FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of a Proceeding Under Article 6 of the FCA
Timothy Shockome,

Petitioner/Respondent,

-against-

Yevgenia Shockome,

Respondent/Petitioner.

DOCKET NOS. V-05156/05157-02 V-05620/05621-02

Yevgenia Shockome, Indiv. and o/b/o Alexander and Victoria

Petitioner,

-against-

Timothy Shockome,

Respondent.

DECISION AND ORDER
FAMILY UNIT NO. 29594

DOCKET NO. O-05362-02

HON. DAMIAN J. AMODEO, FAMILY COURT JUDGE

NOTICE: YOUR WILLFUL FAILURE TO OBEY THIS ORDER MAY, AFTER COURT HEARING, RESULT IN YOUR COMMITMENT TO JAIL FOR A TERM NOT TO EXCEED SIX MONTHS FOR CONTEMPT OF COURT.

In these proceedings Timothy Shockome [hereinafter father], by petition filed August 15, 2002, and Yevgenia Shockome [hereinafter mother], in a cross-petition filed September, 5, 2002, are each seeking to modify a prior custody/visitation order entered in the Supreme Court on July 11, 2002, which granted them joint custody of their children Alexander (DOB: 3/2/1995) and Victoria (DOB: 11/13/1996).[1] Each now seeks sole custody and requests that the other have supervised visitation. The mother also requests an order of protection based on allegations contained in a family offense petition filed on August 23, 2002.

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[1]The father has an older child, Anders (DOB: 11/26/1984), from a previous marriage.

BACKGROUND

The father is 41 years old and is employed as a Technical Support Analyst for Computer Generated Solutions, a company which troubleshoots computer problems for contract clients. He has gross earnings of approximately $27,000. The father has a bachelor's degree in Russian.

The mother is 31 years old and is employed full-time for IBM as a software engineer. She has a bachelor's degree in mathematics. She was born and raised in Moscow, Russia, where the parties met while the father was working there. The parties were married in 1994 when the mother was three months pregnant with Alexander. In 1996, when Alexander was 11 months old, the parties moved to Austin, Texas, as the father wanted to be closer to his older son, Anders. Eventually, the parties relocated to Poughkeepsie when the mother was offered a position with IBM. She presently has gross earnings of more than $60,000.

The mother and father have been separated since July 2000.

PROCEDURAL HISTORY

This Court has a long history with the parties, both in Family and Supreme Court, dating back to September 2000. A complete understanding of the manner in which the Court has proceeded cannot be properly assessed without a thorough review of that history.

The mother commenced a divorce action on the grounds of cruelty by service of a summons on September 15, 2000. In a counterclaim dated October 27, 2000, the father also sought a divorce on the grounds of cruelty and requested sole custody of the children. The father's then attorney, Lisa Harley, Esq., filed a Request for Judicial Intervention on November 13, 2000 and the action was assigned to the undersigned, as Acting Supreme Court Justice.

Prior to the commencement of the divorce action, the father had filed a custody petition in Family Court seeking joint custody of the children. In that petition he alleged, among other things, that: he was seeking nighttime employment so that he could care for the children during the day; his son, Anders, who suffered from bipolar disorder was on medication and not a threat to the parties' children; and, the mother was trying to keep the children from the father, using her objection to Anders as an excuse. The father did not pursue his Family Court petition when the issue of custody was raised in the divorce action. In his divorce counterclaim the father alleges, among other things, that: the mother criticized and ridiculed him to the children; treated Anders cruelly; pitted the father's love for his son Anders against his love for the parties' children; and, refused to allow him to see the children if Anders was present.

On November 8, 2000, the mother filed a family offense petition in Family Court alleging that: the father took or kept the children out of school to take them to see Anders at a psychiatric hospital; he gave the children junk food like candy, coke and chips; he came to her house and yelled, asking for visits with the children; and he called her repeatedly, as many as 25 times per day and used vulgar language toward her. The Court granted the mother a temporary order of protection containing the standard language, directing that the father refrain from "assault, stalking, harassment, menacing, reckless endangerment, disorderly conduct, intimidation, threats or any criminal offense against" the mother. The mother was also granted temporary custody, *ex parte*, and the father had such visitation as the parties could agree, as well as telephone contact with the children.

On January 10, 2001, a preliminary conference was held in Supreme Court in the matrimonial action, at which the parties appeared with counsel[2] and Gary Lane, Esq., then law guardian, appeared

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[2] The mother appeared with her first attorney, Leah Cohen, Esq.; the father appeared with Lisa Hartley, Esq.

on behalf of the children. The issues raised in the mother's family offense petition were transferred to the Supreme Court, and the order of protection was amended and entered in Supreme Court. Specific visitation for the father was added on the condition that the children not be left alone with Anders and that the father be present at all times. The Supreme Court temporary order of protection was amended several times thereafter and expired by its own terms on July 30, 2001. No further order of protection was issued in Supreme Court.

In the ensuing months numerous Supreme Court conferences were held in an effort to resolve the issue of custody/visitation and the financial issues in the matrimonial action. The Court was also awaiting receipt of records from Texas regarding Anders.

The parties were unable to resolve custody and on April 15, 2002 a custody trial was commenced in Supreme Court. At that time, the mother was represented by her second attorney, Michael Kranis, the father by Lisa Hartley, and the children by the same Law Guardian, Gary Lane. A forensic report dated October 9, 2001, written by Stephanne Pleshette, CSW, Senior Social Worker, Astor Family Court Evaluation Service, was received into evidence by stipulation, subject to the right of either side to cross-examine the maker of the report[3].

On July 11, 2002, after three days of testimony, the parties, both represented by counsel, entered into a stipulation of settlement. The agreement was very extensive, covering all aspects of custody and visitation. The 49-page transcript of the settlement has been made a part of the record in this proceeding. After the settlement was placed on the record, the Court conducted a thorough *voir dire* of the parties as to their consent to the stipulation[4].

