

<b>Matter of Christiauna G.</b>
2017 NY Slip Op 32979(U)
April 4, 2017
Family Court, Ontario County
Docket Number: 11590
Judge: Stephen D. Aronson
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NEW YORK STATE  
COUNTY OF ONTARIO

ONTARIO COUNTY FAMILY COURT

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ONTARIO COUNTY DSS,

*Petitioner,*

**DECISION**

IN THE MATTER OF CHRISTIAUNA G  
AND LILYAUNA G

*Children under 18 Years of Age  
Alleged to be Neglected by*

*File 11590*

ERIC G. AND HOLLY Y. ,  
*Respondents.*

*Dockets NN-00526, -00527-15/16A&B,  
NN-00526, -00527-15/17C*

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ERIC G.,

*Petitioner,*

**DECISION**

v.

HOLLY Y.

*File 11590*

*Respondent.*

*Dockets V-01390, -01391-16; 0-00248-17*

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HOLLY Y.

*Petitioner,*

**DECISION**

v.

,ERICG.

*File 11590*

*Respondent.*

*Dockets V-01555, -01556-16;  
V-01687, -01688-16*

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Presiding: *Hon. Stephen D. Aronson*

Appearances: *Jason Housel*, for petitioner-respondent Eric G.  
*Peter Einset*, for petitioner-respondent Holly Y.  
*Susan Gray Jones*, Attorney for the Children  
*Gary L. Curtiss*, Ontario County Attorney (*Sandra J. Packard*, of counsel), for  
petitioner Ontario County Department of Social Services, interested party

these family court proceedings, Eric G. (father) and Holly Y. (mother)  
are the biological parents of Christiauna G. , bom February 7, 2012, and Lilyauna G., bom  
July21, 2014 (the children).

Family Court litigation involving this family dates back to 2013. In their brief lives to date, the children have spent time in the custody of the two parents simultaneously, their maternal grandfather, their mother, and the Ontario County Department of Social Services (DSS), which placed them in a foster home. They have been in the temporary custody of their father since October 4, 2016, with their mother having supervised visitation. The order by which DSS is supervising this family will expire on April 4, 2017. DSS participated in the hearing on the Article 6 petitions as an interested party.

Previous litigation addressed the mother's and father's issues with domestic violence, unemployment, and lack of housing; the mother's mental and emotional disabilities; and the father's status as a Level Two Sex Offender. A CPS report was indicated against both parents in 2013 for inadequate guardianship and food/clothing/shelter of the child Christiauna.

#### RECENT PETITIONS AND ORDERS

In January 2014 a consent order issued by this court gave Mark Y., Sr. (grandfather), and the parents joint legal custody of the child Christiauna. The order also changed the residential placement of the child from the maternal grandfather to the parents, over the objection of the Attorney for the Child and contingent upon the parents applying for and accepting preventive services from the Wayne County Department of Social Services. The grandfather was given visitation with Christiauna one weekend per month, and the parties were prohibited from consuming or being under the influence of alcohol or any illegal drugs or illegal substances during periods of access to or residency with the child. This order preceded the birth of the younger child, Lilyauna.

The grandfather's joint custody of Christiauna ended with an order of this court entered March 31, 2015, granting joint custody and physical placement of her solely to the parents. The Attorney for the Children withdrew a violation petition, and the grandfather withdrew a visitation petition as a part of that order. Lilyauna was about eight months old at the time that order was entered but was not mentioned in the order, as no one was disputing custody over her.

## PETITIONS

All of the petitions filed since April of 2015 are discussed here in chronological order by filing dates. All of them pertain to both of the children. All of them are still pending except the neglect petition filed by DSS. The caption references the neglect matter because three petitions filed by the mother were filed under the neglect docket.

### **DSS Neglect Petition.**

On April 20, 2015, DSS filed a neglect petition against both parents on behalf of both children. The children were removed, and a finding of neglect was made. The children were in foster care from April 2015 until September 2016. At a court appearance on October 4, 2016, DSS requested termination of its placement of the children and placement of the two children with the father, with whom they had already been placed on trial. DSS also sought continuation of supervised visits for the mother and extended supervision of the family by DSS for six additional months. These requests were granted. The DSS's supervision of the mother will expire on April 4, 2017. The petition by DSS is no longer pending, but some of the mother's petitions were filed under the neglect docket numbers. Those are shown in the caption above.

**The Father's Custody Petition.**

On September 23, 2016, the father filed for custody of the children. At that point in time, the two children were placed with him by the DSS on trial. His petition recites the efforts he made pursuant to the DSS neglect order of disposition, namely, parenting education, drug and alcohol evaluation, mental health evaluation, and a period of supervised visitation. He states, "I can offer my children a safe environment free [of] harmful drama between mother, grandmother & new boyfriend." He states that the children are in a state-registered day care center while he works and that they are registered for Seneca County Head Start. He states that the mother continues to struggle with parenting education and is in a relationship with a man she has identified as physically abusive and a drug dealer and user. He states that ongoing mental health care and ongoing parenting classes are recommended for the mother in her psychological evaluation conducted as a part of the disposition of the neglect matter against both parents. Finally, he requests a temporary order of protection at paragraph 14 of the custody petition, referring to the mother's "history of lying, making false allegations & reports, mental health concerns, and sabotage attempts [sic] on petitioner (respondent & boyfriend made fake Facebook to harass [sic] petitioner)."

**The Mother's Custody Petition.**

On October 4, 2016, the mother filed a petition seeking joint custody with the father and primary residential placement, saying she wants to co-parent 50/50, that the respondent is violent and a sex offender, that the mother has cared for the children since their births, and that Christiauna should be enrolled in Pre-K, not day care. She seeks a reffain-from order of protection in paragraph 14 of the custody petition. She attached a lengthy statement denying

having made false CPS reports against the father, accusing the father of harassing her and her boyfriend and threatening them twice in the courthouse, expressing concern about the father's girlfriend Amanda H because she "was released from prison recently for some pretty serious charges," stating that her DSS supervisor told her she is doing well with her visits, and concluding that she just wants what is best for her children. She also attached a police report from July 12, 2016, concerning texts between the father and the mother's boyfriend Jeremy.

#### **The Mother's Visitation Petition.**

On October 14, 2016, the mother filed a visitation petition under the neglect docket, seeking a visit on Christmas Eve day and a change of location of the visits. She states that since the children were returned to the father, her supervised visits "are being cancelled routinely and are 6 visits behind." She renews the request made in her custody petition of October 4, 2016, for an order of protection against the father. In a lengthy attached statement she alleges that the father "took my Monday phone calls away and continues to work against me instead of with me to co-parent the best we can . . .". She also asks if her supervised visits can be moved back to a church in Palmyra because she has moved in with her boyfriend again, and it is difficult for her to afford the transportation to Canandaigua for the visits. She alleges that she has no car and that the cost of going to Canandaigua for visits is "almost \$200 a month." She mentions that the room where her visits occur in Canandaigua is too small for the children to play, whereas the church has plenty of space for them.

#### **The Mother's Violation Petition.**

On November 25, 2016, the mother filed a violation petition under the neglect docket, alleging: "Eric was supposed to keep the phone calls on Sunday, Monday and

Wednesday the same but he terminated all contact with the kids and shuts his phone off on the days I'm supposed to call and CPS does nothing about it."

#### **The Mother's Custody Petition by Order to Show Cause.**

On November 25, 2016, the mother filed a custody petition by order to show cause, alleging that the father "threatens I will never see or speak with my children ever again once he has full custody." She also alleges that her daughter is old enough to be in Pre-K and is not in it. She seeks 50/50 custody, immediate unsupervised visits, and weekly phone calls. She alleges: "My girls not having a relationship with their mom could do a lot of psychological damage to them now and in the future. My one daughter already shows signs of anger and hate since being returned to Eric." She complains that she was denied time with the girls on Thanksgiving and that they spent most of that day at a babysitter's home. She states that her relationships with the children were fine when they were in foster care but have deteriorated since they returned to their father's custody. She expresses frustration over Eric's angry and harassing behavior toward her and her boyfriend Jeremy and her mother and the lack of consequences to Eric. She complains that CPS does nothing about Eric's behavior. She expresses her belief that she is being discriminated against because of her disabilities.

