

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

YEVGENIA SHOCKOME,

Appeal No. 2004-4757

Petitioner-Appellant,

-against-

TIMOTHY E. SHOCKOME,

Respondent-Respondent.

BRIEF FOR PETITIONER-APPELLANT

This brief is submitted on behalf of Petitioner-Appellant, Yevgenia Shockome on an appeal from decision and order of the Family Court, Dutchess County (Hon. Damian J. Amodeo, J.), entered May 10, 2004.

Questions Presented

1. Does the unavailability of significant portions of the record require the decision be reversed?

The court taped over some of Respondent's testimony and virtually all of Appellant's testimony. The trial court was either unaware of or failed to reveal the missing record prior to its decision.

2. Does the trial court's decision to severely limit Appellant's right to challenge the evaluation require the decision be reversed?

The trial court cut short Appellant's right to cross-examine the evaluator, severely limited the right to questions on redirect and completely barred rebuttal testimony.

3. Was it proper for trial court to remove children from Appellant's care without a hearing where there were controverted issues and the hearing would require more than a year?

The trial court removed children from their mother and severely limited her access to them without a hearing or written decision explaining justification for these extreme and harmful acts.

4. Did the trial court's failure to take allegations and evidence of domestic violence seriously require the decision be reversed?

Throughout the trial and even before, the court sought to justify its failure to take domestic violence seriously.

5. Are Respondent's acts of harassment excused because he believed he was being denied phone calls?

The trial court refused to grant Appellant an Order of Protection because it believed Respondent's abusive and harassing acts were justified by his anger about missing some phone calls.

6. Is there a sound and substantial basis for the extreme actions taken against the mother and children?

The trial court impliedly claims there was a sound and substantial basis in the record.

7. Did the trial court use the discredited Parental Alienation Syndrome by another name?

The trial court denies this was the basis for its decision.

8. Can the court compel a parent to change therapists as a precondition for visitation rights?

The trial court required Appellant to change therapists.

9. What consequences are required to remedy the gender and other biases demonstrated and tolerated by trial court?

The trial court impliedly claims it can engage in gender and other bias.

Statement of Facts

Appellant (mother) was born and raised in Russia. She married Respondent (father) in August of 1994. Father was born and raised in Texas, had two prior failed marriages and a son named Anders (vII missing)

The parties' son, Alexander was born March 2, 1995 while the couple still lived in Russia. Their daughter Victoria (Vika) was born on November 13, 1996 after they moved to Texas. During the time in Texas father was often out of work and failed to provide adequately for the family. The mother was repeatedly forced to seek charity in order to have food, clothing, diapers and other necessities (vII missing).

Throughout the marriage, the mother was the primary parent (vIXp226) and cared for the children with little help from the father. Her outstanding parenting skills were recognized when she received the Mother of the Year Award. The father's more lackadaisical approach to parenting included failing to watch them when they were very young (vII missing); leaving them alone in a car when he went to see his lawyer (vVIIp31); feeding them a lot of junk food (v Xp66); failing to make sure they were adequately dressed (vXp67) and excessive use of spanking (vII missing).

The father physically abused mother and engaged in verbal abuse throughout the marriage including regularly calling her names like "fucking

bitch.” It is likely the children were present for such incidents (vXp165-66). The father also sexually abused the mother (vVp141-2).

The mother finished her degree in Mathematics in Texas and obtained job with IBM in Poughkeepsie. The parties moved to Poughkeepsie in 2000. Shortly thereafter the father twice abandoned the family to return to Texas. After second such incident, mother decided to separate from father and thereafter filed for divorce in August of 2000 (vII missing). Father became angry at the mother’s decision to leave him and threatened to punish her (vVIIp196 and 198) by taking the children (vVp115).

Father used his phone calls to the children to abuse and harass the mother and manipulate the court. He taped many of the calls, but not those with his most offensive remarks. His calls were so repugnant as to cause the mother to suffer panic attacks when he called (vII missing).

In the spring of 2002 the mother spoke with the school nurse, Linda Meeker about Alex’s problems. She advised her to seek help from Family Services and the mother followed her advice (vVIIIp177). Family Services assigned Rosemarie Struk as Alex’s therapist (vII missing). Although the mother spoke with Ms. Struk only about her concerns regarding Alex, Ms. Struk recognized from her fear of the father and body language that the

mother was a battered woman. Ms. Struk advised mother to seek help from local battered women's services (vVIIp31).

Ms. Struk filed a complaint with Child Protective Services (CPS) over mother's objections. The complaint was based in part on information provided by the mother about the father's practice of massaging or scratching the children all over their bodies (except genitals). The mother was particularly concerned because after returning from visitation, the children were scratching each other like their father did, while almost naked, and being in ecstasy. The children begged their mother to do this to them. (vVIIp20-30) The other basis for complaint were reports from school that Alex tried to pull down a little girl's pants; slapped girls on the bottom; tried to kiss a boy; played with himself during after school program and acted inappropriately during the good touch bad touch class (vIXp137).

Although mother warned CPS father would be in school on certain days and asked that the children be interviewed before that, CPS waited until father was in the school and interviewed the children while father was there (vVIIp46 and vVIIIp198). The interview with the children lasted twenty minutes. The children were asked some direct questions and refused to respond (vVIIIp190-192). CPS never investigated the behaviors reported by the school (teachers, nurse, parents) and never determined the cause of these

behaviors (VIXP164-171). Instead they quickly unfounded the case . Thereafter the trial court stopped the therapy (vII missing) before the cause of Alex's behavior could be determined and prevented any investigation that could have determined why Alex had acted out (vIXp158). Judge minimized importance of finding the cause of Alex's behavior (vIXp159).

On July 11, 2002 the mother was pressured into accepting joint custody whereby she would have the children 60% of the time. The court approved joint custody despite the fact that the mother had a Permanent Order of Protection against father from criminal court and allegations of domestic violence in her divorce complaint (vII missing). In late July of 2002, after the Order of Protection expired, father increased the frequency and abusiveness of his phone calls (FOP). On August 15, 2002 before the joint custody stipulation was reduced to writing, father petitioned for sole custody (custody order). On August 23, 2002 the mother obtained TOP for herself and children based upon father's increased abuse and harassment (TOP). On September 5, 2002 she filed for sole custody (decision).

The court moved up initial appearance on the three petitions included in this appeal to September 12, 2002 forcing mother to appear unrepresented. During the hearing court gave father's attorney opportunity to make whatever arguments or representations she wanted (many of which

were never even attempted to be proven at trial). When the attorney finished, judge refused to give mother any opportunity to respond, but instead stated he was inclined to take children from the mother. Every time mother tried to respond she was cut off, talked over, yelled at and threatened. The court removed all protection for children and every meaningful protection for the mother. Court also placed restrictions on mother although father had no family offense petition pending (9/12/02 transcript).

On January 17, 2003, without an evidentiary hearing or written decision explaining the extreme actions taken against the mother and children, court took children from mother and limited her to supervised visitation. The court also barred the mother from speaking with teachers, doctors or other providers (1/17 order)

Court did not start trial until June 10, 2003 and despite requests for more trial days to expedite the trial, the decision was not rendered until May 10, 2004 (see letters from Appellant's attorney and actual schedule).

After Appellant's experts, particularly Dr. Maureen Hannah, destroyed validity of the evaluations based upon their failure to consider child abuse and domestic violence issues; failure to speak with anyone but the parties and children, and obvious ignorance of basic domestic violence

understanding on the part of the evaluator, court decided a new evaluation was necessary (evaluation order). Appellant's attorney repeatedly requested that any new evaluation be performed by someone with particular expertise in domestic violence and child abuse. The judge responded in conference and later on the record by saying that evaluator should have a little knowledge of domestic violence and child abuse, but not too much because such experts always find abuse (VIII missing). Thereafter court appointed an evaluator with limited experience and knowledge over the objection of Appellant (vIX,X,XII)

The order appointing evaluator referred to the father's domestic violence as "alleged," but did not use alleged to refer to the alleged negative remarks of the mother (evaluation order). Evaluator was not permitted to review any documents without court's permission. The only documents she was denied were ones offered by Appellant (vIXp70-71). Evaluator saw the father and children at a time when he had complete control over them. Evaluator could only see children and mother where there was a supervisor which interfered with the ability of the children to be open and honest (evaluation). She had limited time to complete report and therefore failed to speak with several people having important knowledge about the family and children.. Linda Meeker was the only person from school the evaluator

spoke with and she refused nurse's offer to speak again when she could have her notes with her (vIXp12 and 25).