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[3] This first forensic report was made part of the record in the subsequent Family Court Proceeding.

[4] The stipulation was reduced to a written Supreme Court order dated October 25, 2002.

The Supreme Court order based on the July 11, 2002 stipulation provides, among other things, that the parties have joint custody of the children, with the mother having primary physical residence and the father having "physical custodial time" equal to approximately 40% of available time. In week one, the children would be with him from the end of school on Wednesdays until 6:00 P.M. on Sundays and in week two, from the end of school on Wednesdays to the commencement of school on Thursdays. Further, the order provided for the parties to alternate holidays, vacations and summer visitation and for telephone contact. The order also contains, what has come to be known as the "standard Dutchess County" custody language which provides, among other things, that both parties have access to all information and records regarding the children and the right to attend all functions and events. The order grants the mother final decision making with respect to medical and educational issues and the father final decision making with respect to religious matters. The parties agreed to consult with respect to these issues and if an agreement could not be reached, to participate in mediation and make a good faith effort to resolve issues through mediation before coming back to Court.

At the time the stipulation was placed on the record there was much discussion about telephone contact for the father since this had long been a problem between the parties. The order provides that during any period that the children are with one parent, the other parent shall have reasonable telephone contact and that the parent should attempt to make the call between 7:00 and 7:30 P.M.

As the July 11, 2002 stipulation was being placed on the record, the law guardian stated his opinion that the settlement was in the best interests of the children and that the children were happy because they would be spending significant quality time with each parent. At the same time, he

encouraged the parents, in the interests of the children, to make every effort not to come back to Court; and, recognizing that each parent was a little unhappy with the settlement, he urged that they put their animosity aside for the sake of the children.

The Court also made a lengthy statement to the parents, recognizing the difficulties they had in the past and urging them to cooperate for the sake of the children. The Court implored each party not to make the children feel guilty for loving the other parent; advised them not to upset a settlement that everyone had worked so hard to achieve; and, cautioned that there would be serious consequences if either party attempted to undermine the arrangement.

CURRENT PROCEEDINGS IN FAMILY COURT

On August 15, 2002, the father filed a petition in Family Court alleging that the mother violated the July 11, 2002 stipulation of settlement. The father attached to the petition a detailed statement setting forth the mother's alleged violations, beginning as early as July 19, 2002, just eight days after the stipulation was placed on the record. Based on these violations, the father sought sole custody of the children. On August 21, 2002, the mother was served with the father's violation petition, which was returnable in Family Court on September 23, 2002.

On August 23, 2002, two days after being served with the father's violation petition, the mother filed a family offense petition against the father in Family Court and made an *ex parte* application for a temporary order of protection. The mother's initial application was heard by Family Court Judge Peter M. Forman, sitting as duty judge that day. Judge Forman, who was unfamiliar with the background of this matter and did not have access to the Supreme Court file at the time of the mother's application, granted the mother's *ex parte* application for a temporary order of

protection and severely limited the father's only recently obtained contact with the children, allowing the father to have only such contact as the parties' agreed and if they were not able to agree, he was to have no contact. This temporary order had the practical effect of gutting the extensive custodial contact rights which the father had only recently obtained in the settlement of the custody/visitation issues in the matrimonial action. It is important to note that the mother's family offense petition was based on the same grounds which she had raised in the past – that the father was being abusive over the telephone. Her remaining allegations were based on incidents which allegedly occurred in November 2000 and repeated verbatim the allegations contained in a family offense petition she had filed some two years earlier, which had been resolved by the July 11, 2002 stipulation.

After the father was served with the family offense petition, his then attorney, Lisa Hartley, sought immediate relief from those provisions which interfered with the father's contact rights with the children. As is the stated practice in this judicial district, because the temporary order placed restrictions on one of the parties' right of access to their children, the matter was advanced to September 12, 2002, the earliest date available before the undersigned.

In the meantime, on September 5, 2002, the mother filed a cross-petition seeking sole custody of the parties' children, alleging, *inter alia*, that the father had harassed her and that the stipulation of settlement failed to provide her with protection from the father. Her petition alleges that she is better equipped to care for the children and more involved with their education; that she provides a nurturing environment for the children, involves them in activities and socialization with their friends; and, provides them with healthy food.

On September 12, 2002, the parties appeared before the undersigned in Family Court. The mother, who had previously been represented by Michael Kranis, appeared ***pro se;*** the father

appeared with counsel, Lisa Hartley, and, Gary Lane, the Law Guardian, appeared on behalf of the children.

During the September 12, 2002 appearance, the father's counsel expressed longstanding frustration with the mother's actions and vigorously and repeatedly requested an immediate change of custody to the father. She based this argument upon the mother's alleged violations of the stipulation and upon her obtaining *ex parte* relief based primarily upon allegations which predated the stipulation, and argued that the mother was continuing to demonstrate her ongoing unwillingness to allow the father to participate in the lives of the children. Notwithstanding the Court's own concern with the mother's continued failure to abide by previous directives and agreements and notwithstanding the mother's repeated interruptions during the September 12th proceedings, the Court continued primary residence with the mother, continued the temporary order of protection in favor of the mother. The Court also restored the father's visitation and contact rights with the children, pursuant to the parties' July 11, 2002 stipulation, and directed that the children not be removed from New York State. This latter restriction was based upon allegations by the father's attorney that the mother had indicated she would take the children out of New York and the fact that the mother has family in Russia and had a relationship with a man who resides in Rhode Island. For these reasons the Court also directed that the parties return their passports to the Court and that an order be sent to the Immigration and Naturalization Service that the children not leave the country[5].

While the mother's present counsel has referred to the September 12th transcript as

[5] By way of background, it is noted that during the matrimonial action, the Court had ordered the parties to surrender their passports to the Law Guardian. When the stipulation of settlement was placed on the record in July 2002, the Law Guardian returned the passports.

