hearing, pursuant to section ten hundred twenty-eight of this act, for the return of the child and that such hearing may be requested at any time during the proceeding. The recitation of such rights <u>shall</u> not be waived." (underlining added).

Subsection (e) states:

> "At the initial appearance, the court shall inquire of the child protective agency whether such agency intends to prove that the child is a severely or repeatedly abused child as defined in subdivision eight of section three hundred eighty-four-b of the social services law, by clear and convincing evidence. Where the agency advises the court that it intends to submit such proof, the court shall so advise the respondent." (underlining added).

Indeed, Judge Romeo's failure to make the required subsection (e) inquiry is all the more striking as both the petition (Ex. C) and proposed order (Ex. B) contained on their first pages, in bold-faced capitalized type, the warning:

> "**IF SEVERE OR REPEATED ABUSE IS PROVEN BY CLEAR AND CONVINCING EVIDENCE, THIS FINDING MAY CONSTITUTE THE BASIS TO TERMINATE YOUR PARENTAL RIGHTS**",

with the petition's "WHEREFORE" clause requesting an order:

> "determining the following child, [xx], to be severely and/or repeatedly abused by clear and convincing evidence; and otherwise dealing with said child in accordance with the provisions of Article 10 of the Family Court Act" (Ex. C, p. 26, ¶b).

Judge Romeo did not even mention this.

Additionally, Judge Romeo concealed – and ran over – the rights of the subject child, whose court-appointed attorney, Elena Tasikis, Esq., had not yet even met with her. As stated by Ms. Tasikas, during the proceeding:

> "I have had an opportunity to review the petition. At this point I have not met up with my client. I do not take a position on her behalf today.
>
> However, I'm requesting that the county give me contact information where my client is in foster care, and I will quickly become involved in this case and exercise due diligence so that we can come back quickly if the Court is amenable to doing that." (Ex. N-1, p. 12).

Judge Romeo did not include this in what she was putting "on the record" (at pp. 22-23).

The February 17, 2021 proceeding then concluded with a further surprise, prejudicial to the respondent-parents and the subject child: the date of the permanency hearing, nearly 7-1/2 months later:

> Clerk: October 1st at 9:45 for a PPH.

> Court: Okay. Everyone knows what to do. That is Monday the 22nd. February 22nd, 9 a.m. Virtual. Okay? All right. That's all the Court has for today on this particular case. (Ex. N-1, pp. 23-24).

The February 17, 2021 Order is Indefensible Throughout

The Order that Judge Romeo signed on February 17, 2021 (Ex. A) was, with minor handwritten insertions/deletions, the SAME as the proposed order that the Monroe County Law Department had filed on February 16, 2021 in Monroe County Family Court (Ex. B), with the February 16, 2021 petition (Ex. C).[7]

Thus, her signed Order left intact the two references to a hearing, recited in the proposed order (Ex. A/Ex. B, at p. 2):

> "And the child having been removed prior to this hearing on an emergency basis pursuant to Family Court Act §1021; or
>
> And a preliminary hearing having been held by this Court pursuant to Section 1027 of the Family Court Act; and the following persons having appeared to determine whether the child's interests require protection pending a final order of disposition…" (underlining added)

And, by inserting the name "Elena Tasikas, Esq." as "Attorney for the Child" as among the "following persons having appeared to determine whether the child's interests require protection…" (Ex. A, p. 2), the signed Order concealed that Ms. Tasikas had not yet met with the child – a further due process violation that would in and of itself require reversal, on appeal.[8]

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[7] The minor changes made by Judge Romeo's Order, all handwritten, were:

- at p. 1: completing the line **"THE NEXT COURT DATE IS: _____"** with "February 22, 2021 @9am, virtually";
- at p. 1: completing the line **"THE PERMANANCY HEARING SHALL BE HELD ON: ____"** with "Oct. 1, 2021 @9:45".
- at p. 2: identifying Respondent [Mother] as having appeared "without counsel";
- at p. 2: identifying Respondent [Father] as having appeared "with counsel Maria Reed, Esq."
- at p. 2: identifying the "Attorney for the Child" as "Elena Tasikas, Esq.
- at p. 2: removing the line for appearances by any "other" persons;
- at pp. 2-3: inserting, in two places, the words "*of the allegations that*";
- at pp. 4-5: removing four lines for insertions in four ordering paragraphs;
- at p. 6: completing the line for the date of the permanency hearing, in the last ordering paragraph, with the date and time: "Oct 1, 2021 @9:45";
- at p. 6: dating, signing, stamping the order.

[8] *See* the Appellate Division, 4th Department's own 2017 manual Ethics for Attorneys for Children, citing and quoting *Matter of Christopher B. v Patricia B.*, 75 AD3d 871 (2010) – with the full case reprinted in its appendix.

These were frauds without which Judge Romeo could not render the balance of the Order, as §1027 does not authorize a judge to make findings and determinations or any orders based thereon, except upon a hearing – with all interested parties having been heard.

Thus, Family Court Act §§1027(b) – (f) read:

> "(b) (i) Upon such hearing, if the court finds that removal is necessary to avoid imminent risk to the child's life or health, it shall remove or continue the removal of the child. If the court makes such a determination that removal is necessary, the court shall immediately inquire …
>
> (ii) Such order shall state the court's findings which support the necessity of such removal, …, and, where a pre-petition removal has occurred, whether such removal took place pursuant to section one thousand twenty-one, one thousand twenty-two or one thousand twenty-four of this part. … In determining whether removal or continuing the removal of a child is necessary to avoid imminent risk to the child's life or health, the court shall consider and determine in its order whether continuation in the child's home would be contrary to the best interests of the child and where appropriate, whether reasonable efforts were made prior to the date of the hearing held under subdivision (a) of this section to prevent or eliminate the need for removal of the child from the home and, if the child was removed from his or her home prior to the date of the hearing held under subdivision (a) of this section, where appropriate, that reasonable efforts were made to make it possible for the child to safely return home.
>
> (iii) If the court determines that reasonable efforts to prevent or eliminate the need for removal of the child from the home were not made but that the lack of such efforts was appropriate under the circumstances, the court order shall include such a finding.
>
> (iv) If the court determines that reasonable efforts to prevent or eliminate the need for removal of the child from the home were not made but that such efforts were appropriate under the circumstances, the court shall order the child protective agency to provide or arrange for the provision of appropriate services or assistance to the child and the child's family pursuant to section one thousand fifteen-a or as enumerated in subdivision (c) of section one thousand twenty-two of this article, notwithstanding the fact that a petition has been filed.
>
> (v) The court shall also consider and determine whether imminent risk to the child would be eliminated by the issuance of a temporary order of protection, pursuant to section one thousand twenty-nine of this part, directing the removal of a person or persons from the child's residence.

> (c) Upon such hearing, the court may, for good cause shown, issue a preliminary order of protection which may contain any of the provisions authorized on the making of an order of protection under section one thousand fifty-six of this act.
>
> (d) Upon such hearing, the court may, for good cause shown, release the child to his or her parent…pending a final order of disposition, in accord with subparagraph (ii) of paragraph (a) of subdivision two of section one thousand seventeen of this article.
> …
> (f) If the court grants or denies a preliminary order requested pursuant to this section, it shall state the grounds for such decision." (underlining added).

Plainly, if Judge Romeo believed that a §1027 hearing was waivable or that respondent-parents who denied the allegations of a petition against them would ever possibly waive such hearing, if informed by the Court of its purpose and the immediacy and appropriateness of the relief it could afford them, or that the subject child could be represented by an attorney who had not yet met with her, her Order would have reflected what had occurred at the February 17, 2021 proceeding.

Yet, Judge Romeo's Order (Ex. A):

- did not identify that respondent-parents denied the allegations of the petition,
- did not identify that the subject child had been effectively unrepresented, and
- was FALSE in twice purporting that a hearing had been held.

It was also FALSE in purporting that the child had been "removed…pursuant to Family Court Act §1021" (Ex. A, p. 2).

Had Judge Romeo simply read the petition (Ex. C), she would have known that the child had NOT been removed pursuant to Family Court Act §1021, namely, WITH the respondent-parents' consent, but pursuant to Family Court Act §1024, which is WITHOUT their consent[9] – a difference so obviously important that §1027(b)(ii) requires that any court order continuing pre-petition removal specify:

> "whether such removal took place pursuant to section one thousand twenty-one, one thousand twenty-two or one thousand twenty-four of this part. …" [10]

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[9] That the child was removed, without consent, was also stated at the February 17, 2021 proceeding by petitioner' counsel, Monroe County Deputy Attorney Lori-Ann Ricci: "The child is in foster care. Was by emergency removal without consent" (Ex. N-1, p. 10).

[10] *See* the practice commentary to §1027 by Professor Merril Sobie in McKinney's, including (at p. 247):

> "**Convening a Section 1027 Hearing**
>
> "A Section 1027 hearing is mandated whenever a child has been removed without court order pursuant to Section 1024, and when a child is removed by court order pursuant to

That the applicable statutory provision that her order would be required to specify was "one thousand twenty four" was set forth by the petition under its bold-faced title heading "**PRIOR REMOVAL WITHOUT CONSENT**":

> "38. Prior to the filing of this petition, pursuant to Family Court Act Section 1024, said child was removed from the custody of [the Parents] without Court Order on February 12, 2021." (Ex. C, p. 23, underlining added).

Family Court Act §1024, "Emergency removal without court order",[11] reads, in pertinent part:

> Section 1022 and the respondent was not present or was not represented by counsel and did not waive counsel [Section 1027(a)(i)]. Since Section 1022 orders are usually issued on an ex parte basis, most removals, other than a Section 1021 consensual removal, trigger the hearing."

[11] §1024 is the most drastic route for removing a child – and McKinney's practice commentary to §1024 by Professor Sobie discusses this – and the Court of Appeals decision in *Nicholson v. Scoppetta*, including, as follows:

> "Article 10 includes four separate provisions authorizing temporary removal of a child from her home …
>
> An emergency removal without court order, pursuant to Section 1024, raises the most serious issues. The decision is made by a child protective service without judicial review or oversight, not to mention an opportunity for the parent to challenge the need for removal. For that reason, the section permits removal only when there exists 'an imminent danger to the child's life or health' [§1024(a)(i)] and 'there is not time enough to apply for a [judicial] order under section one thousand twenty-two' [§1024(a)(ii)].
>
> **Section 1024 and the *Nicholson* Case**
>
> For forty plus years following the 1962 enactment of the Family Court Act, Section 1024 emergency removals were largely unchecked. Since such removal is for only a brief period pending the filing of a petition and a Section 1027 hearing, judicial review was minimal or non-existent. (Often the issue presented to the Court was whether a Section 1024 removed child should be returned, rather than the initial removal's validity.) That era closed and Section 1024 was carefully reinterpreted in the 2004 landmark Court of Appeals decision in *Nicholson v. Scoppetta*, 3 N.Y.3d 357…Emergency removal without court order was one essential part of the case, as certified to the New York Court of Appeals by the Federal Court of Appeals.
>
> In *Nicholson*, the Court of Appeals interpreted Section 1024 strictly, thereby limiting the practice of emergency removals: …
>
> The Court also cautioned that the so-called 'safe course' theory whereby Social Service officials (or the Court in a Section 1022 situation) believe it should err in favor of child protection in doubtful circumstances (see, e.g. *Matter of Darnell D.*, 139 A.D.2d 610…(2d Dept. 1988) 'should not be used to mask a dearth of evidence or as a watered-down, impermissible presumption' [3 N.Y.3d 357, 380]. The decision states that where there is insufficient time to file a petition prior to seeking removal (obviously the most

(a)…a…county department of social services shall take all necessary measures to protect a child's life or health including, when appropriate, taking or keeping a child in protective custody… if

(i) such person has reasonable cause to believe that the child is in such circumstance or condition that his or her continuing in said place of residence or in the care and custody of the parent…presents an imminent danger to the child's life or health; **and**

(ii) there is not time enough to apply for an order under section one thousand twenty-two of this article. (underlining and bold added).

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preferred route), the agency should whenever possible seek an ex parte court order rather than resort to emergency removal under 1024.

…Post-*Nicholson*, Section 1024 should be employed sparingly, but of course remains available when the only plausible alternative to a demonstrably dangerous home is an immediate temporary removal.

The case also addresses the applicable rules governing the judicial determination which must quickly follow removal, whether in the form of a post-1024 removal hearing, an *ex parte* determination pursuant to Section 1022, or an evidentiary hearing held in accord with sections 1027 or 1028. Concluding that a blanket prescription favoring removal was never legislatively intended, Chief Judge Kaye stated that in determining whether the child should be temporarily removed (or, for that matter, when an *ex parte* or §1024 removal should be continued):

> 'The [Family] court must do more than identify the existence of risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring and it must determine factually which course is in the child's best interest. Additionally, the court must specifically consider whether imminent risk to the child might be eliminated by other means, such as issuing a temporary order of protection or providing services to the victim [3 N.Y.3d 357, 378-79].'

The Court accordingly welded together, in one paragraph, the 'imminent danger' test with the requirements, found in sections 1027 and 1028, that, where appropriate, 'reasonable efforts' have been made to prevent or eliminate the need for a temporary removal, and, further, that continuation in the child's home would be contrary to his best interests (see, *e.g.* §1028(b)). The essential 'balancing' test places a heavy burden on the Family Court judge, who must determine the issue at a very early stage of the proceedings, and under stringent time limitations. (Pursuant to the Permanency Act, L.2005, c. 3, the Court is required to conduct an evidentiary Section 1027 hearing 'no later than the next court day' following the filing of a petition, which in turn must be filed the day after the removal has occurred.) Removal always presents at least an emotional risk to the child, if not actual emotional harm, a fact recognized by the Court of Appeals. It may be necessary, it may be desirable, there may be no other viable alternative, but the post-*Nicholson* decision to remove cannot be lightly made."

On its face, the petition (Ex. C) was insufficient to support removal pursuant to Family Court Act §1024 as it failed to even baldly assert, as required by subsection (a), that there had been "not time enough to apply for an order under section one thousand twenty-two of this article". Such provision – Family Court Act §1022 entitled "Preliminary orders of the court before petition filed" – ALSO contains a panoply of pre-petition safeguarding provisions, including mandating a hearing, stating, at its (a)(ii):

> "When a child protective agency applies to a court for the immediate removal of a child pursuant to this subdivision, the court shall calendar the matter for that day and shall continue the matter on successive subsequent court days, if necessary, until a decision is made by the court." (underlining added).

Indeed, the petition (Ex. C) was also *facially* deficient by its failure to assert compliance with other elements of §1024, such as required by its (b)(ii) and (iii), reading:

> (b) If a person authorized by this section removes or keeps custody of a child, he shall
>
> (ii) make every reasonable effort to inform the parent of the facility to which he has brought the child, and
>
> (iii) give, coincident with removal, written notice to the parent…of the right to apply to the family court for the return of the child pursuant to section one thousand twenty-eight of this act…. Such notice shall also include the name, title, organization, address and telephone number of the person removing the child, the name, address, and telephone number of the authorized agency to which the child will be taken, if available, the telephone number of the person to be contacted for visits with the child, and the information required by section one thousand twenty-three of this act. Such notice shall be personally served upon the parent…at the residence of the child… An affidavit of such service shall be filed with the clerk of the court within twenty-four hours of serving such notice exclusive of weekends and holidays pursuant to the provisions of this section. The form of the notice shall be prescribed by the chief administrator of the courts. Failure to file an affidavit of service as required by this subdivision shall not constitute grounds for return of the child."

Evident from the *face* of the petition (Ex. C) is that it did not purport that CPS had made ANY effort to inform the respondent-parents of where their child had been taken four days earlier, let alone that "every reasonable effort" had been made to so-inform them. In fact, the petition furnished evidence that the [Parents] did not know their daughter's whereabouts, by its page 21 reprinting of a February 16, 2021 e-mail, sent by [the Mother] at 1:56 am, stating "I am not sure where my daughter is…". Nor did the petition purport that "coincident with removal" the [Parents] had been furnished with the required "written notice" or annex a copy.

These deficiencies would have been revealed by a §1027 hearing on a petition involving a §1024 emergency removal, without consent – as well as other potential deficiencies:

(1) whether the Court's file contained the required affidavit of service for the §1024 "written notice";

(2) whether the petition had been properly issued by the Court, with a summons, as required by Family Court Act §1035a – and served pursuant to Family Court Act §1036;[12]

(3) whether there had been compliance with Family Court Act §1026, entitled "Action by the appropriate person designated by the court and child protective agency upon emergency removal", whose subsections (a) and (b) read:

> "(a) The appropriate person designated by the court or a child protective agency when informed that there has been an emergency removal of a child from his or her home without court order shall…(ii) except in cases involving abuse, cause a child thus removed to be returned, if it concludes there is not an imminent risk to the child's health in so doing. In cases involving abuse, the child protective agency may recommend to the court that the child be returned or that no petition be filed.
>
> (b) The child protective agency may, but need not, condition the return of a child under this section upon the giving of a written promise, without security, of the parent…that he or she will appear at the family court at a time and place specified in the recognizance and may also require him or her to bring the child with him or her." (underlining added).[13]

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[12] Family Court Act §1036(a) also states: "The court shall also, unless dispensed with for good cause shown, direct that the child be brought before the court."

[13] McKinney's practice commentary to Family Court Act §1026 by Professor Sobie states (at pp. 240-41):

> "Section 1026 is the sequel to Section 1024. The moment that a child has been removed without Court order under Section 1024, the instant section's provisions apply.
>
> …The next step, ordinarily undertaken by a child protective official, is to determine whether an alleged neglected child who has been removed should be returned on the ground that '…there is not an imminent risk to health in so doing.' [Section 1026(a)(ii)]. That may sound strange, since the child should not have been removed in the first instance absent imminent risk. However, facts which at first blush may have appeared to constitute an imminent risk situation may, upon further investigation or reflection, fall short of the stringent removal standard (or an experienced supervisor may reach a different conclusion than the caseworker who first reported to the scene). In that event, it would be counterproductive to wait for a court appearance before undoing the harm. The child protective agency may condition return on the parent's written promise to appear in court [Section 1026(b)]; of course, once a petition has been filed, triggering

Suffice to add that even had the child been removed, with consent, and the petition brought under Family Court Act §1021, as Judge Romeo's signed Order falsely purported (Ex. A, p. 2) based on the Monroe County Law Department's proposed order (Ex. B, p. 2), a hearing, with findings based thereon, would have also been mandated, as §1021 reads:

> "…a hearing shall be held no later than the next court day after the petition is filed and findings shall be made as required pursuant to section one thousand twenty-seven of this article." (underlining added).

Certainly, it is questionable that Judge Romeo even read the petition (Ex. C), as NO impartial, competent judge could have dispensed with a hearing on such a substantively ambiguous, contradictory, and *facially*-deficient petition whose allegations of "sexual abuse" of the child were all in the context of hygienic, bathing, and religious practices, with no allegation that such was for sexual gratification.

> an appearance, the Court would in any event order the issue of a summons [see Section 1035] or, when appropriate, a warrant for the production of the parent [see Section 1037].
>
> The option to return the child is not available when the alleged conduct amounts to child abuse, although the agency may recommend to the court 'that the child be returned or that no petition be filed [subdivision (a)]. The last clause, permitting a recommendation that no petition be filed, conflicts with the subdivision (c) absolute requirement that a petition be filed, indeed be filed almost immediately. (The only way to comply with both provisions may be to file a petition and then move to have it dismissed, a needless and time-consuming exercise.) …It makes no sense to aggravate the familial harm and dislocation by retaining the child pursuant to Section 1024 … Perhaps the legislative thought was that when an allegation of abuse surfaces the child protective agency, acting alone, should not be trusted; however, it would be a rare case where the Court denied the agency's motion for return.
>
> Subdivision (c) was significantly amended by the 2005 Permanency Act to assure a prompt court review whenever any child has been removed without court order. Unless the child is returned by the relevant child protective service on the very day of a removal, the agency must cause a petition to be filed on the court day following the removal. In turn, the Court must conduct a Section 1027 hearing no later than the next court day following the filing of the petition (unless briefly extended for good cause shown)…." (underlining added).

§1026(c) reads:

> "If the child protective agency for any reason does not return the child under this section after an emergency removal pursuant to section one thousand twenty-four of this part on the same day that the child is removed, or if the child protective agency concludes it appropriate after an emergency removal pursuant to section one thousand twenty-four of this part, it shall cause a petition to be filed under this part no later than the next court day after the child was removed. The court may order an extension, only upon good cause shown, of up to three court days from the date of such child's removal. A hearing shall be held no later than the next court day after the petition is filed and findings shall be made as required pursuant to section one thousand twenty-seven of this part." (underlining added).

A.
Judge Romeo's Hearing-Less, Legally-Insufficient, Evidence-Less Findings and Determinations

The Order's findings and determinations – required by §1027 to be based on a hearing – are set forth under the bold-faced words: "**The Court finds and determines that**" (Ex. A, pp. 2-3). Beneath are three sections, identical to the proposed order (Ex. B, pp. 2-3), except as below noted.

The Order's Section I
"Criteria for Temporary Removal of Child"

Under this section heading (Ex. A, pp. 2-3) are three lettered paragraphs of presumed "criteria":

> "**A.** The parents and/or persons legally responsible for the child were asked and refused to consent to temporary removal of the child and was (sic) informed of an intent to apply for an order or removal; and" (Ex. A, p. 2).

This I-A (Ex. A, p. 2) is devoid of a single specific, is so careless that it fails to delete from the proposed order the inapplicable language "and/or persons legally responsible for the child" (Ex. B, p. 2), and does not correct the grammatical error of the singular "was".

It is also ambiguous. The [Parents] refused to consent to temporary removal on February 12, 2021 because they denied the allegations that they had sexually abused and neglected their daughter. This without-consent removal is identified by the petition's ¶32 (Ex. C, p. 11)[14] and its ¶38 (Ex. C, p. 23), under the bold-faced capitalized title heading "**PRIOR REMOVAL WITHOUT CONSENT**", which furnished the specific Family Court Act provision pursuant to which the child was removed without a court order, on February 12, 2021, *to wit,* "Family Court Act Section 1024".

At the February 17, 2021 court appearance (Ex. N-1), the [Parents] continued to deny the sexual abuse and neglect allegations when, nonetheless, they consented to their daughter's temporary removal as a result of Judge Romeo's concealment of the purpose of the §1027 hearing and her affirmative misrepresentation that it would not be the most expeditious way for them to get their child out of foster care and back to them. I-A conceals this February 17, 2021 consent and its circumstances – and that NO hearing was held despite the mandatory directive of §1027.

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[14] "…both Respondents refused to provide consent for the removal of the subject child. The subject child was removed on an emergency basis and placed into foster care."

