IMPORTANT:
This is a link to a simple pdf version of your Her Justice manual. Please download this document and then open it in Adobe Acrobat or Google Chrome in order to access all the features of this manual, including bookmarks and page thumbnails.

Custody and Visitation Manual 2025

HER JUSTICE

CUSTODY & VISITATION MANUAL 2025

HER JUSTICE

CUSTODY AND VISITATION MANUAL

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ORIENTATION TO HER JUSTICE

SECTION 1 – ORIENTATION TO HER JUSTICE AND YOUR CASE

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FREQUENTLY ASKED QUESTIONS

Thank you for taking a pro bono case through Her Justice. We hope the following frequently asked questions will help guide your representation and troubleshoot some common challenges in pro bono work. Our manuals provide additional information and guidance specific to each type of case in our program. Of course, your mentor is always available to answer questions about legal strategy and client expectations as your case progresses.

1. What is my firm's relationship with Her Justice for the purpose of this matter?

Her Justice is a consultant to the firm. We provide mentoring, training, sample documents, and will also review any written materials that you produce in the case. When we put a client on our waitlist, we explain to them that they will be represented directly by a firm, and that we will act as consultants to their lawyers. We assert attorney-client privilege over our direct communications with clients and over our communications with our pro bono teams.

We recommend that you explain this relationship to your client at your initial meeting so that they can be reminded of our relationship with the firm and understand that the firm should be their main point of contact going forward. We recommend that Her Justice be described in your retainer agreement as an outside consultant with whom you may have privileged and confidential discussions and share documents and information.

2. This is my first pro bono client and I don't feel like I understand their perspective on the case. What should I do?

Our clients' culture and individual life histories influence their perspectives and priorities in making important decisions. It is possible that your client is making certain considerations in making these decisions or forming their perspective on their case that you are not aware of. This means that the perspective our client has on their case may vary significantly from you. Take this as an opportunity to explore sensitivity and cultural humility. Do not assume. Leave space for inquiry and introspection.

For more information, please see the Best Practices and Ethical Considerations section of this manual. Consult your mentor for further guidance.

3. What is required if my client and I do not speak the same languages?

We are grateful to firms that take cases for clients with limited English proficiency, who are even less likely to have access to justice than our similarly situated clients with English fluency. In working with LEP clients it is paramount that you ensure they are accurately understanding the information you are providing them with and that you are understanding the needs they are communicating to you. To do this, work with qualified interpreters. Qualified is a relative term so please consider the nature of the conversation and the language capacity of the interpreter you are working with. It is best practice to work with a qualified interpreter - any staff member that demonstrates written and spoken fluency - at your firm that can consistently interpret during all calls and communications with your client If that is not accessible to you, think creatively about the interpretation and translation services available to you. Ask your pro bono coordinator if it is possible to retain professional interpreter services, or assist you in reviewing the internal staff language capacity. For potentially non-sensitive information it may be appropriate to have a friend or family member interpret. **It is never appropriate to have a client's child interpret**. **It is never appropriate to rely on Google Translate or similar multilingual neural machines translation service.**

For more information, please see the Best Practices and Ethical Considerations section of this manual. Consult your mentor for further guidance.

4. What special considerations are there for working with domestic violence survivors?

Approximately 80% of Her Justice clients self-identify as survivors of Intimate Partner Violence (IPV). Your representation may or may not be directly related to the abuse that they have experienced. Depending on your client's specific circumstances, there are multiple ways that your client's experiences as a survivor may impact your work together. It is best practice in the course of your representation to make your client's safety and autonomy paramount.

For more information, please see the Best Practices and Ethical Considerations, and What is Domestic Violence sections, and Appendix Resources of this manual. Consult your mentor for further guidance.

5. What special considerations are there for working with clients with physical or cognitive disabilities?

Your client may have a physical, developmental, or emotional disability. Their disability may be the result of the abuse they've experienced. Their disability may or may not be

diagnosed and may or may not be visible or obvious to you. Talk with your client about what, if any, accommodation is needed. Check in with your client periodically about what they need in order to work most effectively with you throughout your representation, e.g., instead of handing them a written paper, ask if they are comfortable reading it to themselves or if they would like you to read it out loud to them. Be mindful of potential obstacles like the accessibility of your building or public transportation to get to your office or a court building.

For more information, please see the Best Practices and Ethical Considerations section of this manual. Consult your mentor for further guidance.

6. I am having trouble getting in contact with my client. What should I do?

We emphasize to clients that your time is valuable, and that they must be responsive to their pro bono attorney's calls, and respectful of attorney time. It is important for attorneys, however, to remember that Her Justice clients typically fall within 200% of the federal poverty line (approximately $30,000 for a household of one), are juggling multiple urgent needs, and are prioritizing accordingly. For example, in light of food or housing insecurities, your client may choose to forego buying cell phone minutes in order to put food on the table. We understand how this choice may impact you and your ability to communicate with your client, however, we ask for your understanding and compassion. We encourage you to speak with your client during your initial call and establish a safe back-up contact in case this situation arises. Be creative in contacting your client and responsive to their needs. Explore alternatives like using work email, text messages, or mail.

For more information, please see the Best Practices and Ethical Considerations section of this manual. Consult your mentor for further guidance.

7. My client has been late to meetings or hasn't shown up to court or my office. What should I do?

We emphasize to clients that they should call you if they need to change or cancel their appointment, or if they are running late. It is helpful if the pro bono attorneys understand that it is not unusual for a client to have trouble keeping an appointment. Our clients are under-resourced. They may be experiencing a more pressing crisis, like an eviction, health crisis, or safety concern. It is possible that attending an appointment may require them to take time off work, pay for round-trip transportation, and coordinate childcare which they may not have the resources to do. Your client, especially at the beginning of your relationship, may feel uncomfortable or embarrassed to share why they cannot make an appointment with you. We ask for your understanding, compassion, patience, and flexibility in this matter. Please keep in mind that the handling and outcome of the case

primarily affects the client and any accommodation that can be provided is greatly appreciated.

Consider whether the firm could pay for a car service or a MetroCard for the client if transportation is a barrier to effective representation. At your first meeting with the client, ask them about their work and childcare schedules so you can select meeting dates and times that are easy to keep. For example, if your case will involve court appearances, tell the client that they should expect to meet with you or attend court during business hours, and that they will have to ask for time off from work or arrange for childcare in order to do so. Plan to meet up early on the day of a court appearance, taking into account the likelihood of the client needing extra time to get to court from home with everything they need and childcare in place. These expectations should be clear at the outset of the case so that the client can plan and does not feel surprised or overwhelmed later on. We thank you for your patience and compassion and encourage you to use your time with your client efficiently, to keep the number of meetings manageable.

For more information, please see the Best Practices and Ethical Considerations section of this manual. Consult your mentor for further guidance.

8. My client wants me to help with a new case or another issue. What should I tell them?

Remember that your firm is retained only for a specific case, and your retainer agreement should state the scope of the representation simply and specifically. For Family Court cases, we recommend that you specify the docket number for your case on the retainer, as you are not obligated to represent the client on future violation and modification petitions. While we encourage firms to assist clients if possible, with related cases, we do not recommend that the firm take on additional cases for a client without consulting with Her Justice or another legal services organization, if the new case is unrelated to family, matrimonial, or immigration work.

Be consistent with the client and maintain appropriate boundaries, remembering that you are their attorney for a discrete issue, and cannot provide social work services or unrelated legal services (for more information on these services, see Question 9, below). If the client has new legal issues, contact Her Justice for a new intake for the client. It is possible that Her Justice can provide advice or an appropriate referral. If the new issue is one that we would typically assist with, we can discuss whether the firm would like to expand its representation to include the new case (for example, the client now has an order of protection case in addition to a child support case).

9. I think my client needs to talk to a counselor or social worker. What should I do?

The litigation process can be very stressful and upsetting for clients. Many clients have underlying mental health concerns, such as depression or post-traumatic stress disorder, or would benefit from extra support in making decisions about the trajectory of their cases. Contact your mentor about connecting your client to the in-house social work program at Her Justice. If your client is a survivor of domestic violence or elder abuse, they also qualify for services at a New York City Family Justice Center (FJC). Your mentor can assist with making a referral. Many clients already have case managers assigned at their local FJC.

10. How can I get up to speed on the substantive law that affects my case?

Our manuals provide an overview of the relevant law for each type of case that we mentor. In addition, we offer live and video training on every type of case, plus some additional advanced topics such as child support enforcement and division of pensions in a litigated divorce. It is imperative that you attend or view the relevant training before you start the case so that you are competent to answer basic questions that your client will have at the first meeting. Your mentor is available to answer your substantive law questions and provide guidance on any research you need to conduct, once you have viewed the training and reviewed our manual. It is also important to remember your general obligation as an attorney to familiarize yourself with the relevant law, so be sure to review, for example, the sections of the Family Court Act, Domestic Relations Law, Civil Practice Law and Rules, or applicable immigration laws you will be relying upon in your case.

11. I have a trial coming up in the Family or Supreme Court and I don't know where to begin. What should I do?

Getting courtroom experience as the lead attorney is one reason that pro bono attorneys, and leadership at their firms, seek out our cases. Our staff attorneys have personally litigated many cases, but we are primarily your consultants on substantive law, client management, and case strategy, rather than trial advocacy skills. For general litigation practice skills (for example, understanding hearsay, entering exhibits into evidence, and conducting cross examination), remember that your firm's litigation department has in-house expertise and resources in addition to the knowledge we can provide.

12. I am going on secondment, parental or other extended leave, or leaving the firm—what happens to my client? Can Her Justice take the case back?

The client has retained your firm, not any individual attorney, for pro bono representation. Her Justice is a pro-bono-first organization. With a relatively small staff of attorneys, we are able to mentor thousands of cases a year because the firms represent the clients directly, aided by our training and mentoring. Because of this leverage model, usually it is not possible for Her Justice to take the case back. Although it is possible to take on a client as

an attorney working alone, it is best if the client has two associates in addition to a supervising partner. This will allow each attorney to accommodate very busy times for billable work and allows for seamless transition of cases in the event that an attorney leaves the firm for any reason. If you are leaving, it is imperative that you find a replacement attorney at the firm before you go. The client should meet their new attorney with you, ideally in person, before you leave, and the new attorney should take possession of all files and materials. Contact Her Justice right away if you are leaving the firm for any significant period of time. Ultimately, when a pro bono attorney is no longer available to the client, it is the responsibility of the firm to re-staff the case. If your firm has taken an uncontested divorce that has become contested, and the firm has a policy against pro-bono contested matrimonial work, speak with your mentor immediately about your options.

BEST PRACTICES AND ETHICAL CONSIDERATIONS

Thank you so much for your time, effort and energy in providing pro bono legal representation to our clients. This document is meant to provide some useful framing of the unique experiences and needs of our clients as well as some best practices and ethical considerations to guide you in your practice.

POVERTY IS A RACE AND GENDER EQUITY ISSUE

The impacts of poverty are felt disproportionately amongst communities of color and communities with Limited English Proficiency (LEP) in New York City and New York State. A comprehensive study of poverty in New York City by the Poverty Tracker Research Group at Columbia University (2021) found that, before the pandemic, nearly one in five adults (or 1.2 million people) in New York City lived in poverty and more than 350,000 children (one in five) live in poverty[1]. Research from the New York State Comptroller shows that one quarter of New York's foreign born population lived below the poverty level in 2021 compared to 15% nationwide[2]. Further, a study by the Poverty Tracker Research Group at Columbia found that every year, from 2016 to 2019, Black and Latino New Yorkers were **twice** as likely as white New Yorkers to experience poverty; 22% of Black New Yorkers, 25% of Latino New Yorkers, 21% Asian New Yorkers lived in poverty from 2016 to 2019 compared to 12% of white New Yorkers.[3] Further, due to structural racism and discrimination, "roughly 40% of Black New Yorkers and 30% of Latino New Yorkers who exited poverty were pushed back below the poverty threshold just a year later"[4]. According to researchers at the Poverty Tracker Research Group at Columbia, "the interaction between racism, discrimination, and economic inequality leaves Black and Latino New Yorkers significantly more likely to endure material hardship than white New Yorkers[5]."

[1] Poverty Tracker Research Group at Columbia University. (2021). The State of Poverty and Disadvantage in New York City. Volume 3.
[2] New Yorkers in Need: A Look at Poverty Trends in New York State for the Last Decade (2022) New York State Comptroller Thomas P. DiNapoli
[3] Poverty Tracker Research Group at Columbia University. (2021). The State of Poverty and Disadvantage in New York City. Volume 3.
[4] Poverty Tracker Research Group at Columbia University. (2021). The State of Poverty and Disadvantage in New York City. Volume 3.
[5] Poverty Tracker Research Group at Columbia University. (2021). The State of Poverty and Disadvantage in New York City. Volume 3.

People of marginalized gender identity, referring to women and individuals who identify outside of the gender binary[6], in New York City were more likely to experience all forms of disadvantage than cisgender[7] men[8]. In fact, families with female heads of household experience poverty at more than two times the rate of all families and four times the rate of married couples.[9] A study conducted by Legal Services NYC (2016) found that Black Americans in same sex couples have poverty rates at least twice of those of different sex couples and Black people in same-sex couples are more than six times as likely to be impoverished than White men in same-sex couples[10]. This same study found that transgender Americans are nearly four times more likely to have a household income under $10,000 per year than the population as a whole (15% vs. 4%)[11].

HER JUSTICE CLIENT POPULATION

Her Justice serves low-income folks of marginalized gender identities who reside in the 5 boroughs of New York with legal issues in the areas of family, matrimonial, and immigration law. Our clients' annual incomes are at or under 200% below the Federal Poverty Level (FPL), which was approximately $30,000 for a single person and approximately $62,000 for a family of 4 in 2023. Poverty is "when an individual or household does not have the financial resources to meet basic needs such as food, clothing, and shelter, or alternatively, access to a minimum standard of living".[12] Our clients are 92% women of color, 83% self-identify as survivors of intimate partner violence, and 48% have Limited English Proficiency (LEP) and would need an interpreter to effectively engage in court proceedings[13].

[6] The gender binary refers to the idea that there are only two genders
[7] Cisgender refers to someone whose gender identity is the same as the sex they were assigned at birth
[8] Poverty Tracker Research Group at Columbia University. (2021). The State of Poverty and Disadvantage in New York City. Volume 3.
[9] New Yorkers in Need: A Look at Poverty Trends in New York State for the Last Decade (2022) New York State Comptroller Thomas P. DiNapoli
[10] Legal Services NYC. (2016). Poverty is an LGBT Issue: An Assessment of the Legal Needs of Low-Income LGBT People. Legal Services NYC.
[11] Legal Services NYC. (2016). Poverty is an LGBT Issue: An Assessment of the Legal Needs of Low-Income LGBT People. Legal Services NYC.
[12] New Yorkers in Need: A Look at Poverty Trends in New York State for the Last Decade (2022) New York State Comptroller Thomas P. DiNapoli
[13] Her Justice Annual Report FY 2022

Her Justice is a pro bono first organization which means we employ a small highly-skilled staff of attorneys that use their skills and expertise to educate and mentor pro bono attorneys, like yourself, on how to effectively serve and represent our client population. In FY 2022, our model allowed us to leverage the skills and expertise of our 14 in-house attorneys to mentor 2,162 pro bono volunteer attorneys who served 5,313 women children, donating 46,092 hours of their time and energy amounting to a value of $35,958,719 in legal services[14].

BEST PRACTICES

Differences in Perspective – Cultural Humility

Her Justice clients come from diverse backgrounds. Our clients' culture and individual life histories influence their perspectives and priorities in making important decisions. It is possible that your client is making certain considerations in making these decisions or forming their perspective on their case that you are not aware of. This means that the perspective your client has on their case may vary significantly from yours. Take this as an opportunity to explore sensitivity and cultural humility.

The term cultural humility was coined by doctors Melanie Tervalon and Jann Murray-Garcia in 1998 and describes "a lifelong commitment to self-evaluation and self-critique, to redressing of power imbalances in the patient-physician dynamic, and to developing the mutually beneficial and non-paternalistic clinical and advocacy partnerships with communities"[15]. Similar to medical professionals, a power imbalance exists between legal professionals and the people they serve. We acknowledge and are grateful for your professional expertise; however, in challenging this power imbalance, it is important to recognize the client as the expert regarding their life experience and the needs of their

[14] Her Justice Annual Report FY 2022
[15] Tervalon, M. & Murray-Garcia, J. (1998). Cultural Humility Versus Cultural Competence: A Critical Distinction in Defining Physician Training Outcomes in Multicultural Education. Journal of Health Care for the Poor and Underserved. Vol 9.2. pp 117-125

family. Remember "client-centered lawyering prioritizes the client, the client's understanding of the problem, and achievement of the client's goals in the way the client deems best"[16]. Empower your client to make informed decisions by explaining the law, legal processes and possible outcomes. Don't assume things and be sure to leave space for inquiry and introspection.

Respect, Empathy & Trust

Many of our clients are survivors of various forms of victimization frequently related to their gender identity, race, ethnicity, sexual orientation, class, English language proficiency, and/or immigration status. They may have experienced further victimization in attempting to access help from agencies or individuals that did not give them the space to be understood. These experiences may cause them to feel hesitant, unsafe, or distrustful. It is important to prioritize building trust in your attorney-client relationship by approaching your client with respect, empathy, patience, and transparency.

Some suggestions for establishing a good relationship with your client are:

- Be prepared to listen. Do not be in a hurry to give advice without the complete picture
- Validate their experience and believe what they tell you unless there is clear evidence of the contrary
- Be mindful of your asks of the client. Keep in mind the other conflicting demands in their life and any existing restrictions on time or money and be as accommodating as possible
- Be realistic in your deliverables to your client and set clear boundaries
- Confirm with the client that you understand them, and they are understanding you
- Be patient in repeating information and be willing to rephrase information to improve understanding
- Listen carefully and encourage questioning
- Be responsive to the needs your client raises with you. If their need falls outside of the scope of your representation, speak with your mentor for appropriate referrals
- Empower the client's informed decision making and respect the decisions they've made

Considerations for LGBTQ+ Clients

[16] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.

LBGTQ+ clients are often among the most marginalized communities served by Her Justice[17]. In working with LGBTQ+ clients it is important to not assume their gender identity or sexual orientation. In your initial conversation with your client introduce yourself by your name and gender pronouns. Ask your client their name and if they feel comfortable sharing their gender pronouns with you. Understand that your client may not feel comfortable sharing their gender pronouns with you initially. If they do not share their gender pronouns with you, please refer to the client by name or using gender neutral pronouns (they/them/theirs). If you make a mistake in your client's gender pronouns, acknowledge the mistake and move on.

Mirror the language the client uses in referring to their gender identity and sexual orientation. Always refer to your client with the name the client gave you. Referring to a client by a name they no longer use is called "deadnaming" and is very traumatizing as it negates your client's identity[18]. If you make a mistake in referring to your client by the wrong name, acknowledge the mistake and move on.

Lastly, be an ally and advocate for your client. According to a Lamba Legal survey of 2,376 LGBTQ+ people, 19% of the survey respondents who had appeared in a court at any time in the past five years had heard a judge, attorney, or other court employee make negative comments about their sexual orientation, gender identity, or gender expression[19]. To the extent the client is comfortable, attempt to address bias in the courtroom and always respect the name, gender, and pronouns they identify with.

Considerations for Clients with Disabilities

Your client may have a physical, developmental, or emotional disability. Their disability may be the result of the abuse they've experienced. Their disability may or may not be diagnosed, and may or may not be visible or obvious to you. Talk with your client about what, if any, accommodations are needed. Be mindful of the accessibility of your building. Be patient with needing to repeat and rephrase information for your client. If you need additional resources to accommodate your client, speak to your Her Justice mentor.

Communication

Be thoughtful about the communication needs of your client. Frequently, our clients do not have experience with the legal system and may be unfamiliar with many of the terms

[17] Meyer, E. (2021). Top 7 Best Practices for Representing Transgender and Nonbinary Pro Bono Clients. Proskauer for Good. Proskauer.
[18] Meyer, E. (2021). Top 7 Best Practices for Representing Transgender and Nonbinary Pro Bono Clients. Proskauer for Good. Proskauer.
[19] as cited in Meyer, E. (2021). Top 7 Best Practices for Representing Transgender and Nonbinary Pro Bono Clients. Proskauer for Good. Proskauer.

commonly used in the court room or legal discourse. Due to circumstance, their formal education may be limited, and they may have a low level of literacy. Be mindful of the needs of your client. Ensure they are able to understand all materials presented to them to the fullest capacity. Always check for comprehension.

For limited English proficiency clients, please review the "Limited English Proficiency (LEP) Clients" on this document.

Scheduling

Before making your first phone call with your client, review the information we provided you with to ensure it is safe to call the client at the time you are calling and that it is safe to leave a voicemail. Remember that many of our clients self-identify as survivors of intimate partner violence and may still be residing with the opposing party.

In your initial conversation with your client establish what methods and times are best for you to contact your client. Keep in mind that our clients are low income and may not have sufficient resources to maintain a phone plan or continuously purchase more minutes for their phone. If possible, ask if there is a trusted friend or family member whose phone you can contact if you experience difficulty in contacting your client.

In making appointments, especially in person, be mindful of time and economic restrictions your client may be experiencing. Take into account their work and child care schedules in making these appointments. Be mindful of any safety concerns your client may have in terms of what times are most appropriate in scheduling appointments. Consider whether the firm can pay for a car service or a MetroCard for the client if transportation is a barrier to effective representation.

When scheduling in person appointments with your client, consider the security requirements to enter the building. Many law offices require guests to present a valid form of identification and intense security checks to enter. This can be extremely anxiety inducing for undocumented clients that may not have a valid form of ID, LGBTQ+ clients that may not have a valid form of ID that reflects their gender identity, and clients with limited English proficiency. Some clients have difficulty navigating large office buildings and may not know where to enter, which elevator to use, or which security desk to go to.It is a best practice to meet your client in the lobby of your building and escort them to the meeting room or your office.

Missed Appointments

We emphasize to our clients that they should call you in advance if they need to change or cancel their appointment or are running late. However, it is not unusual for clients to have trouble keeping appointments. Our clients are under-resourced. They may be experiencing

a more pressing crisis, like an eviction, health crisis, or safety concern. Or attending the appointment may require them to take time off work, pay for round-trip transportation, and coordinate childcare which they may not have the resources to do. Your client, especially at the beginning of your relationship, may feel uncomfortable or embarrassed to share why they cannot make an appointment with you. We ask for your understanding, compassion, patience, and flexibility in this matter. Please keep in mind that the handling and outcome of the case primarily affects the client and any accommodation that can be provided is greatly appreciated.

Responsiveness

Our clients typically have incomes below 200% of the federal poverty line, which was approximately $30,000 for a single person and approximately $62,000 for a family of 4 in 2024, and are typically juggling multiple urgent needs. Many of our clients do not have a phone plan and instead purchase minutes on a pre-paid phone. However, in light of food or housing insecurities, your client may choose to go without minutes to put food on the table. We understand how this choice may impact you and your ability to communicate with your client, however, we ask for your understanding and compassion. We encourage you to speak with your client during your initial call and establish a safe back-up contact in case this situation arises. Be creative in contacting your client and responsive to their needs. Explore alternatives like using work email, text messages, or mail.

Interacting with the legal system is inherently traumatizing and anxiety-inducing for many of our clients. Remember that for many of our clients the legal system is unfamiliar. This is not their area of expertise and they know they need to rely on your knowledge and support to successfully navigate their case. Be patient when fielding phone calls and questions from your client. Be transparent about your capacity and set clear boundaries with your client. For example, if you are receiving multiple calls a week from a client asking for case updates, call them back and schedule a regular check-in meeting with them that fits with your work schedule to go over any questions they have and provide any case updates. This will help ease the clients' anxiety as they know a schedule to expect regular communication from you on their case.

Interviewing

Clients are often sharing sensitive personal information with you that can be difficult to share. It is imperative to build trust in your attorney-client relationship. Remind your client that the information they share with you is confidential. When asking questions about sensitive information make sure your questioning is grounded in what is needed for the case. It may be helpful to provide the client with some additional framing when asking questions as to why the information is needed and what it will be used for. For example,

- when asking questions regarding sensitive information we suggest this framing: "I am going to ask you some questions to better understand your case and how I can help. Please be as forthcoming as possible so I can provide you with the best assistance possible. Some of these questions may ask you about sensitive or private information. I want to assure you that everything you share with me is confidential, I will not share what you tell me here without your permission. Before we begin, I just want to emphasize that you do not have to share anything with me that you do not feel comfortable sharing. Please let me know if you would like to take a break or stop at any point during our interview."

At the end of the interview thank the client for sharing this information with you. It was likely not easy for them to share that level of vulnerability with you. Reground them in what this information will be used for and provide them with any next steps.

Limited English Proficiency (LEP) Clients

As stated previously, our clients come from diverse backgrounds and speak a multitude of languages. In 2022, 6 million people in New York spoke a language other than English; of that, 2.5 million speak English less well and would be considered Limited English Proficient or LEP.[20] LEPs in New York City speak 151 different languages[21]. New York City has acknowledged the need for greater language access through NYC Local Law No. 33 (LL 30) that requires covered agencies to translate commonly distributed documents into 10 designated languages and provide telephonic interpretation in at least 100 languages[22]. However, LL 30, for the most part, does not apply to most legal organizations including legal nonprofits. This means that there is a huge gap in the legal services available for LEPs. Even in our own work we see cases for LEPs take much longer to receive services than similarly situated English speaking cases.

We greatly appreciate your effort if you are handling a case for an LEP client. In working with LEP clients it is paramount that you ensure they are accurately understanding the information you are providing them with and that you are understanding the needs they are communicating to you. To do this, work with qualified interpreters. Qualified is a relative term so please consider the nature of the conversation and the language capacity of the interpreter you are working with. It is best practice to use an in-house qualified interpreter to work with your client for the duration of the case. If that is not accessible to you, think creatively about the interpretation and translation services available to you. See if it is possible to retain professional interpreter services or review the internal staff language capacity. For potentially non-sensitive information it may be appropriate to have a friend or family member interpret. **It is <u>never</u> appropriate to have a client's child interpret**. **It is never appropriate to rely on Google Translate or similar multilingual**

[20] VOLS. (2022). Language Access in Pro Bono Practice.
[21] VOLS. (2022). Language Access in Pro Bono Practice.
[22] VOLS. (2022). Language Access in Pro Bono Practice.

neural machines translation service. The Spanish Group, an internationally recognized certified translation service list 5 reasons why you should not use Google Translate or a similar software for translations:

- Translation apps translate the text literally. Think about the number of times you speak in expressions in English. For example, the phrase "break a leg" is an expression of good luck, however, if translated literally it gives the impression that you are wishing that someone would break their leg.
- Many of these translation apps are not updated or operated by professional translators
- The translator apps do not account for the regional dialect your client may speak.
- Using a translator app frequently requires proofreading by someone fluent in the language to ensure the grammar and language choices match with the idea being expressed.
- Using a translator app for translating sensitive information is unsafe as the information may be compromised during a data breach[23]

Here are some other best practices in working with interpreters:

- Always brief the interpreter on the nature of the call before starting the meeting with client
- Consult the interpreter regarding whether a legal interpreter is more appropriate for the call
- Speak to the client directly, do not address your comments to the interpreter
- Ask the interpreter to confirm the client can understand them
- Ask the client to ensure they understand you

Managing Your Case

Even if there are no updates in your case for the client, continue to regularly check in with them. Remember our clients are facing many complex issues and conflicting demands. Without regular check-ins you may miss vital information about your client's living situation, access to phone and internet services, and safety.

Be affirmative in asking questions to your mentor and informing them of any case updates. It is your responsibility to inform your mentor in a timely fashion when documents are due to be filed in court or immigration authorities, when court dates are scheduled, and when final orders or judgements are received. Without this information we are unable to accurately report on our cases and are unable to monitor the needs of our clients.

[23] The Spanish Group. (2020). 5 Reasons why not to Use Google Translate for Business Purposes. The Spanish Group. https://thespanishgroup.org/blog/top-5-reasons-not-use-google-translate-business-purposes/

Change in Notary Requirements

On January 1, 2024 CPLR 2106 was substantially amended to allow ANY person to submit an affirmation instead of an affidavit, with essentially the same force and effect. Now, in civil proceedings, any Pro Se litigant can swear to the truth of something without the requirement of a notary.

However, we believe it is best practice to continue notarizing all documents that have previously required a notary signature. This limits liability, claims of malfeasance or fraud, and takes very little additional effort. The samples herein include the notary language.

In the event you or your firm choose to submit documents that do not require notarization without a notary signature, you can find the "non-notary" language in the courts' sample forms, located here: https://ww2.nycourts.gov/forms/familycourt/custodyvisitation.shtml

WHAT IS DOMESTIC VIOLENCE?

The United Nations defines domestic abuse or domestic violence as a pattern of behavior in any relationship that is used to gain or maintain power and control over an intimate partner, child, relative, or any other household member[1]. The epidemic of domestic violence involves physical acts of violence, emotional, psychological, verbal, sexual, legal and financial abuse against an intimate partner or family member[2]. This includes any behaviors that "frighten, intimidate, terrorize, manipulate, hurt, humiliate, blame, injure, or wound someone"[3]. Fundamentally, domestic violence is "a pattern of coercive behavior or tactics that is culturally learned and socially condoned"[4].

> **Domestic violence can impact anyone of any race, age, sexual orientation, gender identity, nationality, religion, socioeconomic background, immigration status, language of fluency, or education level**[5].

Although many domestic violence cases involve individuals in a romantic relationship (typically referred to as intimate partner violence), this may not always be the case. The individuals involved may be dating, cohabitating, married, divorced, separated, and/or have a child in common. Domestic violence can present and be interpreted differently depending on the surrounding cultural and social context of the individuals involved. However, a consistent theme is use of power and control to victimize the other party.

EXAMPLES OF ABUSIVE BEHAVIORS

Physical Abuse

This form of abuse includes acts like spitting, scratching, biting, grabbing, shaking, shoving, pushing, restraining, throwing, twisting, slapping, punching, choking, burning, forcing sexual contact, forcing alcohol and/or drug use, and other acts that inhibit physical well-being. Food and medication may be withheld and access to medical attention or police services may be prevented. They may be kidnapped or confined in an enclosed space

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[1] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse
[2] Breger, M. L., Kennedy, D.A., Zuccardy J.M., & Hon. Elkins, L.H. (2022). New York Law of Domestic Violence. Chapter 1. Domestic Violence Defined.
[3] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse
[4] New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.
[5] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse

or abandoned in an unfamiliar place. Physical abuse may or may not cause visible physical injuries[6].

Sexual Abuse

This form of abuse includes pressured sex when that is not consensual, coerced sex by manipulation or threat, physically forced sex, sexual assault accompanied by violence, or other acts the right to freely and safely express their sexuality[7].

Emotional Abuse

This form of abuse includes acts and behaviors like undermining a person's self-worth though constant criticism; belittle one's abilities; name-calling or other verbal abuse; damaging a partner's relationship with their children; and isolating a partner from friends and family[8].

Psychological Abuse

This form of abuse involves acts or behaviors causing fear or intimidation; threatening physical harm to self, a partner, or child(ren); attacking a partner's property, pets, or others acts of intimidation; and forcing isolation for anyone outside of the relationship or domestic violence situation[9].

Financial or Economic Abuse

Economic abuse occurs when control is invoked over the ability to acquire, use and maintain financial resources, such as transportation, food, clothing, shelter, insurance, credit, and money. This form of abuse involves making or attempting to make a person financially dependent by maintaining total control over financial resources, withholding access to money, committing identity theft by opening fraudulent accounts or credit lines in their name, placing sole financial responsibility for supporting their household, and/or forbidding attendance at school or employment[10].

Cyber Abuse

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[6] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse & New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.
[7] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse & New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.
[8] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse & New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.
[9] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse & New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.
[10] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse & New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.

This form of abuse includes hacking, installation of spyware, cyber stalking, spoofing, identity theft, impersonation (including deep fakes), sexual extortion (colloquially known as sextortion), and the nonconsensual distribution or threat of distribution of sexually explicit images and videos[11].

Abuse of Process

This form of abuse involves misusing and manipulating legal and social processes to weaponize them against the victimized person. This includes acts like making false reports of abuse, substance abuse, or child neglect to police or ACS, filing frivolous or fraudulent immigration or court proceedings, filing retaliatory orders of protection, intentionally delaying court or immigration proceedings, misleading or lying about their legal rights and options, threats of deportation, threats to withdraw or refusal to continue support in immigration applications, stealing newly received immigration benefits or identification – like employment authorization documents, A numbers, and social security numbers – to commit identity theft, etc.

POWER AND CONTROL WHEEL

Below is the original power and control wheel. Since its creation, subsequent power and control wheels have been developed to explore specific accepts of abuse in relation to a person's identity. It describes the tactics a responsible party may use to maintain control over the person they are victimizing[12]. This wheel is not comprehensive but provides helpful framing to understand the aspects of victimization someone may be experiencing. *Other versions of the power and control wheel specific to victimization experienced immigrants and people with a disability can be found in the Appendix section of this manual*

[11] New York Cyber Sexual Abuse Task Force. About Cyber Sexual Abuse. New York Cyber Sexual Abuse Task Force. https://cyberabuse.nyc/

[12] National Domestic Violence Hotline. (2023). Power and Control Break Free from Abuse. National Domestic Violence Hotline. https://www.thehotline.org/identify-abuse/power-and-control/

[13]

"WHY DO THEY STAY?" The Stages of Change Model

Domestic violence is a complex and multi-dimensional issue that's presentation and impact cannot be generalized. Each person processes the complexities of their relationship and their trauma from the abuse they experienced differently. This process is uniquely personal to them and often not a linear process[14]. The psychology field has developed a tool for understanding the complex needs and actions of domestic violence survivors[15]. It describes the process survivors go through when they seek to end the violence and abuse they experienced. The model includes five distinct stages:

(1) *Pre-contemplation*

a. In this stage the person experiencing the abuse is not aware of the extent of the problem and minimizes or denies the abuse. At this point they likely have no intention to change or leave the situation. They may feel responsible for

[13] Copyright by the Domestic Abuse Intervention Project, 202 East Superior Street, Duluth, MN, 55802 218-722-2781
[14] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[15] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.

the abuse they are suffering and may be modifying their actions to avoid further abuse[16].

(2) Contemplation

a. Usually in this stage the abuse has increased in its severity. The survivor begins to consider the possibility of changing their current situation and may begin building social, emotional, and financial support. They may make an initial attempt to leave. However, the survivor may express ambivalence and fluctuate between feeling troubled and unconcerned as they consider whether the situation can continue unchanged[17].

(3) Preparation

a. In this stage the survivor beings to understand the abuse they experienced differently. They become more aware of the abuse they are experiencing and attempt to determine the best course of action and develop a plan to carry it out. In this stage the survivor may set aside money; call an abuse hotline; gather information about resources, services, and legal options for survivors of domestic violence; and reconnect with people they were isolated from[18].

(4) Action

a. In this stage the survivor begins to carry out strategies to protect themselves and their children from future violence by taking actions such as going into shelter, seeking a protection order, or having others intervene in the abuse[19].

(5) Maintenance

a. This stage involves a continuation of actions by the survivor that are needed to maintain the change. These actions may involve safety planning, seeking mental health counseling, and rebuilding financial health[20].

This model is cyclical and nonlinear. In fact, it is common for survivors to fluctuate between stages as they move towards maintenance[21]. Again, a survivor's process of leaving a domestic violence situation and healing from the trauma they experienced is specific and personal to them.

OTHER MODELS AND THEIR LIMITATIONS

Two of the most common models used to understand the intricacies of domestic violence are the Battered Woman Syndrome and the Cycle of Violence. The Batter Woman Syndrome and Cycle of Violence models were developed by Lenore Walker in her 1979 book *The Battered Woman* and further developed in her 1984 book *The Battered Woman Syndrome*[22]. The Cycle of Violence describes the cyclical nature of abuse in intimate partner

[16] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[17] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[18] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[19] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[20] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[21] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[22] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.

violence. The cycle starts with building tension, acute abuse, and a honeymoon phase or a loving repentant period[23]. Walker defines battered woman syndrome as "a cluster of psychological and behavioral characteristics that abused women develop as a result of how they perceive their batterer's violence"[24]. Walker posits that abused women developed "learned helpless" as a result of the "cycle of violence"[25]. Meaning that the continued and repeated abuse and control will cause the abused women to enter "psychological paralysis" and stop trying to leave the abusive situation[26]. According to Walker, "Once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive, 'helpless'"[27].

This model conflates domestic violence with intimate partner violence (IPV), imposes a heteronormative cisgender understanding of IPV that positions the cisgender woman as victim and the cisgender man as abuser, disempowers the survivor, and implies the survivor is complicit in the continuation of abuse. In addition, these models are not created to understand domestic violence and intimate partner violence from the perspective of the person being victimized. It instead gives justification to view people who remain in abusive relationships as lost causes.

[23] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[24] as cited in Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[25] as cited in Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[26] as cited in Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[27] as cited in Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.

SECTION 2:

THE LAW AND PRACTICAL APPLICATIONS

SECTION 2 – THE LAW AND PRACTICAL APPLICATIONS

A. Cover Page and TOC
B. General Timeline for Custody Visitation Proceedings
C. The Law
D. Immigration Considerations and the Violence Against Women Act
E. Immigration Considerations and Custody Visitation Cases

GENERAL TIMELINE FOR CUSTODY AND VISITATION PROCEEDINGS*

Please note: Family Court in New York City operates with extensive delays, and it is difficult to predict how long a proceeding may take or the length of time between adjourn dates.

INITIAL STEPS

- Client goes to Family Court to file a Custody Petition which sets forth the basis for asking for custody or seeking a change to an existing order, or they are served with a Petition for Custody or Visitation.
- If client files, then Clerk provides client with a Summons with a return date and information about how to serve the Respondent. They will be directed to either find someone to serve the Respondent or the Court will designate the Sheriff to serve the Respondent with the documents.

RETURN OF PROCESS/FIRST APPEARANCE

- Client brings a properly completed affidavit of service of process to court on the return date. If a Sheriff has effectuated service for them, proof of service will be sent directly to the court. Where your client is the Respondent, they appear in response to the Petition served upon them.
- Parties are asked if they wish to represent themselves or want an opportunity to bring counsel or ask for assignment of counsel if they are financially eligible. Low-income parties are entitled to assigned counsel in certain types of cases, and that includes the parents in a custody/visitation proceeding. If requesting assigned counsel, the party will be directed to provide proof of income on or before the next court date.
    - Matter is adjourned if parties want counsel, or waive counsel and are unable to come to a resolution.
    - If service could not be made on the Respondent, the matter is adjourned for new service on Respondent or a request is made for alternate service (after multiple efforts to serve the Respondent).

SUBSEQUENT APPEARANCES AND CONFERENCES

- Opportunity to answer petition or file a cross-petition.

- Court inquires if parties have spoken to one another and their position on the matter.
- Court may appoint an Attorney for the Child(ren).
- Court may hear some brief facts from the parties and determine whether to set down for a conference or for further Fact Finding.
- Negotiations sometimes begin with assistance of the Judge's court attorney. Where a Referee or Judicial Hearing Officer is handling the case, they may conference the cases before parties enter the courtroom, as time permits.

COURT ORDERED INVESTIGATION (COI)

- A visit to the parties' respective homes may be ordered by Court and arranged by the Administration for Children's Services (ACS) to examine the conditions of the home where children may be living or visiting if a concern is raised.
- The Court Ordered Investigation (COI) is a written report returned directly to the Court. Note, this type of investigation is not the same as a call to ACS alleging abuse and neglect.

FORENSICS

- Where a case is likely to go to trial, a forensic psychiatrist, psychologist, or social worker may be assigned to speak with the parties and provide an overview of the parties' personal history, parenting style and information from collateral sources about the parties to the court.
- At trial, forensic reports may be challenged.

POTENTIAL OUTCOMES

- Withdrawal – The party bringing the action no longer wishes to pursue the case (for many reasons)
- Stipulation of Settlement – Parties agree to resolve the case and set forth an agreement in writing for court to approve ("so order").
- Default – If service was made upon a party and the party served fails to appear at the initial appearance or repeatedly fails to appear at subsequent court dates, an order on Default may be entered by the court granting the moving party the relief sought.

HEARING/TRIAL

- Prepare client and all witnesses for testimony, including direct, cross examination, and re-direct.

DISPOSITIONAL PHASE

- Court enters an Order for Custody and/or Visitation either same day or later in writing.

APPEAL

- When your client disagrees with a court order and a legal basis exists for appealing, appeal must be filed within 30 days of order regardless of whether you are representing the client in the appeal. Appeals of interim or temporary orders are rarely granted in custody proceedings absent an egregious error, so if you or your client wish to appeal a temporary order, you should contact your mentor to discuss it.

Practice Tip: This is a general timeline for how a case develops. Some cases will require additional steps including motion practice to deal with issues such as jurisdiction, improper service, motions to keep address confidential, and dismissals.

THE LAW

A. CUSTODY

a. Standard: Best Interest of the Child

Neither parent has a prima facie right to custody of the child[1]. Rather, the standard for custody decisions between parents is what is in the "best interests of the child" based upon all circumstances in evidence before the court and is a gender-neutral evaluation[2]. Friederwitzer v. Friederwitzer, 55 N.Y.2d 89 (1982) and Eschbach v. Eschbach, 56 N.Y.2d 167 (1982) are the leading Court of Appeals decisions in the area of custody and set forth the best interests standard.[3] Case law establishes the following as significant, but not exclusive, considerations in determining best interests:

- ❑ Domestic violence
- ❑ each parent's relative fitness
- ❑ the quality of each parent's home environment
- ❑ each parent's ability to provide for the child's emotional and intellectual development
- ❑ the financial status and ability of each parent to provide for the child the parental guidance each parent provides
- ❑ which parent has been the "primary caretaker" since birth
- ❑ the existence of, and custodial arrangements with respect to, the child's siblings or step-siblings (courts prefer to keep siblings together)
- ❑ the child's preference
- ❑ maintaining stability – prior orders or agreements as to custody and the length of time the present custody arrangement has been in effect
- ❑ a parent's compliance with existing custody/visitation orders or agreements
- ❑ attempts to interfere with the other parent's access to the child

Courts weigh these factors alone and together in their discretion, and it is difficult to predict how a court will decide an individual case.

There is a very large and ever-expanding number of reported cases in which these factors, and others, are discussed and applied. Some cases are mentioned in the footnotes accompanying this text. Conduct individual case law research given the individual facts and legal issues presenting in your case.

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[1] DRL § 240(1), §70.

[2] Linda R. v. Richard E., 162 A.D.2d 48, 561 N.Y.S.2d 29 (2d Dept. 1990). Additionally, the "tender years presumption" that previously led courts to favor mothers as the custodian of young children no longer rules. See, e.g., Andrews v. Andrews, 74 A.D.2d 546, 425 N.Y.S.2d 120 (1st Dept. 1980), aff'd mem., 53 N.Y.2d 787, 439 N.Y.S.2d 918 (1981).

[3] See, e.g., Vogel v. Vogel, 149 A.D.2d 501, 539 N.Y.S.2d 982 (2d Dept. 1989); Farkas v. Farkas, N.Y.L.J. 7/13/92, at 31, col. 4.

b. Best Interests Factors

i. Domestic Violence

New York State statutes require the Family and Supreme Courts to consider the effects of domestic violence when making a custody and visitation determinations.[4] See Domestic Relations Law[5] and Family Court Act.[6]

DRL §240(1) reads in relevant part:

> *Where either party to an action concerning custody of or a right of visitation with a child alleges in a sworn petition or complaint that the other party has engaged in an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in article eight of the Family Court Act, and such allegations are* ***proven by a preponderance of the evidence****, the court* ***must consider*** *the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making such a direction pursuant to this section* ***and state on the record how such findings, facts and circumstances factored into the direction****. If a parent makes a good faith allegation based on a reasonable belief supported by facts that the child is the victim of child abuse, child neglect, or the effects of domestic violence, and if that parent acts lawfully and in good faith in response to that reasonable belief to protect the child or seek treatment for the child, then that parent shall not be deprived of custody, visitation or contact with the child, or restricted in custody, visitation or contact, based solely on that belief or the reasonable actions taken based on that belief. (emphasis added)*

FCA §§ 651(a) and (b), and 652(c), which apply to custody/visitation determinations in Family Court, were amended to add that such determinations should be made, "in accordance with subdivision one of section two hundred forty of the domestic relations law." This addition incorporates into each section, by reference, the provisions of amended DRL § 240(1).

<u>Family or Household Member or Intimate Partner</u>

While "domestic violence" is not defined in DRL 240(1), it does specify that the alleged act of domestic violence must have been committed against the party making the allegation or against a "family or household member" as the term is defined in FCA § 812(1) – that is, persons related by "consanguinity or affinity" (blood or marriage), persons currently or formerly married to one another, persons who have a child in common, regardless of whether they have been married or have lived together at any time, and people who have

[4] Law of 1996, ch. 85.
[5] DRL §240(1).
[6] FCA §§ 651(a, b), 652c, and related provisions FCA §§ 447(a), 467(c), and 549(a).

had an "intimate relationship" with their alleged abusers and includes intimate partners, including dating couples, same-sex couples and teenage couples. A victim does not need to have lived with the abuser or have been sexually intimate with the abuser in order for the relationship to qualify.

Weight Accorded Domestic Violence

Domestic violence is the only best interest factor specifically listed in the DRL, which specifies that the court must consider domestic violence "regardless of whether the child has witnessed or has been a direct victim of violence."[7] As to the weight that courts should give this factor relative to other factors, it is not specified in the statute. The legislative findings supporting the 1996 law[8] only indicate that domestic violence should be a "weighty" consideration for the courts. Studies are cited detailing the harm suffered by children in violent homes, whether or not they witness or suffer the violence themselves, as well as studies showing a high correlation between spouse abuse and child abuse.

Types of Domestic Violence Considered

The statute refers to "physical or psychological violence" which is used as "the means of control and the norm for the resolution of disputes."[9] Many of the family offenses listed in FCA Article 8 (for which the Supreme and Family Courts may issue orders of protection) include conduct that does not cause bodily injury, such as harassment, and which is intended to threaten or scare the victim.

Burden of Proof for Domestic Violence

Pursuant to the statute, courts are only required to consider acts of domestic violence that have been alleged in a sworn pleading and proven by a preponderance of the evidence[10] This requirement gives the respondent notice of the allegations and a chance to defend against them. Courts also have discretion to consider unproven allegations of domestic violence.

If your client already has an Order of Protection from the Family, Supreme or Criminal court, and such order was issued upon a finding of fact, you do not need to re-prove this act in the custody proceeding. You can ask that res judicata effect be given to these previous findings. This can be done by asking the court to take "judicial notice" of its own prior order, or introducing a certified copy of a court's order of protection. However, an

[7] Laws of 1996, ch.85.
[8] Memorandum in Support, Ch. 85, L. 1996; McKinney's 1996 Session Laws of New York, Memorandum in Support, New York Assembly, P. 2051-2054.
[9] Laws of 1996, ch 85 §1.
[10] See e.g., In Re: Michelle Lopez, 232 A.D.2d 760, 232 A.D.2d 760, 649 N.Y.S.2d 484 (3d Dept. 1996) (where mother failed to prove alleged domestic violence by a preponderance of the evidence, Supreme Court, Appellate division affirmed Family Court granting of custody to father).

order of protection issued upon consent without a finding of wrongdoing on the record will not suffice for res judicata.

ii. Parental Fitness

There are numerous factors that weigh into a consideration of parental fitness.

Abandonment

A parent's prolonged or total absence from a child's life is an important basis for denying custody.[11] "Abandonment" is used loosely in custody cases and does not conform to the statutory definition of abandonment applicable in termination of parental rights proceedings.[12] Where a parent leaves the marital home to escape physical abuse by the other parent, no abandonment should be found.[13]

Neglect and Abuse

A parent's conduct that demonstrates an indifference to the child's needs may weigh against or even prevent a claim for custody. For example, allowing a child to be absent from school an excessive amount, leaving a young child alone overnight, and failing to prevent mistreatment by a paramour all have been held to constitute neglect.[14] Direct acts of abuse towards a child also weigh against custody, such as excessive corporal punishment[15] and violence by one parent against the other.[16]

Substance/Alcohol Abuse

Excessive drinking or drug abuse, alone or with other factors, also has been a basis for denying custody.[17] However successful participation in a treatment program by an alcoholic or drug-addicted parent may remove this bar to custody.[18]

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[11] See, e.g., In re Peter F., 281 A.D.2d 821, 721 N.Y.S.2d 879 (3d Dept. 2001); In re Chantelle TT, 281 A.D.2d 660, 721 N.Y.S.2d 417 (3d Dept. 2001).
[12] Social Services Law §384(b).
[13] See, e.g., Olmo v. Olmo, 140 A.D.2d 677, 528 N.Y.S. 880 (2d Dept. 1988).
[14] See, e.g. In re Evan F., 48 A.D.3d 811, 853 N.Y.S.2d 142 (2d Dept. 2008); In re Celine O., 68 A.d.3d 1373, 890 N.Y.S.2d 722 (3d Dept. 2009) (leaving children unattended overnight); In re Angelo P., 98 A.D.3d 108, 952 N.Y.S.2d 2 (1st Dept. 2012); (custody given to Commissioner of Social services because child was found severely bruised after being left alone with mother's paramour).
[15] See, e.g., In re Jonathan W., 17 A.D.3d 374, 792 N.Y.S.2d 560 (2d Dept. 2005) (father's excessive corporal punishment of child and mother's failure to prevent father's use of excessive corporal punishment constituted neglect).
[16] See, e.g., In re Jeremiah M., 290 A.D.2d 450, 738 N.Y.S.2d 585 (2d Dept. 2002).
[17] See, e.g., Remillard v. Luck, 2 A.D.3d 1179, 768 N.Y.S.2d 714) 3d Dept. 2003).
[18] See, e.g., Ferguson v. Skelly, 80 A.D.3d 903, 914 N.Y.S.2d 428 (3d Dept. 2011).

Mental Illness/Physical Disability

Where the custody of a child is in dispute, the parties' physical and medical health becomes part of the custody consideration.[19] A diagnosis of severe mental illness can be the basis for denying custody.[20] For example, where one parent has a history of mental health issues, even if loving towards the child, the court may award custody to the other parent.[21] Where both parents have psychological issues, the court may choose to weigh the severity of each parent's condition.[22]

A court will consider whether the parent has been through or is currently enrolled in a treatment program for that parent's mental illness[23]. But the mere possibility that a parent who is currently enrolled in treatment could improve is not enough to grant that parent custody.[24]

By contrast, if a person has a *physical disability*, it is impermissible for the court to simply rely upon that condition as prima facie evidence of the parent's unfitness or as evidence of probable detriment to the child. Physical disability alone may not render a party ineligible for custody. [25] Rather, the court must make a factual inquiry into the parent's actual and potential capacities, learn how the parent has adapted to the disability and manages their problems, consider how the other members of the family have adjusted thereto, and take into account the special contributions the parent makes to the family despite the disability.[26]

Indiscreet Sexual Activity/Sexual Preference

Adultery or unconventional sexual behavior may only be a basis for a denial of custody if it has a proven detrimental effect on the child.[27] Also, parents should not be held, on the basis of gender alone, to different moral, behavioral or sexual standards in the evaluation of a parent's contact with the child.[28]

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[19] See, e.g., Rosenblitt v. Rosenblitt, 107 A.D.2d 292, 486 N.Y.S.2d 741 (2d Dept. 1985).
[20] In re Shawndalaya II, 46 A.D.3d 1172, 847 N.Y.S.2d 772 (3d Dept. 2007).