"infamous" and as a "smoking gun,"[6] which proves the Court's bias in this matter, what transpired during that appearance must be viewed in the following context. When the parties were initially before this Court in November 2000, the mother urged that contact between the father and the children should be restricted because the father's child, Anders, posed a threat to the children involved in this proceeding. Initially, and for an extended period of time and over the strenuous objection of the father, this Court, in accord with the mother's wishes, had restricted the father's contact with the children, especially when Anders was to be present. One of the reasons for the protracted restriction of the father's contact with the children was the difficulty and delay encountered in obtaining Anders' records from Texas. Ultimately, the Court's review of the records, upon receipt, demonstrated that the mother's concerns had been greatly exaggerated and largely unfounded[7].

In addition, in the context of the Supreme Court custody trial, allegations had been made that the father had subjected the children to sexual abuse. These allegations were based on the father running the back of his fingers lightly on the back, arms and legs of the children [hereinafter massaging] and the mother's assertion that the children were exhibiting sexually suggestive behavior. These allegations were investigated by the Dutchess County Department of Social Services and the report was "unfounded." In addition, and perhaps of greater significance in the context of these proceedings, during the Supreme Court custody trial, Linda Meeker, the nurse teacher at the children's school, testified that the mother had acknowledged to her that she herself had engaged in

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[6] Despite the confidentiality of Family Court records, present counsel for the mother has desseminated this transcript to various political figures, agencies, groups and media.

[7] While Anders did have some emotional problems, these problems did not pose the threat that the mother and her then attorney had long suggested.

the same massaging of the children. Based in large part upon this latter revelation, the initial custody trial came to an abrupt end and a settlement was reached between the parties.

On September 12th, had the Court allowed the mother's appearance without counsel to delay addressing the father's contact with the children, it would have had the practical effect of, once again, allowing the Court to be used by the mother to extend the *ex parte* interference with the father's access to the children. To have proceeded in any other manner would be analogous to a court denying a victim of domestic violence immediate necessary relief because the person accused of the abuse appeared and requested an adjournment to obtain counsel.

The matter was adjourned to October 8, 2002 to allow the mother an opportunity to obtain new counsel.

Thereafter, the mother obtained her third attorney, Adam Levy. A new Law Guardian, Frank Marocco, was assigned on October 7, 2002, as the previous Law Guardian was unavailable to continue for reasons unrelated to this case. At Mr. Levy's request, the Court ordered a new forensic evaluation, which counsel for the parties stipulated would be admissible into evidence and considered by the Court, subject to the right of either party to call the maker for cross-examination. The matter was adjourned for several weeks for the evaluation to be conducted and a report prepared.

On January 17, 2003, the parties, counsel and the Law Guardian appeared. The forensic evaluation, which had been received and shared with counsel, recommended a transfer of residential custody to the father, a recommendation with which the law guardian agreed. Based upon the content of that report, the recommendation of the law guardian, the Court's already extensive history with the parties and the repeated failure of the mother to adhere to specific directions of the Court

concerning the father's contact and involvement with the children, the Court temporarily transferred residential custody to the father and directed that the mother's visitation be supervised. The Court made this temporary order to protect the best interests of the children and not to punish the mother. Indeed, the Court had repeatedly implored the mother, over a period of more than two years, to comply with its directives and to discontinue her efforts to exclude the father.

On January 30, 2003, the mother appeared with her fourth and present attorney, Barry Goldstein.

By order to show cause dated February 18, 2003, Mr. Goldstein made a motion to have this Court recuse itself and to have the proceedings transferred to another county. Despite never having previously appeared in this Court, Mr. Goldstein argued, among other things, that this Court was generally incompetent; more particularly, it was incompetent to handle any matter relating to domestic violence; that the Court was biased against women and his client in particular; that all the judges in this Court and in Dutchess County were incompetent to handle issues involving domestic violence; and, that Dutchess County, as a whole, did not have effective and appropriate services to handle domestic violence issues. He further suggested that, if the Court were to recuse itself and transfer the matter to Westchester or Rockland County, which he felt were more enlightened on domestic violence issues [purportedly due in large part to Mr. Goldstein's own educational efforts] Mr. Goldstein could then come to Dutchess County and "create the training needed to make sure that Dutchess County is using its courts and related agencies to stop domestic violence." The mother's motion also sought to have the Court vacate the temporary order of residential custody. The motion was opposed by both the father and the Law Guardian.

By decision dated March 19, 2003, the Court denied the mother's motion in its entirety,

finding that the mother had not presented any meritorious ethical, legal or factual basis for the Court to recuse itself. The Court stated that a final determination as to custody would be made based upon the testimony and evidence presented during the trial. Counsel and the parties were directed to appear on April 8, 2003 for further proceedings and to schedule the trial. The trial commenced on June 10, 2003[8].

At the commencement of the fact-finding hearing certain stipulations were placed on the record. At the hearing, which took place over a period of 14 days, both parties testified; Dr. Meg Sussman testified as a court witness; the mother called 11 witnesses, including, Maureen "Mo" Therese Hanna, psychologist; Katrina Yahraes, MSW, the mother's therapist; Hanna Talmadge, CSW, Spectrum Behavioral Health; Carol Bardon, a freelance writer and reporter and a neighbor and friend of the mother; Priscilla Taylor, Advocate, YWCA Battered Women's Services; Rose Marie Struk, CSW, Family Services, Inc.; Tadiana Ferran, the mother's best friend; Eilene Alverson, co-worker and friend of the mother; Aja Butler, the mother's boyfriend; and Linda Meeker, nurse and teacher. The father also testified in rebuttal. The Court denied the mother's application to call two rebuttal witnesses for reasons set forth on the record and discussed below.

The Court received and considered various pieces of documentary evidence, including prior forensic evaluations of the parties and children; reports from the agencies which supervised the mother's visitation; the curricula vitae of the professional witnesses; and various pieces of correspondence submitted by counsel, relating to factual and legal issues raised during these proceedings.