> "**B.** The child appear (sic) to suffer from abuse and neglect by the parents or persons legally responsible for the child's care; and" (Ex. A, p. 2)

This I-B (Ex. A, p. 2) is devoid of a single specific, is so careless that it fails to correct the proposed order's grammatical error in the plural "appear" (Ex. B, p. 2), and, by the inclusion of the word "appear", concedes the lack of evidentiary support for this supposed finding/determination – no hearing having been held, despite the mandatory directive of §1027.

> "**C**. Immediate removal or, if already removed, continued removal, of the child is necessary to avoid imminent danger to the child's life or health because ***of the allegations that*** [the Child] (age 8) made credible disclosures of sex abuse by the Respondents. [The Child] stated on a routine basis, Respondent [Mother] inserts her finger inside the subject child's vagina and rubs oil all over the subject child's unclothed body. Respondent [Father] is aware his wife, Respondent [Mother] inserts her fingers inside the subject child's vagina and fails to intervene or protect the subject child from the abuse." (Ex. A, pp. 2-3).

This I-C (Ex. A, pp. 2-3) retains the inapplicable words of the proposed order: "Immediate removal or, if already removed" (Ex. B, pp. 2-3) and inserts the handwritten words "***of the allegations that***". Other than that, it mirrors the petition's ¶40 (Ex. C, p. 23), except for the prefatory words of ¶40: "The child should remain removed from the care of the Respondents in accordance with Family Court Act §1027…".

Entirely concealed is that the [Parents] DENIED the allegations of sexual abuse and DENIED that their daughter had made "credible disclosures" of same – and that NO hearing had been held, despite the mandatory directive of §1027.

The Order's Section II
"Required 'Best Interests' and 'Reasonable Efforts' Findings"

Under this section heading (Ex. A, p. 3) are two lettered paragraphs:

> "**A.** Continuation in, or return to, the child's home would be contrary to the best interests of the child because ***of the allegations that*** [the Child] (age 8) made credible disclosures of sex abuse by the Respondents. [The Child] stated on a routine basis, Respondent [Mother] inserts her finger inside the subject child's vagina and rubs oil all over the subject child's unclothed body. Respondent [Father] is aware his wife, Respondent [Mother] inserts her fingers inside the subject child's vagina and fails to intervene or protect the subject child from the abuse. This determination is based upon the following information:
>
> Petition, dated February 16, 2021;
> Report of Suspected Child Abuse or Neglect, dated February 12, 2021;
> Petitioner's ongoing Child Protective Investigation"
>
> (Ex. A, p. 3, bold and underlining added).

This II-A (Ex. A, p. 3) retains the inapplicable words of the proposed order "Continuation in, or" (Ex. B, p. 3) and inserts the handwritten words "***of the allegations that***". Other than that, it mirrors the petition's ¶42 – the sole paragraph under the petition's bold-faced, capitalized title heading "**BEST INTERESTS FINDINGS REQUESTED**" (Ex. C, p. 24) – whose only difference is its substitution of the word "determination" for the word "assertion" which had been followed by the two sources of "information" apart from the petition, *to wit*,

> "Report of Suspected Child Abuse or Neglect, dated February 12, 2021;
> Petitioner's ongoing Child Protective Services Investigation".

However, §1027(b)(ii) expressly requires that a finding of the child's "best interests" include a determination as to:

> "whether reasonable efforts were made…to prevent or eliminate the need for removal of the child from the home and, if the child was removed from his or her home prior to the date of the hearing…, where appropriate, that reasonable efforts were made to make it possible for the child to safely return home". (underlining added).

For this reason and the Court of Appeals' 2004 decision in *Nicholson v. Scoppetta*, (fn. 2, *supra*) and commentary thereon (fn. 11, *supra*), Judge Romeo's Order (Ex. A, p. 3), replicating the proposed order (Exhibit B, p. 3), joins "Best Interests" and "Reasonable Efforts" in its single section II title "**Required 'Best Interests' and 'Reasonable Efforts' Findings'**.[15]

However, the second paragraph under that title heading is FRAUDULENT by the recited facts that it purports "**follow[]:**". Thus, it reads:

> "**B.** Reasonable efforts, where appropriate, to prevent or eliminate the need for removal of the child from the home, and, if the child were removed prior to the date of this hearing, to return them safely were made as **follows:** Petitioner offered assistance with making a safety plan for the subject child's care **outside of the home.** Petitioner transported the subject child to the home of a resource, but the subject child was unable to remain in the home, through no fault of Petitioner or the subject child. Petitioner offered to assist the Respondents with communication with the subject child and offered the Respondents preventive services. This determination is based upon the following information:
>
> > Petition, dated February 16, 2021;
> > Report of Suspected Child Abuse or Neglect, dated February 12, 2021;
> > Petitioner's ongoing Child Protective Investigation"
> >
> > (Ex. A, p. 3, underlining and bold added).

[15] By contrast, the petition has two separate section titles "**BEST INTERESTS FINDINGS REQUESTED**" with its sole ¶42 and "**REASONABLE EFFORTS MADE**" with a sole ¶43 (Ex. C, p. 24).

In other words, the ENTIRE description of "Reasonable efforts" are for "the subject child's care **outside of the home" –** and, as to this, there is NO finding that this was "appropriate under the circumstances", as §1027(b)(iii) also expressly requires:

> "If the court determines that reasonable efforts to prevent or eliminate the need for removal of the child from the home were not made but that the lack of such efforts was appropriate under the circumstances, the court order shall include such a finding." (underlining added).

And the petition itself manifests this identical fraud by its ¶43 – the one and only paragraph under the petition's bold-faced, capitalized title "**REASONABLE EFFORTS MADE**" (Ex. C, p. 24), which reads:

> "43. Reasonable efforts, where appropriate, to prevent or eliminate the need for removal of the child from the home, and, if the child was removed prior to the date of this hearing, to return them safely home, were made as **follows:** Petitioner offered assistance with making a safety plan for the subject child's care **outside of the home.** Petitioner transported the subject child to the home of a resource, but the subject child was unable to remain in the home, through no fault of Petitioner or the subject child. Petitioner offered to assist the Respondents with communication with the subject child and offered the Respondents preventive services. This assertion is based on the following information:
>
> Report of Suspected Child Abuse or Neglect, dated February 12, 2021;
> Other: Ongoing Child Protective Services Investigation."
>
> (Ex. C, p. 24, underlining and bold added).

As to the identical three sources on which the two paragraphs of the Order's "**II. Required 'Best Interests' and 'Reasonable Efforts' Findings**" rely for their purported "determination" (Ex. A, p. 3), all three are frauds:

"Information" Source #1: "Petition, dated February 16, 2021"

The petition, signed by Monroe County Division of Social Services Caseworker Kate Travis and verified by her (Ex. C, pp. 26-27), with an additional signature of Amanda L. Oren, Esq., as Deputy County Attorney (Ex. C, p. 26) was, *on its face*, deficient and contradictory, including, as follows:

- the petition annexed as its only attachment (Ex. C. pp. 28-31) and quoted at ¶5 what it falsely purported to be the "child protective referral" of "a mandated reported (sic) employed in the Brighton School District", stating that "'The mother…and the father…touch eight-year-old [Child's] private areas in a sexual manner on an ongoing basis….The child was caught masturbating in art class and admitting the above information'". However, the petition's ¶¶7-20

pertaining to what the child said at the so-called "forensic interview" that CPS senior caseworker Trisha Kalpin conducted in the presence of CPS caseworker Travis, do not reflect her "admitting" to being "touch[ed]…in a sexual manner" – with ¶9 quoting her as explaining that she had been "itching" in art class because of "dry skin down there";

- the petition failed to annex the purportedly "anatomically correct drawing" (¶¶8, 9, 12) that Ms. Kalpin showed the child during the purported "forensic interview", purportedly with a body part that is the vagina, and which the child identified as the "nuts" – the same word as she used in identifying the buttocks.

- the petition's ¶¶7-20 pertaining to what the child said at the "forensic interview" establish that she did not use the word "vagina" and never said that her mother "inserts her finger inside [her] vagina", contrary to the petition's ¶¶40 and 42;

- the petition's ¶18 pertaining to Ms. Kalpin's question to the child as to whether her parents touched her breasts, to which the child had responded affirmatively was anatomically perverted as that body part, on an eight-year old, is deemed the chest – the word which appears in the same paragraph to describe the routine massages given to the child by her mother;

- the petition's ¶¶10-16 establishing that what the child stated about her mother touching her was in the context of bathing, hygiene, and Hindu practices, NOT lending itself to any inference that it was for sexual gratification and such was NOT alleged by the petition.

"Information Source #2: "Report of Suspected Child Abuse or Neglect, dated February 12, 2021"

What document is this? The inference is that it is the petition's ONLY attachment – referred to and quoted at the petition's ¶5 (Ex. C) as follows:

> "5. On or about February 12, 2021, a referral was received by Child Protective Services, the source being a mandated reported (sic) employed in the Brighton School District, who stated:
>
> > 'The mother [xx] and the father [xx] touch eight-year-old [Child's] private areas in a sexual manner on an ongoing basis.'

> Miscellaneous information contained in the referral dated February 12, 2021
>
> 'The child [xx] was caught masturbating in art class and admitting the above information.'
>
> As a result of the allegations contained in this referral, petitioner began a child protective investigation regarding this family. (Copy of child protective referral, dated February 12, 2021, attached hereto and made a part of this petition.)".

However, the petition's attached "child protective referral" – to which its ¶5 refers and quotes – is NOT the "child protective referral". It is CPS' February 12, 2021 "INTAKE REPORT" – with no quotation marks to indicate the actual words of the "mandated reported (sic) employed in the Brighton School District" making the CPS referral, whose identity the petition did not identify (Ex. C ¶5, p. 29). These actual words of the mandated reporter are set forth by what the petition did not attach or quote: the LDSS-2221A form entitled "REPORT OF SUSPECTED CHILD ABUSE OR MALTREATMENT" that, as required by Social Services Law, Article 6, Title 6, §415 "Reporting Procedure" and so-reflected on the face of the LDSS-2221A form itself, must be furnished to CPS within 48 hours of a call-in.[16]

Contrary to the CPS "INTAKE REPORT", the mandated reporter's LDSS-2221A form (Ex. D-2) does not describe the [Parents] as touching their daughter "in a sexual manner", but in the context of bathing – and makes no mention of masturbation, let alone that the child admitted to this or to her parents touching her "in a sexual manner". In full, the written narrative states:

> "The writer, who is a Social Worker at French Rd elementary, received a phone call that the student, [xx], was 'touching herself' in class. Upon arrival to the art room, the art teacher, Melissa Roland, showed me a video of [the Child] with her hand in her pants, moving her hand back and forth vigorously. She reported that she noticed this about 10 weeks ago and reported it to another counselor. She did not have the student again until recently but started to notice it again.
>
> I asked [the Child] to come talk with me and I explained who I was. She reported that things were going well at school and home. I told her that it was noticed that she was touching her private parts. She said that she was scratching because she has dry skin. We talked about cleanliness and how if it is near her private parts she should go to the bathroom for that, and make sure she washes her hands thoroughly after that. I then asked her if anyone else touches her private parts. She said her mom and dad do when they give her a bath and need to help her clean. She stated that this was 'okay and normal for my family.' She proudly announced that she just recently started to take baths once in a while on her own. I asked her to describe how they help her clean, and she said that they wash their hands well, then put soap on their fingers and wash her private parts with their

[16] The CPS' own Manual (Chapter 2, A-3) identifies that a mandated reporter is required to provide a signed, written report to CPS on an LDSS-2221A form "within 48 hours of making an oral report".

> fingers. She said that mom usually helps her but once in a while dad does. She reports that she takes baths almost daily, but that they don't help her as much as they used to, only on 'special days when she needs to be really clean. I asked her if anyone else touched her private parts and she said only her doctor when she gets check ups. She said she knows that she shouldn't let anyone else touch her there because she learned about it in school. I asked her if she felt uncomfortable or hurt at all when her parents did this, and she said 'not really' and repeated that it was 'normal' several times. I asked her if her parents told her not to tell anyone that they help her clean, and she said they did, but it's okay to tell me because I'm a counselor and have to keep things private. I explained that was true, unless we think someone is being hurt. She said that she was not being hurt, that she was 'okay' with it. I explained that no one, even her parents should really be touching her private parts, and that if she wants to touch herself, she needs to do it in private at home. I told her that we did need to just make sure she was safe and she again repeated that she was. She washed her hands and returned to art class." (Ex. D-2, underlining added).

In other words, the actual February 12, 2021 "REPORT OF SUSPECTED CHILD ABUSE…" (Ex D-2) does NOT describe any kind of emergency situation that would warrant immediate removal of a happy, safe-feeling child from her home – which is why the petition (Ex. C) does not quote it, does not annex it, but, rather, implies a diametrically-opposition situation *via* a false "INTAKE REPORT".

Suffice to add that the petition, by its ¶5 and annexed CPS "INTAKE REPORT", conceals the identity of the "mandated reported (sic) employed in the Brighton School District" who has made the "child protective referral"[17]. She is Tara O'Brien.

The petition does mention Ms. O'Brien, once, in its ¶6, but without identifying her as the "mandated reported (sic) employed in the Brighton School District" who has made the CPS referral described in ¶5. Instead, ¶6 states:

> "According to Petitioning Caseworker, on or about February 12, 2012 (sic), she along with Senior Caseworker Trish Kalpin arrived at French Road Elementary School and met with School Guidance Counselor, Licensed Master Social Worker Tara O'Brien and [the Child] (age 8). Both Petitioning Caseworker and Licensed Master Social Worker O'Brien observed Senior Caseworker Trisha Kalpin forensically interview the subject child."

In other words, the petition not only does not identify Ms. O'Brien as the source of the ¶5 CPS referral, but confers upon her an added and more august title: "Licensed Master Social Worker", for purposes of lending credibility, as an observer, of Ms. Kalpin's so-called "forensic[] interview" of the child.

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[17] Her identity is blacked out in the "INTAKE REPORT" (Ex. C, p. 29).

"Information" Source #3: "Petitioner's ongoing Child Protective Investigation"

This source is completely conclusory, not specifying what CPS had determined in the four-day span since the child was removed from her parents.

ANY "ongoing Child Protective Investigation" of any competent nature remotely complying with the protocols of the New York State Child Protective Services Manual would, in the space of those four days, have already obtained the documentary evidence from which the fraud of the February 16, 2021 petition (Ex. C) and of the proposed order based thereon (Ex. B) were readily verifiable – and such would have been established at the §1027 hearing that was required to be held on February 17, 2021. Among this documentary evidence:

> (1) the LDSS-2221A form (Ex. D-2) that Ms. O'Brien filed with CPS rebutting the "INTAKE REPORT", falsely purported by the petition's ¶5 to be her "child protective referral"[18] (Ex. C);
>
> (2) the "anatomically correct…female drawing" (Ex. E), referred to at the petition's ¶¶8-9, 12 as having been utilized by Ms. Kalpin at the "forensic interview" of the child, rebutting the petition's allegations that the child had pointed to its vagina – as it shows NO vagina. There is only a frontal and back view of a female child, the back view showing the buttocks, and the front view showing not even the vulva, but the pubic area. There were no splayed legs from which a vagina might be even remotely seen.[19] Indeed, if the front drawing was to be purported as showing the vagina and that the child's name for this was "the nuts", the back drawing should have comparably been purported as showing the anus – with the child's name for it also "the nuts". Yet, the petition made no mention of the anus and did not comparably claim that touching the child's buttocks was penetration of her anus. The drawing alone was sufficient to require dismissal of the petition, on grounds of fraud.
>
> (3) Ms. Travis' "investigation progress notes" for February 12, 2021, which she had entered into the CPS' computer system on February 15, 2021 (Ex. F):
>
> - revealing at p. 2: that the child had explained to Ms. O'Brien that she had been "itching" in her art class – and that Ms. O'Brien had told her that this was the reason she was going to be interviewed, *to wit*, "people wanted to see what is going on w/her itching" – in other words, not because she had been "masturbating";

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[18] Such discrepancy between the two should have triggered an investigation by CPS, consistent with the CPS Manual, Chapter 6, L-2: "Suspected false reports".

[19] See, *inter alia*, the Planned Parenthood webpage "What are the parts of the female sexual anatomy?", with both a narrative text and video: https://www.plannedparenthood.org/learn/health-and-wellness/sexual-and-reproductive-anatomy/what-are-parts-female-sexual-anatomy.

- revealing at p. 1: that during the "forensic interview", the child explained her understanding that she was there "because of her 'itching'" – in other words, the child did not admit to be "masturbating", contrary to the petition's ¶5, quoting from the CPS "INTAKE REPORT", falsely purported to be Ms. O'Brien's "child protective referral";

- revealing at p. 2: that the child "did not have a name for the breasts" – thereby contradicting the petition's ¶18;

- revealing at p. 2: that the petition's ¶19 removed the child's explanation for why sometimes "it hurts" when her mother gave her massages and "might squeeze", namely, it was "on accident";

- revealing at p. 2: that the petition's ¶19 had removed the child's explanation for why it "felt 'a little uncomfortable" when her mother was tickling her on the preceding night, namely "because her moms nails were a little sharp and hurt her 'a little bit' because it was rough.";

- revealing at p. 2: that Ms. Kalpin had asked the child "who she could speak w/if she was ever touched or asked to touch someone in a way that was not ok" – and that she had replied that "she could speak w/a parent or her teacher", in other words the child trusted that they would be responsive;

- revealing at p. 3: that Ms. Kalpin seemingly made the decision to remove the child from the parents unilaterally, without indicated consultation of any of the other persons present at the interview, including fellow caseworker Travis, or CPS supervisory staff, including its attorneys[20], or the Monroe County Department of Law – and notwithstanding nothing the child had stated or indicated met the definition of "sexual abuse", as defined by the Family Court Act §1012(e)(iii) and identified by the CPS Manual's Chapter 14, E-13 entitled "Sexual Abuse";

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[20] Chapter 9 of the CPS Manual, entitled "Family Court Proceedings (Article 10)", states, at A-1,

"CPS must be knowledgeable of the provisions contained in FCA Article 10, as the law provides for the specific court procedures to intervene with a family and details CPS responsibilities in such proceedings.

This chapter outlines the relevant provisions of FCA Article 10. When CPS or other LDSS staff have legal questions related to FCA Article 10, however, a consultation with the CPS attorney is required. CPS attorneys can also consult with OCFS legal counsel where appropriate."

- revealing at p. 3: that Ms. Kalpin's decision to immediately remove the child from the parents was without even having spoken to the parents, so as to give them an opportunity to explain their purported "sexual abuse" of their daughter – or to explore whether they would be amenable to alternatives to removing their child from their home[21];

- revealing at p. 3: that the sole purpose of Ms. Kalpin's telephone call to the parents, following the conclusion of the interview, was "to make a safety plan for [the Child] to stay elsewhere for the 3-day weekend", not to give them an opportunity to clarify the situation or explore alternatives to removal;

(4) the further CPS "investigation progress notes"[22] (Ex. O-3) for the case entered into the CPS computer system as of February 17, 2021, revealing:

- no reference to Ms. O'Brien's LDSS-2221A form (Ex. D) – notwithstanding the CPS Manual states: "Upon receiving the LDSS-2221-A, CPS should note it in the progress notes and include the form in the case record" (Chapter 6, F-1);

- no reference to the status of the Brighton Police Department's investigation – notwithstanding the notes identify:

  (i) "a joint investigation with CPS and Brighton PD", with instructions to the assigned caseworkers to "coordinate the investigation with the assigned investigator" (Ex. G, at p. 1);

  (ii) that the police had arrived at the school on February 12, 2021 and that Ms. Travis had spoken to them, following the "forensic interview" of the child, getting from them their "report #" (Ex. F, at p. 3);

  (iii) that [the Mother] advised, on February 15, 2021, that "she and her husband planned on going to Brighton PD today regarding this case as they haven't heard from them yet. Sr.

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[21] The CPS Manual's Chapter 8 entitled "Service Provision and Development of a FASP with a Protective Program Choice; Chapter 5, entitled "Family Assessment Response".

[22] According to the CPS Manual, Chapter 6, I-1,"CPS investigation progress notes":
"The notes must: • state the actions taken in the investigation, including emergency and/or controlling interventions taken, • describe all communications and interactions with the subject, children, other persons named in the report, source, and collateral contacts, • describe any other activities undertaken to collect information needed to formulate an assessment or make a determination regarding the report of abuse or maltreatment, and • document caseworker/supervisor conferences, including the matters discussed and any required follow-up activities."

> CW [Kalpin] explained that an investigator had just been assigned to their case from the police department and that the assigned investigator and CW would be reaching out to them tomorrow to follow back up with them." (Ex. O-3, p. 10);

- that already on February 12, 2021 CPS had determined that there was "no CPS history" for either respondent-parent (Ex. G, pp. 1-2);

- that already, by the early afternoon of February 16, 2021, Ms. Travis had the results of the REACH clinic's physical examination of the child, finding no evidence of sexual abuse (Ex. O-3, at p. 21) – and that, two hours later, she apparently did not reveal that to [the Father], in a phone conversation, noted as follows (Ex. O-3, p. 22):

> > "[The Father] asked if [the Child] also saw a doctor. I told him that she had a medical exam today at the CAC. He asked about the doctors findings. I told him that the final report is not available at this moment. He asked if it would be tomorrow. I told him that I wasn't sure.
> >
> > [The Father] said that he knows they have court tomorrow…"

(5) handwritten "investigation progress notes" pertaining to February 12, 2021 and the four-plus days until February 17, 2021 NOT entered into the CPS computerized system,[23] most importantly, Ms. Kalpin's handwritten note for February 12, 2021 – *if, in fact, it existed* – that she would enter into the computer on February 26, 2021 (Ex. H), which materially diverged from Ms. O'Brien's LDSS-2221A form (Ex. D-2) by both affirmative statements and material omissions. In full, this belatedly-entered February 12, 2021 note stated:

> "Sr. CW contacted SW O'Brien who confirmed the details of the report. She explained that she was contacted by [the Child's] art teacher, Melissa Roland due to an incident that occurred this afternoon during art. Specifically, Ms. Roland observed [the Child] masturbating in art class. She explained that the teacher took a video of [the Child's] actions and sent it to her (SW Tara O'Brien) school issued IPad. She explained in the video [the Child] can be seen vigorously masturbating. She explained that she went to the art class and had [the Child] come to the office with her. She reported she followed up with [the Child] about the incident in her art class and [the Child] stated 'my mom and dad touch my private parts.' She reported that [the Child] stated her mom touches her privates more

[23] These handwritten notes are part of the CPS file – revealed by Ms. Kalpin on June 17, 2021, during the cross-examination of the [Parents'] then attorney Nathan Van Loon, Esq. (Ex. N-14, pp. 18-21, 26-27).