#### **The Father's Family Offense Petition.**

On March 3, 2017, the father filed a family offense petition against the mother, alleging that on February 22, 2017, he received a text from the mother's boyfriend Jeremy accusing him of using vulgar language with children in the front yard of the mother's and Jeremy's home and that the mother called CPS to report these allegations. He alleges that he was at work in Geneva as of the time the mother and her boyfriend accuse him of having driven by their home in

Palmyra. The court issued a temporary refrain order of protection against the mother and in favor of the father.

### **The Mother's Visitation Petition by Order to Show Cause.**

On March 9, 2017, the mother, through her attorney, filed a petition by order to show cause, seeking immediate unsupervised, overnight visitation. She alleges that "too much supervised visitation is not good for the children" and that the father has threatened to stop all phone contact between her and the children. She also states: "I live with Jeremy and his two children who I help take care of daily who are 8 and 9 in a 2 story 3 bedroom home. I do not foresee [sic] a risk of harm to any children within my home." She seeks unsupervised visitation, including overnights. She references a pending family offense petition filed by her in Wayne County Family Court against the father with a return date of March 20, 2017. The petition was filed under the neglect docket. No immediate relief was granted.

### THE HEARING

A hearing was held on February 14 and March 24, 2017. There was no request for a *Lincoln* hearing. The attorneys gave oral summations at trial.

#### **Testimony by Eric - February 14, 2017.**

The father testified on direct examination that he is 41 years old and lives at 120 East Main Street, Waterloo, New York. He has worked full-time at CCI International in Geneva for about four years. He has a vehicle by which he gets to and from work and has a valid driver's license. The girls Christiauna, age 5, and Lilyauna, age 2, were in foster care during the neglect proceeding but are now living with him and have been for about four months. While the children

were in foster care DSS required the father to get a psychological evaluation, an alcohol and drug evaluation, get training in hands-on parenting techniques, and get help with money management. He completed all of these requirements over a period of several months. During that time the father met with or interacted with county workers three or four times per week. The county did home visits before giving the father custody of the children. The father's residence is an apartment with bedrooms, a kitchen, and a living room.

The father described his daily routine. He testified that he wakes up at 5:00 a.m., gets the girls up and dressed, packs diapers, and drops them off at day care at 6:00 a.m. He goes to work and gets out at 4:45 p.m. Then he picks up the children. He gives them baths, they play games, have a meal, and get ready for bed. He testified that he also takes them to their doctor visits.

The father testified that the day care he uses is Susie's Lollypop Day Care in Geneva. Ontario County covers some of the cost, and the father makes a co-payment. He testified that he is up to date with his co-payments. He testified that he sometimes takes the girls to the Museum of Play in Rochester and to parks in the area and to WalMart to look at toys. He testified that the mother has supervised visits and that the county transports the children to the visits once a week.

The father testified that over the past three or four months there has been telephone visitation between the mother and the children. None of the phone calls has gone very well in his opinion. He testified that eight out of ten calls go badly. He testified that the mother usually will try to argue or fight with him over the phone and then the children cry and don't want to speak to her. He testified that last week, one of the children scratched him when he asked her to speak with her mother. He testified that he deals with the children's arguing, fighting, and acting out.

The father testified that since the girls have been living with him he has had difficulty with the mother constantly calling the police to complain about him, accusing him of harassment or stalking. He has also received threatening messages on Facebook that were investigated by the County. He testified that the mother recently filed a proceeding in Wayne County Family Court in which she falsely alleges he is harassing and/or stalking her. He would like to have all the court proceedings remain in Ontario County.

The father testified that he is in a position to continue caring for his daughters. He also testified that he has access to a counselor for anger management purposes.

On cross-examination by the mother's attorney the father testified that a temporary reffain-ffom order of protection against him has been issued in the Wayne County proceeding. He testified that he has the speaker turned on when the mother calls to speak to the children, that his apartment is located opposite Connie's Diner on East Main Street, that he does not take medications for mental health and has not been told to do so, and that he is required to stay 1,000 feet away from educational facilities. He also testified that his girlfriend sleeps over at his apartment. He and his girlfriend sleep in the living room, and the children sleep in the bedroom, which has a door on it.

Respondent's exhibit A, received into evidence, is a certificate of conviction for criminal sexual act in the second degree and endangering the welfare of a child. The father testified that he was convicted of these charges because he got a "blow job" from a 13-year-old girl. He spent three years, from 2005 to 2008, in prison. Respondent's exhibit B, received into evidence, is a certificate of conviction for a violent felony. Respondent's exhibits C and D are waivers of indictment. The father testified that he is a level two sex offender and does not know when that

will expire.

The father testified that he went as far as the ninth grade in school, that he has never married, that he was born in Cheverly, Maryland, and that he and his family came to the Finger Lakes when he was six years old. He testified that he got violent with his mother when he was eight years old. He testified that it would be better for the children if he and the mother were friends with each other. He denied having called the mother a whore, slut, retard, or shit any time since 2014. He acknowledged having called the mother a bitch. He also acknowledged the fact that sometimes in the heat of the moment he says "I am God." He testified that he is a tattoo artist.

The father testified that the children spend most of the day at day care from Mondays through Thursdays, getting home at about 5:15 p.m. He testified that they are in bed by 8:00 to 8:30 p.m. He testified that it is safe to put the children in day care.

The father testified that he told Jeremy to break off his relationship with the mother because Jeremy is interfering in these proceedings between the parents. The father does not recall whether in the past year he told Jeremy that "Holly's cunt is roast beef." He testified that he is not predisposed against the mother because she is mentally slow. He testified that he called Jeremy a "pussy." He testified that he doesn't know whether he disapproves of the mother living with Jeremy, but he does not want the mother to live with Jeremy. He testified that he does not know where the mother should live. He testified that the mother cannot read or write, has no car, and receives SSI benefits of \$700 per month.

The father testified that his girlfriend interacts with the children and goes places with them.

The father testified that he and the mother lived together for four and one-half years during which they broke up frequently. He testified that he worked outside the home during that time, that he did the cooking, and that the mother took care of the children.

The father testified that the neglect charge resulted in the children being taken away from both parents and being put in foster care for eight months. He testified that he does not believe the charges were fair against either the mother or him.

The father testified that his home is on Routes 5 and 20 and is close to a factory and a liquor store. He testified that his back yard is the size of the courtroom and that he and the children are happy living there. He testified that he can have flexibility with his work in case the children get sick.

The father testified that breakfasts for the children consist of cereal, pancakes, fruit, and breakfast bowls.

The father testified that if he gets custody, he will encourage a strong relationship between the mother and the children. He testified that he will make the children available; the rest is up to the mother.

The father testified that as of April 4, 2017, DSS will no longer transport the mother to visitations. Getting transportation is then the mother's problem. He testified that the children should have contact with their mother.

The father testified that Dr. Margaret Hollister on Parrish Street is the children's doctor. He testified that the younger child has a food allergy. The children go for regular medical checkups every two to three months.

The father testified that he would like the mother's parental rights terminated because she has regressed in services and still is not safe around the children, according to CPS. The father testified that the mother is learning disabled, but he does not hold it against her.

The father testified that he has taken suboxone sometime prior to 2014.

On cross-examination by the AFC, the father testified that the children's bedroom contains two beds with pink canopies, a TV, a DVD, boxes of toys, a doll house, art work on the wall (some of which the father created), a photo of each of the children, and portraits of the children and their parents.

The father testified that before the supervised visits take place the children are happy and laughing; that when their mother calls, the four-year-old balls up [gets teary or curls up into a ball?]; and that the four-year-old is usually quiet when she returns from seeing her mother. He testified that he plans to get Christiauna into a formal pre-K program and that he spends time reading to the children. He testified that he does not have the ability to communicate with the mother about his plans for school for Christiauna.

The father testified that the phone calls between the children and their mother used to be five minutes long, but he lets the children talk as long as they want.

The father testified that he has an 18-year-old daughter named Sabrina who lives in Canandaigua; that Sabrina's mother has physical placement of her, that his daughters are all close to each other, and that he is close to Sabrina.

The father testified that he does not agree with the allegations of neglect in the petition by DSS; he feels that he and the mother were wrongfully accused of neglect.

The father testified that the mother admits that she lies about things. She last told him so about a month ago.

On re-direct examination the father testified that despite his feelings about the neglect case, he went through all of the DSS-recommended services and found them to be beneficial.

On re-cross examination by the mother's attorney the father testified that Sabrina lives with her mother, and the last time Sabrina lived with him was 2010-2011. He testified that the time he observed his five-year-old daughter being quiet after a visit with her mother was a day the child had been at day care, and it was 5:00 p.m. when he was observing her.