[21] See, e.g, Cesario v. Cesario, 168 A.D.2d 911, 565 N.Y.S.2d 653 (4th Dept. 1990).
[22] See, e.g., Fringo v. Riccio, 171 A.D.2d 963, 567 N.Y.S.2d 907 (3d Dept. 1991) (father's depression more isolated in occurrence than mother's severe and disturbing problems and long history of dysfunctional behavior). 24 In re Richard S., 6 A.D.3d 1039, 776 N.Y.S.2d 604 (3d Dept. 2004).
[23] In re Harris "AA", 285 A.D.2d 755, 727 N.Y.S.2d 769 (3d Dept. 2001).
[24] In re Harris "AA", 285 A.D.2d 755, 727 N.Y.S.2d 769 (3d Dept. 2001).
[25] See, e.g., Janus v. Janus, 239 A.D.2d 712, 657 N.Y.S.2d 256 (3d Dept. 1997).
[26] See id. at 657; See also Hatz v. Hatz, 116 Misc.2d 490, 455 N.Y.S.2d 435 (Fam. Ct., Rensselaer Co. 1982), aff'd, 97 A.D.2d 629, 468 N.Y.S.2d 943 (3d Dept. 1983).
[27] See, e.g., Sitts v. Sitts, 74 A.D.3d 1722, 902 N.Y.S.2d 274 (4th Dept. 2010).
[28] Linda R. v. Richard E., 162 A.D.2d 48, 561 N.Y.S.2d 29 (2d Dept. 1990).

Sexual preference does not render a parent unfit.[29] A parent's sexual preference should not even be a consideration in a custody proceeding unless it is shown to adversely affect the child's welfare.[30]

Dangerous or Undesirable Lifestyle

Various behaviors that singly would not form a basis for denying or modifying custody, may combine to be determinative. Several cases are illustrative:

1. Where the biological father had an unstable lifestyle and had abused the biological mother in front of the children the Court modified custody in favor of the biological mother.[31]
2. Where a biological father had custody but exhibited "bizarre and paranoid" behavior, which resulted in the child being frightened and depressed, the Court modified custody in favor of the biological mother.[32]

iii. Custodial Interference

The law places a premium on a child's relationship with both parents. Courts have held that as part of a best-interests analysis, it is proper and relevant to consider the effect that an award of custody to one parent might have on the child's relationship with the other parent.[33]

Moreover, courts have held that willful deprivation of a non-custodial parent's visitation is a basis for awarding custody to the non-custodial parent,[34] because such "interference" is so inconsistent with the best interests of the child as to per se raise a strong probability that the offending party is unfit to act as a custodial parent.[35]

As a result, a parent who is seen as interfering with another parent's relationship with a child may be considered to be acting against the child's best interests.[36] In contrast, the "friendly parent" – the one who is more likely to encourage frequent and continuing contact with the non-custodial parent – is seen as the more appropriate custodian. A parent who already has court-ordered custody may even risk losing it if they deny the non-custodial parent reasonable visitation or does not comply with court-ordered visitation.[37]

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[29] See, e.g., Paul C. v. Tracy C., 209 A.D.2d 955, 622 N.Y.S.2d 159 (1st Dept. 1994); Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 447 N.Y.S.2d 893 (N.Y. 1980).
[30] See, e.g., Sitts v. Sitts, 74 A.D.3d 1722, 902 N.Y.S.2d 274 (4th Dept. 2010).
[31] Supangkat v. Torres, 101 A.D.3d 889, 954 N.Y.S.2d 915 (2d Dept. 2012).
[32] Christy S. v. Phonesavanh S., 2013 WL 3770717, 2013 N.Y. Slip Op. 05400.
[33] David C. v. Laniece J., 102 A.D.3d 542, 958 N.Y.S.2d 145 (1st Dept. 2013); King v. Barnes, 100 A.D.3d 1209, 954 N.Y.S.2d 272 (3d Dept. 2012).
[34] See, e.g., Beyer v. Tranelli-Ashe, 195 A.D.2d 972, 600 N.Y.S.2d 598 (4th Dept. 1993).
[35] Olufsen v. Plummer, 105 A.D.3d 1418, 963 N.Y.S.2d 804 (4th Dept. 2013); Tori v. Tori, 103 A.D.3d 654, 958 N.Y.S.2d 510 (2d Dept. 2013).
[36] See, e.g., Lawlor v. Eder, 106 A.D.3d 739, 966 N.Y.S.2d 92 (2d Dept. 2013).
[37] See, e.g., O'Loughlin v. Sweetland, 98 A.D.3d 983, 951 N.Y.S.2d 160 (2d Dept. 2012).

It is important to note that the term "parental alienation syndrome" has widespread reference in the family court system despite the fact that it has **not** been proven to have scientific validity or reliability. Despite the increased use of the term, there are numerous articles debunking "parental alienation syndrome" that discuss its evidentiary inadmissibility.

Unfortunately, where there is a history of domestic violence between the parties, an abused parent's efforts to protect themself and the child from the other parent's violence might be seen by the court as interference. If charged with interference with the contact between the child and the other parent, the abused parent has the burden of proving the abuse or the burden of proving that they had to escape the violence in order to rebut the charge of interference.

If the charge of parental interference or alienation is raised in your case, please discuss with your Mentor.

Allegations of Abuse or Neglect

Often in the course of a custody proceeding, one parent makes allegations of child abuse or neglect against the other parent. If the court finds these allegations to be unfounded and "mere attempts" to interfere with the child's relationship with the other parent, there is a risk the court might award custody to the other parent.[38] Thus, a parent making such claims against the other parent should first make certain that there is sufficient evidence to support these allegations. If raised in your case, please discuss with your Mentor.

iv. Primary Caretaker (Psychological Parent)

Courts often consider which parent has provided the most care to a child since birth.[39] For example, courts favor giving custody to the parent who has been most actively involved in the child's day-to-day life: taking the child to school and other activities; feeding, dressing and bathing the child; helping the child with homework; reading to the child before bed; taking the child to a doctor, etc.

In this context, courts often consider which parent is better able to devote time to care for the child. Direct care and guidance by a parent rather than by a third party is generally preferred. A parent will not be denied custody simply because they work, although regular hours and time for the child on a regular basis are preferable. If both parents work and would need to have someone else care for the child, priority sometimes is given to the parent whose extended family (such as grandparents) are available to watch the child.[40]

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[38] See, e.g., Doroski v. Ashton, 99 A.D.3d 902, 952 N.Y.S.2d 259 (2d Dept. 2012).
[39] See, e.g., Musacchio v. Musacchio, 2013 WL 3213847, N.Y. Slip Op. 04857); Anonymous v. Anonymous, 2013 WL 2989573, N.Y. Slip Op. 04553.
[40] See, e.g., Xiomara M. v. Robert M., Jr., 102 A.D.3d 581, 958 N.Y.S.2d 391 (1st Dept. 2013); Eschbach v. Eschbach, 56 N.Y.S.2d 167, 451 N.Y.S.2d 658 (1982).

v. Ability to Meet Child's Physical and Emotional Needs

Another factor considered in awarding custody is the parent's ability to provide for the child's physical and emotional needs.[41]

Where both parents are loving and devoted to the child, courts favor the parent who has demonstrated an increased level of insight and ability to provide for the child's emotional, psychological and developmental needs.[42]

vi. Quality of Parent-Child Relationship

Another important factor that can be decisive in a custody determination is the comparison of a child's relationship to each parent, especially where that relationship is either particularly good or bad.[43]

vii. Child's Preference

A court deciding custody should also consider the wishes of the child,[44] however this factor is not determinative. This significance of this factor is heavily dependent upon the child's age, maturity and freedom from undue parental influence. Courts in general consider a young child to be unable to assess their own best interests with objectivity and to be very susceptible to parental manipulation,[45] unless there is specific evidence to the contrary. The preferences of an older child are usually given greater weight.[46] And, in cases where it is shown that improper parental influence has been exerted, courts will not give much weight to the child's stated preference.[47]

viii. Separation of Siblings

Courts tend to resist custody arrangements that separate siblings. A strong policy exists among courts to keep siblings together in order to preserve familial bonds.[48] In most cases, courts will not disrupt siblings' relationships by splitting their custody among parents unless there is an overwhelming need to do so[49] or unusual and compelling

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[41] See, e.g., Williams v. Williams, 100 A.D.3d 1347, 953 N.Y.S.2d 421 (4th Dept. 2012).
[42] See, e.g., Xiomara M. v. Robert M., Jr., 102 A.D.3d 581, 958 N.Y.S.2d 391 (1st Dept. 2013); Eschbach v. Eschbach, 56 N.Y.S.2d 167, 451 N.Y.S.2d 658 (1982).
[43] See, e.g., Eschbach v. Eschbach, 56 N.Y.2d 167, 451 N.Y.S.2d 658 (1982); Sandman v. Sandman, 64 A.D.2d 698,
[44] See, e.g., Mercado v. Frye, 104 A.D.3d 1340, 961 N.Y.S.2d 717 (4th Dept. 2013); Luo v. Yang, 103 A.D.3d 636, 959 N.Y.S.2d 255 (2d Dept. 2013).
[45] See, e.g., Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 447 N.Y.S.2d 893 (1982).
[46] See, e.g., Luo v. Yang, 103 A.D.3d 636, 959 N.Y.S.2d 255 (2d Dept. 2013).
[47] See, e.g., Zelnik v. Zelnik, 196 A.D.2d 700, 601 N.Y.S.2d 701 (1st Dept. 1993).
[48] See, e.g., Severo v. Lizzette C., 157 A.D.2d 726, 549 N.Y.S.2d 821 (2d Dept. 1990).
[49] See, e.g., O'Connell v. O'Connell, 105 A.D.3d 1367, 963 N.Y.S.2d 789 (4th Dept. 2013).

circumstances.[50] In cases where the best interests of each child lie with a different parent, split determinations are appropriate.[51]

ix. Religion

Courts tend to refrain from intervening with respect to a child's religious upbringing, in view of the constitutional protection of religious freedom. A court may not inquire into religious beliefs and practices of the parents and may not base a custody decision upon the determination that a particular belief or practice would or would not be in the child's best interests.[52]

On the other hand, courts may consider religion as a factor in a custody determination where the child has actual ties to a specific religion, or where specific religious practices threaten the child's health or welfare.[53] For example, where a parent violates a preexisting agreement to continue to raise the child in their religion since birth,[54] or refuses to provide adequate medical care for a child based upon religious beliefs, courts might intervene. However, recently the Second Department has clarified that the courts may not direct the parent to engage in (or refrain from) any religious belief or practice, nor can the court interpret an agreement that directs the children to be raised in comportment with a certain religion as directing the parent to comply also with such religious practices[55]. Otherwise, decisions about a child's religious upbringing will be left to the child (if the child is of sufficient age and/or intelligence), or to the parents if they can agree, or where no agreement is possible, to the custodial parent.[56]

x. Race

Race and/or the possible adverse effects of racial prejudice on the child awarded to the minority parent may not be the sole basis for a custody decision.

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[50] See, e.g., Stramezi v. Scozzari, 106 A.D.3d 748, 964 N.Y.S.2d 585 (2d Dept. 2013); O'Connell v. O'Connell, 105 A.D.3d 1367, 963 N.Y.S.2d 789 (4th Dept. 2013).
[51] See, e.g., Schussler v. Schussler, 109 A.D.2d 875, 487 N.Y.S.2d 67 (2d Dept. 1985); Klat v. Klat, 176 A.D.2d 922, 575 N.Y.S.2d 536 (2d Dept. 1991).
[52] See, e.g., Aldous v. Aldous, 99 A.D.2d 197, 473 N.Y.S.2d 60 (3d Dept. 1984), appeal dismissed, 63 N.Y.2d 674 (1984), cert denied, 469 U.S.1109, 105 S.Ct. 786 (1985).
[53] See, e.g., People ex rel v. Sisson, 271 N.Y.285, 2 N.E.2d 660 (N.Y. 1936); Mester v. Mester, 58 Misc.2d 790, 296 N.Y.S.2d 193 (Sup. Ct. Nassau Co. 1969).
[54] See, e.g., Smith v. Smith, N.Y.L.J. 10/9/90, at 34 col. 1 (Fam. Ct. Monroe Co.) (mother restrained from having children practice religion other than Catholicism, but custody not changed to father).
[55] See, e.g. Weisberger v. Weisberger, 154 A.D.3d 41 (2d 2017)(while it was appropriate to direct the mother to make all reasonable efforts to ensure that the children's appearance and conduct comply with the religion in which they were born and raised, it was error to direct that enforcement of the parties' stipulation of settlement required the mother to practice full religious observance during any period in which she has physical custody of the children); Cohen v. Cohen, NY Slip Op 08391 2d Dept. decided Nov. 20, 2019 ("We emphasize, as did the Supreme Court, that the defendant is not required, at any time, to himself comply with any religious practices.")
[56] See, e.g., Spring v. Glawan, 89 A.D.2d 980, 454 N.Y.S.2d 140 (2d Dept. 1982).

xi. Economic Status

Case law on this factor is conflicting.

Some courts have held that the relative financial positions of the parents is not controlling in determining custody.[57] Poverty alone cannot be a basis for the denial of custody. For example, the mere fact that one's home is not as spacious as the other parent's home, by itself, is insufficient to deny custody where the record contains no evidence that the biological mother's quarters are in any way inadequate or detrimental to the child's emotional or physical health.[58] Likewise, one parent's better financial position and ability to provide more comforts was not determinative in deciding custody, where the evidence indicated the biological mother's trailer home was a safe place to live.[59] However, contrast with *Cross v. Caswell*[60], where the record supported the court's determination that the biological father should have primary physical custody where they have a four bedroom home, is gainfully employed and can provide child with a more stable home environment and where the biological mother was unemployed and has resided in at least four different apartments since separating from the biological father.

xii. Prior Arrangement and Voluntary Agreement

Some courts accord significant weight to keeping custody with the parent who has it by virtue of voluntary agreement between the parties, in the interest of stability for the child.[61] Many courts have held that if the non-custodial parent wishes to assume custody, that parent must demonstrate how such change will significantly enhance the child's welfare or why the other parent is no longer fit.[62]

Other courts have moved away from the presumption of favoring a prior arrangement or stipulation by the parties and towards a more neutral balancing of factors in the child's best interests,[63] especially where the prior arrangement was only temporary and of short duration.[64]

If a parent had to flee the home due to domestic violence, and left the child in the custody of the other parent, it can be argued that leaving was not voluntary, and thus, does not indicate any agreement that the abusive parent should have custody. Similarly, an initial custody arrangement that was a result of coercion should be disregarded by the court,[65]

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[57] Salk v. Salk, 89 Misc.2d 883, 393 N.Y.S.2d 841 (Sup. Ct., New York Co. 1975), aff'd mem. 53 A.D.2d 558, 385 N.Y.S.2d 1015 (1st Dept. 1976).
[58] Matter of Rosiana C. v. Pierre S., 191 A.D.2d 432, 594 N.Y.S.2d 316 (2d Dept. 1993).
[59] Bilodeau v. Bilodeau, 161 A.D.2d 906, 557 N.Y.S.2d 471 (3d Dept. 1990); See also, Matter of White, 118 A.D.2d 336, 505 N.Y.S.2d 116 (1st Dept. 1986).
[60] Should be: Cross v. Caswell, 113 A.D.3d 1107, 977 N.Y.S.2D 853 (4th Dept. 2014)
[61] See, e.g., Eschbach v. Eschbach, 560 N.Y.2d 167, 451 N.Y.S.2d 658 (1982); Fox v. Fox, 177 A.D.2d 209, 582 N.Y.S.2d 863 (4th Dept. 1992); Prete v. Prete, 193 A.D.2d 804, 598 N.Y.S.2d 79 (2d Dept. 1993).
[62] See, e.g., Salvati v. Salvati, 221 A.D.2d 541, 633 N.Y.S.2d 819 (2d Dept. 1995), appeal dismissed, 87 N.Y.2d 954, 641 N.Y.S.2d 827 (1996); Stock v. Stock, 2013 WL 3722171, N.Y. Slip Op. 05307.
[63] See, e.g., Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 447 N.Y.S.2d 893 (1982); Krim v. Comerford, 57 N.Y.2d 704, 454 N.Y.S.2d 701 (1982).
[64] See, e.g., Land-Wheatley v. Land-Wheatley, 2013 WL 3722053, N.Y. Slip Op. 05318.
[65] See, e.g., Fanelli v. Fanelli, 215 A.D.2d 718, 627 N.Y.S.2d 425 (2d Dept. 1995).

and a parent who obtains custody by force is not entitled to a presumption of continued custody.[66]

xiii. Environmental Stability

Courts are reluctant to uproot a child from their familiar environment for the sake of the child's emotional well-being.[67] In some cases, courts have made the maintenance of a child's familiar environment a condition, though not the sole basis, of continuing custody.[68]

Stability is raised in custody modification cases, but also will be a factor in initial custody determinations whenever the child has lived in one place for an extended period of time. In many cases, the court will then seek to preserve this stability in a custody proceeding.[69] The stability factor is especially important when the child is young. Courts are hesitant to take custody of a young child away from the parent who has had custody since birth.[70]

c. Travel Abroad During Pendency of Custody Case and after the case Finalized

If your client has custody of the child, they may want to take the child abroad to visit their family during the pendency of the custody case. Before advising them that this is permissible, please speak to your Her Justice mentor. Your client's planned trip may impact temporary visitation and result in your client's violation of a temporary order. It may be necessary to receive permission from the Court before your client can travel abroad with their child. However, if your client received a final order directing them as the sole custodian of the child, they do not need permission from the other parent or the Court prior to traveling aboard with the child unless the terms of the order specifically direct otherwise. Note, check with consulates and with airlines about specific requirements for travel if you client does not have a sole (legal and physical) custody order. Your client may need permission to obtain a passport for travel outside of the United States. While there is a mechanism for requesting a passport for a child without the other parent's consent due to safety or other concerns (Form DS-5525), the State Department in recent years has become more restrictive about granting such requests. Carefully weigh considerations of obtaining a passport for the child with your client as the other parent is also in a position to seek to travel with the child.

d. Joint Custody

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[66] See, e.g., Rohan v. Rohan, 213 A.D.2d 804, 623 N.Y.S.2d 390 (3d Dept. 1995).
[67] See, e.g, Christina MM. v. George MM., 103 A.D.3d 935, 959 N.Y.S.2d 758 (3d Dept. 2013).; Rodriguez v. Delacruz-Swan, 100 A.D.3d 1286, 954 N.Y.S.2d 692 (3d Dept. 2012).
[68] See, e.g, Ellis v. Burke, 2013 WL 3927680, N.Y. Slip Op. 05524.
[69] See, e.g., Bush v. Bush, 104 A.D.3d 1069, 962 N.Y.S.2d 449 (3d Dept. 2013).
[70] See, e.g., Wolfer v. Wolfer, 183 A.D.2d 903, 584 N.Y.S.2d 139 (2d Dept. 1992); Prete v. Prete, 193 A.D.2d 804, 598 N.Y.S.2d 79 (2d Dept. 1993); Lobo v. Muttee, 196 A.D.2d 585, 601 N.Y.S.2d 322 (2d Dept. 1993); Keating v. Keating, 147 A.D.2d 675, 538 N.Y.S.2d 286 (2d Dept. 1989); Williams v. Williams, 188 A.D.2d 906, 591 N.Y.S.2d 872 (3d Dept. 1992).

New York courts will order joint legal and/or physical custody of a child only where both parents agree to it and it is in the best interests of the child.[71] Joint custody is generally inappropriate where parents are "antagonistic and embattled."[72] Despite this, courts (and sometimes Attorneys for the Children) often pressure parties to agree to joint custody even where inappropriate as a means to resolve cases more expeditiously. You must clearly articulate the reasons to the Court if joint custody is **not** appropriate.

Joint custody is also not favored where the client is a survivor of domestic violence. Such arrangements only work where both parents are able to communicate, work out their differences, and engage with each other as equals. Second, it requires parents to have greater contact with each other, which is exactly what your client may be trying to avoid by leaving the home and attempting to secure custody.[73] Third, joint custody facilitates an abuser's ability to continue to abuse, control, manipulate and act violently towards their victim by forcing them into a joint parenting role. This is true for both joint physical custody and joint legal custody, each of which allows endless opportunities for harassment and abuse.

i. Joint Legal Custody

Under such arrangements, both parents should be equally involved in decisions regarding the child's life and activities. Usually, one parent has primary physical custody of the child, while the other has scheduled visitation. Any significant life decisions concerning the child must be made by both parents together, in areas such as: medical/health, school/education, extracurricular activities, plans for summer vacation/camp, religious upbringing, travel, etc. In certain matters, each parent may be afforded a specific area in which that parent will have final decision-making authority, or a "sphere of influence" over different aspects of the child(ren)'s lives. For instance, one parent may have final decision-making authority regarding the children's medical issues and religion, while the other parent may have authority over sports programs and all educational issues.

ii. Joint Physical Custody

Under such arrangements, the child lives with each parent for a substantial portion of time. For example, the child might alternate weeks at each parent's home or live with one

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[71] The Court of Appeals in Braiman, 44 N.Y.2d 584, allows for the award of joint custody when it is a "voluntary alternative" made by "relatively stable, amicable parents."

[72] See, e.g., Anonymous v. Anonymous, 2013 WL 2989573, N.Y. Slip Op. 04553.

[73] Perpetrators of domestic violence frequently become more violent after the parties separate. The increase in violence is in part an attempt to regain control of the victim. Shared parenting requires a woman to remain in constant contact with her abuser during the dangerous time of separation. U.S. Dept. of Justice statistics indicate that divorced and separated women report 75% of all spousal violence, even though they only make up 10% of the population. *Testimony of Christopher Whipple, Assoc. Dir. Of Operations for Victims Services, before NYS Senate Standing Committee on Children and Families*, Jan. 11, 1996.

parent during the week and the other parent on the weekends. Note, there are **no** strict guidelines as to how physical custody is to be directed by the courts (i.e. alternate weekends). Cookie cutter arrangements that do not meet the parties' availability and interest in caring for the child should be avoided, though they are often favored by the courts, again, as means of quicker resolution.

Rather, thoughtful consideration of the arrangement that will ultimately achieve the best interest of the child is paramount and should be the foundation for crafting a workable stipulation of settlement.

Practice Tip: A court may strongly encourage a joint custody arrangement and settlement where the domestic violence is in the distant past, or the dispute appears seemingly workable to the Court. In cases where your client is adamant that joint custody is not possible, do not be intimidated by the Court's urging. Instead, you will need to advocate your client's position effectively and clearly articulate the reasons why the court should not order a joint custody arrangement. Helping the Court to understand what has not worked in the past and consequences that arose as a result of joint decision-making are vital where there is a power imbalance.

e. Non-Parent Custody

New York Domestic Relations Law § 70 identifies three categories of people who can seek custody or visitation with children: parents, siblings, and grandparents. Among these three groups, the biological parent's claim to custody is superior to those of all non-parents, unless the biological parent has surrendered that right by adoption, abandonment, or persistent neglect, or is proved by clear and convincing evidence to be unfit to be a parent.[74]

Thus, a person who is not a biological parent has no standing to apply for custody against a biological parent unless they can prove such "rare extraordinary circumstances which would drastically affect the welfare of the child."[75] Only if "extraordinary circumstances" are first established is the non-biological parent given standing and the court then permitted to hear the non-parent's petition for custody and make a disposition based upon the child's best interests. The burden of establishing "extraordinary circumstances" is on the person or organization (e.g., NYC Administration for Children's Services) seeking to deprive the biological parent of custody Generally, once it is found that a parent is fit and has not abandoned, surrendered or otherwise forfeited parental rights, no best interests inquiry is permitted as to who should have custody.[76]

i. Domestic Violence as Extraordinary Circumstances

[74] Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821 (1976).

[75] Id.

[76] See, e.g., Antionette M. v. Paul Seth G., 202 A.D.2d 429, 608 N.Y.S.2d 703 (2d Dept. 1994); Matter of Commissioner of Social Services of City of New York (Tyrique P.), 216 A.D.2d 387, 629 N.Y.S.2d 47 (2d Dept. 1995).

A parent's acts of domestic violence against another parent can establish extraordinary circumstances. For example, courts have awarded custody to the grandparents of a child where the petitioning biological father's history of domestic abuse against the deceased biological mother was found to constitute extraordinary circumstances, thereby allowing the issue of best interests of the child to be addressed.[76] In the best interest analysis, the father was determined to be unfit based upon the violence. One court held that the indictment and incarceration of a parent for the murder of the other parent is sufficient, standing alone, to establish extraordinary circumstances so that a non-parent has standing and a best interests analysis can be reached.[77]

ii. Standing for Non-Biological Parents

For many years New York courts cleaved to the bright line rule established in Alison D. regarding who may qualify as a 'parent' for purposes of custody or visitation under DRL § 70. In Alison D. v. Virginia M.[78], the Court of Appeals declined to grant standing to seek visitation to the petitioner, a non-biological, non-adoptive parent, who argued that they had de facto parent status and that they should be viewed as a parent under the doctrine of equitable estoppel. The Court limited standing for parents to only those with formal legal parentage by virtue of marriage, biology, or adoption.

After the passage of the Marriage Equality Act, and other legislative developments requiring gender equality before the law, New York courts overturned the bright line rule in Alison D. In the Matter of Brooke S.B. v. Elizabeth A.C.C.[79], the court granted standing to seek custody/visitation to a non-biological and non-adoptive parent who had not been married to the biological parent. In Brooke, the same sex couple decided to have a child by in-vitro fertilization. The non-biological parent attended doctor appointments, was present at the birth, and gave the child their last name. The couple lived together, sharing all major parenting responsibilities in raising the child. When the couple separated, the biological parent denied the non-biological parent contact with the child, and the nonbiological parent filed a petition seeking joint custody of the child.

The Family Court agreed with the biological parent's argument that the petitioner had no standing to petition for custody under the rule in Alison D., namely that there must be either a biological or adoptive connection to the child in order to qualify as a parent under the Domestic Relations Law. The Supreme Court Appellate division subsequently unanimously affirmed the Family Court decision. But on appeal, the Court agreed with the petitioner, the non-biological parent, holding that a non-biological non-adoptive parent could achieve standing to petition for custody if by clear and convincing evidence they could show that the parties had a prior agreement to conceive and raise a child, overturning Alison D. The Brooke court was careful to emphasize that the decision only established standing for a non-biological, non-adoptive parent to bring a custody or

[77] See, e.g., Ratliff v. Glanda (App. Div. 3rd Dept. 1998) cited in N.Y.L.J. 8/9/99 at 3, col. 3.
[78] Alison D. v. Virginia M., 77 N.Y.2d 651, 569 N.Y.S.2d 586 (1991).
[79] In the Matter of Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 39 N.Y.S. 3d 89 (Ct App 2016).

visitation petition; the determination of custody or visitation itself would be left to trial courts.

Brooke's impact was immediate. One case that was on appeal when the Brooke decision was rendered, Frank G. v. Renee P.F[80].,would have likely been dismissed under the restrictive Alison D. standard of who qualifies as a parent. When Frank and Joseph, a same sex couple, decided to have a child, they did so with the help of Joseph's sister, Renee, who acted as a surrogate for Frank's sperm. After twins were born, Frank and Joseph shared parenting responsibilities but Joseph did not adopt the children, nor did he and Frank get married. When the couple separated, Frank (the biological parent) took the children out of state, denying Joseph and Renee access to the children. Both Renee and Joseph filed petitions for custody. Under the Brooke rule, the non-biological parent was able to achieve standing to seek custody because clear evidence showed the parties prebirth intention to conceive and raise a child together.

The Brooke decision explicitly declined to address the issue of standing by equitable estoppel[81]. However, both the First[82] and Second[83] Departments have since held that the doctrine may be applied as an independent basis for a non-biological, non-adoptive parent to assert standing.

Thus, evidence of de facto parenting carries a great deal of weight. A recent Supreme Court decision, finding 'clear and convincing evidence of a prior agreement to conceive and raise a child,' granted custody/visitation to three parents, aka 'tri-custody.'[84] In Dawn M. v. Micheal M.,[85] a married couple began a relationship with an unmarried woman, and after moving in together, the three adults decided to conceive and raise a child together. After the child was born to the unmarried woman, the relationship between the two married parents deteriorated. The male spouse moved out, while the female spouse remained with the biological mother of the child and the child. Even though this nonbiological female parent resided with and cared for the child, she filed a petition for custody and visitation rights because she was afraid of eventually losing her contact with the child.

In granting the non-biological spouse's petition for joint custody, the court created a tri-custody arrangement between the ex-spouses and the biological mother. Claiming that this three-way arrangement was simply the logical outgrowth of the Brooke decision, and the Marriage Equality Act which allowed same sex couples to marry. The court emphasized that the child was emotionally invested with each of the three adults, and so the interests of the child were best served by maintaining their presence in the child's life.

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[80] Frank G. v. Renee P.F., 142 A.D.3d 928 (2d Dept. 2016).
[81] "What factors a petitioner must establish to achieve standing based on equitable estoppel are matters left for another day, upon a different record." Brooke S.B., 61 N.E.3d at 501.
[82] Matter of K.G. v. C.H., 2018 N.Y.Slip Op. 04683, (1D, decided June 26, 2018).
[83] Chimienti v. Perperis, 171 A.D.3d 1047 (2d 2019). Notably, the Second Department applied equitable estoppel to grant standing to a stepparent in a pre-*Brooke* decision despite *Alison D.* Jean Maby H. v. Joseph H., 246 A.D.2d 282 (2nd Dept. 1998).
[84] Interestingly, the Brooke court stated that the "plain language of the Domestic Relations Law sec. 70 clearly limits a child to two parents, and no more than two, at any given time." Brooke S.B., 61 N.E.3d at 505 (footnote 3).
[85] Dawn M. v. Michael M., 47 N.Y.S.3d 898 (2017).

f. Change of Custody

Custody orders are always modifiable when circumstances in the child's life and those of the parents necessitate a change. New York State establishes there must be a "significant change of circumstances" to permit a custody order to be modified. Courts prefer not to change custody, without compelling circumstances. Even where a parent has demonstrated a significant change of circumstances, a change in custody is not guaranteed. The parent seeking the change then has to show that the proposed change is in the best interests of the child. This applies to both legal and physical custody. Usually, this standard requires the advantages of the change to greatly outweigh the advantages of continuity and stability of the current arrangement. Where there is no indication that a change in custody will significantly enhance the child's welfare, courts have held it is best not to disrupt the child's life.[86] (Of course, custody may be changed if it is demonstrated that the custodial parent is unfit or that continued custody will be detrimental to the child's welfare.) New York courts more readily allow changes to custody arrangements that were negotiated by the parents without a custody trial.

It also should be noted that parents can, by agreement or contract, decide to employ a different legal standard to determine future custody disputes. For example, courts have allowed parents to enter into stipulations of settlement that provide that both parents can re-petition for custody and that neither would have to prove a "change of circumstances" in order to seek modification.[87]

Practice Tip: To seek a change of custody, you will need to submit a modification petition. Check in with your Her Justice mentor prior to submitting a modification petition.

g. Paternity

In New York State, a child born to parties who are married is presumptively the child of both parties. Thus, a couple has an equal right to assert and seek custody of the child born while they are married. This "presumption of legitimacy" is strong, but also rebuttable.[88]

By contrast, a biological father of a child born to unwed parents is not legally the father, even if they signed the birth certificate and the child carries their last name. Thus, the putative father usually lacks standing to seek custody of the child until an order of filiation (or paternity) is entered by a court of competent jurisdiction.

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[86] See, e.g., Ellis v. Burke, 2013 WL 3927680, N.Y. Slip Op. 05524.

[87] In Studenroth v. Phillips, 230 A.D.2d 247, 657 N.Y.S.2d 257 (3d Dept. 1997) (court upheld the validity of such provisions on the grounds that parties to a civil proceeding are free to stipulate away statutory and constitutional rights, as long as public policy is not offended. The court found that the parents can provide that future custody petitions would be determined based upon the "best interests" test rather than a "change of circumstances" test).

[88] See, e.g., Golser v. Golser, 115 A.D.2d 695, 496 N.Y.S.2d 521 (2d Dept. 1985); Michaella M.M. v. Abdel Monem El. G., 98 A.D.2d 464, 470 N.Y.S.2d 659 (2d Dept. 1984); Evelyn H. v. David H., 189 Misc. 2d 132, 729 N.Y.S.2d 132 (Sup. Ct. Clinton Co. 2000).

Orders of filiation are obtained in proceedings pursuant to Article 5 of the Family Court Act. Courts determining paternity may order both blood grouping and DNA tests for the child and biological father[89] if the parties do not both admit on the record to paternity for the biological father. Blood genetic marker tests which exclude paternity are given conclusive weight,[90] but results which only include a putative father among those who could be the father are only evidence of paternity and do not in themselves mandate a finding of paternity.[91]

An attorney should consider the following strategies to prevent an abuser from securing custody/visitation:

- ❑ if the abuser is petitioning for custody or visitation and your client is not married, and there is no order of filiation, you should move to have the petition dismissed and a direction given that they first establish paternity;
- ❑ if the abuser petitions for paternity, your client can request and the court can order, blood tests. If they are excluded, in most cases they cannot apply for custody/visitation;* even if the tests establish a high probability of paternity, your client still can request a full hearing on the issue;
- ❑ even if your client is married to the putative father, it may be possible to rebut the presumption of legitimacy at a trial[92]

* In some cases your client may be equitably estopped from denying paternity even if the putative father is excluded, when the court finds it is in the best interests of the child to continue to believe the respondent is their biological father, such as when they have acted in that capacity as a de-facto parent for the child's entire life, at the biological mother's request[93]. An abused spouse would need to counter-argue in the subsequent custody/visitation action that continued contact with an abusive spouse is not in the child's best interests.

h. Same Sex Couples

See section e(ii) above.

B. VISITATION

a. Substantive Law

Pursuant to DRL §240(1), proceedings concerning visitation with the non-custodial parent also must be resolved based upon what is in the child's best interests. Visitation is presumptively in the best interests of the child.[94] Absent extraordinary circumstances, where visitation would be detrimental to the child's well-being, a non-custodial parent has

[89] See, e.g., S.L.B. v. K.A. a/k/a K.D., 153 Misc.2d 47, 579 N.Y.S.2d 964 (Fam. Ct. N.Y.Co. 1992).
[90] FCA §532.
[91] See, e.g., Ghaznavi v. Gordon, 163 A.D.2d 194, 558 N.Y.S.2d 47 (1st Dept. 1990).
[92] See, e.g., Constance G. v. Herbert Lewis L., 119 A.D.2d 209, 506 N.Y.S.2d 111 (2d Dept. 1986).
[93] See, e.g., Anton W. v. V., N.Y.L.J. 1/29/93 (Fam. Ct. Bronx Co. 1993).
[94] Carter v. Work, 100 A.D.3d 1557, 954 N.Y.S.2d 384 (4th Dept. 2012).

a right to reasonable visitation.[95] However, the child's right to be safe from harm is paramount to any right of access a parent has.[96] Pursuant to FCA §1030 and DRL §240, courts have recognized circumstances that warrant restricting visitation, such as sexual, physical, and emotional abuse of a child, as well as domestic violence against a child's family members. Case law provides for consideration of the custodial parent's safety and convenience in determining visitation.[97]

Suspension or denial of visitation rights to a parent is a very serious decision that only is invoked for compelling reasons and in drastic circumstances when there is substantial, clear and convincing evidence (such as testimony from an expert or a serious physical injury to a child) that visitation would be harmful to the child.[98] Visitation will be denied altogether only in the most egregious cases, such as those where the child would be at risk of serious physical danger. Usually, such relief is only temporary until the parent can seek treatment for their problems and demonstrate that it is safe to resume contact with the child.

Supervised visitation is a less severe, but still serious, remedy available to the court.[99] Visitation can be supervised by a third party, including a friend/family member, or an agency. If necessary to protect the child courts may also restrict non-personal contact such as phone calls and letters.[100]

Caution your client about the temporary nature of supervised visitation.

A child's objection to visitation is not sufficient to deny access to the non-custodial parent.[101] The court may try to facilitate visitation by an order of counseling or therapy for the child and parent, separately or together or both.[102]

Practice Tip: Courts (and sometimes Attorneys for the Child) often push to "normalize" visits as quickly as possible to expedite resolution. It is also very rare for the court to deny visits completely without at least attempting supervised or even therapeutic visits. Clients who seek restrictions on visitation need to cite specific examples of harmful, dangerous, threatening, or other inappropriate behavior by the other parent, not just generalized language. Any threats by the other parent to take the child away, especially out of the country, should be reported. Courts also typically prefer family members as supervisors to agencies, so if your client has objections to family members the other parent might suggest, they should be prepared to give specific reasons why, including examples of conduct by the family member the client finds problematic.

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[95] See, e.g., Castagnola v. Muller, 105 A.D.3d 954, 963 N.Y.S.2d 681 (2d Dept. 2013).
[96] See, e.g., Molier v. Molier, 53 A.D.2d 996, 386 N.Y.S.2d 226 (3d Dept. 1976), appeal granted, 42 N.Y.2d 803, 397 N.Y.S.2d 1027 (1977), and order modified, 46 N.Y.2d 718, 413 N.Y.S.2d 372 (1978).
[97] See, e.g., M.J. v. D.J., 133 Misc.2d 883, 508 N.Y.S.2d 838 (Fam.Ct. Broome Co. 1986); Hampsey v. Hampsey, 149 Misc.2d 606, 566 N.Y.S.2d 1018 (Fam. Ct. Ontario 1991).
[98] See, e.g., Rambali v. Rambali, 102 A.D.3d 797, 958 N.Y.S.2d 188 (2d Dept. 2013); Roskwitalski v. Fleming, 105 A.D.3d 1432, 963 N.Y.S.2d 901 (4th Dept. 2013).
[99] Hall v. Simmons, 2013 WL 3455627 N.Y. Slip Op. 05210; In re Gabriel J., 100 A.D.3d 572, 955 N.Y.S.2d 18 (1st Dept. 2012).
[100] See, e.g., Fox v. Fox, 177 A.D.2d 208, 582 N.Y.S.2d 863 (4th Dept. 1992) (warranted by demonstrably disruptive effect of non-custodial parent's phone calls).
[101] See, e.g., Vanderhoff v. Vanderhoff, 207 A.D.2d 494, 615 N.Y.S.2d 919 (2d Dept. 1994).
[102] See, e.g., Hughes v. Wiegman, 150 A.D.2d 449, 541 N.Y.S.2d 57 (2d Dept. 1989); Resnick v. Zoldan, 134 A.D.2d 246, 520 N.Y.S.2d 434 (2d Dept. 1987).

b. Domestic Violence as a Factor

i. Case Law

Evidence of domestic violence against a family member, even in the presence of a child, does not automatically result in a restriction of visitation to the abusive parent. A violent parent will be denied visitation only in extreme cases where the domestic violence was very severe, the child was also abused, or the parent is imprisoned for violence that the child witnessed or experienced.[103] Your client must be forewarned that some form of visitation is usually granted.[104]

Some courts have held that if there is no evidence the children themselves are in danger of being physically harmed then it is not detrimental to have visitation. Other courts have held that violence towards the custodial parent, especially in the presence of the child, is conduct that is so clearly detrimental to the child's welfare that it raises a question of the child's safety so that a hearing on the issue is first required.[105]

It is an error for a court to deny or restrict visitation without a hearing. In cases where evidence of domestic violence is presented in a sworn petition, courts sometimes will order supervised visitation for the allegedly violent parent pending a hearing on the issue. Moreover, the court usually will order forensic psychological evaluations of the parties and appoint a lawyer for the child prior to a hearing to determine whether unsupervised visitation is in the best interests of the child. The court has the power to order the parents to submit to the psychological evaluations without their consent. Moreover, the court may suspend visitation by a parent who refuses to submit in the face of evidence of domestic violence.[106]

In order to persuade the court to order supervised visitation, there must be sufficient evidence presented by you as the attorney to establish the dangers inherent in any unsupervised visitation. Consider using the following: testimony by the victim and other witnesses; hospital and school records; reports from a social worker, therapist, physician or nurse; reports or testimony from ACS; tape recordings of 911 calls; police reports; prior orders of protection or certificates of disposition (from Criminal Court).

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[103] See, e.g.,Vann v.Vann, 205 A.D.2d 897, 613 N.Y.S.2d 481 (3d Dept. 1994); Strahl v. Strahl, 66 A.D.2d 571, 414 N.Y.S.2d 184 (2d Dept. 1979); *aff'd*, 49 N.Y.2d 1036, 429 N.Y.S.2d 635 (1980); Matter of Adam H. and Jason M., 600 N.Y.S.2d 406 (4th Dept. 1993) (visitation suspended where father used excessive force on children, repeatedly disregarded court orders with respect to visitation, used children as pawns against ex-wife); Ceasar A.R. v. Raquel D., 179 A.D.2d 574, 578 N.Y.S.2d 831 (1st Dept. 1992) (incarcerated father, murdered children's mother, raped their sister, children's fear of him).

[104] See, e.g., Matter of Adam H., 195 A.D.2d 1074, 600 N.Y.S.2d 406 (4th Dept. 1994) ("The denial of visitation to a non-custodial parent constitutes such a drastic remedy that it should be ordered only when there are compelling reasons, and there must be substantial evidence that such visitation is detrimental to the children's welfare.").

[105] See, e.g., Susan G.B. v. Yehiel B.H., 216 A.D.2d 58, 627 N.Y.S.2d 384 (1st Dept. 1995); Janousek v. Janousek, 108 A.D.2d 782, 485 N.Y.S.2d 305 (2d Dept. 1985); Katz v. Katz, 97 A.D.2d 398, 467 N.Y.S.2d 223 (2d Dept. 1983).

[106] See, e.g., Susan G.B. v. Yehiel B.H., 216 A.D.2d 58, 627 N.Y.S.2d 384 (1st Dept. 1995); Zirkind v. Zirkind, 218 A.D.2d 745, 630 N.Y.S.2d 570 (2d Dept. 1995).

ii. Safety Issues with Visitation

As an attorney you need to explore with the client the type of visitation arrangement that they feel will be safe in their case. There should be no opportunity for kidnapping of the child (if that is a concern or threat), or physical, verbal or emotional abuse of the child or client. In addition, if the client and children are in a confidential location such as a domestic violence shelter, the visits must be structured to protect that confidentiality.

If your client does not object to having the child continue to visit with the other parent because they believe the noncustodial parent presents no harm to the child, you should work with the client to structure visits in a way that will protect them from additional verbal or physical abuse and also shield the child from witnessing further abuse during visitation exchanges. To that end, visitation drop-off and pick-up can take place away from the client's home – at the local police station (where a copy of the client's order of protection should be on file) or the lobby of a friend or relative's home or a public place (such as a library) where any disturbance would be witnessed and police could be called.

Whenever possible, it is best to have a neutral person assist with the visitation exchange. Or, it can be specified that the other parent can pick the children up at the client's home, but only in the lobby area. The court order should formalize the specific protections and limitations that are in effect so the parties will have a clear understanding of how visitation will work. You should advise your client that they also are required to abide by the terms of the visitation order and that if they do not do so, the other parent could file a violation petition against them. Of course, if their refusal to obey is justified by a fear for the children's safety – for example, if the other parent shows up drunk to pick up the child – they should file their own violation petition to suspend visitation or at least explain why they kept the children from that particular visit.

In other cases, a client may have serious concerns about the child's safety during visitation and oppose all visitation. In these situations, where there is not sufficient evidence to deny or supervise visits, you should make every effort to structure visits so that the child is safe. If the child is not already engaged in therapy, the client should consider enrolling the child in therapy as quickly as possible to help address concerns around visitation. The client can obtain referrals from the Family Justice Center or from a social worker at Her Justice.

iii. Safety Planning with a Child

You should advise your client that it might be a good idea to safety-plan with the child before unsupervised visits, so that the child is safer and feels safe while with the other parent. A child who has been abused or who has witnessed violence towards the client may be very scared or anxious about unsupervised visits. Planning

for these visits not only can help a child manage their own fear and anxiety that the abusive parent might turn on them, but also can help them develop safety skills and plans to minimize the risk of violence during visits. At the same time, you and your client must be careful not to aggravate the fear and anxiety the child might already feel in anticipating visits. The goal is to empower a child to act to protect themself, as well as to identify outside sources of help that the child can call upon when necessary.

One cautionary note – courts often misinterpret a client's protection and encouragement towards safety planning as an act of custodial interference with the other parent's time with the child. Thus, to the extent that the child is working with a counselor or therapist with whom the client has a good rapport, it may be better for the client to suggest or to encourage that person to engage in safety planning with the child instead.

Often a child already will have engaged in successful strategies to divert, minimize or stop the violence towards themself or others. The child and client can review these strategies and assess which were successful, in addition to thinking of additional ways to avoid confrontation with the abuser during visits. Some strategies include:

- ❑ have child encourage involvement of extended family in activities during visitation, if these persons will provide oversight of the other parent's behavior and make sure the child is not harmed
- ❑ make sure the child knows how to use a cell or pay phone, how to make a credit card-call, how to call 911, and the phone number at which the client can be reached
- ❑ use cell-phones so the child can memorize one number at which they always can reach the client
- ❑ have child identify all potential escape routes from visitation location, such as doors, windows; where phones are located in the home and out on the street; nearby places or people to run to for help, such as a place of worship or police station (pre-arrangement can be made by the child and mother)
- ❑ make sure the child knows that if the other parent is intoxicated or using drugs, explain that this behavior may be even more difficult to predict and/or violent; and knows when to flee the home and where to go if the other parent's behavior becomes too erratic or dangerous

One problem many children face during unsupervised visitation is the noncustodial parent's interrogation of the child about the custodial parent's life and whereabouts. It is important for the child to understand the dangers of disclosing too much information to the non-custodial parent, especially if the client/child is living in a new, confidential location. On the other hand, the child must put their safety first and answer questions, if necessary to avoid violence. The child can then warn the client, when the child returns home, what information they were forced to disclose.

c. Restriction of Visitation

In situations where it is established that the child will be at risk if an abuser has or continues to have unsupervised visitation, a client can seek supervised visitation from the court, or move to have the visitation suspended or denied altogether. Courts have restricted visitation in cases where the danger to a child is established, such as those where there is domestic violence,[107] child abuse and neglect, risk of abduction, drug or alcohol abuse, or mental illness.[108] The noncustodial parent may seek to have the visitation restriction lifted upon an evidentiary showing that the restriction is no longer necessary for the child's safety.

i. Expert Testimony

The testimony of mental health (forensic) experts (psychiatrists, psychologists, social workers) can help the court determine that restricted visitation is appropriate where the non-custodial parent has a history of domestic violence, though it is not always necessary. As courts weigh the detrimental effects of domestic violence against the detrimental effects of not having visitation with a parent, expert testimony can aid the court in determining the degree to which the violence has affected the child, the chance of further emotional or mental harm to the child, and the extent to which the non-custodial parent's abuse of the custodial parent is indicative of a physical risk to the child.

In cases where there has been physical abuse against the child, the court will not need expert testimony to establish a direct link between the domestic violence and the detriment to the child. However, if a particular judge seems harder to persuade or unconvinced the violence in the home had any negative effect upon the child, you might consider calling an expert to establish this link.

Where evidence indicates that visitation with the non-custodial parent presents some risk of harm to the child, the court may restrict visitation in order to protect the child, while preserving, if possible, the parent's access to the child. By law, the conditions imposed are supposed to be as least restrictive as possible while still protecting the child.[109]

ii. Supervised Visitation

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[107] See, e.g., Katz v. Katz, 97 A.D.2d 398, 467 N.Y.S.2d 223 (2d Dept. 1983) (father abused mother in presence of child and threw TV set on floor when child disobeyed him); A.F. v. N.F., 156 A.D.2d 750, 549 N.Y.S.2d 511 (2d Dept. 1989) (father assaulted mother in child's presence and allegedly sexually molested child); Fuentes v. Caney, 193 A.D.2d 410, 597 N.Y.S.2d 73 (1st Dept. 1993) (father pulled gun in front of child on two occasions)

[108] See, e.g., Robert Aa. V. Colleen Bb., 101 A.D.3d 1396, 956 N.Y.S.2d 642 (3d Dept. 2012) (father's drug and alcohol abuse, and accusations that he was convicted of rape); In re Mia B., 100 A.D.3d 569, 955 N.Y.S.2d 15 (1st Dept. 2012) (mother neglected the children by using excessive corporal punishment on children).

[109] See, e.g., Landau v. Landau, 214 A.D.2d 541, 625 N.Y.S.2d 239 (2d Dept. 1995).

Visitation can be supervised by a third party or can take place at a "Supervised Visitation Center." Supervision at a Center rarely continues indefinitely because there is a lack of programs for supervised visitation in the city.

The court's order should contain basic information, such as the child's name and date of birth; the names, addresses and telephone numbers for the parties and their attorneys; who will supervise the visitation; if a Center will, whether the program charges a fee[110] and which party is responsible for it; whether the court wants a report from the supervisor, and if so, what it should cover; the date of the next court appearance. Usually a judge will order supervised visitation for a limited duration of time (such as 6 months), as specified in the order. At the end of that time, the court will re-assess the need for the visits to be supervised, often relying upon a report from the program or supervisor of how visits are progressing and whether the other parent is behaving appropriately with the child.

You and your client should provide any Supervised Visitation Center with all relevant pleadings, court documents, mental health evaluations (if not labeled confidential), and reports of other agencies that are involved in the case. This will help the Center assess initially how much supervision the abuser may need and what issues may arise during the course of such visits.

Supervised Visitation Centers

Unfortunately, due to funding cuts, there are very few Supervised Visitation Centers and they often have long waiting lists to participate. Also, they are limited in the times that they are able to host parents, on average one time per week, for a short visit of a few hours. For these and other reasons, courts often are reluctant to order such visits. Still, if you and your client feel that such protection is essential for the safety of the child, you should investigate appropriate programs and seek the necessary court order.