> often than her dad and 'my mom washes me inside my private with her fingers.' She reported that [the Child] proceeded to explain that this happens 'a lot less than it used to' and 'only on special occasions when I have to be very clean'. [The Child] explained 'It's ok because it is normal for her family'. [The Child] stated that 'they told me not to tell anyone, but you are a counselor and it will be private.
>
> Sr. CW inquired how old the student was and if she had any delays or development delays. She reported that [the Child] was eight years old and was very bright. Sr. CW inquired why the teacher took a video of the incident. She explained the teacher felt it was necessary to take a video because she has previously addressed this issue with mom and did not feel mom took her seriously.[24] Sr. CW advised SW O'Brien not to show anyone else the video or show anyone else the video aside from LE. Sr. CW informed SW O'Brien that herself and another CW would be at the school shortly to meet with [the Child]. She advised CW that [the Child] would be in the main office with her." (Ex. H, underlining and footnote added).

All such documentary evidence, dispositive that petitioner had NO probable cause for ANY petition under Family Court Act Article 10, let alone for having removed the child pursuant to §1024, would have been adduced at a hearing, from the witnesses whose testimony the respondent-parents would have been entitled to. Most importantly: (1) Kate Travis, the CPS case worker who had signed the petition and wrote the "investigation progress notes" for the February 12, 2021 "forensic interview"; (2) Trisha Kalpin, the CPS senior case worker who had conducted the "forensic interview" of the child; (3) Tara O'Brien, the school social worker and mandated reporter who had made the CPS referral; (4) Melissa Rolland, the child's art teacher, who launched it all; and (5) the child herself.

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[24] This contrasts with Ms. Travis' "investigation progress notes" for February 12, 2021, stating:

> "SW Tara O'Brien said that Vinchenza's art teacher, Melissa Rolland, took the video of [the Child] touching herself in class. When asked why Melissa took the video, Tara said Melissa told her she had mentioned [the Child] touching herself before and didn't feel that people took it seriously, so she felt someone needed to see it. (Ex. F, p. 3).

Based on Ms. O'Brien's LDSS-2221A form (Ex. D-2), the referred-to "people" may in fact be just one: "another counselor" – and this may well have been the class counselor, Marguerite Opett, who, on February 12, 2021, was not at the school, but to whom Ms. O'Brien would e-mail the LDSS-2221A form, at 3:31 p.m., with the subject line "You owe me!" and a message reading: "CPS on their way now to interview 😊" (Ex. D-1).

The Order's Section III
"Findings Regarding Alternatives to Removal to Foster Care"

Under this section heading (Ex. A, p. 3) are two lettered paragraphs:

> "**A.** Based upon the investigation conducted by the Monroe County Department of Human Services, there is no non-respondent parent, relative or suitable person with whom the child may appropriately reside."

Aside from the fact that "Alternatives to Removal to Foster Care" are only relevant where there has been a finding, based upon a hearing, that removing the child from the home is in her "best interests" – which, as hereinabove demonstrated, was not done – the finding as to "alternatives to removal to foster care", mandated by §1027(b)(ii), was required to be based NOT on the circumstances that existed on February 12, 2021, when the child was taken into foster care, but as of the February 17, 2021 date of the hearing – and based on testimony from respondent-parents as to whether, in the nearly five days that had elapsed since February 12, 2021, they could identify a "relative or suitable person with whom the child may appropriately reside". This III-A essentially mirrors ¶44 of the petition, which, under the title heading "**SUITABLE RESOURCE**" (Ex. C, p. 25), read:

> > "Upon information and belief, and based upon Petitioner's investigation, there is no non-respondent parent, relative or suitable person currently identified with whom the child may appropriately reside."

> "**B.** Imminent risk to the child would not be eliminated by the issuance of a temporary order of protection or order of protection directing the removal of [the Mother] and/or [the Father] from the child's residence."

This bald conclusion, not based on a hearing, does not identify a single specific as to why a temporary order of protection, as provided for by §1027(b)(v), would not, by removing "[the Mother]…from the child's residence", eliminate any "imminent risk" to the child. Nor does this purported finding embrace such other, less drastic orders of protection that §1027(c) enables a court to make, upon the hearing, for "good cause shown", pursuant to Family Court Act §1056, whose pertinent language reads:

> "1. The court may make an order of protection in assistance or as a condition of any other order made under this part. … The order of protection may set forth reasonable conditions of behavior to be observed for a specified time by a person who is before the court and is a parent or a person legally responsible for the child's care… . Such an order may require any such person
>
> > (c) to refrain from committing a family offense, as defined in subdivision one of section eight hundred twelve of this act, or any criminal offense against the child…;
> > …

> (e) to refrain from acts of commission or omission that create an unreasonable risk to the health, safety and welfare of a child;
> …
> (i) to observe such other conditions as are necessary to further the purposes of protection."

There was ZERO evidence that an order of protection tailored to the alleged "sexual abuse" would not have sufficed. Indeed, ALL indications were that the [Parents] were responsive, devoted parents concerned about their child's health and welfare and would comply with "reasonable conditions" pursuant to Family Court Act §1056.

This III-B (Ex. A, p. 3) is an abridgment of the petition's comparably deficient ¶45 (Ex. C, p. 25), reading:

> "Upon information and belief imminent risk to the child would not be eliminated by the issuance of a temporary Order of Protection or Order of Protection directing the removal of Respondent [Mother] and/or Respondent [Father] from the child's residence based upon the following facts and for the following reasons: Respondent [Mother] and Respondent [Father]i are the sole caretaker of the subject child in the family home, and no other adult custodian has been identified, who will assume care of the child in the family home."

B.
Judge Romeo's 16 Ordering Paragraphs,
Rendered Without a Hearing and Without Findings and Determinations Based Thereon, are VOID, *as a Matter of Law*

After twice purporting that a hearing was held – and after concealing that the above so-called findings/determinations were not made upon a hearing – Judge Romeo's Order (Ex. A, p. 3) states in bold-faced type: "**NOW, therefore, it is**". 16 ordering paragraphs then follow (Ex. A, pp. 3-6) – identical to those of the proposed order (Ex. B, pp. 3-6), excepting the blacking out, in four places, of lines for insertions, plus the handwritten insertion of "Oct 1, 2021 @9:45" for when "a permanency hearing shall be held".

Most pertinent of these 16 ordering paragraphs:

> "ORDERED that the application for removal of the child is hereby granted; and it is further
>
> ORDERED that, pending further proceedings the child shall be placed in the care and custody of the Monroe County Department of Human Services, Division of Social Services; and it is further
>
> …

ORDERED that the child protective agency arrange for the following services or assistance to the child and their family pursuant to section 1015-a or 1022(c) of the Family Court Act: [line for insertion blacked out]; and it is further

…

ORDERED that [the Mother] (DOB: 08/23/1978) and [the Father] (DOB: 03/21/1977) are required to comply with the terms and conditions specified in the order of protection, issued pursuant to Family Court Act 1029, incorporated into this order and made a part hereof; and it is further

ORDERED that [the Mother] (DOB: 08/23/1978) shall comply with the following Order of Protection:

a. refrain from committing a family offense or any criminal offense against the child or against any person to whom custody of the child is awarded, or from harassing, intimidating or threatening such person.
b. Abstain from offensive conduct against the child or against any caretaker of the child.
c. Refrain from acts or omission or commission that create an unreasonable risk to the health, safety and welfare of the child.
d. Inflict no corporal punishment on the child.

and it is further

ORDERED that [the Father] (DOB: 03/21/1977) shall comply with the following Order of Protection:

a. refrain from committing a family offense or any criminal offense against the child or against any person to whom custody of the child is awarded, or from harassing, intimidating or threatening such person.
b. Abstain from offensive conduct against the child or against any caretaker of the child.
c. Refrain from acts or omission or commission that create an unreasonable risk to the health, safety and welfare of the child.
d. Inflict no corporal punishment on the child.

and it is further

ORDERED that Respondents shall have visitation with the child, as arranged and supervised by the Monroe County Department of Human Services, Division of Social Services or by a person or agency approved by the Monroe County Department of Human Services, Division of Social Services; and it is further

ORDERED that the Monroe County Department of Human Services, Division of Social Services shall notify the Respondent(s) of Uniform Case Review (Social Services Law §409-e) conferences and their right to attend such

> conferences and have counsel or some other representative or companion present with them; and it is further
>
> ORDERED that if the child remain (sic) in foster care or is directly placed pursuant to Sections 1017 or 1055 of the Family Court Act, a permanency hearing shall be held on: Oct 1, 2021 @9:45".

All 16 ordering paragraphs (Ex. A, pp. 3-6) are VOID, *as a matter of law*, as §1027 does not authorize a court to make any order except upon a hearing, with findings and determinations based thereon – with all parties afforded the right to be heard. Moreover, as hereinabove shown, the findings and determinations that Judge Romeo purports to have made are TOTALLY deficient and sham.

II.
Family Court Act §1027(a)(ii) Imposed Ongoing Obligations upon Monroe County Deputy Attorney Ricci – and Empowered Attorney for the Child Tasikas and Judge Romeo

So important is the essential question as to "whether the child's interests require protection pending a final order of disposition" that Family Court Act §1027(a)(ii) provides:

> (a)ii. "In any such case where the child has been removed, any person originating a proceeding under this article shall, or the attorney for the child may apply for, or the court on its own motion may order, a hearing at any time after the petition is filed to determine whether the child's interests require protection pending a final order of disposition. Such hearing must be scheduled for no later than the next court day after the application for such hearing has been made." (underlining added).[25]

Subsequent to February 17, 2021, Monroe County Deputy Attorney Lori-Ann Ricci knew – beyond what she may be presumed to have known prior thereto, including from the *face* of the February 16, 2021 petition (Ex. C) – that the petition suffered from legal and evidentiary infirmities – imposing upon her the duty, pursuant to §1027(b)(ii), to apply for a hearing "to determine whether the child's interests require protection pending a final order of disposition". These infirmities – and the fact that no §1027 hearing had been held on February 17, 2021 (Ex.

---

[25] Also see Family Court Act §1027(a)(iii):

> "In any case under this article in which a child has not been removed from his or her parent…, any person originating a proceeding under this article or the attorney for the child may apply for, or the court on its own motion may order, a hearing at any time after the petition is filed to determine whether the child's interests require protection, including whether the child should be removed from his or her parent…, pending a final order of disposition. Such hearing must be scheduled for no later than the next court day after the application for such hearing has been made."

N-1) – would also have been apparent to Attorney for the Child Tasikis and Judge Romeo. Yet none took action consistent with §1027(b)(ii), instead subjecting the respondent-parents and their child to the unwarranted separation and suffering created by the February 17, 2021 Order (Ex. A) that had not only totally denied them of due process, but had, by affirmative falsehoods, concealed the due process deprivations.

Indeed, at the second court appearance on February 22, 2021 (Ex. N-2), the subject child was still effectively unrepresented – as Ms. Tasikas had inexplicably kept the child "in the dark" about why she had been removed from her family, as to which the child had no knowledge:

> "Judge, I wanted to put our position on the record. We did have an opportunity to interview [the Child], not at length or as much as we will, but we did get an overview of her position and update about what's happening in foster care. What I would like the Court to know is that my client is eight years old and very intelligent, articulate young woman and completely – she is a little bit baffled about why she is in foster care right now. She is confused. The Court is aware she has a culturally specific home life. I think being in foster care at this point is a challenge for her and very difficult for her. My concern, of course, is that she is being re-traumatized at this point by being in this situation without understanding why she is there. I understand that's part of my job, but I'm trying to do this in an age appropriate way, not give her too much information at this time. … I just want this to be clear that my client is blind-sided about what is going on around her and has no context to understand what is going on around her…." (Ex. N-2, pp. 9-10).

As Ms. Tasikas herself recognized, it was her "job" to have apprised her "very intelligent, articulate" eight-year old client that she had been removed from her parents because she had supposedly made "credible disclosures" of sexual abuse and neglect by them, so that her client might instruct her on the subject, including as to whether the interpretation of her supposed "disclosures" was correct. Instead, Ms. Tasikas proceeded as if the allegations were true and that her client needed to be protected from the mother, who would have to be out of the house in order for her client to be returned to the father, with visitation by the mother supervised. Indeed, although Ms. Tasikas supported the request made by [the Father's] lawyer, Maria Reed, Esq., for immediate return of the child to the father if [the Mother] was going to be moving out that day, she made no objection – on either legal or evidentiary grounds – to Judge Romeo's assertion to Ms. Reed, without any hearing having been held:

> "I read that petition, it's very concerning and <u>your client would not be a respondent unless the Department alleged good cause. And I found good cause</u> on Friday.[26] There are some things very concerning to me." (Ex. N-2, p. 9, underlining and footnote added);
>
> "…what I'm most concerned about <u>the sex abuse allegations contained within this petition</u>. And that they are clearly allegations, Ms. Reed, I understand that, but mother's case certainly probably is in a different position than father's case, but

[26] The prior first court appearance, on February 17, 2021, was a Wednesday.

> there are allegations in the petition that father was aware of everything going on in that home and didn't take any actions regarding the allegations. So, until everything is in place, I'm not going to return that child. I think the significant abuse, alleged abuse, against this child certainly outweighs the cultural differences we have now. I cannot return the child home unless everything is in place. I would be remiss if I did. My job is very difficult and I need to make sure there is a balancing act, and seriously, the sex abuse allegations outweigh any cultural difference that I see." (Ex. N-2, pp. 12-13).

Obviously, if the petition's allegations of sex abuse – on which Judge Romeo was relying – were untrue, the child was being victimized by the complete absence of due process by which she had been taken from her parents. Yet, Ms. Tasikas had NOT discussed the petition's allegations with the child, as she admitted on February 22, 2021 (Ex. N-2, pp. 9-10), and, inferentially, had NOT discussed with the child the terms that Judge Romeo and the petitioner were requiring be "in place" if the child was to be returned home, let alone asked what the child thought about them.

Compounding this, Ms. Tasikas gave ZERO indication of having taken any steps, on the child's behalf, to investigate whether she had made the "credible disclosures" upon which the petition's "sex abuse" allegations rested. Indeed, it was [the Mother], not Ms. Tasikas or Ms. Reed, who, at the February 22, 2021 proceeding, raised the issue of access to "[her] daughter's statements" and asked "what is the procedure" (Ex. N-2, p. 20).

Only then did Ms. Reed state that she "did request discovery from the Department" (at p. 21), to which Ms. Ricci responded:

> "So, Judge, case worker did get the case ready for discovery on Friday. It was either sent over electronically Friday or will be today…" (at p. 21).

It appears that it was not until March 2, 2021 that Ms. Ricci made discovery,[27] consisting of:

(1) the February 12, 2021 so-called "child protective referral" (Ex. O-1) identified at ¶5 of the petition as "attached hereto and made a part of this petition" (Ex. C, pp. 28-31), which was, in fact, the CPS' "INTAKE REPORT";

(2) the "female and male anatomically correct drawings" (Ex. O-2), identified at ¶8 of the petition as used at the February 12, 2021 "forensic interview" of the child, with references at ¶9 to "anatomically correct female drawings vagina" and at ¶12 to "the female anatomically correct drawing", showing no vagina or even vulva;

---

[27] Ms. Ricci asserted, at ¶14 of her July 21, 2021 affirmation in opposition to the [Parents'] July 7, 2021 summary judgment/dismissal motion: "The agency case file regarding the child protective referral in the pending matter, including progress notes, was produced for discovery by all counsel on February 24, 2021." That does not appear to be accurate. Firstly, it appears Ms. Ricci did not make production until March 2, 2021. Secondly, production was materially deficient, missing, *inter alia*, the ACTUAL "child protective referral" – this being Ms. O'Brien's LDSS-2221A form (Ex. D-2) and the two "investigation progress notes" that Ms. Kalpin would enter on February 26, 2021 (Ex. H, Ex. I).

(3) the "investigation progress notes" (Ex. O-3) that had been entered in CPS' computer system through February 23, 2021 – and, among them,

(i) CPS supervisor Nicole Nelson's note for February 12, 2021, entered February 12, 2021, which should have been the first note, but was not (Ex. G, p. 1),

(ii) Supervisor Nelson's note for February 12, 2021, entered February 15, 2021 (Exhibit G, pp. 1-2); and

(iii) Ms. Travis' note for February 12, 2021, entered February 15, 2021 (Ex. F);

(4) the February 16, 2021 results of the REACH clinical examination of the child (Ex. O-4), finding no evidence of sexual abuse;

NONE of these corroborated the petition's allegations that "[the Child] stated on a routine basis, Respondent [Mother] inserts her finger inside the subject child's vagina" – the basis for the petition and removal of the child.

Indeed, at the next court appearance, on March 4, 2021 (Ex. N-3), [the Mother] herself highlighted that the allegation that she "inserts her finger inside the subject child's vagina" was NOT in the progress notes. The colloquy was as follows:

March 4, 2021 transcript (Ex. N-3, pp. 24-25)

[Mother]: So this question is for – and you as well as to Ms. Ricci as well as to Elena and to my husband's attorney. I would like to point out in my child's progress notes where did my child use the words 'finger,' 'insert' and 'vagina'? Could you please direct me? I'm trying to find these words in the progress report.

Court: So perhaps – I – I am not privy to progress notes. This is by function of – a subpoena for time of trial. So I cannot answer those questions.

[Mother]: Judge, you do not read the progress notes? Is that what you are stating?

Court: Under the law I'm not entitled to them until the time of trial. No. I'm only allowed to look at the petition that's pending, ma'am.

[Mother]: Even in the petition. Not in the order, in the petition where did my child state a finger, insert and vagina?

Court: Okay. So, counsel, if someone wants –

[Mother]: Can I see that?

Court: I'm going to give a trial date and I'm going to give a scheduling order. Counsel, while – if Ms. Ricci or someone wants to look at that petition while I'm doing that. I do need to do that right now.

March 4, 2021 transcript (Ex. N-3, p. 37)

[Mother]: Last comment, last point that I would like to say. So today in this court whatever has happened has denied to answer when I have asked where to point out where the finger or vagina or insert has been noted in the progress notes. Because these three, I couldn't find it. And no one here, of all the four people who are present, no one has directed me or shown me where these three words are in my child's statement. So you have –

Court: Ma'am, I don't believe that that is the Court's job, is to point out specific things in the petition.

If you have a question, again, those are – those are perhaps things you should be speaking with an attorney about or, you know, that would be a question for the time of trial as well. Those are triable issues as to whether or not the Department has sustained their burden at the time of trial or a motion can be made at any time prior to that."

That Ms. Travis' "investigation progress notes" (Ex. F) did NOT support the petition she signed (Ex. C) was not the only problem to which [the Mother] alerted Judge Romeo and counsel. She also alerted them to the petition's manipulation of language:

March 4, 2021 transcript (Ex. N-3, pp. 12-13)

[Mother]: …It's a false case. …

Because – definitely. Because in this my child is eight-year-old. Eight-year-old doesn't get a breast. I know you all have your children, you all have daughters. Any eight-year-old doesn't have a breast.

But in this application my daughter is shown, presented as if she has breast. Which is very derogatory and very insulting and humiliating. They should not have used as a breast. They should have said it as a chest. And they sexualized that chest as a breast and they showed as mom and dad are touching the breast.

I wonder in this case if Trisha has asked my child to undress herself and if she's seen my child's breast? Did she see that she has a breast? Why did the breast come into the complaint?

> I feel very – when I'm reading the complaint, Judge, I and my husband, and we are not able to read that statement. Because it's been as a breast.
>
> And when you, all the four attorneys who might be the moms here, and if my case is going to someone, child is shown as having a breast. Where is a breast here for my eight-year-old child?

[Father]: Correct.

[Mother]: What part of the – do you call your babies having a breast?

Court: So, ma'am, some of the things you're raising I'm sure Ms. Reed will speak to her client about how petitions are drafted and make appropriate arguments when they're supposed to be made. And that is what an attorney would do on your behalf as well and would be able to explain to you the process.

And I certainly understand though. I understand. Maybe it's a cultural difference.

[Mother]: No, Judge. It's not a cultural difference. And you can – and I totally understand we are doing this in the best interest of the child, but this is worse interest of the child where you are sexualizing the chest into the breast.

This is very unethical on the part of the person who has drafted this petition, showing my child's chest as a breast. Very unethical, Judge, and very derogatory and humiliating my child and the parents…"

From [the Mother's] statements at the March 4, 2021 proceeding (Ex. N-3), it would have been readily apparent to Judge Romeo what Ms. Ricci and Ms. Tasikas may be presumed to have recognized from the discovery materials, namely, that the petition was factually unfounded, indeed deliberately distorted – and the product of profound insensitivity and disrespect for Hindu customs and practices. All three had on-going responsibilities pursuant to §1027, which they ignored, failing even to take the most obvious and called-for step of having the "very intelligent, articulate" eight-year old child brought in for an interview so as to clarify what – at best – was ambiguous in the petition (Ex. C) and Ms. Travis' "investigation progress notes" (Ex. F) as to the child's supposedly "credible disclosures".

Instead, Judge Romeo proposed – and the attorneys agreed – to a scheduling order that put the trial of the case five months away – completely unconcerned that the [xx] parents and child would thereby be forced to endure conditions imposed by Ms. Ricci and ordered by Judge Romeo, based on a palpably false and contrived petition, which a §1027 hearing would have readily revealed. [The Mother] spoke eloquently about what they were facing:

March 4, 2021 transcript (Ex. N-3, p. 27)

"…if you separate my child this long it is going to impact our health. It is going to – financially we will become like very weak. Mentally we will become weak. Health-wise we will become weak. And you're torturing all of us by putting it until August 6th."

March 4, 2021 transcript (Ex. N-3, p. 29)

"If I don't have my daughter's contact and financially we'll incur these expenses and mentally I will be tortured. My child will be – is under trauma right now. My husband work and school is being disturbed because of you not allotting the time because your calendar is full until August 6th."

March 4, 2021 transcript (Ex. N-3, p. 33)

"…this is going to incur lot of money for us. The hotel expense and the food. And all the – all the things is going to devastate the whole family. At least we need some break from this whole ridiculed case, false case."

Suffice to add that at the March 4, 2021 proceeding (Ex. N-3), Ms. Tasikas gave NO update as to whether she had finally apprised her client of the allegations of the petition that had resulted in her being placed in foster care – and what her client's response had been. Nor did Judge Romeo make the slightest inquiry. Instead, Ms. Tasikas continued to subject her unknowing client to conditions based on "credible disclosures" her client had never made.