The need for a new evaluation was not determined until the middle of the trial. The evaluator's testimony did not occur until most of the witnesses including expert witnesses had already testified (transcripts). The court cut short Appellant's cross-examination of evaluator (vXp102), and severely limited redirect (vXIIp195-200). The court refused to permit Appellant to have any witnesses to rebut evaluator's report and testimony (Amodeo letter) even after repeatedly promising the Appellant could at least call Dr. Maureen Hannah for rebuttal (vIXp12, vXIIp174).

ARGUMENT

POINT I:

THE UNAVAILABILITY OF SIGNIFICANT PORTIONS OF THE RECORD REQUIRES THE DECISION BE REVERSED

There is no dispute the trial court taped over Volume II of the transcripts which contains most of Appellant's testimony including the entire direct examination. There is also no dispute the afternoon session of Volume I(ii) which contains a brief portion of the Respondent's testimony is similarly missing. Also missing, is a brief part of Volume VI where the

judge's threats and diatribe against dv advocates was cut short with a note suggesting a break in the proceeding. During Dr. Hannah's testimony in Volume III, the court stopped the proceedings after it became obvious the existing evaluations were useless. During the conference (not taped) the judge stated he wanted an evaluator that has some knowledge of domestic violence and child abuse, but not too much because such experts always find abuse. The judge later repeated this statement on the record, but it does not appear in the transcript. This statement appears in letters and motions (including the Order to Show Cause in this appeal) and has never been challenged by anybody.

Obviously the testimony of the mother is a critical part of the evidence. An entire day of testimony in which for the first time she presented the full story of her life with the father and his abuse and neglect. There is no way so much material could be reconstructed. I have notes on the questions I asked, but that would still leave a lot of evidence out. Furthermore we were dealing with a situation in which the father's attorney, law guardian and court were antagonistic. Although this court cannot hear the yelling that was often directed at the Appellant's side, nor see the body language of the judge as he looked away from Appellant's witnesses and acted in a dismissive and disrespectful manner even to the professional

witnesses, there are enough statements in the record for this court to see that all of the court's attacks were directed against Appellant's side and there was a double standard in play. During the trial and in papers filed afterwards, Respondent's attorney repeatedly made false representations about the mother's testimony. Under these circumstances there was no possibility an accurate record could have been recreated.

The law regarding missing records is clear. Where the final portion of the transcript regarding motion to dismiss was missing and remaining transcript incomprehensible and parties could not reconstruct the record, the decision must be reversed and a new trial ordered. Tucker v. City of New York, 583NYS2d905,154M2d100 (Civ Ct. Kings Cty.-1992)

“The transcript is the only part of the record on appeal that establishes what actually transpired during the trial. Since an appellate court does not ordinarily consider matters outside the record, the Trial Judge and the parties must be careful to insure that the transcript reflects all matters which they might wish to urge on appeal and is not deficient or incomplete in any way.” Where minutes were not transcribed and the transcript was not representative of the actual record, the decision must be reversed and a new trial required. Matter of Ernest LL v. Rosemary LL, 50AD2d706,707, 375NYS2d495 (3rd Dept.-1975).

In an abuse and neglect proceeding the court addressed the issue of insufficiency of the record. Where entire transcript is intact and the missing exhibits are either irrelevant or of minimal significance a new trial was not granted. Dept. of Social Services v. Waleska M, 195AD2d507 (2nd Dept.-1993).

It is hard to imagine that even the other side could claim the mother's testimony is irrelevant or of minimal significance. Indeed they and the court have spent enormous energy trying to justify treating virtually everything she said as false. During her testimony, the mother described the sexual abuse she suffered. He repeatedly pressured mother to engage in a threesome with another man. She gave in to his demands once, but stopped it after some fondling. The father continued to demand she do this for him despite her refusals. He often said he could get other women to do this. The mother was clearly embarrassed and pained. Even without hearing her voice and seeing her body language it would have been easy for this Court to understand this had happened as she described. Even the evaluator admitted that the mother's description appeared genuine.

One of the key points the court uses in its decision to assume the mother was not credible was the claim the mother had massaged or scratched the children in essentially the same way the father did. The judge

attributed this statement to Linda Meeker, but Ms. Meeker disagreed with the court (vVIIIp180-182). The mother's missing testimony undermined the court's unsubstantiated claim.

Certainly the evidence presented by the mother and her credibility are central to the outcome. The other evidence is so overwhelming that there is no reasonable way to come to the decisions and conclusions made by the trial court. This Court cannot affirm these decisions without considering the mother's testimony.

ARGUMENT

POINT I:I

THE TRIAL COURT'S DECISION TO SEVERELY LIMIT APPELLANT'S ABILITY TO CHALLENGE THE EVALUATION REQUIRES A REVERSAL

The trial court stopped Appellant's cross-examination of the evaluator, permitted only a few questions on redirect and refused to permit any rebuttal witnesses. While the court can place reasonable restrictions on a parties' ability to challenge an evaluation, all of the restrictions, particularly taken together are unreasonable.

Prior to the start of the trial, the court required the parties provide information including a list of witnesses and information about what expert witnesses would say. There were two limited evaluations that our side

needed to respond to and we prepared accordingly. All of our experts were critical of the evaluations. In the second evaluation, the report said the mother is a strong and articulate woman so could not possibly need a domestic violence advocate. All the genuine experts agreed this was an outrageous statement demonstrating an incredible ignorance about domestic violence (vIIIp164, vIVp194 vVIp118). In Volume III Page 171-172, Dr. Hannah demonstrated the prior evaluation was woefully inadequate. Among the problems she cited was the failure to consider child abuse or domestic violence; failure to speak with anyone outside the family and reliance on MMPI test that reveals nothing about domestic violence and little about anything related to custody. In the middle of Dr. Hannah's testimony, the court recessed the trial and decided a new evaluation was needed.

In its decision, the trial court falsely accused Appellant of refusing to agree to any evaluator unless it was someone she selected. In fact she requested that any evaluator should be an expert in domestic violence and child abuse. During the conference, the court asked the parties for suggestions of how to obtain an evaluation given the parties' limited resources. Appellant proposed that the evaluation be performed by a local agency which the family court, CPS, district attorney and many other agencies regularly rely on. They would have provided an evaluator for each

child at no cost and the law guardian could have made the arrangements. Instead, in a part of the transcript that has inexplicably disappeared, the judge stated he wanted an evaluator who knows a little about domestic violence and child abuse, but not too much because these experts always find abuse. In selecting Meg Sussman they found someone with limited experience and knowledge.

Accordingly, Appellant found herself halfway through her case before learning there would be a major new witness and almost finished her case before facing the widespread mistakes in the report. Under the circumstances it would have been reasonable for the court to be more open to Appellant's right to challenge the report through cross-examination and rebuttal witnesses. Instead the court chose to be extremely restrictive. Two and one-half days of cross-examination seem reasonable on the surface, but that does not consider the frequent interruptions that occurred for frivolous objections and extensive questions by the judge usually designed to undercut the points Appellant was making.

“The conclusions of court-appointed neutral forensic psychologist, like those of any other expert are subject to question through the process of cross-examination and rebuttal.” Ochs v. Ochs,

193M2d502,506,749NYS2d650 (SC West Cty.-2002). In this case we had some cross, but no rebuttal.

It is the duty of the court in exercising its grave responsibility, to become aware of and seek out every bit of relevant evidence. Matter of Anonymous, 34AD2d942,312NYS2d348 (1st Dept.-1970). In the instant case the trial court refused to seek relevant evidence and as a result constructed a theory about the cause of the mother's PTSD which is physically and psychologically impossible.

In Krebs v. Krebs, 83AD2d989 (4th Dept-1981), a custody award was reversed and sent back for trial so defendant would have opportunity to cross-examine those involved in making the report AND the opportunity to present testimony or other evidence in contravention of the report. This is particularly important in the present case because the court took the position that only a psychologist could present testimony to rebut the evaluation performed by a psychologist (and then wouldn't even permit our psychologist to testify in rebuttal). Other kinds of evidence can be used to rebut an evaluation and the court was wrong to refuse to permit the lay witnesses offered in rebuttal as well as the Director of the NYS Coalition Against Domestic Violence.