The father testified that he has told the children that their mother is physically sick and that the mother has told him she has lied, but not that she has lied about Jeremy.

Testimony by Holly - February 14, 2017.

The mother was called as a witness by the father's attorney. She testified that she is 25 years old and has lived at 218 East Jackson Street, Palmyra, for one and one-half years with Jeremy and his children Bailey and Carter. She testified that she reported to her CPS caseworker Jessica Cosentino that Jeremy put his hands on her and hit her, but it was a lie. She testified that she shoved Jeremy in an argument over a phone, and Jeremy called the police. She testified that she lied to Jessica because she was angry at Jeremy. She testified that she had shoved Jeremy in an effort to calm him down and that he pushed a door open. She testified that this was the only time such a thing happened. She testified that she has informed Jessica that she lied about Jeremy. She testified that Jessica is "a lying, vindictive bitch" because Jessica tells the father everything that happens in her (the mother's) house.

The mother testified that over the past several months she has had supervised visits-first twice a week, and then down to once a week for the past three or four weeks. She testified that at the most recent visitation Christiauna had a birthday celebration and received a cat from the maternal grandfather. The mother testified that she did not lose her temper when Lilyauna wanted

to play with the cat and that she had never seen the supervisor before. The mother testified that she decreased the visits from twice a week to once a week because she has no car, no license, and no transportation.

The mother acknowledged that she accused the father of having a sexual relationship with a female DSS caseworker.

The mother testified that she takes Gabapentin three times a day for muscle spasms and that it stops the pain. She testified that her mental health diagnosis is anxiety and bipolar disorder but that she is not medicated for these diagnoses.

The mother testified that during a visit with her children a few months ago she had to be told to stay off her cell phone while with them.

The mother testified that she has convictions for grand larceny, which is a sealed proceeding because she was 17, and for three counts of misdemeanor forgery. She testified that she signed her name on a copied check and cashed the check. She testified that she was sentenced to three years' probation in Wayne County and that it will end in November 2017.

The mother testified that she graduated from Midlakes High School with an IEP diploma, that she can read "a little bit," and that she cannot write "anything sensible."

The mother testified that her visits are from 9:30 to 12:30 at the Canandaigua Family Resources. She testified that the visits were moved to a church in Palmyra, but now they again take place at Canandaigua Family Resources.

The mother testified that she receives SSI and pays \$200 per month for medical transportation. She testified that she has gone to the girls' doctor appointments three or four times.

The mother testified that during the past eight months she graduated from a drug and alcohol course at FLACRA and that she had a slight marijuana issue. She testified that she has also had mental health counseling in Wayne County because of her lying and her mental health disorders, that is, her problems with reading and writing and her bipolar disorder.

The mother testified that if the children are with her and an emergency should arise, she would call an ambulance or ask the neighbors to help her.

The mother testified that she does not talk to her daughters about this case. The mother testified that Jeremy has no criminal record. She testified that during the domestic dispute between Jeremy and her, her arm was in the door. She testified that Jeremy's children, ages 8 and 9, were in the house at the time but were on a different floor of the house. She testified that Jeremy called the police but did not have her charged.

The mother testified that the supervisors at her visits do not talk to her. She testified that she asked a supervisor what she should do when the children fight or bicker, but the supervisor did not tell her what to do. She testified that if she were to have unsupervised visits, she would put them in time out and would figure out what to do.

The mother testified that the children, ages 5 and 2, fight a lot during her visits and that Christiauna got rude with her once. She testified that she put Christiauna in time out on that occasion and then Christiauna apologized to her and told her that "daddy's been talking bad" about her (the mother). She testified that she has to discipline the children during her visits and usually puts them in a chair.

The mother testified that she feels she is treated unfairly in court. She feels she is okay to have unsupervised visits; she did it for four and one-half years. She testified that she and the father were home when the children were taken from them.

The mother testified that she lied at the time of her fight with Jeremy and said that he was selling suboxone. She testified that she lies when she is upset. She denied having posted any lies on Facebook during these court proceedings.

On cross-examination by her own attorney, the mother said her visitations occur every Tuesday for three hours. She testified that the supervisors don't treat her fairly and that she does not know who will supervise her visits after April. She testified that she wants unsupervised visits, that the children like to see her, and that she likes to see the children. She testified that she does not want to get back with the father. She testified that her anxiety does not prevent her from caring for the children and that she used to be at home alone with the children when the father was off at work. She testified that her father had custody of Christiauna for a year when Christiauna was 1-1/2 years old. Prior to that, Christiauna was with the mother. She testified that she had 2-1/2 years of unsupervised contact with Christiauna before supervised visits began.

The mother testified that she lied about Jeremy because she was angry at him and that Jeremy has helped her with her petitions for unsupervised visits.

The mother testified that since October 2016 the father has been shutting off the phone or hanging up on her and that he is very mean to her. She testified that if DSS no longer helps her with transportation to see the children, she will figure out how to do it.

The mother testified that since 2014 the father has called her "slut," "retard," and "bitch." She testified that sometimes the father answers the phone before she talks to the children.

The mother testified that the children have never been sick in her care but that they come to the visits sick sometimes. She testified that when she lived in Geneva with the children and the father she cooked a little, cleaned, played with the children, and helped them get dressed in the mornings. She testified that she had them at home with her, and she was trying her best during

that time. She testified that the father did not play with the children.

The mother testified that she doesn't know whether she has intellectual limitations.

The mother testified that she has tried to make it to the visits but couldn't visit very often in Canandaigua because she had no transportation.

The mother testified that she is not a risk to the children, that she is fit to care for them. She testified that she takes care of Jeremy's children and that Jeremy has kidney stones and hernias.

The mother testified that she calls the children on Mondays and Wednesdays at 8:00 p.m.

The mother testified that the father shoved her once and was charged in Farmington Town Court as a result.

The mother testified that she had contact with the DSS caseworkers infrequently. She testified that they wouldn't call her back.

The mother testified that Jeremy has custody of his children and that she would like visitation with her children every other weekend at her home. She testified that she would encourage a strong relationship between the children and their father; that she would not disparage the father to the children.

On cross-examination by the AFC, the mother testified that she met Jeremy through a friend, Nathan, who had been her boyfriend. She testified that she and Jeremy moved in together three or four months after they met. She testified that Jeremy removed her from where she had been living because there was a heroin addict living there and prostitution was going on there, though it did not include her. She testified that Jeremy's house is rented, and her name is on the lease.

The mother testified that there was domestic violence between Jeremy and her in August 2016 and that she called the police on Jeremy in January 2016 because he got loud with her. She testified that Jeremy was mad because she was talking to another man. She testified that Jeremy took her money and that Lauren Pankewyitch is her Wayne County representative payee.

The mother testified that she has never been provided with parenting classes. She testified that she signed up for them in Wayne County, but DSS said that did not count because the children were not present.

The mother testified that she takes two breaks during the visits to smoke a cigarette and that she still smokes. She testified that she has taken medications for anxiety and bipolar disorder but has been taken off them.

The mother testified that she has started counseling with a new counselor at Wayne County Behavioral Health, that the counselor at the church couldn't do it any more.

The mother testified that she has two dogs, a black lab and a yellow lab, and ferrets. She testified that no one has raised concerns about the dogs.

The mother testified that in August 2016, when she and Jeremy were fighting, she asked the father if she could move back in with him.

On re-direct examination by the father's attorney the mother testified that she lived with her boyfriend Nathan for less than three months before moving in with Jeremy.; she doesn't recall Nathan's last name. She testified that she has known Nathan as long as she has known the father.

The mother testified that she went to live with her mother after separating from the father. After a couple of weeks, her mother's landlord objected to her being there. The mother testified that she then lived in a motel for about two weeks and went back to her mother's for about two

weeks.

The mother testified that two girls-Amanda and Vanessa-were engage in prostitution and were hanging out at Nathan's place. They would go to bars. The mother testified that she moved out when the prostitutes got in an argument and she found out they were on heroin. She testified that she went from Nathan's house to Jeremy's and that she had been talking to Jeremy about four or five months at that point.

The mother testified that in August 2016 she wanted to see if the father and she could work things out "for the children."

The mother testified that she and Jeremy smoke cigarettes outside the house.