March 4, 2021 transcript (Ex. N-3, pp. 8-9)

Tasikas: At this point I don't have too many comments.

We did have an opportunity to meet with [the Child]. She's a very bright, articulate young woman. It is her – she was very excited about the prospect of returning home. I didn't speak to her after she's been home. And she is interested in having as much contact with her mother as possible. So if Mom and Dad can have some relative resources or some resources that would be able to supervise these visits, I would encourage them to give those names to the caseworker so that my client can have more contact with mother hopefully.

Following the March 4, 2021 proceeding (Ex. N-3) and based on the proceedings of February 22, 2021 (Ex. N-2), Judge Romeo signed a further order, submitted to her by Ms. Ricci, which stated:

"ORDERED that the terms of the [February 17, 2021] Order shall continue in full force with the following modification(s):

1) Upon approval of the Monroe County Department of Human Services, Division of Social Services (MCDHS), the child [xx] shall be released on a trial discharge to her father [xx] under the supervision of the Monroe County Department of Human Services.

2) Respondent [Mother] shall vacate and stay away from the residence located at 316 Wintergreen Way, Rochester, NY 14618, unless approved by the Monroe County Department of Human Services.

3) Respondent [Father] shall keep Respondent [Mother] away from the child's residence unless approved by the Monroe County Department of Human Services.

4) Respondents [Father] and [Mother] shall not speak to the child about the pending case or court proceedings.

5) Respondents [Father] and [Mother] shall cooperate with preventive services arranged by the Monroe County Department of Human Services and follow recommendations.

6) Respondent [Father] shall notify the caseworker about child care plans and the identity of any child care providers.

7) Respondent [Father] is not approved to supervise in person visits between Respondent [Mother] and the child. Father is approved to supervise telephone and virtual contact between the mother and the child and shall terminate the contact in the event of any inappropriate contact.

8) Respondents [Father] and [Mother] shall cooperate with the Monroe County Department of Human Services, Division of Social Services caseworker(s) and allow reasonable access to the home and the child for scheduled and unscheduled visits."

The prefatory paragraph stated it was "upon the consent of all persons appearing in this matter. This included "Elena Tasikas, Esq., Attorney for the child", who never claimed to have informed her client of the "credible disclosures" she was purported to have made that were the predicate for the Order.

III.
The March 24, 2021 and March 26, 2021 Letters Required Dismissal of the Petition, *as a Matter of Law*, and Triggered Responsibilities and Duties Pursuant to Family Court Act §1027(b)(ii) – So, too, the Withdrawn , but Served, March 30, 2021 CPLR §3211(7) Dismissal Motion

By letters dated March 24, 2021 and March 26, 2021 (Ex. M-1, Ex. M-2) – to which all counsel were cc'd – [the Mother's] newly-retained attorney Anjan Ganguly, Esq. furnished Judge Romeo with pertinent particulars as to both facial and evidentiary deficiencies of the petition so that, in the words of his March 24, 2021 letter (Ex. M-1), she could "promptly dismiss the within petition, or alternatively vacate or modify any pending removal orders or orders of protection so that my client may be allowed to return home." All counsel were present for a March 25, 2021 court conference before Judge Romeo's law clerk, at which Mr. Ganguly discussed the content of the March 24, 2021 letter.

The facts and law presented by Mr. Ganguly's two letters and at the March 25, 2021 conference were then – as now – sufficient for the requested dismissal/vacatur relief. Here excerpted are the parts pertaining only to the petition's pleading deficiencies, requiring dismissal for failure to state a cause of action, and pertaining to the "investigation progress notes", devoid of any statement by the child that her mother ever digitally penetrated her vagina with her fingers, requiring dismissal based on evidence.

The March 24, 2021 Letter

In pertinent part, Mr. Ganguly's March 24, 2021 letter (Ex. M-1) stated:

> "The gravamen of the instant petition is that [the Mother] sexually abused her eight-year-old daughter, [xx], by touching the child's intimate areas. …
>
> It is clear from the factual allegations set forth in the petition that the alleged touching was done in the context of bathing the child and applying oils or lotions on the child's body. Indeed, **the petition does not allege that [the Mother] ever touched her daughter for any sexual purpose**.
>
> …
>
> To the extent that the petition alleges anything that might remotely constitute sexual abuse, those allegations are set forth in paragraph 12 of the petition, which alleges *inter alia* that [the Mother] 'places the oils on her hands and then inserts her fingers inside the subject child's 'nuts' a/k/a vagina.' On this point, [the Mother] categorically denies that she has ever inserted her finger into her daughter's vagina. She acknowledges that despite any cultural differences, such conduct is as unacceptable in Indian culture as it is in American culture.
>
> Notwithstanding the allegation in para. 12 of the petition, it is unclear from CPS's Investigation Progress Notes ('Notes') that either the child or [the Mother] ever actually said that my client 'inserted her fingers' into the child's vagina. The Notes dated 2/15/21 indicate that the child 'said that her mom

sometimes puts the oil inside to 'get the bacteria out.' (Notes, 2/15/21, at pg. 2.) The Notes later state that 'Sr. CW explained that [the Child] did disclose that while she was massaging her [the Mother] placed here [sic] fingers inside her vagina.' (Notes, 2/15/21, at pg. 4.) In other words, the Notes indicate that the caseworker told [the Mother] that the child said that [the Mother] 'placed here [sic] fingers inside her vagina.' But, the Notes do not state that *the child ever said* that [the Mother] *inserted* her fingers into her daughter's vagina. The phrase 'inserts her fingers inside the subject child's 'nuts' a/k/a vagina' as used in the petition, has a different, more illicit, connotation than what the Notes indicate the child actually said: 'puts the oil inside to 'get the bacteria out.'' It should also be highlighted that the physical exam of the child conducted by the REACH clinic indicated no evidence of penetration.

All that being said, **even if all of the allegations set forth in the petition were true, the petition fails to set forth a *prima facie* case of abuse** within the meaning of Art. 10. Family Court Act §1012(e) provides in pertinent part:

> (e) 'Abused child' means a child less than eighteen years of age whose parent…
>
> (i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protected disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or
>
> (ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means…
>
> (iii)
>
> (A) **commits, or allows to be committed an offense against such child defined in article one hundred thirty of the penal law**; [Emphasis added.]
> (B) [concerning prostitution];
> (C) [concerning 'offenses affecting the marital relationship'];
> (D) [concerning sexual performance of a child]; or
> (E) [concerning sex trafficking].

The only subsection of §1021 that could possibly apply here is (e)(iii)(A), 'commits, or allows to be committed an offense against such child defined in article one hundred thirty of the penal law.' The petition does not allege that [the Mother] inflicted physical injury or created the risk of such injury within the meaning of 1012(e)(i) or (ii); and clearly §§1012(iii)(B) through (E) do not apply here.

However, **the allegations of the petition do not satisfy the elements of any offense defined in Penal Law Art. 130**. On a *strained* reading of Art. 130 the only offenses that might, for the sake of argument, fit the allegations in the petition are forcible touching (PL §130.52) and sexual abuse in the first, second, or third degrees (PL §§130.55, 130.60, and 130.65). Each and every other offense defined in Art. 130 includes elements that are plainly absent in the instant case. For example, rape (PL §§130.25, 130.30, 130.35) requires sexual intercourse; criminal sexual act (PL §§130.40, 130, 45, 130,150) requires oral and anal sexual contact. Aggravated sexual abuse in the second or fourth degrees (PL §§130.65-a, 130.67) involves inserting 'a finger in the vagina' but 'includes an element of 'physical injury' which is not present in this case.

While Penal Law §§130.52, 130.55, 130.60, and 130.65 involving touching of intimate parts, those sections also **require that the touching be for some sexual purpose**. Penal Law §130.52 provides, in pertinent part:

> A person is guilty of forcible touching when such person intentionally, and for no legitimate purpose:
>
> 1. forcibly touches the sexual or other intimate parts of another person **for the purpose of degrading or abusing such person, or for the purpose of gratifying the actor's sexual desire**… [Emphasis added.]

There is no allegation in the petition – nor is there any logical reading of the petition – that would suggest that [the Mother] touched her daughter 'for the purpose of degrading or abusing such person, or for the purpose of gratifying the actor's sexual desire.'

Penal Law §§130.55, 130.60, and 130.65 (sexual abuse in the first, second, or third degrees) each require that a person 'subjects another person to sexual contact.' 'Sexual contact' is defined in §130.00(3) as follows:

> 'Sexual contact' means any touching of the sexual or other intimate parts of a person **for the purpose of gratifying sexual desire of either party**. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed. [Emphasis added.]

Again, the petition does not allege, nor does it lend itself to any rational interpretation, that [the Mother] touched her daughter 'for the purpose of gratifying sexual desire.'

> …the question before this court is…whether my client sexually abused her daughter. Based on the foregoing, the instant petition does not even allege that [the Mother] sexually abused her daughter within the meaning of Article 10. For that reason, the petition should be dismissed and any pending orders of removal or protection should be vacated.
>
> Alternatively, and minimally, the petition fails to support a finding that the child is in any imminent risk by her mother being present in the home. This court should vacate or amend any pending removal orders or orders of protection so as to allow [the Mother] to return home to her child.
>
> …
>
> If the court is not inclined to promptly vacate or modify the pending orders of removal and protection so as to permit my client to return home, I would request a hearing pursuant to Family Court Act §1028, to be held within three (3) days of the date of this letter." (bold, underlining, and italics in the original).

The March 26, 2021 Letter

In pertinent part, Mr. Ganguly's March 26, 2021 letter (Ex. M-2) stated:

> "I am writing in connection with the '1028 Hearing' in the above-referenced matter, scheduled for March 29, 2021. In sum and substance, the argument set forth below is that the court should return the child to the custody and care of her mother because doing so presents no imminent risk to the child's life or health. Moreover, the petition sets forth no allegations that could give rise to a finding of imminent risk.
>
> …
>
> It is unclear from the petition what imminent risk my client allegedly poses to the child. The Department hasn't established that my client ever posed a risk in the first instance, since the petition fails to set forth a *prima facie* case of child abuse. This point is outlined in my letter of March 24, 2021. A copy of that letter is attached hereto and incorporated herein by reference.
>
> It was pointed out at yesterday's conference that my March 24, 2021 letter addressed the abuse cause of action, but not the neglect cause of action. I will address that issue here.
>
> Although the petition includes a boldfaced heading that purports to state a cause of action for Neglect, it is unclear that cause of action is asserted against my client; and, even if it is, the petition does not actually set forth any factual allegations that support such a cause of action against my client.
>
> The Neglect heading asserts a cause of action based upon 'respondent's failure to provide said child with adequate supervision and guardianship by unreasonably inflicting or allowing to be inflicted harm or a substantial risk thereof…' The only paragraph under that heading reads, 'The petitioner repeats

the allegations contained in paragraph 5 through 36 above…' (See Petition at pg. 22.)

There are at least two problems with this putative cause of action for Neglect; firstly, it is unclear which respondent this cause of action is alleged against. The heading references '…the Respondent's [sic] Failure…': that is, one 'Respondent's' *singular*, not both Respondents' *plural*. I am not merely making a grammatical point here. The singular use of 'Respondent's' makes sense, since the petition seems to allege that my client abused the child and that the co-respondent father *neglected* the child by failing to provide adequate supervision and guardianship so as to prevent the alleged abuse.

Secondly, to the extent that the Department intends for the Neglect claim to be asserted against my client, the petition still fails to state a cause of action because nowhere does the petition allege that the child was in any way impaired or in imminent danger of impairment, or that mom inflicted harm or a substantial risk of harm on the child. …nowhere does the petition allege facts sufficient to constitute neglect within the meaning of Art. 10.

The Neglect cause of action, such as it is, appears to allege that the child was neglected within the meaning of Family Court Act §1012(f)(i)(B). That subsection provides in pertinent part,

> 'Neglected child' means a child less than eighteen years of age
>
> (i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent…to exercise a minimum degree of care…
>
> (B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court…
>
> Furthermore, §1012(g) provides that,
>
> 'Impairment of emotional health' and 'impairment of mental or emotional condition' includes a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including incorrigibility, ungovernability or

> habitual truancy; provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.

It seems the petition simply takes as self-evident that the child's 'physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired' or that the child 'was, or was at risk of, being harmed physically or emotional.' Nowhere does the petition…so much as hint at facts that would support a finding that the child suffers from 'impairment of emotional health' or 'impairment of mental or emotional condition.' There is no suggestion that the child suffers from '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' or any other factor that might plausibly demonstrate 'a state of substantially diminished psychological or intellectual functioning.'

The petition's assertions of child abuse and neglect are, frankly, based on insinuation, innuendo, and mischaracterization of facts that is sometimes subtle, and other times blatant. At the March 25th conference, Ms. Ricci suggested that the primary, perhaps sole, factual allegation underlying the Department's objection to mom returning home is the allegation in paragraph 12 of the petition that [the Mother] 'places the oils on her hands and then inserts her fingers inside of the subject child's 'nuts' a/k/a vagina.' This mischaracterization of fact is addressed in my March 24th letter, but I will highlight it again here: <u>CPS's own investigative notes do not support the allegation that [the Mother] inserts her fingers into the child's vagina</u>. The Investigative Progress Notes dated 2/15/21 indicate that the child 'said that her mom sometimes puts the oil inside to 'get the bacteria out'' (Notes, 2/15/21, at pg. 2.) It appears, from my client's perspective, that the child's words to the CPS Investigator – which described her mother helping her with hygiene – were perverted in the petition to suggest that my client digitally penetrated her daughter in a sexual manner.

I understand that Monday's hearing is not a hearing on a motion to dismiss. That motion is forthcoming, and is scheduled for argument on April 7, 2021. However, the court's determination of 'imminent risk to the child's life or health' should take into account the legal and factual sufficiency of the underlying allegations. …" (italics and underlining in the original).

Judge Romeo Wilfully Violated her Duty to Determine Whether the Petition was Legally Sufficient to State a Claim of Child Sex Abuse under the Family Court Act §1012(e) and Penal Law §130

Neither Ms. Ricci, nor Ms. Tasikas – nor Mr. Reed – gave written responses to the March 24 and March 26 letters (Ex. M-1, Ex. M-2).

Nor did Judge Romeo request oral responses from them on March 29, 2021 at the hearing she commenced on Mr. Ganguly's "application…to determine whether the child should be returned" to [the Mother], pursuant to §1028[28] – a hearing which could have been obviated simply by requiring their responses to the letters. The hearing began, as follows (Ex. N-4, pp. 4-5):

> "Judge, I don't want to belabor the point. I've sent two letters to the Court, one dated March 24th and one dated March 26th, that outline my client's position. …As far as an opening statement, if it's okay with the Court, I want to rest on those [March 24, 2021 and March 26, 2021 letters] as an opening statement. I do want to highlight, for the purposes of this hearing, as the Court and counsel is aware, the question is what, if any, imminent risk is there to the child? And my client's position is that there was – it's painfully clear that there is no imminent risk and that mom should be allowed to return home and be reunited with her child."

To this, Ms. Ricci's sole response – and the Court's reply – were (Ex. N-4, p.6):

> Ricci: Judge, at this point, we're ready to proceed. Our position is stated in the petition. It's stated – I would refer the Court to the current removal order in the case. It is my position that this case is about risk, and I strongly disagree with Mr. Ganguly, that we do feel the child is in imminent risk and we intend to show the Court why.

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[28] Family Court Act §1028(a) states:

> "Upon the application of the parent…of a child temporarily removed under this part or upon the application of the child's attorney for an order returning the child, the court shall hold a hearing to determine whether the child should be returned (i) unless there has been a hearing pursuant to section one thousand twenty-seven of this article on the removal of the child at which the parent…was present and had the opportunity to be represented by counsel, or (ii) upon good cause shown. Except for good cause shown, such hearing shall be held within three court days of the application and shall not be adjourned. Upon such hearing, the court shall grant the application, unless it finds that the return presents an imminent risk to the child's life or health. If a parent or other person legally responsible for the care of a child waives his or her right to a hearing under this section, the court shall advise such person at that time that, notwithstanding such waiver, an application under this section may be made at any time during the pendency of the proceedings." (underlining added).

Court: All right. Are you, too, waiving an opening statement, Ms. Ricci, other than that?

Ricci: Yes.

In other words, Mr. Ganguly's opening statement was his March 24, 2021 and March 26, 2021 letters (Ex. M-1, M-2) and Ms. Ricci's was the petition (Ex. C) and the Court's "current removal order in the case", this being the February 17, 2021 Order (Ex. A), modified by the March 4, 2021 Order of trial discharge to [the Father] that had required [the Mother] to vacate the house and have no unsupervised contact with her daughter (*supra*, at pp. 37-38).

The hearing then commenced with Ms. Ricci calling Ms. Kalpin to the stand (Ex. N-4, pp. 7- 37) – and Ms. Ricci was still on her direct examination of Ms. Kalpin when the hearing was adjourned, over Mr. Ganguly's objection, to be resumed on April 5, 2021.[29]

The next day, March 30, 2021, Mr. Ganguly filed a CPLR §3211(a)(7) motion to dismiss the petition for failure to state a cause of action, supported by a combined "attorney's affirmation and memorandum of law" (Ex. M-3), summarizing his March 24 and March 26, 2021 letters, which were annexed as Exhibit A. Its return date was April 7, 2021.

Judge Romeo never decided Mr. Ganguly's §3211(a)(7) dismissal motion because, upon [the Mother's] discharge of Mr. Ganguly, prior to its return date, [the Mother] mistakenly had the motion withdrawn. As for [the Mother's] §1028 hearing that Mr. Ganguly had commenced on March 29, 2021 and which was to resume on April 5, 2021, it would be delayed by Judge

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[29] Mr. Ganguly's objection – and Judge Romeo's response – were, as follows

Ganguly: I'm objecting to the adjournment of this proceeding, which my position would be that it's in violation of the terms of Section 1028, that the [hearing] shall be held within three days and not adjourned. I understand the Court is doing its best to schedule this.

I can only hope that the Department and the Court understands the havoc that is being brought on my client's family and that adjourning this out a week for what's, possibly, an hour, hour and a half, and then potentially having to adjourn it again, only continues – only continues the injustice that's being dealt to my client. So I'm noting my objection for the record that we should continue this hearing right here and now, until it's done. (Ex. N-4, p. 39).

…

Court: …I'll note your objection for the record, Mr. Ganguly, but I would disagree with your interpretation of 1028. The Court did hold a hearing for 1028 under the family court act within three days. It doesn't say it has to hold it until conclusion.

The court is going to adjourn this matter. I am not sitting the rest of the week. I am certainly going to bring it in at every available time that I have until its conclusion. It is not – it is not a 1028 hearing (sic), where I have to hear it consecutive days, this is a 1028 – the standard is different.

So I am going to bring this matter back in on April 5th, the next day that the Court is in session at 10 a.m….

Romeo's refusal to allow [the Mother] to proceed without an interpreter – and not continued until June and July, in tandem with a §1028 hearing for [the Father], requested by Nathan Van Loon, Esq., who [the Father] retained to replace Ms. Reed – and who additionally would be representing [the Mother].

Mr. Van Loon's first appearance before Judge Romeo was on May 24, 2021 (Ex. N-9) in connection with his §1028 application on [the Father's] behalf. By then, two months had elapsed since Mr. Ganguly's March 24, 2021 letter (Ex. M-1). The assertions therein that the petition did not properly plead a cause of action for sexual abuse and for neglect – repeated by his March 26, 2021 letter (Ex. M-2) and then by his withdrawn CPLR §3211(7) dismissal motion (Ex. M-3) – did not require ANY hearing. It was a legal question, for determination by the Court. This is why, during the §1028 hearings for both [Parents] that would then stretch out for more than two months, Ms. Ricci continually objected when Mr. Van Loon cross-examined her witnesses about the petition's absence of the material allegations necessary for sexual abuse of a child on the ground that it called for an expert legal opinion:

June 1, 2021 transcript (Ex. N-11, pp. 50-54)

Van Loon: …And part of your training and part of the [Child Protective Services Manual, Chapter 6], there is Section O-2 –I'm trying to pull it out here – which talks about the elements of abuse. And particularly you testified earlier today that the issue wasn't physical abuse, it was sexual abuse; is that right

Resch: Yes.

Van Loon: Okay. So under their Section O – I'm sorry – O-2b, the State of New York apparently defines for your investigation purposes: Sexually abuse a child by committing or allowing to be committed against a child a sex offense as defined in several sections of the Penal Law…Right?

Resch: Yes.

Van Loon: Okay. So they go to the Penal Law. Are you familiar with the Penal Law at all in the course of your training in sex abuse cases?

Resch: Yes.

Van Loon: Okay. And are you aware of what the definition of sexual abuse is pursuant to the definitions portion of Penal Law Section 130.

Resch: I am not.

Van Loon: Judge, I would ask that the Court take judicial notice of Penal Law 130 Section 3, which says: Sexual contact means any touching of

the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, 'whether directly or through clothing…'
Were you aware of that?

Court: Wait a minute. Hold on one second. You've asked me to take judicial notice of something.

Ricci: Judge, I know what the Penal Law says. I don't have a problem with the Court taking judicial notice of it.

The relevancy in this case I would make an objection to. That this is not – Ms. Resch is not in law school. She's not a lawyer. She's not even the investigation workers. She is the case manager through CPS as she identified.

So I don't have a problem with the Court taking judicial notice, but I would object to any further questions of Ms. Resch regarding the relevancy.

Court: So I'll take judicial notice.

Van Loon: Thank you, Judge. I don't –

Court: I will afford it the appropriate weight in review. Okay.

Van Loon: Now you familiarized yourself with the petition in this matter; is that right?

Resch: Yes.

Van Loon: You reviewed it?

Resch: Yes.

Van Loon: Looked at it?

Resch: Yup.

Van Loom: Prepared for it in, you know, the testimony that you made today; is that right?

Van Loon: Yes.

Resch: There is no allegations with regard to [the Mother] that she touched her child for the purpose of gratifying sexual desire, is it?

Ricci: Judge, I object. There is no petition in evidence and this witness cannot testify to something that's not even in evidence.

Van Loon: It's hearsay, right? They asked – we allowed a lot of hearsay in because that's what the law says. And I'm asking this witness with regard to the petition that she prepared, she reviewed and looked at it, whether there is any allegations that [the Mother] engaged in touching intimate parts of another person for the purposes of gratifying sexual desire pursuant to the Penal Law.

Ricci: Once again I would object. The caseworker is not the person who is going to determine that. The Court determines that. So I would object that this question is not relevant to this caseworker and she cannot answer it in a legal fashion. She's not a lawyer.

