Nicholson v. Scoppetta

Court of Appeals of New York

October 26, 2004, Decided

No. 113

Reporter
3 N.Y.3d 357 *; 820 N.E.2d 840 **; 787 N.Y.S.2d 196 ***; 2004 N.Y. LEXIS 3490 ****

Sharwline Nicholson, on Behalf of Herself, Her Infant Children, Destinee B. and Another, and All Others Similarly Situated, et al., Respondents, v. Nicholas Scoppetta, Individually and as Commissioner of Administration for Children's Services, et al., Appellants, et al., Defendants.

Prior History: Proceeding, pursuant to NY Constitution, article VI, § 3 (b) (9) and Rules of the Court of Appeals *(22 NYCRR) § 500.17*, to review questions certified to the New York State Court of Appeals by the United States Court of Appeals for the Second Circuit. The following questions were certified by the United States Court of Appeals and accepted by the New York State Court of Appeals: "1. Does the definition of a 'neglected child' under N.Y. Family Ct. Act § 1012(f), (h) include instances in which the sole allegation of neglect is that the parent or other person legally responsible for the child's care allows the child to witness domestic abuse against the caretaker? 2. Can the injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a parent or other caretaker constitute 'danger' or 'risk' to the child's 'life or health,' as those terms are defined in the N.Y. Family Ct. Act §§ 1022, 1024, 1026-1028? [and] 3. Does the fact that the child witnessed such abuse suffice to demonstrate that 'removal is necessary,' N.Y. Family Ct. Act §§ 1022, 1024, 1027, or that 'removal was in the child's best interests,' N.Y. Family Ct. Act §§ 1028, 1052(b)(i)(A), or must the child protective agency offer additional, particularized evidence to justify removal?" **[****1]**

Nicholson v. Scoppetta, 344 F.3d 154, 2003 U.S. App. LEXIS 19076 (2d Cir. N.Y., 2003)

Disposition: Certified questions answered.

Core Terms

removal, neglect, domestic violence, impairment, imminent danger, imminent risk, emotional, questions, degree of care, circumstances, witnessed, court order, emergency, best interests of the child, battered, violence, abused, temporary, exposed, emotional health, ex parte, mothers, harmed, victim of domestic violence, procedural due process, reasonable effort, expert testimony, best interest, attendant, answered

Case Summary

Procedural Posture

In the course of its review in a 42 U.S.C.S. § 1983 action by plaintiffs, mothers and their children, alleging due process violations by defendants, a city, its child welfare agency, and various officials, the United States Court of Appeals for the Second Circuit certified questions regarding whether N.Y. Fam. Ct. Act art. 10 permitted removal of children from the home based solely on findings that their mother was a domestic abuse victim.

Overview

In answering the federal appeals court's questions, the court first focused on the definition of "neglected child" at N.Y. Fam. Ct. Act § 1012. It clearly required a showing that the child's physical, mental, or emotional condition was impaired or in danger of impairment as a consequence of a lack of care by the parent or caretaker. Furthermore, the continuum of removal procedures set forth at N.Y. Fam. Ct. Act art. 10, pt. 2 required in every situation, except for emergency removal without court order in circumstances involving very grave danger, an advance determination, by a family court, that actual impairment or risk thereof required removal of the child from the home and that removal was in the child's best interests. Where the statute was properly applied, there could be no removal grounded in a baseless presumption that a mother who had been a victim in the past, and whose children might

have been present at that time, had thereby automatically failed to take proper care of her children.

Outcome
The court responded that far more was required to find neglect and justify removal than a mere showing that the parent had been a victim of domestic violence and that the children had been exposed to the violence.

LexisNexis® Headnotes

Family Law > Family Protection & Welfare > Children > General Overview

HN1 **Family Protection & Welfare, Children**

N.Y. Fam. Ct. Act. § 1012(f) defines a "neglected child" to mean: a child less than 18 years of age whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care in providing the child with proper supervision or guardianship, by unreasonably inflicting, or allowing to be inflicted, harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court. Thus, a party seeking to establish neglect must show, by a preponderance of the evidence, according to *N.Y. Fam. Ct. Act § 1046(b)(i)*, first, that a child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired and, second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship.

Family Law > Family Protection & Welfare > Children > General Overview

HN2 **Family Protection & Welfare, Children**

The first statutory element of "neglected child" under *N.Y. Fam. Ct. Act § 1012(f)* requires proof of actual (or imminent danger of) physical, emotional or mental impairment to the child. This prerequisite to a finding of neglect ensures that the New York Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior. "Imminent danger" reflects the legislature's judgment that a finding of neglect may be appropriate even when a child has not actually been harmed; imminent danger of impairment to a child is an independent and separate ground on which a neglect finding may be based. Imminent danger, however, must be near or impending, not merely possible. In each case, additionally, there must be a link or causal connection between the basis for the neglect petition and the circumstances that allegedly produce the child's impairment or imminent danger of impairment.

Family Law > Family Protection & Welfare > Children > General Overview

HN3 **Family Protection & Welfare, Children**

N.Y. Fam. Ct. Act. § 1012(h) specifically defines "impairment of emotional health" and "impairment of mental or emotional condition" to include a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including incorrigibility, ungovernability, or habitual truancy. Under New York law, such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.

Family Law > Family Protection & Welfare > Children > General Overview

HN4 **Family Protection & Welfare, Children**

Assuming that actual or imminent danger to a child has been shown, "neglect" within the meaning of *N.Y. Fam. Ct. Act § 1012* also requires proof of the parent's failure to exercise a minimum degree of care. "Minimum degree of care" is a baseline of proper care for children that all parents, regardless of lifestyle or social or economic position, must meet. Notably, the statutory test is minimum degree of care--not maximum, not best, not ideal--and the failure must be actual, not threatened.

Family Law > Family Protection & Welfare > Cohabitants & Spouses > General Overview

Family Law > Family Protection & Welfare > Children > General Overview

HN5[] Family Protection & Welfare, Cohabitants & Spouses

In determining whether a child is neglected within the meaning of N.Y. Fam. Ct. Act § 1012, courts must evaluate parental behavior objectively: would a reasonable and prudent parent have so acted, or failed to act, under the circumstances then and there existing. The standard takes into account the special vulnerabilities of the child, even where general physical health is not implicated. Thus, when the inquiry is whether a mother--and domestic violence victim--failed to exercise a minimum degree of care, the focus must be on whether she has met the standard of the reasonable and prudent person in similar circumstances. What course of action constitutes such a parent's exercise of a minimum degree of care may include such considerations as: risks attendant to leaving, if the batterer has threatened to kill her if she does; risks attendant to staying and suffering continued abuse; risks attendant to seeking assistance through government channels, potentially increasing the danger to herself and her children; risks attendant to criminal prosecution against the abuser; and risks attendant to relocation. Whether a particular mother in these circumstances has actually failed to exercise a minimum degree of care is necessarily dependent on facts such as the severity and frequency of the violence, and the resources and options available to her.

Family Law > Family Protection & Welfare > Children > General Overview

HN6[] Family Protection & Welfare, Children

Only when a petitioner demonstrates, by a preponderance of evidence, that both elements of N.Y. Fam. Ct. Act. § 1012(f) are satisfied may a child be deemed neglected. When the sole allegation is that the mother has been abused and the child has witnessed the abuse, such a showing has not been made. This does not mean that a child can never be neglected when living in a household plagued by domestic violence. Neglect might be found where a record establishes that, for example, the mother acknowledged that the children knew of repeated domestic violence by her paramour and had reason to be afraid of him, yet allowed him several times to return to her home, and lacked awareness of any impact of the violence on the children; or where the children were exposed to regular and continuous extremely violent conduct between their parents, at times requiring official intervention, and where caseworkers testified to the fear and distress the children were experiencing as a result of their long exposure to the violence. In such circumstances, the battered mother is charged with neglect not because she is a victim of domestic violence or because her children witnessed the abuse, but rather because a preponderance of the evidence establishes that the children were actually or imminently harmed by reason of her failure to exercise even minimal care in providing them with proper oversight.

Family Law > Family Protection & Welfare > Children > General Overview

HN7[] Family Protection & Welfare, Children

New York has long embraced a policy of keeping biological families together. Yet when a child's best interests are endangered, such objectives must yield to the State's paramount concern for the health and safety of the child.

Family Law > Family Protection & Welfare > Children > General Overview

HN8[] Family Protection & Welfare, Children

N.Y. Fam. Ct. Act. art. 10, pt. 2 sets forth four ways in which a child may be removed from the home in response to an allegation of neglect (or abuse) related to domestic violence: (1) temporary removal with consent; (2) preliminary orders after a petition is filed; (3) preliminary orders before a petition is filed; and (4) emergency removal without a court order. Those sections create a continuum of consent and urgency and mandate a hierarchy of required review before a child is removed from home.

Family Law > Family Protection & Welfare > Children > General Overview

HN9 **Family Protection & Welfare, Children**

N.Y. Fam. Ct. Act § 1021 provides that a child may be removed from the place where he is residing with the written consent of his parent or other person legally responsible for his care, if the child is an abused or neglected child under N.Y. Fam. Ct. Act art. 10. This section is significant because many parents are willing and able to understand the need to place the child outside the home and because resort to unnecessary legal coercion can be detrimental to later treatment efforts.

Family Law > Family Protection & Welfare > Children > General Overview

HN10 **Family Protection & Welfare, Children**

If parental consent cannot be obtained, N.Y. Fam. Ct. Act § 1027 provides for preliminary orders after the filing of a neglect (or abuse) petition. Thus, according to the statutory continuum, where the circumstances are not so exigent, the agency should bring a petition and seek a hearing prior to removal of the child. In any case involving abuse--or in any case where the child has already been removed without a court order--the New York Family Court must hold a hearing as soon as practicable after the filing of a petition, to determine whether the child's interests require protection pending a final order of disposition. N.Y. Fam. Ct. Act § 1027(a). The section further provides that in any other circumstance (such as a neglect case), after the petition is filed, any person originating the proceeding (or the Law Guardian) may apply for--or the court on its own may order--a hearing to determine whether the child's interests require protection, pending a final order of disposition.