In its decision and throughout the trial, the court repeatedly criticized Appellant's attorney and implied he was wasting time on unimportant matters. In fact, after a report in which the evaluator's only conclusion about domestic violence was that she couldn't tell to a CERTAINTY whether the father had abused the mother, many significant admissions were obtained during cross-examination including: Father committed incidents of physical abuse throughout the marriage; Committed verbal abuse throughout the marriage including regularly cursing mother and referring to her as a "fucking bitch"; and the children were likely present for some of these incidents (vXp165-66); Father either denied his abuse or wasn't asked (vXp166-67) Used a "gross misjudgment" standard to evaluate father's parenting (vXp199); It is likely mother has PTSD (vIXp100); Father is most likely cause of her panic attacks (vIXp103); Mother's PTSD was not caused by removal of children (vXp10) or Judge Amodeo's statements (vXp12); Believes mother has PTSD to reasonable degree of psychological certainty (vXp20); Mother horribly affected by way father treated her (vXp22); When children lived with mother, father had ok relationship with children, all his visitation and spoke often with children by phone (vXp100); Mother is not unsafe to children (vXIIP15-16); If mother had been given custody and protected from harassing calls, arrangement would have worked

better and mother would be less angry (vXIIp76); Doesn't believe children have been alienated from either parent (vXIIp81); Father's statements far more harmful to children than anything mother said (vXIIp86); Taking children from mother more harmful than everything father claimed mother said (vXIIp88); Didn't know father left children alone in car (vXIIp121).

Clearly the cross-examination was revealing important information to support the mother's case. This important information was obtained throughout the questioning. A review of the transcripts will show many more examples. There was also much information obtained demonstrating many significant mistakes made by evaluator in performing evaluation. Court and the other side sought to rely on the recommendations of the evaluator, but her findings, particularly her testimony don't support those recommendations. Indeed the Court should consider how an evaluator who was asked to make a determination regarding the issue of domestic violence could have left out of her report the key findings mentioned above.

The cross-examination also revealed many questionable statements by the evaluator including: She didn't include the panic attack mother suffered after meeting with evaluator because she didn't think it was an important incident (vIXp89); She is not sure if Alex's behaviors in school are important (vIXp159); She doesn't know if children's unwillingness to be

open is more common in dv cases (vIXp187); She is not sure if eating a lot of junk food and watching a lot of tv is harmful (vIXp188); She believes the father was able to separate his interests from Alex's interests when he stopped therapy (vIXp204); She doesn't know what PTSD in a dv case says about the severity of his abuse (vXp21-22); She believes that even where mother is safe parent, it is not always most important for mother to be children's primary relationship where dv has occurred (vXp46-47); She doesn't believe court's decision sending children to live with father who has committed some acts of domestic violence against mother sends harmful message to children (vXp51); She didn't consider harm to children of future abusive relationship because it was too far in future to predict (vXp53); She believes it is common to have an incident or two of dv and nothing more (vXp164); She wasn't sure if father used communication to abuse and intimidate mother. Would be important if it could be determined but short of father admitting it or witness overhearing it, this is tough to prove. Accepting word of alleged victim would never be sufficient if she is neutral evaluator (vXp226); She believes it's common for men to call partners "fucking bitch" a few times and then not say it other times. Fact that father used this language in public doesn't suggest he used it in private (vXp232-233); She is not sure if use of "B" word is particularly harmful to

girls (vXp237-8); She is not sure which parent is more likely to teach children sexism. Use of “B” word no indication of sexism (vXp239-40); She didn’t know if Vika would be less likely to report crime in future if someone hurts her, if court keeps her with father (xIIpP90-91); She can’t answer whether children are likely to suffer long term harm from losing their mother (vXIIp94).

For each of these statements and many others there are only two possibilities. Either the answers are so obvious that there is no need for an expert to prove the evaluator wrong (in which case her recommendations are invalid) or we must have an expert to testify that each of these statements is unreasonable and therefore evaluator’s recommendations are unreliable. In that case, of course, the refusal to permit rebuttal testimony was prejudicial.

The harm of the restrictions was even greater in the context of the original witnesses who testified. Respondent’s entire case consisted of Respondent’s testimony Appellant had eleven witnesses including five experts plus the school nurse. Respondent had no way to prove his case or challenge the five genuine experts who testified without Dr. Sussman. Under the circumstances the court’s restrictions are even more unfair.

ARGUMENT

POINT III

IT WAS ERROR FOR THE TRIAL COURT TO REMOVE CHILDREN FROM MOTHER'S CARE WITHOUT A HEARING WHERE THERE WERE CONTROVERTED ISSUES AND THE FINAL HEARING WOULD REQUIRE MORE THAN A YEAR

On July 11, 2002 Appellant was pressured to accept joint custody with her abuser. The court stated if the arrangement failed it would take the children from the party responsible. On September 12, 2002 the parties appeared for the first time based on new petitions for custody and the mother's Family Offense Petition. The father complained the mother was interfering with his phone calls and the mother complained that particularly since the expiration of her Order of Protection (from criminal court) the father had increased his use of phone calls to abuse and harass her. Accordingly, depending on the evidence, the court might determine that either party caused the joint custody arrangement to fail (or the court could have realized it was a flawed arrangement whose failure was inevitable). The court moved up the date of the hearing to September 12, 2002 and refused to give mother the opportunity to obtain representation. The father's attorney was given opportunity to speak at length about Respondent's claims and made many representations that would never be even attempted to be

proven at the subsequent trial. The court refused to permit the mother to respond, but instead, based upon the one-sided presentation and the court's biases declared it was inclined to take the children from the mother. We urge this Court to review the entirety of this transcript because it demonstrates how the court acted when it was not looking to create an appearance of fairness. The mother was yelled at, threatened and talked over. At least three times she asked to be permitted to respond to the false allegations made on behalf of the father. The court's only response was to threaten her. This transcript is so important because thereafter the judge's mind was forever closed.

On January 17, 2003, the court took the drastic action of not only taking custody from the primary parent, but restricting her to supervised visitation; preventing her from speaking to teachers, doctors or other providers and holding her passport (despite being limited to supervised visitation). The trial court provided no explanation or justification for these extreme actions. The action was taken at a time when the trial court claimed to be unaware this is a domestic violence case; did not know the father's phone calls were excessive and harassing (even court's own evaluator admitted this vXp227); did not know the mother suffers from panic attacks and PTSD and was using evaluations that were later discredited.

In Colley v. Colley, 200AD2d839,606NYS2d796 (3rd Dept-1994), the court held that during a divorce case it is improper to award temporary custody where parents made contradictory arguments, without an evidentiary hearing, where it became obvious an expeditious trial was unrealistic.

The present case is procedurally slightly different in that there was a custody settlement in the divorce case and then the parties brought Family Court Petitions while the divorce was pending. Nevertheless the same principles apply and the same harm results from changing custody without trial. In the present case the trial did not start for five months after the change in custody and a decision after trial occurred almost sixteen months after the children were removed. Although no one could have known how long a trial would take, the many serious and complicated issues made it unreasonable to believe the trial could have been completed expeditiously.

In Robert C.R. v. Victoria R., 143AD2d262,532NYS2d176 (2nd Dept-1988), the child was living with the mother. The father sought pendente lite change of custody based on allegations the mother was unfit (denied by mother). “It is error as a matter of law to make an order based on controverted allegations without having had the benefit of a full hearing in order to resolve those factual issues...” The court also said that the trial court should have made specific findings of fact.

Accordingly, the trial court did exactly what it was not supposed to do. Significantly, as mentioned earlier, even the court's own evaluator admitted the mother was a safe parent and the children had never been alienated. Thus there was no need to rush such extreme actions.

These illegal and unnecessary actions severely prejudiced the mother's case. The judge's in camera meeting with the children occurred when they were living with the father and had no meaningful contact with their mother. The same is true of their meetings with the evaluator and Ina Berg. Dr. Sussman acknowledged that it was likely the children were less open as a result of being under the control of the father. Certainly this decision contributed to the inability of the evaluator or others to find out the cause of Alex's behaviors at school (evaluator said it would have been important to find cause of Alex's behavior vIXp158, but children are too sealed up to find out the cause vIXp199). Indeed Sussman admitted she thought there was a real probability mother would not get custody because of existing situation and opposition of judge and law guardian (vXIIP17-20). Throughout the trial, mother was under severe scrutiny whenever she saw the children while no one was watching the father. In other words, once the court took the children without an evidentiary hearing the mother's chances were severely prejudiced.