It is important for you to have researched such programs before requesting relief in court so that you can offer to the judge a viable program. You should contact potential programs on behalf of your client and inquire about availability and openings, how long the waiting list is,[111] how frequently and when visits can be scheduled,[112] and how much it will cost. If you convince the judge such relief is necessary based upon the abuser's behavior, the judge often will order the non-custodial parent to pay the costs of the program. Or, if a party is indigent, an

[110] Many programs charge no fee; others charge a sliding-scale or low fee per session. This is one reason these programs have such limited resources.
[111] Many programs have waiting lists of weeks to months. If the need for supervised visitation is serious enough, courts may require non-custodial parents to go without access to their children for the duration of the waiting period.
[112] Many programs are only open weekdays or evenings and are closed on the weekends, which can make visitation difficult to schedule for a parent who is working and/or has children who are of school age.

attorney can ask for the county to assume the costs, pursuant to County Law §722-c.[113]

One other alternative is to hire someone to supervise the visits, such as an agency social worker[114]. Again, you will need to do the leg-work to locate such a person and determine availability and rates, before presenting this option to the court or the other side.

One advantage of having a neutral party (center or hired social worker) supervise the visitation is that this person can then offer credible testimony as to whether the supervision should continue. Since supervision is seen as a temporary remedy, the court will want to review the necessity of the arrangement at certain intervals. If the abuser has been behaving inappropriately, the supervisor can recommend continuing the supervision or other action, such as having the abuser attend parenting classes. A second advantage is that this person is less likely than a family member or friend to be vulnerable to a noncustodial parent's demands or threats.

Practice Tip: For a contact list of Supervised Visitation Centers in NYC see the listing at end of this manual or contact your Her Justice mentor for more information about our experiences with various centers.

Precautions Taken By Supervised Visitation Centers

These programs take precautions to ensure the safety of the children as well as the custodial parent during visits. For example, many Centers use metal detectors, employ security guards, and enlist cooperation from local police precincts. They often have the non-custodial parent arrive before and leave after the custodial parent so that there is no chance for the non-custodial parent to, follow, harm or otherwise harass the custodial parent. Parents are provided separate rooms, so that they have no contact; a staff person takes the child from one parent to the other.

Centers also have conditions for visitation that the parents must read, agree to and sign before taking part in the program. For example, non-custodial parents must agree not to bring any weapons to visits and to be searched for such before entering; not to attempt to remove the child from the premises; not to speak negatively about the other parent with the child; not to address issues such as court proceedings or future unsupervised visits with the child; not to question the child about the custodial parent's whereabouts or activities; not to whisper or tell secrets; not to use drugs or alcohol before or during the visit; not to use physical punishment during the visit; and to obey the staff. The supervisor has the power to intervene if inappropriate behavior ensues, as well as the discretion to terminate the visit if necessary.

A typical agency visit usually takes place in a room decorated for children, with toys and games. Supervisors remain in close proximity and observe the parent-child

[113] An argument can be made that supervised visitation should be considered the type of "other services" for which this statute authorizes payment by the city or county on behalf of indigent litigants.
[114] FCA §1030c authorizes supervised visitation under the supervision of a social services employee.

interaction. They usually do not interfere unless the child is in distress or a program rule is violated. Following each visit, the supervisor records a detailed entry into the child's file describing the parent-child interaction. These records and the testimony of supervisors are valuable evidence should either parent petition for modification of visitation. Such evidence is seen as objective, and thus, supervisors are often called to testify at visitation modification hearings.

Practice Tip: Where there are safety issues or concerns about the Supervised Visitation Agency, be sure to raise your concerns with the Center, all parties and the Court, as appropriate. Also, let your Her Justice mentor know of any specific concerns you may have relating to the supervision.

Family/Friend Supervision

A family member or friend of either parent may be willing and able to supervise visits where both parties feel comfortable with this person. This is a serious commitment to ask of someone, especially if visits are taking place every week or more often. The parties need to make sure the person they agree upon to supervise understands and is willing to make this commitment. As an attorney, you should review the proposed arrangement to make sure that it is safe for your client and their child. Often abusers will suggest their parents or siblings as supervisors – the client might not trust such a person to protect the children and it may mean alerting the court about the actions of their abusive relative. A court order for privately-arranged visitation should state the time and place of the visits, name the family/friend supervisor, and specify any requirements or limitations. The advantage of this type of supervised visitation is that it gives the parties more flexibility to arrange visitation that is convenient with their schedules.

iii. Discuss with your client options in advance of the court date so that your client does not feel pressured to name an individual at the court hearing. Suspension or Denial of Visitation

Where substantial evidence demonstrates that even supervised visitation will risk physical or psychological harm to the child, visitation may be suspended or denied altogether. As mentioned above, in New York, the abuser will be denied access to a child only in extreme cases, such as when domestic abuse was very severe, when the abuser abused the child directly or caused physical injury to the child, or when they are imprisoned for acts of violence the child witnessed or the child directly experienced.[115]

[115] See, e.g., In re Mia B., 100 A.D.3d 569, 955 N.Y.S.2d 15 (1st Dept. 2012); Robert Aa. v. Colleen Bb., 101 A.D.3d 1396, 956 N.Y.S.2d 642 (3d Dept. 2012).

The court may deny all contact with the child with testimony from psychologists or psychiatrists who have examined the child and/or non-custodial parent, as well as of bad behavior by the parent.[116]

Evidence of bad behavior can include: violations of orders of protection, failure to attend counseling as ordered by the court, failure to obey the terms of any previous supervised visitation, and physical violence towards the custodial parent and/or child. Evidence of harm to the child can include testimony from a court-appointed mental health doctor or privately retained expert that the child suffers things like anxiety, depression, dramatic weight loss or other physical ailments, or is acting out in school and otherwise doing poorly; or evidence of physical injury caused by the parent.[117]

d. Conditions on Visitation: Therapy, Counseling, Drug/Alcohol Treatment

An abused client may want to insist that the abuser's right to visitation be conditioned upon their participation in or completion of therapy, a parenting class, counseling and/or drug/alcohol treatment. However, courts have held that treatment may not be a precondition for visitation.[118] Thus, a court cannot compel a parent to obtain treatment before visitation is ordered or condition subsequent applications for visitation upon the applicant having received treatment.[119]

On the other hand, once visitation is granted, treatment may be ordered as a component of that visitation.[120] Similarly, a court may consider the parent's emotional or psychological condition in deciding whether or not to award any visitation at all, and under what restrictions. These restrictions may apply until the court feels they are no longer necessary because the parent has undergone therapy or completed a treatment program.[121]

Thus, as the attorney for the custodial parent you can request that the court order the abuser to enter therapy, counseling or a drug/alcohol program as part of an order setting forth the terms of their visitation. Alternatively, you may seek to have visitation suspended or supervised until the non-custodial parent seeks help. You also may ask that the court

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[116] See, e.g., Robert P. v. Gayle P., 164 Misc.2d 794, 626 N.Y.S.2d 416 (Fam. Ct. 1995); Mohammed v. Cortland County Dept. of Social Services, 186 A.D.2d 908, 589 N.Y.S.2d 112 (3d Dept. 1992); Vann v. Vann, 205 A.D.2d 897, 613 N.Y.S.2d 481 (3d Dept. 1994).

[117] See, e.g., Nacson v. Nacson, 166 A.D.2d 510, 560 N.Y.S.2d 792 (2d Dept. 1990).

[118] See, e.g., Roskwitalski v. Fleming, 105 A.D.3d 1432, 963 N.Y.S.2d 901 (4th Dept. 2013) (reversing Family Court's order granting mother visitation contingent upon her engaging in mental health counseling;).

[119] See, e.g., Id.

[120] See, e.g., Matter of Donna Mongiardo, 232 A.D.2d 741, 649 N.Y.S.2d 45 (3d Dept. 1996) ("It is well settled that Family Court does not have the authority to order a party to undergo counseling or therapy before visitation will be allowed. However, the court does have the authority to include a directive to obtain treatment as a component of a custody or visitation order.").

[121] See, e.g., Landau v. Landau, 214 A.D.2d 541, 625 N.Y.S.2d 239 (2d Dept. 1995) (unconditional daytime visits awarded to mother who suffered severe depression, delusion, emotional volatility and impaired judgment, all of which impaired parenting skills; no expanded or overnight visitation until mother undergo psychotherapy); Hubbard v. Hubbard, 221 A.D.2d 807, 633 N.Y.S.2d 856 (3d Dept. 1995) (father granted alternate weekend visitation despite Court's concern about his propensity toward violence, with the condition that he have mental health evaluation and attend parenting classes); Vanderhoff v. Vanderhoff, 207 A.D.2d 494, 615 N.Y.S.2d 919 (2d Dept. 1994).

specify in its order that the custodial parent has the right to withhold visitation any time the non-custodial parent shows up to get the child while under the influence of drugs or alcohol.

e. Non-Parent Visitation

i. Grandparent Visitation

DRL §72 authorizes grandparents to apply to the Supreme Court for visitation rights by special proceeding or writ of habeas corpus. DRL §72 also indicates that a grandparent may apply to the Family Court pursuant to FCA §651 for the same relief. A best interest determination is made by the courts.

Though grandparent visitation may seem like an innocuous or desirable thing, the reality is that in many cases where grandparents seek visitation involve dysfunctional families in high conflict situations. Granting visitation rights could potentially place even more stress on the grandchildren affected and when grandparents actually go to court to seek visitation, it often is to back up their sons who are abusive of their partners or the grandchildren. In court, however, grandparents often are viewed favorably by judges, who see them as stable, caring individuals who want to be more involved in the lives of their grandchildren and your client may be under pressure to acquiesce to the grandparent's involvement. Ensure that your client articulates strong arguments to overcome the presumption that they are trying to prevent extended family from having contact with the children.

ii. Sibling Visitation

DRL §71 authorizes a siblings (whether whole or half-blood) to apply to the Supreme Court, by writ of habeas corpus or special proceeding, for visitation rights with a sibling. The statute also authorizes applications for sibling visitation to the Family

Court pursuant to FCA §651(b). Both courts determine such issues according to the "best interest of the child may require."

These statutes only apply to siblings. Aunts and uncles have no standing to seek visitation rights.[122]

iii. Non-Biological Individual

The same principles and cases discussed in the section on Equitable Estoppel for Nonbiological Parents applies here. Refer to Section A. (5) Non-Parent Custody above.

[122] See, e.g., Matter of Katrina E., 223 A.D.2d 363 (1st Dept. 1996), *leave to appeal denied* 88 N.Y.2d 809.

C. JURISDICTIONAL ISSUES

a. Fleeing the Jurisdiction with a Child

Sometimes a victim of domestic violence will need to flee the state, or even the country, in which they, the children and the abuser, have been living in order to escape the abuse. Often, a client will flee with their children to a state or country where they have more of a support network of family and friends with whom they can live. They might take flight at the spur of the moment, when facing serious violence or threats, or after realizing that an order of protection is not keeping them safe from an abuser who continues to harass and abuse. Sometimes they will flee when an adverse custody decision has been reached in their state of residence, either giving the abuser custody of the child or visitation, which the client feels places the child and/or themself in danger.

It is important for an attorney counseling a client who is thinking of fleeing to explain that it is very difficult to live "in hiding" and it is likely that eventually they will be located, and that the laws that apply to interstate/international custody issues are very complicated. The client should seek legal advice both here and from an attorney who practices in the jurisdiction they would like to move to in order to be aware of their rights in both locations. While there is substantial conformity across states with the UCCJEA (discussed below), the interpretation of some of its provisions may differ across states, as well as how it interacts with other laws and procedures. They will face very serious penalties unless they can prove that they have good cause for fleeing. Some courts have excused a client's flight from the state with their child in violation of a custody order in cases of domestic violence[123] However, if a client is not able to make a good case, they risk losing custody permanently to their abuser, having extremely restricted visitation rights, and possibly faces incurring significant court costs.

An attorney should not assist a client in fleeing a jurisdiction or violating a custody/visitation order, though the attorney should explain the provisions and exceptions of the relevant laws (below). The attorney-client privilege does not protect an attorney who knows where a child has been taken; the attorney must disclose the child's location.[124]

In such situations, or where a client and their child have moved to New York from another state, an attorney must take note that potential interstate or international jurisdictional issues will be relevant in relation to custody. There are several statutes which govern and of which an attorney must be aware. Though these laws contain some justification defenses for victims of domestic violence, they tend to be interpreted narrowly by judges who are not sympathetic to or educated about the dynamics of domestic violence.

b. Interstate Custody Law: UCCJA, UCCJEA and PKPA

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[123] See, e.g., Desmond v. Desmond, 134 Misc.2d 62, 509 N.Y.S.2d 979; Vogel v. Vogel, 149 A.D.2d 501, 539 N.Y.S.2d 982 (2d Dept. 1989) (affirming custody award to mother despite flight from abuser); Olmo v. Olmo, 140 A.D.2d 677, 528 N.Y.S.2d 880 (2d Dept. 1985) (holding that abuse justified mother's fleeing from jurisdiction).

[124] In Baltimore City Dept. of Social Services v. Bouknight, 493 U.S. 549 (1990) (the U.S. Supreme Court held that a lawyer may not invoke the 5th Amendment against self-incrimination to resist an order to produce a child).

i. History and Overview

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was adopted by New York State in 1999, and became effective April 28, 2002. The UCCJEA is codified in Article 5-A of the Domestic Relations Law, and has replaced the Uniform Child Custody Act (UCCJA) as governing custody and interstate jurisdiction issues in New York.

Both the UCCJA and the UCCJEA aim to discourage interstate child abductions by parents and to resolve which state has jurisdiction in interstate disputes so as to prevent "forum-shopping" by parents seeking to secure or modify custody/visitation orders. Prior to the enactment of the UCCJA, since jurisdiction could be predicated upon mere physical presence of a child in a state, a parent who "lost" a custody battle in one state could abduct the child, relocate to a new state, and re-litigate the issue of custody. The former state's courts could not enforce their custody decrees beyond their borders; thus, they could not charge the abducting parents with contempt or kidnapping unless the parents returned to the state.

The UCCJA and UCCJEA establish guidelines for interstate custody cases when one or both parents move to a new state, with or without a child, by making clear which state can make a custody order, which state can modify such order, and which state has enforcement rights. The UCCJEA maintains the basic objectives of the UCCJA, but it updates and improves upon the earlier statute. It also incorporates the full faith and credit provisions of the Violence Against Women Act (VAWA), enacted by Congress in 1994.[125]

Additionally, the UCCJEA is applicable in other types of cases where custody or visitation is at issue, including guardianship, separation or divorce, paternity, abuse and neglect, termination of parental rights, and proceedings for protection orders. Adoptions are not covered by the UCCJEA.

Because the UCCJEA completely replaced the UCCJA for all cases commenced as of April 28, 2002, practitioners must be careful when citing caselaw that refers to the UCCJA. While some provisions are identical or similar enough that prior caselaw may still be applicable, if the caselaw refers to a provision of the UCCJA that has been replaced or removed, it is no longer good law.

ii. PKPA

In addition, the UCCJEA is more consistent with the federal Parental Kidnapping Prevention Act (PKPA)[126] than the UCCJA. The PKPA was enacted to add the force of the Full Faith and Credit Clause of the Constitution to the UCCJA. Too many custody decisions were not being honored and enforced by courts of other states,

[125] 18 U.S.C. §§2265-2266. For example, providing as an affirmative defense to a charge of parental kidnapping that the parent left the state with the child to escape domestic violence or abuse of the child and permitting domestic violence and child abuse to be considered when determining which state has jurisdiction over a case.
[126] 28 U.S.C. §1738A. The PKPA took effect in 1981.

even after those states had enacted their own versions of the UCCJA. The PKPA somewhat parallels the UCCJA, but is supposed to govern where conflicts between the two statutes exist.[127] It protects the right of a decree state to exercise continuing jurisdiction over child custody and manifests a strong congressional intent to channel custody litigation into the court having continuing jurisdiction.[128] Many state courts, however, have simply ignored the preemptive PKPA law and modified other states' custody and visitation orders under their own inconsistent UCCJA state statute. The UCCJEA was enacted in order to rectify this situation and erase the conflicts between the UCCJA and the PKPA.

The PKPA requires every state to enforce a custody order of every other state, as long as the issuing state's order meets the jurisdictional[129] and due process requirements[130] set forth in the PKPA. It also prevents states from modifying custody orders issued by other states, with a few, limited exceptions.[131] And, it prevents custody proceedings from commencing in a new state if already pending in the courts of another state, assuming the other state has jurisdiction pursuant to the PKPA.[132]

The PKPA also established the Federal Parent Locator Service to find parents who have an abducted child and enabled arrest warrants to be issued pursuant to the Fugitive Felon Act[133] for parents crossing state or international lines to avoid prosecution on felony abduction charges.

iii. Major Provisions of the UCCJEA

The UCCJEA primarily achieves four goals: (1) it codifies practices that reduce interstate conflict, (2) it determines which state has and should exercise jurisdiction, (3) it conforms jurisdictional standards to the PKPA, (4) it protects victims of domestic violence who move out of state.[134] The UCCJEA does not, however, dictate standards for making or modifying custody or visitation decisions, or confer jurisdiction upon a state (the state must have jurisdiction before it can proceed to consider the merits of the case).[135] The two major components of the UCCJEA are jurisdiction (initial jurisdiction and modification jurisdiction), and enforcement.[136]

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[127] By virtue of the federal constitutional supremacy clause.
[128] See, e.g., Mark L. v. Jennifer S., 133 Misc.2d 454,506 N.Y.S.2d 1020 (Fam. Ct. Schoharie Co. 1986).
[129] See PKPA, sections (b) and (c).
[130] Namely, reasonable notice and opportunity to be heard must have been given to all parties to the action, any parent whose rights have not been terminated, and any person who has physical custody of the child. See section (e) of the PKPA.
[131] For example, if a state has jurisdiction pursuant to the PKPA to make a custody determination and the court of the other state no longer has jurisdiction or has declined to exercise it to modify the order. See section (f) of the PKPA.
[132] See section (g) of the PKPA.
[133] 18 U.S.C. 1073. Once a warrant has been issued, the FBI can become involved in looking for the abductor parent. The warrants are known as "UFAP" (Unlawful Flight to Avoid Prosecution) warrants. 136 See *Reichler, supra* note 1, at 1.
[134] The U.S. enacted the convention into law in 1986.
[135] See id. at 2.
[136] See id.

Home State Priority

The UCCJEA specifies several basis for jurisdiction over a custody proceeding, but like the PKPA, it prioritizes home state jurisdiction and preserves for the home state the first shot at asserting jurisdiction and trying the case. If the child has a home state, only that state may make the initial custody determination, unless it declines jurisdiction. "Home state" is defined as the state where a child and a parent have lived for at least six consecutive months before custody proceedings were filed. If the child is under six months, it is the state where the child has lived with a parent since birth. A temporary absence from the state (for example, fleeing the state due to violence but not making a permanent change of residence) will not affect the tolling of the six-month period.

Notably, a home state keeps its status as such for six months after the child leaves the state, regardless of the reason for leaving, as long as one parent remains behind.

Significant Connection Jurisdiction

In cases where there is no home state or the home state has declined jurisdiction, jurisdiction may be assumed by a state with "significant connection" to the child. "Significant connection" means that substantial evidence regarding the child's care, protection, training, and personal relationships exist in the state so that the best interests analysis can be done. Contrary to the UCCJA, the child does not have to be present in the state for there to be significant connection jurisdiction under the UCCJEA. Moreover, simply being present in the state does not entail having a "significant connection."

Courts having home state or significant connection jurisdiction may decline to exercise it on the ground that another state is the "more appropriate forum" to hear the case. In determining the issue of convenient forum, the courts must consider (among other factors) whether domestic violence occurred, is likely to occur in the future, and which state offers the best protection for the parties and child.[137]

Finally, if no state's court exercises jurisdiction in the three ways mentioned above, then any other state may exercise jurisdiction.

Exclusive Continuing Jurisdiction

The UCCJEA provides that once New York makes a custody determination, it has exclusive, continuing jurisdiction. New York's jurisdiction continues either (1) as long as one parent continues to reside in the state,[138] or (2) until New York's courts

[137] Parties should ask to be present for conversations between judges in different states when such determinations are made. Parties can ask to bring witnesses to give testimony as part of such telephone conferences and can also request that a record of such conversations be made.

[138] Any state court can make the determination that a child and both parents no longer reside in NY State and then can assume jurisdiction itself.

determine that the child or the child and one parent no longer have significant connections to the state and that substantial evidence regarding the child's care, protection, training, and personal relationships no longer exists in New York.

Vacuum Jurisdiction

A court will take jurisdiction where no other state would have jurisdiction.

Temporary Emergency Jurisdiction

In an emergency, and only when a child is actually present in New York State, NY courts may assume temporary jurisdiction over a custody matter and issue a temporary, short term custody order or a temporary, short-term modification of another state's custody order. An "emergency" includes situations where the child has been abandoned in the state or the child, parent, or sibling is in danger of mistreatment or abuse.

Additionally, the UCCJEA permits a court to exercise temporary emergency jurisdiction to protect not only a child, but also a sibling of the child or the child's parent. The UCCJA, by comparison, only allowed temporary emergency jurisdiction to protect a child. New York courts were strict in evaluating what constitutes an emergency under the UCCJA, and are likely to also be strict under the UCCJEA.

If no custody order is already in effect and no custody proceeding is already commenced in the child's home state, then New York's emergency decree continues in effect until the state with original jurisdiction acts. Alternatively, the temporary emergency order issued by New York can become final once New York becomes the child's home state (after the child has lived here at least six months) if no other state has asserted jurisdiction in that time and NY's temporary order provides for this relief.

The UCCJEA emergency jurisdiction provision is potentially helpful in protecting against domestic violence where custody/visitation orders are involved:

(1) First, the law permits the courts of another state to assume temporary jurisdiction when a parent is being abused or threatened with abuse, or to protect all siblings even if only one child is being abused.
(2) Second, it alerts the courts of both jurisdictions that the safety of the parties and the child must be the first consideration. It may be possible to convince the court that issued the initial decree or the home state court to decline jurisdiction.
(3) Third, when a court is determining whether an emergency exists in order to assume temporary emergency jurisdiction, it is bound under VAWA by the factual findings of a court that issued an order of protection and may not require the party to re-litigate these findings as long as the protective order was granted after notice to the respondent and an opportunity to be heard.

These full faith and credit provisions seem to apply even when the protective order was issued on consent of the respondent.

(4) Fourth, if a party alleges in a petition for custody that the health, safety or liberty of a party or child would be jeopardized by disclosing identifying information, then the information may be sealed pending a hearing.

Unfortunately, if an abused client cannot prove their case successfully and the court finds that domestic violence does not exist, not only will it decline to assert jurisdiction, but it may also assess costs against them for all the opponent's litigation expenses in defending against the action.

Jurisdiction for Modifying Custody Decrees

Except where there is temporary emergency jurisdiction, courts of New York may not modify another court's custody order unless New York has home state or significant connection jurisdiction and one of two conditions are met:

(1) the court of the issuing state determines it no longer has exclusive continuing jurisdiction; or the court from the issuing state determines NY would be a more convenient forum; OR
(2) either the NY court or the other state court can determine that all of the parties to the action (child and parents) have moved away from the issuing state

Enforcement of Custody and Visitation Orders

The most significant difference between the UCCJEA and the UCCJA is that the UCCJEA includes uniform procedures for enforcement of custody and visitation orders so that other states' orders can be more rapidly enforced in New York.

There are three enforcement mechanisms included in the UCCJEA:

(1) Registration of custody or visitation orders with NYS so that the courts will treat the other state's order as if it is a NYS order;
(2) Expedited Habeas Corpus procedures to enforce another state's order by holding a hearing with the abducting parent and child within three days;
(3) Creation of an interstate network of prosecutors and other public officials who have the power to enforce orders of other states by helping to locate and return abducted children.

NY's UCCJEA specifies that NY courts must treat a foreign country as if it were a state and give recognition to foreign custody orders which comply with UCCJEA jurisdictional predicates.

Temporary emergency jurisdiction orders and custody/visitation provisions of orders of protection are entitled to enforcement.

Practice Tip: Attorneys might consider conditioning out-of-state visitation upon the prior registration of the controlling order in the state to which the child is going for visitation, so that it can be immediately enforced if the child is not returned.

Communication Between Courts

The UCCJEA and the PKPA both aim to avoid simultaneous proceedings in different states or wrongful modifications of other state's orders.

The UCCJEA sets up detailed procedures for uniform methods of communication between courts of different states. Such communications are most likely in cases where temporary emergency jurisdiction is being sought or where no state has priority jurisdiction. Parties must be promptly informed of inter-court communications, a record of such must be kept (for appeals) and the parties must have access to the record. Also, the UCCJEA provides that counsel or the parties may be involved in such communications, or at the very least, must have the chance to present facts and legal arguments before a decision about jurisdiction is made. Witnesses' testimony and documentary evidence may be transmitted by telephone, fax, audio-visual or other means.

Declining Jurisdiction

The UCCJEA permit a court to decline jurisdiction for two reasons:

(1) The state feels it is an inconvenient forum

(2) The petitioner has engaged in unjustifiable conduct

The UCCJEA, in part to cover situations where domestic violence is an issue.

Inconvenient Forum: Relevant factors to consider include:

(1) the existence of domestic violence and whether it is likely to continue

(2) which state can best protect the parties and child from violence

(3) how long the child has lived outside the state

(4) how far it is between the two courts

(5) the relative finances of the parties

(6) any agreement by the parties as to which state should hear the case

(7) the nature and location of evidence needed to resolve the case

Unjustifiable Conduct: If a state court has jurisdiction as a result of "unjustifiable conduct" by the petitioner parent, the court must decline to exercise it (except in temporary emergency jurisdiction situations). Such conduct includes abducting and hiding a child from the other parent. Several exceptions to this rule exist:

(1) all parties agree to accept the jurisdiction

(2) no other state has exclusive continuing jurisdiction

(3) the court having proper jurisdiction declines on the grounds of inconvenient forum

(4) the court has assumed temporary emergency jurisdiction

(5) parent and child are fleeing in order to protect themselves from violence

c. International Custody Law: The Hague Convention

i. Background

In October 1980, representatives from 29 countries met in The Hague and drafted the Convention on the Civil Aspects of International Child Abduction, otherwise known as the "Hague Convention."

The purpose of the Hague Convention is two-fold:[139]

(1) to secure the prompt return of a child wrongfully removed to or retained in any foreign country which is a party to the Convention; and

(2) to ensure that the rights of custody and access under the laws of one signatory state are effectively respected by all other signatory states

The United States and most European nations are signatories to the Hague Convention.[140]

The enabling legislation is the "International Child Abduction Remedies Act" or ICARA.[141]

The focus of the Convention is on returning the child to the country from which they were abducted, not on determining whether residence in a particular country or with a particular parent is in the best interests of the child. The merits of the underlying custody dispute are to be left to the courts in the country of the child's habitual residence.

ii. Substantive Provisions

The Hague Convention provides that a child, under the age of sixteen (16) years, who is wrongfully removed from their "habitual residence," shall be returned to that country.

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[139] Article 1.
[140] The U.S. enacted the convention into law in 1986.
[141] 42 U.S.C. §11601 *et. seq*.

Under the Convention, the removal or retention of a child is considered wrongful if:[142]

(1) it is in breach of custody rights under the law of the country in which the child was a habitual resident immediately before the removal or retention; AND

(2) at the time of removal or retention, those rights were being exercised

It is not necessary for there to have been an actual award of custody for a parent to invoke the Hague Convention (though such would help the parent's case). Article 5 defines custody rights as including rights relating to the care of the child, and in particular, the right to determine the child's place of residence.

"Habitual residence" is not defined by the Convention. U.S. courts have held that in determining which country is the child's "habitual residence," the court should assess the facts and circumstances of each case and focus on the child's past experiences. It is not synonymous with "home state" as defined in the PKPA, UCCJA and UCCJEA. For example, one New York court held that a child who had been a resident of NYS for just over six months at the time litigation was commenced should be returned to France, where the child had lived their entire life before coming to NYS.[143] Habitual residence usually is the residence prior to the questionable removal of the child, unless the move was authorized and intended to be permanent.[144]

In order to have a child returned, the "left-behind" parent must prove, by a preponderance of the evidence, that the child has been wrongfully removed or retained within meaning of the Hague Convention.[145] If the parent is trying to enforce visitation rights only, the burden of proof is still a preponderance of the evidence that the parent has such rights.

Once a wrongful removal or retention has been established, the child must be returned unless the "taking" parent can prove one of the following exceptions or affirmative defenses:[146]

(1) if the removal or retention has occurred more than one year prior to the start of custody proceedings in the "new" country, which decides the child is "now settled in its new environment;"[147] (parents should act immediately to secure return of a child under the Convention and not let one year elapse); OR

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[142] Article 3.

[143] Brennan v. Cibault, 227 A.D.2d 965, 643 N.Y.S.2d 780 (4th Dept. 1996).
[144] Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993).
[145] 42 U.S.C. 11603(e).
[146] Articles 12, 13 and 20.
[147] Article 12.

(2) the other parent was not actually exercising custody rights at the time of the removal/retention, or had consented to or subsequently acquiesced in the removal/retention;[148] OR

(3) there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;[149]

OR

(4) the "new" country's courts find that the child objects to being returned and is of sufficient age and maturity to have their views taken into account;[150] OR

(5) the return would not be permitted by the fundamental principles of the "new" country relating to the protection of human rights and "fundamental freedoms"

Domestic violence is often not sufficient to meet the burden of "grave risk of harm." Courts do not look at whether return to the parent in the other country places the child at risk of harm, only whether return to that country is dangerous, for example because there is a civil war in progress. Courts of the other country are given the responsibility to protect the child from parent-imposed harm. If a parent can prove the other country's courts are unable or unwilling to protect the child from domestic abuse, a case can be made for "grave risk of harm." A parent opposing return must prove "grave risk of harm" by clear and convincing evidence.

iii. Procedure

Both state courts and U.S. District Courts have concurrent original jurisdiction over cases arising under the Hague Convention.[151] Any parent seeking to initiate proceedings under the Convention for the return of a child or for enforcing visitation rights may file a petition in any court which has jurisdiction over the case and the child, wherever the child is located at the time.[152] Notice must be given to the other parties in accordance with UCCJEA notice provisions.

Each country must designate a "central authority"[153] to carry out its duties under the Convention, such as discovering the whereabouts of the child, securing the voluntary return of the child, exchanging information relating to the child, and initiating or facilitating proceedings to return the child or secure visitation rights. The State Department's Office of Children's Issues plays this role in the U.S. It also may be necessary to secure counsel in the foreign country. International Social Services (based in NYC) will help U.S. parents set up services in other countries to protect and provide for children who are returned.

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[148] Article 13.
[149] Article 13.
[150] Id.
[151] 42 U.S.C.11603(a).
[152] Id. at (b) - (d).
[153] Articles 6-7.

iv. Registering Custody Orders

If the other parent is from another country, especially one that is not a signatory to the Hague Convention, it is a good idea for the U.S. parent to file all temporary or final custody orders with the U.S. State Department. Also, during the course of a custody proceeding in the U.S., it is wise to ask the hearing court to hold the child's passport for the duration of the proceeding to prevent the flight of the dual-citizenship parent with the child.

Often, a child is removed to a country that has not ratified the Convention. For example, none of the Middle Eastern countries, with the exception of Israel, has ratified the Convention. In such countries, the only remedy for the U.S. parent is to secure a U.S. custody award and then apply to the civil justice system in the foreign country where the child has been abducted.

In addition, under the International Parental Kidnapping Act ("IPKA")[154] the U.S. can request that an abducting parent be surrendered from any country with which the U.S. has an extradition treaty. Arrest warrants can be issued and enforced by local authorities, since parental child abduction is a crime in many countries. The IPKA makes it a federal crime, punishable by a fine or three-year prison term or both, for a parent to wrongfully remove or retain a child outside the U.S. with the intent to obstruct the lawful exercise of parental custody or visitation rights.

v. Resources

Other help resources with such cases include:

(1) Dept. of State, Bureau of Consular Affairs booklet, "International Child Abduction" (Publication 10210).

(2) Dept. of State's web page: http://travel.state.gov

(3) Dept. of State's Office of Children's Issues: phone # 202-736-7000

(4) Web page containing Hague Convention cases: "HiltonHouse.com"

(5) Information on passport restrictions: Office of Passport Policy and Advisory Services: phone # 202-955-0377

D. RELOCATION

As discussed above, when a client flees the jurisdiction or the country with the child, either before seeking an order of custody or in violation of an existing custody/visitation order,

[154] Enacted in 1993 and codified at 18 U.S.C.1204.

the UCCJEA, the PKPA and the Hague Convention govern the resulting jurisdictional disputes between states and nations.

If the parent decides instead to seek the proper court's permission to relocate with the child to a location far enough away that the non-custodial parent's access rights to the child will be affected, the case will be guided by the law on relocation. The issue of relocation can arise either as part of the initial custody determination, or after a custody decision has been reached.

a. Relocation with a Court's Permission

Prior to 1996, relocation by custodial parents was limited to cases in which "exceptional circumstances" were shown to exist.[155] This standard was overhauled in the 1996 decision, Matter of Tropea v. Tropea, which sets forth the current guidelines courts use for relocation cases. The Court of Appeals in Tropea holds that "each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on the best interests of the child."[156] Thus, relocation cases are fact-sensitive, and it is difficult to predict the chances for success. However, some basic guidelines do emerge from Tropea and successive cases.

The Court in Tropea mentions a number of specific considerations a court must weigh in determining whether or not to allow a custodial parent and child to relocate. None of these factors are weighted or prioritized. These factors have been used by successive courts in deciding relocation cases. They include:

- ❑ each parent's reason for seeking or opposing the move
- ❑ the good faith of the parent in requesting or opposing the move
- ❑ the quality of the relationships between the child and the custodial and noncustodial parents
- ❑ child's respective attachments to each parent
- ❑ non-custodial parent's interest in securing custody
- ❑ feasibility and desirability of a change in custody
- ❑ degree to which custodial parents and child's life may be enhanced economically,
- ❑ emotionally and educationally by the move
- ❑ quality of lifestyle child will have if move permitted or denied
- ❑ impact of move upon quantity and quality of child's future contact with noncustodial parent
- ❑ feasibility of devising visitation schedule that will enable non-custodial parent to maintain meaningful child-parent relationship
- ❑ effect of move upon any extended family relationships

[155] See, e.g., Weiss v. Weiss, 52 N.Y.2d 170, 436 N.Y.S.2d 862 (1981); Daghir v. Daghir, 56 N.Y.2d 938, 453 N.Y.S.2d 609 (1982).
[156] Tropea v. Tropea, 87 N.Y.2d 727, 642 N.Y.S.2d 575, 665 N.E.2d 145 (N.Y. 1996).

The dictum of Tropea endorses moves based upon a "fresh start" for the custodial parent. Cases since Tropea, however, have suggested that this factor alone will not justify a move.[157] In fact, even marriage to a resident of another state will not guarantee relocation.

Tropea itself involved two nearby moves – both within 3-hour driving distances. Though a short distance can be helpful in arguing for relocation, since it permits more frequent contact with the non-custodial parent, it still is not a guarantee that a move will be permitted, since it does affect the non-custodial parent's mid-week visitation and participation in mid-week activities, including the schooling of the child. Still, some courts have been more willing to permit nearby moves.[158] Some significant long-distance moves also have been permitted by courts; the Second Department allowed a move from Brooklyn to California[159] and the Fourth Department allowed one to Ohio.[160]

i. Restriction in Prior Orders

Another consideration of which to be aware is that courts sometimes impose restrictions on parents' movement within custody/visitation orders, or the parents themselves might have included a geographical relocation restriction by agreement in a stipulation. Thus, if a case is not a first-time custody proceeding, but a modification seeking permission to move, provisions imposed by the court or agreed to by the parties in the initial order (or in a divorce judgment or separation agreement resolving custody issues) may prohibit a subsequent move or at least be an additional factor relevant to the court's best interests decision. In some cases, it may be possible to have such restraints removed in later actions.[161]

ii. Best-Interests Considerations

Some post-*Tropea* courts have indicated that relocation cases should involve traditional best-interest considerations, in addition to whether the child's best interests are served by the proposed relocation. Of course, if the court is making an original custody determination at the same time it is deciding relocation, it will consider traditional best interests as well as relocation best interests. If relocation issues arise after an initial custody/visitation order or agreement between the parties, the courts may mix traditional and relocation best interests considerations. For example, the Second Department in *DiMedio v. DiMedio* indicated that a more general best interests test should be used and that forensic examinations should be ordered where one parent's stability is challenged by the other in the context of a

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[157] Sawyer n/k/a Porter v. Sawyer, 664 N.Y.S.2d 505 (4th Dept. 1997); Clark v. Williams, 229 A.D.2d 686, 645 N.Y.S.2d 160 (3d Dept. 1996).
[158] Piccinini v. Piccinini, 103 A.D.3d 868, 960 N.Y.S.2d 181 (2d Dept. 2013) (move to Greenwich, CT, from Westchester County, NY); Lebron v. Lebron, 101 A.D.3d 1009, 956 N.Y.S.2d 125 (2d Dept. 2012) (under 50 miles).
[159] Wofford v. Marquardt, 104 A.D.3d 698, 961 N.Y.S.2d 222 (2d Dept. 2013).
[160] Grant v. Grant, 101 A.D.3d 1711, 957 N.Y.S.2d 530 (4th Dept. 2012).
[161] See, e.g., Matter of Mascola v. Mascola, N.Y.L.J. 6/12/98, at 36, col. 2 (2d Dept.) (Appellate Division removed court-imposed restraint on any future relocation and restored original stipulation by the parties that required new negotiations for any future proposed move).

relocation proceeding.[162] The court specified that "traditional factors" such as the stability of each parent's home should be considered. Similarly, the Fourth Department in *Hilton v. Hilton* considered traditional best interests concerns in assessing a proposed relocation, including a parent's history of domestic violence and the fact one parent was the primary caretaker for the child and could better provide for the child's needs.[163]

b. Consideration of Domestic Violence

As with any consideration of best interests, the court must factor in proven domestic violence. Domestic violence committed by the non-custodial parent supports a proposed relocation, all other things being equal. Even prior to Tropea, the courts recognized the need to escape serious and repeated domestic violence as a legitimate motive for relocation.[164] In addition, it can be argued that the absence of domestic violence enhances the emotional quality of the life the child, as well as the economic life of the child, by removing the debilitating effects of the violence upon the custodial parent who may not be able to work or may have lost a job due to the abuse.

Moreover, a change in custody to the non-moving parent is less likely where that parent is proven to be abusive and therefore an inappropriate custodian.[165]

E. DANGER OF ARTICLE 10 PROCEEDINGS

Note: This section is primarily for informational purposes. Her Justice does not place cases with pro bono attorneys that involve Article 10 proceedings or ones that we believe are at risk of Article 10 proceedings. However, in the course of representing your client in a custody proceeding, it is possible that the Administration for Children's Services (ACS) may take action against one or both parents resulting in an Article 10 proceeding. If ACS takes such action in your case, or if you or your client have reason to believe they are considering such action, notify your Her Justice mentor immediately.

a. Overview

One danger in bringing allegations of domestic violence or other parental unfitness factors to light in the context of a proceeding for custody or visitation is that the state might decide that neither parent is an appropriate custodian and remove the child from both parents' care. Owing in part to studies in the last ten years showing a link between domestic violence and child abuse, evidence of domestic violence in the home is now recognized as one of the main risk factors triggering a child protective investigation. Family Court Act article 10 establishes procedures for determining when the state, through child

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[162] DiMedio v. DiMedio, 233 A.D.2d 394, 650 N.Y.S.2d 746 (2d Dept. 1996).
[163] Hilton v. Hilton, 665 N.Y.S.2d 203 (4th Dept. 1997).
[164] 167 A.D.2d 786, 563 N.Y.S.2d 344 (3d Dept. 1990).
[165] Irwin v. Schmidt, 236 A.D.2d 401, 653 N.Y.S.2d 627 (2d Dept. 1997), Moreno v. Cruz, 24 A.D.3d 780, 806 N.Y.S.2d 702 (Second Dept. 2005); G.K. v. L.K., (Sup. Ct., Kings Co., Sunshine, J) (U) (2008 WL 4058712) (2008 N.Y. Slip Op. 51790) (Aug. 15, 2008); W.Y. v. I.V., (Fam. Ct., Richmond Co., DiDomenico, J) (U) (2010 WL 668178) (2010 N.Y. Slip Op. 50285) (Feb. 24, 2010).

protective services and Family Court, may intervene against a parent or parents to protect a child from injury or mistreatment and to protect the child's physical, mental and emotional well-being.

Pursuant to Social Services Law §424 (9), where ACS determines that it is necessary to remove a child from its parents in order to safeguard the child from further abuse or neglect, it may take the child into protective custody and commence a proceeding against the parents in Family Court.

i. Definition of Abuse

Family Court Act §1012 defines an abused child as one less than 18 years old whose parent or other legally responsible person (1) 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 protracted disfigurement, or protracted impairment of t physical or emotional health or protracted impairment of the function of any bodily organ; or (2) creates or allows a substantial risk of such injury to be created; or (3) commits a sex offense against a child.[166]

ii. Definition of Neglect

A neglected child is defined as one under 18 years old whose physical, mental or emotional condition has been impaired, or is in imminent danger of becoming impaired, as a result of the failure of the child's parent or other person legally responsible for the child's care, to exercise a "minimum degree of care" (1) in supplying the child with food, clothing, shelter, education and medical care; or (2) in providing the child with proper supervision and guardianship by unreasonably inflicting or allowing to be inflicted upon the child "harm or a substantial risk thereof."[167]

iii. Definition of Harm

"Harm" is not defined by the statute, but examples given include the infliction of excessive corporeal punishment, the misuse of drugs or alcohol to the point where the parent loses control, and any other similarly serious acts. The threshold of harm required to satisfy the definition of a "neglected child" is lower than that for an "abused child." However, neither definition requires any actual injury to the child. Both do require a showing that the harm or risk was the result of acts or omissions by the parent.[168]

b. Case Law

In 2004, the New York State Court of Appeals handed down the landmark decision, Nicholson v. Scoppetta, the culmination of a federal class action lawsuit initiated in 2000 on behalf of victims of domestic violence and their children. In its unanimous decision, New

[166] 42 U.S.C. § 13981(d) (1997).
[167] FCA § 1012(f)(i)(A,B).
[168] FCA § 1012(h).

York's highest court held, in part, that a court reviewing a Family Court Act article 10 petition *may not* find "a respondent parent responsible for neglect based on evidence of two facts only: that the parent has been the victim of domestic violence, and that the child has been exposed to that violence." The Court of Appeals held that "more is required for a showing of neglect under New York law than the fact that a child was exposed to domestic abuse against the caretaker. Answering the question in the affirmative, moreover, would read an unacceptable presumption into the statute, contrary to its plain language." The Court also ruled that, as in other neglect cases, a court must consider whether the domestic violence victim exercised "a *minimum* degree of care, not maximum, not best, not ideal" and "under *the circumstances then and there existing*." The Court emphasized that there must be proof of harm or danger of harm to the child and the focus must be on "serious harm or potential harm." The harm cannot be merely possible; it must be near or impending. The Court rejected the presumption of emotional harm from witnessing domestic violence because not every such child suffers such harm.[169]

c. Statutory Restrictions on Removal in DV Cases

The Court in *Nicholson* ruled that a practice of removing children from abused parents without court order violates state law unless the child is in "such urgent circumstance or condition" of imminent danger that there is no time to go to court. The Court categorized the test as "stringent," and evidence of harm or risk to the individual child is necessary to justify removal.

The Court noted that "it may be difficult for an agency to show, absent expert testimony, that there is imminent risk to a child's emotional state" or that "any impairment of emotional health is clearly attributable" to the victim's actions or inaction. Finally, the Court held that the trial court must weigh the risk of potential harm of staying in the home against the known harm of removal.

d. Caution regarding Allegations of Sexual Abuse

It is also worth noting that repeated and unsubstantiated allegations of sexual abuse against another parent and subjecting a child to repeated examinations has been held to constitute neglect where the child suffered emotional impairment as a result of such behavior.[170] This is important to keep in mind in a custody case, where a parent might raise concerns of sexual abuse. In some cases, although raising such allegations may be well-intentioned, where they are uncorroborated, the parent risks being viewed as obstructionist to the parent/child relationship and could risk a finding of neglect or loss of custody of the child. Caution should be taken to involve individuals with experience in

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[169] Nicholson v. Scoppetta, 3 N.Y.3d 357, 820 N.E.2d 840, 787 N.Y.S.2d 196 (N.Y. 2004). Crystal R v. James R, Sr., (Fam. Ct., Suffolk Co., Budd, J)(U)(1/27/2009 NYLJ p. 30, col. 1)(Dec. 15, 2008

[170] Stephen S. v. Linda E., (Fam. Ct., Suffolk Co., Lynaugh, J)(U), 27 Misc.3d 1233(A (2010 WL 2347006)(2010 N.Y. Slip Op. 51024)(Jun. 04, 2010); Melissa WW. v. Conley XX., 88 A.D.3d 1199, 931 N.Y.S.2d 748 (Third Dept. 2011)(2011 WL 5083222)(2011 N.Y. Slip Op. 07546)(Oct. 27, 2011)

sexual abuse cases to form a professional opinion as to whether the child has been abused and to offer services to the child in a safe setting.

e. Termination of Parental Rights

If a child is removed from a parent's care after a finding of abuse or neglect and placed in foster care, a parent runs the additional danger of having the child permanently removed from their care and put up for adoption. Pursuant to Family Court Act §611 and §614, after a child has been in foster care for more than a year, the foster care agency may bring a proceeding to declare the child "permanently neglected" pursuant to Social Services Law §384-b. The agency prior to a permanent removal must first demonstrate that it attempted to provide assistance and services to the parent to resolve problems preventing return of the child to the parent, including counseling and other programs specifically for an abused parent.[171]

f. Attorney's Role

The commencement of a child protective proceeding is very serious because the entry of a finding of neglect can have devastating consequences, including the removal of the child from the custody of both parents for extended periods of time, and ultimately, the termination of parental rights. Judges of both the Family Court and Supreme Court can and do order investigations by child protective authorities in custody proceedings and can/do initiate such child protective proceedings.

Attorneys need to think and plan strategically with their clients for the possibility of intervention by ACS, where it seems a risk. Often, preventative action taken by a parent and advocacy by an attorney can stop an ACS investigation before it turns into a formal charge against a parent.

For example, attorneys should:

- ❑ assess the severity and duration of the physical/emotional violence and its impact upon the client and child; determine whether there has been prior ACS involvement with the family;
- ❑ assess the need of the client and children for services, such as shelter, public assistance, counseling, therapy, parenting classes, etc., and assist the client in obtaining such; a parent needs to demonstrate to ACS that they are attempting to improve the situation;
- ❑ identify possible alternative custodians for the child in the event removal or placement occurs – better to have the child placed with a family-member than with a foster care agency

NOTE: If your client is being investigated by ACS for reasons other than a routine Court Ordered Investigation (discussed in "Pre-Trial Preparation and Discovery" in

[171] See, e.g., Alexander B., 70 A.D.3d 524, 894 N.Y.S.2d 747 (First Dept. 2010)(2010 WL 547031)(Feb. 18, 2010); Matter of Guardianship of Star Leslie W., 63 N.Y.2d 136, 481 N.Y.S.2d 26 (1984).

the Section 3 “Step by Step Guide” section of this manual), contact your Her Justice mentor immediately for further advice and assistance.

IMMIGRATION CONSIDERATIONS AND THE VIOLENCE AGAINST WOMEN ACT (VAWA)

The Violence Against Women Act[1] was signed into law in 1994 as Title IV of the Violent Crime and Law Enforcement Act, pursuant to Congress' Commerce Clause powers. VAWA's goal is to improve the prevention and prosecution of violent crimes against women and children. VAWA is the first federal law recognizing and attempting to stop crimes of violence motivated by gender. In pursuit of this goal, VAWA includes provisions such as:

- ❑ a requirement that states, territories, and tribal courts give full faith and credit to protective orders issued by all other states, territories and tribal courts
- ❑ establishment of a federal civil rights cause of action for victims of gender motivated crimes of violence
- ❑ federal criminal penalties for persons who travel to another state with intent to injure their spouse or partner, or who cause the victim to cross state lines for this purpose, and cause injury to their victims
- ❑ federal criminal penalties for persons who travel to another state with intent to violate a protective order and do violate such order
- ❑ self-petitioning for legal resident status by battered immigrant women (on behalf of themselves and their children) who are married or related by blood to an abuser with legal resident status, even if the marriage is legally terminated after the petition is filed
- ❑ suspension of deportation for battered immigrant women and children who have resided in the U.S.A. for at least three years, if such would result in extreme hardship to the victim or her parent or child

Another important aspect of VAWA for survivors of domestic violence is the Civil Rights Remedy.[2] This provision permits victims of violent crimes sue in federal or state court and to seek money damages, compensatory and punitive damages, an injunction, a declaratory judgment, and attorneys' fees for injuries suffered as a result of gender-based crimes that could be felonies under state or federal law. These crimes include family offenses, sexual assault and rape, physical abuse in the course of one's employment, and felonies against property (as long as they involve injury or serious risk of injury to a person as well). Some examples of what money damages can cover include costs associated with injuries to a victim's person (such as medical bills or counseling) or property, loss of employment or lost time from work as a result of harassment at work, financial compensation for pain and suffering, and punitive damages to punish the attacker.

[1] P.L. No. 103-322, 108 Stat. 1902 (1994).
[2] 42 U.S.C. § 13981(d) (1997).

To prevail on a civil lawsuit pursuant to the Civil Rights Remedy, a woman must prove two things by a preponderance of the evidence: (1) that she suffered a "crime of violence"[3] that is seriousness enough to rise to the level of a felony under federal or state law; and (2) that the violent crime committed against her was motivated, at least in part, by her gender. The perpetrator does not have to have been charged, prosecuted or convicted for the act in a criminal proceeding in order for the VAWA civil rights lawsuit to proceed.

VAWA does not include any express statute of limitations period in which actions must be brought. It is likely that the federal "catch-all" statute of limitations[4] will be applied to VAWA Civil Rights Claims commenced in state as well as federal courts. The "catch-all" provides a four-year limitations period for civil actions arising under federal laws that do not specify otherwise.

[3] An act that involves the use or threat of force.

[4] 28 U.S.C. §1658 (1990).

IMMIGRATION CONSIDERATIONS AND CUSTODY/VISITATION CASES

As part of the representation of your client, you should know the immigration statuses of your client, their child and the adverse party and be aware of immigration-related consequences and issues that may arise in the custody case. If you need assistance ascertaining the immigration status of your client or members of their family, please contact your Her Justice mentor.

Family Court Jurisdiction and Immigration Status:

Public policy favors granting families living in the U.S. access to the Family Court to resolve conflicts and tensions for the best interests of the child. Courts have consistently held that immigration status, or lack thereof, does not preclude an individual from establishing residency in order to maintain an action for custody. New York follows the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) regarding which court has jurisdiction over a particular custody dispute. The UCCJEA focuses on the physical location of the child, the child's contact and connections in the state, and the child's welfare. It makes no mention of immigration status in determining the relevant factors for jurisdiction.