Family Law > Family Protection & Welfare > Children > General Overview

HN11 **Family Protection & Welfare, Children**

Upon a hearing pursuant to N.Y. Fam. Ct. Act § 1027(a), if the New York Family Court finds that removal is necessary to avoid imminent risk to a child's life or health, it is required to remove or continue the removal and remand the child to a place approved by the agency. N.Y. Fam. Ct. Act § 1027(b)(i). In undertaking this inquiry, the statute also requires the court to consider and determine whether continuation in the child's home would be contrary to the best interests of the child. The order must state the court's findings that support the necessity of removal, whether the parent was present at the hearing, what notice was given to the parent of the hearing, and under what circumstances the removal took place. N.Y. Fam. Ct. Act § 1027(b)(i).

Family Law > Family Protection & Welfare > Children > General Overview

HN12 **Family Protection & Welfare, Children**

In order to justify a finding of imminent risk to life or health, the agency need not prove that the child has suffered actual injury. Rather, the court engages in a fact-intensive inquiry to determine whether the child's emotional health is at risk. N.Y. Fam. Ct. Act § 1012(h), moreover, sets forth specific factors, evidence of which may demonstrate substantially diminished psychological or intellectual functioning. N.Y. Fam. Ct. Act. § 1012(h) contains the caveat that impairment of emotional health must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.

Family Law > Family Protection & Welfare > Children > General Overview

HN13 **Family Protection & Welfare, Children**

The measures codified at N.Y. Fam. Ct. Act § 1027(b)(i) ensure that children involved in the early stages of child protective proceedings and their families receive appropriate services to prevent the children's removal from their homes whenever possible.

Family Law > Family Protection & Welfare > Children > General Overview

HN14 **Family Protection & Welfare, Children**

The plain language of N.Y. Fam. Ct. Act § 1027 and the legislative history supporting it establish that a blanket presumption favoring removal from the home was never intended. The court must do more than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by

reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests. Additionally, the court must specifically consider whether imminent risk to the child might be eliminated by other means, such as issuing a temporary order of protection or providing services to the victim. N.Y. Fam. Ct. Act § 1027(b)(iii), (iv). Where one parent is abusive but the child may safely reside at home with the other parent, the abuser should be removed. This will spare children the trauma of removal and placement in foster care.

Family Law > Family Protection & Welfare > Children > General Overview

HN15 **Family Protection & Welfare, Children**

N.Y. Fam. Ct. Act § 1022 provides that a court may enter an order directing the temporary removal of a child from home before the filing of a petition if three factors are met. First, the parent must be absent, or, if present, must have been asked and refused to consent to temporary removal of the child and must have been informed of an intent to apply for an order. Second, the child must appear to suffer from abuse or neglect of a parent or other person legally responsible for the child's care to the extent that immediate removal is necessary to avoid imminent danger to the child's life or health. Third, there must be insufficient time to file a petition and hold a preliminary hearing.

Family Law > Family Protection & Welfare > Children > General Overview

HN16 **Family Protection & Welfare, Children**

In a proceeding under N.Y. Fam. Ct. Act § 1022, just as in an N.Y. Fam. Ct. Act § 1027 inquiry, the court must consider whether continuation in the child's home would be contrary to the best interests of the child; whether reasonable efforts were made prior to prevent or eliminate the need for removal from the home; and whether imminent risk to the child would be eliminated by the issuance of a temporary order of protection directing the removal of the person from the child's residence. The court must engage in a fact-finding inquiry into whether the child is at risk and appears to suffer from neglect. N.Y. Fam. Ct. Act § 1022 ensures that in most urgent situations, there will be judicial oversight in order to prevent well-meaning but misguided removals that may harm the child more than help. It is designed to avoid a premature removal of a child from his home by establishing a procedure for early judicial determination of urgent need.

Evidence > Inferences & Presumptions > General Overview

Family Law > Family Protection & Welfare > Children > General Overview

HN17 **Evidence, Inferences & Presumptions**

Whether analyzing a removal application under N.Y. Fam. Ct. Act §§ 1027 or 1022, or an application for a child's return under § 1028, a family court must engage in a balancing test of the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal. The term "safer course" should not be used to mask a dearth of evidence or as a watered-down, impermissible presumption.

Family Law > Family Protection & Welfare > Children > General Overview

HN18 **Family Protection & Welfare, Children**

N.Y. Fam. Ct. Act § 1024 permits removal without a court order and without consent of the parent if there is reasonable cause to believe that the child is in such urgent circumstance or condition that continuing in the home or care of the parent presents an imminent danger to the child's life or health, and there is not enough time to apply for an order under N.Y. Fam. Ct. Act. § 1022. N.Y. Fam. Ct. Act § 1024(a). Thus, emergency removal is appropriate where the danger is so immediate, so urgent that the child's life or safety will be at risk before an ex parte order can be obtained. The standard obviously is a stringent one.

Family Law > Family Protection & Welfare > Children > General Overview

HN19 **Family Protection & Welfare, Children**

N.Y. Fam. Ct. Act § 1024 establishes an objective test, whether the child is in such circumstance or condition

that remaining in the home presents imminent danger to life or health. In construing "imminent danger" under § 1024, whether a child is in "imminent danger" is necessarily a fact-intensive determination. It is not required that the child be injured in the presence of a caseworker nor is it necessary for the alleged abuser to be present at the time the child is taken from the home. It is sufficient if the officials have persuasive evidence of serious ongoing abuse and, based upon the best investigation reasonably possible under the circumstances, have reason to fear imminent recurrence. Since this evidence is the basis for removal of a child, it should be as reliable and thoroughly examined as possible to avoid unnecessary harm to the family unit.

Headnotes/Summary

Headnotes

Parent and Child -- Abused or Neglected Child -- Child Who Witnessed Domestic Violence -- Sufficiency of Evidence of Neglect

1. In a neglect proceeding pursuant to Family Court Act article 10, evidence that the respondent parent has been the victim of domestic violence, and that the child has been exposed to that violence, without more, is insufficient to find that the child has been neglected as defined in Family Court Act § 1012 (f). In order to deem a child neglected under the statute, a petitioner must demonstrate, by a preponderance of evidence, actual or imminent danger of physical, emotional or mental impairment to the child, and the parent's failure to exercise a minimum degree of care in providing the child with proper supervision or guardianship. If emotional or mental impairment is alleged, it must be clearly attributable to the parent's failure to exercise the prerequisite degree of care. Whether a parent who is a victim of domestic violence has actually failed to exercise a minimum degree of care is necessarily dependent on facts such as the severity and frequency of the violence, and the resources and options available to the parent.

Parent and Child -- Abused or Neglected Child -- Child Who Witnessed Domestic Violence -- Postpetition Removal

2. Emotional harm suffered by a child exposed to domestic violence, where shown, may warrant removal of the child pursuant to Family Court Act § 1027 by court order after a petition is filed. The plain language of the statute and the legislative history supporting it, however, establish that a blanket presumption favoring removal was never intended. Upon identifying the existence of a risk of serious harm a court must also weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests. Additionally, the court must specifically consider whether imminent risk to the child might be eliminated by other means, such as issuing a temporary order of protection or providing services to the victim.

Parent and Child -- Abused or Neglected Child -- Child Who Witnessed Domestic Violence -- Ex Parte Removal by Court Order

3. Emotional harm suffered by a child exposed to domestic violence, where shown, may warrant ex parte removal of the child by court order pursuant to Family Court Act § 1022 if the agency believes there is insufficient time to file a petition, if three factors are met: the parent is absent or, if present, was asked but refused to consent to temporary removal of the child and was informed of an intent to apply for an order; the child appears to suffer from abuse or neglect of a parent to the extent that immediate removal is necessary to avoid imminent danger to the child's life or health; and there is insufficient time to file a petition and hold a preliminary hearing. The court additionally must consider whether continuation in the child's home would be contrary to the best interests of the child, whether reasonable efforts were made to prevent or eliminate the need for removal from the home, and whether imminent risk to the child would be eliminated by the issuance of a temporary order of protection directing the removal of the person from the child's residence.

Parent and Child -- Abused or Neglected Child -- Child Who Witnessed Domestic Violence -- Emergency Removal without Court Order

4. Emotional harm suffered by a child exposed to domestic violence, where shown, may warrant emergency removal of the child without court order pursuant to Family Court Act § 1024 in only the rarest of circumstances. Removal without a court order and without consent of the parent is only permitted if there is reasonable cause to believe that the child is in such urgent circumstance or condition that continuing in the home or care of the parent presents an imminent

danger to the child's life or health, and there is not enough time to apply for an ex parte order under *Family Court Act § 1022*. Although it cannot be said that, for all future time, the possibility of the need for an emergency removal can never exist in the case of emotional injury or the risk of emotional injury caused by witnessing domestic violence, it must be a rare circumstance in which the time would be so fleeting and the danger so great that emergency removal would be warranted.

Parent and Child -- Abused or Neglected Child -- Child Who Witnessed Domestic Violence -- Removal -- Sufficiency of Evidence

5. In a neglect proceeding pursuant to *Family Court Act article 10*, there is no blanket presumption favoring removal of a child who witnesses domestic violence. Rather, particularized evidence must exist to justify removal, including, where appropriate, evidence of efforts made to prevent or eliminate the need for removal and the impact of removal on the child. Expert testimony is not required, although it may be difficult in some cases for an agency to show, absent expert testimony, that there is imminent risk to a child's emotional state, and that any impairment of emotional health is clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.