We would ask the Court to consider why the trial court would bar the mother from speaking to teachers, doctors or other providers. This would have occurred outside the presence of the children so it was not to protect them. The mother had a good relationship with the providers and as primary parent had useful information the father would not have. The only purpose was to keep the mother uninformed about how her children were doing. The judge attacked Appellant for not providing more proof of information from the school, but its unnecessary restrictions made that difficult. Clearly it is bad practice to call witnesses without knowing what they would say. Two of the teachers would only speak with Appellant's attorney on condition they not be forced to testify. Their information would have supported mother's position (as the testimony of the nurse did), but they refused to testify. The law guardian said he would subpoena the teachers, but in the end failed to do so. There is a reasonable presumption he failed to call them because their testimony would not support his position against the mother.

As stated above, the court should have provided a written explanation of its drastic actions against mother and children. Appellant was extremely prejudiced by having to guess the basis for the court's order. The court initially implied this issue was alienation which was supported by the court's statements (vIXp61-63). This justification, however, was undermined when

evaluator admitted there was no alienation. She sought to justify the extreme actions by saying mother was too angry at the abuse she suffered. Evidently this victim blaming theory was too much even for the court. In the decision, the court claimed the justification was the mother was trying to keep the father out of the children's lives (which is contradicted by the evidence). What we have had then is an extreme order in search of a justification instead of a decision based upon evidence. The court's failure to state the basis for its extreme actions at the time the children were taken, unfairly prejudiced Appellant.

This section is critically important because the numerous mistakes by the court require reversal. The original decision taking the children from their mother was improper and any reversal must include immediately returning children to their mother.

ARGUMENT

POINT IV

THE TRIAL COURT FAILED TO TAKE ALLEGATIONS AND EVIDENCE OF DOMESTIC VIOLENCE SERIOUSLY

Domestic Violence did not attract significant public attention until the late 1970s. At that time there was little research or knowledge about the harm domestic violence causes children. Battered mothers who came to

court seeking to limit a father's visitation were commonly asked if he also abused the children. If the answer was no, the father was given at least normal visitation. As more research was conducted, we learned children are harmed by witnessing domestic violence. New York responded by changing the law requiring evidence of domestic violence always be admissible in custody and visitation cases.

In November of 2002, this Court took a major step towards protecting battered women and their children in the case Wissink v. Wissink, 301AD2d36 (2nd Dept-2002). The Court ruled that not only must domestic violence be considered, but it must be considered *SERIOUSLY*. In this case an older teenager wanted to live with her father who was by all accounts a good parent aside from his abuse of the mother. In the past that would have assured the father custody, but not when domestic violence must be taken seriously.

Particularly important in *WISSINK* was the importance of using the most up-to-date research about domestic violence. This Court used this research and applied it to the facts in *WISSINK* to make its decision. This is critical to taking dv seriously.

WISSINK occurred after the court stated its intention of taking the children from their mother, but before the formal decision on January 17,

2003. There is no indication in the record the court considered *WISSINK* before making its order. Only after Appellant's new attorney mentioned the case in his efforts to return the children to their mother did the court refer to *WISSINK*. Nevertheless, while paying lip service to the case, the court failed to use up-to-date research or take domestic violence seriously.

The trial court's failure to take domestic violence seriously is clear on the record and permeates the proceeding. In a case in which the mother sought a divorce based upon cruelty and had a Permanent Order of Protection from criminal court based upon an incident in which the father banged on the mother's door while the children were present and repeatedly yelled, screamed and referred to her in the most denigrating and sexist terms, the court approved and even encouraged joint custody. The court did this even though a disinterested witness testified about this incident prior to the "settlement." The court used an evaluation to justify its extreme actions against the mother and children which said the mother was strong and articulate so could not possibly need a domestic violence advocate. In its final decision, the court decided the father might have been justified in harassing and abusing the mother with unwanted phone calls because he was angry that he missed some calls. This is the equivalent of the common

abuser excuse he wouldn't have to hit her if she hadn't burned the carrots.

Why is the court supporting abuser excuses?

When the first two evaluations were exposed by Dr. Hannah, the court obtained another evaluation. Appellant requested that any new evaluation be done by someone expert in domestic violence and child abuse. This is basic to taking domestic violence seriously. As described above the court insisted on an evaluator with limited knowledge of domestic violence. Dr.

Sussman's resume suggested she might have such expertise, but it turned out her involvement with the Pace Women's Justice Center was limited. Her ignorance of basic domestic violence information (such as her confusion about how often deliberately false complaints of abuse are made by women and children) confirms she never had the requisite expertise.

The court's hostility towards those working to end domestic violence is particularly revealing. During the first conference in which Mr. Goldstein appeared, the judge's first words were that he wouldn't be intimidated by the women in the back (referring to the dv advocates supporting the mother).

The court yelled, screamed and threatened these advocates saying they were not to speak with anyone (vVIp78). The full extent of the tirade was again conveniently taped over. The judge later in response to testimony by

another advocate acknowledged they could speak to the mother and each other (vVIp152).

The court also minimized or disregarded what the genuine domestic violence experts said by claiming they were representing the mother and basing their opinions solely on what she told them. These claims are not supported by the evidence. Rosemarie Struk was the therapist for Alex. The mother merely followed the advice of the school nurse and accepted the agencies' choice of therapists. In other words she wasn't selected with any view toward litigation and was advocating for her client not the mother. Ms. Struk was the first professional to advise mother that she is a battered woman and should seek help. This was not based on mother describing the father's domestic violence, but rather from the therapist observing the mother's body language and fear of the father (vVIIp25-33). Hannah Talmadge was the therapist for both parties. The mother did not tell her about father's domestic violence and in fact if she had Ms. Talmadge would not have treated both parties because of ethical considerations (vVIp11-14). Katrina Yahraes (vVp192) and Priscilla Taylor also described the use of body language, tone of voice and other involuntary signs in determining mother is a victim of domestic violence.

For obvious reasons, abusers tend to abuse their partners at home or in other places where there are no witnesses. Batterers often hit their victims in places where the injuries aren't visible. Accordingly there are many cases where the only available evidence is the testimony of the victim which is then denied by her abuser. In such cases, a court must rely on the body language, tone, consistency and other aspects of the testimony. It can and should also use up-to-date research about domestic violence instead of the myths and stereotypes that have commonly been used in the past (and too often today).

In her report, Sussman suggested the lack of hospital or police records (aside from the father's arrest and ACD) somehow suggests the mother's later reports are unreliable. The trial court made similar comments prior to trial. In fact it is common that safety and other concerns prevent reports

Sussman's flawed approach is summed up in Vol X P. 161-163. On Page 161 she says, "I essentially had the mother's word against the father's word." The implication was she can't find abuse when the father denies it. This is an approach that fails to take domestic violence seriously and if adopted would mean that battered women are not safe in the courts of New York. Sussman admitted she had transcripts (which showed father's excessive and harassing calls), witnesses (such as Rebecca Watson who

heard the father banging on the door and calling the mother obscene names), the diagnosis of panic attacks and PTSD and her discussions with the mother's therapist. Sussman then states on page 163 "but I did not have evidence." The scary thing about this case is that few women have the level of proof provided by this mother. The approach taken by Sussman and approved by the court fails to take domestic violence seriously and places the lives of battered women and their children in jeopardy.

The court and evaluator were biased against the mother and minimized the father's domestic violence, but just the evidence of father's abuse found by evaluator requires the mother receive custody and the father supervised visitation.

Although the evaluator used a certainty standard against the mother, the actual standard is preponderance of the evidence. By this standard, the evaluator determined: The father physically abused the mother throughout the marriage; Verbally abused her throughout marriage including regularly cursing and calling her names like "fucking bitch"; Children were present during some of these incidents (vXp165-66); Father caused mother's PTSD and panic attacks (vIXp96-103 vXp20). The genuine experts who testified (and were prevented from rebutting the evaluator) made far stronger

statements about father's abuse. There is nothing in the record to justify challenging the conclusion that the father severely abused the mother.

WISSINK says courts should use the most up-to-date research about domestic violence. Dr. Sussman, did so when she chose to read *THE BATTERER AS PARENT* by Lundy Bancroft and Jay Silverman in preparation for the case. Unfortunately she waited until after writing her report. Repeatedly she failed to follow the book's recommendations.