Immigration Status and "Best Interests" Analysis:

In applying the "best interests" standard, the adjudicator weighs a variety of factors in determining who should have primary care of the child. Unlike domestic violence, immigration status is not one of the statutorily mandated factors that the adjudicator must consider. However, immigration status does play into family power dynamics, especially when there are families with members who have different immigration statuses and domestic violence is present. It is important to have an understanding and awareness of these dynamics in developing your case strategy. Please speak to your Her Justice mentor to discuss these issues.

Accusations of Kidnapping:

The adverse party may accuse your client of planning to remove the child and take them to their home country. Conversely, your client may have concerns that the adverse party will take the child abroad without their consent. It is advisable to consult the Federal Parental Kidnapping Prevention Act (PKPA) and the UCCJEA for guidance. You may be able to request supervised visitation from the court because of specific threats to kidnap the child, but this relief is not always granted. The judge may also order that the parties give the child's passports to the Court while the case is pending to ensure that the child is not removed from the U.S. Another option to prevent international child abduction is to place

the child on the Department of State "Children's Passport Issuance Alert Program." The Department of State website As part of the representation of your client, you should know the immigration statuses of your client, their child and the adverse party and be aware of immigration-related consequences and issues that may arise in the custody case. If you need assistance ascertaining the immigration status of your client or members of their family, please contact your Her Justice mentor.

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SECTION 3 –

STEP BY STEP GUIDE TO COMPLETING YOUR CASE

HER JUSTICE

SECTION 3: STEP BY STEP GUIDE TO COMPLETING YOUR CASE

A. Cover Page and TOC
B. Ethical Considerations for Interviewing your Client
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H. Tools and Tips for Custody Visitation Cases
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ETHICAL CONSIDERATIONS: INTERVIEWING YOUR CLIENT

Custody determinations are fact-based. Thus, it is crucial for the attorney to know all the relevant facts of the client's case and to learn as much as possible about the client as a parent. Through several in-depth interviews with your client, you must cover all areas relevant to a best-interest determination.

1. *Assessing the Case*

Some areas to make sure and cover with your client include:

Basic Data for the Parties:

- name/address of both parties
- Names/address/dates of birth for each child
- relevant history of the marriage
- occupation and employer (work schedule, income, etc.)
- existence of prior marriages and dispositions
- prior proceedings, orders, judgments concerning custody and visitation (ask the client to give you copies of all these documents as soon as possible)
- prior civil/criminal orders of protections and proceedings (again, get copies to look over yourself, not only of the final order but also of the petition)
- emotional health and psychiatric history of parties
- physical health and medical history of parties (subpoena necessary records)

Background of Child:

- history of child's residence: with whom has lived, lives now, address, duration of
- relationship to siblings
- relationship to extended family/relatives
- school history, performance (grades, absences), names of teachers, guidance counselors, social workers
- previous custodial and visitation arrangements
- any special medical/emotional issues
- religious history
- extracurricular activities, sports, organizations
- history of financial support by each party, amount of child support paid
- names/addresses of physicians, counselors, therapists
- relationship to potential new spouse or step-siblings,

Parties' Strengths/Weaknesses as Custodial Parent:

- primary caretaker history; parents' comparative prior involvement with child:

- parenting skills, interaction with child, awareness of significant individuals in
- child's life (friends, teachers, tutors, health care providers, etc.)
- fitness factors (such as drug and alcohol abuse, employment history, educational background, criminal record, etc.)
- motivation: why is custody an issue? What are the parties fighting about?
- Relationship with other parent – violence, issues in relationship, reasons other parent wants custody, willingness to recognize other parent as important part of child's life and facilitate relationship
- Child's preference as to custodial/visitation arrangements
- Preference of parties to custody/visitation (any voluntary visitation schedule)

Other Details:

- Names/addresses of all potential witnesses; relation to party
- Previous interventions of any mental health experts or ACS in family's history
- If the client is missing any of their court papers, such as their petition for custody, an attorney should ask them to go to the Family Court and obtain copies of the missing papers from the court file. They will need to bring a photo identification and proceed to the court clerk's office.
- Relocation issues—is either party seeking to move to another State (or country) or far enough away to disrupt the other parent's access to the child? **If this is an issue in your case, speak to your Her Justice mentor right away.**

Practice Tip: For guidance in assessing your client's case, see the Custody Questionnaire in the Supplementary Materials in this section of this manual.

2. *Assessing the Client as Witness*

Can the client survive a custody battle (physically and emotionally)? Or, will you need to work more towards settling the case? What are the client's strengths and weaknesses that will make them an effective witness? Are they able to communicate well and present well? Do they present as hostile? To whom? (the court? the opposing party?) Have they committed prior bad acts? Do they have a history of drug abuse or convictions that will be brought up by the other side?

An attorney needs to assess the client's weaknesses and encourage the client to do whatever possible to address them prior to trial. For example, does the client need to be involved in an alcohol or drug treatment program, counseling or therapy? Do they need to become more involved in the child's care or more visible to teachers, coaches or others who work with the child?

3. *Preparing the Client for Battle*

Custody cases can be terrifying experiences for clients because they may be confused by the legal process and scared of losing significant contact with a child. A client's heightened emotional state may inhibit their ability to process information. It is important to frequently ask the client if they have any questions/concerns and explain each phase of the process and what they can expect.

Custody cases often involve protracted negotiations and many settle without going to trial, based upon evidence gathered and evaluations completed pre-trial. Much of your preparation, therefore, will be strategizing to place your client in the best possible negotiating position.

Clients should be advised to avoid involving the child in lengthy discussions about the litigation at hand. Clients risk being seen by the court as trying to "drag" a child into their battles with the other parent in an attempt to get the child on "their side."

The client needs to be prepared to interact positively with other people involved in the case – the court-appointed mental health evaluator, the lawyer for the child, the Probation officers, the court personnel (judge, law secretary). They need to know what to expect from each of these people and how to present themself so that they see the client in the best possible light. If they come across as angry, vindictive or disorganized or even "crazy" in an initial appearance, they may do serious damage to their credibility and their case.

Though Family Court tends to be more "casual" than many other forums, it is important for your client to show respect to the court and the judge by behaving in a respectful manner. Ostentatious or inappropriate dress can be a liability; advise your client to dress simply, conservatively and neatly. Under no circumstances should your client wear jeans to court, though many other litigants do.

Advise your client that their courtroom demeanor is important. Help your client be aware of their body language and facial expressions as they practice giving their direct testimony. Also, make sure the client knows that under no circumstances should they engage in any outbursts while in the court. Even if the judge, opposing counsel, Attorney for the Child, respondent or a witness says something that is outrageous or untrue, make sure your client knows not to call out in court. Advise them that you will speak for them, and that you will keep a legal pad next to you on the table so they can jot notes to you during the proceeding without causing an interruption by trying to speak to you or others in the courtroom.

Above all, make sure the client knows that in spite of the emotionally charged atmosphere of the courtroom, they cannot engage in negative exchanges with the other side or opposing witnesses. Likewise, they should not make faces or exasperated noises while listening to the testimony of others. The court will not only notice such behavior but will hold it against your client. Even after the judge has left the room, court officers will notice any outbursts and likely report them to the judge. Advise your client to remain calm and silent until the two of you are in a private space again.

Finally, it is important to involve the client in preparation for the case – not only to keep them aware of what is going on in their case (and thus, calmer), but also because they will have sole access to certain evidence in their possession, such as photos, records, and

documents. Also, the client will need to provide a list of potential witnesses for their case and make initial contact with these individuals to see if they are willing to testify on their behalf. The more involved a client is in their case, the greater the likelihood of success and the less time they will have to worry.

INITIATING AN ACTION

A. PETITIONING THE COURT

1. Supreme Court vs. Family Court

In New York, the Supreme Court and the Family Court have concurrent jurisdiction over custody and visitation proceedings. Both Supreme Court[1] and Family Court[2] can make custody/visitation determinations for minor child, whether or not the parties are married. In practice, however, the Supreme Court usually refers unmarried litigants to Family Court.

Any proceeding for custody/visitation in Family Court is governed by Article 6 of the Family Court Act and by the Domestic Relations Law §240(1).

The Family Court may exercise original jurisdiction where a petition for custody or visitation is filed with the court,[3] or may exercise derivative jurisdiction in cases referred to it by the Supreme Court, for example as part of a divorce action.[4] Moreover, the Family Court can modify or enforce the custody/visitation provisions of a Supreme Court divorce judgment where the Supreme Court has not reserved the exclusive right to do so for itself, even without a referral.[5] If the Supreme Court order or judgment is silent on this issue, the Family Court can enforce or modify the order.

Thus, if your client wants to modify or enforce a Supreme Court Order or Judgment concerning custody, before making an application in Family Court you must examine the prior order to see whether Supreme Court retained exclusive jurisdiction. If it did, the modification or enforcement must be brought in Supreme Court by Order to Show Cause with supportive papers. If the Supreme Court Order or Judgment is silent on this issue or gives Family Court concurrent jurisdiction (more likely), an application may be made in either Supreme or Family Court. In Family Court, the action would be brought by filing a "Petition to Enforce/Modify an Order of Another Court."

As a general rule, a prior Family Court order for custody or visitation will terminate once the Supreme Court makes an order affecting custody/visitation, unless the Supreme Court specifically continues the Family Court order.[6] If a matrimonial action is pending in the Supreme Court (one parent has filed and served the other with a Summons with Notice),

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[1] Section 240(1) of the Domestic Relations Law states that custody and visitation may be requested as ancillary relief in the Summons with Notice and in the Complaint (or in the Answer/Counterclaim). Or, if not requested therein, by Order to Show Cause and Petition or by Writ of Habeas Corpus, though this last procedure is not as widely used.

[2] Section 651(b) of the Family Court Act states, in part, that when initiated in Family Court, the court has jurisdiction to determine, in accordance with DRL §240(1), proceedings for custody or visitation of minors, including applications for grandparent visitation pursuant to DRL §72 or §240.

[3] FCA § 651(b).

[4] Id. at 651(a), 652(a).

[5] Id. at 652(b).

[6] FCA §447(b).

and the other parent then petitions the Family Court for custody/visitation, the Family Court lacks jurisdiction.[7] In such cases, the matter must be litigated in Supreme Court as part of the divorce action because that forum was chosen first -- unless the Supreme Court refers the matter to Family Court. On the contrary where there is an existing Family Court matter and a divorce action is commenced, either party may seek to file a motion to consolidate the family court action into the divorce proceeding. Such transfer will be at the discretion of the court in deciding which court should continue to have jurisdiction.

2. Integrated Domestic Violence Courts

Based on the one family-one judge concept, the State's Integrated Domestic Violence Courts (IDV), part of the Supreme Court, exists to handle all related cases pertaining to a single family where the underlying issue is domestic violence. The Court seeks to promote justice and protect the rights of all litigants while providing a comprehensive approach to case resolution, increasing offender accountability, ensuring victim safety, integrating the delivery of social services, and eliminating inconsistent and conflicting judicial orders. Each IDV Court empowers a single judge with the authority to handle family, criminal and matrimonial matters. Criminal allegations of domestic violence should form the threshold requirement for entry into the IDV Court, with related cases in at least two of the three areas of the law. This means that there must be or have been a criminal court Order of Protection proceeding pending when the matter was originally referred to the IDV part, along with either a pending Family Court proceeding such as a custody/visitation proceeding, order of protection (or both) or a Supreme court divorce proceeding. Cases are internally referred to the IDV through court personnel. Issues child support or spousal support are typically not heard by the IDV Judge unless these issues are part of a divorce proceeding. There are Integrated Domestic Violence Courts in New York City in all five boroughs. The goals of the Integrated Domestic Violence Court are as follows:

(1) Informed judicial decision-making based on comprehensive and current information on all matters involving the family;

(2) Consistent handling of all matters relating to the same family by a single presiding judge;

(3) Efficient use of court resources, with reduced numbers of appearances and speedier dispositions;

(4) Linkage to social services and other resources to address comprehensively the needs of family members;

(5) Promotion of victim safety through elimination of conflicting orders and decisions;

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[7] See N.Y. Const., art. VI, §13[b][2]; and also, e.g., Harley v. Harley, 129 A.D.2d 843 (3d Dept. 1987); Poliandro v. Poliandro, 119 A.D.2d 577, 500 N.Y.S.2d 744 (2d Dept. 1986); James A.T. v. Denise M.T., (Fam.Ct., Orange Co., Klein,J)(2004 WL 1118641)(2004 N.Y. Slip Op. 24155)(May 13, 2004); Moore v. Moore, 187 Misc.2d 914, 725 N.Y.S.2d 821 (Fam. Ct. Fulton Co.2001)

(6) Increased confidence in the court system by reducing inefficiency for litigants and by eliminating conflicting orders;

(7) Coordinated community response and collaboration among criminal justice and child welfare agencies and community-based groups offering social services and assistance to domestic violence victims and their children.

Locations:

BRONX

INTEGRATED DOMESTIC VIOLENCE COURT, BRONX COUNTY

Bronx County Hall of Justice

265 EAST 161st Street

Bronx, NY 10451

718-618-1067

BROOKLYN

INTEGRATED DOMESTIC VIOLENCE COURT, KINGS COUNTY

Kings County Supreme Court

320 Jay Street Brooklyn, NY 11201

(347) 296-1279

MANHATTAN

INTEGRATED DOMESTIC VIOLENCE COURT, NEW YORK COUNTY

100 Centre Street

New York, NY 10013

(646) 386-3579

QUEENS

INTEGRATED DOMESTIC VIOLENCE COURT, QUEENS COUNTY

Queens County Supreme Court

Criminal Term 125-01 Queens Blvd. Kew Gardens, NY 11415

(718) 298-1404

STATEN ISLAND

INTEGRATED DOMESTIC VIOLENCE COURT, RICHMOND COUNTY

18 Richmond Terrace

Staten Island, NY 10304

718-390-8645

How do cases get to IDV?

When petitions are filed in either criminal or family court they are screened for current or past overlap between Family Court and Criminal Court filings. If they overlap, they may be selected for adjournment to the IDV Court to be heard.

a. Choosing a Forum

If a parent wants to obtain a divorce as well as custody of their children, or if a divorce action has already been commenced, the parent must proceed in Supreme Court and request custody as part of the divorce action. If the parties are not married, or the parent wants to obtain custody without initiating a divorce action and no divorce is pending, the proceeding can be brought in either forum. For several reasons, most litigants choose to proceed with their custody/visitation cases in Family Court.

First, Family Court does not require filing fees or assess court costs, since it is "a poor person's court." While you can obtain poor person's relief, pursuant to CPLR §§1101,1103 in Supreme Court, waiving fees for indigent clients, it is an extra step.

Second, parents can initiate an action without an attorney in Family Court. The clerk of the court will help a litigant prepare and file a summons and petition and will provide instructions for service. Unfortunately, these petitions often are poorly drafted and incomplete, since the preparer is not an attorney and does not have time to conduct a careful, thorough interview with the client. Thus, once retained, you may want to prepare an amended petition for your client.

Third, Family Courts often have more resources for dealing with custody/visitation disputes. As discussed further below, most judges routinely assign attorneys for the children at public expense, whereas Supreme Court judges do not routinely appoint them, and if they do, often require litigants to pay this cost. Family Courts have Probation Departments and other public agencies such as ACS who can conduct home studies and court ordered investigations. Family Court judges routinely order psychological evaluations ("forensics") of the parties by the court's Mental Health Service, and may in its discretion order alcohol and drug evaluations. These services will be paid for by the court (county) if the parties are low-income or indigent.

Fourth, judges in Family Court often have more experience with and better knowledge of the relevant law than those in Supreme Court because they deal with custody/visitation issues on a daily basis.

3. Order to Show Cause/Petition/Writ of Habeas Corpus

FCA §651(b) states that custody/visitation proceedings in Family Court may be brought either by Writ of Habeas Corpus, Order to Show Cause ("OSC") or Petition. Most petitioners use OSC in an emergency situation. Writs of Habeas Corpus are used to secure the liberty of a person wrongfully imprisoned or otherwise restrained. If you must file a Writ of Habeas Corpus, you should simultaneously file a petition for custody. In the context of a custody case, they are used most often when one parent has wrongfully removed or retained the child from the custody of the other. The other parent can file a Writ to have the child produced in court (on the return date) and returned to their custody. Once the Writ of Habeas Corpus is satisfied through the production of the child, the custody petition will then be heard by the Family Court. The general rule is that, while temporary custody may be granted without a hearing, "where sufficient facts are shown by uncontroverted affidavits, it is error as a matter of law to make an order respecting custody, even in the pendente lite context, based on controverted allegations without having had the benefit of a full hearing". Further, temporary custody should not be awarded to a parent where there are questions of fact as to whether the parent awarded temporary custody is a suitable temporary custodian.[8] In proceedings initiated by Writ of Habeas Corpus, the pleadings should conform with the requirements of DRL Article 70.

Note that in the absence of a matrimonial action, clients can get into Supreme Court for a custody/visitation determination only upon a Writ of Habeas Corpus.[9]

Most cases are commenced by way of filing a Petition. The petition should not be too detailed. A client might want to include a great deal of information in the pleadings, but it can be dangerous to do so, because you are "tipping your hand" to the other side. Best to keep the petition relatively short, just outlining the basics of the story and that your client is the appropriate custodial parent. For instance, if your client is the child's primary caretaker, regularly takes the child(ren) to doctors' appointments, is directly involved with child(ren)'s teacher, the petition should state this information. However, make sure to include any allegations of domestic violence so that you can seek whatever temporary relief you need from the court based upon the petition. If you are preparing the petition for your client, make sure to use the court's official form or follow its format so it is easy for the court to read. Attachments can be used as necessary. For example, you may want to attach an order of protection if one exists, or a police report.

Make sure to bring several copies (at least 3) of the petition with you to court. You will need to file the original with the court, and have at least two copies (one to be served upon the respondent and one for your files).

4. Amended Petitions

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[8] Carlin v. Carlin, 52 AD3d 559, 560 (2d Dept. 2008); and Matter of Jesse M. [Cynthia L.], 73 AD3d 780 (2d Dept. 2010).
[9] DRL § 70.

A client may already have filed their petition for custody before securing an attorney to represent them. Once retained, you should immediately review the client's custody petition and make sure it is legally sufficient to proceed. If not, the attorney should file an amended petition with the court.

The Family Court Act does not specifically provide for leave to file an amended petition. However, pursuant to CPLR § 3025, a party is entitled to file an amended pleading (such as a petition) "as of right" (that is, without specific permission from the court or opposing side) within 20 days or at any time before the period to respond to the pleading expires. If more than 20 days have expired, an attorney still should file the amended petition if necessary. Unless the other side specifically objects to the filing, the court usually will accept it without question. Even if the other side objects, counsel can argue that the petitioner did not have the benefit of counsel in drafting the initial petition. In rare instances, counsel may need to seek permission from the Court to file a motion seeking to amend a petition.

a. Filing the Amended Petition

The amended petition must be served upon the respondent, or their attorney if they are represented, by regular mail prior to the next court appearance. A notarized affidavit of service should be completed by the person who did the mailing, or if an attorney served the petition, an affirmation of service (not required to be notarized). The original affidavit or affirmation must be annexed to the original of the amended petition and filed with the court. A pleading may not be filed with a court unless it contains proof it has been served upon the other side.

It is a good idea to take an extra copy of the papers with you to file in court. You may ask the court clerk to stamp the second copy as "filed" and give it to you for your records. It is helpful to have an extra copy, especially if the court misplaces the originals.

Note that it is always better if the attorney of record does not complete service, in case service is challenged by the other side and the person who served the papers must testify in court. It would be awkward if the attorney were the witness for service. In such a case, another attorney would need to be retained to assist with the hearing on the issue of service. Such hearings are known as "Traverse Hearings."

If there is no time to serve the amended petition by mail before the next court date, the petition may be handed to the opposing party by the attorney at the court appearance. This is not preferred practice, and the other side often will request an adjournment to review the amended petition, further delaying proceedings. If an attorney does serve and file an amended petition on the day of court, they should make sure the clerk knows that the case is on the day's calendar and ask that the amended petition and proof of service be added to the court's file before the case is called.

B. SERVING THE RESPONDENT

1. Requirement of Personal Service

After a client files a petition, they will be given a copy of the summons (with return date listed), petition, affidavit of service and instruction sheet describing how service should be made. If the attorney files the papers, the court is likely just to give the attorney a copy of the summons and petition.

A respondent must be served with a copy of the summons and petition by personal delivery. This is not the same as personal service pursuant to CPLR § 308 which permits, among other things, "substituted service," i.e., the leaving of court papers with a person of suitable age and discretion at a party's home or business. If you are not able to serve the respondent by personal delivery, you will need to seek the court's permission to serve them by other means, such as by substituted service pursuant to CPLR §308.

For custody and visitation proceedings, the respondent must be served at least eight (8) days before the return date upon which they must appear in court. See CPLR § 403(b).

The Sheriff should serve the Summons and Petition for Custody and/or Visitation, along with any Family Offense petitions (requesting an Order of Protection). Speak with your client about what instructions they were given with regard to service. If the client chooses to and it is safe to do so, in lieu of the Sheriff, they may seek out a friend or family member to serve the papers, or hire a process server. The client cannot serve the respondent themself. Pursuant to CPLR § 2103(a), papers may be served by any person not a party to the action who is at least 18 years of age.

It is generally best to have a third-party serve papers upon the respondent, in case the respondent challenges service as improper. The testimony of an objective process server that service was properly effectuated is more persuasive than that of a friend or family member who is biased for or against a party. Also, custody proceedings can be highly emotional, and it might not be safe for a petitioner's friend or family member to be the person serving the respondent, if their reaction is likely to be more violent in that case. In such a case, consider asking the Sheriff to perform the service.

2. Motion for Alternative Service

If after reasonable efforts, a respondent cannot be personally served, the court may order substituted service, such as by mail. See CPLR § 308. Often a respondent will avoid service and an application for substituted service will have to be made to the court by the petitioner or their attorney. The petitioner's server should keep written records of attempts to serve the petition in order to establish "reasonable efforts" for the court. Several attempts must be made by the server, at different times of the day, and even at different locations (such as respondent's residence, place of employment, homes of relatives) to persuade the court to order alternate service.

3. Format for Respondent's Answer/Response

Pursuant to CPLR § 101 and FCA § 165, Family Court proceedings are governed by the CPLR except where a specific inconsistent statute controls. A petition in Family Court is the equivalent of a complaint in Supreme Court (CPLR § 402) and the answer to that petition must comply with CPLR time limits (CPLR §§ 320(a), 322(b) and 3012(a)) unless another statute controls. Therefore, the response/answer to the petition must adequately address the allegations in the petition and it must be filed timely. Each and every allegation needs to be admitted, denied, or declined. An attorney who fails to deny an allegation risks having the court deem it admitted, except in the limited circumstance where "no responsive pleading is permitted." CPLR § 3018. In addition, responses should track the petition paragraph by paragraph to help the court to easily determine what the parties agree on and what is at issue.

C. THE FIRST COURT APPEARANCE (RETURN DATES)

1. Overview

a. Attorney Retained Post-Filing Petition

An attorney who is retained after a client already has filed a petition and appeared in court needs to ascertain from the client whether the case has been "set down" for a hearing (trial). If the client is unsure, the attorney can look up the case on the court website at www.courts.state.ny.us under WebFamily. Alternatively, attempt to get a transfer from the clerk's office to the "Part" where the case will be heard to inquire with a clerk or if the case is before a Judge, with their court attorney or clerk. Please note, that it is often a challenge to get through to the "Part" because it is in session for the greater part of the day.

If it is the first appearance in court since the petition was filed, there will generally not be a hearing. Rather, the respondent will be given a chance to appear and reply on the record to the petition (by agreeing to the relief sought by the petitioner or by contesting the relief requested in the petition). Proper service must be established (with the filed affidavit of service or an admission by respondent that he was served), though if the respondent appears and does not contest service, proper service will be assumed.

It is customary, when you check in with the court officer to let the officer know that you and your client are present, and in court to be asked for proof of service upon the respondent. Make sure you bring extra copies so that you can give one to the court and upon request to opposing counsel. If time permits, file a copy with the court clerk and keep one copy for your own records.

If the client already has been back to court for an appearance when the attorney is retained, it is still likely that the case is not set down for a hearing. Often, the Court will have entered the respondent's reply on the record at the first joint appearance and adjourn the matter so the parties can secure counsel.

However, the attorney should be aware that a case might be settled at their first appearance. For example, if the respondent fails to appear, having been properly served, the court may proceed on the petition anyway. The court may issue a default order of custody, or take testimony on the record from the petitioner (hold an "inquest") why it is in the child's best interest for the petitioner to have custody of the child. Note, however, that the court usually will not grant a default order for custody or visitation to a noncustodial parent on the return of process (service) date if the custodial parent does not show. Usually, the court will ask that the custodial parent be served again and the matter will be adjourned to another date to allow for enough time to effectuate service.

If the respondent does appear (with or without counsel), they may agree to conference the case, either with a court attorney if the case is before a judge or in front of the judge or referee, if one has been assigned. If the parties are able to arrive at a satisfactory settlement during a conference, it can be embodied in a stipulation and signed by the parties. The stipulation can then be read into the record before the judge. The parties can consent to the stipulation in open court, and the judge can "so-order" it, thereby rendering it an order of the court, enforceable as such. Alternately, counsel for the parties may be directed to prepare and submit an order for signature by the court that embodies the terms of the stipulation. Best practice is to prepare a stipulation settling custody and visitation prior to the court appearance, allowing for all parties, their attorneys and the attorney for the child(ren) to review the terms and sign the agreement prior to submitting the Order to the Court.

An attorney should have good knowledge of the facts of case before the first appearance and be prepared to conduct an inquest or settlement negotiations, if necessary. It is sometimes helpful to create a timeline of events that you can have at your fingerprints when on the record, including biographic information about your client and detailed information as to the dates and nature of the incidents that will support your client's position.

In any custody case where the respondent already has appeared and contested the petitioner's request for custody, it is still unlikely there will be a hearing on the attorney's first court appearance. Many other procedures will delay the time to a trial, such as the appointment of an attorney for the child ("Attorney for Child") and the conducting of mental health examinations, home studies and other investigations ordered by the court.

Note that an attorney may ask the court for a "time certain" (specific time for any subsequent court appearances, either in the morning or afternoon calendar, so that the waiting time to appear before the court is reduced.

b. Review of Court File and Obtain Transcripts of Prior Proceedings

If there have been several court appearances by the client alone, and especially if evaluations and reports are in progress or completed, the attorney should go to the courthouse and review the case file.

The attorney should obtain transcripts from each of the prior proceedings. Obtaining transcripts of prior court proceedings is beneficial for attorneys who were retained after the client appeared in court for one or more proceedings. It may take some time to obtain these transcripts so it is important to request these transcripts as soon as possible after you are retained. Obtaining transcripts can be done by following the information found in this link: https://www.nycourts.gov/courts/transcripts/

In the file, the attorney will find copies of pleadings filed (petitions and cross-petitions), temporary orders issued (such as for temporary custody, mental health evaluations or home studies, the appointment of an Attorney for the Child), and the court's notes on the case. The attorney will be able to take extensive notes by hand from the file, and may be allowed to photocopy under the view of a clerk. Reports by the Probation Department, Administration for Children's Services (ACS), mental health evaluators, etc., will be found in the case file, but the attorney will not be able to have a copy or photocopy them without the court's permission.

In order to review a file, an attorney must submit a Notice of Appearance stating they are the attorney on the case and must show photo identification. You should also have a notarized letter from your client giving consent to review the file including past court files, if you need a complete history of past court proceedings. Pursuant to the Uniform Rules of the Family Court § 205.5, only a party or a party's attorney may review the court file. Though an employee of an attorney, such as a paralegal, should be allowed to review the file, a court clerk is likely to challenge that person's authority to do so, even if the attorney provides the employee with written proof of employment by the attorney, as well as written proof the attorney represents the party. Each court has different rules about when you can review the file. Most courts will not have the file accessible in the record room the day before or the day after the hearing. Check with the county record room where your case is going to be heard before going to access the file.

2. *Notice of Appearance*

The Uniform Rules of the Family Court § 205.10 provide that an attorney shall file a Notice of Appearance at or upon the attorney's first appearance in court or no later than ten days after appointment or retainer, whichever is sooner. The Notice simply contains your name, office address, telephone number, and the name of the party on whose behalf the attorney appears under the caption and the type of case.

It is suggested and good practice to serve a copy of the Notice of Appearance on opposing counsel or the pro se litigant and file it with the court with proof of service as soon as possible. This way, all parties and the court are notified that the client is represented and that all papers should be served on you, not the client. Sometimes the

court will need to contact the parties in a matter, for example in order to change a scheduled appearance date; by filing the Notice of Appearance with the court prior to your first appearance, the court should notify you directly if anything comes up on a case.

However, see practice tip below for typical cases.

Practice Tip: Usually, there is no need to file a Notice of Appearance with the court in advance of your first court appearance, unless you need to review the case file ahead of time. Otherwise, you can proceed to the courtroom specified on the summons and provide the court officer or court clerk with a Notice of Appearance prepared ahead of time, or request a blank Notice from the court officer prior to entering the court room. The Notice of Appearance can typically be found at the litigant's table and you can fill out and hand over to the court prior to going on the record.

3. Appearing under Her Justice's Student Practice Order

Her Justice has a Student Practice Order from the Appellate Division which allows law students and law graduates to appear on Family Court cases under the supervision of an admitted attorney. If you are a law student or law graduate, it is important that you appear in court with an admitted attorney. The admitted attorney can introduce you to the court and seek permission for you to speak for the client under their supervision pursuant to the Her Justice Student Practice Order. If you are a student or law graduate, then you will state your appearance on the record as appearing under supervision pursuant to the Her Justice Practice Order.

The admitted attorney supervisor has the obligation to supervise you in-court and out-of-court work as well.

If you have any questions about the Practice Order, please contact your Her Justice mentor.

4. Settlement Discussions

Pursuant to the Uniform Rules of the Family Court §205.12, in any proceeding, a conference (or conferences) should be held as soon as practicable to consider the issues. The Rules provide that at the conclusion of a conference, a written order shall be issued by the court summarizing any matters to which the parties agree or stipulate.

In practice, the first conference usually will be a settlement discussion, and most judges will not conduct a formal conference or issue an order pursuant to the Uniform Rules. Rather, the parties or their attorneys, before actually appearing in court, will conference the case themselves, and, as is customary, with the judge's court attorney, in order to narrow the issues and see whether settlement of the case is likely. Note, Court Attorney Referee or Judicial Hearing Officer's do not have a court attorney at their disposal to conference cases. If a settlement is reached, or a partial settlement, it should then be read into the record by the judge.

Courts often place tremendous pressure on the parties to settle, especially in the context of custody cases that can be long, drawn-out, and emotional. Because the courts presume

that it is in the best interests of the child to have contact with both parents, they prefer both parents to work out an agreement between themselves that they can live with, instead of having the court make an order after investigation and trial.

If no settlement is reached at the first appearance, and the case proceeds to the investigation and trial stages, other conferences may be held along the way, by the court's directive or at the request of a party. For example, pursuant to the Uniform Rules §205.12, conferences can be held to discuss:

- ❑ simplification or limitation of issues to be raised at trial
- ❑ amendment of pleadings
- ❑ admissions of fact
- ❑ completion of discovery or investigations/reports
- ❑ stipulation as to admissibility of documents
- ❑ limitation of number of expert witnesses
- ❑ possibilities for settlement (as the case progresses)
- ❑ filing of motions
- ❑ hearing of motions fixing a date for a trial

You and your client cannot have ex parte communications about the case with the court attorney or the judge. If procedural information is required (such as how to get a subpoena signed by the judge or how a judge hears certain motions), it is best to email with notice to all counsel whenever possible, but if necessary you may call the "part clerk" or the judge's court attorney. However, never ask these individuals for advice about your case, as they are seen as extensions of the judge and thus unable to give such.

5. Assignments of Counsel to Respondents

Pursuant to Family Court Act § 262(a), any parent involved in a custody proceeding, whether as a respondent or a petitioner, who is indigent and financially unable to hire an attorney, has the right to have counsel assigned by the court. Such assignments are implemented pursuant to County Law Article 18-B.[10] Thus, court-appointed attorneys are often referred to as "18-B attorneys." At a respondent's first appearance in court, the judge must advise them that they have a right to be represented by counsel of their own choosing and to adjourn the proceedings to secure and confer with counsel. The judge also should inform the respondent that if they are indigent they have the right to have counsel appointed on their behalf by the court.[11] In practice, judges often do not mention this unless the respondent states that they cannot afford to hire counsel and requests to have counsel appointed by the court. In such cases, the judge will voir dire the respondent on the record as to their financial status. If the respondent is unemployed, or on public assistance, or very low-salary, the judge may appoint them an 18-b attorney.

[10] FCA §262c.
[11] FCA §262(a).

If the respondent states on the record that they wish to be represented by counsel, the case will then be adjourned in order to allow the respondent time to find or be appointed an attorney.

D. TEMPORARY RELIEF

On the day a client files their petition for custody in court, they can seek various forms of temporary relief from the court pending a final decision in the case. If the attorney is present, they may make such requests on the client's behalf.

Once the custody petition is filed, the client and/or attorney will wait to go before the "Intake Judge" for the day who will then assign a return date and issue a summons. It is customary for the judge to ask for clarification of the petition and relief sought by the petitioner, if necessary. If there are emergency circumstances requiring immediate, ex parte relief, the client or their attorney may ask for it then. It is a good idea to bring some supporting documents for the relief you seek, such as police reports, ACS reports, hospital records, etc.

1. Custody

A client can ask that they are given temporary custody of the child during the course of the custody proceeding. This is a good idea, especially in cases where the respondent is also a legal parent and has threatened or attempted to remove the child from their custody. Unless there is a custody order in effect, both parents have an equal legal right to physical custody of the child. If the other parent abducts or refuses to return the child, the police will not assist the client in getting the child back unless they have an order that states they have custody, or temporary custody, of the child. If no such order exists, the police in most cases will advise them to go to Family Court for help. However, this can prevent the return of the child for weeks, depending on how busy the court is and how long it takes the client to secure such relief. The longer the child stays with the other parent, the more difficult it can be to regain custody.

Temporary custody orders often are in place for up to a year or longer if there is a protracted custody trial. If an abusive parent files first and obtains a temporary custody order, you can file an Order to Show Cause or a Writ of Habeas Corpus for the return of the child to your client's custody. A good argument can be made that they should continue to have custody pending the final outcome of the case, especially if the child previously has been in their care for an extended period of time. You also should set forth the other parent's violence and any other reasons that indicate your client should have temporary custody.

2. Supervised/Suspended Visitation

If the child is in physical danger as a result of the other parent's violence, drug/alcohol addiction, or other problems, the petitioner should immediately seek an order for

supervised or suspended visitation (if visitation already exists), and/or a temporary order of protection for the child.

3. *Orders of Protection*

a. Attorney Retained Post-Filing Petition

If the client and/or child is in physical danger or is being threatened or harassed by the respondent, they can seek a temporary order of protection (TOP) for themself and their child on the very first appearance in court, when they file their petition or counter-claim for custody/visitation.[12] The TOP can be issued ex parte (that is, in the absence of the opposing party). If the respondent is still living in the home, the client should seek to have them excluded as part of the order. Tensions and emotions run very high during custody cases, and it therefore can be a very dangerous time for a client and their child where the respondent is violent.

A client also may file for a TOP separately, pursuant to Article 8. If the client already filed for an Article 8 protective order, and the matter is still pending, the Article 8 proceeding will be consolidated with the custody/visitation proceeding so the same judge will hear both matters.

See Her Justice Manual "Representing Survivors of Domestic Violence".

b. Review of Court File and Obtain Transcripts of Prior Proceedings

Pursuant to Family Court Act §655 and §656, an order of protection may be issued in the context of a custody/visitation proceeding in Family Court.[13] The order may be on behalf of one party and against the other party to the custody/visitation action.[14] The order may protect a child, a parent, or any person to whom custody of the child is awarded (such as a grandparent or older sibling).[15] A parent who is a party may seek an order of protection for the child against the other parent.[16]

The Family Court may issue the Article 6 (custody matters) order of protection for "good cause shown," which is not defined in the statute.[17] In practice, however, courts use the same guidelines used in Article 8 (family offense) proceedings.[18] The petitioner for the order must establish, prima facie and by a preponderance of the evidence, that the person against whom they seek an order has committed or

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[12] FCA § 655.
[13] Note that the Supreme Court may issue an order of protection in a custody or visitation action before it between parents who are married or formerly married, pursuant to DRL §240(3).
[14] FCA §§ 154-b, 655
[15] FCA § 656(a) and (c).
[16] The child's attorney, also referred to as "Attorney for Child", may also seek a TOP for the child.

[17] FCA § 655(a).
[18] See, e.g., White v. White, 200 A.D.2d 578, 608 N.Y.S.2d 849 (2d Dept. 1994); Fakiris v. Fakiris, 177 A.D.2d 540, 575 N.Y.S.2d 924 (2d Dept. 1991).

threatens to commit a family offense against the petitioner and that the order is reasonably necessary to protect the petitioner. The court must make a finding on the record that the person protected "is entitled to issuance of the order of protection" or that the person subject to the order has given "knowing, intelligent and voluntary consent to its issuance."[19]

An order of protection issued under FCA §655 and §656 may include all of the provisions of an order of protection issued pursuant to FCA Article 8. These include provisions directing the abuser to stay away from the protected person's home and job and enjoining acts that may endanger the welfare of a child. If the abuser has court ordered visitation with a child, the order of protection may contain provisions allowing a parent to visit a child at court-established times or under certain conditions established for the protection of the custodial parent. For example, it may specify that the noncustodial parent is permitted to pick up and drop off the child at the custodial parent's house, notwithstanding a stay-away order of protection, at a designated time for visitation. If the non-custodial parent comes by the home at any other time, they will be in violation of the order, even if the alleged purpose is to see the child. Or, the order may direct the parents to exchange the child for visitation at a safe location, such as a local police station, so that the custodial parent will not have the threat of having their abuser come to their house.

By incorporating the terms of visitation into an order of protection, the court also authorizes the police to assist the custodial parent in enforcing the terms of the visitation order. For example, if the respondent does not return the child at the time and place designated in the order of protection, the custodial parent may seek the police's assistance in getting the child returned without first filing a violation petition with the Family Court.

Notably, the existence of a prior order of visitation does not compel the court issuing an order of protection to allow visitation to continue, if such would be harmful to the child or parent. If a parent is charged with criminal assault against a child, a court can issue a temporary order of protection for the child prohibiting all visits by the defendant parent despite a pre-existing court order granting that parent visitation.

In addition, although rarely often exercised, an order issued pursuant to FCA § 656 may require the respondent to pay the reasonable counsel fees and disbursements incurred by the petitioner, regardless of the petitioner's ability to bear these litigation costs.[20] It may also require the respondent to participate in an educational program and to pay the costs of any such program, including parenting skills classes.[21] And, it may require the respondent to pay for, either directly or through insurance, expenses incurred for medical treatment and arising from any of the incidents forming the basis for the order.

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[19] FCA § 154-b.
[20] FCA §656(h).
[21] FCA §656(f).

Orders of protection issued pursuant to Article 6 are implicitly allowed to last for the duration of the minority of any child whose custody or visitation is the subject of the final custody or visitation order. Thus, they can be longer lasting than protective orders issued under Article 8 which can last for a maximum of five years. The corresponding section of the Domestic Relations Law states this duration outright,[22] while the Family Court Act implies such by stating that orders of protection under Article 6 only may issue in assistance of or conjunction with another order regarding "the custody or visitation of minors."[23]

As with any order of protection, orders issued under Article 6 are entered into the statewide computer registry. Violations of the orders subject the respondents to mandatory arrest.

E. ATTORNEY FOR THE CHILD

The "Attorney for the Child" is an attorney[24] specially designated by the court to represent a child in a court proceeding. They are appointed in many types of Family Court cases, such as custody/visitation, juvenile delinquency and PINS, abuse/neglect, and guardianship matters. In some types of cases, the appointment is mandatory.[25]

It is important for you and your client to understand that the Attorney for the Child is an attorney like any other, and they are not required to have specialized training in representing children nor do they typically have additional expertise such as a degree in child development. There are agencies such as The Children's Law Center that specialize in representing children and have social workers on staff to aid their attorneys, but the level of expertise of the individual attorneys can still vary.

Many Attorneys for Children seek to interview the parents as part of their investigation. The Attorney for the Child is opposing counsel to the parents, so there is no confidentiality between them. Whether to permit the Attorney for the Child to interview your client is a strategic decision for you and your client to make. In many cases it will be beneficial to have the child's attorney hear your client's perspective and be made aware of what evidence your client has in their favor, as well as to explain or respond to negative things the other party has alleged about them. To protect your client's interests, you should be present for any and all interviews with your client so you have your own record of what was discussed. Under no circumstances should the Attorney for the Child speak to your client about the substance of the case without your knowledge and permission, and it should be brought to the court's attention if they attempt this. It is generally permitted, however, for the Attorney for the Child to have incidental contact with your client in order to facilitate their attorney-client relationship with the child. Such contact could include, for example, scheduling an appointment with your client for the Attorney for the Child to

[22] DRL §240(3).
[23] FCA §651(b).
[24] Pursuant to FCA §242 governing, "Attorney for the Child".
[25] See FCA §249.

meet with the child, or asking your client to produce the child's documents such as a report card.

The Family Court Act states that the Attorney for the Child is needed as "counsel to help protect [the child's] interests and to help them express their wishes to the court."[26] A Child whose parents or others can afford to pay for a private attorney or who secure a volunteer attorney may have "counsel of their own choosing."[27] In cases with low-income or indigent families, however, the court will appoint an Attorney for the Child, and the parents are not liable for the attorneys' fees. However, the Family Court can order that the parties pay the lawyer for the child's fees if they are not indigent. The failure of the lawyer for the child to actively participate in the proceedings is grounds for vacating an order.[28]

An Attorney for the Child is different than a "guardian ad litem" in that the latter is a person, often but not necessarily a lawyer, who is appointed by the court to represent the interests of an infant or an incompetent person.[29] In some ways, however, the lawyer for the child has the role of both lawyer and guardian ad litem for the child, in that the lawyer for the child is supposed to advocate for the child's position but also act in the best interests of the child.[30]

The FCA definition does not make clear which of the lawyer for the child's roles should prevail – that of advocate or that of guardian. In other words, whether the lawyer for the child should advocate for the result the child wishes or the result the lawyer for the child believes is in the child's best interests.[31] With very young children, who cannot express their wishes, the lawyer for the child will by necessity act more as guardian, determining what is in the child's best interests. With older children, such as teenagers, the lawyer for the child will be more of an advocate, since it would be difficult for the lawyer for the child to argue against the result the older, more mature child wants. Cases where the lawyer for the child's role is less clear are those where the children fall in between these two extremes – the children can articulate their wishes to a certain extent but the attorney for child feels their desired outcomes are not in their best interests. Regardless of the lawyer for the

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[26] FCA §241. The DRL does not deal with the appointment of an Attorney for Child, though the Uniform Rules for Trial Courts provide that the Supreme Court may appoint an Attorney for the Child for minor children in a divorce proceeding, or choose one from a list submitted by the parents. See §202.16(f).

[27] Section 241 of the Family Court Act specifies that minors involved in Family Court proceedings should be "represented by counsel of their own choosing or by an appointed Attorney for Child."

[28] See, e.g., Van Gorder v. Van Gorder, 188 A.D.2d 1049, 591 N.Y.S.2d 915 (4th Dept. 1992) (lawyer for child in custody modification proceeding did not participate in the hearing or the appeal).

[29] In some cases, a child might need both a guardian ad litem and an Attorney for Child. For example, if a child needs to bring a petition before the court, but there is no parent to do so on the child's behalf, a guardian ad litem may need to act in that role of quasi-parent. The guardian ad litem can be another family member of the child, such as a grandparent, aunt or uncle, or a friend of the child's family.

[30] See, e.g., Marquez v. Presbyterian Hospital, 159 Misc.2d 617, 608 N.Y.S.2d 1012 (Sup. Ct. Bx. Co. 1994).

[31] For more analysis and perspectives on the role of the Lawyer for the Child see: "Perspective: *New Era in Representing Children*" (NYLJ, 10.22.08; link at https://nsuworks.nova.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1054&context=nlr)and "*The Chief Judge Clarifies the Role of Attorneys for Children*" by Elliot J. Wiener linked at HYPERLINK "http://www.phillipsnizer.com/publications/articles/AttorneysforChildren_art.cfm"http://www.phillipsnizer.com/publications/articles/AttorneysforChildren_art.cfm

child's position, however, the lawyer for the child is statutorily required to convey the child's wishes to the court.[32]

The appointment of a lawyer for the child is not mandatory in custody/visitation cases, but is left to the discretion of the judge.[33] In most contested cases, however, a lawyer for the child will be appointed and paid by the state.[34] There is no statute or regulation directing at what point in the course of a Family Court proceeding the lawyer for the child should be appointed. Often the judge will appoint the lawyer for the child when it is clear the custody case will be contested – if there is no settlement reached after the first few appearances.

1. Investigation and Practice in Custody Cases

It is important for parents to understand what types of investigation a lawyer for the child should be performing in a case, so that they are not suspicious or hostile towards a lawyer for the child making appropriate inquiries. The NYSBA has adopted and published standards for Attorneys for Children in custody and visitation cases.[35] Though these standards have not been enacted into law or officially adopted by any Appellate Division as part of its Rules, the First, Second and Third Departments use them informally and provide them to lawyers who take their Attorney for Child training programs. The thrust of the standards is to encourage an Attorney for the Child to take an active role as an attorney for a party.

Unfortunately, some attorneys do not give proper consideration to the effect of proven domestic violence upon the child's best interests, as required by the amended DRL and FCA. An attorney representing a survivor of domestic violence in a custody case may find that the attorney for the child is not sympathetic to, or even aware of, the dynamics of domestic violence and how they play out in a custody case. Often lawyers for the child see domestic violence by one parent against the other as something between the parents that has nothing to do with the custody case as long as the abusive parent never hits the child. It might be necessary, as the attorney for a victim of domestic violence, to "educate" the Attorney for the Child about the necessity, and legal requirement, of considering proven domestic violence between parents in a custody case.

a. Preliminary Stages and Pre Trial

One of the functions of the child's attorney is to investigate the case in order to determine which custody/visitation arrangement would be in the best interests of the child. The attorney for the child should obtain and examine all relevant court

[32] FCA § 241.
[33] Id at 249. By contrast, lawyers for the children must be appointed in all child protective, juvenile delinquency, and PINS proceedings.
[34] Pursuant to FCA §245. It is unclear whether Family Courts have the power to direct parents to pay the fees of a court-appointed Attorney for Child. Often in Supreme Court when a lawyer for the child is used, the judge will direct the parents to pay the Attorney for Child's fees on a pro rata basis.
[35] These standards can be found online at http://www.nysba.org/StandardsforAttorneysRepresentingChildren/. See also, http://www.nycourts.gov/courts/ad4/AFC/handbook.pdf.

documents, including those from prior or concurrent cases involving the family, such as family offense[36] or criminal offense proceedings. It is important for the attorney for the child to hear the child's perceptions and descriptions concerning the role, relationships and activities of each parent, as well as intra-family dynamics.

The attorney for the child also should interview the child client to ascertain the child's wishes, the need for independent evaluations, and the need for temporary or interim relief from the court, such as an order of protection or supervised visitation. The lawyer can apply for such relief on behalf of the child. If child abuse is alleged in the course of a custody action, the lawyer for the child should move for independent evaluations and apply to stay the custody proceeding so that ACS can investigate abuse or neglect allegations. Other relief a lawyer for the child can seek on behalf of the child client includes:

- ❑ a motion to protect the child from having to testify in open court
- ❑ a motion to bar evidence that is not relevant or that might be highly emotional
- ❑ a motion for a protective order to protect a child from pressure from a parent to take a certain position or testify in a specific way; this conduct is harassment
- ❑ if the court conducts an in-camera interview with the child, a motion that it be held in chambers with only the judge, the attorney for child, and a court reporter present
- ❑ a motion to protect the child from repeated cumulative evaluations (if each side seeks expert support)

The attorney for the child should endeavor to visit the child's present home, and the proposed home of the other parent. However, they often rely on home visits and reports made by ACS, Probation, their social worker or some other agency. However, it is important for the lawyer to ascertain for themself whether each parent's home is a safe, comfortable environment for the child.

The lawyer for the child should interview both parents, as well as anyone with relevant knowledge of the child or the parties and any potential factual or expert witnesses. For example: relatives, school teachers, guidance counselors, social workers, coaches, child care providers, therapists and counselors who work with the child.

The attorney for child, where appropriate, should request court ordered investigations, such as psychiatric/psychological, educational and medical evaluations, as well as home studies.

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[36] It is not yet routine for a lawyer for the child to be appointed in a family offense proceeding, even if the proceeding is running concurrently with a custody proceeding in which an attorney for the child is involved. However, if an attorney for the child in a custody proceeding asks to also participate in the family offense proceeding courts usually will permit such involvement. At the very least, the lawyer for the child can attend the order of protection proceeding.

The attorney for the child should participate fully in all pre-trial conferences and negotiations. The attorney for the child should formulate a position on the issues after in-depth conversations with the child-client as well as investigation and interviews with other relevant persons. The attorney for the child should actively advocate that position in all pre-trial meetings and reject any settlements suggested by the parents that would not be in the child's best interests, even if both parties to the custody dispute agree to them.

As the child's attorney, the attorney for the child should be treated as any other attorney representing a party in interest. Thus, the attorney for the child must be served with all documents addressed to the court or opposing counsel, and has a right to participate in conferences, introduce evidence, call witnesses, cross-examine other parties' witnesses, and advocate the child's position. Similarly, any correspondence sent to the attorney for the child by a parent's attorney must be copied to the opposing side. The attorney for the child should not be treated as having a lesser role (as a neutral party), or a greater role (as a referee or assistant to the judge) than those of the parents' attorneys.

b. Trial

At trial, the attorney for the child clearly possesses the powers of counsel to a party (though the child is not technically a party to the proceeding). The attorney for the child can and should cross-examine witnesses, raise objections and move for appropriate judicial rulings. The attorney for the child should present a case at trial, including independent witnesses and evidence. Usually, the attorney for the child presents their case after the parents or other parties have rested.

The attorney for the child should not submit any pre-trial reports to the court, but should submit legal papers and argue orally on the evidence, like the other parties to the case. Similarly, the attorney for the child should not engage in any ex parte communications with the court.

c. Post-Trial

The attorney for the child, as an attorney, may prepare and submit a post-trial Memorandum of Law summarizing and discussing the evidence in the record, making legal arguments, and advocating for a particular disposition.