Counsel: *Michael A. Cardozo, Corporation Counsel*, New York City (*Alan G. Krams, Leonard Koerner, Jonathan Pines, Martha A. Calhoun, Carolyn Wolpert* and *Kristin M. Helmers* of counsel), for appellants. I. A child can be neglected within the meaning of *section 1012 (f) (i) (B) of the Family Court Act* when a parent who is a victim of domestic violence fails to take appropriate steps to protect her child from actual harm, or the risk thereof, resulting from witnessing the violence. (*Matter of Nicole V., 71 N.Y.2d 112, 518 N.E.2d 914, 524 N.Y.S.2d 19*; *Matter of Tompkins County Support Collection Unit v Chamberlin, 99 N.Y.2d 328, 786 N.E.2d 14, 756 N.Y.S.2d 115*; *Matter of Jessica YY., 258 A.D.2d 743, 685 N.Y.S.2d 489*; *People v Carroll, 93 N.Y.2d 564, 715 N.E.2d 500, 693 N.Y.S.2d 498*; *Matter of Peterson Children, 185 Misc. 2d 351, 712 N.Y.S.2d 345*; *Matter of Daphne G., 308 A.D.2d 132, 763 N.Y.S.2d 583*; *People v Johnson, 95 N.Y.2d 368, 740 N.E.2d 1075, 718 N.Y.S.2d 1*; *People v Malone, 180 Misc. 2d 744, 693 N.Y.S.2d 390*; *People v Hitchcock, 98 N.Y.2d 586, 780 N.E.2d 181, 750 N.Y.S.2d 580*; *People v Parr, 155 A.D.2d 945, 548 N.Y.S.2d 121*.) II. In some cases, the risks of emotional injury arising from witnessing domestic violence can constitute imminent danger to life and health warranting removal. (*Matter of Commissioner of Social Servs. [R./S. Children], 168 Misc. 2d 11, 637 N.Y.S.2d 607*; *Matter of Robert H., 307 A.D.2d 293, 762 N.Y.S.2d 107*; *Tenenbaum v Williams, 193 F.3d 581*; *Matter of Christopher JJ., 281 A.D.2d 720, 721 N.Y.S.2d 692*; *Matter of Erika B., 268 A.D.2d 586, 702 N.Y.S.2d 110*; *Matter of Maria M., 244 A.D.2d 255, 664 N.Y.S.2d 440*; *Matter of Kasheena M., 245 A.D.2d 231, 666 N.Y.S.2d 639*.) III. The decision to remove or place a child because of witnessing domestic violence is based on an assessment of case-specific facts, not on a presumption that removal is necessary. (*Friederwitzer v Friederwitzer, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893*; *Matter of Philip M., 82 N.Y.2d 238, 624 N.E.2d 168, 604 N.Y.S.2d 40*; *Matter of Tami G., 209 A.D.2d 869, 619 N.Y.S.2d 222*, *85 N.Y.2d 804, 650 N.E.2d 414, 626 N.Y.S.2d 755*; *Matter of Athena M., 253 A.D.2d 669, 678 N.Y.S.2d 11*; *Matter of Lonell J., 242 A.D.2d 58, 673 N.Y.S.2d 116*; *Matter of Deandre T., 253 A.D.2d 497, 676 N.Y.S.2d 666*; *Matter of Eric B., 299 A.D.2d 754, 751 N.Y.S.2d 72*; *Matter of Carlos M., 293 A.D.2d 617, 741 N.Y.S.2d 82*; *Matter of Marino S., 100 N.Y.2d 361, 795 N.E.2d 21, 763 N.Y.S.2d 796*; *Matter of Marie B., 62 N.Y.2d 352, 465 N.E.2d 807, 477 N.Y.S.2d 87*; *Matter of Bennett v Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821*.)

Lansner & Kubitschek, New York City (*David J. Lansner* and *Carolyn A. Kubitschek* of counsel), and *Sanctuary for Families, Center for Battered Women's Legal Services* (*Jill M. Zuccardy* of counsel), for Subclass A respondents. I. A battered mother has not neglected her child where the sole allegation is that her child witnessed domestic violence against her. (*Matter of Scott M., 284 A.D.2d 589, 725 N.Y.S.2d 444*; *Matter of Jessica R., 230 A.D.2d 108, 657 N.Y.S.2d 164*; *People v Johnson, 95 N.Y.2d 368, 740 N.E.2d 1075, 718 N.Y.S.2d 1*; *People v Jenkins, 282 A.D.2d 926, 726 N.Y.S.2d 468*; *People v Alexander, 97 N.Y.2d 482, 769 N.E.2d 802, 743 N.Y.S.2d 45*; *Matter of H./R. Children, 302 A.D.2d 288, 756 N.Y.S.2d 166*; *Matter of E.R. v G.S.R., 170 Misc. 2d 659, 648 N.Y.S.2d 257*; *Wissink v Wissink, 301 A.D.2d 36, 749 N.Y.S.2d 550*; *Samala v Samala, 309 A.D.2d 798, 765 N.Y.S.2d 523*; *Matter of Finkbeiner v Finkbeiner, 270 A.D.2d 417, 705 N.Y.S.2d 268*.) II. Possible future emotional harm to a child who has witnessed domestic violence does not justify removal from the victim parent. (*Matter of Dominique A., 307 A.D.2d 888, 764 N.Y.S.2d 37*; *Moodian v County of Alameda Social Servs. Agency, 206 F. Supp. 2d 1030*; *Tenenbaum v Williams, 193 F.3d 581*, *cert denied sub*

nom. City of New York v Tenenbaum, 529 U.S. 1098, 120 S. Ct. 1832, 146 L. Ed. 2d 776; Matter of Marie B., 62 N.Y.2d 352, 465 N.E.2d 807, 477 N.Y.S.2d 87; Matter of Ronald FF. v Cindy GG., 70 N.Y.2d 141, 511 N.E.2d 75, 517 N.Y.S.2d 932; Matter of Spence-Chapin Adoption Serv. v Polk, 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937; Matter of Tammie Z., 66 N.Y.2d 1, 484 N.E.2d 1038, 494 N.Y.S.2d 686; Matter of Ella B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133; Matter of Karen L., 80 A.D.2d 681, 436 N.Y.S.2d 427; Matter of Roy Anthony A., 59 A.D.2d 662, 398 N.Y.S.2d 277.) III. The City of New York must offer particularized evidence to justify removal of a child, including proof that the harm of remaining in the home exceeds the harm of removal. (Matter of John B. v Niagara County Dept. of Social Servs., 289 A.D.2d 1090, 735 N.Y.S.2d 333; Matter of Kimberly H., 242 A.D.2d 35, 673 N.Y.S.2d 96; Matter of Robert H., 307 A.D.2d 293, 762 N.Y.S.2d 107; Matter of Tantalyn TT., 115 A.D.2d 799, 495 N.Y.S.2d 740; Matter of Tammie Z., 66 N.Y.2d 1, 484 N.E.2d 1038, 494 N.Y.S.2d 686; Matter of Ella B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133; Matter of Hofbauer, 47 N.Y.2d 648, 393 N.E.2d 1009, 419 N.Y.S.2d 936; Matter of Ronald FF. v Cindy GG., 70 N.Y.2d 141, 511 N.E.2d 75, 517 N.Y.S.2d 932; Matter of Bennett v Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821; Matter of Spence-Chapin Adoption Serv. v Polk, 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937.)

Legal Aid Society, Juvenile Rights Division, New York City (*Judith Waksberg* and *Monica Drinane* of counsel), and *Lawyers For Children, Inc.* (*Karen Freedman* of counsel), for Subclass B respondents. I. The definition of a "neglected child" under Family Court Act § 1012 (f) and (h) does not include instances in which the sole allegation of neglect is that the parent or other person legally responsible for the child's care allows the child to witness domestic abuse against the caretaker. (Matter of Jason T., 2 A.D.3d 738, 768 N.Y.S.2d 662; Matter of Theresa CC., 178 A.D.2d 687, 576 N.Y.S.2d 937; Matter of Lonell J., 242 A.D.2d 58, 673 N.Y.S.2d 116; Matter of Nassau County Dept. of Social Servs. [Dante M.] v Denise J., 87 N.Y.2d 73, 661 N.E.2d 138, 637 N.Y.S.2d 666; *Matter of Jeremiah M., 290 A.D.2d 450, 738 N.Y.S.2d 585*; Matter of Tami G., 209 A.D.2d 869, 619 N.Y.S.2d 222; People v Johnson, 95 N.Y.2d 368, 740 N.E.2d 1075, 718 N.Y.S.2d 1; Matter of Michael G., 300 A.D.2d 1144, 752 N.Y.S.2d 772; Matter of Francis S., 296 A.D.2d 507, 745 N.Y.S.2d 486; *Matter of Athena M., 253 A.D.2d 669, 678 N.Y.S.2d 11*.) II. The injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a parent or other caretaker cannot constitute "danger" or "risk" to the child's "life or health," as those terms are defined in Family Court Act §§ 1022, 1024, 1026 and 1028. (Kia P. v McIntyre, 235 F.3d 749; Tenenbaum v Williams, 193 F.3d 581; Gottlieb v County of Orange, 84 F.3d 511; Hurlman v Rice, 927 F.2d 74; Good v Dauphin County Social Servs. for Children & Youth, 891 F.2d 1087; Duchesne v Sugarman, 566 F.2d 817; Matter of Robert H., 307 A.D.2d 293, 762 N.Y.S.2d 107; Matter of Maria M., 244 A.D.2d 255, 664 N.Y.S.2d 440; Franz v Lytle, 997 F.2d 784; Matter of Kimberly H., 242 A.D.2d 35, 673 N.Y.S.2d 96.) III. The fact that the child witnessed such abuse does not suffice to demonstrate that "removal is necessary" under Family Court Act §§ 1022, 1024 and 1027, or that "removal was in the child's best interests" under Family Court Act §§ 1028 and 1052 (b) (i) (A), without the child protective agency offering additional particularized evidence to justify removal. (Matter of Nicole V., 71 N.Y.2d 112, 518 N.E.2d 914, 524 N.Y.S.2d 19; Matter of Nassau County Dept. of Social Servs. [Dante M.] v Denise J., 87 N.Y.2d 73, 661 N.E.2d 138, 637 N.Y.S.2d 666; Matter of Philip M., 82 N.Y.2d 238, 624 N.E.2d 168, 604 N.Y.S.2d 40; Matter of Marie B., 62 N.Y.2d 352, 465 N.E.2d 807, 477 N.Y.S.2d 87; Matter of Cruz, 121 A.D.2d 901, 503 N.Y.S.2d 798; *Matter of Isaiah Keith B., 306 A.D.2d 343, 760 N.Y.S.2d 675*; Matter of Ronald M., 254 A.D.2d 838, 677 N.Y.S.2d 839; Matter of Daniella HH., 236 A.D.2d 715, 654 N.Y.S.2d 200; Matter of William T., 185 A.D.2d 413, 585 N.Y.S.2d 814; *Matter of Synovia G., 163 A.D.2d 257, 558 N.Y.S.2d 539*.)