Van Loon: I'm not asserting that she is a lawyer, Judge. But the petition puts somebody on notice of what they're alleged to have done. Now, there is a lot of allegations flying in that petition and in some of the case notes. But in the petition, the four corners of which we're here defending at least in part today, that necessary element doesn't seem to have made it into the petition.…

June 1, 2021 transcript (Ex. N-11, p. 59)

Van Loon: …now that we have Court Exhibit 1, I would ask her to refresh her recollection as to whether there is any allegations in the petition itself with regard to [the Mother] touching her daughter for the purpose of sexual gratification.

Ricci: Judge, I would object. That is a legal question. It is a legal question for this Court, but it is also a legal question based on case law that the caseworker is not an appropriate individual to answer that question.

Van Loon: Judge, she can read a petition. She's prepared. She's read it before.

Ricci: It's not the reading of the petition, it's the applying the law to the petition.

Court: And I'm certainly aware of that standard. I'm going to allow this witness to answer what she knows and what she doesn't know.

If she is – if she is able to answer I will allow her to answer.

June 3, 2021 transcript (Ex. N-12, pp. 9-12)

Van Loon: Ms. Resch, last time we were here I asked you to review the actual petition portion and indicate where it said in the petition that the mother, [xx], touched her child for the purpose of sexual gratification.

Ricci: And, Judge, I just want to be clear, I want to renew my objection to the question, in that this witness is not an appropriate person to give her opinion on a legal opinion on that issue.

Court: So I will continue my ruling that she can answer what she knows, if she knows something. And I will afford it all the appropriate weight. This is a family court proceeding, not a criminal proceeding. But I certainly understand the questioning and the objections thereto and I'll consider it all. So you can answer if you can.

Resch: It does not say anywhere in the petition specifically that there was the sexual abuse for sexual gratification.

Van Loon: Okay. So not present in the petition.

…

Van Loon: So in your case notes that you have there that are in front of you have in front of you marked for identification, is there a case note in there which says that my client [the Mother] touched her child for the purpose of sexual gratification?

Resch: No.

Van Loon: So there is nothing in the petition and there is nothing in your case notes, correct?

Resch: Correct.

June 3, 2021 transcript (Ex. N-12, pp. 47-48)

Van Loom: Well, isn't it fair to say that your petition and the attached case notes don't actually – well, with regard to the actual petition it doesn't – the actual petition doesn't allege a circumstance that rises to the level of sexual abuse as defined under the Penal Law Section 130, correct?

Ricci: Judge, against, I would object. This witness is not an expert. It's improper to ask her opinion about that.

Court: Sustained.

…

Van Loon: …There isn't actually any part of your petition that says that the child – that the mother specifically engaged in touching of the child for purposes of sexual gratification; you've already stated that, correct?

Resch: Correct.

June 17, 2021 transcript (Ex. N-14, pp. 45-46)

Van Loon: And with regard to your petition itself that was filed in this matter, there is no claim in that petition that either mother or father was touching the child's vagina for the purpose of sexual gratification, is that correct?

Ricci: Objection. That is the petition that's before the Court and it does allege sexual abuse. This witness is not an expert or an attorney to address that.

Van Loon: Well, she just got two Master's Degrees, Judge. I'll move along.

Court: She has not been classified as an expert. Overruled.

Van Loon: Understood.

Court: Or sustained. Sorry.

June 28, 2021 transcript (Ex. N-15, pp. 42-43)

Van Loon: So, you're aware of the petition and the allegation of sexual abuse; is that right?

Kalpin: Yes, I am.

Van Loon: Okay. Now, you're also aware that the petition, itself, does not allege that there was a touching for purposes of sexual gratification; isn't that so?

Ricci: Judge, objection as to what the petition alleges. That's a legal –

Van Loon: Well, she's familiar with the petition, is she not?

Kalpin: That was asked last time, as well, and that is a basis of the petition.

Van Loon: But it's not written in your petition, is it?

…

Court: Mr. Van Loon, this whole line of questioning, I've already heard before.

Van Loon: Okay.

Court: I ask you to move on. Sustained.

Van Loon: Okay. I'll move on, Judge.

Rather than ruling on that legal question – or asking the lawyers to assist her by memoranda of law as to whether a petition so *facially* deficient could support a Family Court Act Article 10 proceeding – Judge Romeo perpetuated hearings and proceedings she was duty-bound to obviate by the ruling she was inexplicably not rendering.

IV.
Attorney for the Child Tasikis Failed to Discharge Her Duties to the Child. Her Successor, Fifield, was Worse, being a Demonstrated Liar – including in Purporting Herself Justified in Substituting Her Own Judgement for the Child's

§7.2 of the Chief Administrators Rules, entitled "Function of the attorney for the child", states, in pertinent part:

> (a) As used in this part, 'attorney for the child' means a law guardian appointed by the family court pursuant to section 249 of the Family Court Act…
>
> (b) The attorney for the child is subject to the ethical requirements applicable to all lawyers…
>
> …
>
> (d) …the attorney for the child must zealously advocate the child's position.
>
> > (1) In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.
> >
> > (2) If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests.
> >
> > (3) When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following

> the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

This rule 7.2 is printed in the 2017 Appellate Division, Fourth Department manual Ethics for Attorneys for Children – a manual whose purpose is expressly to "educate the bench about the proper role of the attorney for the child". It then furnishes a "Summary of Responsibilities of the Attorney for the Child", reading:

> "While the activities of the attorney for the child will vary with the circumstances of each client and proceeding, in general those activities will include, but not be limited to, the following:
>
> (1) Commence representation of the child promptly upon being notified of the appointment;
>
> (2) Contact, interview and provide initial services to the child at the earliest practical opportunity, and prior to the first court appearance when feasible;
>
> **(3) Consult with and advise the child regularly concerning the course of the proceeding, maintain contact with the child so as to be aware of and respond to the child's concerns and significant changes in the child's circumstances, and remain accessible to the child;**
>
> (4) Conduct a full factual investigation and become familiar with all information and documents relevant to representation of the child. To that end, the lawyer for the child shall retain and consult with all experts necessary to assist in the representation of the child.
>
> (5) Evaluate the legal remedies and services available to the child and pursue appropriate strategies for achieving case objectives;
>
> (6) Appear at and participate actively in proceedings pertaining to the child;
>
> (7) Remain accessible to the child and other appropriate individuals and agencies to monitor implementation of the dispositional and permanency orders, and seek intervention of the court to assure compliance with those orders or otherwise protect the interests of the child, while those orders are in effect; and
>
> (8) Evaluate and pursue appellate remedies available to the child, including the expedited relief provided by statute, and participate

> actively in any appellate litigation pertaining to the child that is initiated by another party, unless the Appellate Division grants the application of the attorney for the child for appointment of a different attorney to represent the child on appeal." (bold in the original).

A section of questions and answers follows – with the court decisions featured in the answers furnished in an appendix.

Evident from the manual, with its citation to *Matter of Christopher B. v Patricia B.*, 75 AD3d 871 (2010), for the proposition "the court erred because its order was issue before the attorney for the child could interview his client, thus prohibiting the attorney from taking an active role in and effectively representing the interests of his client", is that among the myriad of reasons why Judge Romeo could not, as she did, issue her February 17, 2021 Order (Ex. A) is because, as Ms. Tasikas identified during the February 17, 2021 proceeding (Ex. N-1, p. 12), she had not yet even met with her client. Likewise, inasmuch as Ms. Tasikas identified during the February 22, 2021 proceeding that she had not yet informed her client why she was in foster care, notwithstanding it was "part of [her] job" (Ex. N-2, pp. 9-10), she could not, as she did, give consent, on behalf of her client, to the conditions that would be embodied in Judge Romeo's March 4, 2021 Order – conditions that clearly did not give the child "as much contact with her mother as possible" (Ex. N-3, p. 9).

Moreover, on February 17, 2021 – because Ms. Tasikas had NOT met with the child or informed her of the pertinent allegations of the petition so as to hear what she had to say about them – and her wishes – so as to guide the child and evaluate what she, as the child's lawyer, needed to do – Ms. Tasikas' most basic duty was to ensure that the law's unambiguous, black-letter requirements – written for the protection of all parties, including the child – were followed. Most fundamentally, that a §1027 hearing be held and continued "on successive court days, if necessary, until a decision [was] made by the court" as to "whether the child's interests require protection, including whether the child should be returned to the parent…pending a final order of disposition". Ms. Tasikas is presumed knowledgeable of this law, just as she is presumed to have read the proposed order the petitioner filed on February 16, 2021, twice identifying the holding of a hearing (Ex. B, p. 2) – and to have realized that when Judge Romeo signed it, on February 17, 2021, she maintained that language intact (Ex. A, p. 2), notwithstanding she had held no hearing.

Certainly, the importance of a hearing should have been evident to Ms. Tasikas from the *face* of the petition (Ex. C), which – for ANY competent attorney – sufficed to raise a panoply of red flags as to what the child was observed to be doing in art class, what she had said and/or pointed to upon being interviewed based thereon – and whether what was being interpreted met the definition of sexual abuse under the Family Court Act.

Certainly, too, upon Ms. Ricci's production of discovery on March 2, 2021 (Ex. O) – even apart from discovery wrongfully withheld[30] – it would have been obvious to Ms. Tasikas, from the

[30] Most important: (1) Ms. O'Brien's LDSS-2221A form "REPORT OF SUSPECTED CHILD ABUSE…" (Ex. D-2); and (2) Ms. Kalpin's two "investigation progress notes" that she entered on February 26, 2021 (Ex. H, Ex. I).

"anatomically correct…female drawing" (Ex. E) and Ms. Travis' "investigation progress notes", (Ex. F) that the petition was insupportable and materially fraudulent – and that her duty to her "very intelligent, articulate" eight-year-old client who gave ZERO indication of being sexually abused by her mother, indeed, who knew nothing about the "credible disclosures" she was purported to have made against her mother and who was begging and pleading to be with her mother, was to make an application, if not pursuant to §1027(a)(ii), than pursuant to Family Court Act §1028(a)[31] "for an order returning the child" to the mother – with an immediate hearing thereupon afforded.

Yet she took no such action, even in face of Mr. Ganguly's own §1028 application and his withdrawn CPLR §3211(7) dismissal motion, which Ms. Tasikas could have easily resubmitted, on behalf of her client. She made no application to challenge either the legal or evidentiary sufficiency of the petition – although both Family Court Act §1027(a)(ii) and §1028(a) conferred upon her ample means to do so.

In addition to Ms. Tasikis' conduct on February 17, 2021 (Ex. N-1), February 22, 2021 (Ex. N-2), and March 4, 2021 (Ex. N-3), as hereinabove recited, she was absolutely silent on April 5, 2021 (Ex. N-5), when Ms. Reed stated:

> "The request that my client would like to make is for the Court to consider an order of protection as opposed to an order of removal. He is willing to, obviously, supervise all contact between the child and his wife. Clearly there would be no digital penetration, as alleged in the proceeding. My client denies, obviously, that that did happen. I would be willing to stipulate that there would be no issue at this point. Right now his priority is to have his wife home. Again, <u>his child was crying all weekend because she's not with her mother</u>, and at this point I don't believe there is imminent risk. I think that an order of protection would be able to keep the child safe. The father will clearly ensure that nothing will happen to this child." (Ex. N-5, pp. 7-8, underlining added).

Not only did Ms. Tasikas not see fit to join in the request, on behalf of her crying child client, she did not even object to Judge Romeo's denying the request, without even asking for her response – or Ms. Ricci's.

Ms. Tasikas' advocacy for her client was just as appalling on April 16, 2021, in purporting to "put [her client's] position on the record" – without alerting the judge to the child's unceasing upset about the separation from her parents:

<u>April 16, 2021 transcript (Ex. N-6, pp. 10-11)</u>

> Tasikas: And if I could just be heard briefly, my client has been calling me and specifically discussing her birthday and it is her request that she does have time with her mother. She's called several times, and so I just wanted to put her position on the record.

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[31] See fn. 28, *supra*, quoting Family Court Act §1028(a).

[Mother]: – need to go home, not just for birthday. She requested – I think Elena did not say that.

April 16, 2021 transcript (Ex. N-16, pp. 16)

Father: …Your Honor, my daughter is really asking for my wife to come home, and not just for the birthday. She's really missing her mom. She's asking day and night when is mommy coming home, I need my mom. It's really causing a lot of distress and pain for my child, and in various ways. She was taken out of the home and now she's not able to see her mom on a – she needs her – a child needs her mom, your Honor. Please don't let – she should be able to have her come home. And I need my wife as well, not just within these certain time frames. We need to be a family reunited again.

And this whole situation, these allegations are false. This whole case is completely wrong and it's really turned ourselves – turned our family upside-down since this whole thing started and this is not in the best interest of my daughter. She is really – she definitely has been harmed emotionally, mentally, in different ways since that day and now that – and it continues on for the past two months that her mom is not with us.

So please, I really, I really ask you to reconsider that my wife [xx] to be able to come home because we are definitely not – we're hurting in different ways that she is not home.

On May 6, 2021, Ms. Tasikas was similarly deficient in conveying the situation to Judge Romeo, as to which [the Mother] made an interjection, as follows (Ex. N-7, pp. 2-3):

Tasikas: …My client, [xx], is actually in the lobby. She not feeling well today, but she is here.

Court: Thank you.

[Mother]: And she wants to see Judge, right?

On May 12, 2021 (Ex. N-8), [the Mother] sought to continue the issue, stating: "So the main important for me here today is, Judge, my child's request to Elena" (at p. 5) – from which Judge Romeo cut her off. [the Father] thereafter continued as to the child's request – with colloquy from Judge Romeo, a lame statement from Ms. Tasikas, and an outrageous response from Judge Romeo, mandating Ms. Tasikas' reply – of which there was NONE:

May 12, 2021 transcript (Ex. N-18, pp. 17-25)

[Father]: Judge, this is really – this whole case, since the beginning, has really caused my whole family a lot of – it's debilitated our family,

literally, socially, emotionally, mentally, financially in many different – at all levels.

My child has been separated from her mother. My wife has been separated from us, from the whole family. …the Court can imagine what challenges we're facing at home, literally. We're not together. Everyone has – is dealing – we're crying. We cannot sleep.

My child is subjected to different challenges in her own life, different strains, different stresses. She's nine now. She just had her birthday just recently. The whole thing should not have been done in the first place. Whatever was done on February 12th, an hour and a half, whatever the time that was spent –

[Mother]: Half an hour.

[Father]: Half an hour. – has causes this chaos in our family's life.

[Mother]: They're all –

[Father]: These are all false allegations against my wife and I.

I can – hope that you can imagine what we're going through. This is not – this whole thing is wrong, what we're going through, what has been done by the Court. I don't know how – what – how we can emphasize that. And my child has told us on many times that she wants – she was writing letters stating – she wants to talk to you directly.

Court: She cannot.

[Father]: I understand that, Judge, but just hear me out.

She wants to talk to you directly saying, why is my mommy not home? My mommy is the best. I am – I am happy with my mom. Why is she not here? Why is it that I have to see her only once a week for an hour? That doesn't make any sense, Judge.

And I know you're the decisionmaker. Being the Judge of this case, you're the decisionmaker as to what happens with this case, but it should not have dragged on this long, three months, for her child – for my child to see her mother.

Court: So –

[Father]: She's asking for her on a daily basis. She's crying on a daily basis. She's having headaches. It's –

Court: So Mr. [Father], I –

[Father]: I don't know what –

Court: I understand.

[Father]: I'm trying to share what my child is going through.

…

Tasikas: I'm sorry to do this because I understand what is happening here today, but I did have a long conversation with my client and I've spoken to her quite a bit and promised her that I would basically speak on her behalf today to the Court and make her position clear.

She was here last time. As this case – as [the Mother] has mentioned, as this case goes on, it's more challenging for my client. She has become more and more frustrated and very, very upset. She's constantly writing letters to you and to – poems about her mother that she would like me to share with everyone. I will reference them.

Court: I will not take them. I will not read them.

Tasikas: Okay. I did promise her that I would mention this to the Court. She is going through a lot right now. She calls me. She's very frustrated and it's very difficult for her to understand what is happening, based on the fact that she is nine years old –

[Mother]: Can you tell her that she wants her mom, that's why she's frustrated?

Court: So Ms. Tasikas –

[Mother]: Elena –

Court: – you're in this court every single day –

Tasikas: I understand.

Court: – and I certainly understand your client's plight. She's a young girl. She's nine years old. <u>The testimony that I've heard so far is troubling, troubling sexual allegations</u>…

…

…<u>Even if the department came in and said they had a plan today, I wouldn't approve it, based on the testimony I've heard so far</u>. …

…

[Father]: Judge can I speak just one last – please.

Court: One minute, Mr. [Father].

[Father]: Judge, really, I understand the proceeding part, and I get it, but my child is literally crying. She's – we're trying to share the message, her message, that she tried to share with Elena. We're trying to share it with you and through this whole process –

Court: So I –

[Father]: – but –

Court: – I understand the message. It's – I understand the message, but the message I'm telling you is I've taken testimony from a caseworker, compelling testimony, that I need to consider over the feelings of an eight-year-old missing her mother – or a nine-year old. That is not – you know, the best interest isn't just because the child misses her mother. The best interest, is there imminent risk in the home –

[Mother]: There is no –

Court: – of the child under New York State Law.

[Mother]: – modesty of the child –

Deputy: Stop.
Are we done?

Court: We are done. Court is adjourned. Thank you.

[Father]: There is no –

Deputy: Let's go. Out. Out.

On behalf of her client, it was Ms. Tasikas' duty to have protested, immediately and vigorously to what Judge Romeo was saying. Apart from her reasonable knowledge that Ms. Kalpin's testimony was perjurious (Ex. N-4, pp. 8-37) – revealed as such, *inter alia*, from the "anatomically correct" female child diagram (Ex. E) and Ms. Travis' "investigation progress notes" (Ex. F), produced by Ms. Ricci on March 2, 2021 (Ex. O) – Ms. Tasikas knew:

(1) there had been no cross-examination of Ms. Kalpin, including by herself;

(2) Ms. Kalpin's direct testimony did not establish that the nine-year old child would be at "imminent risk" if her mother was allowed to return home – and it was completely preposterous for Judge Romeo to suggest otherwise;

(3) there was no evidence, let alone testimony, that the situation could not be resolved by a temporary order of protection prohibiting [the Mother] from bathing or massaging the child, in whole or in part, as a condition for her return to the home.

Indeed, not only does Family Court Act §1028(e) expressly state:

> "The court may issue a temporary order of protection pursuant to section ten hundred twenty-nine of this article as an alternative to or in conjunction with any other order or disposition authorized under this section",

the referred-to Family Court Act §1029 empowered Ms. Tasikas to make such application:

> "…In any case where a petition has been filed and an attorney for the child has been appointed, such attorney may make application for a temporary order of protection pursuant to provisions of this section."

Instead, there was not a peep from Ms. Tasikas.

Six days later, at a May 18, 2021 court conference before Judge Romeo's law clerk, Ms. Tasikas orally requested to withdraw,[32] stating her child client had actually asked for another attorney, because she was displeased and frustrated with Ms. Tasikas, who she did not believe was advocating for her well and did not trust.

The May 18, 2021 conference was not recorded by the court – and it appears that Ms. Tasikas may have been allowed to leave the scene without filing a written request to withdraw and explaining why. At the next court appearance, on May 24, 2021 (Ex. N-9), Ms. Tasikas was gone – and in her stead a new attorney for the child, Sarah Fifield, Esq.

Judge Romeo herself gave no explanation, nor referenced having signed an order permitting Ms. Tasikas to withdraw or appointing Ms. Fifield. Instead, she allowed Ms. Fifield to besmirch the child by asserting: "The prior attorney for the child had to get off the case, didn't have to, but because the child was not really communicating, did so." (Ex. N-9, p. 17). This was false – as Ms. Fifield would have known: (1) from speaking with the child; (2) from speaking with Ms. Tasikas; and (3) from examining Ms. Tasikas' file of the case, which, presumably Ms. Tasikas had turned over to her.

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[32] This conference and the manner in which Ms. Tasikas' application to withdraw was granted would be concealed by Ms. Ricci's September 17, 2021 affirmation in response to Mr. Van Loon's September 2, 2021 motion for Ms. Fifield's removal, whose ¶4 states:

> "On May 18, 2021, Attorney for the Child Elena Tasikas, Esq. requested to be relieved of her representation of the child based on a breakdown in the attorney client relationship. The Court granted such relief based on the agreement of the parties. Thereafter, Sara Fifield, Esq., was appointed as Attorney for the Child [xx], first appearing on May 24, 2021."

There was NO evidence that the problem was that child "was not really communicating" with Ms. Tasikas. To the contrary, the child was even texting her (Ex. K). Rather, the problem was Ms. Tasikas, who was NOT following through with the child's communications – and, certainly, not in any effective, legally meaningful way. Apart from making no applications pursuant to Family Court Act §1027(a)(ii) and §1028(a), Ms. Tasikas had not even furnished Judge Romeo with the child's letters (Ex. J) – which required nothing more than filing her own attorney's affirmation annexing them – nor applied to have the child brought to court to be interviewed by Judge Romeo – both of which the child was requesting because she recognized that her voice was not being heard.

Having LIED that the child had not been "communicating" with Ms. Tasikas, Ms. Fifield then LIED again in purporting that the child was not communicating with her on matters germane to the case and "appears to be programmed" – using this to justify herself in substituting her judgement for the child's. She stated:

> "And I sat down with my client and there were certain topics she was willing to discuss openly with me and we had a good rapport, but then there were the allegations, which she does not want to discuss. And so, it's – my client appears to be programmed. I mean she wants to come home and loves her parents, it's evident, and, you know, I want to see that happen in a safe way and in a way where we're sure she is going to be safe. I'm not confident that that could happen today, Judge. And because it appears to me that my client lacks capacity for voluntary judgment, because of the nature of the programming, I am putting on the report that I am substituting my judgment for now for her own. I recognize my client's age, and that's uncommon for a child this age, however, I am doing it out of concern for her safety…" (Ex. N-9, p. 17, underlining added).

There was NO inquiry about this by Judge Romeo – let alone due process afforded to the nine-year old child. Nor did Ms. Fifield's then demonstrate "judgment" *vis-à-vis* what did NOT require "discuss[ion]" with the child, namely, alerting Judge Romeo that the ONLY conclusion possible from review of the petition (Ex. C) was that, at best, it was ambiguous, contradictory, and legally-insufficient – and that based upon review of the very evidence that Ms. Ricci had produced on March 2, 2021 (Ex. O), most importantly, the so-called "anatomically correct" female diagram used in the "forensic interview", identified by the petition and by Ms. Travis' "investigation progress notes" (Ex. F), the more accurate conclusion was that the petition was evidentiarily-unsupported and manipulated.