The attorney for the child should explain to the child what the court's decision means, the rights and responsibilities of each of the parents and the child under the judge's order, the possibility of appeal, and the possibility of future modification of the order. Pursuant to FCA §1120, the attorney for the child has standing to initiate and argue an appeal from a Family Court order.

2. *Tactical Considerations: Preparing and Advocating for Your Client*

In practice, the Attorney for Child is often given significant say as to the outcome of the custody case. Judges frequently appoint an attorney for a child in whom they have confidence and with whom they have worked before and then rely heavily upon this attorney's suggestions, especially in settlement negotiations. The judge, however, should not abdicate responsibility for deciding the case to the Attorney for Child. The judge may and should decide a case contrary to the attorney for child's position if the evidence convinces the judge that the attorney for child's position is not supported by the evidence.[37] On the other hand, the attorney for child can be especially persuasive because the attorney for child usually presents evidence after the other parties have rested and is often regarded as a person without a vested interest in either side. Thus, the attorney for child can be a very influential person.

Your client needs to be prepared to make a positive impression upon the attorney for child. Initial contact should be arranged through you, as the attorney, so you have time to explain to the client who the attorney for child is, what the attorney for child's function is, how the client should present issues and concerns to the attorney for child, and how/to what extent the client should share additional relevant information with the attorney for child. Unfortunately, due to a heavy caseload, some Attorney for the Child may not do the investigation they should in their custody cases. Thus, the burden often falls upon you as the advocate for the parent to bring relevant facts, witnesses, and documents to the attorney for child's attention.

Above all, the client and attorney both need to develop a good rapport with the attorney for child. One way to do this is to recognize that an attorney for child's function is not to solve interim problems and quarrels over visitation, or to serve as a personal confidante to one party or attorney. Another suggestion is to allow the attorney for child to speak freely with your client without you being present. This reinforces that your client has nothing to hide. Prepare your client for these conversations ahead of time and discuss what types of information they should share.

Third, it is important to counsel a client to appear accommodating of the attorney for child and attentive to the attorney for child's inquiries. For example, if the attorney for child requests to make a home visit, the parent needs to be amenable to arranging for such at the attorney for child's convenience. The parent should make sure the home is safe, clean, and allows the child some space of their own, such as their own bed and drawer/closet and a space in which to do homework or other activities.

Fourth, warn your client that the attorney for children is not a neutral party and may develop strong feelings for or against the parents and may advocate for one of the parents and against the other parent. This can cause particular problems for an abused client, who is likely not to present as well as their abuser. Abusers are often very manipulative, persuasive and charismatic. This is often how they gained control over their spouse/victim in the first place. The abuser is likely to present to the attorney for child as confident, assertive, calm, and willing to "work together" with the other parent. By contrast, your client is likely to come across as frightened, shaken, nervous, uncertain, depressed, and

[37] See, e.g., Chait v. Chait, 215 A.D.2d 238, 638 N.Y.S.2d 426 (1st Dept. 1995) and St. Pierre v. Burrows, 14 A.D.3d 889, 788 N.Y.S.2d 494 (Third Dept. 2005).

"unwilling" to work things out and/or settle the case. Knowing the abuser has successfully managed to manipulate others in the past, they realistically fears the abuser will manipulate the attorney for child. As a result, your client may come across as paranoid. It is important as an attorney to educate the attorney for child about the dynamics of domestic violence and your client's particular situation.

Fifth, it is important to counsel your client to be careful not to put words into the child's mouth or tell the child what to say to the attorney for child because the attorney for child will be very watchful for such "brainwashing" and will hold it against the parent. On the other hand, your client should encourage the child to speak openly to the attorney for child, including about the situation in the home.

Finally, as an attorney, you should be aware that a lawyer for a parent in a custody case cannot communicate with the child unless the Attorney for Child's prior consent has been obtained. This is based upon the child and attorney for child's attorney-client relationship. The attorney for child will likely bring it to the attention of the court if you violate this rule.

Practice Tip: Remember, substantive communications you may need to have with the Attorney for the Child should also include the opposing party's attorney.

F. USE OF COURT-ATTORNEY REFEREES

Judges often refer issues to Court Attorney-Referees, who are court-employed admitted attorneys to "hear and report" or to "hear and determine" if the parties and counsel consent to the referral. The following matters may be referred to a Referee to hear and report, or hear to determine if the parties agree custody, visitation, post disposition Article 10 (abuse/neglect) proceedings and adoptions.

Once the parties are before the referee a determination is made whether the referee will hear and report back to the judge on a case or, if the parties' consent, will hear and determine the matter. Consent is required to hear and determine for the cases.

Most references are to hear and report, meaning that the Referee holds an evidentiary hearing if required and issues a report containing recommended findings and conclusions. A transcript of the hearing can be produced but its filing may be waived by the parties. When a report has been filed and notice of the filing is given by the Referee, the plaintiff must move to confirm or reject all or part of the report within 15 days after notice of the filing is given. CPLR 4403; Uniform Rule 202.44(a). A referee may also be appointed to supervise disclosure. CPLR 3104.

On a reference to determine, the Referee decides the matter referred. There is nothing for the referring Justice to confirm or reject. Any appeal is taken directly to the Appellate Division from the entered order or judgment of the Referee. The court may order such a reference on consent (with a few exceptions) or in the case of a long account, or where otherwise constitutionally permitted, i.e., issues in which references were permitted historically. The parties may also, with few limits, designate their own referee.

PRE-TRIAL PREPARATION AND DISCOVERY

A. DEVELOPING A THEORY OF THE CASE

Especially with custody and visitation determinations, which are largely fact-based, the more familiar you are with the case and the more prepared you are for a trial, the more likely it is the case will settle favorably. You need to allow plenty of time to collect evidence and prepare your witnesses. It is important to develop a "theory" of the case, a story that is logical and consistent with the evidence, as well as persuasive to the judge. Your theory will be developed as you familiarize yourself with the facts of the case, interview witnesses, and collect evidence. In its most basic form, the theory of a custody case will always be that it is in the best interests of the child for your client to be the custodial parent.

In order to develop a case theory, you should do the following:

- ❑ review the factors supporting your client as custodial parent
- ❑ determine how to prove each factor – with evidence or witness testimony and collect such
- ❑ determine as best as possible the contradictory evidence/testimony the other side will present and what their theory of the case might be
- ❑ research possible evidentiary issues/rules that may prevent evidence from being introduced at trial
- ❑ identify the weaknesses and strengths of your client's case strategize about how to strengthen your case, diffuse its weaknesses, and attack the other side's case

There are two main types of cases you will encounter in the context of custody proceedings – the - Unfitness Case and the Comparative Case.

1. The Unfitness Case

If one parent is unfit to be the custodial parent – for example, the parent abuses drugs/alcohol, they are violent towards the child or your client, they exhibit other behaviors dangerous to a child – you can verify this lack of fitness with evidence such as certified copies of records/orders (such as orders of protection against them or criminal convictions); testimony from knowledgeable witnesses; copies of their alcohol treatment records, etc. You are starting off on stronger footing if you have evidence of the other side's unfitness. Often these cases will not go to trial because the other side recognizes how unlikely they are to be awarded custody or unrestricted visitation.

2. The Comparative Case

Most custody cases that do go to trial are situations where both parents are on equal footing – both are "fit" or have comparable weaknesses. However, if the parties are no longer residing together, the custodial parent has the advantage of continued involvement with and access to the child during the process. If your client is no longer living with the child, immediately seek some temporary visitation for your client from the court. You may need to file a petition for visitation to seek this relief but can most certainly make this request at the initial court appearance. You do not want your client to start off the case in a lesser litigation position as the "non-custodial" parent.

In the comparative case, your client needs to develop a workable, full plan for custody, so that it appears to the court that they are ready and prepared to assume full custody. This plan should address the following:

(1) Residence – where will the custodial parent and child live? In the marital home? In a new home, and if so, will it be near the school and extended family and the non-custodial parent? Affordable?
(2) Schools – will the child remain in the same school district or does the parent have the ability to move to a better district? Does the client need to reserve a spot in another school in case custody is awarded them?
(3) Child care arrangements – will the client be a stay at home parent? Or is there the need to arrange for child care when the parent is at work or school? Are relatives available to assist? After-school programs?
(4) Other parent's access – what type of visitation plan does the client think works best for the child and the child's schedule? Is the client willing to facilitate visitation with the other parent?
(5) Other needs – will the child keep the same doctors, therapists, medical insurance plan? What about religious, extra-curricular, school activities?

B. INTERVIEWING WITNESSES

1. The Child

As mentioned above, the attorney for a parent in child custody proceeding may not communicate with or question a child for whom the court has appointed an Attorney for Child without the Attorney for Child's consent.[1] Also, you are not likely to be allowed to call the child as a witness for your case. Rather, the court will rely upon the Attorney for Child to express the child's position to the court, or in special cases, will conduct an in-camera hearing with the child. ***See In Camera Interviews with Children, below.***

[1] See, Cooperman v. Cooperman, N.Y.L.J.; Disciplinary Rule 7-104(a)(1) of the Code of Professional Responsibility; New York State Bar Association, Opinion 656 (38-93).

2. *Third Party Individuals*

Your client will need to help you identify prospective witnesses who could testify on their behalf. Ask the client to provide background notes on potential witnesses, including their names, addresses, phone numbers, and employment, connections to the child and/or your client, and possible areas of testimony. Review these summaries with your client and make an initial assessment of the value of each witness before contacting them.

It often is difficult to get third parties to speak to you, and even more difficult to convince them to appear as friendly, cooperative and positive witnesses on your client's behalf. The initial contact and overture should come from the client – they can ask if they are willing to speak to their attorney.

As the attorney, you will need to assess whether you think an individual will make a good witness. You should not rely on the client's assessment, but interview each of these people yourself, personally. Explore with the witness not only the positive qualities of the client, but also what that person thinks the positive and negative qualities of the other parent are.

If the individual has negative things to say about your client, that person may not make the best witness, especially under cross-examination. Also, if the person adamantly refuses to testify, even after you try to nicely persuade them, do not subpoena them – an angry, uncooperative, hostile witness will not help your case. That person might at least agree to be interviewed by the Attorney for Child or any court-appointed investigators.

The types and number of witnesses you call on your client's behalf will depend on the facts and theory of your case. Some individuals to consider and the topics they might be able to speak to, include:

(1) <u>Relatives</u>

Knowledge of day-to-day care provided by your client

Domestic violence or child abuse

(2) <u>Neighbors</u>

Knowledge of day-to-day care

Domestic violence or child abuse

(3) <u>Teachers/coaches/guidance counselors</u>

Ability, development and aptitudes of child

Interaction with parents; which one more involved in school life

Discipline/parent's response

School records of child (to show doing well/poorly with current parent)

(4) <u>Day care workers</u>

Observations re: care/development of child Parent participation, transportation, etc.

(5) Activity leaders

Scouts, sports, music, etc. Parent participation

(6) Religious leaders

Attendance of formal services

School/training

Religious upbringing of child

(7) Babysitters

Household routine

Observation of the child at home and with parent;

Who supervises?

(8) Co-workers and friends

Knowledge of interaction with child

Stability and attributes of child

(9) Department of Social Services

Interaction with parent and child

(10) Counselors, therapists, psychologists

Expert opinions as to parties actively in counseling

Do not need Attorney for Child's permission to have therapist working with the client and child testify about both at trial.

(11) Doctors/health care providers

Medical problems/general health parties

Pediatrician/dentist for child

Interaction with parents

Transportation; Consultation

Medical records

(12) Negative witnesses (to use against other party)

Drug/alcohol rehabilitation

Police/police reports

ACS involvement/child protective workers about abuse

C. DISCOVERY: INVESTIGATION AND DISCLOSURE

While your client will be a significant source of information, you should also consider using available discovery services to corroborate information from your client and uncover additional information about the adverse party. While the Family Court Act does not include specific provision for discovery by the parties in custody cases, other than by subpoena, it also does not limit it. FCA §165(a) provides that the CPLR provisions apply to Family Court proceedings unless the FCA provides otherwise and to the extent they are appropriate to the proceedings at hand. CPLR Article 31 governs discovery.

However, there is case law that makes it clear that non-financial discovery is not permitted in custody cases in the First and Second Departments without permission from the court to protect against a deterioration, or further deterioration, of the parental relationship.[2]

Practice Tip: Prior to engaging in discovery practice in a custody case, speak to your Her Justice mentor to strategize how such investigation will fare for your client's case and with the court. Note, most Judges presiding in the Family Court do not permit extensive discovery without a good faith showing of the need for the information as it is viewed as potentially hampering and likely to impair the parental relationship at the expense of the child. Where such strategy is being considered, discuss the pros and cons with Her Justice given all the factors in your client's case.

1. Subpoenas

FCA §153 authorizes the court to issue a judge-ordered subpoena or subpoena duces tecum to compel the testimony of a witness or the production of documents. An attorney may issue a subpoena pursuant to CPLR Article 23. A subpoena compels an individual to appear at a certain court on a certain day and time to give testimony. A subpoena duces tecum compels the production of documents and records either by a certain date prior to trial at the office of the attorney, or to the court on the day of trial. Municipal agencies and hospitals often refuse to return documents to the office of an attorney, but rather agree only to produce them to the court.

After commencement of an action, any party can serve any other party with a subpoena to allow the serving party to inspect designated documents or enter upon land to inspect the documents (subpoena duces tecum). CPLR 3120. The subpoena shall specify the time (not less than 20 days after service), place and manner of inspection or entry. CPLR 3120. Additionally, items to be inspected should be described with particularity. CPLR 3120. CPLR Section 3122 lists the procedure for compliance with, or objection to, subpoenas received by the party served. A point worthy of special mention, a subpoena served on a medical provider needs to state in conspicuous bold-face type that the records will not be provided

[2] See, e.g., Rubin v. Rubin, 73 A.D.2d 148, 151-52, 425 N.Y.S.2d 331, 333 (1st Dept. 1980).

unless the subpoena is accompanied by a written authorization by the patient. CPLR 3122(a).

Any person may comply with the subpoena as long as the person is able to identify the subpoenaed material and testify to their origin, purpose and custody.[3] Section 2303(a) of the CPLR requires the serving party to serve each party who has appeared in the action with a copy of the subpoena duces tecum. These copies have to be served promptly after service on the witness and before production of the subpoenaed material. To ensure compliance, the Family Court Clerk will request verification. Service of the subpoena must comply with the requirements set forth in CPLR Section 2103. This procedure was adopted to promote fairness in the use of subpoenas and allow parties the opportunity to make timely objections. It is important to note, if one wishes to serve a subpoena upon a department, corporation, state or officer of the state, the serving party needs to make a motion. CPLR 3120(4).

A subpoena must be "so-ordered" by the court (signed by the judge), instead of directly issued by the attorney, where it is directed to a municipal agency or seeks the medical records of another parent. Certified copies of a client's own medical records may be obtained without a court-ordered subpoena if a medical release signed by the client is attached to the attorney's subpoena. Certified copies of a child's medical records may be obtained with a medical authorization[4] signed by the custodial parent and attached to an attorney's subpoena.

CPLR §2302 specifies when subpoenas must be signed by a judge. Call the judge's court attorney to find out when it is convenient for the judge to sign a subpoena that must be so ordered. Also, with any so-ordered subpoena that seeks records concerning the other side, and to which your opponent might object, you should give notice that you are seeking such records.

Ask the judge's court attorney how the judge prefers notice to be given to the respondent – by sending a letter and copy of the subpoena or by Notice of Motion. The other side might move to quash the subpoena.

Pursuant to CPLR §2302, you must pay one day's witness fee upon service of a subpoena, as well as traveling expenses to the courthouse for any witnesses that are coming from outside NYC. Pursuant to CPLR § 8001, the witness fee currently is $15.00. Travel expenses are 23 cents per mile. A check for the relevant amount must be served along with the subpoena.

If your client is served with a subpoena by the respondent, you may move the Family Court for an order quashing or modifying the subpoena pursuant to CPLR § 2304. You will need to explain the specific harm your client will suffer if they are compelled to comply.

Failure of a party to obey a so-ordered subpoena qualifies as contempt of court and sanctions may result, such as limiting which issues a respondent may present at trial. See

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[3] CPLR § 2305.

[4] The authorization is similar to the medical release, but also includes the information that the person seeking the child's records is the custodial parent, as well as identifying information about the child.

CPLR § 2308. Non-judicial subpoenas must be enforced by filing a motion to compel in Supreme Court. CPLR §2308(b).

When requesting documents by subpoena or with a release, it is a good idea to attach a Certification and Delegation of Authority forms with a letter requesting the agency/entity to fill out and return the forms when they produce the records to you. By having a proper Certification and Delegation of Authority, the records are admissible in evidence under the business record exception to hearsay. See CPLR § 4518.

a. Drug and Alcohol Treatment Records

Pursuant to 42 U.S.C. § 290dd-2, records of substance abuse treatment may be disclosed only upon the written consent of the patient or upon court order for good cause shown. In assessing good cause, the statute says the court must weigh the public interest and need for disclosure against the injury to the patient, treatment and patient/doctor relationship. Of course, in a custody proceeding the parties are held to have placed their physical and mental conditions in issue, which supports disclosure.[5] There must, however, first be showing that resolution of custody issues require revelation of protected material.[6] In a case where wife sought disclosure of husband's treating therapist by production of notes or deposition as gravamen of her claim for relocation to Pennsylvania is premised on contention that husband's violent and abusive behavior is partly related to alcohol abuse, the court found potential for abuse without court supervision, and unrestricted order to disclose all notes would be too broad. The Court determined that it would conduct in camera inspection of treating therapist's notes for the camera review subject to redaction.[7] Some courts have allowed the use of a so-ordered subpoena to secure the respondent's treatment records.[8] Other courts require an attorney to make a motion on notice to the other side and the relevant hospital and to argue need for disclosure. The Court of Appeals has noted that the "strictest adherence" should be afforded to the confidentiality requirements for substance abuse treatment facility records[9].

b. Hospital and Doctor Records

CPLR § 4504 governs the physician/patient privilege. Unless a patient waives the privilege, a doctor or nurse shall not be allowed to disclose any confidential communications made by the patient in the course of treatment. This is important

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[5] See, e.g., Stern v. Stern, 225 A.D.2d 540, 639 N.Y.S.2d 80 (2d Dept. 1996); Rosenblitt v. Rosenblitt, 107 A.D.2d 292, 486 N.Y.S.2d 741 (2d Dept. 1985).
[6] See, McDonald v. McDonald, 196 A.D.2d 7, 608 N.Y.S.2d 477 (2 Dept., 1994).
[7] A.L. v. C.K., (Sup. Ct., Kings Co., Sunshine, J) 21 Misc.3d 933, 866 N.Y.S.2d 514 (2008 WL 4602303)(2008 N.Y. Slip Op. 28399)(Oct. 15, 2008).
[8] DeBlasio v. DeBlasio, 187 A.D.2d 551, 590 N.Y.S.2d 227 (2d Dept. 1992) (Court held he was allowed to subpoena).
[9] Social Services v. David R.S., 55 N.Y.2d 588, 593.

to keep in mind when considering whether to call the treating physician for the respondent or child as a witness or subpoena the respondent's medical records.

CPLR § 4507 establishes the psychologist/client privilege. This is also a broader privilege than that of the physician/patient because the nature of the treatment consists almost entirely of confidential communications.

An attorney must make an argument on behalf of a subpoena for such records. Hospital administrations could potentially send their own attorney to argue on behalf of quashing the subpoena.

A seminal case in the First Department states that disclosure of psychiatric hospital records in custody cases must be approved on a case-by-case basis. Before such records are disclosed to the adverse party, there must be a showing beyond "mere conclusory statements" that the resolution of the custody issue requires the protected material to be revealed.[10] Where a party subpoenas confidential records of the other party, no disclosure will occur until a Special Term justice[11] examines the records and determines which if any parts shall be disclosed. The Special Term justice will consider factors such as: any psychiatric testimony to be offered or proposed, whether the records are material and necessary to determine custody, and whether the parties and the court have sufficient information without the records to do so.

The Second Department has been more liberal and has held that a party to a custody case is deemed to have waived his right to a physician-patient or psychiatrist-patient privilege because in disputing custody the party places his physical, mental and emotional condition into issue.[12] This automatic waiver does not necessarily mean the party is obligated to provide the adversary with pre-trial discovery of confidential doctor/patient communications. A judge must first review the subpoenaed records and determine whether the disclosure is necessary and relevant to a party's current and future ability to function as a custodial parent.[13]

2. Interrogatories

Interrogatories are written questions served upon the other party who has a definite time to answer them. They also may require the production of documents and photographs in the person's possession. CPLR §§3130-3133 cover the use of interrogatories, though they **are not customarily** used in Family Court cases.

3. Depositions

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[10] Hickox v. Hickox, 64 A.D.2d 412, 410 N.Y.S.2d 81 (1978).
[11] A judge other than the one hearing the case, whose role is limited to determining a limited issue.
[12] Baecher v. Baecher, 58 A.D.2d 821, 396 N.Y.S.2d 447 (1977); Proschold v. Proschold, 114 Misc.2d 568, 451 N.Y.S.2d 946 (Suffolk Co. 1982).
[13] Coderre, N.Y.L.J. 2/26/90, at 29 col. 6 (S.Ct. Suffolk Co.).

Depositions **are not customarily** used when conducting discovery in Family Court custody/visitation cases, though they are available pursuant to CPLR §§3106 et seq. The right to conduct a deposition upon the issue of custody and/or visitation has been limited by courts in the First and Second Departments, which often do not permit them in custody cases, citing the potential for harassment and abuse.[14]

In general, depositions are frowned upon by the court unless you make a showing of special circumstances. For example, you might need to use a deposition where a witness or even a party resides outside the state. DRL §75-r authorizes examination by deposition and such deposition may then be admitted into evidence at trial.[15]

4. Discovery and Inspection

CPLR §3120 provides for the production of documents and other items for inspection, testing, copying and photographing. Pursuant to subsection (a) (1) (ii), a party, upon notice only (no court order required), may be required to permit entry upon designated land or other property for the purpose of inspection. In a custody case where the habitability of the parties' home environments are at issue you can use this section to gain access to the biological father's residence, not only for yourself but also for any experts you have retained on your client's behalf.

Pursuant to subsection (b), you may seek a court order requiring a non-party to the action to produce documents or other items for inspection. This is done by Notice of Motion with personal service upon the non-party. Since "person" in this context has been defined to include all legal entities, including the State of New York,[16] this section can be used to access records such as: school records, police reports, day care records, work/personnel records, the Probation Department's criminal records for a parent,[17] and any other records which are probative of the issues raised and can be identified with the necessary specificity.[18] However, it is more customary in Family Court to use a so-ordered subpoena for such documents, upon notice to the other side if necessary.

Practice Tip: Do not issue Interrogatories, a Notice of Deposition, or Demand for Discovery and Inspection upon an opposing party or counsel without first seeking permission from the court, and be prepared to explain in detail why the court should consider allowing them despite the general prohibition against them in the First or Second Department. Ensure that you have a good faith basis for seeking discovery and can make an offer of proof, if asked. Review your pleadings and determine whether there is a nexus between what you are seeking to discover and the requested relief and allegations that form your petition. Be prepared to have your request reviewed by the court and, even if allowed, be stricken or limited in part.

[14] See, e.g., Garvin v. Garvin, 162 A.D.2d 497, 556 N.Y.S.2d 699 (2d Dept. 1990);.
[15] See CPLR §3106, §3117, §3120 and §3118.
[16] Kaplan v. Kaplan, 31 N.Y.2d 63, 334 N.Y.S.2d 879 (1972).
[17] See, e.g., Eileen v. Stephen, 143 Misc.2d 582, 541 N.Y.S.2d 318 (1989).
[18] See, e.g., Carrella v. Carrella, 97 A.D.2d 394, 467 N.Y.S.2d 215 (2d Dept. 1983);

If you or your client are served with any of these discovery devices or a Motion seeking leave to serve them, contact your Her Justice mentor immediately.

5. Request for Physical or Mental Examination

An attorney can make a request that the other side submit to a physical or psychological examination pursuant to CPLR §3121(a), where such condition is in controversy. This rule has been applied to custody cases.[19] Theoretically, this section gives a party the unlimited right to have the other side examined without the need for a court order and only upon notice to the other side. Pursuant to CPLR §3121(b), a party's attorney may attend the client's physical or mental examination.

a. Forensic Evaluation

The most common use of this section in a custody case arises when a party selects their own "forensic expert" (psychiatrist or psychologist) to evaluate the parental and other qualities of the parties. The goal is to have the expert examine the adverse party and the child as well as the client. The ability to have all parties examined is crucial, since courts often ignore any professional testimony offered by a witness who has examined only one parent.[20]

This tool is limited, however, by statute and case law. Pursuant to FCA §251 and the Uniform Rules of Trial Courts §202.16 (f)(3) and §202.18, the Family Court has the right to appoint a forensic expert to examine all parties and children wherever custody is in issue, and most courts invoke this right in contested custody matters. Once this "independent neutral expert" has been appointed by the court, the right of a party to invoke CPLR §3121(a) in order to have their own expert examine the adverse party is subject to a motion by the other side for a protective order.

In a controlling case on this issue, *Rosenblitt v. Rosenblitt*,[21] the Appellate Division, Second Department reversed the trial court's direction that plaintiff submit to an examination by defendant's psychiatrist, stating that such an exam would be duplicative of the evaluation done by the court's appointed forensic, absent proof that the evaluation was in some way deficient. Where such proof is not presented, a party should not be able to "shop" for a favorable expert opinion, especially not one that is a "hired gun" for one party.

Given the holding in *Rosenblitt*, the chance to use CPLR §3121(a) is somewhat limited, though it can readily be used where no forensic examination has been ordered by the court or where an attorney can make a good argument that the court-ordered forensic is deficient. For example, where the forensic fails to take into

[19] See, e.g., Wegman v. Wegman, 37 N.Y.2d 940, 380 N.Y.S.2d 649 (1975); Burgel v. Burgel, 141 A.D.2d 215, 533 N.Y.S.2d 735.
[20] See, e.g., Walden v. Walden, 112 A.D.2d 1035, 492 N.Y.S.2d 827 (2d Dept. 1985); Alan G. v. Joan G., 104 A.D.2d 147, 482 N.Y.S.2d 272 (1st Dept. 1984).
[21] 107 A.D.2d 292, 486 N.Y.S.2d 741 (2d Dept. 1986).

account domestic violence in evaluating the parties, you can argue that the evaluation is incomplete or deficient.

Keep in mind that if the court does not require the other side and the child to submit to your client's own expert for evaluation, this expert's evaluation is likely to be given little weight in court because it is one-sided.[22] On the other hand, judges sometimes consider testimony of a psychiatrist who only interviewed one side, where the testimony is also based upon facts about the other side established independently at the hearing.[23]

b. Drug/Alcohol Evaluation

Another possible use for CPLR §3121(a) is to compel the other party to undergo physical testing for drug and alcohol use in cases where it is alleged convincingly that the other party has a substance abuse problem. In *Burgel v. Burgel*,[24] the Appellate Division, Second Department sanctioned the use of this statute to compel one party to submit to a test to detect the use of cocaine within several months prior by examination of a hair sample. In the case before the court, allegations of continued, present cocaine use were determined to be highly relevant or material to the issue of custody, thereby warranting the test.

Courts usually ask parties accused of drug or alcohol abuse if they are willing to submit to testing. If not, courts are unlikely to order testing unless there is evidence before the court demonstrating a reasonable ground for believing such tests are necessary. For example, no reasonable ground was shown where there was only "suspicion" that the biological mother smoked marijuana and where the test suggested by the petitioner was not guaranteed to detect traces of the drug.[25] Also, many courts do not see these tests as all that reliable because the parties often have ample time to get the drugs out of their systems before the tests are actually performed.

6. Party's Own Statements

If your client believes that the opposing party possesses tape recordings of heated conversations between the two of them, or angry letters the client sent to them, in which the client is portrayed in a less-than-favorable light, it is important to serve a notice

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[22] See, e.g., Walden v. Walden, 112 A.D.2d 1035, 492 N.Y.S.2d 827 (2d Dept. 1985) (within court's discretion to afford little weight to recommendation of plaintiff's expert that plaintiff be awarded custody where made without benefit of interview with mother/defendant). Moreover, if the trial court did rely heavily on such a report, the custody award may not be upheld on appeal. See, e.g., Alan G. v. Joan G., 104 A.D.2d 147, 482 N.Y.S.2d 272 (1st Dept. 1984) (custody award lacked sound and substantial basis in the record).

[23] See, e.g., Crum v. Crum, 122 A.D.2d 771, 505 N.Y.S.2d 656 (2d Dept. 1996); Stellone v. Kelly, 45 A.D.3d 1202, 846 N.Y.S.2d 723 (Third Dept. 2007).

[24] 141 A.D.2d 215, 533 N.Y.S.2d 735 (2d Dept. 1988).

[25] Garvin v. Garvin, 162 A.D.2d 497, 556 N.Y.S.2d 699 (2d Dept. 1990); see also, Eileen C. v. John C., 152 A.D.2d 645, 544 N.Y.S.2d 16 (2d Dept. 1989).

pursuant to CPLR §3101(e) demanding production of all statements (written, oral or tape-recorded) in the possession of the opposing party. Such notice will insure that you and your client will not be unpleasantly surprised at trial with statements that they forgot they made. And, if such statements were recorded illegally, you can make a motion to suppress them pursuant to CPLR §4506.

7. Compliance

If the other side does not respond to a request for discovery pursuant to CPLR §3101 etc. seq. within the time prescribed, the attorney can make a motion to compel pursuant to CPLR §3124. The court may sanction non-compliance in several ways, as delineated in CPLR §3126. For example, the court can resolve disputed issues in favor of the party seeking compliance; prohibit the disobedient party from putting forth certain claims or defenses; or prohibit the non-compliant party from introducing certain evidence or witnesses.

At the same time, you can make a motion pursuant to CPLR §3103 for a protective order to quash any improper discovery requests made by the other side. Examples of improper requests include: those which would be too costly to comply with; those in which the material requested is irrelevant to the case or too broad; or those in which the material requested is confidential and disclosure would harm the client.

D. COURT-ORDERED INVESTIGATIONS (COI)

In addition to asking for a mental health evaluation of the parties and child (see "Forensics" below), the court often will order investigations of the parties and their homes by ACS, and/or other entities attached to the court. It takes several weeks to get these reports back, once ordered. Counsel will not likely receive this report prior to the return date. Although, counsel is entitled to a copy of any court-ordered reports, some Judges instruct counsel not to give a copy to their client. You will need to ask for a copy of the report from the court officer prior to the case being called to give yourself an opportunity to review it with your client.

Judges often ask the parties and/or counsel to sign a "consent" or stipulate that the chosen agency may make an investigation and report to the court confidentially. Absent such consent, the court may not use such a report without providing the litigants a chance to challenge its contents[26]. While the court has a right to order the parties to submit to the investigation, it may not require a party or counsel to waive the right to read the report[27], cross-examine the author, and introduce countervailing evidence.

A litigant should not waive these rights. DO NOT agree to language in the court's order stating that the report will be "available to the court" or "received in evidence." You need to protect your client in case the report is damaging to their case by preserving your right

[26] See, e.g., Wilson v Wilson, 226 A.D.2d 711, 641 N.Y.S.2d 703 (2d Dept. 1996).
[27] See, e.g., Baumgartner v. Baumgartner, 64 A.D.2d 880, 408 N.Y.S.2d 99 (2d Dept. 1978).

to cross-examination on the issue of the preparation of the report. If the report is negative against your client, there are several things you can do to counter it:

- ❑ ask the judge to permit you to call the case worker to appear in court so you can cross-examine them
- ❑ provide evidence/facts as to why the report is inaccurate or filled with misrepresentations
- ❑ ask for a second COI, though you must allege specific, concrete facts as to why this is necessary

If the report is favorable to your client, you may want to make sure it is entered into evidence by calling the worker who prepared the report as a witness and admitting it through their testimony at trial. If your adversary objects to the report being entered on hearsay grounds, you can agree to have the offending sections redacted.

Once the court has considered the report as part of its determination of the case, it should become part of the official record in the event of an appeal.

Practice Tip: A COI is often ordered for both parties. Because you will want to ensure that your client does not have unnecessary contact with ACS, where there is no concern for safety of the child in your client's home, you can ask the court to limit the order to investigate only the Respondent's home. Expect resistance from the court and possibly a denial of your request or that even where an order does not have your client's name, that ACS will still investigate your client's home. Be forewarned that COI's are notoriously poorly written and contain factual inaccuracies and damaging quotes about your client's behavior from the opposing party or collateral sources. Take caution to explain to your client that if the report is going to go into evidence, such statements can be challenged. Help your client to keep composure despite inaccuracies and statements that they perceive to be untrue about them in the report. In addition, be sure that you heed any cautions from the court or court officers about giving a copy of the report to your client. The court will permit you to discuss the report with a client, but will not want you to give them a physical copy. Although, there is some concern from advocates about this position, it is important to ensure that you follow the court directives about not providing a copy of the report to your client.

E. FORENSICS

1. Use by the Courts

Where custody of a child is in dispute, the parents/parties place their physical and mental condition in issue[28]. A court may therefore direct the parties to undergo "forensic examinations" (mental health evaluations done by a psychiatrist or psychologist) to assist the court in making a custody determination.[29] The court may direct such evaluation of the parties and their children without their consent.[30] These are usually conducted by clinicians on the staff of the Family Court Mental Health Services Clinic, or another mental health

[28] See, e.g., Rosenblitt v. Rosenblitt, 107 A.D.2d 292, 486 N.Y.S.2d 741 (2d Dept. 1985).
[29] See FCA §251.
[30] See, e.g., Kessler v. Kessler, 10 N.Y.2d 445, 225 N.Y.S.2d 1 (1962).

expert selected and agreed upon by all parties. A court may draw adverse inferences (and even deny custody and visitation) from a party's failure or refusal to submit to a court-ordered examination, especially in the face of allegations of physical and verbal abuse.[31] Areas that are commonly explored in such evaluations include:

1. Developmental History
2. Background Information
    a. Academic history
    b. Driving record
    c. Mental health history
    d. Alcohol and drug use/abuse history
    e. Arrest record/convictions
3. Medical History
4. Current Situation and Mental Health Status
    a. Living arrangements
    b. Current medical information
5. Psychological Testing
    a. Academic
    b. Intelligence
    c. Personality
    d. Neurological
    e. Self-reports and questionnaires
6. Family Dynamics and History
7. Parental Fitness
8. Child's Development
    a. Academic: school, performance, interests
    b. Social: friends, outside school interests, religious
    c. Psychological: development growth or regression
    d. Caretaking: what parent performs what roles
9. Prior marriage and children, if any
10. Current marriage: first years, pregnancy, birth, parental roles

Since a court determining custody has an affirmative duty to "become aware of and seek out every bit of relevant evidence and advice on the subject" in order to determine the best interests of a child, the failure to obtain forensic evaluations where they are necessary may require remittal[32]. Where evidence indicates that independent assessments are needed, especially where serious issues of parental fitness are involved (such as domestic violence, sexual abuse, mental health issues, a child's refusal to have any contact with a parent, a parent's willingness to foster a relationship with the other parent), a court should direct forensics.[33] However, it is not error for the court to decline to order forensics where the record contains no evidence that the parties are unfit or have emotional or mental

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[31] See, e.g., Zirkind v. Zirkind, 218 A.D.2d 745, 630 N.Y.S.2d 570 (2d Dept. 1995).
[32] See, e.g., Audubon v. Audubon, 138 A.D.2d 658, 526 N.Y.S.2d 474 (2d Dept. 1988); Savoca v. Bellofatto, 960 N.Y.S.2d 212 (N.Y.A.D. 2 Dept. Mar 06, 2013)
[33] See, e.g., Giraldo v. Giraldo, 85 A.D.2d 164, 447 N.Y.S.2d 466 (1st Dept. 1982); Matter of Vernon Mc. v. Brenda N., 196 A.D.2d 823, 602 N.Y.S.2d 58 (2d Dept. 1993).

problems,[34] especially in light of how expensive these can be. Courts usually do not order forensics right away; the court often waits to see if the case can settle. Also, the reports take about eight weeks to complete, so they do delay proceedings.

Forensic evaluations in custody cases are usually ordered by the court sua sponte, but if not, they may be requested orally and ex parte by any party to the action.[35] Usually they are paid for by the court, though the judge has the discretion to order non-indigent parties to split the costs of such examinations and any court-appearance time the expert provides (such as if called by a party to testify). However, if your client cannot afford to pay their share, you may request that the court pay for such pursuant to County Law §722-c (State funding).

Most experts are chosen from lists provided by the 18-B panel, and choices are often made by the judge on the basis of the expert's reputation or their familiarity with a particular forensic examiner. If you have any objections to the person or agency designated to conduct the investigation, whether due to lack of qualifications, incompetence, or bias, you should state these at the outset to the court.[36]

Where domestic violence is an issue, the attorney should request that the forensic evaluator have training and experience in this area. You should argue that such training and experience is necessary so that the expert is more capable of determining whether or not the abuse took place, and if so, what impact it had and will have upon the child. Argue that if domestic violence is ignored by the evaluator, or not given proper attention, the evaluation will have little usefulness to the court[37] and a second evaluation might be necessary, causing delays and subjecting the child to additional stress.

You should investigate suggested or potential experts by getting a copy of their curriculum vitae and by specifically asking them about their experience with domestic violence.

Practice Tip: Speak to your Her Justice mentor to see if they have had experience with the particular expert, or if the forensic expert has not yet been selected, whether they can recommend experts for you to suggest to the judge.

Courts must make the forensic reports available to the parties so that each attorney can read the report and discuss it with their client. In some courts, counsel is not given an actual copy of the report but is required to read and take handwritten notes at the courthouse from the report in the case file. Other courts have the mental health evaluators submit the reports directly to the attorneys on the case, as well as to the court. You should specifically request to be provided with a separate copy of the report. You can also request

[34] See, e.g., Mascoli v. Mascoli, 132 A.D.2d 653, 518 N.Y.S.2d 25 (2d Dept. 1987) (change of custody); Clark v. Dunn, 195 A.D.2d 811, 600 N.Y.S.2d 376 (3d Dept. 1993); Pincus v. Pincus, 138 A.D.2d 687, 526 N.Y.S.2d 501 (2d Dept. 1988).

[35] You also can seek to have the county pay the fees of the forensic evaluator, pursuant to County Law §722-c (a "722-c order") if the parties are indigent. The judge will question the parties about their finances and use the same standards as used to appoint 18-B counsel.

[36] See, e.g., Shapiro v. Shapiro, 89 A.D.2d 538, 452 N.Y.S.2d 626 (1st Dept. 1982).

[37] See, e.g., E.R. v. G.S.R., 170 M isc.2d 659, 648 N.Y.S.2d 257 (Fam. Ct. 1996).

to have the forensic produce copies of the notes the forensic prepared and relied upon in order to prepare the forensic report.

Make sure you preserve the right to review forensic reports when they are finished, as well as the right to call the expert for purposes of cross-examination. Usually parties are asked to agree to a standard stipulation concerning the conduct of the examination and the use of the reports prepared on the basis of the examination. Typically, the stipulation contains a provision authorizing the examiner to submit the report directly to the court. However, you should not agree that the report will not be disclosed to the parties or their counsel, or that only limited disclosure to counsel will be permitted.

Never stipulate to be bound by the outcome of the evaluation or waive your right to examine the reports and/or cross-examine the expert as a witness before the report is admissible into evidence.[38]

You should make clear to the court your insistence on the right to obtain disclosure of the report and confront the expert. It is best practice not to consent to the expert report being admitted into evidence. These reports often contain errors or false and damaging conclusions against your client that you will want to counter or disprove through cross-examination. Absent a waiver by the parties or counsel, the expert's report must be disclosed to counsel/the parties and may not be reviewed by the presiding judge unless the report is first placed into evidence.[39]

Since the judge does not review the report until it is received into evidence, a favorable report can be used to negotiate a settlement for your client. Without a waiver, a court's consideration of a mental health report without prior disclosure to counsel is reversible error.[40]

2. Preparing Your Client

A client has the right to have counsel present at an evaluation, though only to observe, not to participate.[41] You and your client need to decide whether this will help or hurt the client's presentation. On the one hand, it can help you prepare to cross-examine the forensic evaluator because you will be able to witness their biases and how they affect the interview first-hand. Conversely, taking detailed notes in the interview might intimidate the evaluator so that the interview is cut short or the evaluator builds up resentment against

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[38] Parties may be asked by the court to stipulate to such, and parties may so stipulate, by law. Kesseler v. Kesseler, 10 N.Y.2d 445, 225 N.Y.S.2d 1, modified., 11 N.Y.2d 716, 225 N.Y.S.2d 966.

[39] See, e.g., In re Leon R.R., 48 N.Y.2d 117, 421 N.Y.S.2d 863 (1979); Kessler v. Kessler, 10 N.Y.2d 445, 225 N.Y.S.2d 1 (1962).

[40] See, e.g., Waldman v. Waldman, 95 A.D.2d 827, 463 N.Y.S.2d 868 (2d Dept. 1983); Austin v. Austin, 65 A.D.2d 903, 410 N.Y.S.2d 688 (3d Dept. 1978); DiStefano v. DiStefano, 51 A.D.2d 885, 380 N.Y.S.2d 394 (4th Dept. 1976).

[41] See, e.g., Matter of Guardianship and Custody of Jose T, 126 Misc.2d 559, 481 N.Y.S.2d 991 (Fam. Ct. Kings Co. 1984).

your client and your case. If you are present, it also might give the impression your client has something to hide.

You must prepare your client for the forensic interview. Explain to them that although the expert is a doctor, their discussions are not confidential. The purpose of the report is to help the judge decide the case. Thus, any information they share will be reported to the judge. Explain to your client that they do not have to volunteer negative information about themself, but they must tell the truth if asked directly. If they lie, and evidence of their lie comes out later at trial, it will be even more damaging to their case than admitting negative information up front.

Advise your client that during the interview they should:

- ❑ avoid displays of anger when discussing the other parent (even if their behavior is outrageous)
- ❑ avoid trying to "character assassinate" the other parent; don't focus on their negative qualities (likely to backfire and make client look vindictive) but on your client's positive ones
- ❑ focus all testimony on the child and the child's needs; for example, if discussing the other parent's domestic violence against your client, do so in the context of the effect their worries it has on the child
- ❑ appear reasonable and willing to foster relationship with other parent (once they get help for drug addiction, stops being violent, no longer a danger to child)
- ❑ Report facts without commentary Evaluators look for:
    - MOTIVE: your client should appear motivated by a sincere belief they are the better custodial parent
    - INTERACTION: your client needs to show they are the parent who gives most love, support, psychological awareness, empathy, developmental sensitivity, and encouragement to the child
    - ROLE MODEL: your client should demonstrate that they are the better role model for the child
    - PARENTING SKILLS: your client should show that they can handle a variety of situations with skill and can foster a healthy relationship with the child
    - HONESTY: your client's statements should be consistent
    - EMOTIONAL HEALTH: a thorough medical and psychiatric history is taken as well as a psychiatric examination to assess the mental functioning of each parent
    - CAPACITY TO FACILITATE INTERACTION: your client needs to show they have the capability to facilitate the relationship between the children and non-custodial parent
    - AVAILABILITY OF EXTENDED FAMILY: will your client be able to offer the children contact with a larger, extended family

Strategize with your client before the interview and think about what facts and history it would be helpful for the forensic expert to know. Review a chronology of events with

them so that they can tell their story coherently, highlighting significant aspects such as the impact of the opposing party's abuse on the children. They can even bring police and hospital records with them to the interview. Make sure they are aware that the forensic will want to observe them interacting with the children and will ask to interview them together. The forensic also might request access to prior treatment records and ask both parents to sign medical releases.

As the attorney, you can contact the forensic directly and offer to provide information about the new law mandating consideration of domestic violence, which many experts might not know about. Make sure to include a copy of the legislative intent/history that cites the impact of domestic violence upon children, even where they are not targets of the violence themselves. Remember to send the Attorney for Child and opposing counsel (or the respondent) a copy of any written communications you offer the forensic.

Practice Tip: Some judges frown upon any contact by either party with the forensic evaluator and do not want you to provide any information about the parties' history. However, where you believe that there is an important fact to bring to the attention of the forensic evaluator about your client's situation, be sure to ask for a directive from the court on the record as to what information will be provided to the forensic and what additional information you can provide to the forensic evaluator that would help them in their assessment of the parties. It is very common for the court to provide copies of the parties' pleadings and any court order to the forensic, you can specifically request this as well as copies of COIs (if you believe that will be helpful to your client) or prior mental health examination reports. There is no prohibition on what documents or information the parties themselves can provide to the forensic, so you should also discuss with your client what if any evidence they should bring to those appointments.

3. Weight Given to Reports

Forensic examinations and recommendations often are heavily relied upon by the courts in determining custody/visitation. Though judges are encouraged by the Appellate Division to be independent and not delegate power to decide custody to the expert,[42] they also are encouraged to order and accord significant weight to the reports.[43] Though these recommendations are supposed to be only one factor to be considered in a custody determination,[44] they are given, and have been held by the Appellate Division to be entitled to, significant weight unless contradicted by other evidence in the record.[45] In one case, the Appellate Division held that Family Court did not give undue weight to opinion

[42] See, e.g., Alanna M. v. Duncan M., 204 A.D.2d 409, 611 N.Y.S.2d 886 (2d Dept. 1994); Hennelly v. Viger, 1944 A.D.2d 791, 599 N.Y.S.2d 623 (2d Dept. 1993).

[43] See, e.g., Matter of Rebecca B., 204 A.D.2d 57, 611 N.Y.S.2d 831 (1st Dept. 1994) (little weight given when psychiatrist evaluated only one party); Rentschler v. Rentschler, 204 A.D.2d 60, 611 N.Y.S.2d 523 (1st Dept. 1994) (court-appointed psychiatric opinion should not be lightly set aside; reversed trial court's award of custody based upon it); Johnson v. Johnson, 202 A.D.2d 584, 609 N.Y.S.2d 81 (2d Dept. 1994) (reversed award of custody on basis of psychologists recommendation).

[44] See Hennelly v. Viger, *supra*.

[45] See, e.g., Young v. Young, 212 A.D.2d 114, 628 N.Y.S.2d 957 (2d Dept. 1995) (custody award reversed where lower court did not set forth convincing reasons for discounting court-directed psychiatric evaluation).

of court-appointed psychologist where trial court gave substantial consideration to testimony presented by both parties as to other factors in modifying prior joint custody arrangement. But, the Appellate Division has also upheld courts that disregarded the forensic where trial evidence contradicted it.[46] In practice, Family Courts tend to rely heavily upon forensic experts, and Appellate Courts often reverse where the advice are not followed, unless there is significant additional evidence in the record as to why it should not be determinative. Thus, if the forensic comes out as against your client, you will need to present countering evidence to convince the judge not to follow the forensic expert's recommendation. Moreover, these experts can and do express their opinion on the ultimate issue in the case – namely, which parent should have custody in the best interests of the child.[47]

4. Challenging an Unfavorable Report

a. Retain Another Expert

Often you are stuck with an unfavorable report by the court's forensic examiner. Courts are reluctant to re-order a new or another forensic exam at a party's request, because they are expensive and take time to complete. If you go to trial, cross-examination might be the only way to boost your client or tear down the report.

However, another option is to retain your own forensic expert to examine your client and testify against the court-appointed forensic examiner's report or testimony. For example, if the court's forensic found your client to be suffering from various psychopathologies, your expert can either discuss why this is a misdiagnosis or offer mitigating circumstances (such as domestic violence). You may also consider hiring your own forensic expert to complete a peer review of the forensic examiner's report.

Recall, however, that this expert's testimony might be entitled to less weight if they only interview your client.[48] If you want this expert also to examine the child, or your client and the child together, you must get the consent of the Attorney for the Child to do so. If you want the other side examined, you must make a motion as described above.

You also could have a therapist or counselor who has been working with your client for a long time to testify on their behalf. This witness also might be able to counter some of the negative effects of the court's forensic evaluation and provide important background or updated information on your client. For example, a therapist can speak to the history of domestic violence and its prolonged effect on your client, progress your client has made in addressing their mental health issues, or improvements they've made in their parenting skills.

b. Cross-Examination of Experts

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[46] Memole v. Memole, 63 A.D.3d 1324, 882 N.Y.S.2d 723 N.Y.A.D. (3d Dept., 2009).

[47] See, e.g., Matter of Rebecca B., *supra*; Lopez v. Lopez, 233 A.D.2d 398, 650 N.Y.S.2d 240 (2d Dept. 1996).

[48] See, e.g., Matter of Rebecca B., *supra*; Walden v. Walden, 112 A.D.2d 1035, 492 N.Y.S.2d 827 (2d Dept. 1985); Alan G. v. Joan G., 104 A.D.2d 147, 482 N.Y.S.2d 272 (1st Dept. 1984).

Forensic experts will give the court their opinion on the ultimate issue of custody – and state which parent they feel is properly the custodial parent. Their authority to give opinion testimony is based upon case law stating a witness qualified as an expert with respect to a particular issue is permitted to testify as to their opinion if the subject matter concerns specialized knowledge beyond the understanding of the fact-finder.[49]

On cross-examination, be sure and ask whether domestic violence was considered and what weight it was accorded in light of the established negative impact upon children. There is a host of psycho-social literature on the impact of domestic violence on children which you can use as material for cross-examination of the expert who does not take proper notice of the domestic violence factor in your case.[50]

There are several grounds upon which you can cross-examine a forensic expert and attack their credibility and knowledge. These include:

- ❑ Bias, Prejudice: e.g., psychologist in case receives repeat referrals from Father's Rights Association; went through own custody battle and has significant baggage as result; due to social, political, personal, theoretical, attitudinal orientation and values
- ❑ Prior Inconsistent Statements: in report for you case; in reports/testimony in other cases; in article and books written
- ❑ Impeachment by Treatise: use work of other experts in the field to challenge expertise
- ❑ Attack Qualifications: either in absolute or comparative terms (e.g., child psychiatrist vs. general practitioner)
- ❑ Attack Profession Itself: point out that mental health profession rests upon less than scientific underpinnings; most psychiatric and psychological opinion does not rest upon scientifically reliable and valid principles (you must have good grasp of literature that establishes this)[51]
- ❑ Attack Witnesses' Methods: as not complying with standards of profession
- ❑ Attack Data on which based opinion: ask expert to assume additional facts or delete certain facts, and whether would influence/change opinion; point out information which was not sought and should have been; ignorance of issues such as domestic violence
- ❑ Attack Underlying Hearsay Data: based upon statements by biased parties to action; expert has no personal knowledge of information being given; must concede that underlying information might be false or inaccurate and if so makes opinion meaningless or at least reduces its validity and probative value
- ❑ Attack Inferences and Conclusions drawn from data; weakness of prediction as to which parent will perform more consistently with child's best interests in future; prediction is mental health's profession's weakest area of performance because it is

[49] See, e.g., People v. Taylor, 75 N.Y.2d 277, 522 N.Y.S.2d 883 (1990).