Greenberg Traurig LLP, New York City (*Alan Mansfield, Stephen L. Saxl, Hilary Ames* and *Jae J. Kim* of counsel), for National Coalition Against Domestic Violence and others, amici curiae. I. An interpretation of article 10 of the Family Court Act that would permit removal or neglect proceedings based solely on the fact that the custodial parent has been the victim of domestic violence would violate substantive due process. (Troxel v Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49; Washington v Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772; Tenenbaum v Williams, 193 F.3d 581; Lehr v Robertson, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614; Meyer v Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042; Duchesne v Sugarman, 566 F.2d 817; Parham v J.R., 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101; Pierce v Society of Sisters of Holy Names of Jesus & Mary, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070; Matter of Bennett v Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387

N.Y.S.2d 821; Moore v City of E. Cleveland, Ohio, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531.) II. An interpretation of article 10 of the Family Court Act that would permit ex parte removal without a hearing or court ordered removal or neglect proceedings based solely on the fact that the custodial parent has been the victim of domestic violence would violate the procedural due process rights of plaintiff classes. (Matter of Deanna E., 150 Misc. 2d 1074, 571 N.Y.S.2d 378; Stanley v Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551; Wallis v Spencer, 202 F.3d 1126; Mathews v Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18; Tenenbaum v Williams, 193 F.3d 581; Batten v Gomez, 324 F.3d 288; Armstrong v Manzo, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62; Jordan by Jordan v Jackson, 15 F.3d 333; *Dykes v Hosemann, 743 F.2d 1488*; Matter of Adrian J., 119 Misc. 2d 900, 464 N.Y.S.2d 631.)

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Washington, D.C. (*Michael C. Bisignano* of counsel), for National Network to End Domestic Violence, Inc., and others, amici curiae. I. Labeling a child who witnesses abuse "neglected" is wrong as a matter of law and policy. (Planned Parenthood of Southeastern Pa. v Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674; United States v Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658.) II. The dangers and risks attendant to a child witnessing domestic violence must be balanced with dangers and risks of removal. III. New York law should require a particularized showing of harm.

Suzanne E. Tomkins, Buffalo, for New York State Coalition Against Domestic Violence and others, amici curiae. I. The findings in Nicholson v Williams (203 F. Supp. 2d 153 [2002]) are consistent with the model policies for child welfare cases involving domestic violence adopted by the State of New York. (Thurman v City of Torrington, 595 F. Supp. 1521; Matter of Lonell J., 242 A.D.2d 58, 673 N.Y.S.2d 116; Matter of Griselua A., 304 A.D.2d 659, 757 N.Y.S.2d 480; Matter of Carlos M., 293 A.D.2d 617, 741 N.Y.S.2d 82; Matter of Francis S., 296 A.D.2d 507, 745 N.Y.S.2d 486; Matter of James MM. v June OO., 294 A.D.2d 630, 740 N.Y.S.2d 730; Matter of Michael G., 300 A.D.2d 1144, 752 N.Y.S.2d 772; *Matter of Athena M., 253 A.D.2d 669, 678 N.Y.S.2d 11*.) II. This Court should reject any per se standards in child welfare cases involving domestic violence. (Matter of Billy Jean II., 226 A.D.2d 767, 640 N.Y.S.2d 326; Matter of Tammie Z., 105 A.D.2d 463, 480 N.Y.S.2d 786; Matter of Tami G., 209 A.D.2d 869, 619 N.Y.S.2d 222; Matter of Nichole SS., 296 A.D.2d 618, 745 N.Y.S.2d 128; *Matter of Jasmine R., 258 A.D.2d 361, 683 N.Y.S.2d 848*; *Matter of Kenny C., 245 A.D.2d 32, 665 N.Y.S.2d 73*.) III. Abused mothers and their children can remain together safely. IV. The most effective way to achieve safety for children is to pursue safety for mothers who are abused and to hold offenders accountable.

Arent Fox PLLC, Washington, D.C. (*Evan Stolove, Janine Carlan, Jennifer Myron* and *Marcy L. Karin* of counsel), for Pennsylvania Coalition Against Domestic Violence and others, amici curiae. I. Witnessing domestic violence does not constitute "neglect" by the battered mother. (Matter of Lonell J., 242 A.D.2d 58, 673 N.Y.S.2d 116; Matter of Barber v Stanley, 260 A.D.2d 744, 687 N.Y.S.2d 765; Matter of Bryan L., 149 Misc. 2d 899, 565 N.Y.S.2d 969; Matter of Megan G., 291 A.D.2d 636, 737 N.Y.S.2d 684; People v Koertge, 182 Misc. 2d 183, 701 N.Y.S.2d 588.) II. Forced separation of children from their nonabusive, protective mothers is not in their best interests. (Matter of Loraida G., 183 Misc. 2d 126, 701 N.Y.S.2d 822; Marisol A. by Forbes v Giuliani, 929 F. Supp. 662.) III. The plain language and the legislative history of the Family Court Act do not permit the State of New York to remove children from their mothers because of witnessing domestic violence. IV. It is the *system*--not mothers--that is failing to protect children.

Deborah A. Widiss, New York City, *Christina Brandt-Young* and *Jennifer K. Brown* for Legal Momentum and others, amici curiae. I. Widespread persistent gender bias compromises government's response to domestic violence, particularly when children are involved. (Mississippi Univ. for Women v Hogan, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090; Craig v Boren, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397; Linda R. v Richard E., 162 A.D.2d 48, 561 N.Y.S.2d 29; Stanton v Stanton, 421 U.S. 7, 95 S. Ct. 1373, 43 L. Ed. 2d 688; United States v Virginia, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735.) II. This Court should interpret the Family Court Act to require a particularized showing of actions (or inactions) that constitute a failure to exercise a minimum degree of care. (Childs v Childs, 69 A.D.2d 406, 419 N.Y.S.2d 533.) III. This Court should respond to the certified questions with guidelines that deter reliance on gender-based stereotypes.

Piper Rudnick LLP, Easton, Maryland (*Ray L. Earnest* of

counsel), for Appellate Advocacy Network and others, amici curiae. This Court should construe the Family Court Act as requiring that, in every proceeding to remove a child from his/her home, the court make a thorough inquiry into whether the child protection agency has made reasonable efforts to avoid removal. (*Stanley v Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551*; *Griswold v Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510*; *Prince v Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645*; *Meyer v Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042*; *Duchesne v Sugarman, 566 F.2d 817*; *Covington v Harris, 136 U.S. App. D.C. 35, 419 F.2d 617*; *Matter of Jacob, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716*; *Kia P. v McIntyre, 235 F.3d 749*; *Mathews v Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18*; *May v Anderson, 345 U.S. 528, 73 S. Ct. 840, 97 L. Ed. 1221, 67 Ohio Law Abs. 468*.)

Yisroel Schulman, New York City, and *Kim Susser* for New York Legal Assistance Group and others, amici curiae. I. Appellant misappropriates the legislative history of *Domestic Relations Law § 240* to support charges of neglect against battered mothers for failing to protect their children from exposure to domestic violence. (*People v Johnson, 95 N.Y.2d 368, 740 N.E.2d 1075, 718 N.Y.S.2d 1*; *Matter of Bennett v Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821*.) II. Appellant's policies and practice result in inconsistent and unrealistic demands imposed on battered mothers in custody and visitation proceedings and child protective proceedings. (*Matter of Blake v Blake, 106 A.D.2d 916, 483 N.Y.S.2d 879*; *Matter of Smith v Purnell, 256 A.D.2d 619, 682 N.Y.S.2d 889*; *Furman v Furman, 298 A.D.2d 627, 748 N.Y.S.2d 190*; *Lorin B. v Michael S., 254 A.D.2d 126, 679 N.Y.S.2d 11*; *Matter of Thompson v Gibeault, 305 A.D.2d 873, 760 N.Y.S.2d 580*; *Matter of J.D. v N.D., 170 Misc. 2d 877, 652 N.Y.S.2d 468*; *Matter of E.R. v G.S.R., 170 Misc. 2d 659, 648 N.Y.S.2d 257*; *Matter of Wissink v Wissink, 301 A.D.2d 36, 749 N.Y.S.2d 550*; *Finn v Finn, 176 A.D.2d 1132, 575 N.Y.S.2d 591*; *Entwistle v Entwistle, 61 A.D.2d 380, 402 N.Y.S.2d 213*.) III. Appellants ignore successful models that exist to protect battered mothers and their children.

Wilbur McReynolds, amicus curiae.