Respondent's exhibit E, proof of parenting course completion, was offered by the mother's attorney and was received into evidence. On re-cross examination by her attorney, the mother testified that someone named Shelby introduced her to Jeremy. She also testified that DSS offered her bus tokens, but there is no bus from Wayne County to Ontario County. She testified that she had no place to live in Ontario County and that if she didn't live with Jeremy, she doesn't know where she would live.

At this point petitioner rested.

**Testimony by Jeremy - February 14, 2017.**

On direct examination by the mother's attorney, Jeremy testified that he is 36 years old and has lived in Palmyra in Wayne County for seven years. He testified that he is not working, that he has a hernia surgery coming up. He testified that he has had housing covered by section 8 since his wife abandoned him and the children. He testified that he lives in a three-bedroom house in a good, quiet neighborhood one street away from downtown. He testified that Holly moved in with him in October 2016 and that they are boyfriend and girlfriend but have no plans

to become engaged or married. Jeremy testified that he has been self-employed as a subcontractor in Florida.

Jeremy testified that Eric intimidates him and that once after a CPS meeting that Jeremy attended in 2016 Eric pointed his truck at Jeremy and Holly and revved up the motor. Jeremy testified that Eric has said three times that he was going to “smash his [Jeremy’s] fucking head into the table.” He testified that Eric has sent him text message with sexual innuendos, talking about doing sexual acts and giving Jeremy nude photos of Holly, and calling Holly “stupid, cunt, and retard.” Jeremy testified that he sent Eric’s text messages to Jessica C.

Jeremy testified that he and Holly took a domestic violence class after an incident between them and that they received certificates of completion.

Jeremy testified that he reads some of the DSS documents to Holly; he reads her the permanency planning reports.

Jeremy testified that he had a prescription for suboxone in New York after being on pain medications in Florida.

Jeremy testified that Eric told him to leave Holly, threatening that if he didn’t leave Holly and get out of the way, he would “be on my balls.”

Jeremy testified that he was at a supervised visit with Holly and saw a bruise on Christiauna’s hand. He doesn’t recall the date.

Jeremy testified that he has had no previous use of illegal drugs, and that Holly has apologized to him for her false accusations.

Jeremy testified that he tries to guide Holly to help her get her children back, that she tells him what to write.

Jeremy testified that he has lived with his two children all of their lives. He has lived alone with them for five years. He testified that he had a domestic violence incident with their mother and has had an order of protection against him in favor of his children's mother. He testified that he had an indicated CPS report against him four years ago, but it was unfounded against him and founded against his wife.

Jeremy testified that he would allow Holly's children to live with him, that his children met her children once and they have waved at each other. He testified that Holly gets along with his children and that she does most of the cooking and helps with the children at home. He testified that he sees no risk of harm to his children from Holly; she is there quite a bit with his children.

Respondent's exhibit F, a certificate for a course about domestic violence called Parents and Children Together, was received into evidence.

At this point in the proceedings, the mother's attorney mentioned a report on the mother by Dr. Santo Bentivegna prepared as a part of the neglect proceedings. The attorneys agreed to look at the report and let the judge know whether there is any objection to it being used as evidence in these proceedings.

Respondent's exhibit G, a certificate of completion by Holly of a course in Wayne County called "Parents Interested in Nurturing Effectively" was received into evidence.

Jeremy testified that he can communicate with Holly. He testified that Holly and Eric argue in their text messages and Eric texts bad things about her. Jeremy testified that he has photographed all of the text messages between Eric and Holly. He testified that there have been text messages between Eric and Holly in 2017, and that Eric has not responded to Holly's requests in those texts.

Respondent's exhibit H is a list of phone calls that were missed.

Jeremy testified that Eric told him on Facebook how to beat a urine test for suboxone.

On cross-examination by Eric's attorney, Jeremy testified that on Facebook he was impersonating a woman asking Eric questions. He testified that he thinks Holly should get visits and that he has never done heroin.

Jeremy testified that Holly lied in August 2016 by saying he was selling suboxone.

Jeremy testified that he thinks they were arguing about her having contacted Eric on multiple occasions and that there was something physical that happened with the door. He testified that he called the police to protect himself, knowing that if Holly called them, he probably would have been taken from his home. He testified that he has forgiven her for lying to the authorities about the suboxone.

Jeremy testified that the section 8 housing was transferred to his name, and it is okay for Holly to live there. He testified that they use her money to help pay the rent. He testified that he met Holly through a friend and that they dated for about five months before she moved in. He testified that at the time she moved in, she had been living with a guy he did not know, but he knew the girls she was living with.

Jeremy testified that he has a driver's license but no car. He testified that Eric pointed his car at Jeremy outside the county building. He testified that he is going to have hernia surgery. He testified that there are no orders of protection against him.

On cross-examination by the AFC, Jeremy testified that there is no lease for his home but that Holly is noted on the paperwork as a roommate.

He testified that he took suboxone to help with Vicodin for kidney stones. He testified that Holly has never smoked marijuana in his presence and that he does not smoke it.

Jeremy testified that in the incident in August 2016 the door swung out and Holly swung out and hit him in the shoulder.

Jeremy testified that Holly moved in with him in October 2015 after they had been hanging out together for four or five months; he knew she had a boyfriend during that time.

Jeremy testified that in January 2016 when Holly called the police they were arguing when he found out she was talking to a guy named Kyle. Jeremy testified that he spoke with a police officer and defended himself, and Holly lied to the officer. He testified that Holly does not lie now as much as she used to and that his children have not been at home when he and Holly have argued.

Jeremy testified that he has only seen a bruise on Holly's children in a photograph, not in person. He testified that he has no obligation to support Holly financially, but he would not just kick her out.

On re-direct examination by the mother's attorney Jeremy testified that he would like to have Holly's children live with them. He acknowledged that it is a lot to take on two more children, but if it's God's will, so be it. He testified that he loves Holly and has never made her leave the home.

On re-cross examination by the father's attorney Jeremy testified that he and Holly started living together in 2015 and that the police were called in January and August of 2016. He testified that he was aware that Holly contacted Eric in August 2016 and asked to live with him.

**Testimony by Lauren P - February 14, 2017.**

On direct examination by the mother's attorney Lauren testified that she has worked for Wayne County DSS for eight years and has been a secondary preventive caseworker for three years. She provides support for day-to-day living for Holly, including referrals to mental health

counseling. This has included Holly's work on substance abuse, taking a domestic violence education program twice, and completing a course called "Parents Interested in Nurturing Effectively" (PINE), which involves 18 course hours. Lauren has served as the representative payee for Holly's social security payments since December 2015. Lauren's agency provided transportation for one visit to see Holly interact with her children. Lauren testified that Holly has to find her own transportation but she gives Holly \$20 per round trip for a taxi ride.

Lauren testified that she visits Jeremy's home at least twice a month and visits Holly in the community. She testified that the home is spotless, very well kept, always smells nice. She testified that the home is safe for small children and that there is a large bedroom for all the girls. She testified that on her first visit, a dog growled, but she has had no concerns about pets since then. She testified that she has evaluated the decor as being "at the top."

Lauren testified that she likes Jeremy and finds him to be a very responsible father. She testified that she has seen Jeremy and Holly play, interact, and discipline kids appropriately.

Lauren testified that she is aware that Holly is asking for unsupervised visits but that she has not witnessed Holly interacting with young children; only with older ones. Lauren testified that Holly would need some help, such as a strong support system for the level of supervision needed for her children.

Respondent's exhibit I, a certificate of completion of a course on domestic violence, was received into evidence.

On cross-examination by the father's attorney, Lauren testified that she has worked with Holly since December 2015. She testified that she had discussions with Holly and Jeremy when the police were called in August 2016 and that Holly did not show her any injuries. She testified

that Holly did not tell her that Holly had lied to the police. Lauren's understanding of the incident was that part of it was allegations that Holly sold suboxone. Lauren testified that Holly told her that she started the argument.

Lauren testified that Holly's limitations are her cognitive limits, her propensity to lie, and her parenting abilities. She testified that the only interaction she has seen between Holly and Holly's children was one occasion when the children got out of a van.

Lauren testified that Holly has lied to her when Holly had to use transportation money for other purposes that were not emergencies. Lauren had Holly and Jeremy together complete a domestic violence program after the August 2016 incident. She testified that Holly had a "barely" marijuana abuse diagnosis.

Lauren testified that the B children are 7, 8, or 9 years old and that if Holly were dealing with her younger daughters alone, she would need assistance.