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[8] In the midst of the trial, and one year after Judge Forman issued a TOP (dated August 23, 2002), which this Court subsequently modified, counsel for the mother made an application to reinstate a TOP with the same terms as the TOP issued in August 2002. The application was denied by this Court in a written decision from which the mother appealed. The mother's appeal was denied by decision and order of the Appellate Decision, Second Department, dated December 26, 2003.

Two *in camera* interviews were conducted with the children.

The Court has also taken judicial notice of all prior Family Court and Supreme Court proceedings held before the undersigned and orders issued involving these parties (see, Richardson, Evidence §2-209, 11th edition; *see, **Matter of Wesley R.,*** 307 AD2d 360; ***Matter of Solomon D.***, 152 Misc.2d 7, 12).

At the conclusion of the hearing the Court invited counsel and the law guardian to submit written summations and memoranda of law, which have also been considered by the Court.

CUSTODY EVALUATIONS

There have been three custody evaluations conducted in the Supreme Court and Family Court custody cases, all of which were received in evidence, subject to the right of any party to call the maker of the report for cross-examination. The content of those reports is only one of many pieces of evidence upon which the Court has relied in reaching its decision.

As noted above, the first custody evaluation, dated October 9, 2001, was conducted by Stephanne Pleshette, CSW with Astor Family Court Evaluation Service, in the context of the Supreme Court action. Ms. Pleshette reached positive conclusions about both parents, stating that they were both "good parents with many strengths." She declined to make a specific recommendation as to where the children should live, other than to note that the children's stability required that one parent's household should be made the "home base" during the school week.

The second evaluation, dated January 16, 2003, was conducted by Gail Brick, CSWR Social Worker, Astor Family Court Evaluation Service. Ms. Brick's report concluded that it was an unfortunate situation that the parties were unable to resolve their individual feelings and share in the

joint custody of the children. While both parents had strengths and cared for the children, she was concerned about the children's perceptions of each parent and concluded that the father was less of a threat to their well-being. She recommended custody be awarded to the father until such time as the mother is "able to jointly share in their care without alienating them from their father."

When the mother's counsel argued that Ms. Brick's forensic report was flawed because it did not adequately address the issue of domestic violence, a suggestion was made that a third evaluation be ordered with a specific focus on issues which the parties felt to be important, including the issue of domestic violence. The Court deemed it appropriate to direct another forensic evaluation of the parties and children to address the issues in this particularly difficult case, including the issue of domestic violence (FCA § 251[a]; ***In re Wesley R.***, 307 AD2d 360; ***Wissink v. Wissink***, 301 AD2d 36; ***Farnham v. Farnham***, 252 AD2d 675).

While counsel for the mother sought to have the evaluation conducted by an individual of his choosing, the Court, in light of the decision of the Appellate Division, Second Department in ***Wissink, supra,*** and, in an effort to obtain a qualified, neutral evaluator, requested that the Law Guardian contact Harriet Weinberger, Director of the Second Department Law Guardian Panel, to obtain the names of evaluators who might have the expertise necessary to handle the difficult issues presented.

Dr. Meg Sussman was selected from the names provided by the Second Department Law Guardian Panel. According to her CV, Dr. Sussman is a licenced psychologist who has experience in performing custody evaluations, especially in cases involving domestic violence and child abuse. Among other things, Dr. Sussman has consulted for Pace University Battered Women's Justice Center, a group long recognized by the Office of Court Administration as knowledgeable in matters

relating to domestic violence. She has also served as a staff psychologist with the Northern Westchester Guidance Clinic, specializing in matters related to domestic violence and sexual abuse.

Additionally, given the nature of this case and the somewhat limited financial resources of the parties, at this Court's special request, the Director of the Appellate Division Law Guardian Panel agreed that Dr. Sussman's fees would be paid by the Law Guardian Panel.

As Dr. Sussman proceeded with her evaluation, the Court permitted counsel for the parties to submit letters to her, which extensively detailed the facts and allegations which counsel wished to bring to her attention. Copies of these letters are being made part of the record in order to provide a more complete understanding of what issues and information were brought to Dr. Sussman's attention as her evaluation proceeded[9].

The Court precluded the mother's counsel from providing Dr. Sussman with a series of letters of reference prepared on behalf of the mother, but gave counsel the opportunity to submit the names and contact information for any of these references to Dr. Sussman, to allow her an opportunity to personally inquire of those individuals, as she deemed appropriate. It is unclear whether the mother's counsel availed himself of that opportunity, although Dr. Sussman's report does contain information which appears to have been obtained from two of these collateral sources.

In addition, the Court precluded the mother's counsel from submitting a letter to Dr. Sussman dated July 30, 2003, which in this Court's view contained no new factual information, but rather a repetition of counsel's subjective views on the issues of domestic violence and his own personal

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[9] The following letters were forwarded to Dr. Sussman by the Law Guardian: Mr. Goldstein's letters dated: July 3,2003 (3 pp.), two dated June 23, 2003 (3pp-addressed to counsel; 5pp-addressed to the Court), July 17, 2003 (4pp), July 17, 2003 (2pp - addressed to Diane Witter, YWCA program); Mr. Kenny's letters dated June 23, 2003 (2pp) and July 8, 2003 (2pp); a copy of Mr. Goldstein's recusal motion; and a copy of certain telephone transcripts. Additionally, prior to Dr. Sussman testifying, she was given a copy of the transcript of September 12, 2002 to review.

opinion and assessment of this case.

Upon completion of her evaluation Dr. Sussman submitted a detailed 20-page report,[10] which concluded that the mother was unjustifiably interfering with the father's participation in the lives of the children and that the mother did not seem to have the capacity to acknowledge the importance of that participation. Dr. Sussman opined that the mother had an idea "reinforced and bolstered by her attorney" that when "justice prevailed" she would have sole custody of her children and the father's contact would be reduced or eliminated. She perceived herself to be the victim of bias by the Court, the law guardian, the YWCA supervised visitation program, CPS, the children's therapist, her previous lawyer and the prior forensic evaluator. As such, she was unwilling to examine the role she played in the loss of primary custody of her children. Dr. Sussman opined that the mother would benefit from coming to recognize that her children want and deserve both parents and that is in their best interests.