In any event, Ms. Fifield would have learned from her review of the court record and Ms. Tasikas' file that [the Father's] former attorney Ms. Reed, had submitted an order to show cause, which Judge Romeo had signed on May 4, 2021 and granted at the May 6, 2021 court proceeding (Ex. N-7, pp. 4-5), in Ms. Tasikas' presence and "upon consent", for a subpoena *duces tecum*:

> "…to Brighton Central School District to produce and deliver to the Clerk of the Monroe County Family Court…on or before the 24th of May, 2021 at 9:00 a.m. certified copies of the records and recordings of [the Child]…for the 2020-2021

> academic school year, including all communication between school staff, the Child, and the parties in connection with these proceedings; and
>
> "Permitting…all counsel, to examine said records and have access to information contained therein for use in connection with the above-captioned proceedings".

Surely, Ms. Fifield's "judgment" would have led her to examine such production – receipt of which the Monroe Family Court clerk's office logged in on May 24, 2021 and sent to Judge Romeo's chambers.[33] Yet, Ms. Fifield never indicated any examination of it, which, had she examined, would have revealed to her Ms. O'Brien's LDSS-2221A form (Ex. D-2), rebutting the so-called "child protective referral" attached to the petition and quoted at its ¶5 (Ex. C), further collapsing a bogus case that would have been evident to her, from the outset. This includes from her initial contact with her client who she was purporting "did not want to discuss" "the allegations" – without identifying the specific "allegations" she was contending the child "did not want to discuss".

V.
Judge Romeo's August 4, 2021 Oral Decision Denying the Motion to Dismiss the Petition Pursuant to CPLR §3212(b) and Family Court Act §1051(c) is Indefensible and Must be Vacated, *as a Matter of Law*

As early as May 28, 2021 (Ex. N-10), with Mr. Van Loon's second court appearance, he indicated his intent to make a motion to dismiss based on evidence:

> "…with respect to the underlying case, we are going to be looking to try and get that dismissed. We'll be making a motion for that.
>
> And with regard to this tape that is apparently out there that the County noticed in their petition, I don't understand how it's not, but we are going to subpoena either Brighton School District and/or Brighton Police Department to have that tape provided to us, because that's the initiatory event for this entire neglect action. I'm a little surprised that it hasn't been turned over or subpoenaed earlier, but we are gearing up, Judge…" (Ex. N-10, p. 14).

Less than a week later, on June 3, 2021 (Ex. N-12), with the conclusion of Mr. Van Loon's cross-examination of CPS caseworker Kathryn Resch, the first witness that Ms. Ricci called at [the Father's] §1028 hearing, he was ready to make a dismissal motion:

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[33] Upon information and belief, neither the clerk's office nor Judge Romeo alerted the [Parents'] attorney, by then Mr. Van Loon, to this production. It remained with Judge Romeo until her exit from the case in August, when it was sent to Judge Nesser, who took over the case. Judge Nesser also did not alert Mr. Van Loon to it – and it was not seen by him until after Judge Nesser's September 8, 2021 so-ordering of Mr. Van Loon's subpoena for school records, sought by his August 23, 2021 order to show cause (*see* p. 77, *infra*). On September 16, 2021, upon going to the court to examine what he thought was the school's production pursuant to the September 8, 2021 subpoena – of which there was, in fact, none – he discovered the school's production to the May 6, 2021 subpoena, of which he had been unaware.

June 3, 2021 transcript (Ex. N-12, p. 77)

Van Loon: So it would [not] be inappropriate for me to try and make a motion to dismiss based upon the testimony we have already heard today, where there is apparently nothing in the petition that says that there was sexual abuse or sexual touching for the purpose of sexual gratification, there's nothing in the case note that follows that, there's nothing in the case notes that tracks

Ricci: Judge –

Van Loon: – those allegations –

Ricci: – I don't believe we're at a time that we're making any motions. I'm not done with my case yet.

Van Loon: I understand that.

Court: That's correct.

A month later, on July 7, 2021, after Mr. Van Loon had concluded his cross-examinations of Ms. Kalpin, the second and final witness that Ms. Ricci called for [the Father's] §1028 hearing and her only witness for [the Mother's] §1028 hearing, he filed a motion to dismiss the petition "pursuant to CPLR §3212(b) and FCA §1051(c) and for such other, further, and different relief as may be just and proper in the premises".

CPLR §3212 is entitled "Motion for summary judgment" and its subparagraph (b) pertains to "supporting proof" and "grounds", stating, in pertinent part:

> "A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. … The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. …"

Family Court Act §1051 is entitled "Sustaining or dismissing petition" and its subparagraph (c) pertains to dismissal of the petition because of insufficient facts.

> "(c) If facts sufficient to sustain the petition under this article are not established, or if, in a case of alleged neglect, the court concludes that its aid is not required on

> the record before it, the court shall dismiss the petition and shall state on the record the grounds for the dismissal."

Annexed to the notice of motion was an affirmation from Mr. Van Loon, highlighting the parents' denials of the petition's allegations of "sexual abuse" and that the allegations were unsupported and rebutted by the supposedly "anatomically correct diagram" of a female child that showed no vagina (Ex. E) and by Ms. Travis' "investigation progress notes" (Ex. F); with the petition, moreover, dismissible, *as a matter of law*, because the alleged "sexual abuse" did not fit within the definition of Family Court Act §1012(e) based on Penal Law §130 – and was not so-pleaded. Also annexed was an affidavit from [the Father], stating, in pertinent part:

> "3. These allegations against me and against my wife are completely false.
> …
> 15. The art teacher Melissa Rolland falsely accused the child that she is masturbating in the art class (the art class is only held once in two weeks, the teacher gets to see the child only on that day and duration of the case is for one hour), why had there been no calls made to the parents first? There are no nurse notes from the school that the art teacher Melissa Rolland had sent my child to see the nurse. The child has never been sent to the nurse. Why would a teacher be ready with her phone to secretly video tape the child? There was no contact by the Brighton School District prior to February 12th, 2021, about the child."

Ms. Ricci opposed respondents' motion by a July 21, 2021 affirmation, which was not just materially false, but serially fraudulent. As illustrative:

- She fraudulently made it appear that respondents' motion was for dismissal for failure to state a cause of action, which it was not. Thus, after reciting (at ¶¶3-12) the allegations of the petition, she recited (at ¶22) the legal standard for dismissal based on pleading deficiencies, with cases pertaining to such motions:

  > "When a court determines a motion to dismiss, the court must view the allegations in the light most favorable to the non-moving party. Matter of Courtney G., 49 AD3d 1327 (4th dept 2008), Matter of Elsa QQ, 249 AD2d 857 (3rd dept 1998) and Matter of Stefanel Tyesha C., 157 AD2d 322 (1st dept 1990). Such inquiry is limited to whether the petition, considered as a whole, states some recognizable cause of action under the law. Matter of Stefanel Tyesha C., 157 AD2d 322 (1st dept 1990)."

  Such standard – and these cases – were inapplicable – to the motion which was for summary judgment/dismissal based on EVIDENCE.

- She concealed, except by inference, that the petition failed to allege that the purported "sexual abuse" was for purposes of sexual gratification, stating at ¶23:

> "It is well resolved, under the Family Court Act, the sexual gratification element can be inferred from the alleged conduct itself. Matter of Shannon K., 222 AD2d 905 (3rd dept 1995). See also Matter of Patricia J., 206 AD2d 847 (4th dept 1994 (massaging vagina and buttocks). In re Lesli R., 138 AD3d 448 (1st dept 2016) (continuing to touch children despite making them uncomfortable) and Matter of Kathleen OO, 232 AD2d 784 (3rd dept 1996) (inserting fingers in child's vagina)."

None of these cases were discussed or shown to be applicable – and ALL are inapplicable:

(1) *Matter of Shannon K*, 222 AD2d 905 (3rd Dept 1995), is a decision having nothing to do with a petition failing to allege sexual gratification and/or failing to cite the pertinent penal law provision pertaining to sexual abuse, as at bar.

It was about EVIDENCE, not the sufficiency of the pleading. As stated by the Appellate Division: "Respondent contends that there was no proof that the alleged touching was of a sexual nature or for the purpose of gratifying sexual desire" – and, further reinforcing that it was about EVIDENCE, not pleading insufficiency, was the Appellate Division's further statement: "there can be no innocent explanation for the conduct respondent was found to have committed by Family Court" – with a description of the basis for the Family Court finding as:

> "A fact-finding hearing…at which respondent testified, expert testimony was produced by both sides and the child testified in camera…the child's account of the sexual touching by respondent was consistent in all material aspects and was corroborated by not only the child's in camera testimony, but also...the two experts that testified…Notably, both experts, including that of respondent, stated that the child's statements and behaviors were consistent with those of a child who had been sexually abused….In addition, petitioner's expert psychotherapist opined that the child had been sexually abused…."

Based thereon, the Appellate Division stated "We find the evidence sufficient to support Family Court's finding that the child was sexually abused", allowing for its "inference", over proof, that "the alleged touching was of a sexual nature or for the purpose of gratifying sexual desire" – there being "no innocent explanation" for the EVIDENTIARILY-established touching.

The Appellate Division's only faulting of the Family Court was that its decision "did not specify under which subdivision of Family Court Act §1012(e) the abuse was found as well as the particular sex offense perpetrated upon the child as defined in Penal Law article 130 as required by statute (*see*, Family Ct Act §1051[e])". As to this, the Appellate Division stated: "Based on the record", which included the "Family Court's detailed factual findings", it

deemed the "defects [of the Family Court decision] technical in nature and harmless…"

(2) *Matter of Patricia J*, 206 AD2d 847 (4th Dept. 1994), is a decision having nothing to do with a petition failing to allege sexual gratification and/or and failing to cite the pertinent penal law provision pertaining to sexual abuse, as at bar.

It was about whether the EVIDENCE, after a hearing, could support an inference of sexual gratification, as to which the Appellate Division stated:

> "At the fact-finding hearing on a petition alleging sexual abuse, respondent admitted massaging the vagina and buttocks of his eight-year-old daughter on many occasions…. Medical records contained findings consistent with sexual abuse. … and it can reasonably be inferred from the evidence that, despite denials by respondent, his actions were for the purpose of sexual gratification";

(3) *In re Leslie R.*, 138 AD3d 488 (1st Dept 2016), is a decision having nothing to do with a petition failing to allege sexual gratification and/or failing to cite the pertinent penal law provision pertaining to sexual abuse, as at bar.

It was whether the EVIDENCE in the record supported the "fact-finding order" of the Family Court, from which sexual gratification could be inferred. As stated "he presented no credible evidence in his defense";

(4) *Matter of Kathleen OO*, 232 AD2d 784 (3rd Dept. 1996), is a decision having nothing to do with a petition failing to allege sexual gratification and/or failing to cite the pertinent penal law provision pertaining to sexual abuse, as at bar.

It was about "Respondent's claim that there was no proof of sexual gratification" – which the Appellate Division rejected because it could be "inferred" from the EVDIENCE adduced at a "fact-finding hearing", where, in addition to respondent's admissions, the child herself gave "unsworn testimony in court that was subject to cross-examination – and the further EVIDENCE consisting of respondent's guilty plea to sexual abuse in the second degree.

- She concealed the dispositive evidence, repetitively identified by Mr. Van Loon's moving affirmation, that the female child drawing, used during the so-called "forensic interview", shows no vagina, but only a front pelvis – thereby establishing that the child's "own words" of "nuts" and "hippy part" cannot be deemed to refer to vagina;

- She concealed ALL the ambiguities and contradictions of the child's statement, and of the petition based thereon, identified by Mr. Van Loon's moving affirmation;

- She flagrantly misrepresented (at ¶27) the child's statement to make it appear that the child had said she was "hurt", 'uncomfortable' and 'fe[eling] weird' by her parent's unspecified conduct – when the child's references were to completely accidental, innocent conduct – about which the child was not complaining and as to which there was no basis for faulting the parents – let alone to purport, as Ms. Ricci did, that it "denote[s] sufficiently serious acts warranting the courts intervention as defined by the Family Court Section 1012 and in accordance with the purposes of the Family Court Act Section 1011".

No papers were interposed by Ms. Fifield, although at the July 27, 2021 oral argument of the motion, she opposed the motion. In so doing, she purported that the caselaw Ms. Ricci had cited was applicable, specifically *Shannon K*. Her remarks were interrupted by [the Mother], as follows:

July 27, 2021 transcript (Ex. N-17, p. 16)

Ms. Fifield: The point is you don't have to provide any proof of what was going on in the parents' head. According to *Matter of Shannon K* and I think the relevant language is the sexual gratification can be inferred from the conduct itself. The touching occurred. The child said it occurred and –

[Mother]: She never said it.

Ms. Fifield's assertion "you don't have to provide any proof of what was going on in the parent's head" was NON-RESPONSIVE to the issue of the petition's pleading insufficiency in failing to allege sexual gratification, first raised by Mr. Ganguly (Ex. M), and then continued by Mr. Van Loon. The pleading insufficiency was the focus of Mr. Van Loom's July 27, 2021 oral argument, which additionally challenged that the child had made the statements being purported:

July 27, 2021 transcript (N-17, pp. 5-10)

"one of those things that we've argued before now but now put in writing is that the County has failed in their petition to adequately plead the sex abuse component of the case, your Honor.

And that's a big part of our issue here is, Judge, is that they have not plead (sic) appropriately and on top of that, based upon the statements in the case notes and Ms. Kalpin having raised – come to the threshold where that would be the issue.

As we pointed out in our papers and we pointed out previously in court, they've got to get to that threshold of Penal Law 130.00 and they haven't done it heretofore in their pleadings. They haven't done it in their case notes, and they haven't done it here in this trial so far and they put on their proof.

So, Your Honor, where we're coming from is, and the position that we've had all along, is they haven't plead (sic) sex abuse nor has any sex abuse actually occurred, and that's a big part and big component here…

…

So with regard to this, Your Honor, with regard to the motion to dismiss itself on the underlying action, the County is responsible for getting to that certain threshold, okay, with regard to the sex abuse allegation. They haven't made it. Simply stated, Your Honor, they never said the standard words that are part of the Penal Law which they're required under the [Family Court] act to say, which is that this was done for the purpose of sexual gratification. They just didn't.

And the testimony of at least the first caseworker stated that, Ms. Resch, in this hearing itself, stated that she agreed, that that was something that wasn't stated in the petition.

So, Judge what I'm asking for is on the law to take a look at the petition itself to see if it rises to that level or not…

So what I would like to have the Court take a look at is take a look at the things that we mentioned in our pleadings with regard to those important words that didn't make it into the report, into the case notes and into the petition and recognize, Judge, that they have to meet a certain threshold, and if they don't meet that threshold, regardless of how they feel about it, the case has to be dismissed because they are the County and they have all the power here and they have the power to take away this child in the first place and they were given this power, but with this power comes the responsibility to get it right and to do the due diligence and do the work.

…

So, Judge, on that initial sort of level in the petition, basically what you have is potential statements by a child that are uncorroborated. They haven't met that burden.

…

So, Judge, in addition to everything else we plead I would ask this, if we come in as equals to this Court, we've been accused, they have their burden. If they have not met it, then their pleadings and petition should be dismissed and we ask for due process in this matter."

Ms. Ricci own oral argument was (Ex. N-17, pp. 10-13) – like her affirmation in opposition to the motion – <u>replete with deceits</u>, beginning with her reliance on her affirmation:

"Judge, I did file an affirmation and response to the motion and I will rest mainly on that, but just to point out, it is the County's position that we have established all of the allegations sufficiently to make a prima facie case in this matter under neglect and under abuse",

further purporting that the County was contending that "the child's statements have been corroborated", noting that her opposing affirmation cited cases showing that "the Court's have determined that it is a relatively lower corroborative evidence in Family Court proceedings"

Ms. Judge Romeo "reserved decision" – and, on August 4, 2021 (Ex. N-21, p. 14), read six sentences, from the bench, as follows:

> "The respondents filed a motion to dismiss, which relies heavily on the belief that the abuse allegations do not meet the standards set forth in the penal law for sexual offenses. The respondents' motions, frankly, read more as an answer to the underlying petition and picks apart each allegation contained therein. This Court is required to view the allegations in the light most favorable to the petitioner and must give the petitioner every favorable inference. As presented by the petitioner, it is well settled that in the context of a Family Court – of the Family Court Act, sexual gratification can be inferred and that inappropriate touching may be a basis for a neglect finding. This Court finds that the petitioner has established a prima facie case for abuse and neglect. Therefore, the respondents' motion to dismiss is hereby denied."

In so stating, Judge Romeo's oral decision:

- concealed that Mr. Van Loon's motion was one for summary judgment/dismissal;

- failed to apply the standard for summary judgment motions, *to wit* EVIDENCE;

- concealed ALL the EVIDENCE respondents had furnished in support of their motion;

- falsely implied that Mr. Van Loon's motion was to dismiss for failure to state a cause of action, which it was not, and governed by the legal standard of sufficiency of the pleading, which it was not, and which, moreover, she did not apply to that aspect of the motion pertaining to the sufficiency of the petition, *to wit*, the absence of any allegation of "sexual gratification", required by Family Court Act §1012(e) and Penal Law §130;

- baldly purported that under the Family Court Act "sexual gratification can be inferred" without citing to, and showing the applicability of, a single case, including "As presented by the petitioner";

- baldly purported that under the Family Court Act "inappropriate touching may be a basis for a neglect finding" without citing to, and showing the applicability of, a single case, including "As presented by the petitioner";

- falsely asserted a "find[ing]" that "petitioner has established a prima facie case for abuse and neglect"[34] – as if the motion had been decided based on EVIDENCE,

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[34] "Upon petitioner establishing its prima facie case, the burden shifted to respondent to explain his conduct and rebut the evidence of his culpability", *Matter of Leslie, supra,* at p. 66, cited in Ms. Ricci's July 21, 2021 opposing affirmation.

which it was not, and where the motion evidentiarily established that petitioner had NO case, quite apart from the deficiency of the petition in failing to plead child sexual abuse as defined by Family Court Act §1012(e) and Penal Law §130.

- failed, by its BALD "find[ing]" that "petitioner has established a prima facie case for abuse", to comply with the requirements of Family Court Act §1051(e), requiring that "if the court makes a finding of abuse, it shall specify the paragraph or paragraphs of subdivision (e) of section one thousand twelve of this act which it finds have been established…"[35]

Judge Romeo did not, thereafter, reduce her oral decision denying the July 7, 2021 summary judgment/dismissal motion (Ex. N-21, p. 14) to a written decision or order.

VI.
Judge Romeo's August 4, 2021 Oral Decision Denying §1028 Relief is Indefensible and Must be Vacated, *as a Matter of Law*

Also on August 4, 2021, indeed immediately prior to reading her six-sentence denial of Mr. Van Loon's summary judgment/dismissal motion (Ex. N-21, p. 14), Judge Romeo read a substantially lengthier decision denying the [Parents] any relief on their §1028 applications (Ex. N-21, pp. 3-14). It was just as indefensible, except for its statement (at p. 3): "At the first appearance, the respondents consented to removal of the subject child and waived their right to a 1027 hearing and the child was placed into foster care" – thereby admitting that her February 17, 2021 Order was false by its twice assertion that a hearing had been held (Ex. A, p. 2).

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[35] Family Court Act §1051(e) reads, in full:

> "If the court makes a finding of abuse, it shall specify the paragraph or paragraphs of subdivision (e) of section one thousand twelve of this act which it finds have been established. If the court makes a finding of abuse as defined in paragraph (iii) of subdivision (e) of section one thousand twelve of this act, it shall make a further finding of the specific sex offense as defined in article one hundred thirty of the penal law. In addition to a finding of abuse, the court may enter a finding of severe abuse or repeated abuse, as defined in subparagraphs (i), (ii) and (iii) of paragraph (a) or subparagraphs (i) and (ii) of paragraph (b) of subdivision eight of section three hundred eighty-four-b of the social services law, which shall be admissible in a proceeding to terminate parental rights pursuant to paragraph (e) of subdivision four of section three hundred eighty-four-b of the social services law; provided, however, that a finding of severe or repeated abuse under this section may be made against any respondent as defined in subdivision (a) of section one thousand twelve of this act. If the court makes such additional finding of severe abuse or repeated abuse, the court shall state the grounds for its determination, which shall be based upon clear and convincing evidence."

Here, too, Judge Romeo's oral decision did not identify ANY of the EVIDENCE the [Parents] had presented, at the §1028 hearings, for return of their child to them. Such EVIDENCE had been summed up by Mr. Van Loon's August 2, 2021 closing argument (Ex. N-20, pp. 5-14), including, as follows:

> "Importantly, Caseworker Resch admitted, that while the county claimed they had concerns of sexual abuse, that they can't say that it happened.
>
> Question: You can't tell us today that sexual abuse has actually happened, correct?
>
> Answer: Based on the reports the child made, there are certainly concerns.
>
> Question: There are concerns?
>
> Answer: Yes.
>
> Question: But you can't say that it happened, right, in fact, right?
>
> Answer: Correct.
>
> The child was seen by the REACH Clinic, which revealed no physical injury to the child. That's admitted as Petitioner's Exhibit 6. …
>
> …Some relevant facts should be noted at this juncture.
>
> The child was in the exclusive care and control of the County of Monroe from the evening of Friday, February 12th of 2021 through Friday, February 26th of 2021. The County has admitted the following:
>
> One, they interviewed the child one time after school on Friday, February 12th of 2021 for around 20 minutes or so.
>
> Two, the examination of the Reach Clinic revealed no physical injury to the child.
>
> Three, there is a videotape made by art teacher M[elissa] Rowland reporting to be the child masturbating in art class that has not been reviewed by any of the caseworkers.
>
> Four, the art teacher, Melissa Rowland, has not been interviewed by any of the caseworkers.
>
> Five, Brighton Police Department has closed their investigation concerning the [Parents] and have declined – repeat declined – to file charges.
>
> Six, Monroe County District Attorney's Office has declined to file charges against either parent. Apparently the county's caseworkers never re-interviewed the child during the two weeks between February 12, 2021 and February 26, 2021, when the child was within their own exclusive care.
>
> Another point, seven I would say, the county chose not to interview the child at the Bivona Child Advocacy Center, where there would have been a videotape of the interview with law enforcement present, even though they had two weeks to do so.
>
> Eight, and importantly, there's nothing in this petition that states that the child was touched for the purpose of sexual gratification, as required under Family Court Act 1012(e), which specifically references article 130 of the Penal Law. There is no corroboration necessary to uphold the idea that the thesis that the child was sexually abused. …

The truth of the matter is throughout her testimony, her sworn testimony, [the Mother] has attempted to explain the practices of her Hindu religion, the customs of her Indian people, and has categorically denied she has ever touched her child inappropriately…

And there are several things that are uncontroverted, that the child is at the top of her class, that she's talented, active in school and extracurricular activities, that the child is bright and articulate, and all those things are – the position of the child is in diametric opposition to her attorney's position in this matter. The child wants to go home. That has been manifested in the testimony throughout…. There has been no evidence, none, that she doesn't have capacity or she suffers from some sort of intellectual disability, developmental or cognitive disability. She knows what she's about, and she knows she wants to go home to her loving parents…The county has not proven that the child is in imminent risk of harm, if returned to the parents. That's the standard. That's their burden. By their own admissions, they cannot prove that the sexual abuse occurred, and what they claim they have is at best concerns. The problem for the county is concerns are not the standard. Uncorroborated hearsay statements are not evidence…

In this case, CPS worker Kalpin, in particular rushed to judgment. She made a mistake. She made unsubstantiated allegations of sexual abuse against the mother that not only the Brighton Police Department and the district attorney disagrees with, but her own colleague can't bring herself to assert that they can prove them.