On cross-examination by the AFC, Lauren testified that she has seen Holly alone with Jeremy's children in the same room with Jeremy.

Lauren testified that she is secondary on the preventive case and that Jessica Cosentino, the primary preventive caseworker, recommended continued supervision.

Lauren testified that Holly gets one visit per week, which costs \$20. Lauren testified that she is aware that Ontario County offers to help, but Wayne County doesn't no near the county line. She testified that she knows that various caseworkers have offered to help with transportation.

Lauren testified, when asked about other lies Holly has told, that Holly has misstated what Eric says to her. She testified that Holly also lied to her about a false Facebook account. She testified that Holly told her that Jeremy sold suboxone but then told her that she lied.

On re-cross examination by the father's attorney Lauren testified that Jeremy and Holly showed her Facebook pictures of Eric drinking in a bar and that she found out later that they had fabricated the pictures.

At this point respondent rested.

At the next court date, March 24, 2017, the parties and counsel engaged in a pre-trial conference before resuming testimony but could not reach agreement. The AFC offered the subpoenaed DSS records into evidence as AFC's exhibit 1. They were received into evidence with no objection.

**Testimony of Dawn Waite-Dinehart - March 24, 2017.**

The AFC called Ms. Waite-Dinehart as her first witness. Ms. Waite-Dinehart has worked for 13 years at Child and Family Resources (CFR) in Geneva. She is the Parenting Skills Program Supervisor, and she supervises visitations. Ms. Waite-Dinehart testified that she and her co-workers try to teach household skills such as cooking, safety, child development, and discipline techniques. She testified that she has an AAS degree in child development and a family development credential.

Ms. Waite-Dinehart testified that she first met the mother about two years ago, when Ontario County referred her to CFR for parenting skills and supervised visitation. CFR provided to the mother appointments to go into her home for about an hour per week. Ms. Waite-Dinehart testified that these services have been provided to the mother for about a year, but because there was inconsistency with appointments, some of the services usually provided in the home were combined with the supervised visits.

Ms. Waite-Dinehart testified that the supervised visits for the mother started in 2014 and are still ongoing. She testified that two supervisors attend the visits to avoid questions about what

was said during them. If only one supervisor were present, the mother would sometimes say that something was said during a visit. It would then get back to DSS and then back to the staff at CFR.

Ms. Waite-Dinehart testified that she supervised a visit for the mother on March 21, 2017, and that the mother always provides snacks and meals. She testified that sometimes the children play on the floor or with the mother's phone. Ms. Waite-Dinehart and the other supervisor try to work with the mother on safety and supervision of the children. The mother is supposed to be on her own with the children. On March 21, the younger child ran down the hall while the mother was preparing something in the microwave.

Ms. Waite-Dinehart's concerns about the mother are (1) the mother has questions or concerns during visitation that should not be dealt with at those times; (2) the mother should not be "parenting from the chair" like she does. The mother tends to sit in a chair and ask her daughter to pick something up rather than doing it herself; (3) the mother has difficulty supervising both children, creating a safety concern. The youngest child gets active, and the mother cannot supervise two of them at a time; and (4) the mother sometimes gets defensive when CFR supervisors are teaching her about discipline techniques. The mother's use of discipline varies. Sometimes she puts the children in "time out" when it is inappropriate to do so.

Ms. Waite-Dinehart testified that the mother is not permitted to talk about this court case during the visits. She testified that the CFR supervisors try to stop the mother from talking to the children about "going home" and from making negative comments about the staff, family members, the DSS, or the children's father. She testified that the CFR supervisors do not allow the mother to leave the visits before they are over. They also do not permit the mother to use her cell phone during visits, after experiencing her using it for multiple phone conversations during

visits, some short and some long. She testified that the mother is expected to take to the visits snacks, food, activities, and clothing.

Ms. Waite-Dinehart testified that the mother has learned some parenting skills at CFR but still needs improvement. She testified that the recommendations made by the CFR supervisors should be helpful to the mother, but the mother does not always follow them. She also testified that they have safety issues within the visitation environment, but she does not know how the mother would be in a different environment.

On cross-examination by the father's attorney Ms. Waite-Dinehart testified that she is the Parenting Skills Program Supervisor and that she and the other supervisors teach parents to have a safe environment for their children. She reiterated that her concerns about the mother are about the mother's ability to balance both children at the same time. She testified that the youngest child is very active and that sometimes the mother is distracted and unaware of where both children are. She testified that sometimes the mother's focus is on one of the children, not both. She testified that there are no dangerous areas in the supervision room except that children could fall from the furniture. She testified to fearing that the children could be harmed outside of the environment of the visitation room.

Ms. Waite-Dinehart testified that the records from CFR show that the mother had a conversation with a CFR staff member about a sexual incident in the presence of the children. She testified that the supervisors used to give the mother breaks to smoke a cigarette, but they ended those because they felt the mother should be spending her time with the children. She testified that there were occasions when the mother would leave during the visits to get things and that CFR had the mother sign a new supervision agreement recently to address these concerns. Ms. Waite-Dinehart testified that another concern has been that the mother would call

or text staff members regarding visitations during their off hours. They didn't want the mother to text staff members, for example, at 3:00 a.m. to cancel a visitation.

Ms. Waite-Dinehart testified that the mother has missed a lot of appointments. She testified that the mother has always contacted CFR if a supervised visit is planned, but sometimes when Ms. Waite-Dinehart would visit the mother's home, the mother would not be there. Ms. Waite-Dinehart testified that on those occasions she would leave a business card, and the mother would call her later. She testified that these missed appointments are the reason that for the past 18 months they have had to combine the parenting sessions with the supervised visits.

Ms. Waite-Dinehart testified that one time a staff member named Amanda was role modeling with the mother, and the mother became visibly frustrated. The mother yelled at Amanda. Ms. Waite-Dinehart does not recall hearing the mother curse. Ms. Waite-Dinehart testified that a while back, the mother got frustrated with the supervisors due to the children being out of her care. The mother was also frustrated by the fact that Ms. Waite-Dinehart had a list of dates the mother had missed for parenting instruction.

Ms. Waite-Dinehart testified that the reason there have been two supervisors at the mother's visits for the past six months is that the mother accused the CFR staff of lying. The mother claimed things were said during the visits that weren't being said.

Ms. Waite-Dinehart testified that she was present for the March 21, 2017, visit. She testified that the visit was fine overall, but that Lilly ran out down the hallway while the mother was cooking. Ms. Waite-Dinehart testified that she is concerned about what would happen to Lilly and where she would go if Ms. Waite-Dinehart weren't there to stop her. She testified that the mother has difficulty multi-tasking. She testified that she and other staff members have had to get involved to prevent harm to the children.

On cross-examination by the mother's attorney, Ms. Waite-Dinehart said each child has separate needs. Lilly, age two, seeks attention from the staff and climbs on the furniture to get attention. Christiauna, age five, can play independently. Ms. Waite-Dinehart testified that she has been to the mother's home about a dozen times, that she has visited all of the mother's residences. She testified that the current residence is clean and is set up appropriately for children. She testified that the supervised visits take place in a room at 514 South Main Street in Canandaigua. She testified that the children interact with their mother and seem to enjoy their time there.

Ms. Waite-Dinehart testified that she only acts as a supervisor once every few months. She testified that the mother has supplied Kool-Aid, fruit, macaroni and cheese, Slim Jims, cheese sticks, brownies, paints, and other snacks for the visits. Ms. Waite-Dinehart testified that she does not tell the mother what to bring. She testified that the children eat constantly during some of the visits. She testified that the macaroni and cheese is cooked in the microwave and that the mother cannot watch over both children 100 per cent while cooking. She reiterated that Lilly ran down the hallway leading to the offices on March 21, 2017. She testified that the mother used to take multiple breaks to smoke a cigarette but then she and her co-worker Amanda Everett asked the mother to stop. She testified that the mother no longer takes breaks to smoke. She testified that the mother called Amanda's cell phone, but she does not know whether or not the call woke Amanda.

Ms. Waite-Dinehart testified that she thinks it is good for children to see their parents and to form relationships with them. She testified that visitation for the mother has decreased in the past six months from Tuesdays and Fridays to just Tuesdays; CFR was told by the county to reduce the visits.

Ms. Waite-Dinehart testified that the mother was not able to control both children at the same time because of the different needs of each child. She testified that the goal of CFR is to help the mother gain skills to be able to parent both children at one time. She testified that the mother has a hard time reading cues from the children and knowing when to step in. She testified that the mother has stopped, for the most part, taking phone calls during her visits after being told to do so. She testified that the children have fallen during visitation but have not sustained injuries except that on one occasion Lilly needed an ice pack applied to her head.