The beginning of the questions about this book occurred in vXp31. Dr. Sussman said the book is authoritative about domestic violence and particularly batterers as parents. She selected this book because the authors are considered experts in their field. On page 32 she states the book contains some of the most up-to-date information about domestic violence and batterers as parents. On page 34, referring to the book she agrees that recent research says batterers engage in harmful parenting practices such as undermining the mother and teaching harmful values and attitudes.

This is exactly the kind of up-to-date information encouraged in *WISSINK*. Taking domestic violence seriously, however did not fit with the goals of the judge and other attorneys. They immediately sought to minimize the importance of the information in the book. In vXp94 and elsewhere the court claims (in contradiction to P. 31 of the actual testimony)

that Sussman said the authors claimed they were experts. The court repeatedly abused and belittled Appellant's counsel for asking questions about this leading and authoritative book which the court's own expert had chosen. The court particularly interfered with questions about Sussman's failure to apply this research to her recommendations.

The authors recommend mothers should always have custody where there has been domestic violence with only one or two exceptions (vXp47). The exceptions have to do with cases in which the mother is not safe. The evaluator, however, agreed mother is safe (vXIIp15-16). Accordingly, taking domestic violence seriously, even after the evaluator watered down the severity of the father's abuse requires mother be given custody. In failing to follow the most up-to-date research about domestic violence, the court failed to take domestic violence seriously.

ARGUMENT

POINT V

THE RESPONDENT'S BELIEF THAT HE WAS DENIED CALLS DOES NOT JUSTIFY HIS HARASSMENT

The court couldn't deny the father abused the mother with excessive and harassing phone calls because it was established by his own testimony and phone tapes. He called ten or more times a day sometimes as late as 1:05 AM. He called when she was working even after she told him not to

call particularly while she was working. He made other calls he didn't tape so in actuality the calls admitted were just a part of the many calls he made and were the least offensive of his calls (vVIpP196-8).

These calls were the main basis (Appellant never tried to prove allegations from before the joint custody stipulation) of the mother's petition for an order of protection. In its decision, the court listed three criminal statutes that might have been violated. Although the panic attacks caused by the father's calls might meet the physical injury requirement in Section 120.20 of the penal law, the father was unaware at the time that his harassment was causing the mother's panic attacks. Sections 240.30 and 240.26 do apply. The only purpose of calling late at night when the mother and children were sleeping was to annoy and harass the mother. Similarly repeated calls, threats and refusal to end conversations even after being told she was working and could not talk could have no proper purpose. None of his calls were ever for emergency matters. Accordingly, Respondent violated both statutes and the mother is entitled to an Order of Protection for herself and children (the harassing calls were often made with children present).

The trial court couldn't deny abusive calls were made (even evaluator said the calls were excessive and harassing). Instead the court said

the father might be angry because he believed the mother was denying him some of his calls and therefore he was entitled to harass and abuse the mother. If this part of the decision is upheld it would change the law in a particularly dangerous manner. Most abusers blame their victims for their own abuse. If this had support in the law, no battered woman would be safe.

In People v. Cobb, 172M2d851661NYS2d903, appeal denied 90NY2d856,661NYS2d183,683NE2d1057, harassment conviction was upheld. The defendant claimed the failure of complainant to properly serve copy of execution for seizure of his car justified his use of physical force to resist. The Court said service was proper under the circumstances, but even if it had been deficient it would not justify use of physical force.

Even closer to the present case is People v. Singh, 187M2d465,722NYS2d368 (App. Term, 1st Dept-1997). The father made a call to child abuse registry in which he threatened to shoot judges, lawyers and others. He claimed he had legitimate purpose to complain that his wife was denying him visitation with his children and to seek help. The Court said the phone call threatening crimes cannot be considered as being for legitimate purpose. To do so would call for subjective judgment as to what was in caller's mind. Accordingly motion to dismiss charges was denied.

In other words, the law says that even if father thinks he has a valid grievance, this would not justify making threats and doesn't justify the excessive and harassing phone calls he made. In reality, the Respondent abused and harassed the Appellant so badly as to cause her to suffer panic attacks. During much of this time he was permitted to make one call per day. If he weren't getting his phone calls, remedies were available. The remedies do not include abuse or harassment.

ARGUMENT

POINT VI

THERE IS NO SOUND AND SUBSTANTIAL BASIS FOR EXTREME ACTIONS TAKEN AGAINST THE MOTHER AND CHILDREN

Based upon the actual evidence, this should be an easy case. The mother is the primary parent with far superior parenting skills than father. He abused her so severely as to cause panic attacks and PTSD. He abused and mistreated the children and the only real dispute is the extent of his abuse. It is only the trial court's decisions and unfair attacks on the mother that create an appearance anything other than sole custody for the mother and restricted visitation for the father should be considered.

This is one of the Custody-Visitation Scandal Cases which are endangering women and children across the country. Custody-Visitation

Scandal Cases include most of the following criteria: Allegations of domestic violence; Gender bias; Extreme outcomes giving custody to batterer and restricted visitation to protective mother; Failure to take domestic violence seriously; Use of discredited Parental Alienation Syndrome; Use of common abuser legal tactics; Failure to have complete investigation of child abuse and dv allegations; Outcomes placing children at risk; Use of “experts” who don’t understand domestic violence issues; A focus demonizing the mother and an extreme outcome making it seem like the judge was bribed (although that is rarely the cause of the improper outcome).

In order to overcome a lack of evidence supporting its decisions, the court resorted to treating proof of one thing as proof of something else. For instance the court without saying so directly has treated proof the mother made negative statements about father to be proof she alienated or at least harmed the children by doing so. In fact with one or two unproven exceptions, all the so called negative statements by the mother are in fact statements encouraging the children to make good choices. The statements are to the effect the mother wants her children to eat healthy, dress appropriately for the weather and avoid adult oriented television shows. These statements were taken as impliedly criticizing the father’s poor

judgment. The court and evaluator were interested in counting negative statements rather than considering harm to the children. Sussman took this to such an extreme she twice mentioned the mother asked Alex to take care of his younger sister (a statement virtually all parents have made), but didn't have room in the report to mention her belief that it was probable the father abused the mother physically and verbally throughout the marriage and caused her panic attacks and PTSD. She also left out the fact that her mistake caused the mother to unexpectedly see the father causing a panic attack (confirmed by supervisor).

At the same time the father's negative statements (repeatedly calling mother "fucking bitch and similar names, telling children mother moved to another city so they wouldn't see her and Vika's repetition of "mommy dummy") which even Sussman agreed were more harmful than anything mother was alleged to say resulted in no consequences to father. This is another example of court's double standard.

The court decided the mother was a liar based on two incidents in which it disagrees with her judgment, but nothing she said is even claimed to be false. One incident involved the mother's concern that it was not safe for her children to be with their stepbrother. Anders was diagnosed with bipolar disorder and had to be hospitalized at least a few times. When he was

supposed to fly to live with his father, he had to be taken off the plane and his father had to come get him (and place him in a mental hospital). The nurse in Texas advised Appellant to keep him away from young children.

The other issue was the mother's concern the scratching or massaging father did to the children was harmful. Alex's therapist and the therapist for the parties both concluded the father's behavior constituted abuse because it violated boundaries. The mother described what the father did and stated he never touched their genitals.

The court concluded Anders wasn't dangerous and that father's massaging didn't constitute abuse. Both of those conclusions are debatable at best. In each case, the mother was concerned about the safety of her children and still did not exaggerate her concerns. The one thing that is beyond question in both situations is the mother was truthful about her concerns. The court might think she used bad judgment (however unreasonable that conclusion would be), but there is no way these incidents support the conclusion she is a liar (Interestingly the court repeatedly criticized Appellant's attorney for referring to the father as an abuser based upon overwhelming evidence, but had no problem with repeated references to the mother as a liar which is unsupported by evidence. Still another example of court's double standard).

Similarly, the father was shown to have abused the mother many times including one observed by a neutral observer. He was found to have abused and harassed the mother on the phone. The father denied any abuse. Nevertheless, the court continued to treat him as if he were credible.

A review of the law with respect to the requirement that a trial court have a sound and substantial basis for its decision demonstrates how far out of the mainstream the court is. In each case the proof was greater than the allegations against Appellant, but the primary parent at least maintained unsupervised visitation and sometimes custody.