[50] See National Children's Advocacy Center, Domestic Violence Effects on Children, Bibliography 2001-2010 at www.nationalcac.org.

[51] See, e.g.: Ziskin, J., Coping With Psychiatric and Psychological Testimony, (Law and Psychology Press: Los Angeles, 6th Edition, 2012) (provides good negative studies to use in cross-exam and contains many references).

enormously speculative, inaccurate, biased[52] even when based upon diagnosis of mental disorder, hard to predict what that means for ability to function as parent

- ❑ Over-Pathologizing: resulting from training and orientation
- ❑ Insufficient Time/Efforts Devoted to Process
- ❑ Parties Under Strain: due to family discord, domestic violence, court battle; so their interactions and behaviors are not normal at this time
- ❑ Lack of Data From Third Parties: forensic only has two sets of biased data from parties to rely upon
- ❑ Data From Third Parties Is Biased: friends and families; biased by loyalties and perceptions so not accurate and reliable data

F. USE OF OTHER EXPERT WITNESSES

In custody cases, some types of witnesses you might want to qualify as experts include: social workers who supervise visitation or work at domestic violence shelters, school psychologists, and therapists who work with survivors of abuse.[53]

An expert can be particularly helpful in cases where the pattern of abuse involves little or no physical violence but more psychological, verbal, or other types of harm. In those cases it may be more difficult for the court (or the Attorney for the Child) to understand the seriousness and impact of such abuse, despite caselaw stressing its significance.

Expert testimony must relate to the subject matter and concern "scientific, technical, or other specialized knowledge" that is "beyond the understanding of the trier of fact" or that will "dispel misconceptions of the typical trier of fact" and thereby help the trier to understand the evidence or determine a fact in issue.[54] In court, you must establish that there is a need for your expert, qualify your witness as an expert, and establish the basis upon which the expert is relying before your expert can testify to their opinions about the issues in the case. Opposing counsel will be given the chance to voir dire your expert regarding their qualifications and evaluation process before the expert will be allowed to testify about the issues.

Pursuant to 22 NYCRR 202.16(g), each expert witness whom a party expects to call to testify at trial must submit a written report to the court and other side at least 60 days prior to trial. Failure to submit a report may preclude the use of the expert at trial, in the

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[52] See, e.g., Tarasoff v. The Regents of the University of California, 17 C.3d 425 (1977) (Amicus Brief filed by American Psychiatric Association declaring inability of psychiatrists to make accurate predictions of future conduct).

[53] For example, in Kamholtz v. Kovary, 210 A.D.2d 813, 620 N.Y.S.2d 576 (3d Dept. 1994) (in a custody modification proceeding, a school psychologist with a Masters of Science degree in counseling and psychology, with 19-years of experience in the field, was found qualified to offer professional opinion on child's psychological condition).

[54] See, e.g., People v. Taylor, 75 N.Y.2d 277, 552 N.Y.S.2d 883 (1990); Matter of Nicole V., 71 N.Y.2d 112, 524 N.Y.S.2d 19 (1987).

court's discretion.[55] This requirement is qualified by CPLR §3103(d)(i), which states that upon request each party must identify each person whom they expect to call as an expert witness at trial. Pursuant to such demand, the party calling the expert must disclose in reasonable detail the subject matter on which the expert will testify, the substance of the facts and opinions, the qualifications of the expert, and the grounds for the facts and opinions. This provision also states that if a party, for good cause, retains an expert in insufficient time to give appropriate notice to the other side, the court has the discretion to allow the testimony. Thus, you should still have your expert submit their report, even if there are less than 60 days before trial. It is likely the judge will permit your expert to testify if the other side is given sufficient time to consider the report.

In any case, if you are thinking of retaining your own expert to examine your client and testify on their behalf, you should notify the judge of your plans as soon as possible, and ask what the particular judge requires as far as notice to the other side. You may notify the judge orally (at a court appearance) or in writing, copying the letter to opposing counsel and the Attorney for Child.

1. Domestic Violence Experts

Prior to 1996, the testimony of expert witnesses about the effect that domestic violence against a parent has upon a child was required to establish the significance of such evidence in custody cases.

The legislative findings for the 1996 law that amended the DRL and FCA (to require judges to consider proven domestic violence as a factor in custody cases) should make it unnecessary to call an expert to testify about the negative effects of domestic violence in most custody/visitation cases. Especially if the effects of the violence are obvious, then expert testimony usually is not necessary -- for example, if the child has been physically abused or injured by the violent parent. In some cases, however, where the judge seems unsympathetic to your case, or unwilling to consider the violence, you might need expert testimony to establish the extent and effect of the violence upon the children.

For example, in cases where the violence was never directed at the child or in cases where you are seeking to have all contact between the child and the violent parent terminated, you might need to offer expert testimony as to why custody to your client or denial of visitation to the opposing party is the only safe course of action.

2. Options for Indigent Litigants

If the court's forensic report is not favorable to your client, and your client cannot afford to pay for an independent, second evaluation you may make a request pursuant to County Law §722-c for funds for another expert and evaluation. This relief can be sought even

[55] See, e.g., LaBombardi v. LaBombardi, 220 A.D.2d 642, 632 N.Y.S.2d 829 (2d Dept. 1995) (error for court to admit second medical report of court-appointed physician which prepared at sole request of plaintiff and not disclosed to defendant until doctor testified).

where counsel is not assigned pursuant to the 18-B law, but only if the client cannot afford an expert or any services other than counsel, or counsel is pro bono.

TRIAL

A. EVIDENCE

Only competent,[1] material,[2] and relevant[3] evidence is admissible in a custody/visitation hearing. Thus, you will need to be mindful of the rules of evidence in New York State.

In addition to witness testimony, some types of documentary evidence you may want to introduce at trial include:

1. Caseworkers' Notes/Files

Your client and her family might have several different agencies already involved in their lives, such as the Department of Social Services (DSS) or a Supervised Visitation Center. Their agency records concerning the family are admissible hearsay under the business records exception, since the collection of such records is within the agency's business and practice. However, witness statements contained within such records must be admitted under another hearsay exception (such as admission by a party), since the witness was not under a business duty to report.

The rules of evidence prohibit the introduction of conclusions in most documents. Generally, a conclusory statement in a business record, which could not have been testified to at trial, must be excluded, even if the rest of the document is admissible as a business record.[4] For example, statements in a case record such as "the apartment was not safe for a child" or "the mother showed no love for the child," would not be allowed into evidence at trial because lay witnesses must confine their testimony to a report of the facts. Such conclusions must be redacted (blacked-out) from the document before it is offered into evidence.

Note, however, that a lay witness may testify about opinions rationally based upon their perceptions, such as whether a person's acts appeared rational or irrational,[5] or whether a person appeared to be intoxicated, angry or ill.[6]

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[1] Competent evidence does not violate any exclusionary rule such as the rule against hearsay.
[2] Material evidence is of consequence to the action.
[3] Relevant evidence tends to prove or disprove any fact of consequence to the action (any material fact).
[4] Bothner v. Keegan, 275 A.D.470, 89 N.Y.S.2d 288 (1st Dept. 1949); see also Stevens v. Kirby, 86 A.D.2d 391, 450 N.Y.S.2d 607 (N.Y.A.D. 1982).
[5] People v. Pekarz, 185 N.Y. 470, 78 N.E.294 (1906); Pearce v. Stace, 207 N.Y. 506; Falkides, 40 A.D.2d 1074, 339 N.Y.S.2d 335 (4th Dept. 1972); Gomboy v. Mitchell, 57 A.D.2d 916, 395 N.Y.S.2d 55 (2d Dept. 1977).
[6] Rawls v. American Mutual Life Ins. Co., 13 E.P. Smith 282, 1863 WL 3622.

2. Tape recordings

Audio recordings of statements made by others may be helpful evidence. For example, if the other parent is often drunk, or chronically shouts at the child, a recording of his voice may help to prove it. Or, if the other parent leaves threatening messages, or unreasonable visitation demands on your client's answering machine, you may introduce these tapes into evidence at trial.

In New York State, one party to a conversation legally may record it, even though the other party is unaware.[7] Where audio-tapes are properly obtained – recorded by a party to the conversation, for example – they are admissible. So are recordings such as voice mail or answering machine messages, which are left by the speaker aware of the recording.

By contrast, listening in on a conversation between two parties, neither of whom has consented is improper, though it is legal for one party to a conversation to consent to a third person eavesdropping.[8] Illegally taped conversations are barred from introduction into evidence by federal law,[9] the CPLR,[10] and New York case law, including in the area of domestic relations.[11] Case law holds that one parent may not tape-record the other parent's conversations with a child, even if the child "consents." Courts have based their rulings on the premise that children have a right to feel they may communicate freely with their parents and that it is important for the child's emotional health to promote a spirit of trust and confidence with each parent.[12]

3. School records and correspondence

Report cards and other school records can be used to illustrate how well your client's child is doing in her care or how poorly the child is doing in respondent's care, or the detrimental effect of a current visitation schedule. Moreover, correspondence between your client and the teacher/school will indicate her attention to and involvement with her child's education.

School records (attendance, academic, guidance counselor) are all hearsay, but are admissible through the Business Records Exception to the Hearsay Rule.

4. Doctor/hospital records for the Child

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[7] People v. Gibson, 23 N.Y.2d 618, 298 N.Y.S.2d 496 (1969), *cert denied* 402 U.S. 951 (1971); See also, Harry R. v. Esther R., 134 Misc.2d 404, 510 N.Y.S.2d 792 (Fam. Ct. 1986).

[8] People v. Erwin, 236 A.D.2d 787, 653 N.Y.S.2d 990 (4th Dept. 1997).

[9] Sections 2510 et. seq. of Title 18, U.S.C.

[10] CPLR § 4506.

[11] See, e.g., Pica v Pica, 70 A.D.2d 931, 417 N.Y.S.2d 528 (2d Dept. 1979); Jaeger v. Jaeger, 207 A.D.2d 448, 616 N.Y.S2d 230 (2d Dept. 1994); Sharon v. Sharon, 147 Misc.2d 665, 558 N.Y.S.2d 468 (Sup. Ct. 1990).

[12] See, e.g., Harry R. v. Esther R., above. See also, Berk v. Berk, 70 A.D.2d 943, 417 N.Y.S.2d 785 (2d Dept. 1979) (holding that without proof of consent of at least one party to conversations, taped conversations could not be put into evidence).

You will need a HIPPA authorization form signed by the custodial parent attached to an attorney's subpoena to obtain certified copies of these records.

5. Letters/Writings

Letters and cards your client's child makes for her can be introduced as examples of the child's love for and attachment to the mother.

Also, threatening or harassing letters from the respondent to the client can be entered into evidence.

See Her Justice Manual on Orders of Protection.

6. Photographs

Photos can be used to illustrate some aspects of your client's care and abilities as a parent. They can demonstrate to the court the physical setting she provides for the child (home, living and sleeping areas, nearby playgrounds) or the various events/activities she enjoys with the child (special celebrations, holidays, trips and vacations, and visits with friends and relatives). Videos also can be used to depict a parent's involvement. Just make sure your client is careful not to prompt the child since the audio portion of the video will reflect this.

Photos also can be used to document injuries suffered by the child and/or client as a result of domestic violence.

7. Orders from other courts

Orders of Protection issued by another family or criminal court

Certificates of disposition (proof of conviction from Criminal Court)

8. Police Reports

See Her Justice Manual on Orders of Protection.

9. Child Protective Records (ACS)

An investigative report of child abuse conducted by ACS, otherwise admissible as a business record pursuant to CPLR §4518, is not admissible in evidence or even subject to discovery if the report is determined to be unfounded or is expunged. Where there is some credible evidence that child
abuse/neglect has occurred and the subject of the report has been notified that the report is "indicated," the report is subject to production and admission into evidence pursuant to Social Services Law §422(4)(A), Family Court Act §651-a and Domestic Relations Law §240(1-a).

B. DIRECT AND CROSS EXAMINATION

1. Direct

Cases generally are won on direct – this is where an attorney proves his/her case. Cross examination might be more dramatic, but it is unlikely you will be able to get the other side's witnesses or the respondent to say things that benefit your case.

Direct examination should be carefully prepared ahead of time and rehearsed with your client and witnesses. It should set forth your theory of the case convincingly so that the judge is persuaded. Every witness will add to your theory of why your client should be the custodial parent; or why visitation needs to be supervised.

See samples of direct examination for your client and other witnesses.

a. Strategy for Direct

Some general things to watch out for when conducting direct examination:

Avoid Compound Questions

Only ask one question at a time. Not only is this easier on your witness, but you will not get an objection from the other side as to form of question.

Ask simple, short, open-ended questions (as if you were asking them to a young child): "Whom did you interview?"

Avoid Leading Questions

Only use these for introductory matters or transitions. Allow the witness to tell the story, so the judge knows she is telling the truth and not a rehearsed statement.

Avoid asking questions that can be answered with a "yes" or "no." Use open-ended questions.

Start all questions with words such as: "what," "who," "where," "why," "when," and "how."

Use verbs to start your questions, for example:

"Tell the court…," "Explain…," "Describe what happened…," "Demonstrate…"

Listen to the Witness

Listen attentively. Not only will the direct exam seem less staged but also you might discover other areas to explore. In your follow-up questions, repeat some of the words used by the witness to reinforce what was said.

Always appear interested in what your witness is saying – keep eye contact, nod at answers when appropriate.

Organization

Keep the examination short and simple – don't try to bring out too many facts at one time.

Keep the questions logically organized. For example, if asking about a particular incident, you could ask questions in order of what happened.

Volunteer Weaknesses of Case

If you don't expose your case's weaknesses on direct, the other side will expose them in a more damaging way on cross. One way to do this is to use other witnesses (such as experts) to discuss your client's shortcomings.

For example, your client's treating therapist can discuss your client's emotional trauma stemming from the domestic violence she has faced and how your client is dealing with this trauma through therapy. You can then minimize the issue by asking the therapist to explain how the trauma will not interfere with your client's good parenting.

Anticipate Objections

Especially where you anticipate your client will include hearsay in her testimony, anticipate objections and have your responses ready (such as possible hearsay exceptions).

b. Client Direct

Direct examination of your client is the most important part of your case and you should spend considerable time preparing and "rehearsing" her so she feels ready and comfortable on the stand. Your client must tell a cohesive story to the judge that covers your theory of why she is entitled to full custody, more visitations, or whatever relief she seeks. Make sure there are not too many tangents to follow and that the testimony does not sound scripted.

It is often best to save your client's testimony until the end of your witness list, so that you can hear what the other witnesses say on the stand first and avoid having them contradict what your client says.

The first step in preparing a client for their direct is to outline the areas to be covered on direct. This outline should be shared with your client so she can review what areas will be covered and in what general order. Often, using an outline of topics, rather than scripted questions, will help the attorney listen more carefully in the courtroom to the client's responses and know to follow up on important areas.

Be prepared to move from one major theme to the next as you have outlined them, prefacing your transitions with phrases such as, "Now I want to focus on your daily care routine with the child…."

Make sure your client testifies in the fullest possible detail, especially about any domestic violence, in order to paint a vivid picture for the court of the atmosphere of terror and chaos in which your client and the child have lived. Descriptions of how your client felt during and after particular incidents are important, as are details of the child's immediate and continuing reactions to the violence.

In terms of structuring a direct, having your client testify in chronological order might make the most sense, but there are other ways to present a case that may be more effective. For example, you may want to have the client first focus on the domestic violence for maximum impact, or perhaps start with the child's special needs and why your client is better at addressing them. You should consider laying out the testimony in a way that will benefit your client, taking into account her strengths and weaknesses as a witness. Some clients need to testify in chronological order to help them remember events, but for others it's not effective. Also think about in what order and how quickly you want to get documents in evidence so your client can rely on them in later testimony. Also, be sure to give your client a chance to "shine"—even clients who have difficulty testifying or who have a lot of bad facts to overcome have subject areas where they come across especially well. Consider ending her direct testimony on a dramatic note, focusing on something she is especially good at or an area where she is very sympathetic.

c. Expert Direct

Expert testimony usually is given in four parts. First, the expert testifies as to his/her qualifications, including education, work experience, and publications. You have the right to have your expert reveal all these qualifications in full on direct, despite the other side's objections or offer to concede that the witness is a qualified expert. However, the court may use its discretion in curtailing an unnecessarily protracted qualification. At the end of this testimony, you will ask the court to recognize the witness as an expert.

Second, the expert describes his/her investigation into the mental health of the parties and child, explaining any tests, interviews or evaluations conducted, any observations of family functioning, and any relevant documents he/she has read.

Third, the expert offers her/his opinion as to custody or visitation. Some judges do not want the opinion expressly stated but wish to hear recommendations as to each parent's abilities and limitations.

Fourth, the expert explains the reasoning behind his/her opinion. The data used to form the basis of the opinion should be put into evidence. This should include any blood, drug, medical or psychological tests conducted on the parents. If the expert interviewed other family members, school personnel, friends, etc., the expert should testify that he/she relied on such hearsay statements in forming his/her opinion.

An expert should not address the ultimate issue in controversy if the issue is one upon which a lay person is capable of forming a conclusion. For example, the expert can testify

that the father is a schizophrenic and cannot function or distinguish reality, but the judge must determine if the child should be in his custody. Only if a lay person would be incapable of drawing inferences because of the technical issues involved, should an expert express an opinion the ultimate issue.[13] In practice, however, courts often ask mental health experts for their opinion on the ultimate issue of the best interests of the child and who should have custody.[14]

You will want to facilitate your expert's testimony by:

Asking questions to clarify

For example, "When you refer to the X Syndrome, what does it mean?" Or, "Please give

the court an example of that kind of behavior?"

Asking questions that illustrate the expert's position

For example, "Doctor, we want to understand your focus on the mother's fear. Please give us a picture of what she was feeling."

2. Cross Examination

You should prepare cross-examination for the respondent and any likely witnesses that he will call. Ask your client what the respondent's theory of the case is likely to be, what he might testify about on the stand, and what witnesses he is likely to call. Bear in mind that because of the general prohibition on discovery, you will have limited material to develop cross examination questions.

Do not engage in protracted cross-examination: focus on areas of testimony that are inconsistent or not believable or which undermine their theory of the case. Never ask open-ended questions, or questions to which you do not know the answer. Do not ask the question "why," as this gives an adverse party the chance to expound and repeat their theory of the case. Use leading questions to limit the answers to "yes" and "no." Do not argue with the witness. Finally, remember that the scope of cross-examination is limited to issues raised on direct and the credibility of the witness.

a. Modes of Impeachment

In addition to attacking an opposing witness's perception or recollection, you also can impeach him/her, demonstrating why he/she is not credible, in the following areas:

- Criminal Conviction

[13] See, e.g., Kulak v. Nationwide Mutual Ins. Co., 40 N.Y.2d 140, 386 N.Y.S.2d 87 (1976).
[14] See, e.g., Matter of Rebecca B., 204 A.D.2d 57, 611 N.Y.S.2d 831 (1st Dept. 1994); Young v. Young, 212 A.D.2d 114, 628 N.Y.S.2d 957 (2d Dept. 1995); Lopez v. Lopez, 233 A.D.2d 398, 650 N.Y.S.2d 240 (2d Dept. 1996).

- Interest, Bias, Hostility
- Reputation for Truth and Veracity
- Prior Inconsistent Statement in writing and under oath (CPLR §4514)

b. Client Cross

You also should prepare your client for cross-examination by the other side. One method is to ask a colleague to sit through part of the client's rehearsal of her direct and then have that lawyer cross-examine based upon that portion of direct. This is especially useful for areas of weakness in the client's case because it might alert you and the client to questions likely to be asked by opposing counsel.

If the opposing party is pro se, it is extremely important that you prepare your client for the fact that the pro se litigant has the right to cross-exam her. This can be particularly traumatic for a client who is a victim of domestic violence. Be particularly wary of any inappropriate questions or behavior by the pro se litigant while he is cross-examining your client. Most courts give a little more leeway to people who are pro se, however, that does not mean that he can badger your client or flaunt the rules of evidence.

Make sure your client understands the purpose of cross-examination. Discuss with her that opposing counsel will be trying to make her look unfit and unstable as a parent, and that above all, she should not lose her cool on the stand. Remind and reassure her that you are there to protect her, by objecting to questions that are inappropriate in form or substance and redirecting her testimony after cross, if necessary.

C. IN-CAMERA INTERVIEWS WITH CHILDREN

Requiring a child to testify in open court against his or her parent and in their presence can be extremely intimidating and traumatizing for a child. In order to limit the psychological danger to a child, courts often will conduct in-camera interviews with the child. The judge will interview the child in chambers, out of the presence of the parties. Such a hearing is known as a "*Lincoln Hearing,*" after the case which upheld such procedures as a limited modification of the traditional requirements of the adversary system.[15] There are three methods of conducting such interviews:

- the court in-camera with the child alone (with their attorney present)
- the court in-camera with the child alone (or with attorney for child), but counsel permitted to submit questions ahead of time
- the court in-camera with the child, attorney for child and the attorneys for the parties

Pursuant to CPLR §4019, the court cannot conduct an in-camera interview with a child in a custody proceeding unless a stenographic record of such interview is made. If an appeal is

[15] Lincoln v. Lincoln, 30 A.D.2d 786, 291 N.Y.S.2d 461, affd. 24 N.Y.2d 270, 299 N.Y.S.2d 842 (1969).

taken to the Appellate Division from a judgment or order of the court on any such action or proceeding, the stenographic record must be made a part of the case record and forwarded under seal to the Appellate Division.[16]

Moreover, the judge is not permitted to use any adverse information learned in a *Lincoln Hearing* to make a custody determination, unless such information has been previously mentioned, without in some way checking its accuracy during the course of the open hearing.[17]

D. MEMORANDA OF LAW AND TRIAL BRIEFS

You might consider submitting a Memorandum of Law or a Trial Brief on behalf of your client. Memoranda of Law are important to submit if there are special or unusual legal issues in the case, of which you want the judge to take particular notice. They usually are submitted at the end of your case, with your summation, and cite case law and relevant statutes to the facts you brought out in trial. You should also check with the court well in advance whether you will be submitting your summation orally or in writing so you can start timely preparing. Where trials are relatively short and with few witnesses, the courts often expect only oral summation. The courts will typically honor requests for written summation, especially when there have been long adjournments between trial dates, but you should clarify this long before the end of your trial so that opposing counsel cannot use a last minute request for written summation as an opportunity to cause further delay by requesting extended time to prepare it.

Trial Briefs are helpful in summarizing your case: the issues presented the relevant law and the evidence supporting your position. They are especially useful when your case is protracted and lasts over the course of many months because they allow you a chance to summarize your case for the court.

E. THE FINAL ORDER

1. Negotiated Settlements

If the parties agree to a settlement before the end of trial, a consent order or stipulation can be prepared by either party's attorney or the Attorney for Child, signed by all parties, and submitted to the court for the judge's signature. Once the judge signs the agreement, it becomes "so-ordered" and, in effect, becomes a court order. All parties are then given a copy of the order.

The judge usually requires all parties to be present to present the stipulation for the judge's signature so that he/she can make sure on the record that all parties are in agreement with its terms and understand their rights.

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[16] Fleishman v. Walters, 40 A.D.2d 622, 336 N.Y.S.2d 511 (4th Dept. 1972); Romi v. Hamdan, 70 A.D.2d 934, 417 N.Y.S.2d 523 (2d Dept. 1979); Matter of Ehrlich v. Ressner, 55 A.D.2d 953, 391 N.Y.S.2d 152 (2d Dept. 1977).

[17] Lincoln v. Lincoln, *supra.*

After the stipulation becomes an order of the court, either side may do a "Notice of Entry," and serve it along with a copy of the Order upon the other side. An Affidavit of Service must be completed and filed with the court, with the Notice of Entry and Order attached. An Order is not considered entered and the time by which an appeal must be filed does not start to run until this step has been taken.

2. Court's Order

If the case proceeds to trial, the judge will issue a final Order after she has had a chance to consider all evidence presented at trial, as well as any Memoranda of Law or Trial Briefs submitted to the court. Some judges will mail out copies of the final order to the parties or their attorneys, if they are represented. Other judges will rely upon the party/attorney to call the court to find out whether the Order is ready. Ask the court what its preferred practice is.

If the Order is favorable to your client, you should immediately prepare and serve the Notice of Entry (with Order attached) upon the other side, and file such (with Affidavit of Service attached) with the court. It is in your client's interest to start the clock running for an appeal, so that the other side has less time to take an appeal "as of right."[18] An appeal must be taken within thirty (30) days after entry and service of a Notice of Entry of the Order.[19] **Thus, if there has been no service of the Notice of Entry and Order, the thirty days never begins to run.[20]**

F. RELOCATION TRIALS

1. Additional Considerations

Additional considerations are necessary in preparing a custody case when the issue of relocation is involved. An attorney will need additional documents to evaluate and prepare the case, as well as additional facts and evidence from the client. New York State is a relatively restrictive jurisdiction when it comes to relocations, requiring special reasons to permit relocation. The parent seeking to move will need to establish that the move enhances the best interests of the child.

Some of the additional documents the attorney will need to evaluate include:

- any prior separation agreement, divorce judgment, or custody/visitation orders that include any geographic or radius restrictions on where the parents and child can live

[18] Meaning without first having to seek the court's permission to appeal.
[19] FCA § 1113.
[20] See, e.g., Lombardi v. Lombardi, 67 A.D.2d 896, 413 N.Y.S.2d 716 (1st Dept. 1979) (appellant served notice of entry but failed to serve copy of order as well and thus time to appeal from order had not begun to run).

- any prior agreements or orders that may contain provisions requiring notice of intent to move
- any visitation provisions or schedules whose terms may be affected by a proposed relocation
- any preliminary or temporary orders if a relocation case is already pending

Additional relevant facts must be gathered from the client, such as:

- the reasons why the non-custodial parent opposes or might oppose the move
- the parenting history and non-custodial parent's involvement with the child, including any visitation arrangements and whether the non-custodial parent has consistently exercised visitation
- the reasons for relocation including details about the new spouse if remarriage is involved and the parties' child's relationship to the new spouse and/or siblings

The client needs to help the attorney identify potential witnesses for the case, including:

- family or extended family members who will provide support in the new location
- significant persons in the child's life, such as teachers, coaches, clergy witnesses who will address issues related to the proposed move, for example:
- employment counselors who can testify to the better job market or prospects for the custodial parent in the new location
- new boss who can testify to open offer and salary
- therapists who can testify to the custodial parent's motivations for the move

The attorney further needs to educate the client about the law and nature of a relocation proceeding. For example:

- explain that relocation proceedings may be lengthy
- honestly explain the law of relocation in NY
- evaluate the likelihood of success for the client, based upon the law and the facts of the client's case

The court may limit proof on the issue of best interests in a relocation case that is not also an initial custody determination to the best interests of the child as related to the relocation (stressing the reasons for the move or the reasons for opposing the move). As the attorney for the parent wishing to move, you can make an offer of proof or bring a motion *in limine* to enlarge the record and bring forth traditional best interests issues, (such as the child's needs, the home environment, the relationship to each parent, parental fitness) if you believe it will help the case. In addition, you can suggest that a best interests inquiry should include forensics and home studies and even the appointment of an Attorney for Child, if these things will bolster your case.

2. Parental Motivation

The custodial parent's motivation for the move and the reasons the non-custodial parent opposes the move will be primary considerations for the court. Often, this issue can be explored in pretrial discovery, for example, through depositions of the parents.

Pure Motives of Moving Parent

In representing the parent who wishes to move, you will be trying to establish that her motives are pure – that she is not trying to impede the relationship between the child and non-custodial parent or to frustrate visitation or access for the other parent. In order to demonstrate this, your client can:

- establish that she always complied with visitation in the past and/or even encouraged further visitation
- show that she tried to negotiate problems with visitation in the past, or encouraged therapy to encourage the child to obey visitation
- give the non-custodial parent sufficient advance notice of a move so that alternate arrangements for visitation can be arranged without disrupting the non-custodial parent's contact with the child
- demonstrate that she is willing to agree to a new visitation plan with the noncustodial parent that will enable him to have continued significant contact with the child; your client should plan a proposed new schedule for visitation and emphasize the quality time and continuous periods of visitation, it will provide such as summer vacations and week-long holidays
- demonstrate her willingness to facilitate the new visitation schedule, such as by physically transporting the child for at least the first visits, paying the cost of such transportation herself

In order to avoid a finding of bad-faith motivations for a move, your client should be careful not to:

- repeatedly deny visitation to the non-custodial parent unless there is good cause, such as an actual physical danger to the child due to a parent's violence or an unsafe living environment[21]
- claim the child is "unmanageable" after visits, unless there are witnesses who can back this up, such as teachers, babysitters, or the child's therapist
- cut back on visits for reasons such as the child does poorly in school, unless there are
  witnesses who can back this up, such as the child's teacher
- enroll the child in multiple activities (such as sports or other after-school or extracurricular programs) that interfere with the other parent's visitation

[21] However, a court always will prefer for a parent to petition to suspend or modify visitation, or for supervised visitation in a safe location, as soon as issues about unsafe visitation arise, instead of taking unilateral action herself in denying all visitation. Of course, if there is an immediate threat to a child, the parent should not allow visitation to proceed that day, but right away should file a petition in Family Court seeking to have the visitation modified on these grounds.

- plan a secret move without notifying the other parent, unless there is a compelling reason, such as domestic violence, that can be proven to demonstrate that secret flight was necessary[22]

Compelling Reasons for the Move

The custodial parent also needs to explain to the court her valid reasons for wanting to move. These will include:

Economic Considerations

- child's basic needs not being met in current location (food, clothing, shelter); inadequate support by other parent
- new employment in a unique position or better job market after a careful search of nearby job markets
- economic advantages available in the new location for the custodial parent and child, such as significantly improved finances due to a higher paying job for the parent or sharing living costs with an extended family or new spouse -- show how the move will permit money to be reallocated and applied more effectively for child's expenses

Environment and Facilities

- better school system and/or extracurricular activities for the child
- a safer neighborhood
- costly programs in current location vs. excellent, low-cost programs in new area
- a better home
- better neighborhood (zoos, parks, playgrounds, trees)

Child's Needs

- show that the child's needs will continue to be met, or will be more able to be met
- demonstrate that typical problems for child who moves will not negatively affect the child; such problems include:

    1. child will be separated from extended family
    2. child will leave behind friends
    3. child's providers may not be available any longer (therapists, tutors, coaches)
    4. child will leave behind regular activities
    5. child may resist visitation with non-custodial parent

[22] Again, however, the courts will prefer to have the custodial parent attempt to resolve such issues in the context of a court proceeding, by seeking an order of protection or a modification of a visitation arrangement to offer greater protection to the parent or child. Of course if flight was an absolute necessity to protect the parent or child, this should be proven to the court as just cause for the "secret" relocation.

Some types of evidence that will be helpful in establishing valid reasons for a move include:

- graphs showing changed financial circumstances (for example, comparing the current high-cost area contrasted with free residence or cheaper food, clothing, other living costs available in new location)
- call realtor to testify to discuss lower median housing costs in new location vs. current location
- call a financial expert to testify using comparative cost-of-living scales in both locations
- evidence of non-payment of child support or arrears by non-custodial parent
- detailed budget showing expenses relating to child not being met; contrasted with budget in new location
- testimony from employment or job-placement counselor (try local universities) and/or resource guidebooks or directories that similar job not available in current location or immediate vicinity
- if move based upon new, better job, make sure the offer is firm and call prospective employer as witness on availability of job, salary, benefits, and advancement in company (not just a lateral move)
- evidence establishing an effort to find a better job in the current location or closer location, such as: letters of inquiry, follow-up correspondence after interviews, rejection letters from potential employers
- if moving to more expensive area, evidence showing that increased earnings will maintain or improve standard of living
- descriptions or photographs of advantages of new location, such as:

    1. better school and facilities (information/articles on school and pictures of facilities)
    2. better and less expensive extracurricular opportunities (brochures detailing lower cost sports or other programs; cancelled checks showing expense of current programs; call director of programs to testify); establish child can continue to take part in current activities
    3. better housing (pictures of new residence, bigger and in better condition, surrounded by playgrounds and nicer neighborhood vs. pictures of current house in need of repairs)
    4. written materials or live testimony on advantages of new location (chamber of commerce, board of realtors, local churches or synagogues, schools, low crime rates established by FBI statistics)

- demonstrate that the child's special activities will be continued in the new location, such as if the child is currently participating in a chess club or sports program (brochures and letters of inquiry as to child's ability to participate)
- call child's therapist to establish that the child is eager to move and excited about the proposed relocation, as well as willing to spend summer and school vacations visiting non-custodial parent; or have judge conduct in-camera interview with child to elicit such testimony if not provided by Attorney for the Child
- show letter written to non-custodial parent suggesting alternative visitation plan and willingness to pay costs of such and work out mutually agreeable schedule

Other Parent's Resistance to the Move

The custodial parent also should develop a theory of why the non-custodial parent's objections to the move are not compelling. For example:

- the non-custodial parent has not been actively involved in the child's life to date and has not fully exercised the visitation they have at present with the child
- the non-custodial parent has not been providing sufficient child support for the child's basic needs so that the custodial parent has been forced to look for a better paying job or to relocate to live with her extended family who will provide economic support
- the non-custodial parent has made no effort to improve the quality of life for the child comparable to what the relocation has to offer the child (for example, the non-custodial parent had not made any effort to identify a local school that would be as good for the child as the one in the new location or at least better than the one the child attends now)

Practice Tip: Remember the focus of a relocation request should be the benefit to the child, not your client. While the benefits to your client can certainly be addressed, especially as they will incidentally benefit the child (for example, the custodial parent will be making more money, so that means more money for the child as well), the case should never rest there. Have your client think and talk about concrete ways, big and small, the move will make the child's life better.

SUPPLEMENTAL MATERIALS

CLIENT QUESTIONNAIRE: CUSTODY/VISTATION

CLIENT INFORMATION

Name of Interviewer: Date:

CLIENT IS: Petitioner Respondent BOTH

NAME:

GENDER PRONOUNS:

OTHER NAMES PREVIOUSLY USED:

MARITAL STATUS: Single Married Divorced Separated Widowed

SOCIAL SECURITY#:

Confidential? Yes No

ADDRESS:

Confidential? Yes No

If NOT ok to mail to this address, mail to: c/o _

COUNTY: New York Bronx Kings Queens Staten Island

PHONE NUMBERS (include area code):

(home phone)

(cell phone)

(other safe phone)

EMAIL:

Do they have access to this email? Yes No

Confidential? Yes No

DATE OF BIRTH:

PLACE OF BIRTH:

Immigration State:

- ❑ U.S. Citizen
- ❑ Lawful Permanent Resident ("greencard")
- ❑ Conditional Permanent Resident
- ❑ Undocumented
- ❑ Other (specify):

Is the client in removal/deportation proceedings? If so, does client have representation?

If client is not a US Citizen or Lawful Permanent Resident, does client have an Employment Authorization Document (EAD)?

Are there pending immigration applications filed by either party for the other?

If so, does client have copies of documents filed with USCIS?

Will client require an interpreter? Yes No

If so, what language?

Highest Level of Education Completed:

GED High School Degree College Post-College Vocational School

Partial High School: (How many years?)

Partial College: (How many years?)

Is client currently receiving any mental health services? Has client received mental health services in the past?

Has client ever been arrested?

What might the opposing party say about client's parenting abilities?

RE: CLIENT'S EMPLOYMENT INFORMATION

Name and address of employer:

Name:

Address:

Phone:

What is/are client's other sources of income? (Check all that apply)

- ❑ Maintenance: $
- ❑ Supplemental Security Income (SSI)
- ❑ Child Support: $
- ❑ Disability (SSD) : $
- ❑ Unemployment: $
- ❑ Public Assistance: $
- ❑ Worker's Compensation: $
- ❑ Soc Sec (SS) : $
- ❑ Other: $ Source:

Number of people living in client's household = self + (please list their name and relationship to the client)

INFORMATION RE: CHILDREN

List the names and ages of ALL CHILDREN under the age of 21:

	NAME	**AGE**	**CHILD'S RELATIONSHIP TO OPPOSING PARTY**	**PLACE OF RESIDENCE**
1.				
2.				
3.				

If opposing party is not the biological father of the child(ren), state name and address of the biological father(s) of the child(ren):

Is there an attorney for the Child(ren)?

If so, what is their contact information?

Does client have any other pending cases? If so, which court? Who represents client in case(s)?

OPPOSING PARTY'S INFORMATION

Name of opposing party:

First Last Name Middle

Social Security number:

How is client related to the opposing party?

address/Where they can be found or served:

Street Apt. #

City State Zip Code

If the client does not know their opposing party's current address, is there any other location where the opposing can be found? Yes No

If yes, where?

PHONE NUMBERS (include area code):

(home phone)

(cell phone)

EMAIL:

DATE OF BIRTH: PLACE OF BIRTH:

Immigration Status:

- ❑ U.S. Citizen
- ❑ Lawful Permanent Resident ("greencard"))
- ❑ Conditional Permanent Resident
- ❑ Undocumented
- ❑ Other(explain):

Highest Level of Education Completed:

GED High School Degree College Post-College Vocational School

Partial High School: (How many years?)

Partial College: (How many years?)

Is the opposing party represented by counsel in custody case? Yes No

If yes, attorney's name, phone, and address:

Are there any other cases pending between client and opposing party? If so, which court? Who represents opposing party? Who represents client?

RE: OPPOSING PARTY'S EMPLOYMENT INFORMATION

Name and address of their employer: (if applicable)

Name:

Address:

Phone:

Email:

If not a US Citizen or Lawful Permanent Resident, does opposing party have work authorization issued by the U.S. Citizenship and Immigration Service (USCIS)?

GATHER INFORMATION RELATED TO PARTIES' CUSTODY CASE

If never married, has paternity ever been established by a court? Yes No

Is there an order of filiation? Yes No

Is there an acknowledgment of paternity? Yes No

If client is petitioner, has client had petition(s) served on opposing party? Yes No

If so, when?

(Please obtain Affidavit of Service (from police) or Affidavit of Attempted Service in unable to serve before court date)

If client is **respondent**, has the client been served? Yes No

If so, what was client served with?

If so, when and how?

If so, consider filing an answer:

Is there an upcoming court date?

(verify at http://iapps.courts.state.ny.us/webcivil/ecourtsMain)? Yes No

If so, what is it?

Which court?

When was the case filed?

What is the file number?

How many court appearances have already been made?

What happened at prior court appearances?

Indicate on chart all information regarding all client's present and past family court cases in all courts and in all states:

Date of Order	Date Case Filed	Docket Number	Criminal or Family Court	Date Order Expires	Temporary or Final Orders and terms?	Next Ct Date
7/12/16	6/12/16	O-12345/16	Bronx Family Court	7/12/18	Final Stay Away Order of Protection	N/A

Provide narrative of past court proceedings:

Have there been any reports to the Child Abuse and Maltreatment Registry?

Yes No.

If so, get a copy of the letter indicating whether the report was unfounded or indicated.
Explanation:

If no support order, has an informal agreement between the parties concerning support been reached? Yes No. If so, indicate:

If so, what are the terms of the informal agreement?

If no visitation order, has an informal agreement between the parties been reached?

Yes No.

If so, indicate:

If so, what are the terms of visitation arrangements?

Is client seeking supervised visitation? What are their reasons for requesting supervised visitation?

EMOTIONAL AND PHYSICAL ABUSE

Have there ever been incidents of domestic violence? Yes No

If so, was the violence directed towards: (check all that apply)

Client alone

Child(ren) alone

Other Family Members

Pets

Destruction of Furniture, Property, etc.

Did the opposing part verbally abuse the client? No Yes

Did the opposing party mentally abuse the client? No Yes

Ask if the opposing socially isolated the client (did not let them use the phone, talk to family, have friends), was obsessive and possessive (jealous, accused them of infidelity), threatened to commit harm to them, to the child, property, or animals, economically abused them (controls or takes all money, prevents them from getting a job), threatened to deport them, threatened to kidnap the child to another country, take their immigration documents, third party threats (e.g., by opposing party's family members, friends, etc.)

If parental kidnapping threats have been made:

Do children have passports? If so, in whose possession are the passports?

Did the opposing party physically abuse the client? No Yes

(Instead of asking whether the client was physically abused, ask if opposing party has ever done the following: pushed them, pulled their hair, spat at them, destroyed their property, kicked them, scratched them, used weapons against them, thrown things at them, slapped them, punched them, hurt the child or pets)

Describe **any domestic violence incidents** that happened in the last few years or abuse that the opposing party regularly inflicted on client. Describe: date, place time, physical injury, and weapons of any kind involved (including household objects), repeated behaviors (include how often it occurred). Start with the most recent:

Include date, time, and place of the incident

Indicate who else was present

Describe any injuries or consequences or medical treatment received

Were the police called?

Was the incident Part of a Petition for an OP?

Are there any witnesses? (If so, what is their contact info?)

Is there any documentation? (If so, have client provide, prepare release, or subpoena)

1. On or about _____, at _____ the opposing party:

Description of Incident (e.g, witnesses, actions taken, etc.)

2. On or about _____, at _____ the opposing party:

   Description of Incident (e.g, witnesses, actions taken, etc.)

3. On or about _____, at _____ the opposing party:

   Description of Incident (e.g, witnesses, actions taken, etc.)

****IF YOUR CLIENT, ADVERSE PARTY OR ANY CHILDREN ARE NOT US CITIZENS, PLEASE CONTACT YOUR HER JUSTICE MENTOR****

THINKING CRITICALLY ABOUT CUSTODY/VISITATION CASES

What type of case do I have?

Paternity Issues

Custody

Modification of Existing Custody Order

Change in Custodial Parent

Visitation

Modification of Existing Visitation Order

Request to Suspend Visitation

Supervised Visitation

Emergency Jurisdiction (UCCJEA – involving another state) Relocation

Violation of Custody or Visitation Order

Hague Convention (involving another country) Paternity Issues

Client is Respondent

Client is Petitioner

Gathering Information

Reports from Forensic Evaluators (who is paying fees?)

Court Ordered Investigation Report from either ACS or Probation

Supervised Visitation Center Report

Supporting documentation: Social Workers, Teachers (know what report will entail says before requesting!)

Do I have the following documents from my client and the non-custodial parent/spouse?

All prior orders and history of parties' court involvement

Any other orders between the parties from other courts/states which may impact my case, i.e. divorce judgment, out of state order

Any other orders involving third parties which may impact my case

Are there any other cases involving the parties, ie: custody/visitation, order of protection? How will this impact my case?

What is the applicable law for my case?

What is the legal standard? i.e. change in circumstances; emergency jurisdiction

Do I understand my client's relationship with the child? Non-custodial parent's relationship?

Does client know teachers, friends, problems child may have? Does child get along with parent?

Is child defiant?

What are the specific needs of each child?

Are there urgent needs? i.e. immediate need to stop visits

Has there been ACS involvement – child abuse/maltreatment report made by or against either parent? (speak with mentor from Her Justice)

What are the living arrangements?

Does child have proper sleeping arrangements, place to study, is home clean and safe for child, is there sufficient food?

Is child left alone? For how long, what age?

Are there other children in the homes of both parents? What is that relationship like?

Is there a need for supervised visitation?

Have you explained to client the parameters of supervised visitation? What arguments do you have for asking for supervision?

What agencies have you found available to conduct supervision – check on hours, dates, costs, security?

Have you spoken to family members to assess their willingness and appropriateness in doing supervised visitation and reporting back to the court?

Do I understand how the parties finances affect custody/visitation?

Are child's financial needs being met?

Is the opposing party a W-2 wage earner, off the books or self-employed?

What is the non-custodial parent/spouse's lifestyle like?

Discovery

Discovery is extremely limited in custody cases. Review case specific case law for various departments. (1st, 2nd, 3rd, 4th)

Can the case settle?

With a stipulation?

Have terms, impact of terms and longevity of plan been thought out? Are all parties clear on the visitation dates, write simple clear language

What if Party Fails to Show

Motion to Dismiss

Argue Needs of Child/Spouse

Preparing Documents

Do I need to prepare new petitions, answers, motions or violation petitions?

For hearings/trial

Preserving Record for Appeal

Have I stated my objections for the record?

Have I asked for clarification from the Judge or Referee?

Have I asked for the relief that I am seeking: temporary or final order of custody or visitation?

Direct Examination:

What witnesses are available?

Will I be able to overcome client's weaknesses?

What will they testify to? Cross Examination:

Will non-custodial parent or spouse be testifying?

Are documents that I will be introducing certified and authenticated?

On the Record

Stand up when addressing the court

Let your voice and client's voice be heard on the record

Give client note pad to jot notes and avoid interrupting you while on the record

Keep addresses confidential when appearing on the record, if necessary make motion

Know how to enter exhibits

Appealing an Order

Did I receive a copy of the Final Order?

How much time do I have to respond?

Do I need to get a transcript of the hearing?

Is there a legal and factual basis to appeal the final order?

TOOLS AND TIPS FOR CUSTODY VISITATION CASES

In litigating a custody/visitation cases refer to the following sources:

- Family Court Act Articles 4, 5 and 6; Domestic Relations Law (DRL) § 240; Social Services Law (SSL) (Yellowbook 2020 Edition, LexisNexis)
- NYS Penal Law
- NY Civil Practice Law and Rules (CPLR) and Uniform Rules of the Family Court 22 NYCRR §205 et. seq. (Redbook 2018 Edition, LexisNexis)

Temporary and Final Orders

- Always ask for a temporary order of custody and visitation
- Argue need for supervised visits, if necessary
- Investigate the waitlist for the agencies that are able to supervise
- Ensure your client understands temporary nature of supervision

Preserving Case for Appeal

- Always make objections on the record where you disagree with a determination made by the court or where evidence is not being allowed into the record

Preparing for Court

- Know the law
- Read the Family Court Act (FCA), Domestic Relations Law (DRL) and Social Services Law (SSL)
- Read the CPLR provisions relevant to your case
- Know your client – where they work, how much they earn, baby sitting expenses, employability, education, past work history
- Gather as much information about the opposing party's lifestyle and employability
- SPEAK TO YOU'RE HER JUSTICE PRIOR to each court appearance (recommended: at least one week advance notice for mentor to review papers and discuss case and give feedback and strategic advice – DO NOT WAIT UNTIL LAST MINUTE)
- Do not feel pressured to settle a case
- Do not settle a case to avoid discovery or a trial
- Avoid settling a case where the opposing party is not being forthcoming with their income information

- Do not settle a case without getting permission from your client and without discussing first with your client the pros and cons of the settlement agreement
- Let the court know if the opposing party is pressuring or threatening your client
- Always address SAFETY issues with your client
- Avoid Reading from Scripts when taking testimony/cross examining
- Negotiate with opposing party attorney or pro se litigant
- Research case law when handling complex issues

USEFUL WEBLINKS FOR CUSTODY/VISTATION CASES

GENERALLY

- NYS Unified Court System: https://www.nycourts.gov/
- Attorney Directory: https://iapps.courts.state.ny.us/attorneyservices/search?1
- Forms – court prepared forms, http://www.courts.state.ny.us/forms/index.shtml
- WebCivil – Pending and Closed Civil Cases Lookup, including divorces: http://iapps.courts.state.ny.us/webcivil/FCASMain.shtml
- WebCrims Criminal Case Lookup: htttp://iapps.courts.state.ny.us/webcrim_attorney/AttorneyWelcome
- WebFamily – Cases in the Family and IDV Courts Lookup: http://iapps.courts.state.ny.us/fcasfamily/main
- E-Law – Look up for divorce cases: http://www.E-law.com
- Human Resources Administration: www.NYC.gov/hra
- Law Help - Find legal assistance for client's on other areas of law: http://www.lawhelp.org/ny/
- Women's Law.Org Website, http://www.womenslaw.org/

CUSTODY/VISITATION CASES

- Department of Justice – lookup information relating to international/interstate travel: http://travel.state.gov/passport/passport_1738.html
- NYS Parent Education Awareness Program: http://www.nycourts.gov/ip/parent-ed/index.shtml
- The Hague DV Project: https://www.americanbar.org/groups/domestic_violence/our-projects/past-projects/hague-dvproject/

SUPERVISED VISITATION CENTERS AND INDIVIDUALS

Website/Email	Name of Agency/Organization	Contact Person	Phone Number
www.nyspcc.org/nyspcc/	New York Society for the Prevention of Cruelty to Children	Xuan Tran Walsh, Program Manager	212-233-5500, ext. 208
www.safehorizon.org	Safe Horizon Bronx Family Court Supervised Visitation Program	Edwina Wright	718-590-2371, ext. 15
www.safehorizon.org	Safe Horizon Brooklyn Family Court Supervised Visitation Program	Miranda Beiker	718-834-7440
parkanita@aol.com; treatmerightinc@aol.com	St. Luke A.M.E. Church, TREAT ME RIGHT INC., Interfaith of New York	Anita Parker	917-414-2668; 212-870-1300 (receptionist)
smancuso@sco.org	Families Building Community	Shannon Mancuso, LMSW	718-507-0700, ext. 22/23
www.bbbsosrc.com	Big Brothers, Big Sisters of Rockland County	Gillian Ballard	845-634-2199, ext. 5
www.supervisionservices.net	Supervision Services	Carlo Malave, MPA	917-293-1688
www.childandfamilypsychservices.com/	Child & Family Psychological Services	Barbara Burkhard, Ph.D.	631-265-9850
www.yourmentalhealth.net	Clinical Forensic Initiatives	Nadine Mass, LMSW	646-537-1749, ext. 106
www.cfs-nyc.com	Comprehensive Family Services	Richard Spitzer	212-267-2670, ext. 101
www.eac-network.org	Education & Assistance Corp. Long Island Supervised	Dorothy Worrell	516-292-4186

	Visitation Program		
100 Park Avenue New York, NY	Family Matters Resource Group	Ann N. Sydor	212-537-6419
www.forestdaleinc.org	Forestdale - Jamaica Community Partnership Initiative	Larry Edwards	718-263-0740, ext. 301
www.NYCID.org	NY Center for Interpersonal Development	Erin Neubauer Keyes; Sequoia Stalder	718-947-4039
130 Stuyvesant Place, 5th Floor, Staten Island, NY 10301	Staten Island Family Court Services	Maryon Schravendeel	718-727-6500, ext. 313
www.supervisedvisitationexperts.com	Supervised Visitation Experts, Inc.	Carmen Candelario	718-892-4982
www.visitationalternatives.net	Visitation Alternatives, Inc.	Jolie Rothschild; Lori Brino	516-445-6223
www.ywcawpcw.org	YWCA Supervised Visit & Safe Exchange Center	Melinda Kaiser	914-949-6227, ext. 128
161 William Street, 9th Floor, New York, NY 10038	New York Society for the Prevention of Cruelty to Children	Xuan Tran Walsh (program manager)	212-233-5500, ext. 208
1854 Amsterdam Avenue, Suite 108, New York, NY 10031	St. Luke A.M.E. Church TREAT ME RIGHT INC. Interfaith of New York	Anita Parker	917-414-2668
dianecoffey@verizon.net	Dianne Hessman, LMSW Private Therapist	Dianne Hessman, LMSW Private Therapist	718-788-6784, cell: 646-4022933
tibs9@aol.com	Dr. Paul Marcus Private Therapist	Dr. Paul Marcus Private Therapist	516-487-7454
65 Oriental Blvd., 3N, Brooklyn, NY 11235	Eileen Montrose Private Therapist	Eileen Montrose Private Therapist	718-946-8155
www.jayneroberman.com/	Jayne Roberman Private Therapist	Jayne Roberman Private Therapist	646-247-8127
Kathleenbowman1@gmail.com	Kathleen Wilson Private Therapist	Kathleen Wilson Private Therapist	404-200-3268

TRIAL OUTLINE

(Prepare at least one month before trial date)

Name of Client:

Opposing Party:

Judge:

Trial Date:

Issues at Trial:

State which party goes first:

I. Theory of Case:

II. Facts that Support our Theory:

A. Witnesses to call (For each witness, list their admissible testimony and testimony that may have admissibility problems and/or potential impeachment problems) (List in order of how you think you will call).