Ms. Waite-Dinehart testified that the mother changes Lilly's diapers unassisted. The mother has also brushed the children's teeth and has helped dress them. She testified that the children range from being sad to happy at the end of the visits. She testified that the next visit will be supervised by Amanda or by a staff member named Eileen.

Ms. Waite-Dinehart testified that she is aware that the mother has no car and no driver's license, and she knows there have been more than six times when transportation prevented the mother's visitation.

On re-direct examination by the AFC, Ms. Waite-Dinehart testified that she has never had an incident where the mother has had to be reminded to change a diaper, but there was an instance of this in the records. She testified that the mother wanted a man named Tom O to be a part of the visit once, but the staff would not allow it. She testified that Mr. O was providing transportation that day. The mother has also asked to have her current boyfriend visit, but this has not been approved by DSS.

On re-cross examination by the father's attorney, Ms. Waite-Dinehart testified that she is familiar with Tom O because she had a case with a family member of his. She testified that it was a CPS case concerning Mr. O's child and that she did not feel Mr. O was an

appropriate person to be at the mother's visit.

Ms. Waite-Dinehart testified that both of the children, but mainly Lilly, tend to go to the supervisors for attention. This was an issue because the focus was on the parent being with the children, so the CFR staff would re-direct the children to their mother.

Ms. Waite-Dinehart testified that she visited two of the mother's residences, including her current one. She testified that the mother's current residence is clean and is set up for children and that there are children living there. She testified that the concern is that the mother cannot read cues well. She testified that the CFR staff are also concerned about having appropriate, stable people at the mother's home.

Ms. Waite-Dinehart testified that in working with the mother for over two years, she has formed the opinion that the children are safe in the environment at CFR but that she does not know whether they would be safe in other environments. She testified that it is her opinion that the mother could benefit from ongoing supervised visitation.

On re-cross examination by the mother's attorney, Ms. Waite-Dinehart testified that she has met Jeremy B and that he was not approved to visit but GPS allowed it once.

She testified that she earned her AAS degree in early childhood development and her family development credentials through Cornell. She testified that her opinion about the mother's visitation is based on her interactions with the mother and her children.

On re-cross examination by the father's attorney Ms. Waite-Dinehart testified that she has concerns about the children being with the mother outside a supervised setting.

At this point in the hearing, the AFC stated that she has one more witness, CPS Caseworker Jessica Cosentino, who was not available to testify on this date. However, the court observed that her testimony would be redundant in light of the information contained in the DSS

records that comprise AFC's exhibit 1. Everyone expressed concern about the delay that scheduling more testimony would cause, particularly because DSS supervision of visitation will expire on April 4, 2017.

The proceeding ended with the attorneys presenting closing arguments orally.

Attorney Einset described his client as a loving mother and the parent who did the care taking when the children were living with both parents, prior to the neglect allegations. He argued that there is no evidence supporting the need for supervised visits and that supervised visits are not good for the children. He argued that the mother has never disturbed anyone and is committed to reestablishing connections with her children. She is seeking joint custody and shared placement with the father and parenting time on weekends. Attorney Einset described the mother and her boyfriend Jeremy as each pitching in 50-50 around the household. He mentioned that the mother helps care for Jeremy's children, ages seven and eight, and there is no evidence that those children are mistreated. He argued that the children like their mother and that she knows how to care for them. He acknowledged that the mother and father cannot co-parent but believes they can communicate to some extent. He stated that phone contact between the mother and the children, which had been happening at 8:00 p.m. on Mondays and Wednesdays prior to the father's recent family offense petition against the mother, will no longer be requested if she is awarded parenting time on the weekends.

Attorney Housel argued that the children were put in foster care following a long litany of issues occurring between the two parents. He stated that while the children were in foster care, the father did everything asked of him by DSS. He stated that the father seeks sole custody and is the appropriate parent to make decisions, that the mother is not in a position to co-parent. He characterized the proof as showing that there are concerns for the children's safety with the

mother outside the walls of Child and Family Resources. He described the mother as a liar, referring to the fake Facebook account set up as an attempt to get the father in trouble. The father believes it is in the children's best interests to continue supervision of the mother's visits. If the visits were to take place at the mother's home, Mr. B would be the supervisor. The father therefore seeks agency-supervised visits for the mother.

Attorney Jones, the AFC, stated that the children are loved dearly by both parents, and both parents are loved by the children. However, the mother has not progressed sufficiently during her supervised visits; both children would be at risk if visits were unsupervised. Attorney Jones referred to allegations of domestic violence at the mother's home and to recanting of allegations. She stated that the mother told the caseworker that she and Mr. B were breaking up in October 2016. She stated that the mother has no history of stability and that it is in the children's best interests for the father to have sole custody and decision making authority. She stated that the father has worked on his issues and has made progress, and she believes the children are safe in his care.

## ANALYSIS

### **Violation Petition.**

The mother alleged in November 2016 that the father denied her phone contact with the children by shutting off his phone. Respondent's exhibit H, a list of missed phone calls, was offered as evidence of her allegation. However, it is this trier of fact's determination after considering all of the credible evidence that the mother failed to prove that the father willfully violated the court order. Accordingly, the violation petition is dismissed.

### **Family Offense Petition.**

The father alleged in March 2017 that the mother was harassing him by falsely accusing him of driving by her home and yelling at the children in her yard. The credible evidence showed that the father was at work in Geneva during the time he was supposedly driving by the mother's home in Palmyra. Nevertheless, it is this trier of fact's determination that after considering the credible evidence, the father failed to prove a family offense. Therefore, this petition is dismissed.

### **Custody and Visitation Modification Petitions: Change in Circumstances / Initial Custody Determination**

With respect to Christiauna, the court is required to determine whether there was a change in circumstances warranting a change of the custody arrangement as being necessary to ensure her best interests. In other words, there was a previous court order granting the parties joint custody of Christiauna (entered March 31, 2015). Lilyauna was not the subject of that custody proceeding, and the parties were presumably either living together at the time or not living together but were agreed as to when and where Christiauna would be living. With respect to Lilyauna, this appears to be an initial custody determination because there is no prior final order dealing with her custody or visitation.

#### *1. Christiauna.*

It is a well-settled principle that a party seeking a change in an established custody arrangement has the burden of showing a change in circumstances sufficient for an inquiry into whether the best interests of the child warrant a change in custody. See, e.g., *Matter of Cole v. Nofri*, 107 AD3d 1510 (4th Dept 2013); *Matter of Stacey L.B. v. Kimberly R.L.*, 12 AD3d 1124 (4th Dept 2004).

Here, a change in circumstances has clearly been shown. The neglect petition resulted in Christiauna being placed in foster care. The Ontario County Department of Social Services (DSS) subsequently set up a dispositional plan. The custody of both Christiauna and Lilyauna was temporarily placed with the father since on or about October 4, 2016, based upon the father's compliance with the dispositional plan. The mother has had ongoing supervised visitation through the DSS, but DSS supervision will cease on April 4, 2017.

Once a change in circumstances has been shown, several factors must be considered in determining the best interests of the child. Among these are the parents' ability to provide a stable home environment for the child; the child's wishes; and the parents' past performance, relative fitness, ability to guide and provide for the child's overall well being, and willingness to foster a relationship between the child and each other. *Matter of Chilbert v. Soler*, 77 AD3d 1405 (4th Dept 2010), *lv denied* 16 NY3d 701 (2011). A change in custody should be made only if the totality of the circumstances warrants a change that is in the child's best interests (*Matter of Stacey L.B. v. Kimberly R.L.*, 12 AD3d 1124 [4th Dept 2004]).

*A. The Parents' Ability to Provide a Stable Home Environment.* The father's home environment seems more stable than the mother's home environment. The father has maintained his home environment for a longer period of time. The mother's home environment has been more transitional, including her relationships with boyfriends. However, the mother appears to be in a more stable relationship at this time.

*B. The Child's Wishes.* The AFC requested that Christiauna be allowed to remain in her father's custody. The AFC also urged that the mother have supervised visitation. There was no request for a *Lincoln* hearing.