The most important factor in determining custody and visitation is the best interest of the child. An appeals court should treat the trial court's judgment of credibility with respect unless they lack a sound and substantial basis. Where father provided children with a well-rounded and stable home environment and stimulating outside activities which mother failed to provide to the same degree, and mother interfered with visitation causing children to miss special events, father received custody. The court-appointed psychiatrist testified the children were experiencing a sense of uncertainty as a result of mother's vindictive attitude towards father. Even under these circumstances mother received alternating weekend visitation. Maloney v. Maloney, 208AD2d603,617NYS2d190 (2nd Dept.-1994).

In a case with many similarities to the present case, an award of custody to a father who committed various acts of domestic violence was reversed. Although trial court's determination is entitled to deference because it had the advantage of hearing witnesses and evaluating character, the authority of the Appellate Division is broad and it would be remiss in its duties if it permitted custody determination to stand that lacked sound and substantial basis in the record. Accordingly the court made its own determination. It criticized the trial court for minimizing the significance of domestic violence and failing to consider the potential harm to child particularly that the child could develop similar pattern of abuse. This case did involve more dangerous incidents of abuse than the present case because the abuse included use of gun. The trial court thought it was significant that there were no new incidents in past two years (since like in the present case child was with father), but appeals court disagreed. Rohan v. Rohan, 213AD2d804,623NYS2d390 (3rd Dept.-1995).

Even where a mother willfully and repeatedly impeded the father's visits, expressed bitterness about the father so strongly as to psychologically damage the children and was properly held in contempt, the remedy was to get father's visits restarted. Fuerst v. Fuerst, 131AD2d426,515NYS2d862 (2nd Dept.-1987).

Buhmeister v. McFarland, 235AD2d846,652NYS2d661 (3rd Dept.-1997) was like the present case in that there was a prior stipulation of joint custody with residence to mother. Father sought custody based upon repeated willful violations of court orders, interference with phone calls and general acrimony. The court considered the harm to children in making the switch (which the children did not want) and that all visitation occurred. Accordingly mother retained custody although court was critical of her behavior.

Where mother repeatedly prevented visitation and phone calls, tried to discourage daughter from having healthy relationship with father, tried to make child believe that father threatens to take her away and never return her to mother, court changed custody to father. Sullivan v. Sullivan, 216AD2d627,627NYS2d829 (3rd Dept.-1995)

In Hartman v. Hartman, 214AD2d780,624NYS2d470 (3rd Dept.-1994) court considered harm of taking children from mother who was primary caregiver and therefore did not change custody despite finding mother willfully interfered with visitation.

Where record established history of mother attempting to prevent visitation or meaningful relationship with father; taking position phone calls should only occur if children have need to speak to father, and mother's

negative statements about father caused children to “parrot” her negative feelings, custody was given to father. Betancourt v. Betancourt, 204AD2d804,611NYS2d941 (3rd Dept.-1994).

Where mother was primary parent and child was living with her after separation, trial court changed custody based upon admissions by mother she had at times interfered with visitation (although father got most of his visits). Court decided trial court acted improvidently in changing custody based on view that mother was solely responsible and failing to consider best interests of the child. There was no indication that a change in custody would substantially enhance child’s welfare. Custodial parent was not shown to be unfit or less fit and therefore custody arrangement should not be disturbed. No evidence about effect that a change in custody from parent who raised him would have on the child. Muzzi v. Muzzi, 189AD2d1022,592NYS2d869 (3rd Dept.-1993).

In Matter of Clary v. Bard, 186AD2d869 (3rd Dept.-1992), although father sometimes interfered with visitation a change in custody will not be given unless it substantially enhances the child’s welfare and custodial parent is not shown to be less fit to continue as custodian.

Finally the legal standard is demonstrated in Skolnick v. Skolnick, 142AD2d570,571 (2nd Dept.-1988). Although a custody determination

which depends upon assessments of character and temperament should be accorded great respect, “an appellate court would be seriously remiss if simply in deference to the finding of a Trial Judge, it allowed a custody determination to stand where it lacks a sound and substantial basis on the record.”

“Although the record contains evidence of the deep resentment and hostility the mother harbors toward the father, and evidence of the fact that, on numerous occasions, some or all of the children have refused to go with the father for visitation, there is insufficient evidence to support the conclusion that this denial is wholly attributable to the intentional acts of the mother.” The court also objected that the record does not contain evidence of how a change in custody would affect the children. The court reversed the trial court’s custody ruling, ordered an expeditious hearing with a new judge, new evaluations and return to the prior order.

There is no dispute that when the children lived with their mother they had all their visitation and most of their scheduled phone calls (in reality most of the missed calls were caused by the father’s failure to follow the rules or demand that mother call him at work which would have jeopardized her job). The court concluded the mother didn’t want the children to have a relationship with father, but even when the Order of Protection was in place

and father could only have visitation agreed upon by mother, he enjoyed regular unsupervised visitation. Instead of relying on the evidence, the trial court took the mother's valid concerns about the father's poor care of the children to mean she didn't want children to have a relationship with the father. The court could have tried to solve the problem by encouraging father to obtain parenting skills and prevent him from abusing mother. Instead the court chose to take the mother out of the children's lives. This may have been in the best interests of father, but certainly not of the children.

The cases cited above require the court to determine the effect of removing the children from their mother. In order to justify the extreme actions taken by the court or even changing custody, the Respondent needed to prove the benefits of taking the children from the mother outweigh the harm. Everyone agreed the children were greatly harmed by taking them from their mother. The evaluator didn't consider the harm to the children of future abusive relationships because it was too far in the future to predict (vIXp53). This was considered an important concern to the *WISSINK* court. The evaluator admitted taking the children away from the mother was more harmful than everything the father claimed the mother said (vXIIp88). The genuine experts all agreed the harm of taking these children from their

mother was greater than any possible benefit and discussed many significant problems likely to be caused by such an action. Although Sussman recommended a change in custody, she never provided any evidence justifying the harm she acknowledged and the harms she wasn't able to understand or investigate. Absent such required evidence there is no substantial basis for the extreme actions taken by the court.

The court, law guardian and evaluator agreed the mother should have custody if it was established the father committed domestic violence against her. Since some incidents were proven by a neutral witness and even the father's own tapes, there is no question the father abused the mother. The apologists for the father have therefore decided that it's only domestic violence if the incidents are frequent and serious enough.

Sussman considered the father's behavior to be "lower level" violence (vXIIp4-9), a term from *THE BATTERER AS PARENT*. The court attempted to use a legal standard of what is sufficient to constitute domestic violence that is inapplicable to custody and visitation. The standard is the best interests of the children and any behavior harmful to the children, even if perfectly legal, should have been considered in order to determine the best interests of the children. The court impliedly did the same thing with the CPS investigation of child abuse. Even if the evidence was not strong

enough to rise to the level of a crime, the behavior could still be harmful and in fact Alex's behavior problems strongly suggest the father's behavior was harmful. Nevertheless the court decided that once the case was unfounded the issue was resolved.

The book makes clear "lower level" violence should be treated like all domestic violence because it has the same kind of harmful effects on children. Sussman's failure to apply this information to the present case is another example of her limited understanding of dv and the court's failure to take domestic violence seriously.

Even the high level of domestic violence the court required was met by the evidence. The panic attacks and particularly PTSD could not have been caused unless the father's abuse was frequent and severe. The trial court sought to avoid this fatal defect in the father's case by deciding the court mistreated the mother so severely as to cause her panic attacks and PTSD. Although the judge has since denied this characterization, in the context of the undisputed evidence about the cause of PTSD, the court's decision cannot be reasonably interpreted any other way.

The only evidence to support the court's conclusion was a general statement by Sussman and witnesses for the mother that PTSD could possibly be caused by a fear of the children being taken from the mother.

No one said it was possible under the facts in this case, but instead all of the experts agreed that the father's abuse caused the mother's PTSD.

Sussman created confusion when she mentioned panic attacks can be caused without traumatic events (such as someone afraid to speak in public). Panic attacks and PTSD are different, however in that it would take something really serious to cause PTSD. In this case the mother's PTSD was not caused by the removal of the children (she knows this because of the timing) and wasn't caused by Judge Amodeo's statements (as the trial court decided). She believes to a reasonable degree of psychological certainty that mother has PTSD (vXp9-20). As mentioned previously she also said mother's PTSD was probably caused by father's behavior.