B. Evidence to be Introduced (List by witness, include potential evidentiary problems and your arguments).

III. Potential Facts that Hurt our Theory

A. Opponent's Anticipated Theory

B. Opponent's Potential Witnesses (Describe possible witnesses, testimony, theory of cross examination, how can you impeach and/or object to witness/admissibility of testimony)

C. Potential Evidence (How could you try to keep it out)

IV. Subpoenas (indicate which are needed and status)

Next Step: Draft Questions for direct and cross (include answers)

NOTARY PUBLIC LAW, FAMILY COURT FORMS, AND E-FILING

Notary Public Law and Family Court Forms

Governor Hochul signed legislation to amend NY CPLR sec. 2106 to expand the use of an "Affirmation of Truth of Statement" in lieu of a notarized sworn statement in civil court actions in New York. This law became effective Jan. 1, 2024 to all actions pending on or commenced after that date.

From that date forward, in place of notarization on any affidavit in a civil action, the client (and any third-party affiants) may instead sign the following statement at the end of the document:

I affirm this ___ day of _____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law. [signature of affiant]

While affirmations instead of affidavits are now an option for many court documents, **we do consider it best practice to continue to notarize documents except where it creates hardship to the client or in an urgent situation** (such as filing an emergency application to the court). As always, please reach out to your Her Justice mentor for guidance in a particular case.

The updated forms with the affirmation language can be found on the New York Unified Court System Website. https://ww2.nycourts.gov/forms/familycourt/index.shtml

E-Filing

As of December 18, 2024 the New York State Electronic Filing System (NYSCEF) is now available for all 5 boros in the NYC Family Courts. NYSCEF is located at: https://iapps.courts.state.ny.us/nyscef/HomePage. Your supervising attorney or managing clerk/attorney at your firm may have a policy or preference as to who in your firm is responsible for e-filing, however you should be familiar with the process as there are certain requirements to e-filing when the other party is unrepresented, and rules covering when a case was commenced "on paper" vs. e-filing.

The NYC Family Courts also make use of the Electronic Document Delivery System (EDDS), located at: https://iapps.courts.state.ny.us/nyscef/SpecialDocumentTransferHome?id=1. This is a system designed for electronic delivery of documents such as letters or evidence to family court clerks' offices as well as individual judges, referees, and magistrates. EDDS is

not a filing system, and should not be relied upon for pleadings, motions, or other documents which requiring processing in the clerk's office.

SECTION 4 –

SAMPLE DOCUMENTS

HER JUSTICE

SECTION 4: SAMPLE DOCUMENTS

A. Cover Page and TOC
B. Notice on Sample Language
C. Sample Documents Notice
D. Sample 1 Petition for Custody
E. Sample 2 Petition for Custody
F. Amended Petition for Custody
G. Petition for Custody Based on Emergency Jurisdiction
H. Petition for Violation of a Court Order
I. Order to Show Cause for Contempt
J. Affirmation in Support of Order to Show Cause for Contempt
K. Affidavit in Support of Order to Show Cause for Contempt
L. Opposition to Modification of Order of Visitation
M. Verified Answer and Cross Petition
N. Petition to Suspend Visitation and Modify Order
O. Order to Show Cause for Emergency Relief
P. Affirmation in Support of Order to Show Cause for Emergency Relief
Q. Affidavit in Support of Order to Show Cause for Emergency Relief
R. Affidavit of Social Worker in Support of Order to Show Cause

NOTICE ON SAMPLE LANGUAGE

Her Justice acknowledges that anyone of any race, age, sexual orientation, gender identity, nationality, religion, socioeconomic background, immigration status, language of fluency, or education level may be victimized by domestic violence[1]. Therefore, we made our materials gender neutral in their discussion of domestic violence, best legal practices, and explanations of the substantive law and practical application of the law. Please note, per standard legal practice, we do not make language edits to direct quotes of legal statute.

However, when it came to our samples, we had to consider additional factors. Court room professionals commonly do not acknowledge the gender pronouns or the chosen name of LGBTQ+ people in the court room. In fact, a Lamba Legal survey of 2,376 LGBTQ+ people found that 19% of the survey respondents who had appeared in a court at any time in the past five years had heard a judge, attorney, or other court employee make negative comments about their sexual orientation, gender identity, or gender expression[2]. The blatant homophobia and transphobia in the court room may result in a client being unfairly scrutinized for gender neutral pronouns being left in court submitted documents. Therefore, we made the decision to use gender neutral names but not gendered pronouns in our samples.

The language used in affidavits, motions, orders, etc. submitted on behalf of your client should reflect the gender pronouns and name they identify with. We encourage you to advocate for your client by affirming their gender identity and sexual orientation in and outside of the court to the extent the client feels comfortable.

[1] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse

[2] as cited in Meyer, E. (2021). Top 7 Best Practices for Representing Transgender and Nonbinary Pro Bono Clients. Proskauer for Good. Proskauer.

SAMPLE DOCUMENTS

Her Justice is providing you with sample documents in this manual for general informational purposes only. You must tailor any samples in this manual or those that your Her Justice mentor provides to you to the specific facts in your client's case. Please refrain from cutting and pasting documents with information that is unnecessary and irrelevant to your case. As there are varying degrees of styles and formats for preparing documents, these serve only as one model. If your firm requires you to follow a particular format, then follow your firm's protocol. Please also refer to the New York State Unified Court System website for additional samples used by the Family Court.

Please shepardize all case law and check legal citations that are used in your papers. Allow sufficient time for the Her Justice mentor to review and provide you with feedback on your pleadings and for service upon all parties. Finally, prior to filing any pleading, discuss with your client for their final approval.

SAMPLE 1: PETITION FOR CUSTODY

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

X In the Matter of a Proceeding under
Article 6 of the Family Court Act

JAY SAMPLE
Petitioner,

File No. 111
Docket No. 11111/18

-against-

PETITION
FOR CUSTODY

LEE SAMPLE,

Respondent.

X TO THE FAMILY COURT:

The undersigned Petitioner, Jay Sample, respectfully shows that:

1. I am the mother and am seeking an order of custody of Jaymie Sample and Jessica Sample (together, the "Children"). I reside at 1708 Norman Street, Apt. 4J, Bronx, New York, 10451.

2. Respondent, Lee Sample, is the father. Respondent resides at 25 Green Avenue, Bronx, New York 10452.

3. The name, gender, current address, age and date of birth of each child who is the subject of this proceeding are as follows:

Name	Gender	Current Address	Date of Birth/Age	Child Resides With
Jessica Sample	F	1708 Norman St, Bronx, NY 10451	5/30/2010 8	Petitioner
Jaymie Sample	F	1708 Norman St, Bronx, NY 10451	5/4/2009 9	Petitioner

4. It would be in the best interests of Jaymie and Jessica to have legal and physical custody awarded to Petitioner. Petitioner is ready and better able than Respondent to care for and supervise the Children for the following reasons:

a. Petitioner has been the primary caregiver of the Children since their birth. During those times in which Petitioner and Respondent lived apart, the Children lived with Petitioner. Petitioner has provided a loving, healthy and stable home environment for the Children.

b. Petitioner has taken an active role in the Children's education, attending school functions and assisting with instruction (elaborate based on your client's circumstances)

c. Petitioner can provide for the Children financially (elaborate based on your client's circumstances).

d. Respondent committed domestic violence against Petitioner throughout their relationship. The following are examples of the pattern of domestic violence that Respondent has committed against Petitioner:

i. On or about 2016, Respondent grabbed Petitioner by the neck and choked her in the midst of an argument. Respondent, who weighed nearly 210 lbs. at the time, was so forceful that he lifted Petitioner up so that her feet were not touching the ground. After Respondent released Petitioner, Respondent put a gun to Petitioner's forehead and said, "I'll kill you." Petitioner later fainted from the stress of the situation.

ii. In or about late January or early February 2017, Respondent pushed Petitioner to the floor and called her a "slut" and a "whore" in front of the Children.

iii. In August 8, 2017, during an argument, Respondent opened the front door and told Petitioner to get out. Petitioner was wearing only pajamas. Respondent would not allow Petitioner back into the apartment. Only after Petitioner called the police from a pay phone across the street and the police came to apartment did Respondent allow Petitioner back into the apartment.

Iv. Respondent threatened to kill the Petitioner by stating: "I don't know why you don't think I couldn't kill you right now." Petitioner filed a complaint with the 44th Precinct following this incident.

v. On or about the 15th day of September 2017, at 1708 Norman Street, Bronx, New York, Respondent in the presence of the Children, repeatedly called Petitioner "a whore" and yelled at Petitioner "You are worthless." Respondent followed Petitioner and kicked the door open to Petitioner's bedroom, attempted to strike Petitioner and threatened to knock out Petitioner's two front teeth, send her to work with a black eye and to hospitalize her. Respondent further threatened "If you don't shut up you'll end up six feet under." "You think that this isn't real, it's real." Respondent then screamed at the Children "I'm gonna knock your mother out", frightening the Children. Respondent continued to scream obscenities like "slut" at the Petitioner in the hallway of the parties' apartment

building, as Petitioner proceeded to leave the residence. Petitioner filed a complaint with the 44th Precinct following this incident.

vi. In the presence of the Children, on or about the 28th day of February, 2018, at 1708 Norman Street Bronx, New York, the Respondent punched Petitioner in the stomach twice with his closed fist, causing Petitioner to hunch over, doubled in pain. Petitioner suffered severe abdominal pains for one week and nausea.

e. Respondent cannot provide a safe and stable environment for the Children. Respondent is not fit to have custody of the Children insofar as he has brought dangerous weapons and drugs into the home and is abusive towards Respondent.

f. During the two months in which Respondent has had visitation with the Children, Respondent has exhibited behavior indicating that custody of the Children would be burdensome to him. Furthermore, Respondent called Petitioner disparaging names in front of the Children.

No previous application has been made before any court or judge for relief herein requested except as described herein.

WHEREFORE, Petitioner mother JAY SAMPLE prays for an order awarding custody to her of the Children JAYMIE SAMPLE and JESSICA SAMPLE, as against Respondent LEE SAMPLE and for such other and further relief as the Court may determine.

Dated: , 20

_____, 20__

_____

Jay Sample Petition

TO: Amy Attorney, Esq.
Law Firm, LLP
14 West Broadway
New York, New York 10007
Attorneys for Respondent

VERIFICATION

I, JAY SAMPLE, being duly sworn, deposes and says: I am the Petitioner in the within action, that I have read and know the contents of the foregoing PETITION FOR CUSTODY; that the same is true to my own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters, I believe it to be true.

_____

Jay Sample Petition

Sworn to before me this

_____, 20__

_____

Notary Public

SAMPLE 2: PETITION FOR CUSTODY

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

X In the Matter of a Proceeding under
Article 6 of the Family Court Act

JAY SAMPLE
Petitioner,

File No. 222
Docket No. 22222/18

-against-

LEE SAMPLE,

Respondent.

PETITION
FOR CUSTODY

X TO THE FAMILY COURT:

The undersigned Petitioner respectfully shows that:

1. Petitioner, JAY SAMPLE currently resides at 123 Main Street, Queens, New York 11316.

2. Petitioner is the Mother of the subject child.

3. Upon information and belief, the Respondent resides at an Unknown Address.

4. Upon information and belief, Respondent is the father of the subject child.

5. The name, gender, current address, age and date of birth of each child who is the subject of this proceeding are as follows:

Name	Gender	Current Address	Date of Birth/Age		Child Resides With
CLAIRE SAMPLE	F	123 Main Street Queens, NY 11326	03/01/03	11	Petitioner-Mother

6. Petitioner was married to the Respondent on June 16, 2012, in the County of New York, State of New York. The marriage has not been terminated.

7. Since birth, the Petitioner has been the sole caretaker of the child, CLAIRE SAMPLE. The Petitioner has fed, bathed, and dressed the child, who has developmental disabilities with her hearing, speech and motor skills. It is the Petitioner who takes the child to her doctor's appointments, hospital procedures and evaluations and takes care of the child when she is ill.

The Petitioner has nurtured the child with little assistance, if any, from the Respondent.

8. Throughout the parties' marriage, the Respondent has subjected the Petitioner to severe physical, emotional, verbal, and sexual abuse. Many of these incidents have occurred in the presence of the parties' child.

9. On or about February 2, 2017, at the marital residence, 123 Main Street, Queens, New York, 11316, the Petitioner returned to the residence after a visit with her sister to find the Respondent waiting behind a closed door. The Petitioner, who was holding the baby, went to the bedroom to put the baby in her bed, the Respondent followed. When the Petitioner attempted to leave the apartment to retrieve other items left in the car, the Respondent started to push the Petitioner, grabbed her by the arm and throwing her onto the couch. The Respondent pulled the Petitioner by the leg off of the sofa, across the floor and into the kitchen, where he waved a knife in front of her face. The Respondent pushed open the door when the Petitioner broke free from the Respondent and ran into the room where the child was. The Respondent thereafter in the presence of the child pushed the Petitioner onto the bed and sexually assaulted the Petitioner. Respondent also threatened to “finish off" the Petitioner.

10. On or about March 3, 2017, at the Petitioner's residence, the Respondent, in the presence of the parties' child, sexually assaulted the Petitioner.

11. On or about April 4, 2017, the Respondent left the marital residence and abandoned the Petitioner and child of the marriage, leaving the Petitioner to pay the rent, household expenses for the marital premises, medical expenses and other necessities for the child.

12. On or about May 5, 2017, the Petitioner drove with the parties' child and met the Respondent in Manhattan to exchange the child for a weekend visitation scheduled by the parties. Upon arriving, the Respondent sat in the passenger seat of the car with the child sitting in between both parties. The Respondent asked the Petitioner where she was going and stated he wanted the car. Petitioner explained that she had plans and needed the car. The Respondent pushed the child and grabbed the car keys from Petitioner's hands by twisting Petitioner's arm. The child began to cry and the Respondent stated if he could not have the car he would refuse to take the child for the weekend. The Respondent thereafter exited the car without the child. Upon information and belief, the Respondent was arrested on or about May 2017 following this incident.

13. The Petitioner was granted a final Order of Protection by the Criminal Court, Queens County, on or about January 15, 2018, under the docket number O- 34521/17 (See Exhibit 1.)

14. The Respondent has made derogatory statements to the child, regarding her black skin and nose. On several occasions the Respondent has stated that he will buy “skin lightener” since the child was black and this will make the child lighter skinned. Respondent has also stated that the child should have a nose job since she did not have a European nose. The Petitioner believes that such statements will have a damaging effect on the child's self-esteem.

15. The Petitioner has been the sole caretaker of Claire Sample. The Petitioner has provided a loving and stable environment for the child. The Respondent has provided no assistance financial or otherwise with regards to raising the parties' child and treatment for her condition. Furthermore, the Respondent is violent physically and sexually.

16. It is in the best interest of the child that custody is granted to the Petitioner. The Petitioner is best able to provide an environment where the child will be able to thrive.

WHEREFORE, Petitioner prays for an order awarding custody of the child named herein to JAY SAMPLE and for such other and further relief as the court may determine.

Dated: , 20

, New York

_____

Jay Sample, Petitioner

STATE OF NEW YOURK)
) ss.:
COUNTY OF NEW YORK)

VERIFICATION

I, JAY SAMPLE, being duly sworn, deposes and says: I am the Petitioner in the within action, that I have read and know the contents of the foregoing PETITION FOR CUSTODY; that the same is true to my own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters, I believe it to be true.

_____

JAY Sample

Sworn to before me this

_____, 20__

_____

Notary Public

SAMPLE: AMENDED PETITION FOR CUSTODY

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

X In the Matter of a Proceeding under
Article 6 of the Family Court Act

JAY SAMPLE
Petitioner,

File No. 333
Docket No. 33333/18

-against-

LEE SAMPLE,

Respondent.

AMENDED PETITION
FOR CUSTODY

X TO THE FAMILY COURT:

The undersigned Petitioner, Jay Sample, respectfully shows, as and for her Amended Petition for an Order of Custody:

1. Petitioner Jay Sample resides at 1708 Norman Street, Apt. 4J, Bronx, New York, 10451.
2. Respondent Lee Sample resides at 25 Green Avenue, Bronx, New York, 11832.
3. Petitioner and Respondent are married; Respondent is the father of the Children and Petitioner is the mother.
4. This proceeding is commenced pursuant to Article 6 of the Family Court Act.
5. The name, gender, current address, age and date of birth of each child who is the subject of this proceeding are as follows:

Name	Gender	Current Address	Date of Birth/Age	Child Resides With
Jessica Sample	F	1708 Norman St, Bronx, NY 10451	5/30/2010 18	Petitioner
Jaymie Sample	F	1708 Norman St, Bronx, NY 10451	5/4/2009 9	Petitioner

6. Petitioner and Respondent were married on January 1, 2002 in a civil ceremony in the country of Japan.
7. It would be in the best interests of the Children to have legal and physical custody awarded to the Petitioner for the following reasons:
    a. Petitioner is the priJay caretaker of the Children, and since their respective births has exercised the priJay responsibility for their upbringing. Petitioner has provided a loving, healthy and stable home environment for the Children. Petitioner is solely responsible for caring for the Children.
    b. Petitioner has taken an active role in the Children's education, attending school functions and assisting with instruction.
    c. Respondent has exhibited behavior indicating that custody of the Children would be burdensome to him. Respondent has taken little interest in the Children, and has only infrequently visited with the Children since January 2015.
    d. Respondent only helps out with the children and their care on a sporadic basis. Additionally, Respondent has failed to consistently provide financial support for the Children.
    e. Respondent, upon information and belief, is currently seeing another woman who in or about July 2017 repeatedly called the marital residence and harassed Petitioner.

f. Respondent has repeatedly committed domestic violence against Petitioner throughout their relationship. Respondent has committed abusive acts against Petitioner including, but not limited to:

   i. From in or about the winter of 2017 continuing to the present time, Respondent has subjected Petitioner to severe physical, emotional and verbal abuse.

   ii. In or about the winter of 20179, Respondent sold all of Petitioner's possessions without consulting Petitioner. Respondent kept his actions secret and Petitioner only learned of the sales from someone in Japan. When Petitioner attempted to discuss with Respondent his actions, Respondent punched Petitioner in the face with a closed fist and choked Petitioner around her neck.

   iii. In or about January 2018, Respondent verbally assaulted Petitioner concerning her attempt to obtain employment. Respondent ridiculed Petitioner's attempt to obtain employment, repeatedly insulting her and called her names including "slut." Respondent refused to allow Petitioner to work outside the home, accusing Petitioner of marital infidelity. iv. In or about January 2018, in response to Petitioner's employment, Respondent verbally abused Petitioner, punched Petitioner in the chest and destroyed marital furniture.

g. Petitioner has been the sole caretaker of the Children, consistently providing a loving and stable environment for the Children. In contrast, Respondent has not taken an active role in the care of the Children and repeatedly subjected Petitioner

to severe physical, emotional and verbal abuse. Respondent cannot provide a safe and stable environment for the Children.

WHEREFORE, for the foregoing reasons, Petitioner prays for an order awarding custody for the children Jaymie Sample and Jessica Sample to the Petitioner and for such other and further relief as the Court may determines to be just and proper.

Dated: , 20

, New York

_____

Petitioner Jay Sample

LAW FIRM, LLP
By: Name of Attorney
123 Broad Street
New York, New York 10005
(212) 555-1212
Attorneys for Petitioner

VERIFICATION

STATE OF NEW YORK)

ss.:)

COUNTY OF BRONX)

Petitioner Jay Sample, being duly sworn, deposes and says: I am the Petitioner in the abovenamed action; I have read and know the contents of the foregoing Petition; that the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, I believe it to be true.

_____

Jay Sample, Petitioner

Sworn to before me this

day of June, 2018

Notary Public

SAMPLE: PETITION FOR CUSTODY BASED ON EMERGENCY JURISDICTION

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

X In the Matter of a Proceeding under
Article 6 of the Family Court Act

JAY SAMPLE
Petitioner,

File No. 444
Docket No. 44444/18

-against-

PETITION
FOR CUSTODY

LEE SAMPLE,

Respondent.

X TO THE FAMILY COURT:

The undersigned Petitioner respectfully shows that:

1. Petitioner resides at 123 Field Street, New York, New York, 10001.
2. Petitioner is the mother of the subject children Chris Sample and David Sample.
3. Upon information and belief, Respondent resides at 987 Main Street, Georgia, 10000.
4. Respondent is the biological father of the aforementioned children. Respondent and Petitioner are not married.
5. This proceeding is commenced pursuant to sections 651 and 656 of the Family Court Act; and Domestic Relations Law S. 75-d (1)(c), granting jurisdiction over child custody determinations to the state in which the child is physically present in an emergency situation.
6. The name, present address, age and date of birth of each child affect by this proceeding are as follows:

Name	Gender	Current Address	Date of Birth/Age		Child Resides With
Chris Sample	M	170 Field St New York, NY 10001	04/03/13	5	Petitioner – Mother

7. The children have been in Petitioner's custody since their birth on April 3, 2013.
8. It would be in the best interests of the children to have custody awarded to the Petitioner for the following reasons:
    a. The Petitioner has been the only caretaker for the children since their birth and has exercised the only responsibility for the children's upbringing for all of their lives to date. Petitioner has provided all emotional, physical, financial and other support for the children. Petitioner feeds and clothes the children, provides them with a safe place to live, takes care of the them around-the-clock, bathes and plays with them during the day, puts them to sleep at night and gets them up in the morning, and takes them to the doctor when they are sick and for regular checkups; and
    b. The Respondent has not contributed any emotional, physical, financial or other support for the children since their birth. The Petitioner and her children are now on public assistance in New York County and are receiving food stamps as a result; and
    c. The Respondent is not a fit custodial parent because he is an extremely violent and physically abusive father and spouse. As a result of his violence towards petitioner and her children, they were forced to flee their home in Atlanta, Georgia and to live with Petitioner's mother in New York. Respondent has committed the following acts of violence against Petitioner and her children:
        i. On April 6, 2017, as Petitioner was leaving the hospital with the twins, Respondent attacked petitioner outside the hospital and kicked and beat Petitioner in the face. Witnesses were able to get Petitioner back inside where she was given stitches before being released. A warrant was issued for Respondent's arrest on April 9, 2017, on the criminal charge of unlawful assault. Respondent could not be found.
        ii. On September 20, 2017, while Respondent was still at-large, Respondent came to Petitioner's home and attempted to kill her and her children. Respondent kicked on Petitioner's front door, screaming obscenities at her and her children inside, ordering Petitioner to open the door. Respondent then grabbed a large lead pipe and began bashing Petitioner's door in. Petitioner called 911.
        iii. When 911 did not respond in a timely fashion and the door to Petitioner's apartment began to give way, Petitioner told Respondent she would come outside and talk to him if he would agree to move away from the apartment and leave the children alone. When Petitioner came outside to speak to Respondent, he attempted to hit her on the head with the lead pipe and screamed he was going to kill her. The police arrived and arrested Respondent.
        iv. Respondent posted bail the next day and began to stalk Petitioner and her children again. Respondent continued to harass and stalk Petitioner and her children through January 1, 2017. He repeatedly threatened her life. Petitioner called the police several times for help, but they "could never locate" respondent. Finally, Petitioner contacted Victim's Services in Georgia, and they helped her and the children relocated to New York.

v. On February 3, 2017, Petitioner received a phone call from respondent at her mother's home. Respondent told petitioner, "you're dead". Petitioner immediately petitioned and received a Temporary Order of Protection against Respondent in New York Family Court.

No previous application has been made to any court or judge for the relief herein requested.

WHEREFORE, Petitioner prays for:

a. This Court to assume jurisdiction over this custody determination pursuant to Domestic Relations Law s.75-d (1)(c), because the subject children and their mother, the Petitioner, have had to flee Georgia for their safety and to save their lives;
b. An order awarding sole custody of the children named herein to Petitioner;
c. Pursuant to section 656 of the Family Court Act, an Order for Protection on behalf of Petitioner and against Respondent, lasting until the aforementioned twin children reach the age of majority;
d. Immediate assignment of free counsel by the Court to assist Petitioner in serving respondent and in preparing her case for a custody hearing; and
e. And for such other and further relief as the Court may determine

Dated: , 20

_____, New York

_____
Jay Sample, Petitioner

VERIFICATION

STATE OF NEW YORK)

ss.:)

COUNTY OF BRONX)

JAY SAMPLE, being duly sworn, deposes and says: I am the Petitioner in the abovenamed action; I have read and know the contents of the foregoing Petition; that the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, I believe it to be true.

_____

Jay Sample

Sworn to before me this

day of June, 2018

Notary Public

SAMPLE: PETITION FOR VIOLATION OF A COURT ORDER

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

X In the Matter of a Proceeding under
Article 6 of the Family Court Act

JAY SAMPLE
Petitioner,

File No. 523
Docket No. 56789/18

-against-

PETITION VIOLATION OF A COURT ORDER

LEE SAMPLE,

Respondent.

X TO THE FAMILY COURT:

The undersigned Petitioner respectfully shows that:

1. Petitioner resides at 123 Field Street, New York, New York, 10001.
2. By Order of this Court, dated October 30, 2017, Respondent was directed to observe the following conditions of behavior: Mother to have custody of the twin children, Chris and David, dob: 4/3/13 Monday – Friday, Father to have weekend visitation, Saturday 10am – 8pm and Sunday from 10am to 8pm with pickup and drop-off at Petitioner's home.
3. Upon information and belief, Respondent has willfully failed to obey the Order of this Court in that: Now Respondent-father failed to return the child on time, returning the child at 11pm in the month of November 2017. Respondent-father repeatedly failed to return the child after asked and Petitioner had to be escorted by the police to pick up the child who was left at the grandmother's home in the care of a 10 year old cousin.
4. Respondent has defeated, impaired, impeded or prejudiced the rights or remedies of Petitioner, in that: Respondent failed to follow the visitation schedule and left the infant children in the care of a 10 year old.
5. No previous application has been made to any judge for the relief herein requested.

WHEREFORE, Petitioner respectfully requests that the order of the Family Court dated October 30, 2017, be enforced in accordance with Article 6 of the Family Court Act and for such other relief as the court may deem just and proper.

Dated: _____, 20

_____, New York

_____

Jay Sample

Sworn to before me this

_____, day of November, 20___

Notary Public

SAMPLE ORDER TO SHOW CAUSE FOR CONTEMPT

NOTICE: THE PURPOSE OF THIS HEARING IS TO PUNISH YOU FOR A CONTEMPT OF COURT. SUCH PUNISHMENT MAY CONSIST OF FINE OR IMPRISONMENT, OR BOTH, ACCORDING TO LAW.

WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.

At a term of the Family Court of the State of New York held in and for the County of Queens, at 89-14 Parsons Blvd., Jamaica, New York, on January 8, 2017

PRESENT: HON. _

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

X In the Matter of a Proceeding under
Article 6 of the Family Court Act

JAY SAMPLE
Petitioner,

File No. 623
Docket No. 6789/18

-against-

ORDER TO SHOW CAUSE

LEE SAMPLE,

Respondent.

X TO THE FAMILY COURT:

Upon the annexed affirmation of Adam Attorney, Esq. and affidavit of Petitioner JAY SAMPLE, both sworn to on January 4, 2018, and upon all prior papers and proceedings filed and had herein, it is hereby

ORDERED that Respondent show cause before Hon. Justine Hunt of this Court on January , 2017 in Part , at , or as soon thereafter as counsel may be heard why an order should not be entered: (1) punishing Respondent, pursuant to New York Civil Practice Law and Rule 5104, Family Court Act Section 156, and Judiciary Law Sections 750, 753, and 756, by fine or imprisonment or both, for contempt of Court for his failure to comply with the terms of this Court's Final Visitation Order entered on August 27, 2017 ("the Final Visitation Order"); (2) enforcing the Final Visitation Order by enjoining Respondent from further violating its terms; and (3) granting Petitioner such further relief as the Court may determine, and it is further

ORDERED that pending the aforesaid hearing, Respondent is hereby directed to immediately comply with the terms of the Final Visitation Order.

LET service by overnight mail of a copy of this Order together with the papers upon which it is based to Respondent at his home address at 111 Main Street, Brooklyn, NY 12222 and to Respondent's attorney of record in this matter (Docket No. V-12345/06) Justin Thyme, Esq. at 111-11 Queens Boulevard, Suite 2220, Forest Hills, New York 675-7205, on or before January 31, 2018, be deemed good and sufficient service thereof.

Dated: _____, 20

_____, New York

ENTER

Hon._____

SAMPLE: AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE FOR CONTEMPT

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

X In the Matter of a Proceeding under
Article 6 of the Family Court Act

JAY SAMPLE
Petitioner,

File No. 623
Docket No. 6789/18

-against-

LEE SAMPLE,

AFFIRMATION IN SUPPORT OF PETITIONER'S ORDER TO SHOW CAUSE

Respondent.

X TO THE FAMILY COURT:

AMY ATTORNEY, an attorney duly admitted to the practice of law in New York State, affirms:

I am an attorney with the law firm of _____, attorneys for Petitioner JAY SAMPLE. I am fully familiar with all matters set forth in this affidavit, either from personal knowledge, documents I have reviewed, or information provided to me by Petitioner. I submit this affidavit in support of Petitioner's Order to Show Cause to hold Respondent in contempt of court for failing to comply with this Court's Final Visitation Order dated August 27, 2013 ("the Final Visitation Order") and to require Respondent to immediately comply with its terms.

1. Respondent Lee Sample was awarded custody of Sarah, the child who is the subject matter of this action, pursuant to a default judgment entered by this Court on February 24, 2016. On July 17, 2016, this Court entered an Order Directing Visitation that granted Petitioner visitation rights with Sarah. On May 3, 2017, Petitioner filed with this Court a petition to enforce her visitation rights based on Respondent's violations of this Court's Order Directing Visitation. On July 9, 2017, this Court granted Petitioner extended visitation pursuant to a Temporary Order of Visitation. On August 9, 2017, Petitioner filed with this Court a petition to modify its February 24, 2016 custody order. After the petition was filed, this Court entered three Temporary Orders of Visitation in favor of Petitioner, dated October 24, 2017, January 17, 2018, and April 9, 2018.

2. On May 10, 2018, Petitioner, due to Respondent's harassing conduct, petitioned this Court to enforce her visitation rights. This Court granted Petitioner extended visitation with Sarah pursuant to an All Purpose Short Order dated May 10, 2018.
3. On May 27, 2018, this Court entered the Final Visitation Order. Respondent was present when this Court entered the Final Visitation Order and was represented by counsel.* Attached hereto as Tab A to Exhibit A is a true and correct copy of the Final Visitation Order.
4. As set forth in greater detail in Ms. Sample's Affidavit in Support of Petitioner's Order to Show Cause, attached hereto as Exhibit A, Respondent willfully violated the clear and express terms of the Final Visitation Order. The Final Visitation Order unequivocally states that Petitioner is entitled to have visitation with Sarah on the first, third, and fourth weekend of every month. See Ex. A. Since this Court entered the Final Visitation Order on May 27, 2018 through the date of this affidavit, Petitioner was entitled to every weekend visits with Sarah. Respondent refused to allow Petitioner to exercise her visitation rights on seven out of those eleven weekends.
5. Respondent recently filed a Complaint for Custody and Visitation in the Family Division of the Superior Court of Essex County, New Jersey ("the New Jersey complaint") on November 26, 2017 seeking to: (1) terminate Petitioner's parental rights; (2) discontinue visitation between Petitioner and Sarah; and (3) vacate all prior orders of this Court providing for visitation between Petitioner and Sarah. Attached hereto as Tab B to Exhibit A is a true and correct copy of the complaint filed by Respondent.
6. Petitioner Sample does not ask this Court to interfere in any way with the New Jersey proceedings recently commenced by Respondent. However, this Court's Final Visitation Order is still in effect and has not been superseded by any other Order of this or any other Court. Since it was entered, Respondent has violated this Court's Final Visitation Order and deprived Petitioner of his visitation rights, including over the holiday. Further, he has stated his intention to continue to violate the Order by denying Petitioner all future visitation with Sarah, including the Christmas and New Year's holidays.
7. Respondent has also violated the Final Visitation Order by: (1) failing to allow Petitioner to have regular telephonic visitation with Sarah; (2) removing Sarah from pre-school without consulting Petitioner; and (3) refusing to provide Petitioner with his contact information at work. Attached hereto as Exhibit B is a true and correct copy of a letter from Tea Cher of Kidcare, Inc., indicating that Respondent removed Sarah from their program.
8. Respondent's willful violations of the Final Visitation Order have prejudiced and impaired Petitioner's visitation rights and have prevented Petitioner from playing any role in her son's development.
9. No prior application for the same or similar relief has been made to this or any other Court.

WHEREFORE, it is respectfully requested that the Court grant the application to hold Respondent in contempt of the Court's Final Visitation Order, dated August 27, 2017, and direct Respondent to immediately comply with its terms.

Dated: May 30, 2018

New York, NY

LAW FIRM, LLP

By: Amy Attorney, Esq.
14 Broadway
Suite 12
New York, New York 10005
(212) 555-2014

SAMPLE: AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE FOR CONTEMPT

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

X In the Matter of a Proceeding under
Article 6 of the Family Court Act

JAY SAMPLE
Petitioner,

File No. 623
Docket No. 6789/18

-against-

AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE

LEE SAMPLE,

Respondent.

X STATE OF NEW YORK)
ss.:
COUNTY OF KINGS)

JAY SAMPLE, being duly sworn, deposes and says:

I am the Petitioner in this matter and submit this affidavit upon personal knowledge in support of Petitioner's application to hold Respondent LEE SAMPLE ("Respondent") in contempt of Court for violating this Court's Final Visitation Order entered on May 27, 2018 ("the Final Visitation Order") and to enforce the Final Visitation Order by enjoining Respondent from further violating its terms.

BACKGROUND

1. I am the mother of SARAH SAMPLE, ("SARAH"), born July 20, 2014. I presently reside at 123-12 Linden Boulevard, South Ozone Park, New York 11423.
2. Respondent is Sarah's father and custodial parent. Respondent presently resides at 773 North 6th Street, Newark, New Jersey 07107.

3. Respondent petitioned this Court for custody of Sarah on December 3, 2014. Respondent was awarded custody of Sarah pursuant to a default judgment entered by this Court on February 24, 2016. See Ex. 3. I petitioned this Court for visitation rights on March 9, 2017. This Court granted me visitation rights pursuant to an Order Directing Visitation entered on July 17, 2017. See Ex. 4.
4. I petitioned this Court on May 3, 2018 to enforce my visitation rights based on Respondent's violations of this Court's July 17, 2017 Order Directing Visitation. This Court granted me extended visitation with Sarah pursuant to a Temporary Order of Visitation entered on July 9, 2017. See Ex. 5.
5. I subsequently petitioned this Court on August 9, 2017 to modify its prior Order granting custody of Sarah to Respondent. This Court entered two Temporary Orders of Visitation on January 17, 2018 and April 9, 2018 that granted me visitation with Sarah for three weekends every month, along with extended visitation in the summer. See Ex. 6, 7.
6. On May 10, 2017, I petitioned this Court to modify my visitation rights. This Court entered an All Purpose Short Order on June 10, 2017 that clarified and affirmed my visitation rights with Sarah. See Ex. 8.
7. On August 27, 2017, this Court entered the Final Visitation Order. See Ex. 1 Respondent and his counsel were present on August 27, 2017 when this Court entered the Order. The Order provides that I have visitation with Sarah on the first, third, and fourth weekends of every month, regular telephonic visitation with Sarah, and meaningful input into major decisions affecting Sarah, such as his schooling.
8. Respondent has failed to comply with the terms of the Final Visitation Order. The Final Visitation Order provides that Respondent must bring Sarah to the police precinct closest to my home, which is the 76th Street Police Precinct, on the weekends that I am entitled to visitation with Sarah. See Ex. 1 ¶ 6(a). Respondent has refused to bring Sarah to the 76th Street Police Precinct on at least seven occasions since this Court entered its Final Visitation Order, depriving me of seven weekends with my son. As described in greater detail below, I have not seen my son since the first weekend in September. Similarly, Respondent has interfered with my telephonic visitation with Sarah and failed to consult me about withdrawing Sarah from pre-school.
9. On September 27, 2017, Respondent filed a Complaint for Custody and Visitation in the Family Division of the Superior Court of Essex County, New Jersey ("the New Jersey Complaint"). This Court's Final Visitation Order was attached to the New Jersey Complaint. In the New Jersey Complaint Respondent seeks to: (1) obtain permanent custody of Sarah; (2) discontinue my visitation with Sarah; and (3) vacate all of the Court's prior visitation Orders. See Ex. 2. In addition, it appears that Respondent is trying to terminate my parental rights.
10. Since filing the New Jersey Complaint, Respondent has stated that, notwithstanding the Final Visitation Order, he will not allow me to see Sarah. In addition, Respondent has refused to communicate with me at all. Respondent instructed me to communicate with his New Jersey attorney.
11. My visitation rights have been violated and I fear that he will continue to deny me any contact with Sarah in the subsequent weeks and upcoming holidays. I request that Respondent be held in contempt of Court for violating the Final Visitation Order and enjoined from further violating its terms.

DENIAL OF VISITATION RIGHTS

12. The Final Visitation Order provides that I have visitation with Sarah on "the first, third, and fourth weekend of every month from Saturday at 10:00 a.m. until Sunday at 7:00 p.m." See Ex. 1 ¶ 6(a). Visitation exchanges are to occur at the 106th Street Police Precinct. See id. Between July and August 2013, Respondent moved with Sarah to Newark, New Jersey, approximately two hours away from where I live. Because I do not have a car, the Final Visitation Order provides that Respondent is "solely responsible" for transporting Sarah to the 106th Street Police Precinct. See id. Respondent has repeatedly failed to bring Sarah to the precinct for my weekend visitations.
13. Pursuant to the Final Visitation Order, I was entitled to six weekend visits with Sarah during September and October 2017. See Ex. 1 ¶ 6(a). Respondent deprived me of three of these weekend visits. Respondent called me at home every Friday night before each of these missed visits and stated that Sarah was too sick to see me. Despite my repeated requests, Respondent never provided me with a doctor's note or any other information regarding Sarah's sickness.
14. According to the Final Visitation Order, I was also entitled to weekend visitation with Sarah during the third weekend in September 2017 (September 16 and 17). See Ex. 1 ¶ 6(a). On Saturday morning, September 16, 2017, I called Respondent at home. I informed Respondent that I was running late but intended to exercise my weekend visitation with Sarah. I requested that Respondent bring Sarah to the 76th Police Precinct one hour later than the Court-ordered visitation exchange time of 10:00 a.m. Respondent refused my request and stated that he would not bring Sarah to the precinct at all. Consequently, I was unable to see Sarah that weekend.
15. Pursuant to the Final Visitation Order, I was entitled to weekend visitation with Sarah during the fourth weekend of September 2017 (September 23 and 24). See Ex. 1 ¶ 6(a). On Friday night, September 22, 2017, Respondent called me at home and informed me that Respondent was too sick to bring Sarah to the 76th Police Precinct the following morning. I pleaded with Respondent to transport Sarah to the precinct. I suggested that someone else, such as Respondent's wife, bring Sarah to the precinct. Respondent refused. Therefore, I was also unable to spend that weekend with Sarah.
16. The Final Visitation Order stated that I was entitled to weekend visitation with Sarah for Thanksgiving weekend from "6 P.M. on Wednesday to 7 P.M. on Sunday"

    (September 27 – October 1, 2013). See Ex. 1 ¶ 6(e). I contacted Respondent at home on Tuesday, September 26, 2013 at approximately 9:00 p.m. to remind him that I had the right to spend Thanksgiving weekend with Sarah. Respondent informed me that he did not want to bring Sarah to the 106 Police Precinct the following day. I told Respondent that I was getting off work early on Wednesday, September 27, 2013 and could meet Respondent at a convenient time and location to pick up Sarah. Respondent stated that he would call me back.

17. Respondent contacted me at work on Wednesday, September 27, 2017, at approximately 2:30 p.m. and stated that he would bring Sarah to my apartment at approximately 9:30 p.m. that evening. After work, I went home and waited for Respondent. Respondent never appeared. I called Respondent at home repeatedly between 9:30 p.m. and 10:00 p.m., but no one answered the phone. Respondent finally answered his phone a little after

10:00 p.m. I asked Respondent why he had not brought Sarah to my apartment that night. Respondent stated that he would not allow Sarah to spend any of the Thanksgiving holiday with me. Respondent then informed me that court papers would be served on me the following morning. Respondent ended this conversation by stating that he would no longer speak to me. Respondent instructed me to speak with his New Jersey attorney. The following morning I was served with the New Jersey Complaint.

18. In an attempt to see Sarah, I left messages on Respondent's home telephone answering machine on Thursday, October 5, 2017 and Friday, October 6, 2017. I reminded Respondent that, pursuant to the Final Visitation Order, I was entitled to spend the first weekend in October with Sarah. Respondent never called me back. I was unable to see Sarah for the fourth weekend in a row.
19. Because of Respondent's refusal to comply with the Final Visitation Order, I have not seen Sarah in over five weeks.
20. Pursuant to the Final Visitation Order, I am entitled to spend the third and fourth weekends of October, Christmas Day, New Year's Eve, and New Year's Day with Sarah. See Ex. 1 ¶ 1(a), (f), (g). I request that this Court enforce the Final Visitation Order so that I may see my son over the upcoming holidays and that it hold Respondent in contempt of Court for failing to comply with the Final Visitation Order.

RESPONDENT HAS DENIED TELEPHONIC VISITATION WITH SARAH

21. The Final Visitation Order entitles me to telephonic visitation with Sarah from Monday to Thursday between 6:30 p.m. and 7:00 p.m., and on Fridays between 8:00 p.m. and 8:30 p.m. See Ex. 1 ¶ 6(h). Upon information and belief, Respondent has caller identification and has been screening his home telephone calls to prevent me from speaking to my son. I have called Respondent's residence approximately three times each week during the designated time periods since the middle of October 2013. Virtually every time I call there is either no answer, the telephone line is busy, or the telephone answering machine picks up. When I have left messages, Respondent has, with few exceptions, not called me back. The last time that I spoke to my son on the telephone, which was also the last time I had any contact with my son, was the second week in September 2013.

RESPONDENT FAILED TO INFORM ME THAT

HE WAS WITHDRAWING SARAH FROM PRE-SCHOOL

22. The Final Visitation Order provides that I "shall have meaningful input into decisions affecting Child before final decisions are made." See Ex. 1 ¶ 3. These decisions include those relating to Sarah's education. See id. In addition, the Final Visitation Order states that Respondent shall keep me "fully advised" of Sarah's progress in school. See id. ¶ 10. Respondent has failed to comply with these provisions.
23. Sarah attended Kidcare, Inc. for pre-school, beginning in the summer of 2017. On Monday, October 2, 2017, I contacted TEA CHER, the Head Teacher at the pre-school, to inquire about Sarah's progress. When I spoke with Head Teacher she informed me that

Respondent removed Sarah from the pre-school in August 2017. I have no idea where, or even if, Sarah is enrolled in pre-school.

24. Respondent never consulted me about withdrawing Sarah from his pre-school and did not even inform me of this major change affecting Sarah's life.

WHEREFORE, I respectfully request that this Court grant my application to hold Respondent in contempt of Court for violating the Final Visitation Order and to enforce the Final Visitation Order _____ by enjoining Respondent from further violating its terms.

_____

Jay Sample

Sworn to before me this

_____, day of May, 20__

Notary Public

SAMPLE: OPPOSITION TO MODIFICATION OF ORDER OF VISITATION

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

X In the Matter of a Proceeding under
Article 6 of the Family Court Act

JAY SAMPLE
Petitioner,

File No. 723
Docket No. 7890/18

-against-

OPPOSITION TO MODIFICATION OF ORDER OF VISITATION

LEE SAMPLE,

Respondent.

X TO THE FAMILY COURT:

The undersigned Respondent, JAY SAMPLE, respectfully shows that:

1. Jay Sample is the Respondent in the above-entitled proceeding and resides at 123 Main Street, Queens, NY 11312.

2. On information and belief, Petitioner, LEE SAMPLE, in the above-entitled proceeding, resides at 987 Union Turnpike, Queens, NY 11336.

3. An order of Visitation was entered in this proceeding on February 23, 2016 wherein it was directed that, beginning on March 2, 2016, LEE SAMPLE could visit with both children, STEVE and SANDRA SAMPLE, at the maternal grandmother's home on alternate Saturdays, from 2:00pm to 4:00pm.

4. For the reasons set forth below, Respondent JAY SAMPLE respectfully opposes Petitioner's request to have visitation away from the maternal grandmother's home.

PETITIONER'S VISITATION WITH SANDRA SAMPLE

5. Visitation with SANDRA SAMPLE, the parties' three year old daughter, should continue to be supervised by the maternal grandmother because Petitioner constitutes a danger to the well-being of the child.

a. Petitioner Lee Sample has repeatedly violated this Court's 2012 Order of Protection by harassing the Cross-Petitioner and causing her to fear for her children's safety. For example, on October 13, 2017, Lee Sample told the children's maternal grandmother that he would "take the children no matter what the court said." Similarly, on December 24, 2017, Cross-Respondent states that he would do "whatever it takes" to see his children. He has also threatened, on numerous occasions, to kidnap the children and flee to Nicaragua, his native country.

b. Petitioner Lee Sample has an alcohol and drug problem and has repeatedly violated the February 23, 2017 Order of Protection by arriving at the April 13, June 8 and August 3, 2017 visitation sessions while under the influence of alcohol.

c. Petitioner Lee Sample has a history of physical, verbal and emotionally abusive behavior, particularly toward Respondent Jay Sample and daughter Sandra Sample.

d. Although violence was not, on information and belief, directed by Lee Sample at the younger child, Sandra, his past acts of domestic violence are relevant to considering Sandra's safety and welfare in resolving isJays regarding the modification of the existing visitation arrangements.

e. Sandra Sample is three years old; it would therefore be proper to restrict visitation to the custodial residence until the child reaches a more suitable age. However, because the relationship between the Petitioner and the Respondent is so strained, Respondent believes it to be in the best interest of the child to have the visitation supervised outside of her house.

g. The only appropriate supervisory relative is the maternal grandmother and there are no other parties available to supervise.

PETITIONER'S VISITATION WITH SANDRA SAMPLE

6. As set forth in the accompanying Cross-Petitioner, visitation with Sandra Samle, the parties' daughter, should be terminated.

7. Should the Court deny Lee Sample's aforementioned Cross-Petition, Respondent Jay Sample opposes Lee Sample's petition for visitation with SANDRA SAMPLE away from the maternal grandmother's home for the reasons set forth below.

a. Respondent opposes the petition on the grounds set out above in Paragraphs 5(a), (b), (c), and (d).

b. Constituting a form of emotional and mental abuse, Lee Sample's relationship with Sandra has been characterized by intermittent harassment of the child. Where such a parent/child breakdown is evident, visitation should be supervised.

c. Lee Sample's drinking before visitation heightens Sandra's anxiety that her father will hurt her or make good on his repeated threats to take her away from her mother. Furthermore, his drinking before visitations increases the very real threat of violent behavior. In the past, Lee's violent episodes have been precipitated by his alcohol abuse; it was for this very reason that the Honorable Judge Simon forbade him, in the February 23, 2017 Order of Protection from seeing his daughters while under the influence of alcohol.

d. Sandra is terrified of her father, and continually expresses her desire not to see him. Taking the child away from the environment provided by the maternal grandmother's home would only heighten her anxiety during the forced visitation.

8. No previous application has been made to any court or judge for the relief herein requested, except for Respondent's Cross-Petition for Modification of Order of Visitation, submitted together with these papers.

WHEREFORE, Respondent JAY SAMPLE respectfully prays that Petitioner LEE SAMPLE's Petition for Modification of Order of Visitation be denied, and for such other relief as to which the court may deem just and proper.

Dated: _____, 20

_____, New York

_____

Jay Sample, Respondent

SAMPLE: VERIFIED ANSWER AND CROSS PETITION FOR CUSTODY

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

X In the Matter of a Proceeding under
Article 6 of the Family Court Act

JAY SAMPLE
Petitioner,

File No. 823
Docket No. 89123/18

-against-

VERIFIED ANSWER AND CROSS PETITION FOR CUSTODY

LEE SAMPLE,
Respondent.

TO THE FAMILY COURT:

STATE OF NEW YORK)

COUNTY OF RICHMOND)

Respondent JAY SAMPLE, ("Respondent Mother"), by her attorney, Adam Attorney, Esq., as and for her Verified Answer and Cross Petition for Custody in answer to the Petition for Custody and Order to Show Cause (together the "Custody Petition") filed by Petitioner LEE SAMPLE ("Petitioner Father") on January 1, 2017 responds and alleges as follows:

1. Respondent Mother denies knowledge and information sufficient to admit or deny the allegations set forth in paragraph one (1) of the Custody Petition.

2. Respondent Mother admits the allegations set forth in paragraph two (2) of the Custody Petition.

3. Respondent Mother denies the allegations set forth in paragraph three (3) of the Custody Petition, and states that Fidel Sample's present address is 108 Ferry Street Tottenville, New York, 10312.

4. Respondent Mother admits the allegations set forth in paragraph four (4) of the Custody Petition.

5. No allegations are set forth in paragraph five (5) of the Custody Petition and Respondent Mother therefore denies the allegations set forth in paragraph five (5) of the Custody Petition, and states that there is an order of protection and custody petition currently pending in the Family Court of the State of New York, County of Richmond under File #:823 and docket numbers O-36549/17 and V-23432/17-respectively.