On the issue of domestic violence, Dr. Sussman noted the diametrically opposed accounts by the parties and found it difficult to determine the extent of domestic violence in the marriage. She did note that there were no police reports, no documented injuries or other public records and that the orders of protection were all filed concurrent with the custody dispute. She was not able to determine that there was a pattern of coercive and abusive behavior during the marriage. She did note that the children did not report witnessing any domestic violence between their parents or report any awareness of their mother being harassed since the parties separated, despite the fact that the mother claimed that the children were present when incidents occurred.

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[10]A review of Dr. Sussman's report, including her extensive use of collateral contacts and her methodology indicates compliance with the suggestions of the Appellate Division, Second Department in ***Wissink v. Wissink***, 301 AD2d 36.

Dr. Sussman's final recommendation was that residential custody should remain with the father and that the mother should continue to have supervised visitation. She also recommended that the parties have as little contact with one another as possible; that each engage in individual therapy; that the father address anger management issues and improve his understanding of his difficulties in relationships with women; that the mother address the issue of accepting the father as an important person in the children's lives, putting aside her own feelings regarding the father when speaking to the children; and cooperating with supervised visitation. She further recommended that the children continue in therapy and that their parents be involved with the goal of the children having a healthy relationship with each parent. She recommended that the children continue to see the mother in a supervised setting until the mother demonstrated an acceptance of the father's role in the children's lives, and a willingness to promote, rather than hinder this process.

Although Mr. Goldstein, in a letter to this Court dated July 14, 2003, indicated that he had received Dr. Sussman's resume and that "it appears that Dr. Sussman has appropriate credentials to do the evaluation," he then objected to the introduction of Dr. Sussman's report into evidence, based on his initial refusal to consent to the evaluation in the format directed by the Court.

At trial, Dr. Sussman's report, which was submitted under oath as her direct testimony, was admitted into evidence as a Court exhibit, subject to the right of cross-examination of Dr. Sussman, (FCA §651(b); 22 NYCRR §§202.16(g); 202.18; ***Matter of Wesley R.,*** 307 AD2d 360; ***Waldman v. Waldman,*** 95 AD2d 827, 828; Ochs v. Ochs, 193 Misc 2d 502, 505-6 and cases cited therein).

Dr. Sussman was cross-examined by counsel for the mother, who was given great latitude in this regard, over a period of two and one-half days, and by counsel for the father and the law guardian for one-half day. Notwithstanding extensive and vigorous cross-examination by counsel

for the mother, Dr. Sussman steadfastly adhered to her recommendations.

Counsel for the mother sought to have two witnesses testify in rebuttal to Dr. Sussman's evaluation, Dr. Maureen Hanna, who previously testified on behalf of the mother and Sherry Frohman, Director, NYS Coalition Against Domestic Violence. The determination of whether or not the court will allow a rebuttal witness to testify falls within the discretion of the court (***Coopersmith v. Gold***, 233 AD2d 572). To appropriately make this determination, the Court required that the mother's counsel provide an offer of proof as to each witness, together with the CV of Ms. Frohman, as the Court already had Dr. Hanna's CV. He failed to submit the required information within the time specified and did not submit an offer of proof with respect to Ms. Frohman, a domestic violence advocate and psychologist who, to this Court's knowledge, had never conducted any forensic evaluations and had never met the father or children.

The Court denied counsel for mother's request to call Dr. Hanna as a rebuttal witness for many reasons. As noted, his request was untimely and did not conform to the Court's direction as to content. Based on the belated submissions which counsel did make, it was clear that Dr. Hanna's testimony would be redundant and cumulative to her prior testimony with respect to domestic violence. Additionally, counsel failed to establish that Dr. Hanna was an expert in forensic evaluations. She had never conducted a custody evaluation, had not met with or evaluated the father or children; and, had no direct factual knowledge of the case. To the extent that Dr. Hanna was offered as a rebuttal witness to impeach the credibility of Dr. Sussman, the Court denied this request as counsel for the mother had a full opportunity to cross-examine Dr. Sussman and did so for more than two and one-half days.

DOMESTIC VIOLENCE

a. General Allegations of Domestic Violence

The mother's claim that she is the victim of a longstanding course of domestic violence is the cornerstone of her case. Domestic violence has generally been defined as a pattern of coercive behaviors that may include some or all of the following: physical abuse, psychological abuse, sexual assault, social isolation, deprivation, intimidation and economic abuse. The primary goal of a perpetrator of domestic violence is to establish and maintain power and control over someone with whom the abuser has had or continues to have an intimate relationship.

Children are adversely affected by witnessing domestic violence, seeing its aftermath or just by living in a home infected with domestic violence.

The Court recognizes that victims of abuse often have confused thoughts and feelings and may even be uncertain as to whether they are being abused. Denial, rationalization and minimization are methods often used to cope with the reality and severity of the abuse to which they are subjected. For many victims simply identifying oneself as a victim can be an extremely difficult step and that prior to coming to a realization that one is a victim, that individual may act in ways which may seem incomprehensible to those not familiar with the dynamics of abuse. The Court agrees with virtually all of the general concepts advanced by the mother's experts.

It is against that background and with that understanding, as amplified by the various experts who testified, that the facts and allegations presented in this case have been measured. There is no doubt in this Court's mind that the mother and father had a relationship that involved a great deal of conflict. Among many others, there were differences in parenting styles and methods of discipline, differences in cultural backgrounds, and differences relating to matters of basic household care.

These many differences often led to heated disagreements and arguments, during some of which the parties exchanged inappropriate and derogatory comments about one another.