Katrina Yahraes, the mother's therapist is in the best position to understand her condition. She confirmed her diagnosis of panic attacks and PTSD with Dr. Gay. Her PTSD is "delayed onset" which means it was not based on one extreme episode but rather many episodes over an extended period of time. The mother did not know what a panic attack was when she suffered them and thought she was crazy which is a typical reaction (vIVp28-49). There were no other triggers that could have caused the attacks. The mother's involuntary actions (shame, etc.) demonstrate the abuse she suffered. Panic attacks started at least a year before children were

taken (vIVp135-158). Threat of taking children could not possibly have caused it because PTSD takes a longer time to develop (vVp132).

In other words the court's construction of a theory that it caused the mother's panic attacks and PTSD is physically and psychologically impossible and nothing in the record supports the court's conclusion. The court argued the fact the law guardian triggered a panic attack in some way undermines the experts' conclusion that the father's abuse was the cause. In fact there is no dispute that the mother viewed the law guardian as an extension of the father and none of the experts thought this made any difference. Significantly, the court demanded that only a psychologist could rebut an evaluation by a psychologist and then developed a psychological theory unsupported by any expert.

The court's conclusion is truly bizarre. There is no substantial or in fact any basis for the court's theory. The experts agree the father's abuse caused the mother's PTSD and panic attacks. This cannot have happened unless father's abuse was serious and traumatic. This is a crucial issue in this case because if this Court agrees that there is no substantial basis for the court's theory, this alone requires reversal. The trial court's baseless conclusion is a clear demonstration of its bias and requires Judge Amodeo have nothing further to do with this case.

ARGUMENT

POINT VII

THE TRIAL COURT IMPROPERLY USED THE DISCREDITED PARENTAL ALIENATION THEORY BY ANOTHER NAME

Parental Alienation Syndrome is a discredited theory self published by Richard Gardner and never peer reviewed. If children don't want to visit their father, say negative things about him or are otherwise antagonistic, the theory assumes the mother brainwashed the children and the remedy must be custody to the father and supervised visitation for the mother. The theory is not included in the DSM or approved by the American Psychological Association or any other reputable mental health organization (for a discussion and explanation of PAS see vIIIp153-160). PAS is illegal in this state *PEOPLE v FORTIN*. 706NYS2d611 (NY Co.-2000). *PEOPLE v LOOMIS*, 172M2d265,658NYS2d787 (Suf Cty-1997). The trial court and all parties now agree PAS cannot be used.

When Mr. Goldstein first entered the case, Mr. Marocco told him the children were removed based upon PAS. This conversation was private so there is no record of it, but was repeated in letters and affidavits that are in the record. Thus far it has never been denied. When Mr. Goldstein raised the issue with the court and cited cases, the court denied using PAS, but just

parental alienation. In Volume IX of the testimony Sussman agrees PAS is thoroughly discredited (P55) and the judge agrees it is invalid (P61).

Unfortunately Sussman doesn't have enough knowledge to recognize when PAS is being used (P64). Dr. Hannah has that knowledge and training. She explained that PAS is often used by another name (such as parental alienation) and believes it was used in this case.

The way PAS works is to have one piece of information assumed to mean something else. So typically if a child expresses something negative about the father, the assumption is the mother is alienating the child. This is used as a substitute for investigating the actual causes of the child's feelings towards the father.

The trial court did the same thing with "negative" statements by the mother. The assumption, without any proof was that if the mother made statements that could imply something negative about father such statements must be harmful and therefore alienating. Thus when mother told Alex to take care of his sister, the evaluator assumed this implied the father could not take care of the sister and therefore it was an attack on the father. Similarly if mother suggested the children be dressed warmly in cold whether, the assumption was she said this not to promote the health and well-being of the children, but as an attack on the father (of course when the

father called the mother a “fucking bitch” or told the children they wouldn’t see their mother because she moved away such actual alienating statements were tolerated.. This is an example of the gender bias we will discuss in the final section).

Even Sussman admitted it is not always harmful for mother to say negative things and in fact it’s sometimes beneficial. Parents in intact marriages commonly say the same kinds of things. “Such statements don’t make the mother unsafe.” (vXp15). The evidence does not support the conclusion the mother’s statements are harmful much less require the extreme actions taken.

The book recommends evaluators and others rely on the battered mother’s judgment regarding the father’s parenting. Instead Sussman assumed the mother’s concerns were exaggerated. She specifically minimized the mother’s concerns about the children being properly dressed (vXp196-199). The assumption the mother was exaggerating the father’s parenting deficiencies was the basis for Dr. Sussman’s theory the mother was “too angry” about the abuse she suffered to have custody.

In evaluating whether the father dresses the children properly and similar parenting issues, Sussman could have used the information in the book and spoken to witnesses who saw the children when they were with

each parent. These witnesses included parents of the children's friends as well as teachers and school personnel. The evaluator refused to speak with any of these individuals with the exception of a brief interview with the nurse because she didn't have time. Instead she relied on reports of David Garcia (CPS) and Ina Berg believing they were neutral sources. In fact Garcia saw the children as they were dressed when with the mother so had no information. Ina Berg saw them when the father was trying to impress her. Thus the evaluator relied on two individuals who were easily manipulated by the father.

If this was the end of the evidence, we believe the evaluator used bad judgment, but recognize that greater weight is given to a "neutral" evaluator than other witnesses. Fortunately a witness saw Alex running around a convenience store parking lot on a cold winter day without a jacket. The father under cross-examination and knowing of the other witness admitted Alex often runs around without a jacket in the cold weather (vXIIIp37). The importance of this admission goes beyond the father's parenting problems. It demonstrates clearly the sources relied upon by the evaluator are in fact unreliable because they were manipulated by the father. It is also instructive that the book's recommendations proved accurate in this case and the mother's concerns were true despite the court's desire to assume everything

she said was false. In fairness to Dr. Sussman this admission came after her involvement in the case so we do not know if it would have overcome her biases.

A central part of PAS cases is the protective mother is limited to supervised visitation. In the face of terrifying panic attacks the mother managed to make sure the children had all their visitation and most of their phone calls. Her so called negative statements were actually valid concerns about her children's well-being. In cases cited in the previous section normal visitation and in fact custody remained with the primary parent despite actual interference that is far more significant than anything this mother was proven to have done. We say this not to argue the court went a little too far and supervised visitation was unnecessary, but to demonstrate there was no basis for any such restrictions. This demonstrates the use of PAS and the extreme bias of the court. In this case (wrong) assumptions were used as a substitute for evidence in a manner detrimental to the best interests of the children. That is why PAS is such a harmful theory and a large part of many Custody-Visitation Scandal Cases.

ARGUMENT

POINT VIII

THE COURT CANNOT COMPEL A PARENT TO CHANGE THERAPISTS AS A PRECONDITION FOR VISITATION RIGHTS

Among the specific orders in the decision is the requirement the mother submit three names of therapists for the court to select one. After the decision we wrote the court and later asked during an appearance if there was some misunderstanding since the mother already has an excellent therapist whom she sees regularly. Judge Amodeo confirmed the order and demanded she see someone else.

Neither Family Court nor Supreme Court has the authority to order therapy as a condition of visitation. Schneider v. Schneider, 127AD2d491,511NYS2d847 affd. 70NY2d739,519NYS2d962,514NE2d382 (1st Dept.-1987). Nascon v. Nascon, 166AD2d510,560NYS2d792 (2nd Dept.-1990).

In Landau v. Landau, 214AD2d541,625NYS2d239 (2nd Dept.-1995) the court sustained an order that mother undergo psychotherapy as condition of visitation despite cited cases which say it is not permitted. Significantly, even where court found mother to suffer severe depression, persecutorial delusions, extreme emotional lability, exceedingly poor judgment and distortion of reality, she was given unsupervised daytime visits.

Two cases cited in *LANDAU* are Ramshaw v. Ramshaw, 186AD2d243,244,588NYS2d310 (2nd Dept.-1992 which says, “The court has no authority to impose an open-ended obligation on the wife to obtain future counseling as an implied condition of its custody determination.” Similarly, Matter of Tito G v. Thelma G, 187AD2d651,652,591NYS2d41 (2nd Dept.-1992) says, “The court has no power to compel a party to undergo therapy as a condition for awarding visitation.”