*C. The Parents' Past Performance.* Family Court litigation involving this family dates back to 2013. In her brief life to date, the child has spent time in the custody of the two parents simultaneously, her maternal grandfather, her mother, and the DSS, which placed her in a foster home. She has been in the temporary custody of her father since October 4, 2016, with her mother having supervised visitation until supervision by the DSS expired on April 4, 2017.

Previous litigation addressed the mother's and father's issues with domestic violence, unemployment, and lack of housing; the mother's mental and emotional disabilities; and the father's status as a Level Two Sex Offender. A CPS report was indicated against both parents in 2013 for inadequate guardianship and food/clothing/shelter of Christiauna.

In January 2014 a consent order issued by this court gave Mark Young, Sr. (grandfather), and the parents joint legal custody of the child Christiauna. The order also changed the residential placement of the child from the maternal grandfather to the parents, over the objection of the Attorney for the Child and contingent upon the parents applying for and accepting preventive services from the Wayne County DSS. The grandfather was given visitation with Christiauna one weekend per month, and the parties were prohibited from consuming or being under the influence of alcohol or any illegal drugs or illegal substances during periods of access to or residency with the child.

The grandfather's joint custody of Christiauna ended with an order of this court entered March 31, 2015, granting joint custody and physical placement of her solely to the parents. The Attorney for the Children withdrew a violation petition, and the grandfather withdrew a visitation petition as a part of this order.

The father has done a good job caring for Christiauna since October 2016. On the other hand, there have been complaints that the mother has been mentally challenged and unable to

appropriately care for Christiauna even in a supervised setting.

*D. The Parents' Relative Fitness.* The father has a decided advantage in this category. He has fully complied with the dispositional plan ordered in the neglect proceeding. He maintains stable employment, has suitable living arrangements for his family, and has proven he can be a stable influence on the child.

On the other hand, the mother has not complied with the recommendations of the dispositional plan. She has some parenting issues and/or mental health challenges that prevent her from being able to appropriately care for Christiauna when she is with both of her children. The staff members at Child and Family Resources who supervise the mother's visits identified the following concerns about the mother, according to the records subpoenaed from the Ontario County DSS:

- Supervisors have to prompt Holly several times to focus on the children.
- Holly tends to use food to placate the children instead of redirecting the children through play or interaction. She ends up overfeeding them.
- Holly allows the children to eat food that has fallen on the floor and even places boxes of food for them on the floor instead of on the table.
- Holly focuses on her cell phone instead of interacting with the girls
- Holly asks the supervisors or caseworkers what to do when one of her children is upset.
- A supervisor needed to tell Holly to stop Lily when Lily was taking things out of the diaper bag, where there are medicines.
- Supervisors need to play with the children because Holly is paying attention only to heating their lunch in the microwave. Holly is consistently unable to attend to the girls

while preparing lunch.

- A supervisor had to tell Holly to change Lily's soiled diaper after 20 minutes of the visit.
- Holly continued to focus on a glue and glitter craft after the girls had lost interest, while Lily climbed on a shelf, stood in a chair, and went through the diaper bag. The supervisor had to ensure that the children were safe while Holly was playing with glue and glitter.
- When the children go to the bathroom, Holly is only able to take care of one of them. The supervisors need to take care of the other one.
- Holly is socially and emotionally a young child (remark from August 2015).
- Holly parents from her chair instead of getting up and tending to the girls.
- Holly remains focused on the children's father and their past relationship. She has not met criteria in areas of understanding basic child development concepts, creating/ maintaining attachment with the children, and child safety (remarks from September 2016).
- On 1/31/17 Holly kept re-playing a video about an alligator when it was clear to the supervisor that Lily found it frightening. The supervisor asked Holly to choose a different video, but she sang the song from the video and continued to play it.
- On 1/31/17 Lily threw a package of noodles across the room. Christiauna chased after her and pushed her into the door. Holly's response to Lily's crying was, "Well, you threw the noodles."
- On 1/31/17 Holly tried to help the maternal grandfather have contact with the children as they were leaving the visit even though she had been told that day that no one was permitted to be at the visits.

The subpoenaed DSS records also included concerns by the visitation supervisors about the father due to his behavior on January 17, 2017. The records indicate that the father arrived almost two hours late for the visit. When he and the children arrived, the children had little emotion, and the music he was playing in the vehicle was so loud it could be heard outside. Neither of the children was buckled into her car seat. At the end of the visit, the supervisor noticed she could not buckle Christiauna in because the seatbelt was too tight to fit. Christiauna said, "Daddy doesn't make us buckle." Eric responded, "Sometimes." The supervisor loosened the straps and buckled Christiauna into the car seat properly. The supervisor noted that she informed the DSS caseworker of the incident.

The DSS records (AFC exhibit 1) also show the following:

- 4/12/16: Holly has a borderline low IQ, struggling with insight, having had a childhood riddled with trauma; caseworker is working on boundaries/consequences.
- 6/7/16: Caseworker notes: Jeremy seems appropriate as a supervisor; Holly is fixated on getting Eric in trouble; Holly is frustrated that Eric has unsupervised visits.
- 6/16/16: Holly had boundary issues when speaking with foster care provider.
- 6/16/16: Jeremy "flipped out," ranting about Eric.
- 6/24/16: Holly has been diagnosed with bipolar disorder and depression and takes Gabapentin. Holly mentions she was mental health arrested at pharmacy when prescription could not be filled.
- 6/28/16: Holly said she was moving out of Jeremy's residence and going back to Ontario County, accusing Jeremy of selling suboxone and being a drug addict.
- 6/29/16: Holly moved bak to her mother's place in Phelps.
- 7/11/16: Holly moved back with Jeremy despite drug-related concerns.
- 7/15/16: Caseworker notes: Holly has been very manipulative, made minimal progress;

caseworker considering reducing her visitation to one hour per week.

- 8/4/16: Holly not making mental health appointments in months.
- 8/11/16: Jeremy admitted his relationship with Holly is not promising and Holly was trying to get back with Eric.

The exhibit is also replete with issues, including financial difficulties, transportation difficulties, and instances of drama in which the mother is seeking to sabotage the father's relationship with the children.

*E. The Parents' Ability to Guide and Provide for the Children's Well Being.* The father has demonstrated that he can guide and provide for Christiauna's well being. Since October 2016, both children have been primarily in his care. He takes care of practically all of the children's needs: caregiving, medical/dental appointments, feeding, clothing, hygiene, schooling, etc.

In the eyes of the DSS, the mother has failed to show an ability to guide Christiauna and provide for her well being. The supervised visitation monitor testified that there is a concern about the mother's ability to care for both of the children at once. The mother insisted that she is perfectly able to care for the children together in an unsupervised setting. She points to the fact that she currently lives in a household where there are young children, and she has no problem caring for them.

*F. The Parents' Willingness to Foster a Relationship Between the Children and Each Other.* The mother claims that the father denies visitation and denies phone contact with the children. The father contends that he does what he can and is frustrated because of his inability to tolerate the mother's irrational behaviors.

Both parties lost control of the children when the children were placed in foster care. Their ability to see the children has been governed by each parent's compliance with the terms

and conditions of the dispositional plan. The DSS has recommended that the father have custody since October 2016. The DSS has continuously recommended that the mother have supervision.

The credible evidence showed that despite their allegations to the contrary, neither parent has demonstrated an unwillingness to foster a relationship between the children and the other parent. The credible evidence showed that the mother's perceptions of the father's interference may be heightened because of her mental challenges. The credible evidence also showed that the father's complaints about the mother may be exacerbated by the father's frustrations with the mother's behaviors.

## 2. *Lilyauna*.

In making an initial custody determination, the overriding priority is the best interests of the child and what will best provide the child's welfare and happiness. *Eschbach v. Eschbach*, 56 NY2d 167 (1982); *Friederwitzer v. Friederwitzer*, 55 NY2d 89 (1982) ; *Matter of Anson v. Anson*, 20 AD3d 603 (3d Dept 2005). The best-interests analysis for Lilyauna is going to involve the same factors as those used with regard to Christiauna, as set forth in *Matter of Chilbert v. Soler*, 77 AD3d 1405 (4th Dept 2010), *lv denied* 16 NY3d 701 (2011), cited earlier. All other relevant factors must also be considered, including the effect an award of custody would have on the child's relationship with the noncustodial parent (*Matter of Lynch v. Gillogly*, 82 AD3d 1529, 1530 [3d Dept 2011]).