Most healthy families have their share of disagreements, arguments and "fights" about various household and other matters. One of the main issues to be decided here is whether the disputes and disagreements described escalated to the severe domestic violence now alleged by the mother.

In her testimony and in the more recent information given to the various expert and other witnesses, the mother presented what could best be characterized as a textbook case of domestic violence, involving an ongoing course of severe physical, sexual, psychological and other abuse, dating back to a time before the parties were married in Russia. The experts called by the mother, consistent with current thinking on this issue, opined that the mother's belated disclosure of the specific and extensive nature of her alleged abuse was due, in large part, to her initial lack of knowledge that she was a victim of domestic violence. They also opined that her lack of action and earlier minimization of the horrific events, which she now describes, are typical of victims of domestic violence.

The father, while acknowledging a generally tumultuous relationship with the mother, denied the essential claims of severe domestic violence, which the mother has most recently advanced. The father claims that it was the mother who was always in the financially and intellectually superior position; it was the mother who sought to control his contacts with their children, who constantly criticized his housekeeping and parenting skills; it was the mother, who would often lose her temper, raise her voice and belittle him; and it was the mother who constantly harassed him with various court proceedings which had the practical effect of curtailing his participation in the lives of their

children.

There was virtually no testimony from witnesses other than the parents as to what actually took place between them during the time they lived together and following their separation in July 2000. Moreover, much of the expert testimony and evidence received in this case relies almost entirely on the report of facts and events given by the parties to the various evaluators, other experts and witnesses. As a consequence, this Court's conclusions rely heavily upon its assessment of the credibility of the mother and father.

b. Panic Attacks and Posttraumatic Stress Disorder

Much testimony was heard regarding the claim that the mother suffers panic attacks and posttraumatic stress disorder [PTSD]. The existence of these conditions has been advanced as corroboration of the mother's allegations of domestic violence.

As to the panic attacks, the credible evidence demonstrates that the mother has exhibited the symptoms of these attacks on a number of occasions. The mother's position has been that these attacks are the product of and tend to confirm long-term abuse by the father. On the other hand, the father, Dr. Sussman and even some of the mother's own experts suggested that the panic attacks could be the result of an anxiety disorder based on the mother's overwhelming concern regarding and her inability to accept the prospect of losing her right to control the lives of the children.

Following the first few instances when the mother failed to comply with Court directives to allow the father to have contact with the children and be involved in their lives, the Court repeatedly and ever more forcefully admonished the mother and warned her of the possibility that a continuation of her inappropriate conduct could result in a transfer of primary residential custody to the father.

Accordingly, for a long period of time the mother has been aware of the very real possibility that she could lose primary custodial control over the children.

The mother and others testified that these panic attacks occurred at times when the father called or had contacts with her. As to the onset of these attacks, the testimony was not consistent. The mother variously indicated that the panic attacks began sometime in October 2000, January 2002 or the summer of 2002. Thus, even the earliest date of onset was after the parties' separation and the beginning of custody litigation.

All the experts generally agreed that panic attacks are typically triggered by some event or circumstance with which the suffering person has difficulty coping. Interestingly, and perhaps most significantly, the mother acknowledged that she had at least one panic attack during a contact with the law guardian. The law guardian never engaged in any inappropriate or abusive conduct toward the mother. However, it has been clear from the outset of this proceeding that the mother considers the law guardian and the Court as allies of the father and views them as the primary obstacles to her ultimate goal of regaining control over the children and limiting the father's involvement. That the law guardian may have triggered a panic attack tends to confirm the fact that these attacks are more likely caused by the mother' s extreme feelings of upset and of her inability to regain control of the children and the situation, rather than by the alleged abuse by the father.

As to PTSD, the Court has reviewed the very detailed and complex definition and symptomology contained in the DSM IV, relative to PTSD [Respondent's Exhibit "S" in evidence], and questions whether the expert testimony establishes that the mother actually suffers from PTSD. In addition, it must be remembered that the experts who rendered opinions on this issue have done so based entirely on the mother's self-report of her symptoms, self-report she made after admittedly

doing a great deal of reading on this and related subjects, including Mr. Goldstein's own treatise on domestic violence.

Nevertheless, assuming that the mother suffers from PTSD, all the experts agreed that it would take a very traumatic single event or series of events to cause an individual to suffer from PTSD[11] -- such as the kind of events or conditions one would experience in a war setting. Having had the mother before this court on numerous occasions, having observed her reaction to Court statements to her regarding the importance of the father's participation in the lives of the children, and most recently, having experienced the manner in which the mother and those supporting her cause have conducted themselves, the mother views the father's challenge to her control and authority in this case as the functional equivalent of a war. The mother views every person who challenges her position of authority as an enemy and every event which tends to diminish her ability to control the lives of the children as a personal assault on her. And, she views the removal of the children from her care in January 2003 as the most devastating and traumatic thing that has ever happened to her. Indeed, Dr. Sussman notes in her report that the mother refers to the transfer of custody to the father as "the tragedy" and notes that the mother is "distraught" over what transpired.

If anything, the mother's panic attacks and alleged PTSD symptoms clearly demonstrate the extreme depth of the mother's belief that she and only she is the person who can or should be allowed to raise these children. If there were two threads of consistency in all the independent evaluations which have been made in this case, they were the mother's persistent belief that the father should not play a significant role in the lives of these children and her open inability to tolerate or accept any notion that the father's presence in the lives of the children was important to them and

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[11]According to the DSM IV (p. 427), the stressor must be of an extreme nature.

in their best interests.

c. Family Offense Petition-Discussion and Findings

In her petition dated August 23, 2002, the mother alleges that the father committed the crime of aggravated harassment (PL §240.30). She also alleges, based on an incident in November of 2000, two years before the petition was sworn to, that the father committed the crimes of harassment (PL§240.26) and reckless endangerment (PL §120.45). These later charges are based upon an incident alleging that the father took the children out of school to see their half-brother in a psychiatric institution. The mother also alleges, without any specificity, that the father may be sexually abusing the children.