She has interviewed the child briefly. Didn't follow up. A simple thing. Follow up with the Bivona Child Advocacy Center for a second interview. Didn't do it, even though she had two weeks to do it. …

…she added a case note on February 26th about what she purported to know on February 12th. As opposed to the myriad of case notes entered into Connections before by her, by her. Why is the 26th important? Because the child came home to her father that day, and Ms. Kalpin needed some allegation, some allegation to keep the case alive, because the contemporaneous notes of her colleague, Kate Travis, took in that first interview and only interview did not rise to the level of probable sexual abuse. …

In this matter, Caseworker Kalpin under cross-examination on June 17, 2021, after trying to convince the Court that mother's statements were corroboration of sexual abuse, finally, finally admitted that mother denied that she sexually abused her daughter.

Question: She denied it, correct? She denied she sexually abused her daughter, correct?

Answer: She denied that she put her fingers inside her daughter's vagina on February 12th.

Pursuant to Family Court Act 1046, as the statements of such a child in sex abuse cases, if uncorroborated, such statements would not be sufficient to make a fact-finding of abuse and neglect. And, yet, the county persists, even though the facts don't support their position, the evidence doesn't support their position, and the law doesn't support their position, because the evidence adduced at a hearing did not establish an imminent risk to the life or health of the child…"

Rather than addressing Mr. Van Loon's presentation of EVIDENCE – or cited law – Judge Romeo rested on the purported credibility of Ms. Ricci's two witnesses,[36] stating:

> "…the department offered testimony of Kay Resch and Trisha Kalpin, both CPS caseworkers. This Court finds their testimony to be credible and consistent, and credits their testimony as fact." (Ex. N-21, p. 4),

further asserting that "The mother's testimony was wholly incredible" (Ex. N-21, p. 9), that the father's "testimony was tainted by the mother's testimony" (Ex. N-21, p. 9), and that

> "the respondents have attempted to make this hearing and the filing of the underlying petition of a result of a failure to understand the respondents' culture and as a shield to detract from the serious allegations. There is no basis in fact to make either of those allegations." (Ex. N-21, p. 12).

In fact, ANY fair and impartial tribunal making credibility determinations would have found, based on Mr. Van Loon's cross-examination of Ms. Resch and Ms. Kalpin, the most shocking admissions and material problems with their testimony, making it not credible[37]– indeed, suffused with fraud, abetted by Ms. Ricci and Ms. Fifield. Indeed, "a failure to understand the respondents' culture" is TOO generous an explanation for the maliciousness and depravity the record manifests – including with respect to the credit-worthy testimony of both parents[38].

Illustrative is Ms. Kalpin's "investigation progress note" entered February 26, 2021 for events of February 12, 2021 (Ex. H), to which Mr. Van Loon's closing argument referred. By that note, Ms. Kalpin purported to recite her phone contact with Ms. O'Brien at 3:05 p.m. on February 12, 2021. The first sentence of the note read: "Sr. CW contacted SW O'Brien who confirmed the details of the report" – without identifying what the referred-to "report" was.

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[36] "Credibility issues, as well as the weight to be given the evidence presented, are primarily determined by the trier of fact … Family Court's determination is entitled to great weight on appeal and should not be disturbed unless clearly unsupported by the record…", *Matter of Kathleen OO*, *supra*, at p. 66, cited in Ms. Ricci's July 21, 2021 affirmation in opposition to Mr. Van Loon's summary judgment/dismissal motion.

[37] **Testimony of Ms. Resch**: May 24, 2021 transcript (Ex. N-9, pp. 31-52); June 1, 2021 transcript (Ex. N-11, pp. 9-60); June 3, 2021 transcript (Ex. N-12, pp. 9-75).
Testimony of Ms. Kalpin: March 29, 2021 transcript (Ex. N-4, pp. 8-37); June 7, 2021 transcript (Ex. N-13, pp. 8-38); June 17, 2021 transcript (Ex. N-14, pp. 9-67); June 28, 2021 transcript (Ex. N-15, pp. 15-71).

[38] **Testimony of [the Mother]**: June 28, 2021 transcript (Ex. N-15, pp. 71-98); June 30, 2021 transcript (Ex. N-16, pp. 9-65); July 27, 2021 transcript (Ex. N-17, pp. 17-48); July 29, 2021 transcript (Ex. N-18, pp. 3-55).
Testimony of [the Father]: July 29, 2021 transcript (Ex. N-18, pp. 55-100); July 30, 2021 transcript (Ex. N-19, pp. 3-70).

Presumably, the "report" was the CPS' "INTAKE REPORT", generated by Ms. O'Brien's phone contact to CPS – the same as annexed to the February 16, 2021 petition (Ex. C) as its sole attachment and quoted in its ¶5 as constituting Ms. O'Brien's "child protective referral" (see pp. 20-21, *supra*).

As hereinabove recited (pp. 20-23, *supra*), the petition's ¶5 and the annexed CPS "INTAKE REPORT" (Ex. C) are rebutted by Ms. O'Brien's LDSS-2221A form, "REPORT OF SUSPECTED CHILD ABUSE…" (Ex. D-2) – setting forth, in Ms. O'Brien's own words, what the child's art teacher told Ms. O'Brien and what the child told Ms. O'Brien – and what Ms. O'Brien presumably recounted in thereupon calling CPS. As Ms. O'Brien sent her LDSS-2221A form to CPS either shortly before or shortly after Ms. Kalpin phoned her at 3:05 p.m. (Ex. H), it is the BEST EVIDENCE of what Ms. O'Brien would have told Ms. Kalpin in their phone conversation – exposing Ms. Kalpin's belatedly-entered February 12, 2021 note as a malicious fraud.

Quite simply, based on the LDSS-2221A form (Ex. D-2), Ms. O'Brien could NOT have made the gross misstatements as appear in the first paragraph of Ms. Kalpin's belatedly-entered "investigation progress note" (Ex. H).

As for the second paragraph of Ms. Kalpin's belatedly-entered note (Ex. H), stating:

> "…Sr. CW inquired why the teacher took a video of the incident. She explained the teacher felt it was necessary to take a video because she has previously addressed this issue with mom and did not feel mom took her seriously. Sr. CW advised SW O'Brien not to show anyone else the video or show anyone else the video aside from LE. Sr. CW informed SW O'Brien that herself and another CW would be at the school shortly to meet with [the Child]. She advised CW that [the Child] would be in the main office with her",

this allegation against [the Mother] – that she had not taken "seriously" her daughter's masturbating in art class, although communicated to her by the art teacher, Ms. Rolland, and that Ms. Rolland had told this to Ms. O'Brien – who then told it to Ms. Kalpin – has ZERO substantiation in the record[39] and the [Parents] denied having ever been contacted by Ms. Rolland or anyone else from the school.[40]

This "investigation progress note" is NOT the only fraud Ms. Kalpin committed on February 26, 2021. She entered, on that date, a further "investigation progress note" into the CPS computer system (Ex. I) – and this note, like the first note (Ex. H), was the subject of cross-examination by

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[39] It is contradicted by both Ms. Travis' own "investigation progress note" for February 12, 2021 (Ex. F) and Ms. O'Brien's own LDSS-2221A form (Ex. D-2). See fn. 24, *supra*.

[40] See, *inter alia*, ¶15 of [the Father's] affidavit in support of the July 7, 2021 summary judgment/dismissal motion, quoted at p. 64 *supra*; [the Mother's] testimony: July 27, 2021 transcript (Ex. N-17, pp. 44-45).

Mr. Van Loon at the §1028 hearings, whose effectiveness was limited because he was unaware of Ms. O'Brien's LDSS-2221A form (Ex. D-2).[41]

In pertinent part, Ms. Kalpin's second note, bearing an entry time of 8:43 p.m. (Ex. I), stated:

> "**I reviewed the case file, progress notes, RAP, Final Safety Assessment, and Investigation conclusion.**
>
> [The Child] was observed at school masturbating while in art class. The teacher pulled [the Child] aside and had her talk with the SW outside of the classroom. [The Child] met with the SW who inquired why she had been touching herself. [The Child] proceeded to disclose that it is something they do in her family and it is ok. [The Child] disclosed that her mom gives her oil massages on special days and places her fingers inside her vagina when she give her oil massages.
>
> [The Child] had a FI at her school (French Road E.S.) in the presence of assigned CW Kate Travis and school SW Tara O'Brien. [The Child] made a credible disclosure of sexual abuse against her Mother [xx]. Specifically, [the Child] disclosed on more than one occasion her mother has massaged her breast, buttocks, and vagina with 'heavy cream, essential oils and baking flour'. [The Child] explained these massages occur on 'special days' and her mom will dress her in special outfits after these massages. [The Child] reported that when her mother puts the essential oils on her hands sometimes, she will place (Mother's) fingers inside her vagina to get the bacteria out. She reported that she likes when her mom does this as she can sleep at night and feels at peace. [The Child] reported her father is aware her mother gives her these oil massages and doesn't intervene. [The Child] denied any of these practices being related to religion, culture, or holidays. [The Child] reported that when her mom touches her vagina it makes her uncomfortable.
> …
> Both parents expressed as part of their Indian Culture they practice Ayurveda with their daughter. As with many forms of Eastern medicine, Ayurveda is fundamentally a preventive approach to well-being. Ayurveda is that each of us is born with a distinct constitution, a particular combination of vata, pitta, and kapha that is completely unique to everyone. In this practice, there is ayurvedic oil massages for children (Abhyanga) the ancient practice of massaging the body with oil, clams the nervous system and rejuvenates the tissues. It should be noted that it appears [the Mother] has incorporated some of these practices and manipulated them to fit her own believes (sic) which has had a negative impact on her daughter.
> ….
> **Case approved to be indicated and transferred to CPSM.**" (Ex. I, bold in the original).

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[41] *See* June 17, 2021 transcript (Ex. N-14, pp. 18-21, 26-27, 59-66); June 28, 2021 transcript (Ex. N-15, pp. 15-18, 23-26, 51).

Ms. Kalpin purported this "Type" of note to be "Supervisor/Managerial Review" – which was itself a fraud as:

> (1) she was NOT a "supervisor" or "manager" – and did not testify to be one at the §1028 hearings, where she identified herself solely as "senior caseworker on the impact team of the Monroe County Department of Human Services"[42]; and
>
> (2) she could NOT be a "supervisor" for her *own* work – a fact concealed by her note's omission of any reference to her being one of two investigative caseworkers assigned to the case– the other being Ms. Travis;

For these reasons, she could not, as the final sentence of her note purports to do, render the determination "**Case approved to be indicated**", which would have been pursuant to 18 NYCRR §432.2(b)(3)(iv), which reads:

> "The child protective service has the sole responsibility for making a determination within 60 days after receiving the report as to whether there is some credible evidence of child abuse and/or maltreatment so as either to 'indicate' or 'unfound' a report of child abuse and/or maltreatment.",

and which determination, and certainly the "review and approve", is required to be made by a CPS supervisor, pursuant to 18 NYCRR §432.2(b)(3)(v), which reads:

> "A child protective service supervisor must review and approve the decision to either indicate or unfound the allegation(s) of child abuse and/or maltreatment."

Moreover, NO competent supervisory/managerial review of "**the case file**" – with its included LDSS-2221A form of Ms. O'Brien (Ex. D-2) and the handwritten "investigation progress notes" that she and Ms. Travis had made (Ex. F, Ex. H) – could approve, as "indicated", the "report" – by which Ms. Kalpin was fraudulently meaning the CPS "INTAKE REPORT", not Ms. O'Brien's diametrically different LDSS-2221A "REPORT OF SUSPECTED CHILD ABUSE…", which established the CPS "INTAKE REPORT" to be a fraud, requiring investigation and prosecution of those responsible for it.

Moreover, as to the above-quoted first two paragraphs of Ms. Kalpin's February 26, 2021 note (Ex. I), their fraudulent concealment and falsification of the material facts is established by (1) Ms. O'Brien's LDSS-2221A form (Ex. D-2); (2) Ms. Travis' own "investigation progress notes" for February 12, 2021 (Ex. F); (3) the supposedly "anatomically correct" female diagram used by Ms. Kalpin at the supposed "FI" of the child – having NO vagina to which the child could point (Ex. E); and (4) the petition itself (Ex. C).

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[42] *See* March 29, 2021 transcript (Ex. N-4, pp. 8-9); June 7, 2021 transcript (Ex. N-13, pp. 8-9).

Suffice to add that at the §1028 hearing on June 7, 2021, Ms. Ricci asked Ms. Kalpin, at the outset of her direct examination, whether the February 12, 2021 child protective referral had been "indicated":

June 7, 2021 transcript (Ex. N-13, pp. 10-11)

Ricci: And in this particular case, did there come a time on February 12, 2021 that the department received a child protective referral involving the child [xx]?

Kalpin: Yes.

Ricci: What was the referral about if you could explain?

Kalpin: There were concerns there were allegations of inadequate guardianship and sexual abuse of [the Child] by both of her parents, [xx] and [xx].

Ricci: And was there ultimately a decision with regard to that CPS referral, if you know?

Kalpin: Yes.

Ricci: Was there an indication –

Van Loon: Objection. Decision by whom? It's a vague question.

Court: Sustained.

Ricci: Did there come a time where that CPS referral was indicated or determined – a determination made on that CPS referral?

Van Loon: Objection. Irrelevant as to this proceeding.

Court: Overruled.

Kalpin: Yes, there was.

Ricci: What was that for?

Kalpin: It was indicated for concerns of sexual abuse and inadequate guardianship of [the Child].

Both Ms. Ricci and Ms. Kalpin well knew, but colluded with each other in concealing, that the "child protective referral" to be "indicated" was NOT the CPS "INTAKE REPORT", annexed by the February 16, 2021 petition and quoted at its ¶5 (Ex. C). Rather, it was Ms. O'Brien's LDSS-

2221A form (Ex. D-2), which Ms. Ricci had not produced for discovery, and which, contrary to the CPS Manual, was not reflected in the "investigation progress notes" because it established the CPS "INTAKE REPORT" to be a fraud.

Judge Romeo did not, thereafter, reduce her August 4, 2021 oral decision denying the [Parents] §1028 relief (Ex. N-21, pp. 3-14) to a written decision or order.

VII.
The Without-Explanation Re-Assignment of the Case from Judge Romeo to Judge Nesser

The next court appearance, following Judge Romeo's two August 4, 2021 from-the-bench oral decisions (Ex. N-21), was on August 24, 2021 (Ex. N-22). It was not, however, before Judge Romeo, but before Judge Joseph Nesser, who did not explain, in any way, why Judge Romeo was not continuing with the case or how he had been selected to succeed her. The only thing he said was that he had been "recently assigned this case" (at p. 2) and had "inherited this recently" (at p. 8).

Judge Nesser signed an order to show cause that Mr. Van Loon had submitted the previous day for production by subpoena *duces tecum* upon Brighton Central School District of videos and records pertaining to the child and to permit the child to be examined by experts. He set oral argument for September 8, 2021.

In response to Mr. Van Loon's request that Judge Nesser consider removal and replacement of Attorney for the Child Fifield, Judge Nesser stated "Any motions you want to make, you make them in writing" (Ex. N-22, p. 14).

A.
Judge Nesser's September 8, 2021 Oral Decision, Denying the Motion for Expert Examination of the Child is Indefensible and Must be Vacated, *as a Matter of Law*

Mr. Van Loon's order to show cause that Judge Nesser signed on August 24, 2021 (Ex. N-22) sought, *inter alia*, an expert examination of the child pursuant to Family Court Act §1038(c) – and, as to this, Mr. Van Loon's supporting affirmation stated:

> "5. The pending neglect action was brought by the County of Monroe on February 16, 2021. By the County's own admission, the only 'evaluation' of the subject child was a less than thirty-minute interview on February 12, 2021, by Caseworker Trisha Kalpin, who is not a physician, psychologist, or social worker.
>
> 6. There was a physical examination conducted by Dr. Ann Lenane of the Reach Clinic at the University of Rochester which reported no physical injuries to the child.

> 7. During trial it was revealed that Caseworker Tricia Kalpin has an academic background in criminal justice, not medicine, psychology, or social work.
> …
> 13. The County of Monroe to my knowledge and belief has never conducted a psychological or sexual abuse evaluation of the subject child other than as previously stated.
> …
> 15. …the County of Monroe had the Bivona Child Advocacy Center as a resource to conduct an interview or an evaluation, but for whatever reason failed to utilize that option.
> …
> 17. In the present matter the sole material allegation is whether Respondent mother and/or Respondent father sexually abused the subject child. Permitting an evaluator to render their opinion after examining the child is necessary to the defense of this action.
>
> 18. The potential 'harm' to the subject child by being asked about the allegations made in the petition are de minimums (sic) as she has already upon information and belief discussed this matter with two separate attorneys for the child and at least one 'interview' at her elementary school with two County caseworkers present."

Family Court Act §1038(c) states, in pertinent part:

> (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. …"

Both Ms. Ricci and Ms. Fifield opposed the expert examination. Ms. Fifield filed a September 7, 2021 opposing affirmation, which, conspicuously, did <u>not</u> assert that the child would, in her opinion, suffer any harm by such examination, nor point to ANY evidence from which that might be inferred. Likewise, Ms. Ricci's September 1, 2021 responding affirmation did <u>not</u> purport that the child would suffer harm by such examination – or point to evidence for same, other than by the deceit, in her ¶11:

> "…In addition to the serious nature of the sexual abuse and neglect allegations in the petition, Respondents have admitted, and the child's attorney has reported, the child is experiencing trauma because of the court proceedings."

This was materially false. The child was NOT "experiencing trauma because of the court proceedings", but because of the court orders removing her from her parents' custody (Ex. J, Ex. K) – as to which the child had repeatedly sought to communicate to the judge, directly, because BOTH of her two court-appointed attorneys were accepting her supposedly "credible allegations" of sexual abuse by her parents that she knew nothing about.

On September 8, 2021 (Ex. N-23), Mr. Van Loon's oral argument was as follows (at pp. 3-7):

> "…we believe that we have a right to have the child be interviewed by a professional, our professional and see if the allegations in the neglect complaint against my clients are accurate. One of the things that has been pervasive (sic) throughout this case is that there has been a lack of intellectual curiosity as to the actual allegations in this matter with regard to sexual abuse against my clients, in that the initial interview with my client's daughter was held at French Road Elementary School for a whopping twenty minutes. There was no follow-up after that with regards to interviews – as to any kind of forensic interviews with regard to Bivona Child Advocacy Center. They didn't get involved. There was no investigation by the Brighton Police Department who decided not to pursue charges in this matter. And it looks like from the case notes itself that the only time that the child was – had any questions about this case was that initial interview.
>
> On top of that, with regard to the discovery process, Your Honor, it turns out that according to my colleague, Ms. Ricci, they've only got two witnesses in this matter, both of whom had previously testified at the 1028.[43] They don't anticipate calling any experts whatsoever at least at this time. And, furthermore, one of things the chief accuser in this matter is not a licensed clinical, social worker, Ms. Trisha Kalpin, who is the caseworker in this matter. So, you don't have any expertise at all, you got nobody with any educational background that would be able to tell, interview the child, who has interviewed the child at all. And then on top of that what you have is a medical report that says that there's been no evidence of any physical injury.
>
> So, you got all those sort of elements and they're just accusing my clients of these horrible things. And we believe that we have a right to defend ourselves. And the question about the trauma issues that were brought up in the responsive papers, this child has been traumatized enough not being home with Mom and Dad for seven months. That's fundamental. The question is: Is this child going to be interviewed by anybody including our experts to be able to try to determine whether this accusation is true? And, Judge we have a right to have our expert independently review and go through and interview the child provided that there are procedural safeguards for it and those procedural safeguards include a videotape of whatever interview that he's going to have with her. Okay.
>
> …

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[43] NOTE ADDED: This was erroneous. Although Mr. Van Loon correctly noted that Ms. Ricci had identified that she would only have two "expert" witnesses at the trial, they were Ms. Kalpin, who had testified at the §1028 hearings, and Ms. O'Brien, who had not. [*See* Ms. Ricci's August 26, 2021 Response to Demand].

> …if we're going to defend this action and on the allegations that they've got against our clients, this is the type of case where either we're right or we're wrong. And the consequences for us not doing this and not trying to have an expert opinion even when the County of Monroe doesn't want to have an expert opinion, doesn't have that intellectual curiosity to say, well, maybe during the time in which the child was in foster care we should have like been to an expert, going to Bivona or try and prove these things. They didn't do any of that. And now it's our turn and we want to put on our defense and we need to put on a defense. …"

Emily Scott, Esq., a Monroe County Deputy Attorney in the Children Service's Unit, appearing at the September 8, 2021 proceeding (Ex. N-23), opposed, stating (at p. 9) "I would object to that pursuant to 1038. It's not an automatic right, and I would rest on Ms. Ricci's papers at this time."

Ms. Fifield then followed:

> "Judge, I would echo that sentiment and I would also – I would be reticent to really buy into what the child says at this point to another evaluator because she's been programmed. You know, the child's language parrots what the parents are saying in court. She <u>appears</u> to have been talked to by the parents and that's her mantra now. So, I don't think that interview would be valid …" (Ex. N-23, p. 9, underlining added).

Thereupon, Judge Nesser denied, from the bench, the respondent-parents' request for an expert examination of the child, stating, in seven sentences:

> "There's a two-prong test. The first is a review of the need of the respondent to have an exam to assist in preparing the case and the second is that the Court must look at the potential harm to the child. There has been no specific need. It's just I need to defend the case. That's not enough. And secondly, the child has already been interviewed twice and unfortunately – and I don't know this for a fact, but it's been intimated on more than one occasion that the child is being spoken with which has an influence on the child.
>
> So, the Court is going to deny the application for a forensic interview." (Ex. N-23, p. 13).