Legal Aid Society, Cleveland, Ohio (*Alexandra M. Ruden* of counsel), and *Michael R. Smalz*, Columbus, Ohio, for Ohio Domestic Violence Network and another, amici curiae. I. An individualized assessment of harm to the child needs to be conducted. II. Removal is not always necessary or in the best interests of the child. (*Croft v Westmoreland County Children & Youth Servs., 103 F.3d 1123*.) III. Children should not be removed from a nonabusive parent because of exposure to parental domestic violence without a showing of harm to that child.

Paul Chill, Hartford, Connecticut, for Joseph L. Woolston and others, amici curiae. I. Removal from parents causes children severe psychological harm, some of which may be mitigated if children are placed with relatives rather than strangers. (*Jordan by Jordan v Jackson, 15 F.3d 333*.) II. No decision to remove a child should be made without considering the likely effects of the removal on the child's psychological health and without making a specific determination that the likely physical and psychological risk of continued exposure to violence outweighs the developmental risk likely to be caused by removal.

Judges: Opinion by Chief Judge Kaye. Judges Smith, Ciparick, Rosenblatt, Graffeo, Read and Smith concur.

Opinion by: KAYE

Opinion

[*198] [**842] [*365]** Chief Judge Kaye.

In this federal class action, the United States Court of Appeals for the Second Circuit has certified three questions centered on New York's statutory scheme for child protective proceedings. The action is brought on behalf of mothers and their children who were separated because the mother had suffered domestic violence, to which the children **[****2]** were exposed, and the children were for that reason deemed neglected by her.

In April 2000, Sharwline Nicholson, on behalf of herself and her two children, brought an action pursuant to *42 USC § 1983* against the New York City Administration for Children's Services (ACS). [1] The action was later

[1] "ACS" includes all named city defendants, including the City of New York. Apart from defendant John Johnson (Commissioner of the State Office of Children and Family Services, which oversees ACS), state officials are named in

consolidated with similar complaints by Sharlene Tillet and Ekaete Udoh--the three named plaintiff mothers. Plaintiffs alleged that ACS, as a matter of policy, removed children from mothers who were victims of domestic violence because, as victims, they "engaged in domestic violence" and that defendants removed **[***199]** **[**843]** and detained children without probable cause and without due process of law. That policy, and its implementation--according to plaintiff mothers--constituted, among other wrongs, an unlawful interference with their liberty interest in the care and custody of their children in violation of the United States Constitution.

[**3]** In August 2001, the United States District Court for the Eastern District of New York certified two subclasses: battered custodial parents (Subclass A) and their children (Subclass B) (*Nicholson v Williams, 205 F.R.D. 92, 95, 100 [ED NY 2001]*). For each plaintiff, at least one ground for removal was that the custodial mother had been assaulted by an intimate partner and **[*366]** failed to protect the child or children from exposure to that domestic violence.

In January 2002, the District Court granted a preliminary injunction, concluding that the City "may not penalize a mother, not otherwise unfit, who is battered by her partner, by separating her from her children; nor may children be separated from the mother, in effect visiting upon them the sins of their mother's batterer" (*In re Nicholson, 181 F. Supp. 2d 182, 188 [ED NY 2002]*; *see also Nicholson v Williams, 203 F. Supp. 2d 153 [ED NY 2002]* [108-page elaboration of grounds for injunction]).

The court found that ACS unnecessarily, routinely charged mothers with neglect and removed their children where the mothers--who had engaged in no violence themselves--had **[****4]** been the victims of domestic violence; that ACS did so without ensuring that the mother had access to the services she needed, without a court order, and without returning these children promptly after being ordered to do so by the court; [2] that ACS caseworkers and case managers lacked adequate training about domestic violence, and their practice was to separate mother and child when less harmful alternatives were available; that the agency's written policies offered contradictory guidance or no guidance at all on these issues; and that none of the reform plans submitted by ACS could reasonably have been expected to resolve the problems within the next year (*203 F. Supp. 2d at 228-229*).

[**5]** The District Court concluded that ACS's practices and policies violated both the substantive due process rights of mothers and children not to be separated by the government unless the parent is unfit to care for the child, and their procedural due process rights (*181 F. Supp. 2d at 185*). The injunction, in relevant part, "prohibit[ed] ACS from carrying out *ex parte* removals 'solely because the mother is the victim of domestic violence,' or from filing an Article Ten petition seeking removal on that **[*367]** basis" (*Nicholson v Scoppetta, 344 F.3d 154, 164 [2d Cir 2003]* [internal citations omitted]). [3]

On appeal, the Second Circuit held that the District Court had not **[****6]** abused its discretion in concluding that ACS's practice of effecting removals based on a parent's failure to prevent his or her child from witnessing domestic violence against the **[**844]** **[***200]** parent amounted to a policy or custom of ACS, that in some circumstances the removals may raise serious questions of federal constitutional law, and that the alleged constitutional violations, if any, were at least plausibly attributable to the City (*344 F.3d at 165-167, 171-176*). [4] The court hesitated, however, before reaching the constitutional questions, believing that resolution of uncertain issues of New York statutory law would avoid, or significantly modify, the substantial federal constitutional issues presented (*id. at 176*).

[**7]** Given the strong preference for avoiding

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the complaint with respect to the assigned counsel portion of the case, which is not before us.

[2] The District Court cited the testimony of a child protective manager that it was common practice in domestic violence cases for ACS to wait a few days before going to court after removing a child because "after a few days of the children being in foster care, the mother will usually agree to ACS's conditions for their return without the matter ever going to court" (*203 F. Supp. 2d at 170*).

[3] The injunction was stayed for six months to permit ACS to attempt reform on its own, free of the court's involvement, and to allow for an appeal. Thereafter, the City and ACS appealed, challenging the District Court's determination. The Second Circuit denied the City's request for an additional stay pending appeal.

[4] Chief Judge Walker dissented, concluding that the injunction should be vacated because the evidence did not support the District Court's findings underpinning the injunction. In his view, the District Court's central factual finding that ACS had a policy of regularly separating battered mothers and children unnecessarily was "simply unsustainable" (*id. at 177*).

unnecessary constitutional adjudication, the importance of child protection to New York State and the integral part New York courts play in the removal process, the Second Circuit, by three certified questions, chose to put the open state statutory law issues to us for resolution. We accepted certification (*1 N.Y.3d 538, 807 N.E.2d 283, 775 N.Y.S.2d 233 [2003]*), and now proceed to answer those questions. [5]

Certified Question No. 1: Neglect

> "Does the definition of a 'neglected child' under N.Y. Family Ct. Act § 1012(f), (h) include instances in which the sole allegation of neglect is that the parent or other person legally responsible for the child's care allows the child to witness domestic abuse against the caretaker?" **[****8]** (344 F.3d at 176.)

[*368] **[1]** We understand this question to ask whether a court reviewing a Family Court Act article 10 petition may 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. That question must be answered in the negative. Plainly, 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.

Family Court Act § 1012 (f) is explicit in identifying the elements that must be shown to support a finding of neglect. As relevant here, HN1[↑] it defines a "neglected child" to mean:

> "a child less than eighteen years of age
> "(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . .
>
> "(B) in providing the child with proper supervision or guardianship, **[****9]** by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court."

[845]** **[***201]** Thus, a party seeking to establish neglect must show, by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]), first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship. The drafters of article 10 were "deeply concerned" that an imprecise definition of child neglect might result in "unwarranted state intervention into private family life" (Besharov, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 1012 at 320 [1999 ed]).

[*369] HN2[↑] The first statutory **[****10]** element requires proof of actual (or imminent danger of) physical, emotional or mental impairment to the child (*see* Matter of Nassau County Dept. of Social Servs. [Dante M.] v Denise J., 87 N.Y.2d 73, 78-79, 661 N.E.2d 138, 637 N.Y.S.2d 666 [1995]). This prerequisite to a finding of neglect ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior. "Imminent danger" reflects the Legislature's judgment that a finding of neglect may be appropriate even when a child has not actually been harmed; "imminent danger of impairment to a child is an independent and separate ground on which a neglect finding may be based" (Dante M., 87 N.Y.2d at 79). Imminent danger, however, must be near or impending, not merely possible.

In each case, additionally, there must be a link or causal connection between the basis for the neglect petition and the circumstances that allegedly produce the child's impairment or imminent danger of impairment. In *Dante M.*, for example, we held that the Family Court erred in concluding that a newborn's positive toxicology **[****11]** for a controlled substance alone was sufficient to support a finding of neglect because the report, in and of itself, did not prove that the child was impaired or in

[5] We are not asked to, nor do we, apply our answers to the trial record, though recognizing that in the inordinately complex human dilemma presented by domestic violence involving children, the law may be easier to state than apply.

imminent danger of becoming impaired (87 N.Y.2d at 79). We reasoned, "[r]elying solely on a positive toxicology result for a neglect determination fails to make the necessary causative connection to all the surrounding circumstances that may or may not produce impairment or imminent risk of impairment in the newborn child" (*id.*). The positive toxicology report, in conjunction with other evidence--such as the mother's history of inability to care for her children because of her drug use, testimony of relatives that she was high on cocaine during her pregnancy and the mother's failure to testify at the neglect hearing--supported a finding of neglect and established a link between the report and physical impairment.

The cases at bar concern, in particular, alleged threats to the child's emotional, or mental, health. ***HN3***[↑] The statute specifically defines "[i]mpairment of emotional health" and "impairment of mental or emotional condition" to include

> "a state of substantially diminished psychological or intellectual **[****12]** functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to **[*370]** think and reason, or acting out or misbehavior, including incorrigibility, ungovernability or habitual truancy" (*Family Ct Act § 1012 [h]*).

Under New York law, "such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward **[**846]** **[***202]** the child" (*id.*). Here, the Legislature recognized that the source of emotional or mental impairment--unlike physical injury--may be murky, and that it is unjust to fault a parent too readily. The Legislature therefore specified that such impairment be "clearly attributable" to the parent's failure to exercise the requisite degree of care.