6. Respondent Mother denies the allegations set forth in paragraph six (6) of the Custody Petition.

7. Respondent Mother denies the allegations set forth in paragraph six a (6a) of the Custody Petition and states that Fidel, born May 4, 2012 (the "child") has always resided with Respondent Mother and only stayed with Petitioner Father for visitation.

8. Respondent Mother denies the allegations set forth in paragraph six b (6b) of the Custody Petition except admits that Petitioner filed an acknowledgment of paternity and is listed on the child's birth certificate as the father and admits that Respondent Mother is currently unemployed. Respondent Mother also specifically denies that Petitioner Father has voluntarily provided support for the child and denies that the child ever began living with Petitioner Father on a permanent basis.

9. There are no allegations set forth in paragraph six c (6c) of the Custody Petition, and therefore Respondent denies the allegations in paragraph six c (6c) of the Custody Petition.

10. Respondent Mother denies knowledge and information sufficient to admit or deny the allegations set forth in paragraph six d (6d) of the Custody Petition that Petitioner is fearful and therefore denies the same. Respondent Mother also specifically denies the remaining allegations set forth in paragraph six d (6d) of the Custody Petition.

11. Respondent Mother denies the allegations set forth in paragraph six e (6e) of the Custody Petition, except admits that Petitioner Father would bring the child to the Respondent Mother's residence in the Brooklyn, and states that Respondent Mother only agreed to allow Petitioner Father visitation during her visit to Brooklyn after meeting the Petitioner Father's parents and being informed that the paternal grandparents would help care for the child during the limited visitation agreed to by Respondent Mother.

12. Respondent Mother denies knowledge and information sufficient to admit or deny the allegations set forth in paragraph six f (6f) of the Custody Petition as to Petitioner Father's knowledge and belief and therefore denies the same and denies all remaining allegations contained in paragraph six f (6f) of the Custody Petition. Respondent Mother also states that Petitioner Father has confessed to her that he has previously used heroine.

13. Respondent Mother denies the allegations set forth in paragraph six g (6g) of the Custody Petition, and states that Fidel has always been safe, secure, and properly cared for in Respondent Mother's custody and care.

14. Respondent Mother denies the allegations set forth in paragraph six h (6h) of the Custody Petition, and states that Respondent Mother maintains a clean and comfortable apartment for her five (5) children, that there is always adequate food for the children, that Respondent Mother cooks for her children, provides proper discipline and structure for her children, and recently converted her two bedroom apartment into a four bedroom apartment.

Respondent Mother also states that she pays her bills on time and supports her children in their schooling efforts including seeking additional resources for them through the children's aid society.

15. Respondent Mother denies the allegations set forth in paragraph six i (6i) of the Custody Petition.

16. Respondent Mother denies the allegations set forth in paragraph six j (6j) of the Custody Petition, and states that Fidel is well cared for, properly supervised and Respondent Mother never leaves Fidel with any adult that would be an inappropriate care provider for the child.

17. Respondent Mother denies knowledge and information sufficient to admit or deny the allegations set forth in paragraph six k (6k) of the Custody Petition concerning Petitioner Father's employment and therefore denies the same and specifically denies that Petitioner Father has been "very involved" in Fidel's upbringing. Respondent Mother also states that Petitioner Father never even saw Fidel during the first six months of her life and was only occasionally and sporadically involved in her life until the year 2014. Prior to September 2014 Petitioner Father never had Fidel for overnight visitation and would only visit Fidel on occasion.

18. Respondent Mother denies knowledge and information sufficient to admit or deny the allegations set forth in paragraph six l (6l) of the Custody Petition and therefore denies the same.

19. Respondent Mother denies knowledge and information sufficient to admit or deny the allegations set forth in paragraph six m (6m) of the Custody Petition and therefore denies the same.

AFFIRMATIVE DEFENSES

20. Petitioner Father's Custody Petition fails to state a claim upon which relief can be granted.

21. Petitioner Father's Custody Petition was filed in a forum with little connection to the child Fidel Sample and should be transferred to Bronx County where the child has resided since birth.

CROSS PETITION FOR CUSTODY

22. Respondent Mother is the biological mother of Fidel, born May 4, 2002 and has always been the custodial parent of Fidel since birth.

23. The Petitioner Father has resided in New York State for a continuous period in excess of 10 years immediately preceding the commencement of this action. I am the Respondent Mother seeking emergency relief from the ex parte order issued on December 20, 2017, by the Honorable Larry Judge, which granted temporary custody to Respondent Lee Sample (the "Order").

24. Approximately seven (7) years ago, Respondent LEE SAMPLE ("Lee") and I began dating. At the time Lee informed me that he was separated with his wife and would soon be divorced. Throughout the time that Lee and I dated, I have always had custody of my four (4) children from a previous marriage: Andrew Jones, Barry Jones, Charlie Jones, and Daniel Jones.

25. During my relationship with Lee, I became pregnant with our daughter Fidel ("Fidel"). When I informed Lee of my pregnancy, he requested that I have an abortion. When I refused, he became angry with me and our relationship went downhill for a while. When Fidel was born on May 4, 2012, Lee did not come to the hospital and he did not sign an

acknowledgement of paternity. In fact, Lee never visited or saw Fidel during the first six months of her life.

26. When Fidel was six months old, he was hospitalized for medical problems. At that time, Lee met Fidel for the first time. Thereafter, Lee acknowledged paternity and although I encouraged Lee to have a relationship with Fidel, Lee only began seeing Fidel on a sporadic and limited basis until he turned 2 years old. Thereafter, relations improved between Lee and I and he began being more involved in Fidel's life. However, Fidel was always under my care, supervision, custody, and control. Prior to September 2014, Lee never had visitation with Fidel away from me, except for a few outings with my other children to public establishments like Chucky Cheese.

27. In early August 2015, I began planning a trip to South Dakota to help my sister look for a house in South Dakota. Prior to my trip, Lee requested that I allow Fidel to stay with him. At the time, Lee sometimes stayed with me and my children at our residence in Staten Island and sometimes stayed at his parents' house in Brooklyn. I informed Lee that I would not be comfortable allowing Fidel to stay with him unless I first met his parents. Thereafter, Lee introduced me to his parents and I agreed to allow Fidel to stay with him and his parents during my trip to South Dakota.

28. While I was in South Dakota, I left my two oldest children Andrew Jones and Barry Jones with their Father in Johnsonville. I also left my two younger sons to stay with a friend in Queens until I returned two weeks later. I returned from South Dakota on September 10, 2015 and went to Lee's parents' house to visit with Fidel. Upon my return, Lee's parents requested that I allow them to take Fidel to the Virginia shore for the weekend. Because I had to

go to Johnsonville to bring my other children home with me, I consented to allow Fidel to stay with Lee and his parents while I went to Johnsonville.

29. I returned from Johnsonville on September 18, 2015 with my two eldest sons and we stayed the night with Lee and his parents on our return from Johnsonville. I spent time with Fidel while at Lee's parents' home. However, while I was away, in an attempt to exterminate the apartment, an exterminator had sprayed chemicals in the apartment which left a white residue throughout the house. In order to give me time to properly clean the house, I consented to allow Fidel to stay a few more days with Lee and his parents. During this time period I regularly visited Fidel.

30. When the apartment was clean, I requested that Fidel be brought back. However, Lee and his mother informed me that they wanted Fidel to take him to karate lessons and so I reluctantly agreed to allow Fidel to stay with Lee and his parents during the weekdays. At the time, I was having Fidel stay with me each weekend from Friday through Sunday.

31. While Fidel was spending weekdays with Lee and his parents, I began remodeling my home to convert my two bedroom apartment into a four bedroom apartment. Because of the construction mess and other matters, Lee and I agreed to have Fidel continue staying with him while I would have him on the weekends and regularly visit him at Lee's parents' home.

32. On December 15, 2015, just a little over two and a half months after I had gone to South Dakota, the remodeling was finished and I finished purchasing the necessary furnishings for the home, including a bedroom set for Fidel's room. During the two and a half months -- from September 28, 2015 through December 15, 2015 -- that I allowed Fidel to have overnight visitation at Lee's parents' home, not only did I regularly visit Fidel at Lee's parents' home including staying the night in the home, but I also had Fidel with me for most weekends from

Friday through Sunday. After Fidel's room was finally prepared, I requested that Fidel come home. When he could no longer make up excuses to keep Fidel from returning home, Lee informed me that he was not planning on returning Fidel to my custody and he served me with an Order to Show Cause that stated that he had custody of Fidel.

33. I have always maintained a safe and secure environment for Fidel. She loves her brother and sisters very much and they love her. I have always provided all of my children with their necessities and I have always shown them love. My home is clean and there is always plenty of food for my children to eat.

34. In order to obtain additional resources and help for my family, as a single parent I have voluntarily sought help from the Children's Aid Society and I have been receiving assistance from them over the past three years. I currently have a social worker, Dana Williams, who I meet with regularly to obtain additional resources for my children. As Dana Williams can testify, I am a fit parent and Fidel is safe and secure in my care. I sincerely hope that this court is aware that Lee's financial ability to hire a nanny rather than care for Fidel himself, does not make him a more fit parent or better able to provide for Fidel's needs. I have always provided all of the necessary emotional, physical, and social care for Fidel since her birth with and without the help of Lee. Fidel should be returned to me immediately.

35. I filed my petition for custody in the Richmond Family Court because since Fidel's birth he has always lived with me in Staten Island. Until the middle of October, Fidel had never been to Lee's parents' home in Brooklyn and all Lee's interactions with Fidel took place in Staten Island. Additionally, even though Fidel did stay for a while at Lee's parents' home in Brooklyn, Lee knew that the arrangement was temporary. During that same time, Fidel also spent many weekends and other times with me and my mother in Staten Island.

36. Additionally, I do not have a vehicle to travel to and from Brooklyn. My income is significantly less than Lee's and it will be a severe hardship for me to have this case heard in Brooklyn. My social worker, Fidel's doctors, and other witnesses all reside in Staten Island and all of the documents, records and other evidence relevant to this case are located in Richmond County, New York. Because I am a resident of Richmond County and prior to the order issued by this Court on December 20, 2015, Fidel was at all times a resident of Richmond County and because Richmond County has the greatest connection to this case, I respectfully request that the case be transferred there.

37. My children are the most important thing in the world to me. After I was tricked into allowing Fidel to have overnight visitation with Lee and his parents during my trip to South Dakota and while remodeling my home, Lee has wrongfully withheld Fidel from me. Moreover, despite my willingness to allow Lee to visit with Fidel while she was in my custody, Lee has refused to allow me to see my baby since this Court granted him custody on January 1, 2005. I am dying inside at the thought of losing my baby all because I agreed to allow Lee to watch Fidel at his parents' home during my two week trip to South Dakota. Fidel should be returned to my custody immediately.

WHEREFORE, Respondent Mother, JAY SAMPLE respectfully requests that judgment be entered against Petitioner Father, Lee Sample, awarding the following relief:

(a) Vacating the provisions of the Order to Show Cause dated December 20, 2015, by the Honorable Larry Judge, which granted temporary custody of the parties' minor child Fidel Sample ("Fidel") to Respondent Lee Sample;

(b) Granting Petitioner Jay Sample interim legal and physical custody of Fidel until a final custody determination has been made;

(c) Granting the non-custodial parent reasonable rights of visitation;

(d) Transferring the above-captioned case to the Family Court for the State of New York, Richmond County where an order for protection and petition for custody are currently pending with File #: 108 and Docket No. O-36549/17 and V-23432/17, which were filed by Petitioner Jay Sample on December 20, 2017, and January 1, 2018, respectively;

(e) Requiring Respondent LEE SAMPLE to present any and all testimony and evidence which supports his petition for custody at the hearing currently scheduled before this Court on January 15, 2018 at 12:00 p.m.; and

(f) Granting any other and further relief the Court deems necessary and proper; No previous application has been made to this Court for the relief requested herein.

Dated: _____, 20

_____, New York

_____

Jay Sample

Sworn to before me this day of January, 20___

Notary Public

SAMPLE: PETITION TO SUSPEND VISITATION AND MODIFY ORDER

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

X In the Matter of a Proceeding under
Article 6 of the Family Court Act

JAY SAMPLE
Petitioner,

File No. 923
Docket No. 90123/18

-against-

PETITION TO SUSPEND VISITATION AND MODIFY ORDER

LEE SAMPLE,
Respondent.

X TO THE FAMILY COURT:

The undersigned Petitioner, Jay Sample respectfully shows that:

1. Jay Sample is the Petitioner in the above-entitled proceeding and resides at 200 Homen Street, Bronx, New York, 10462.
2. Respondent is believed to reside at 400 Union Avenue, Bronx, NY 10451.
3. An order of Visitation was entered in this proceeding on February 23, 2017 wherein it was directed that, beginning on March 2, 2017, Lee Sample could visit with both children, Tim and Terri Sample, at the maternal grandmother's home on alternate Saturdays, from 2:00pm to 4:00pm.
4. Since the entry of this Order, there has been a change of circumstances. Terri Sample, the parties' oldest daughter, has become so distraught and fearful of visitations with her

father that it is disrupting her life and continued visitations are no longer in the best interests of the child.

5. Ann is a bright, articulate nine year-old in an accelerated school program. Terri is terrified of her father and experiences sleeplessness, great anxiety and nightmares immediately before scheduled visitations, and has difficulty concentrating in school.
6. Terri has expressed, and continues to express a strong desire that she no longer be forced to visit with her father and clearly expressed this preference to the NYC Administration for Children's Services, as is reflected in its February 2017 Court Ordered Investigation.
7. For the first four years of Terri life, her contact with her father Lee Sample was limited – by his choice – to about three times per year.
8. In April 2016, when Ann was four years old, her parents Jay and Lee Sample married, and for the first time they lived together as a family. The father Terri had barely known was suddenly living with her and her mother. This cohabitation lasted only two years, as Lee abandoned the family for good in 2018. During that time, as she told the NYC Administration for Children's Services during its Court Ordered Investigation, Ann was severely traumatized by her father's alcohol and drug abuse, as well as his physical, verbal and emotional violence towards Jay.
9. While living with Jay and Lee Sample, Terri was both a witness to the repeated physical, verbal and emotional abuse of her mother by her father, and was a recipient of mental and verbal abuse by him as well. For example, in August 2017, when Terri was five years old, Lee came home drunk and wanted to have sexual intercourse with Jay. During an ensuing fight, Lee pushed Terri into a room and locked the door. Terri was locked in, and crying to be let out. Afterwards, Lee kicked open the door, smashing the lock.

Furthermore, in December 2012, when Terri was seven years old, Lee used a belt to beat Jay across the body. Terri also witnessed numerous other incidents involved Lee's physical, verbal and emotional abuse of Jay.

10. Lee Sample has repeatedly violated this Court's February 23, 2017 Order of Protection by harassing the Cross-Petitioner and causing her to fear for her children's safety. For example, on October 13, 2017, Lee told the children's maternal grandmother that he would "take the children no matter what the court said." Similarly, on December 24, 2017, Respondent stated that he would do "whatever it takes" to see his children. He has also threatened on numerous occasions to kidnap the children and flee to Nicaragua, his native country.
11. Lee Sample has also repeatedly violated this Court's February 23, 2017 Order of Protection by arriving at the April 13, June 8, and August 3, 2017 visitation sessions while under the influence of alcohol.
12. Lee Sample's drinking before visitation heightens Terri's anxiety that her father will hurt her or make good on his repeated threats to take her away from her mother. Lee's drinking before visitations increase the very real threat of violent behavior since in the past, Lee's violent episodes have been precipitated by his alcohol abuse; and it was for this very reason that the Honorable Judge Cohen forbade Lee, in the February 23, 2017 Order of Protection from seeing his children while under the influence of alcohol.
13. Lee Sample has repeatedly failed to attend visitation arranged by this Court in its February 23, 2017 Order of Visitation. To date, he has failed to visit his children on five of twenty scheduled dates – fully one-quarter of the session under this Court's Order. Lee

Sample has neither explained his absences on July 6, July 20, November 23, December 12, and December 21, 2017, nor attempted to reschedule these visitation sessions.

14. Consideration of Terri's best interests militate for termination of visitation. In the past, Lee Sample has verbally and emotionally abused Terri, and he has recently committed flagrant violations of this Court's Order of Protection by threatening to kidnap the children and take them to a foreign country, and by being under the influence of alcohol during visitations. Terri's visitations with her father have caused her extreme stress and fear. It is neither her wish nor in her best interest to continue visitations as contemplated under the current Order.
15. That by reason of the above-described change of circumstances said Order of Visitation should be modified as follows:
    a. Lee Sample's visitation with Terri Sample, the parties' nine-year old daughter, should be suspended.
    b. Lee Sample's continued supervised visitation with Ben Sample, the parties' seven-year old son, should be conditioned upon:
        i. Participation in an alcohol or counseling program; and
        ii. the provision that Lee Sample not consume alcohol or drugs on the day of visitation; and
        iii. a surrender of Lee Sample's passport to this court or before each visitation session.
    c. This visitation with the son, Ben, if any, should continue to be at the maternal grandmother's home on alternate Saturdays, from 2:00pm until 4:00pm.

16. No previous application has been made to any court or judge for the relief herein requested, except for the Cross-Petitioner's Opposition to Petition for

WHEREFORE, JAY SAMPLE prays that said Order of Visitation be modified in the respects set forth herein and for such other relief as the Court may deem just and proper.

Dated: _____, 20

_____, New York

_____

Jay Sample, Petitioner

SAMPLE: ORDER TO SHOW CAUSE FOR EMERGENCY RELIEF

At a term of the Family Court of the State of New York held in and for the County of Queens, at 151-20 Jamaica Aveune, Jamaica, New York, NY 11201 and the State of New York, on the , 31st day of January , 2018

PRESENT: HON.

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

X In the Matter of a Proceeding under
Article 6 of the Family Court Act

JAY SAMPLE
Petitioner,

File No. 1234
Docket No. 11234/18

-against-

ORDER TO SHOW CAUSE FOR EMERGENCY RELIEF

LEE SAMPLE,

Respondent.

X TO THE FAMILY COURT:

Upon the annexed Emergency Affirmation of Amy Attorney, Esq., dated January 20, 2018, the exhibits attached thereto; the annexed Affidavit of Petitioner Jay Sample, dated January 20, 2018; the annexed Affidavit of Shana Williams dated January 20, 2018; the annexed Answer and Cross-Petition for Custody filed by Petitioner Jay Sample; the accompanying Petition to Transfer Venue filed by Petitioner Jay Sample; the accompanying Petition for Writ of

Habeas Corpus filed by Petitioner Jay Sample; and all of the papers and proceedings heretofore had herein, and good sufficient cause appearing,

LET Respondent Roy Sample, show cause before this court, located at the courthouse at 151-20 Jamaica Avenue, Jamaica, NY 11201 on the 15th day of February, 2018 at 10 a.m. or as soon as thereafter as counsel can be heard for an Order:

(A) Vacating the provisions of the Order to Show Cause dated January 8, 2018, by the Honorable Peter Ponder, which granted temporary custody of the parties' minor child Rafaela Sample ("Rafaela") to Respondent Roy Sample;

(B) Granting Petitioner Jay Sample interim legal and physical custody of Rafaela until a final custody determination has been made; and

(C) Granting the non-custodial parent reasonable rights of visitation; and

(D) Transferring the above-captioned case to the Family Court for the State of New York, Bronx County where an order for protection and petition for custody are currently pending with File #:108 and Docket #: O-36549/18 and V-23432/18, which were filed by Petitioner Jay Sample on January 15, 2018 and January 19, 2018, respectively; and

(E) Requiring Respondent Roy Sample to present any and all testimony and evidence which supports his petition for custody at the hearing currently scheduled before this Court on February 15, 2018 at 11:00 a.m.; and

(F) Granting any other and further relief the Court deems necessary and proper;

GOOD AND SUFFICIENT CAUSE APPEARING, let service by hand delivery of a copy of this order, together with the papers upon which it was granted, be served on Silver & Spears LLP, counsel of record for Respondent Roy Sample, on or before the 15th day of February 2018, be deemed good and sufficient service; and it is further

ORDERED that Respondent Roy Sample is required to present any and all evidence and testimony supporting his petition for custody during the hearing currently scheduled before this Court on February 15, 2018 at 10:00 a.m. or as soon thereafter as counsel can be heard, and it is further

ORDERED that pending a determination of this motion, the Petitioner Jay Sample is granted unsupervised visitation with Rafaela Sample, born May 4, 2012, on Sunday January 24, 2018 from 10:00 a.m. until 6:00 p.m. E.S.T. and that Respondent Roy Sample shall drop off and pick up Jay Sample from Petitioner Jay Sample's residence located at 123 Main St.,

Bronx, New York for said visitation.

Dated: _____, 20

J.S.C.

TO: Amy Attorney, Esq.
Law Firm, LLP
14 West Broadway
New York, New York 10007
Attorneys for Respondent

SAMPLE: AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE FOR EMERGENCY RELIEF

FAMILY COURT OF THE STATE OF NEW
YORK COUNTY OF QUEENS

X In the Matter of a Proceeding under
Article 6 of the Family Court Act

JAY SAMPLE
Petitioner,

File No. 1234
Docket No. 11234/18

-against-

AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE FOR EMERGENCY RELIEF

LEE SAMPLE,

Respondent.

X TO THE FAMILY COURT:

Amy Attorney, Esq., an attorney duly admitted to practice law in the courts of the State of New York, affirms under the penalties of perjury as follows:

I am the attorney of record for the Petitioner Jay Sample, and submit this emergency affirmation in support of this emergency request for as set forth within Petitioner Jay Sample's Order to Show Cause.

I. NEED FOR EMERGENCY RELIEF

On December 2, 2017, the Honorable Peter Ponder issued an order granting temporary legal and physical custody of Rafaela Sample ("Rafaela"), born May 4, 2012, to Respondent Lee Sample based upon an ex parte order to show cause. The Court's order is attached herewith as Exhibit A.

The Order to Show Cause was issued based upon the uncorroborated allegations of Respondent Lee Sample set forth in his petition for custody. Without legal representation, Petitioner Jay Sample filed a petition for custody in the Bronx Family Court, wherein a hearing was held with both parties present on December 20, 2017. The Bronx family reserved ruling on the matter until a decision concerning transferring the case to Bronx County is made by this Court.

Upon information and belief, Respondent Lee Sample has not allowed Petitioner Jay Sample to see or have any contact other than telephone calls with the parties' child, Rafaela. Since the Court issued temporary custody to Respondent Lee Sample, Petitioner Jay Sample has not seen her daughter, Rafaela.

Moreover, upon information and belief and according to the Affidavits of both Petitioner Jay Sample and corroborating witness and social worker Shana Williams, Petitioner Jay Sample has been the primary custodian of Rafaela and has always provided a safe, secure, and healthy environment for her.

An emergency order to show cause is necessary in order (1) to allow Jay Sample interim visitation until the Court's hearing on Respondent Lee Sample's Petition for Custody and Order to Show Cause scheduled for February 15, 2018; and (2) to insure that the court will be presented with sufficient evidence and testimony on February 15, 2018 to properly determine interim custody of Rafaela.

Accordingly, this Court should grant the emergency relief requested herein.

Dated: January 30, 2018

New York, New York

SAMPLE: AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE FOR EMERGENCY RELIEF

FAMILY COURT OF THE STATE OF NEW
YORK COUNTY OF QUEENS

X In the Matter of a Proceeding under
Article 6 of the Family Court Act

JAY SAMPLE
Petitioner,

File No. 1234
Docket No. 11234/18

-against-

AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE FOR EMERGENCY RELIEF

LEE SAMPLE,

Respondent.

X TO THE FAMILY COURT:

STATE OF NEW YORK)
COUNTY OF QUEENS)
ss.:

Jay Sample, being duly sworn, deposes and says:

I am the Petitioner seeking emergency relief from the ex parte order issued on December 20, 2013, by the Honorable Peter Ponder, which granted temporary custody to Respondent Lee Sample (the "Order").

BACKGROUND

1. Approximately seven (7) years ago, Respondent Lee Sample ("Lee") and I began dating. At the time Lee informed me that he was separated with his wife and would soon be divorced.

Throughout the time that Lee and I dated, I have always had custody of my four (4) children from a previous marriage: Andrew Jones, Barry Jones, Charlie Jones, and Daniel Jones

2. During my relationship with Lee, I became pregnant with our daughter Rafaela Sample ("Rafaela"). When I informed Lee of my pregnancy, he requested that I have an abortion. When I refused, he became angry with me and our relationship went downhill for a while. When Jay was born on May 4, 2012, Lee did not come to the hospital and he did not sign an acknowledgement of paternity. In fact, Lee never visited or saw Jay during the first six months of her life.

3. When Jay was six months old, she was hospitalized for medical problems. At that time, Lee met Jay for the first time. Thereafter, Lee acknowledged paternity and although I encouraged Lee to have a relationship with Rafaela, Lee only began seeing Rafaela on a sporadic and limited basis until she turned one year old. Thereafter, relations improved between Lee and I and Lee began being more involved in Rafaela's life. However, Rafaela was always under my care, supervision, custody, and control. Prior to May 2013, Lee never had visitation with Rafael from me, except for a few outings with my other children to public establishments like Chuck E. Cheese.

OVERNIGHT VISITATION

4. In early July 2013, I began planning a trip to South Dakota to help my sister look for a house in South Dakota. Prior to my trip, Lee requested that I allow Rafaela to stay with him. At the time, Lee sometimes stayed with me and my children at our residence in the Bronx and sometimes stayed at his parents' house in Old Town, New York. I informed Lee that I would not be comfortable allowing Rafaela to stay with him unless I first met his parents. Thereafter,

Lee introduced me to his parents and I agreed to allow Rafaelal to stay with him and his parents during my trip to South Dakota.

5. While I was in South Dakota, I left my two oldest children Andrew and Barry with their Father in Johnsonville. I also left my two younger children to stay with a friend in Queens until I returned two weeks later. I returned from South Dakota on Thursday, July 29, 2013 and went to Lee's parents' house to visit with Rafaela on Friday July 30, 2013. Upon my return, Lee's parents requested that I allow them to take Rafaela to the Virginia shore for the weekend. Because I had to go to Queens to bring my other children home with me, I consented to allow Rafaela to stay with Lee and his parents while I went to Queens.

6. I returned from Queens on August 7, 2013 with my two youngest children and we stayed the night with Lee and his parents on our return from Queens. I spent time with Rafaela while at Lee's parents' home. However, while I was away, in an attempt to exterminate the apartment, an exterminator had sprayed chemicals in the apartment which left a white residue throughout the house. In order to give me time to properly clean the house, I consented to allow Rafaela to stay a few more days with Lee and his parents. During this time period I regularly visited Rafaela.

7. When the apartment was clean, I requested that Rafaela be brought back. However, Lee and his mother informed me that they wanted Rafaela to take children's gymnastics lessons and so I reluctantly agreed to allow Rafaela to stay with Lee and his parents during the weekdays. At the time, I was having Rafaela stay with me each weekend from Friday through Sunday.

8. While Rafaela was spending weekdays with Lee and his parents, I began remodeling my home to convert my two bedroom apartment into a four bedroom apartment. Because of the

construction mess and other matters, Lee and I agreed to have Rafaela continue staying with him while I would have her on the weekends and regularly visit her at Lee's parents' home.

LEE REFUSES TO RETURN RAFAELA

9. On December 15, 2013, just a little over two and a half months after I had gone to South Dakota, the remodeling was finished and I finished purchasing the necessary furnishings for the home, including a bedroom set for Rafaela's room. During the two and a half months -- from September 10, 2013 through December 15, 2013 -- that I allowed Lee to have overnight visitation at Lee's parents' home, not only did I regularly visit Rafaela at Lee's parents' home including staying the night in the home, but I also had Rafaela with me for most weekends from Friday through Sunday. After Rafaela's room was finally prepared, I requested that Rafaela come home. When he could no longer make up excuses to keep Rafaela from returning home, Lee informed me that he was not planning on returning Rafaela to my custody and he served me with an Order to Show Cause that stated that he had custody of Rafaela.

Rafaela Should Be Returned To Petitioner

10. I have always maintained a safe and secure environment for Rafaela. She loves her brother and sisters very much and they love her. I have always provided all of my children with their necessities and I have always shown them love. My home is clean and there is always plenty of food for my children to eat.

11. In order to obtain additional resources and help for my family, as a single parent I have voluntarily sought help from the Children's Aid Society and I have been receiving assistance from them over the past three years. I currently have a social worker, Shana Williams, who I

meet with regularly to obtain additional resources for my children. As Shana Williams can testify to, I am a fit parent and Rafaela is safe and secure in my care.

12. I sincerely hope that this court is aware that Lee's financial ability to hire a nanny rather than care for Rafaela himself does not make him a more fit parent or better able to provide for Rafaela's needs. I have always provided all of the necessary emotional, physical, and social care for Rafaela since her birth with and without the help of Lee. Rafaela should be returned to me immediately.

THIS PROCEEDING SHOULD BE TRANSFERRED

TO THE BRONX FAMILY COURT

13. I filed my petition for custody in the Bronx Family Court because since Rafaela's birth she has always lived with me in the Bronx. Until the middle of May 2013, Rafaela had never been to Lee's parents' home in Queens County and all Lee's interactions with Rafaela before May 2013 took place in the Bronx. Additionally, even though Rafaela did stay for a while at Lee's parents' home in Queens County, Lee knew that the arrangement was temporary. During that same time, Rafaela also spent many weekends and other times with me and my mother in the Bronx.

14. Additionally, I do not have a vehicle to travel to and from Queens County. My income is significantly less than Lee's and it will be a severe hardship for me to have this case heard in Queens County. My social worker, Rafaela's doctors, and other witnesses all reside in the Bronx and all of the documents, records and other evidence relevant to this case are located in Bronx County, New York. Because I am a resident of Bronx County and prior to the order issued by this Court on December 20, 2013, Rafaela was at all times a resident of Bronx County

and because Bronx County has the greatest connection to this case, I respectfully request that the case be transferred to the Bronx County Family Court.

CONCLUSION

My children are the most important thing in the world to me. After I was tricked into allowing Rafaela to have overnight visitation with Lee and his parents during my trip to Florida and while remodeling my home, Lee has wrongfully withheld Rafaela from me. Moreover, despite my willingness to allow Lee to visit with Rafaela while she was in my custody, Lee has refused to allow me to see Rafaela since this Court granted him custody on December 20, 2008. I am dying inside at the thought of losing Rafaela all because I agreed to allow Lee to watch her at his parents' home during my two week trip to Florida. Rafaela should be returned to my custody immediately. I therefore respectfully request that this Court issue an ORDER:

(a) Vacating the provisions of the Order to Show Cause dated December 20, 2013, by the Honorable Jacob P. Wonder, which granted temporary custody of the parties' minor child Rafaela Sample ("Rafaela") to Respondent Lee Sample;

(b) Granting Petitioner Rafaela Sample interim legal and physical custody of Rafaela until a final custody determination has been made; and

(c) Granting the non-custodial parent reasonable rights of visitation; and

(d) Transferring the above-captioned case to the Family Court for the State of New York, Bronx County where an order for protection and petition for custody are currently pending with File #:108 and Docket #: O-36549/13 and V-23432/13, which were filed by Petitioner Jay

Sample on January 13, 2013 and January 15, 2013, respectively;

(e) Requiring Respondent Lee Sample to present any and all testimony and evidence which supports his petition for custody at the hearing currently scheduled before this Court on January 22, 2013 at 11:00 a.m.; and

(f) Granting any other and further relief the Court deems necessary and proper; No previous application has been made to this Court for the relief requested herein.

Dated: _____, 20

_____, New York

_____

Jay Sample

Sworn to before me this day of June, 2018

Notary Public

AFFIDAVIT OF SOCIAL WORKER IN SUPPORT OF ORDER TO SHOW CAUSE

FAMILY COURT OF THE STATE OF NEW YORK COUNTY OF QUEENS

JAY SAMPLE
Petitioner,

File No. 1234
Docket No. V-11234/18

-against-

AFFIDAVIT OF SOCIAL WORKER IN SUPPORT OF ORDER TO SHOW CAUSE

LEE SAMPLE,

Respondent.

X TO THE FAMILY COURT:

STATE OF NEW YORK)
COUNTY OF QUEENS)
ss.:

Shana Williams, being duly sworn, deposes and says:

1. I am currently employed as a social worker with Children's Aid Society. Prior to my employment with the Children's Aid Society I received a Bachelor's Degree in Psychology from the John Jay College of Criminal Justice. I have been working as a social worker for the past five years and have worked with approximately 200 different individuals and families during my tenure as a social worker.
2. I met Jay Sample approximately three years ago when I began my employment with the Children's Aid Society. During the past year, I have had biweekly visits with Ms. Sample both in her home and at the Children's Aid Society's, Bronx Family Center. Ms. Sample's relationship with the agency is voluntary and she participates in programs with

the Children's Aid Society in order to obtain additional resources for herself and her five (5) children as a low income single parent.

3. On several occasions I have met with both Jay Sample and Rafaela Sample, Ms. Sample's daughter. During all of my interactions with them, Jay has appeared to be happy, healthy, and well cared for both physically and emotionally.
4. During my interactions with Ms. Sample at her home, I have observed the home to be a clean, comfortable, and safe environment for Ms. Sample's children. I have not observed any signs of neglect or danger. Moreover, to my knowledge, Ms. Sample has never been reported or investigated by any state or federal agency for neglecting her children nor have I witnessed any need or occasion for any such intervention.
5. During the past year, I have always understood that Ms. Sample was the custodial parent of Jay and I have never personally met Lee Sample. During each of my biweekly visits with Ms. Sample, Jay has always been in Ms. Sample's custody and care.
6. During a very recent visit to Ms. Sample's home, I observed the remodeled condition of Ms. Sample's home. The former two bedroom apartment has been converted into a four bedroom apartment in order to provide more privacy and personal space for each of Sample's children. During my visit the apartment was clean and is a suitable place for Jay and Ms. Sample's other four (4) children to reside.
7. In my professional opinion based upon five years' experience as a social worker and having worked with approximately 200 individuals and families, I consider Jay Sample to be a fit parent with the capacity to care for Jay Sample and to provide for Jay's physical and emotional needs.

Dated: _____, 20

_____, New York

_____

SHANA WILLIAMS

Sworn to before me this

day of June, 2018

Notary Public

APPENDIX

HER JUSTICE

APPENDIX

A. Appendix cover page and table of contents
B. Trauma Informed Interviewing Best Practices
C. Tips for Working with Interpreters
D. Immigrant Power and Control Wheel
E. Disability Power and Control Wheel
F. Lawyer's Manual on Domestic Violence Content and Link

HER JUSTICE

NATIONAL Center on Domestic Violence, Trauma & Mental Health

EXCERPT FROM

Representing Domestic Violence Survivors Who Are Experiencing Trauma and Other Mental Health Challenges:

A Handbook for Attorneys

Written by

Mary Malefyt Seighman, JD ♦ Erika Sussman, JD ♦ Olga Trujillo, JD

On behalf of the

National Center on Domestic Violence, Trauma & Mental Health

Edited by

Carole Warshaw, MD

December 2011

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Section One: Interviewing

Do Not Exacerbate the Harm or Risks

Lawyers working with survivors who are experiencing trauma and other mental health-related challenges should aim to ensure that their representation does not exacerbate the harm done to a client or create additional harms. Every domestic violence survivor faces risks. Some risks are batterer-generated; some risks are life-generated.[4] Survivors who are experiencing trauma or other mental health challenges may face additional risks when they come in contact with systems and individuals who are ill equipped to address their particular mental health needs. Thus, attorneys must take steps to ensure that their relationship with the client does not exacerbate the risks or further harm the mental health of the survivor.

Be Aware of the Signs of Trauma

Lawyers working with survivors of domestic violence should be aware of signs of trauma and mental health challenges, such as:

- The client does not talk about her experience(s) in a linear manner. She may go off on tangents or her speech may not seem coherent.
- What would seem to be highly emotional facets of her experience are expressed with little emotion both in terms of facial expression and body language, and in terms of the tone of her voice (sometimes referred to as "flat affect"). She may be intellectually present but emotionally detached.
- The client develops a deep, blank stare or an absent look during meetings with her; this could be a sign that she is dissociating.
- The client is unable to remember key details of the abuse.

If you notice any of the above signs, you will want to take steps to avoid triggering feelings that are disruptive to your client as you work together on her case. While an attorney cannot ensure that an individual remains present and does not dissociate or otherwise disengage, there are steps you can take to remove as many barriers as possible to help your client be psychologically present for her own advocacy.

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[4] *See* Jill Davies, Eleanor Lyon, and Diane Monti-Catania, *Safety Planning with Battered Women: Complex Lives/Difficult Choices* (Sage Publications 1998).

Survivor-Defined Representation When the Client is Living with Trauma-Related or Other Mental Health Conditions

Survivor-defined advocacy requires that attorneys tailor their advocacy approach to meet the individualized needs of survivors. For survivors facing mental health challenges, this means that lawyers must:

- Gain an understanding of the ways in which *this client's* challenges impact her ability to engage in the advocacy process, and
- Tailor interviewing and counseling approaches to meet the needs of and maximize the self-determination of each individual client.

Survivors facing mental health challenges will often require more time and resource-intensive advocacy than other survivors. To use their time and resources wisely, lawyers must consider how to tailor their advocacy approach to be responsive to the issues and needs of survivors experiencing trauma related conditions and mental health concerns.

Begin a Dialogue about the Survivor's Mental Health Needs

The lawyer should begin a dialogue with the survivor about her mental health needs as it relates to the lawyer/client relationship. This type of conversation provides a space for the survivor to explain her circumstances and for both lawyer and survivor to develop strategies for accommodating those challenges in the course of their relationship.

Lawyers need not, and should not, try to gather the client's entire mental health history at this stage in the process. Rather, these preliminary conversations about the client's mental health should focus upon how any mental health challenges affect her functioning. To get this conversation going, lawyers might ask, "Is there anything that I should know to help us work better together?" Or, "How can I, as your lawyer, accommodate what you need in this process?" For example, if the lawyer's office creates too much sensory stimulation or causes sensory overload, your client might suggest meeting somewhere else. If she has difficulty focusing for long periods of time, the attorney might suggest taking several breaks or scheduling shorter appointments.

It is best practice for lawyers working with survivors to take the time necessary to build relationships and trust with their clients. Trust is key to developing the type of lawyer-client relationship required for effective representation. There are times, however, when lawyers have a limited amount of time or are meeting clients just before a hearing. In these situations, you need to gather as much information as possible, as quickly as possible, in preparation for your case. It is important to know that, when working under such tight deadlines, your client may not feel comfortable enough yet to disclose details about trauma

and mental health conditions. In those situations, you are not likely to get complete and accurate information about this from your client. Under such circumstances, you may want to partner with an advocate who has been working with the survivor to assist in gathering this information and to provide you with the context necessary to understand and advocate for the comprehensive and individual needs of the survivor.

Techniques for Building Trust and Ensuring Informed Consent with Survivors Who Experience Trauma and/or Mental Health Symptoms

Survivor-centered interviewing skills are critical to providing comprehensive, individualized advocacy to survivors of domestic violence, whether or not a survivor has experienced trauma or mental health concerns. First, by offering a survivor the space to tell her own story, from her own perspective, an attorney can begin to lay the foundation for building trust. Second, when an attorney actively listens to a survivor's story, she gains a more comprehensive, contextual understanding of the survivor's needs. This rich understanding, when combined with a working relationship based on trust and respect for survivor agency, forms the basis of an effective survivor-attorney partnership that can work toward the expressed goals and objectives of the survivor.

Oftentimes in the lives of survivors, people were abusive or let them down, service providers responded ineffectively to them, and/or systems ignored or added to their pain. Each survivor has a unique perspective of these realities and lives with the effects of these negative experiences. A survivor's cultural background will also impact the way in which she perceives her prior experiences.

Many survivors who have experienced violence from an intimate partner and/or have trauma related concerns are often likely to accommodate what they think you want. This can play out in different ways. A client may ask you directly, "What do you think I should do?" Or, a client may intuitively pick up from your discussion with her what she believes you want her to do. You may think the survivor is making an informed decision when in fact she is trying to do what she thinks you want.

To overcome the distrust that survivors who are dealing with trauma-related or other mental health symptoms experience, lawyers must take steps to nurture a respectful working relationship with them. Lawyers should:

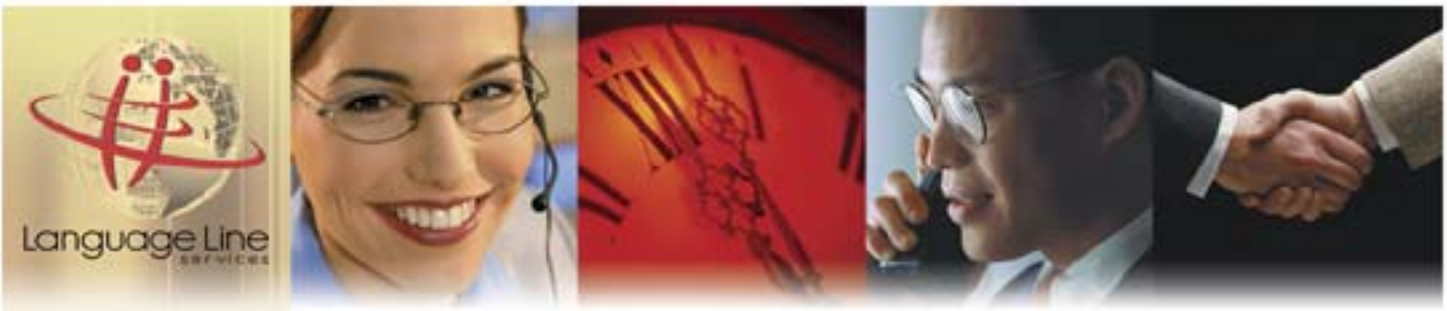
- Develop a basic understanding of trauma-related and mental health conditions that survivors may experience;
- Be skilled in listening and asking questions to understand a survivor's perspective and needs; and
- Know how to decide what information and options to offer to meet those needs.

It is within the context of a respectful relationship that lawyers can provide opportunities for survivors experiencing trauma and mental health challenges to access the resources they need and to exercise more control over their own lives.

Jill Davies has crafted a list of the ways in which advocates can offer concrete assistance to survivors who have experienced trauma resulting from multiple victimizations. Attorneys for survivors who are dealing with mental health challenges can assist clients by:

- Recognizing that survivors may be unable to access all of the details;
- Providing options and the time and space for survivors to make fully-informed decisions;
- Validating the survivor's feelings throughout the process;
- Being responsive to a survivor's requests for information and support, even if she asks for the same information several times;
- Partnering with survivors to identify alternative coping strategies, when they are engaging in self-harming behaviors;
- Finding supports for developing alternative or additional coping strategies;
- Connecting survivors who are experiencing a mental health crisis with a trusted mental health referral/resource; and
- Offering support to survivors who are using alcohol and/or drugs by safety planning and strategizing to the greatest extent possible at the time (including assessing risks and developing strategies that mitigate the risks posed by alcohol and drug use) and encouraging them to contact you again.[5]

[5] Adapted from Jill Davies, Helping Sexual Assault Survivors with Multiple Victimizations and Needs, A Guide for Agencies Serving Sexual Assault Survivors (July 2007).



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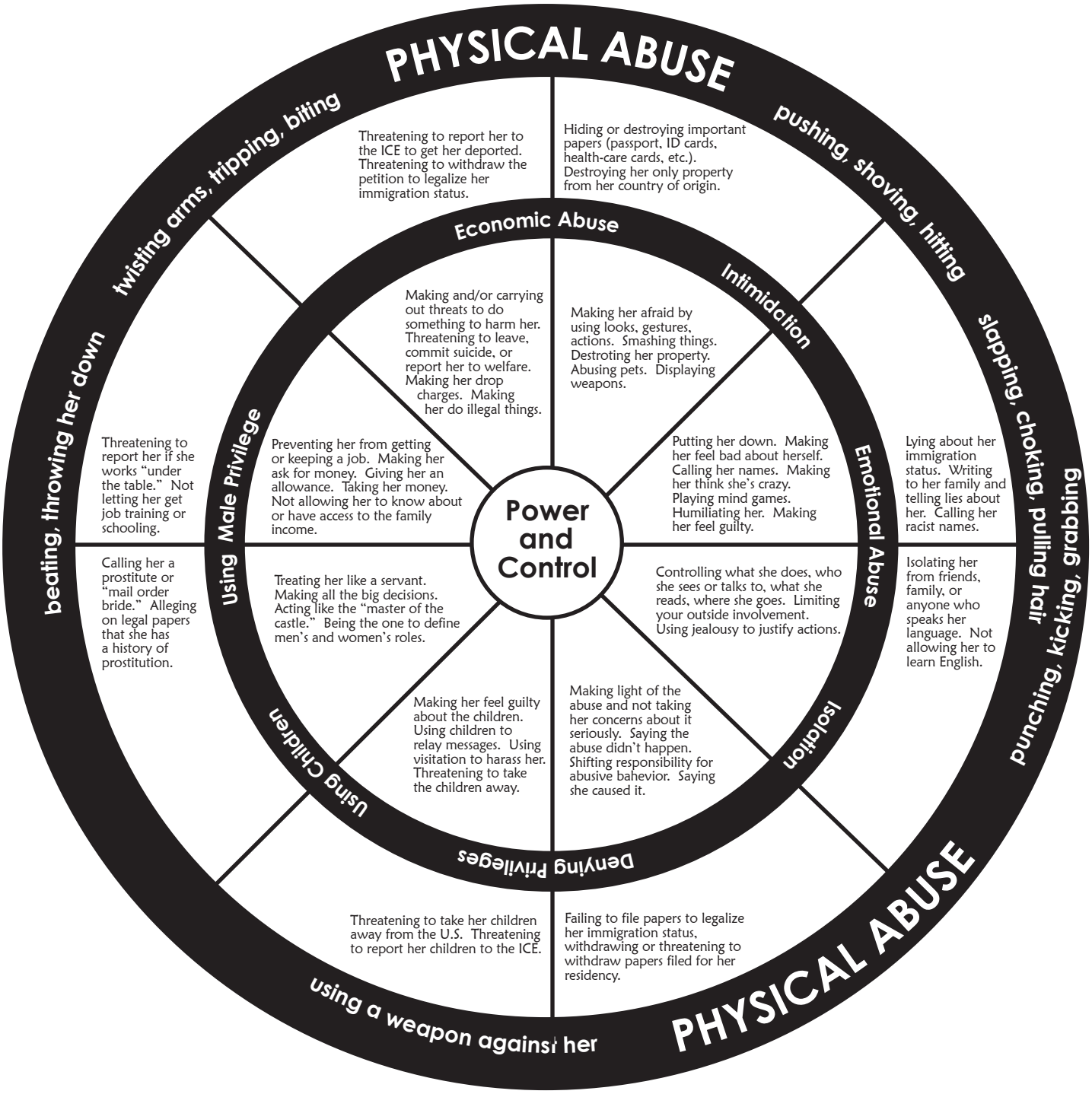
TIPS FOR WORKING WITH AN INTERPRETER

1. **BRIEF THE INTERPRETER -** Identify the name of your organization to the interpreter, provide specific instructions of what needs to be done or obtained, and let him/her know whether you need help with placing a call. If you need the interpreter to help you place a call to the Limited English Proficient (LEP) customer, you may ask the interpreter for a dial-out. There is a limited amount of time allotted for placing a dial-out once the interpreter is on the phone. Therefore, it is important that you provide a brief introduction and specific instructions to the interpreter in a timely manner.
2. **SPEAK DIRECTLY TO THE CUSTOMER -** You and your customer can communicate directly with each other as if the interpreter were not there. The interpreter will relay the information and then communicate the customer's response directly back to you.
3. **SPEAK NATURALLY, NOT LOUDER -** Speak at your normal pace, not slower.
   - SEGMENTS - Speak in one sentence or two short ones at a time. Try to avoid breaking up a thought. Your interpreter is trying to understand the meaning of what you're saying, so express the whole thought if possible. Interpreters will ask you to slow down or repeat if necessary. You should pause to make sure you give the interpreter time to deliver your message.
   - CLARIFICATIONS - If something is unclear, or if the interpreter is given a long statement, the interpreter will ask you for a complete or partial repetition of what was said, or clarify what the statement meant.
4. **ASK IF THE LEP UNDERSTANDS -** Don't assume that a limited English-speaking customer understands you. In some cultures a person may say 'yes' as you explain something, not meaning they understand but rather they want you to keep talking because they are trying to follow the conversation. Keep in mind that a lack of English does not necessarily indicate a lack of education.
5. **DO NOT ASK FOR THE INTERPRETER OPINION -** The interpreter's job is to convey the meaning of the source language and under no circumstances may he or she allow personal opinion to color the interpretation. Also, do not hold the interpreter responsible for what the customer does or does not say. For example, when the customer does not answer your question.
6. **EVERYTHING YOU SAY WILL BE INTERPRETED -** Avoid private conversations. Whatever the interpreter hears will be interpreted. If you feel that the interpreter has not interpreted everything, ask the interpreter to do so. Avoid interrupting the interpreter while he/she is interpreting.
7. **AVOID JARGON OR TECHNICAL TERMS -** Don't use jargon, slang, idioms, acronyms, or technical medical terms. Clarify unique vocabulary, and provide examples if they are needed to explain a term.
8. **LENGTH OF INTERPRETATION SESSION -** When you're working with an interpreter, the conversation can often take twice as long compared with one in English. Many concepts you express have no equivalent in other languages, so the interpreter may have to describe or paraphrase many terms you use. Interpreters will often use more words to interpret what the original speaker says simply because of the grammar and syntax of the target language.
9. **READING SCRIPTS -** People often talk more quickly when reading a script. When you are reading a script, prepared text, or a disclosure, slow down to give the interpreter a chance to stay up with you.
10. **CULTURE -** Professional interpreters are familiar with the culture and customs of the limited English proficient (LEP) customer. During the conversation, the interpreter may identify and clarify a cultural issue they may not think you are aware of. If the interpreter feels that a particular question is culturally inappropriate, he or she might ask you to either rephrase the question or ask the interpreter to help you in getting the information in a more appropriate way.
11. **CLOSING OF THE CALL -** The interpreter will wait for you to initiate the closing of the call. When appropriate, the interpreter will offer further assistance and will be the last to disconnect from the call. Remember to thank the interpreter for his or her efforts at the end of the session.

Language Line Services • One Lower Ragsdale Drive, Bldg. 2 • Monterey, CA 93940 • www.LanguageLine.com

Immigrant Power and Control Wheel



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Lawyer's Manual on Domestic Violence

Representing the Victim, 6th Edition

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Mary Rothwell Davis, Dorchen A. Leidholdt and Charlotte A. Watson

Supreme Court of the State of New York, Appellate Division, First Department

The New York State Judicial Committee on Women in the Courts

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Supreme Court of the State of New York, Appellate Division, First Department
Hon. Luis A. Gonzalez, Presiding Justice

New York State Judicial Committee on Women in the Courts
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