The only allegations set forth in the most recent family offense petition which postdate the settlement of the custody issues in the matrimonial action relate to the father's allegedly making harassing phone calls to the mother. She asserts that he called and threatened that if she took their son to therapy she would have to answer to the judge; that he did not want their son to speak to a therapist; and that he calls every day, numerous times throughout the day. And, she asserts that he has threatened her through the mail by stating that "you will never wear me down. I just got started."

To find that the father committed a family offense against the mother, the Court must find that his conducted falls within one of the penal law offenses enumerated in Family Court Act §812(1).

As it pertains to this matter, the following definitions apply:

Section 240.30 of the Penal Law provides that:

> A person is guilty of aggravated harassment in the second degree when, **with intent to harass, annoy, threaten or alarm** another person, he or she:

> 1. either (a) communicates with a person, anonymously or otherwise, by telephone, . . . in a manner likely to cause annoyance or alarm; . . . or
> 2. makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication; (emphasis added)

Section 240.26 of the Penal Law provides that:

> A person is guilty of harassment in the second degree when, **with intent to harass, annoy or alarm** another person: . . .
>
> 3. he or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose. (emphasis added)

Section 120.20 of the Penal Law provides that:

> A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person[12].

While it is acknowledged that the number of telephone calls made by father to the mother may have been outwardly excessive, these calls were not unjustified in light of the mother's persistent refusal to abide by the terms of the Court order with respect to the father's right of telephone contact with the children. The Court finds that the calls, viewed in this context, were not made with the intent to harass, annoy, threaten or alarm the mother, but were a direct and logical consequence of the mother's lack of compliance with specific Court directives.

Courts have held that words alone cannot satisfy the elements of Penal Law §240.26(3) (***People v. Dietz***, 75 NY2d 47, 51-52; ***Matter of Dora v. Ramon U.***, 2003 WL 22427239). Even if the father engaged in some rude conduct, that does not rise to the level of a family offense, particularly when viewed in the context of his frustration with the mother's longstanding interference

[12] Serious physical injury is defined as: "Physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." [get site]

with his contact and involvement with the children (see, ***Dora***, supra).

Further, the mother submitted no evidence as to the alleged incident in November 2000 regarding taking the children to see Anders. In any event, even if true, this would not rise to the level of reckless endangerment as defined by the penal law and occurred two years prior to the mother filing the petition.

Thus, the credible testimony does not support a finding, by a preponderance of the evidence, that the father violated the applicable provisions of the penal law and the Court dismisses the mother's family offense petition.

ALLEGATIONS OF SEXUAL ABUSE

As noted above, the allegations of sexual abuse of the children, which the father consistently and adamantly denied, were investigated by the Department of Social Services, Child Protective Services (CPS) and determined to be unfounded. While asserting that the CPS investigation was conducted in an incompetent fashion, counsel for the mother did not call David Garcia, the person who conducted the investigation, for the purpose of confirming this claim of incompetence. Similarly, aside from the school nurse, Linda Meeker, no witnesses were called or even clearly identified to verify and place in context the several hearsay observations allegedly made by others concerning inappropriate, sexually suggestive conduct allegedly engaged in by the children while at school. Counsel's strategy was clear -- loft a set of vague hearsay and suggestive facts and have the mother's experts comment on those facts, assuming, first, that the events occurred, and second, that they occurred in a context which has the most negative connotation for the father.

Carol Baron, a freelance writer who is neighbor and friend of the mother, testified that she

had frequent and regular contact with the mother and the children. She noted that on many occasions when the children were at her home, Victoria would take her clothing off, down to her underwear and, at times, would even run naked around the house. When questioned about this, the child would state that her father would allow her to do this at home. The mother also testified that she observed the children masturbating almost every day. Interestingly, two other witnesses called by the mother, Tadiana Ferran and Eilene Alverson, testified that they never observed any inappropriate or sexually provocative conduct on the part of the children, notwithstanding the fact that each claimed to have exchanged hundreds of visits between their homes and the mother's home while the children were present. Ms. Baron also claimed to have observed the children, on other occasions after custody was transferred to the father, appearing very unkempt, comparing the children's appearance to Lisa Steinberg. Such was her concern that she filed a CPS report against the father, which was investigated and later "unfounded."

Dr. Sussman also addressed the issue of sexual abuse in her report. She concluded that the information available to her did not suggest that the father had sexually abused the children. This opinion was based, in part, on the following: she herself did not note any symptoms in the children consistent with sexual abuse; Ina Berg, the children's current treating therapist, had not observed any sexualized behavior; and, the children themselves did not acknowledge to anyone that there had been any improper behavior on the part of the father. In reaching her conclusion, Dr. Sussman also spoke directly to David Garcia.

Dr. Sussman opined that part of the underlying problem as to this issue could well be attributed to the different ideas each parent has regarding appropriate boundaries, a concept with which some of the mother's own expert witnesses agreed. The mother's somewhat distorted way of

viewing the children's actions is further exemplified by her claims that she observed the children to be masturbating while jumping on the couch during a supervised visitation session at the YWCA program. No one other than the mother viewed or interpreted the children's conduct in the same manner, and again, her claims were not supported by objective, trained observers.

CREDIBILITY

As noted earlier, the Court's assessment of the credibility of the parties is crucial to the outcome of this case. This is especially so since the mother's entire case depends on whether or not she has been truthful with the Court, with other witnesses with whom she has had contact, and with the various experts called on her behalf. Indeed, if this Court believed even one-half of the mother's allegations regarding the course of father's conduct over the years of their relationship, it would be the father and not the mother who would be restricted to supervised visitation. However, with little exception, the opinions advanced on her behalf assume the truth of everything the mother has asserted. The mother's experts have all indicated that little, if any, of what the mother told them was independently verified. Thus the opinions of the mother's experts, none of whom interviewed or spoke with the father or the children, depend almost entirely upon the mother's self- report of facts and events as a basis for the opinions which they have rendered.