HN4[↑] Assuming that actual or imminent danger to the child has been shown, "neglect" also requires proof of the parent's failure to exercise a minimum degree of care. As the Second Circuit observed, "a fundamental interpretive question is what conduct satisfies the broad, tort-like phrase, 'a minimum degree of care.' The Court of Appeals has not yet addressed that question, **[****13]** which would be critical to defining appropriate parental behavior" (*344 F.3d at 169*).

"[M]inimum degree of care" is a "baseline of proper care for children that all parents, regardless of lifestyle or social or economic position, must meet" (Besharov at 326). Notably, the statutory test is "*minimum* degree of care"--not maximum, not best, not ideal--and the failure must be actual, not threatened (*see e.g. Matter of Hofbauer, 47 N.Y.2d 648, 656, 393 N.E.2d 1009, 419 N.Y.S.2d 936 [1979]* [recognizing, in the context of medical neglect, the court's role is not as surrogate parent and the inquiry is not posed in absolute terms of whether the parent has made the "right" or "wrong" decision]).

HN5[↑] Courts must evaluate parental behavior objectively: would a reasonable and prudent parent have so acted, or failed to act, under the circumstances then and there existing (*see Matter of Jessica YY., 258 A.D.2d 743, 744, 685 N.Y.S.2d 489 [3d Dept 1999]*). The standard takes into account the special vulnerabilities of the child, even where general physical health is not implicated (*see Matter of Sayeh R., 91 N.Y.2d 306, 315, 317, 693 N.E.2d 724, 670 N.Y.S.2d 377 [1997]* [mother's decision to demand immediate return **[****14]** of her traumatized children without regard to their need for counseling and related services "could well be found to represent precisely the kind of failure 'to exercise a minimum degree of care' that our neglect statute contemplates"]). Thus, when the inquiry is whether a mother--and domestic violence victim--failed to exercise a minimum **[*371]** degree of care, the focus must be on whether she has met the standard of the reasonable and prudent person in similar circumstances.

As the Subclass A members point out, for a battered mother--and ultimately for a court--what course of action constitutes a parent's exercise of a "minimum degree of care" may include such considerations as: risks attendant to leaving, if the batterer has threatened to kill her if she does; risks attendant to staying and suffering continued abuse; risks attendant to seeking assistance through government channels, potentially increasing the danger to herself and her children; risks attendant to criminal prosecution against the abuser; and risks attendant to relocation. [6] Whether a particular mother in these circumstances has actually failed to exercise a

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[6] The Legislature has recognized this "quandary" that a victim of domestic violence encounters (Senate Mem in Support, 2002 McKinney's Session Laws of NY, at 1861). To avoid punitive responses from child protective services agencies, the Legislature attempted to increase awareness of child protective agencies of the dynamics of domestic violence and its impact on child protection by amending the ***Social Services Law*** to mandate comprehensive domestic violence training for child protective services workers (*id.*).

minimum degree of care is necessarily dependent on facts such **[****15]** as the severity and frequency of the violence, and the resources and options available to her (*see* **[**847]** **[***203]** *Matter of Melissa U., 148 A.D.2d 862, 538 N.Y.S.2d 958 [3d Dept 1989]*; *Matter of James MM. v June OO., 294 A.D.2d 630, 740 N.Y.S.2d 730 [3d Dept 2002]*).

HN6[↑] Only when a petitioner demonstrates, by a preponderance of evidence, that both elements of *section 1012 (f)* are satisfied may a child be deemed neglected under the statute. When "the sole allegation" is that the mother has been abused and the child has **[****16]** witnessed the abuse, such a showing has not been made. This does not mean, however, that a child can never be "neglected" when living in a household plagued by domestic violence. Conceivably, neglect might be found where a record establishes that, for example, the mother acknowledged that the children knew of repeated domestic violence by her paramour and had reason to be afraid of him, yet nonetheless allowed him several times to return to her home, and lacked awareness of any impact of the violence on the children, as in *Matter of James MM. (294 A.D.2d at 632)*; or where the children were exposed to regular and continuous extremely violent conduct between their parents, several times requiring official intervention, and where caseworkers testified to the fear and distress the children were **[*372]** experiencing as a result of their long exposure to the violence (*Matter of Theresa CC., 178 A.D.2d 687, 576 N.Y.S.2d 937 [3d Dept 1991]*).

In such circumstances, the battered mother is charged with neglect not because she is a victim of domestic violence or because her children witnessed the abuse, but rather because a preponderance of the evidence establishes that the children **[****17]** were actually or imminently harmed by reason of her failure to exercise even minimal care in providing them with proper oversight.

Certified Question No. 2: Removals

Next, we are called upon to focus on removals by ACS, in answering the question:

> "Can the injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a parent or other caretaker constitute 'danger' or 'risk' to the child's 'life or health,' as those terms are defined in the *N.Y. Family Ct. Act §§ 1022*, *1024*, *1026-1028*?" (*344 F.3d at 176-177*.)

The cited Family Court Act sections relate to the removal of a child from home. Thus, in essence, we are asked to decide whether emotional injury from witnessing domestic violence can rise to a level that establishes an "imminent danger" or "risk" to a child's life or health, so that removal is appropriate either in an emergency or by court order.

While we do not reach the constitutional questions, it is helpful in framing the statutory issues to note the Second Circuit's outline of the federal constitutional questions relating to removals. Their questions emerge in large measure from the District Court's **[****18]** findings of an "agency-wide practice of removing children from their mother without evidence of a mother's neglect and without seeking prior judicial approval" (*203 F. Supp. 2d at 215*), and Family Court review of removals that "often fails to provide mothers and children with an effective avenue for timely relief from ACS mistakes" (*id. at 221*).

Specifically, as to ex parte removals, the Circuit Court identified procedural due process and *Fourth Amendment* questions focused on whether danger to a child could encompass emotional trauma from witnessing domestic violence against a parent, warranting emergency removal. Discussing the procedural due process question, the court remarked that:

> **[**848]** **[***204]** "there is a strong possibility that if New York law **[*373]** does not authorize *ex parte* removals, our opinion in *Tenenbaum* at least arguably could weigh in favor of finding a procedural due process violation in certain circumstances. If New York law does authorize such removals, *Tenenbaum* likely does not prohibit us from deferring to that judgment. In either case, the underlying New York procedural rules will also be an important component of our balancing. **[****19]** Thus, the state-law question of statutory interpretation will either render unnecessary, or at least substantially modify, the federal constitutional question" (*344 F.3d at 172*). [7]

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[7] In *Tenenbaum v Williams (193 F.3d 581 [2d Cir 1999])*, a child's parents brought an action pursuant to *42 USC § 1983* challenging the New York City Child Welfare Administration's removal of their five year old from her kindergarten class--under the emergency removal provision of *Family Court Act § 1024*--and taking her to the emergency room where a pediatrician and a gynecologist examined her for signs of

[**20]** The court also questioned whether "in the context of the seizure of a child by a state protective agency the *Fourth Amendment* might impose any additional restrictions above and beyond those that apply to ordinary arrests" (*id. at 173*).

As to court-ordered removals, the Second Circuit recognized challenges based on substantive due process, procedural due process--the antecedent of Certified Question No. 3--and the *Fourth Amendment*. The substantive due process question concerned whether the City had offered a reasonable justification for the removals. The Second Circuit observed that "there is a substantial *Fourth Amendment* question presented if New York law does not authorize removals in the circumstances alleged" (*id. at 176*).

Finally, in certifying the questions to us, the court explained that:

> "[t]here is . . . some ambiguity in the statutory language authorizing removals pending a final determination of status. Following an emergency removal, whether *ex parte* or by court order, the Family Court must return a removed child to the parent's custody absent 'an imminent risk' or 'imminent **[*374]** danger' to 'the child's life or health.' At the same time, the Family Court **[****21]** must consider the 'best interests of the child' in assessing whether continuing removal is necessary to prevent threats to the child's life or health. Additionally, in order to support removal, the Family Court must 'find[ ] that removal is necessary to avoid imminent risk.' How these provisions should be harmonized seems to us to be the province of the Court of Appeals" (*344 F.3d at 169* [internal citations omitted]).

The Circuit Court summarized the policy challenged by plaintiffs and found by the District Court as "the alleged practice of removals based on a theory that allowing one's child to witness ongoing domestic violence is a form of neglect, either simply because such conduct is presumptively neglectful or because in individual circumstances it is shown to threaten the child's physical or emotional health" (*id. at 166 n 5*).

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possible sexual abuse. When they found none, the child was returned to her parents. The Second Circuit reversed the District Court's judgment in pertinent part and held that a jury could have concluded that the emergency removal for the medical examination violated the parents' and child's procedural due process rights, and the child's *Fourth Amendment* rights.

It is this policy, viewed in light of the District Court's factual findings, that informs our analysis of Certified Question No. 2. In so doing, we acknowledge the Legislature's expressed goal of "placing increased emphasis on preventive services **[**849]** **[***205]** designed to maintain family relationships rather than responding **[****22]** to children and families in trouble only by removing the child from the family" (*see Mark G. v Sabol, 93 N.Y.2d 710, 719, 717 N.E.2d 1067, 695 N.Y.S.2d 730 [1999]* [emphasis omitted] [construing Child Welfare Reform Act of 1979 (L 1979, chs 610, 611)]). We further acknowledge the legislative findings, made pursuant to the *Family Protection and Domestic Violence Intervention Act of 1994*, that

"[t]he corrosive effect of domestic violence is far reaching. The batterer's violence injures children both directly and indirectly. Abuse of a parent is detrimental to children whether or not they are physically abused themselves. Children who witness domestic violence are more likely to experience delayed development, feelings of fear, depression and helplessness and are more likely to become batterers themselves" (L 1994, ch 222, § 1; *see also People v Wood, 95 N.Y.2d 509, 512, 742 N.E.2d 114, 719 N.Y.S.2d 639 [2000]* [though involving a batterer, not a victim]).