<u>By this September 8, 2021 oral decision, Judge Nesser</u>:

(1) cited <u>no</u> law or commentary explicating the "two-prong test";[44]

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[44] "[Family Court Act §1038(c)] creates a presumption of necessity of an examination rebuttable only by a showing special circumstances or potential harm to the child.[fn] …the court must determine whether, under the circumstances of a particular case, the potential benefits outweigh the potential harm.[fn]", <u>Carmody Wait</u>, 2nd §119A.81 "Examination or Interview of abused or neglected child".

(2) furnished no particulars of the purported two interviews of the child – the first being by Ms. O'Brien, as to which he had only the CPS "INTAKE REPORT", annexed to the petition (Ex. C), NOT her rebutting LDSS-2221A form (Ex. D-2), the second being by Ms. Kalpin, rebutted by the "anatomically-correct" female child diagram, having NO vagina (Ex. E);

(3) did not state that he was determining that the child would suffer "potential harm" – or that there was ANY evidence in the record to support such determination that he did not make; and

(4) introduced an extraneous "intimat[ion]" that he conceded he did not know "for a fact".

Thereafter, Judge Nesser did not reduce this oral decision denying an expert interview of the child (N-23, p. 13) to a written decision or order.

B.

Judge Nesser's September 20, 2021 Oral Decision Denying the Motion to Remove Attorney for the Child Fifield is Indefensible and Must be Vacated, *as a Matter of Law*

On September 2, 2021, Mr. Van Loon made a motion to remove Ms. Fifield as attorney for the child, supported by an affirmation in which he stated:

> "5. Ms. Fifield in her representation has decided to substitute her own judgment notwithstanding the child's position and [has] work[ed] to keep the child out of her parent's care.
>
> 6. There is no evidence that indicates that the child suffers a mental defect or disability that would affect the child's understanding or memory. In fact, the evidence has been that this is a bright, active, intelligent child who knows her own mind.
>
> 7. Complicating matters is the report of the child's therapist, Shipra Bakhchi, PhD, that the child was struck on the knee by Sara Fifield, Esq. The child expressed distress and discomfort. Exhibit A.
>
> 8. It is clear that the attorney-client relationship has broken down between [the Child] (DOB: 04/23/2012) and Sarah Fifield, Esq., requiring her to be replaced as the child's counsel.
>
> 9. The entire initiation of the neglect matter was predicated by a video recording taken by French Road Elementary School Art Teacher Melissa Rolland claiming that the child was inappropriately touching herself in a sexual way. The video was obtained by subpoena through the Brighton Police Department. The video shows the child in art class at her desk with other children

in class. The child was scratching her right hip. Not only did Ms. Fifield not want to see the video, but she also strenuously objected to its admission into evidence.

10. The lack of trying to review or track down evidence on behalf of her client runs in contravention to paragraph 4 of the Summary of Responsibilities of the Attorney for the Child, which stated, 'Conduct a full factual investigation and become familiar with all information and documents relevant to the representation of the child.'

11. Of important note is that the Brighton Police Department and the Monroe County District Attorney's Office have not filed criminal charges against either Respondent and have ended their investigation in this matter. Exhibit B

12. In conclusion, what exists before the Court is a neglect matter of the worst sort, a sexual abuse claim unsupported by criminal charges against either Respondent, based upon a twenty minute interview with the child which was predicated by a video taken by school personnel which does not show any sexual behavior of the child. Compounding the troubles in this matter is an attorney for the child who has substituted her judgment and has actively pursued a course of wilful ignorance not by reviewing said video and actively attempting to keep the video out of evidence.

13. As if that were not complicating factors enough, the child has told her therapist that Ms. Fifield struck her on the knee.

14. Furthermore, in Ms. Fifield's statements to the Court, she has never confirmed the allegations of sexual abuse or inappropriate touching from her interviews with her client, but instead parroted the contents of the County of Monroe's petition in maintaining her position against the wishes of her client."

Ms. Fifield opposed by a September 17, 2021affirmation, which did NOT deny or dispute ANY of the allegations of the motion, excepting that she had struck the child on her knee. She identified not a single investigative step she had taken to ascertain the truth of the petition's allegations – and, instead, put forward the testimony of Ms. Kalpin, at the §1028 hearings, as if true:

"8. The Caseworker has testified that Baby was interviewed at school prior to the parents having access to the child, and at that point, she clearly stated that her mother had inserted her fingers into the child's vagina as part of a routine of massages, and at times it was uncomfortable and at one time it actually hurt her."

As Ms. Fifield well knew, the falsity of this testimony was established by BOTH the petition and the evidence produced by Ms. Ricci on March 2, 2021 (Ex. O), namely the so-called "anatomically correct" female child diagram, having no vagina (Ex. E) and Ms. Travis'

"investigation progress notes" (Ex. F) and embodied by Mr. Van Loon's July 7, 2021 summary judgment/dismissal motion, utilized by him, with other evidence, during the §1028 hearings.

Indeed, at the September 20, 2021 oral argument (Ex. N-24), Ms. Fifield actually conceded that she had done NO investigation of the petition's allegations, putting the blame on her child client, as follows:

> "Judge, I agree that she's bright. I think she is brighter than bright. This is a very smart kid and I think that she's receiving some evident communication and instructions not to talk to the AFCs about the allegations. We talk about other things – soccer, things that she wants to talk about – but Mr. Van Loon is correct inasmuch as she doesn't want to talk about the allegations and I have to go by what's in the papers as far as the allegations……" (Ex. N-24, p. 3, underlining added).

Apart from her "I think" speculation, Ms. Fifield did not identify a single specific as to what the child had said as to why she "doesn't want to talk about the allegations" – including whether the child actually knew what "the allegations" of the petition were. Notably, Ms. Fifield's oral admission that she had had no conversations with her client about the "allegations" was not even in her opposing affirmation – and there was NO claim by her, either orally or in any papers, to having made ANY investigation of the petition's allegations on behalf of her client.

For her part, Ms. Ricci responded to the motion by a September 17, 2021 affirmation. It made no claim that Ms. Fifield was furnishing "independent counsel for the child", as intended by Family Court Act §249 – and instead offered up the deceitful statement, at her ¶6a:

> "At all relevant times, during the court appearances on the matter, Attorney Fifield has consistently stated her client's wishes (to return home) to the Court and reported the basis for advocating any position contrary to her client's wishes. Her actions were consistent with the Rules of the Chief Judge Section 7.2 and the Summary of Responsibilities of the Attorney for the Child. See New York State Supreme Court, Appellate Division, Fourth Department, Attorneys for the Children Program, Guidelines for Attorneys for Children and Ethics for Attorneys for Children, January 2017."

Concealed entirely was that, apart from a perfunctory assertion of "her client's wishes (to return home)", Ms. Fifield had never "reported the basis for advocating any position contrary to her client's wishes" other than by conclusory assertions, as to which no due process had been afforded to either the child or the parents.

Although Ms. Ricci was present at the September 20, 2021 oral argument, it was her colleague, Ms. Scott, who spoke, stating:

> "Judge, I would just rest on the papers. Ms. Fifield is an excellent attorney for the child. I believe she's acted in compliance with the guidelines and ethical rules.

> Here determination as to whether or not she should be relieved is up to the Court and I would rest on the papers at that point." (Ex. N-24, p. 4).

Thereupon, Judge Nesser, without even inquiring of Ms. Fifield as to whether the child was even knowledgeable of the motion her parents were making for Ms. Fifield's removal – and without asking her whether she believed it would be harmful to the child to be interviewed by him, *in camera*, if not to give testimony, under oath – and without giving the parents an opportunity to offer testimony as to the pertinent facts – denied the motion, from the bench, stating:

> "The Court has read all the papers. I would note that 7.2(d), sub 3, states that when an attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and consider[ed] judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the Court of the child's articulated wishes if the child wants the attorney to do so, despite the attorney's position.
>
> Ms. Fifield cites *Viscuso*, 129 AD3d 1679. It's a Fourth Department case, 2015. I've got a more recent case, matter of *Vega versus Delgado*, a Fourth Department case, 2021. The records reported that the determination that the mother's persistent and pervasive pattern of alienation of the child from the father is likely to result in a substantial risk of imminent and serious harm to the child. The AFC acted in accordance with her ethical duties when she informed the Court of the child's wishes and then advocated for a result different from the child's position.
>
> I've read the entire record of the proceeding and I'm not going to remove the attorney for the child. She has the right to advocate a position different from the child if it's warranted, and in this situation, I believe it's warranted.
>
> I'll note your exception.
>
> I have known Ms. Fifield a long time and the fact that an allegation, all of a sudden that she hit the child's leg, I mean, that's – it's incredulous.
>
> …I'm denying the application." (Ex. N-24, pp. 4-6)

In other words, Judge Nesser furnished NO specifics, let alone evidence, as to why – based on "the entire record of the proceeding" he purported to have "read – Ms. Fifield had "the right to advocate a position different from the child" and was "warranted", thereupon injecting his own personal view, based on having "known Ms. Fifield for a long time", to discount an allegation of the motion[45] – essentially the ONLY allegation Ms. Fifield had denied.

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[45] Judge Romeo had similarly relied on her personal knowledge of Ms. Fifield, stating, on June 28, 2021: "Ms. Fifield, you have practiced in my court since I've been on the bench. This is my 5th year. I knew you previously, in private practice when I was a law clerk in the building. I have never once received any complaints against you. This Court has absolutely no reason to believe that there is any truth that you have touched any of your clients, in any fashion. …" (Ex. N-15, pp. 8-9). Such followed upon the surfacing of the child's allegations, put on the record by Ms. Fifield, with response thereto by Mr. Van Loon and Judge Romeo (at pp. 3-10).

Suffice to further note that Judge Nesser's "more recent case" of the Appellate Division, Fourth Department, *Vega v. Delgado*, was an appeal from Judge Nesser's own decision. Like *Viscuso*, it was a child custody case, not a case involving Article 10 removal of a child from her parents – and the appellate affirmance of Judge Nesser was itself DEVOID of any specificity, including for its assertion:

> "The record establishes that the court "carefully weighed the appropriate factors, and the determination of the court, 'which [was] in the best position to evaluate the character and credibility of the witnesses, must be accorded great weight'".

IF in *Vega v. Delgado*, Judge Nesser "carefully weighed the appropriate factors", he certainly did not do so here in what is essentially a two-sentence decision, stating:

> "I've read the entire record of the proceeding and I'm not going to remove the attorney for the child. She has the right to advocate a position different from the child if it's warranted, and in this situation, I believe it's warranted",

Moreover, at bar, unlike in *Vega v. Delgado*, he was in NO "position to evaluate the "character and credibility of the witnesses" as he had taken NO witness testimony.[46]

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[46] There was ample witness testimony to be taken – beginning with the child herself – and including CPS, which had arranged for a forensic interview of the child at Bivona on September 28, 2021 concerning the child's allegations of Ms. Fifield's inappropriate physical contact – of which there was video recording and, presumably, expert evaluation.

The "family service progress notes" – subsequently obtained by the [Parents] in late October 2021 (Ex. R) and then in January 2022 (Ex. S) — reveal a great deal that CPS was duty-bound to have communicated to Ms. Ricci, prior to September 2, 2021, when respondents' brought their motion to remove Ms. Fifield, during the pendency of the motion, and after Judge Nesser's September 20, 2021 decision, so that she could take protective steps, as was her duty, to ensure that the child had an attorney who would advocate for her before the judge, which was not happening – and which was causing the child great distress. This includes that Ms. Fifield was NOT transmitting the child's letters to the judge that CPS was giving to Ms. Fifield for that purpose. As illustrative:

- "progress note" for August 16, 2021 (Ex. R, p. 226):

> "… [The Child] requested the opportunity to speak to the judge; CW explained that in court, attorneys speak to the judge and encouraged [the Child] to speak to AFC. [The Child] requested she write a letter and CW send it to the judge; CW informed [the Child] if she wants to write a letter, CW could get it to AFC but would not be able to share it with the judge. [The Child] stated she would write a letter now.
> …
> [The Child] provided CW with a note:
>
> > 'Dear judge, I want to go home I really miss my mom and dad and Sarah hit me because I said I want to go home I love when my mom gave me blessing on Pongal and divali and I want to go

> home and it hurt when Sara hit me [Foster Parent] Mary Kate knows that to I cried on that day. I really miss my mom, dad, grandma and my dog.'"

- "progress note" for August 24, 2021 (Ex. R, at p. 228-232, at 230):

  Reprinting August 20, 2021 e-mail to [the Father]:

  > "Hi [Father],
  >
  > When I was given the letter, I informed [the Child] I was unable to provide the letter to the judge, but agreed to give it to her attorney. The letter has been given to the attorney and I am unable to send a copy to you. …"

- "progress note" for September 15, 2021 (Ex. R, p. 263):

  "[The Child's] teacher found a note in [the Child's] desk that they were concerned about:

  > 'Dear judge, you are mean I want to go home my mom is the best I just want to go home my lawyer made a mistake I really miss my mom and dad. Sara touched me bad. My mom never did anything bad.'"

- "progress notes" for September 21, 2021 (Ex. R, pp. 270-271):

  "Erin reports she received a call from [the Father] and [the Mother] Friday (9/17) and they had numerous questions regarding the letters [the Child] has been writing including, who gave [the Child] the paper, who gave her the pen, did anyone tell her to write the letter, etc.

  [The Child] wrote another letter:

  > 'I want to go home I miss my parents I wrote so many letters to [teacher] Carrie Moulton but she would never send them my lawyer hit me and touches me bad. My mom is really good I really want to go home.'

- "progress notes" for September 30, 2021 (Ex. R, pp. 282-284):

  "Mrs. Gohil said that [the Child] has been trying to talk to the Judge."

- "progress notes" for October 26, 2021 (Ex. S, pp. 72-73)

  "…[The Child] quickly asked TW if I told the Judge what she said to me at my last visit. TW stated that I relayed to our attorneys and Judge what she stated. [The Child] said she wants to know what I said. TW explained that I do not have my notes to tell her exactly what she said.

Judge Nesser never reduced his September 20, 2021 oral decision denying the [Parents'] motion to remove Ms. Fifield as attorney for the child (Ex. N-24, pp. 4-6) to a written decision or order.

C.
The November 23, 2021 Court Proceeding & December 23, 2021 Order

On November 23, 2021, court proceedings were held. The [Parents] were now represented by Maurice Verrillo, Esq. – and the transcript reflects the following:

November 23, 2021 transcript (Ex. N-26, pp. 2-3)

Scott: …I believe we have a settlement in this matter. We did offer an ACD for a period of six months to both Respondents with a proposed dispositional plan. That is dated today because I printed it off today, but I have provided that to counsel a few weeks ago.

Part of this deal would include a trial discharge of the child [xx] to the Respondents and that would begin today.

Court: Okay. Mr. Verrillo, have you had the opportunity to discuss this matter with your clients?

Verrillo: Yes, your Honor. I have discussed it in detail since I have gotten it. I have reviewed their options with them. I understand they want to agree to it. I have explained to them what an ACD is generally. I know the Court is going to get into that and I did note – and I have noted to counsel obviously that there's no admission involved here. They deny the allegations. I have explained the process to them and I have explained that to the County that they deny the allegations, but they are agreeable to a resolution.

Court: Ms. Fifield?

Fifield: Judge, I support this resolution along with the terms of the proposed dispo plan.

…

[The Child] asked if I told the Judge that she wants to go home. TW stated that I did. [The Child] asked if I told the Judge about the oil massages and how her parents are safe and they didn't do anything wrong. TW explained to [the Child] that I did tell our attorneys everything she said to me.

[The Child] then said Sarah her attorney, hit her many times because she said she wanted to go home. [The Child] also said that Sarah touched her inappropriately."

November 23, 2021 transcript (Ex. N-26, pp. 11-22)

Court: Do you both understand the terms and conditions of the proposed dispositional plan? [The Father]?

[Father]: I understand the terms.

Court: [The Mother], do you understand the terms?

[Mother]: The order has to contain that the parents has denied these allegations and these allegations are completely false and this whole –

Court: I'm not going to – listen to me –

[Mother]: It has to – the Order has to state that.

…

Court: Do you understand the terms?

[Mother]: I understand the terms, however all these allegations are completely false and we deny all these allegations. [The Child] is very pampered, my only daughter.

Court: You have always said that, all right?

[Mother]: I'm saying that again.

Court: Do you understand that an ACD with a Marie B. waiver basically means that you're going to do these conditions in six months. As long as you do them, the case goes away as if it never happened, all right? If you don't do them, then the Department has a right to file a violation petition against you and they can just prove any of the allegations in the proposed dispositional plan. They don't have to prove the allegations in the original petition; do you understand that, [Father]?

[Father]: Yes, I understand.

Court: [Mother], do you understand that?

[Mother]: We basically never did any of these things.

Court: I'm just saying do you understand what I just said?

[Father]: We understand.

[Mother]: We understand. We basically never did any of these things.

Court: You said that. Okay. And do you understand –

[Mother]: These are all lies. All lies.

Court: Stop. Stop.

…

Court: There is an Order of Protection contained within the order that you wouldn't do anything to put the child at risk of harm. If you were to violate the Order of Protection and it was proven, it potentially could subject you to incarceration; do you understand that?

[Father]: We understand that.

Court: Do you understand.

[Mother]: I understand, but we never did that.

Court: I understand. I'm just saying – See, I keep telling you, you need to speak with your attorney and he will be your voice in court. You keep ignoring that.

Hold on. What do you want to advocate on behalf of your clients, Mr. Verrillo?

Verrillo: Yes, your Honor. I have stated a number of times previously that my clients deny the allegations and say they are false.

Court: Right.

Verrillo: I told them there's no admission involved in this…

…

Verrillo: What has been said, Judge, and I have communicated it previously to counsel is that my client had requested that when the final order is issued that it indicate they deny the allegations and that they say that they are not true. That's what I have indicated to counsel for the final order.

…

Court: …Do you understand that by agreeing to this today you're not going to have a trial; do you both understand that?

[Father]: Yes.

…

Court: [Mother], do you understand you're not going to have a trial by agreeing to this today?

[Mother]: I understand and the trial itself is a setup. It's a fraud.

Court: Do you understand by agreeing – has anybody made any promises to you, threatened you or forced you to agree to this today?

[Father]: No.

[Mother]: Family [C]ourt. Family Court has threatened me –

Court: No. Has anybody forced you to agree to this?

[Mother]: By legally kidnapping my child.

Court: Has anybody forced you to agree to this today?

[Mother]: Family Court. You, Judge.

Court: How did I force you?

[Mother]: You legally kidnapped my child.

…

Court: Has anybody made any promises to you, threatened you or forced you to agree with this? [Father]?

[Father]: We don't have much of a choice here.

Court: You always have a choice. You – listen to me. Listen to me –

[Father]: Because our kid has been legally kidnapped.

Court: You do have a choice. You can have a trial.

[Father]: We don't want a trial.

…

Court: Okay. So back to my original question, has anybody forced you to agree to this today?

[Father]: No.

Court: [Mother]? Did you hear the question?

[Mother]: I didn't hear it. Can you ask it again.

Court: For the third time, has anybody forced you to agree to this today?

[Mother]: Judge –

Court: You have the option. You can have a trial or you can agree to this.

[Mother]: Judge –

Court: Yes or no?

[Mother]: You legally kidnapped my child.

Court: It's a simple yes or no. A simple yes or now.

[Mother]: This Court is –

Court: Has anybody forced you – stop with soliloquies. I don't need to hear all the comments. I just need a yes or no answer. Has anybody forced you to agree to this today; forced you?

[Mother]: Basically you're asking me to lie and to protect you.

Court: I'm not asking you to lie. You have the right to have a trial or you can agree to this.

[Mother]: Yeah, that trial is a fraud.

Court: What do you want to do?

[Mother]: Again, you are the one – yes. Yes. Go ahead. Yes.

Court: No. Has anybody forced you to agree to this today, yes or no? You have the option of having a trial. So it's up to you whether you want to have a trial or you want to agree to this today and go from here.

So has anybody made any promises to you, threatened you or forced you to agree to this today? It's a simple yes or no; to settle it today?

[Mother]: No. I answered that. Okay. No.

Court: All right.

…

Court: And are you agreeing to this knowingly, voluntarily and intelligently of your own free will after discussing it with your attorney? [Father]?

[Father]: Yes.

Court: [Mother]? [Mother]?

[Mother]: What's the question again? Repeat it, Judge, please.

Court: All right. Are you agreeing to this knowingly, voluntarily and intelligently of your own free will after discussing it with your attorney to settle the case; yes or no?

[Mother]: I was being forced by this Court –

Court: No. That's not my question. That wasn't my question. Are you agreeing to this knowingly, voluntarily and intelligently of your own free will after discussing it with your attorney to settle the case? A simple yes or no.

[Mother]: Because that's a lie if I answer that question.

Court: I need a yes or no, [Mother].

[Mother]: Yes. I want my child back.

Court: Real simple. Is this upon your recommendation in the best interest of the child, Ms. Fifield?

Fifield: Yes, Judge

Court: All right. Then this Court will accept this…

…

Court: [Father] and [Mother], I just want to tell you both that your attorney is an excellent attorney. He's done an excellent job for you and provided you excellent representation. Make sure you thank him.

I want to thank Ms. Fifield and I want to thank the Department.

[Mother]: It is good white people protect white people and praise them –

Court: I'm still speaking.

[Mother]: I'm proud of you.

Court: I'm still speaking. But thank your attorney. He just did a great job for you today. Make sure you do the services and demonstrate to the caseworker what you're doing, all right? I want things to go well. Good luck to you. We're all set.

[Mother]: I want you to be honest, too, Judge.

Court: Stop. Stop. See you later. We're done.

* * *

On December 23, 2021, Judge Nesser signed a proposed order from Ms. Scott pertaining to the ACD disposition of November 23, 2021, adapted from a form order, which stated: "Notice having been duly given to the Respondents pursuant to Section 1036 or 1037 of the Family Court Act".

Family Court Act §1036 states, in pertinent part:

> "(a) …in cases involving abuse, the petition and summons shall be served within two court days after their issuance. … The court shall also, unless dispensed with for good cause shown, direct that the child be brought before the court. …" (underlining added).

Notwithstanding the mandatory "shall" language, it does not appear that the summons was ever served – or the petition with it – and the record contains no affidavit of service for either. Likewise, the Court never directed that the child "be brought before the court" – and the record is devoid of any request, let alone "good cause shown", for dispensing with that powerful requirement, which, moreover, the child herself was continually requesting (Ex. J, Ex. K).