*A. The Parents' Ability to Provide a Stable Home Environment.* The father's home environment seems more stable than the mother's home environment. The father has maintained his home environment for a longer period of time. The mother's home environment has been more transitional, including her relationships with boyfriends. However, the mother appears to be in a more stable relationship at this time.

*B. The Child's Wishes.* The AFC requested that Lilyauna be allowed to remain in her father's custody. The AFC also urged that the mother have supervised visitation. There was no request for a *Lincoln* hearing.

*C. The Parents' Past Performance.* Family Court litigation involving this family dates back to 2013. In her brief life to date, Lilyauna has spent time in the custody of the two parents simultaneously, her mother, and the DSS, which placed her in a foster home. She has been in the temporary custody of her father since October 4, 2016, with her mother having supervised visitation until supervision by the DSS expired on April 4, 2017.

Previous litigation addressed the mother's and father's issues with domestic violence, unemployment, and lack of housing; the mother's mental and emotional disabilities; and the father's status as a Level Two Sex Offender. A CPS report was indicated against both parents in 2013 for inadequate guardianship and food/clothing/shelter of Lilyauna's sister Christiauna.

An order of this court was entered March 31, 2015, when Lilyauna was about eight months old. The order gave joint custody and placement of Lilyauna's sister Christiauna to the parents, ending a period when the maternal grandfather had placement of her. The order did not mention Lilyauna, as no one was disputing custody over her.

The father has done a good job caring for Lilyauna since October 2016. On the other hand, there have been complaints that the mother has been mentally challenged and unable to appropriately care for Lilyauna even in a supervised setting.

*D. The Parents' Relative Fitness.* The father has a decided advantage in this category. He has fully complied with the dispositional plan ordered in the neglect proceeding. He maintains stable employment, has suitable living arrangements for his family, and has proven he can be a stable influence on the child.

On the other hand, the mother has not complied with the recommendations of the dispositional plan. She has some parenting issues and/or mental health challenges that prevent her from being able to appropriately care for Lilyauna when she is with both of her children. The staff members at Child and Family Resources who supervise the mother's visits and the DSS caseworkers identified concerns about the mother that are listed in bullet form on pages 38-41 above. The same concerns apply to both of the children.

The visitation supervisors also had concerns about the father's behavior when he took the children for their visit on January 17, 2017, detailed on page 40 above.

*E. The Parents' Ability to Guide and Provide for the Children's Well Being.* The father has demonstrated that he can guide and provide for Lilyauna's well being. Since October 2016, both children have been primarily in his care. He takes care of practically all of the children's needs: caregiving, medical/dental appointments, feeding, clothing, hygiene, schooling, etc.

In the eyes of the DSS, the mother has failed to show an ability to guide Lilyauna and provide for her well being. The supervised-visitation monitor testified that there is a concern about the mother's ability to care for both of the children at once. The mother insisted that she is perfectly able to care for the children together in an unsupervised setting. She points to the fact that she currently lives in a household where there are young children, and she has no problem caring for them.

*F. The Parents' Willingness to Foster a Relationship Between the Children and Each Other.* The mother claims that the father denies visitation and denies phone contact with the children. The father contends that he does what he can and is frustrated because of his inability to tolerate the mother's irrational behaviors.

Both parties lost control of the children when the children were placed in foster care. Their ability to see the children has been governed by each parent's compliance with the terms

and conditions of the dispositional plan. The DSS has recommended that the father have custody since October 2016. The DSS has continuously recommended that the mother have supervision.

The credible evidence showed that despite their allegations to the contrary, neither parent has demonstrated an unwillingness to foster a relationship between the children and the other parent. The credible evidence showed that the mother's perceptions of the father's interference may be heightened because of her mental challenges. The credible evidence also showed that the father's complaints about the mother may be exacerbated by the father's frustrations with the mother's behaviors.

*G. Effect of an Award of Custody to One Parent on the Child's Relationship with the Noncustodial Parent.* Awarding custody of Lilyauna to the father will clearly limit the child's time with her mother and the extent to which a meaningful relationship can be developed between them, especially where, as here, the mother lacks transportation and lives in a different county than the father. Lilyauna's young age is also a factor that limits the feasibility of a lot of time spent with her mother. As she gets older and requires less supervision, it is likely her relationship with her mother will expand time wise and will deepen appropriately.

## CONCLUSION

The best interests of the children would be promoted by granting sole custody to the father.

The issue is whether the mother should have supervised visitation or unsupervised visitation. New York law recognizes that visitation with a noncustodial parent is generally presumed to be in children's best interests (*Matter of Fox v. Fox*, 93 AD3d 1224 [4th Dept 2012]). Denial of visitation is considered a drastic remedy to be employed only where there are compelling reasons for doing so and where there is substantial evidence that visitation will be

harmful to children's welfare (*Matter of Chapman v. Tucker*, 74 AD3d 1905, 1906 [4th Dept 2010]). When making a determination with respect to visitation, the most important factor is the best interests of the children (*Fox*, 93 AD3d 1224; *Chapman, id.*) A parent seeking to modify an existing visitation order must show a change in circumstances that reflects a genuine need for the modification so as to ensure the children's best interests. *Matter of Sumner v. Lyman*, 70 AD3d 1223 (3d Dept 2010), lv denied 14 NY3d 709 (2010) (father engaged in erratic behavior and domestic disputes, some of which occurred in presence of children). Where a parent is either unable or unwilling to discharge his or her parental responsibility properly, unsupervised visitation may be deemed detrimental to children. *Id.* at 1225.

In this case, there is substantial evidence that unsupervised visitation would be detrimental to the children's welfare and that supervised visitation would be in the children's best interests. The mother's inability to keep both children safe at once during the visits that were supervised by the DSS and the conclusion of the supervisors/educators at Child and Family Resources that the mother does not currently have adequate parenting skills as well as her vindictive attempts to get the father in trouble by creating a false Facebook account and making false allegations about him to the DSS all raise concerns about her ability to care for the children in an unsupervised setting. The Attorney for the Children also recommends supervised visitation. Certainly, supervised visitation under these circumstances is appropriate. See, e.g., *Matter of Simpson v. Simrell*, 296 AD2d 621 (3d Dept 2002) (although there was no direct evidence that father ever directed his anger at his daughter or harmed her, the child was present during domestic disturbance and father's inability to control his anger resulted in court directing two hours of supervised visitation; and father could apply for unsupervised visitation after seven months if he completed anger management.)

In my view, supervised visitation is appropriate in this case. No evidence was adduced about whether the supervision should be by an agency or by agreed-upon individuals, nor was any evidence adduced about the availability or cost of either. These are factors that need to be considered. See, e.g., *Matter of St. Pierre v. Burrows*, 14 AD3d 889 (3d Dept 2005) (held that the court cannot delegate the nature and frequency of supervised visitation to a local agency; the court must set forth the nature and frequency of all supervised visits and determine persons adequately suited to protect the child from the petitioner's negative influence during visitation). In *Matter of Nathaniel I*, 97 AD2d 973 (4th Dept 1983), the appellate court ruled that one supervised visit for one hour per week is unduly restrictive and should be modified to rehabilitate and reunite the family unit. It is the purpose of the Family Court to rehabilitate and reunite families whenever possible. *Id.* at 974.

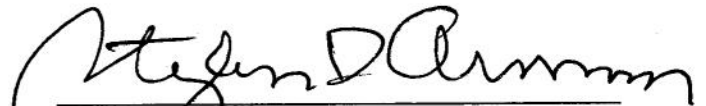
Therefore, the case should be restored to the calendar to determine an appropriate supervisor.

Also, the order derived from this decision should include the following decretal paragraphs:

1. Both parents shall ensure that the children are safely seat belted and buckled when the children are being transported.
2. Neither parent shall be permitted to make disparaging statements about the other parent in the presence of the children nor allow third persons to do so.
3. Neither parent shall engage in or commit any act of commission or omission that would adversely impact on the health, safety or welfare of the children.
4. The mother shall be required to engage in mental health counseling and to follow any recommendations made by the professional, social worker, therapist, and/or counselor.

Attorney for the Children to submit order on notice.

Dated: April 4, 2017



Hon. Steven D. Aronson  
Acting Family Court Judge

via (M)mail (P)in-court (F)fax (E)e-mail (B)attny/box  
 Pet(s) 7 Pet Atty(s) leg Resp(s)     Resp Atty(s) E  
 AFC E DSS     Probation     SCUL     CoAtty      
 Parent/Int. party     Other      
 Order distributed on \*4 JH H~fbv Kerry McGrath