These legislative findings represent two fundamental--sometimes conflicting--principles. ***HN7***[⬆] New York has long embraced a policy of keeping "biological families together" (*Matter of Marino S., 100 N.Y.2d 361, 372, 795 N.E.2d 21, 763 N.Y.S.2d 796 [2003]*). Yet "when a child's best **[*375]** interests **[****23]** are endangered, such objectives must yield to the State's paramount concern for the health and safety of the child" (*id.*).

As we concluded in response to Certified Question No. 1, exposing a child to domestic violence is *not* presumptively neglectful. Not every child exposed to domestic violence is at risk of impairment. A fortiori, exposure of a child to violence is not presumptively ground for removal, and in many instances removal may do more harm to the child than good. ***HN8***[⬆] *Part 2 of Article 10 of the Family Court Act* sets forth four ways in which a child may be removed from the home in response to an allegation of neglect (or abuse) related to domestic violence: (1) temporary removal with consent; (2) preliminary orders after a petition is filed; (3) preliminary orders before a petition is filed; and (4) emergency removal without a court order. The issue before us is whether emotional harm suffered by a child exposed to domestic violence, where shown, can

warrant the trauma of removal under any of these provisions.

The Practice Commentaries state, and we agree, that the sections of part 2 of article 10 create a "continuum of consent and urgency and mandate **[****24]** a hierarchy of required review" before a child is removed from home (*see* Besharov, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 1021 at 5 [1999 ed]).

Consent Removal

First, ***HN9***[↑] *section 1021* provides that a child may be removed "from the place where he is residing with the written consent of his parent or other person legally responsible for his care, if the child is an abused or neglected child under this article" (*Family Court Act § 1021*; *see Tenenbaum v Williams, 193 F.3d 581, 590 n 5 [2d Cir 1999]*; *Matter of Jonathan P., 283 A.D.2d 675, 724 N.Y.S.2d 213 [3d Dept 2001]*). This section is significant because "many parents are willing and able to understand the need to place the child outside the home and because resort to unnecessary legal coercion can be detrimental to later treatment efforts" (Besharov at 6).

Postpetition Removal

[2] ***HN10***[↑] If parental consent cannot be obtained, *section 1027*, at issue here, provides for preliminary orders after the filing of a neglect (or abuse) petition. Thus, according **[**850]** **[***206]** to the statutory continuum, where the circumstances **[****25]** are not so exigent, the agency should bring a petition and seek a hearing *prior to* removal **[*376]** of the child. In any case involving abuse--or in any case where the child has already been removed without a court order--the Family Court must hold a hearing as soon as practicable after the filing of a petition, to determine whether the child's interests require protection pending a final order of disposition (*Family Ct Act § 1027 [a]*). As is relevant here, the section further provides that in any other circumstance (such as a neglect case), after the petition is filed any person originating the proceeding (or the Law Guardian) may apply for--or the court on its own may order--a hearing to determine whether the child's interests require protection, pending a final order of disposition (*id.*). [8]

[**26]** For example, in *Matter of Adam DD. (112 A.D.2d 493, 490 N.Y.S.2d 907 [3d Dept 1985])*, after filing a child neglect petition, petitioner Washington County Department of Social Services sought an order under *section 1027*. At a hearing, evidence demonstrated that respondent mother had told her son on several occasions that she intended to kill herself, and Family Court directed that custody be placed with petitioner on a temporary basis for two months. At the subsequent dispositional hearing, a psychiatrist testified that respondent was suffering from a type of paranoid schizophrenia that endangered the well-being of the child, and recommended the continued placement with petitioner. A second psychiatrist concurred. The Appellate Division concluded that the record afforded a basis for Family Court to find neglect because of possible impairment of the child's emotional health, and continued placement of the child with petitioner.

While not a domestic violence case, *Matter of Adam DD.* is instructive because it concerns steps taken in the circumstance where a child is emotionally harmed by parental behavior. The parent's repeated threats of suicide caused emotional harm that could **[****27]** be akin to the experience of a child who witnesses repeated episodes of domestic violence perpetrated against a parent. In this circumstance, the agency did not immediately remove the child, but proceeded with the filing of a petition and a hearing.

HN11[↑] Upon such a hearing, if the court finds that removal is necessary to avoid imminent risk to the child's life or health, it is **[*377]** required to remove or continue the removal and remand the child to a place approved by the agency (*Family Ct Act § 1027 [b] [i]*). In undertaking this inquiry, the statute also requires the court to consider and determine whether continuation in the child's home would be contrary to the best interests of the child (*id.*). [9]

[**28]** The Circuit Court has asked us to harmonize the "best interests" test with the calculus concerning

[8] Under *section 1028*, a parent or person legally responsible for the care of a child may petition the court for return of the child after removal, if he or she was not present or given an adequate opportunity to be present at the *section 1027* hearing. The factors to be considered when returning a child removed in an emergency mirror those considered in an initial determination under *sections 1027* and *1022*--best interests, imminent risk, and reasonable efforts to avoid removal.

[9] The order must state the court's findings which support the necessity of removal, whether the parent was present at the hearing, what notice was given to the parent of the hearing and under what circumstances the removal took place (*Family Ct Act § 1027 [b] [i]*).

"imminent risk" and "imminent danger" to "life or health" (*344 **[**851]** F.3d at 169*). **[***207]** ***HN12***[↑] In order to justify a finding of imminent risk to life or health, the agency need not prove that the child has suffered actual injury (*see Matter of Kimberly H., 242 A.D.2d 35, 38, 673 N.Y.S.2d 96 [1st Dept 1998]*). Rather, the court engages in a fact-intensive inquiry to determine whether the child's emotional health is at risk. *Section 1012 (h)*, moreover, sets forth specific factors, evidence of which may demonstrate "substantially diminished psychological or intellectual functioning" (*see also Matter of Sayeh R., 91 N.Y.2d 306, 314-316, 693 N.E.2d 724, 670 N.Y.S.2d 377 [1997]*; *Nassau County Dept. of Social Servs. [Dante M.] v Denise J., 87 N.Y.2d 73, 78-79, 661 N.E.2d 138, 637 N.Y.S.2d 666 [1995]*). As noted in our discussion of Certified Question No. 1, *section 1012 (h)* contains the caveat that impairment of emotional health must be "clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child" (*see Matter of Theresa CC., 178 A.D.2d 687, 576 N.Y.S.2d 937 **[****29]** [3d Dept 1991]*).

Importantly, in 1988, the Legislature added the "best interests" requirement to the statute, as well as the requirement that reasonable efforts be made "to prevent or eliminate the need for removal of the child from the home" (L 1988, ch 478, § 5). [10] These changes were apparently necessary to comport with federal requirements under title IV-E of the Social Security Act (*42 USC §§ 670-679b*), which mandated that federal "foster care maintenance payments may be made on behalf of otherwise eligible children who were removed from the home of a specified relative pursuant to a voluntary placement agreement, or as the result of a 'judicial determination to the effect that continuation therein would be contrary to the welfare of **[*378]** the child and . . . that reasonable efforts [to prevent the need for removal] have been made' " (Policy Interpretation Question of US Dept of Health & Human Servs, May 3, 1986, Bill Jacket, L 1988, ch 478, at 32-33). ***HN13***[↑] The measures "ensure[d] that children involved in the early stages of child protective proceedings and their families receive appropriate services to prevent the children's removal from **[****30]** their homes whenever possible" (Mem from Cesar A. Perales to Evan A. Davis, Counsel to Governor, July 27, 1988, Bill Jacket, L 1988, ch 478, at 14).

By contrast, the City at the time took the position that

> "[t]he mixing of the standards 'best interest of the child' and 'imminent risk' is confusing. It makes no sense for a court to determine as part of an 'imminent risk' decision, what is in the 'best interest of the child.' If the child is in 'imminent risk', his/her 'best interest' is removal from the home. A 'best interest' determination is more appropriately made after an investigation and a report have been completed and all the facts are available" (Letter from Legis Rep James Brennan, City of New York Off of Mayor, to Governor Mario M. Cuomo, July 27, 1988, Bill Jacket, L 1988, ch 478, at 23).

In this litigation, the City posits that the "best interests" determination is part of the Family **[****31]** Court's conclusion that there is imminent risk warranting removal, and concedes that whether a child will be harmed by the removal is a relevant consideration. The City thus recognizes that the questions facing a Family Court judge in the removal context are extraordinarily complex. As the Circuit Court observed, "it could be argued that the exigencies of the moment that threaten the welfare of a **[**852]** **[***208]** child justify removal. On the other hand, a blanket presumption in favor of removal may not fairly capture the nuances of each family situation" (*344 F.3d at 174*).

HN14[↑] The plain language of the section and the legislative history supporting it establish that a blanket presumption favoring removal was never intended. The court *must do more* than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests.

[*379] Additionally, the court must specifically consider whether imminent risk to the child might **[****32]** be eliminated by other means, such as issuing a temporary order of protection or providing services to the victim (*Family Ct Act § 1027 [b] [iii]*, *[iv]*). The Committee Bill Memorandum supporting this legislation explains the intent that "[w]here one parent is abusive but the child may safely reside at home with the other parent, the abuser should be removed. This will spare children the trauma of removal and placement in foster care" (Mem of Children and Families Standing Comm, Bill Jacket, L 1989, ch 727, at 7).

These legislative concerns were met, for example, in

[10] The Legislature added these provisions to *sections 1022* and *1028* as well.