Accordingly it is doubtful the trial court can impose therapy under the circumstances of this case, but Judge Amodeo did something far more offensive. The court would prevent the mother from continuing with her therapist who has helped her get through numerous traumas. Clearly after all the mother has been through it is difficult for her to develop the kind of trusting relationship necessary for effective therapy. Dr. Sussman noted in her report the mother had trouble trusting her. The abuse the mother has suffered from her husband, the supervised visitation programs, the evaluators (including being subjected to meeting her abuser which triggered a panic attack) and the judge have made it very difficult for the mother to trust strangers. She has a trusting relationship with a therapist who is knowledgeable and has helped her greatly. The mother could not see a therapist selected by the judge and continue with her present therapy for

financial and ethical reasons (most therapists would object to such an arrangement). Thus the court would take away the effective therapy she has for a new therapist she would have difficulty trusting.

Clearly this part of the order is foolish and illegal. The point is not just to remove this indefensible portion of the order, but judge's attempt to impose such a controlling and detrimental order demonstrates the level of bias and animus the court has displayed against the mother.

ARGUMENT

POINT IX

WHAT CONSEQUENCES ARE REQUIRED TO REMEDY THE GENDER AND OTHER BIASES DEMONSTRATED AND TOLERATED BY THE TRIAL COURT?

In Volume IX pages 26 and 27 there is a discussion of a quote from the report of the New York State Judicial Committee on Women in the Courts.

“ While domestic violence victims now benefit from heightened public awareness, more sensitive police and prosecutorial approaches and increases in resources, and these crimes are treated with appropriate seriousness in the courts, victims of domestic violence all face higher standards for establishing credibility than abusers, treatment based on stereotypes and a tendency to blame them for their abuser's behavior.”

Dr. Sussman acknowledged this occurred to some extent in this case, but in reality this is another example of the evaluator's understatement regarding the role of domestic violence in this case.

In Volume X pages 153-166 and elsewhere there is a discussion of the higher standards she used against the victim. The two major issues the court asked the evaluator to consider were domestic violence and negative statements about the other parent. In her report she could not determine the extent of the father's domestic violence to a certainty and then used a likely or probable standard when determining the mother made more negative statements than the father. Thus on the issue the mother needed to prove the burden was 100% while on the father's issue it was 51%.

Even after Sussman was confronted with her use of a higher standard against the mother, she did not understand how she had used gender bias to prejudice the mother. This is particularly important because the only witnesses for the Respondent was the father whose testimony demonstrated that he abused the mother (through excessive and harassing phone calls) and failed to take proper care of the children; and the evaluator who based her recommendations on gender bias.

The gender, immigrant and other biases used against the mother weren't minor or limited to the evaluator. Although the Appellant made bias

a major issue, the court never objected to its use or sought to overcome the prejudice done to the mother. Instead, the court made light of confirmation bias claims made by Appellant and strongly supported by the evidence. Furthermore, the court permitted gender bias to permeate the proceedings. The father was treated as credible even after it was established he had lied about incidents of domestic violence while the mother was treated as a liar based upon incidents in which the court disagreed with her judgment, but she was never found to have even exaggerated her concerns. The court made numerous threats and restrictions against the mother regarding the father's claims she was interfering with his calls, but never did anything to control the excesses from the father's phone calls that were the real cause of the problem. The court engaged in and encouraged numerous myths and stereotypes about women including: the lack of prior police reports or hospitalizations suggests the mother is making up or exaggerating his abuse (in the decision the court acknowledged there are often good reasons why reports aren't made, but didn't apply this understanding to the case); the court used the second evaluation despite a statement that the mother was a strong and articulate woman so could not possibly need a dv advocate; used the recommendation of an evaluator who concluded that the mother was "too

angry” as a result of the abuse she suffered to have custody or unsupervised visitation.

There have been many official court reports in this state and others about the all-too-frequent use of gender bias. Recommendations have been made for more training and other efforts to stop this prejudicial behavior. As this case demonstrates, these efforts have failed to end gender bias in the courts. Frankly we are not aware of any cases in which courts have imposed remedies for gender bias. Clearly a woman such as this mother who faces gender bias is at a severe disadvantage based upon her gender. This court and committees can complain about how unfair and improper this is, but unless there are consequences for the use of gender bias, courts are in reality tolerating mistreatment of half the population. On this record there can be no question that the Appellant was disadvantaged by being a woman. The question for this court is what is the remedy?

As discussed above, appellate courts normally give deference to the trial court because it saw and heard the witnesses. When a court uses or tolerates gender bias, however, this rationale no longer exists. This mother was not judged based on her demeanor, body language etc., but on her gender. It is impossible to separate the bias caused by sexism from any legitimate factor. Accordingly, at the very least an appeals court should not

give any consideration to the opinions of a court that has used or tolerated gender bias.

This is a scary case because few battered mothers have the resources this mother had. By all accounts she has not just good, but outstanding parenting skills. She has a good job so that she could afford the expenses necessary to continue the case even against an abuser who was given free attorneys and other advantages. She was able to present five expert witnesses because all her experts participated pro bono or at reduced fees. She was supported by the domestic violence community throughout the trial because of their concern she was being mistreated. She finally obtained an attorney with expertise in domestic violence.

It would be nice to believe Judge Amodeo is the worst judge in the world, but in fact there are many bad and insensitive judges all over the country. This is why there are so many Custody-Visitation Scandal Cases. If Yevgenia Shockome with all her advantages cannot protect her children, no battered woman is safe in the courts of New York.

There are of course many charges and allegations against the mother to make her look bad. The standard abuser legal tactic is to blame the victim. A superficial look at these cases suggests that the bad outcome is because of some unusual defects in the mother. With gender bias any

mother can be made to look bad. The actual evidence demonstrates Appellant is an exceptional mother.

If this court returns the children to the mother, gives them a permanent order of protection and limits the father to supervised visitation, this case is still a failure. By the time this court can correct the errors, the children will have been without their mother for over two years. They have been subjected to living with an abuser and there is evidence he did other harmful things while they were under his care. They have been sent messages society tolerates the mistreatment of women. The mother's finances have been destroyed by legal fees and court expenses; excessive child support; medical and therapy fees as a result of the father's abuse and retraumatization by the court. We believe just the failure to have a complete transcript or to permit rebuttal of the evaluator's report and testimony requires reversal, but if all the court does is reverse the case and require a new trial, the harm to the children would continue (and resultant reduction in the chances that therapy can help them overcome their mistreatment) and the mother would face a new trial without any resources to present her case. Most battered women start with fewer resources than Appellant so the practical effect of such a remedy is to deny the protection of the courts to battered women.

Many domestic violence organizations around the state and country came to the trial to support Appellant. As I write this, at least three organizations have spoken to me about submitting amicus briefs in support of the mother. The reason (as mentioned in an affidavit of Priscilla Taylor in our OSC on this appeal) is that women are starting to stay with their abuser rather than risk seeking the court's help and risk what was done to the Appellant where the court helped her abuser to hurt she and her children.

Various parts of the court system put out informational brochures urging battered women to seek help in the courts. The movement to end domestic violence is watching this case. If this court fails to protect Yevgenia Shockome and her children it would be unsafe to continue to make representations that battered women should seek help from the court system. If this case is not corrected, battered women will stay with their abusers as the safer alternative, and the result will be more tragedies.

All the mistakes made in this case favored Respondent. The actual evidence demonstrates this is an easy case in which the mother should have custody and the father supervised visitation. The mother and children should have their Order of Protection restored. Judge Amodeo and indeed Frank Marocco should have nothing further to do with this case. It is long

since time to help the mother and children heal instead of helping the father continue his abuse.

Before the trial, the law guardian submitted a report from the school. When the children were living with their mother, Vika would skip around school holding another girl's hand laughing and giggling. After they lost their mother Vika would walk around school alone, head down, very sad. There is nothing in all the evidence that ever justified making the children suffer like this. We ask this Court to restore these children's hopes; restore their smile; restore their mommy.

CONCLUSION

The decision and order appealed from should be reversed. The Appellant should be immediately awarded sole custody and the Respondent should be given supervised visitation. The Appellant should have the right to choose her own therapist and speak with the children's providers. Judge Amodeo and Frank Marocco should have no further involvement with this case and if there is ever a need for any further proceedings they should take place outside of Dutchess County.

RESPECTFULLY SUBMITTED

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