Matter of Naomi R. (296 A.D.2d 503, 745 N.Y.S.2d 485 [2d Dept 2002]), where, following a hearing pursuant to *section 1027*, Family Court issued a temporary order of protection against a father, excluding him from the home, on the ground that he allegedly sexually abused one of his four children. Evidence established that the father's return to the home, even under the mother's supervision, would present an imminent risk to the health and safety of all of the children. Thus, pending a full fact-finding hearing, Family Court took the step of maintaining the **[****33]** integrity of the family unit and instead removed the abuser.

Ex Parte Removal by Court Order

[3] If the agency believes that there is insufficient time to file a petition, the next step on the continuum should not be emergency removal, but ex parte removal by court order (*see e.g. Matter of Nassau County Dept. of Social Servs. [Dante M.] v Denise J., 87 N.Y.2d 73, 661 N.E.2d 138, 637 N.Y.S.2d 666 [1995]*). ***HN15***[↑] *Section 1022 of the Family Court Act* provides that the court may enter an order directing the temporary removal of a child from home *before* the filing of a petition if three factors are met.

First, the parent must be absent or, if present, must have been asked and refused to consent to temporary removal of the child and must have been informed of an intent to apply for an order. Second, the child must appear to suffer from abuse or neglect of a parent or other person legally responsible for the child's care to the extent that immediate removal is necessary to avoid imminent danger to the child's life or health. Third, there must be insufficient time to file a petition and hold a preliminary hearing.

HN16[↑] Just as in a *section 1027* inquiry, the court must **[****34]** consider whether continuation in the child's home would be contrary to the best interests of the child; whether reasonable efforts were **[*380]** made prior to the application to prevent or eliminate the need for removal from the home; and whether imminent risk to the child would be eliminated by the issuance of a temporary order of protection directing the removal of the person from the child's residence. [11] **[**853]** **[***209]** Here, the court must engage in a fact-finding inquiry into whether the child is at risk and appears to suffer from neglect.

[11] The order must state the court's findings concerning the necessity of removal, whether respondent was present at the hearing and what notice was given.

The Practice Commentaries suggest that *section 1022* may be unfamiliar, or seem unnecessary, to those in practice in New York City, "where it is common to take emergency protective action without prior court review" (Besharov, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 1022 at 10 [1999 ed]). If, **[****35]** as the District Court's findings suggest, this was done in cases where a court order could be obtained, the practice contravenes the statute. *Section 1022* ensures that in most urgent situations, there will be judicial oversight in order to prevent well-meaning but misguided removals that may harm the child more than help. As the comment to the predecessor statute stated, "[t]his section . . . [is] designed to avoid a premature removal of a child from his home by establishing a procedure for an early judicial determination of urgent need" (Committee Comments, McKinney's Cons Laws of NY, Book 29A, Family Ct Act §322 [1963 ed]).

HN17[↑] Whether analyzing a removal application under *section 1027* or *section 1022*, or an application for a child's return under *section 1028*, a court must engage in a balancing test of the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal. The term "safer course" (*see e.g. Matter of Kimberly H., 242 A.D.2d 35, 673 N.Y.S.2d 96 [1st Dept 1998]*; *Matter of Tantalyn TT., 115 A.D.2d 799, 495 N.Y.S.2d 740 [3d Dept 1985]*) should not be used to mask a dearth of evidence or as a watered-down, impermissible presumption. **[****36]**

Emergency Removal Without Court Order

[4] Finally, *section 1024* provides for emergency removals without a court order. ***HN18***[↑] The section permits removal without a court order and without consent of the parent if there is reasonable cause to believe that the child is in such urgent circumstance or condition that continuing in the home or care of the **[*381]** parent presents an imminent danger to the child's life or health, and there is not enough time to apply for an order under *section 1022* (*Family Ct Act § 1024 [a]*; *see generally Matter of Joseph DD., 300 A.D.2d 760, 760 n 1, 752 N.Y.S.2d 407 [3d Dept 2002]* [noting that removal under such emergency circumstances requires the filing of an article 10 petition "forthwith" and prompt court review of the nonjudicial decision pursuant to *Family Ct Act § 1026 (c)* and *§ 1028*]; *see also Matter of Karla V., 278 A.D.2d 159, 717 N.Y.S.2d 598 [1st Dept 2000]*). Thus, emergency removal is appropriate where the danger is so

immediate, so urgent that the child's life or safety will be at risk before an ex parte order can be obtained. The standard obviously is a stringent one.

HN19[↑] *Section 1024* establishes **[****37]** an objective test, whether the child is in such circumstance or condition that remaining in the home presents imminent danger to life or health. [12] In construing "imminent danger" under *section 1024*, it has been held that **[**854]** **[***210]** whether a child is in "imminent danger" is necessarily a fact-intensive determination. "It is not required that the child be injured in the presence of a caseworker nor is it necessary for the alleged abuser to be present at the time the child is taken from the home. It is sufficient if the officials have persuasive evidence of serious ongoing abuse and, based upon the best investigation reasonably possible under the circumstances, have reason to fear imminent recurrence" (*Gottlieb v County of Orange, 871 F. Supp. 625, 628-629 [SD NY 1994]*, citing *Robison v Via, 821 F.2d 913, 922 [2d Cir 1987]*). The *Gottlieb* court added that, "[s]ince this evidence is the basis for removal of a child, it should be as reliable and thoroughly examined as possible to avoid unnecessary harm to the family unit" (*871 F. Supp. at 629*).

[**38]** *Section 1024* concerns, moreover, only the very grave circumstance of danger to life or health. While we cannot say, for all future time, that the possibility can *never* exist, in the case of emotional injury--or, even more remotely, the risk of emotional injury--caused by witnessing domestic violence, it must be a rare circumstance in which the time would be so fleeting and **[*382]** the danger so great that emergency removal would be warranted. [13]

Certified Question No. 3: Process

Finally, the Second Circuit asks us:

> "Does the **[****39]** fact that the child witnessed such abuse suffice to demonstrate that 'removal is necessary,' *N.Y. Family Ct. Act §§ 1022*, *1024*, *1027*, or that 'removal was in the child's best interests,' *N.Y. Family Ct. Act §§ 1028*, *1052(b)(i)(A)*, or must the child protective agency offer additional, particularized evidence to justify removal?" (*344 F3d at 177*.)

[5] The Circuit Court has before it the procedural due process question whether, if New York law permits a presumption that removal is appropriate based on the witnessing of domestic violence, that presumption would comport with *Stanley v Illinois (405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 [1972]* [recognizing a father's procedural due process interest in an individualized determination of fitness]). All parties maintain, however, and we concur, that under the Family Court Act, there can be no "blanket presumption" favoring removal when a child witnesses domestic violence, and that each case is fact-specific. As demonstrated in our discussion of Certified Question No. 2, when a court orders removal, particularized evidence must exist to justify that determination, including, where appropriate, evidence **[****40]** of efforts made to prevent or eliminate the need for removal and the impact of removal on the child.

The Circuit Court points to two cases in which removals occurred based on domestic violence without corresponding expert testimony on the appropriateness of removal in the particular circumstance (*Matter of Carlos M., 293 A.D.2d 617, 741 N.Y.S.2d 82 [2d Dept 2002]*; *Matter of Lonell J., 242 A.D.2d 58, 673 N.Y.S.2d 116 [1st Dept 1998]*). Both cases were reviewed on the issue whether there was sufficient evidence to support a finding of neglect. In *Carlos M.*, the evidence showed a 12-year history of domestic violence between the parents which was not only witnessed by the children but also often actually spurred their intervention. **[**855]** **[***211]** In *Lonell J.*, **[*383]** caseworkers testified at a fact-finding hearing about the domestic violence perpetrated by the children's father against their mother, as well as the unsanitary condition of the home and the children's poor health.

We do not read *Carlos M.* or *Lonell J.* as supportive of a presumption that if a child has witnessed domestic violence, the child has been harmed and removal is

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[12] *Section 1022* also requires that the child be brought immediately to a social services department, that the agency make every reasonable effort to inform the parent where the child is and that the agency give written notice to the parent of the right to apply to Family Court for return of the child.

[13] *Section 1026* permits the return of a child home, without court order, in a case involving neglect, when an agency determines in its discretion that there is no imminent risk to the child's health in so doing (*Family Ct Act § 1026 [a]*, *[b]*). If the agency does not return the child for any reason, the agency must file a petition forthwith, or within three days if good cause is shown (*Family Ct Act § 1026 [c]*).

appropriate. That presumption would be **[****41]** impermissible. In each case, multiple factors formed the basis for intervention and determinations of neglect. As the First Department concluded in *Lonell J.*, moreover, "nothing in *section 1012* itself requires expert testimony, as opposed to other convincing evidence of neglect" (*242 A.D.2d at 61*). Indeed, under *section 1046 (a) (viii)*, which sets forth the evidentiary standards for abuse and neglect hearings, competent expert testimony on a child's emotional condition *may* be heard. The *Lonell J.* court expressed concern that while older children can communicate with a psychological expert about the effects of domestic violence on their emotional state, much younger children often cannot (*242 A.D.2d at 62*). The court believed that "[t]o require expert testimony of this type in the latter situation would be tantamount to refusing to protect the most vulnerable and impressionable children. While violence between parents adversely affects all children, younger children in particular are most likely to suffer from psychosomatic illnesses and arrested development" (*id.*).

Granted, in some cases, it may be difficult for an agency to show, **[****42]** absent expert testimony, that there is imminent risk to a child's emotional state, and that any impairment of emotional health is "clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child" (*Family Ct Act § 1012 [h]*). Yet nothing in the plain language of article 10 requires such testimony. The tragic reality is, as the facts of *Lonell J.* show, that emotional injury may be only one of the harms attributable to the chaos of domestic violence.

Accordingly, the certified questions should be answered in accordance with this opinion.

Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo, Read and R.S. Smith concur.

Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions by this Court pursuant to *section 500.17* of the Rules of **[*384]** Practice of the Court of Appeals (*22 NYCRR 500.17*), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified questions **[****43]** answered in accordance with the opinion herein.

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