In addition, the credibility and objectivity of the views expressed by most, if not all, of the mother's witnesses are in serious question. They appeared to be so invested in the mother's position that answers to many questions posed by father's counsel, the law guardian and the Court were, at times, inconsistent with their prior testimony and at other times tested notions of common sense and

logic[13]. There appeared to be a consistent pattern of answering even the most basic questions in a manner which the expert or other witnesses believed would not injure the position of the mother. This lack of candor calls into question not only the weight to be given the opinions expressed by the experts, but also the very reliability and objectivity of the opinions the experts expressed.

It is somewhat ironic that counsel for the mother suggests that the Court, the law guardian and the neutral experts who testified in this matter were all practicing what one of the mother's witnesses described as "confirmation bias" – a tendency to view facts or information from some preconceived notion of what the facts should be or viewing the facts in a way which tended to support a position favorable to one side or the other. In fact, a careful review of the testimony of virtually all of the witnesses called by the mother, indicates an unerring, if not meticulous, use of confirmation bias in viewing every action and attribute of the father as somehow sinister and viewing every action or attribute of the mother as virtuous.

The Court has also heard a great deal of testimony regarding the statistical probability that an alleged victim of domestic violence is unlikely to give false or exaggerated testimony. The Court recognizes that the use of statistics can be of great assistance when confronted with differing versions of the same story or when there is little independent evidence to demonstrate whether either or both parties may be telling the truth. However, when information is available to a court which clearly indicates that one of the parties has given false or exaggerated information to gain an advantage, the need to rely upon a statistical profile of a hypothetical victim of domestic violence becomes unnecessary, or, at the very least, far less compelling.

Throughout this matter, Mr. Goldstein and many of the mother's witnesses, referring to a

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[13] Hanna Talmadge testified that any touching of a child by a parent, even if done to soothe the child, was inappropriate.

variety of statistical data, opined that a high percentage of men who seek custody are abusers; a high percentage of abusers are manipulative, often appear calm and controlled; are untruthful; and, use the system to their advantage. A similar statistical profile of alleged victims was also advanced to help explain the mother's conduct. However, for a court to unduly rely on statistical profiles would be to abandon the tools upon which courts have long depended to properly and carefully assess the credibility of the parties and witnesses. When the credible evidence is at actual variance with what the statistics have predicted, that evidence must displace a contrary statistical assessment.

An assessment of the mother's credibility is made even more difficult because the mother, at first, presents as a very credible individual. However, over the years she has demonstrated an ability to manipulate the legal system in her favor. With the assistance and clear coaching by present counsel and those who have advocated on her behalf, the mother's credibility is placed in even greater question.

The mother's counsel has sought to portray her as a poorly represented, weak and naive Russian immigrant. However, since coming to this country, the mother has earned a college degree, receiving a 4.0 average in her major subjects, has been employed in a high-paying technical job with IBM; and, has been viewed as a strong-minded and intelligent woman.

In this case, the Court has had contacts with the parties which are far more numerous and extend over a far greater period of time than those of any of the experts called in this case. The Court has had the opportunity to view the demeanor of both parties and their reactions to various statements and situations during the many court appearances which they made and as they each testified during the two hearings which were held before this Court. In reaching its conclusion that the mother is not a reliable reporter of facts, events and circumstances, the Court has considered, among other things, the following:

1.In earlier proceedings the mother gave an inaccurate portrayal of Anders as a dangerous child and attempted to villanize him. The mother's claims, which were not supported, could best be characterized as a gross exaggeration.

2.In the mother's August 2000 verified complaint in the divorce action, no mention is made of the very serious allegations of domestic violence which she has most recently advanced. As the law guardian pointed out, this lack of prior assertions of domestic violence takes on added significance in view of the fact that the initial forensic evaluator in her 2001 report made special note of the fact the mother and father were intent on making sure the evaluator "had all the facts." As to the mother's present assertion and excuse that she was then unaware that she was a victim of domestic violence, such lack of awareness would not have rendered her incapable of stating historical facts as she knew them to be, especially in view of the severity and frequency of the abuse she now alleges. Eilene Alverson, one of the mother's witnesses, testified that since meeting the mother in 1999, the mother spoke to her on an almost daily basis about being physically abused by the father in Russia, Texas and New York. Was this witness exaggerating to help the mother, or did the mother have a memory lapse when she was preparing the various earlier petitions she filed and when she went for the earlier evaluations in this matter?

3.During the investigation regarding the sex abuse allegations against the father, the mother, knowing that she herself had engaged in similar massaging activities failed to disclose that fact to the investigators or the other professionals to whom she spoke.

4.In papers submitted to the Court, the mother and her current attorney asserted that the mother filed her August 23, 2002 family offense petition without knowledge of the father's prior application for sole custody. An affidavit of service of the father's custody petition clearly indicates that the mother had been served two days prior to the date she filed the family offense petition.

5.The law guardian made note of the mother's incredible explanation for not visiting with the children for one nine- week period; her false attempt to blame the father for her inability to visit with the children immediately before the second *in camera* interview with the children; and her unsupported claims that the law guardian somehow urged Victoria not to visit with the school nurse.

6.At one point during the trial the mother indicated that she could not afford to pay the fees for the supervised visitation program. When asked how she could then afford the new TV which she had in her home, she replied that her paramour, Aja Butler, had purchased it for her. However, when Mr. Butler testified, he denied any knowledge of such a purchase.

7.The mother led her therapist to believe that the father was threatening to take the children away from her, when she was contemplating a move from Texas to New York. The mother failed to disclose to her therapist that the father had actually told the mother to move with the children to New York and he would stay in Texas.

8. When the mother spoke with Rosemarie Struk, to whom she had been referred by Linda Meeker, the nurse teacher at the children's school, regarding Alex's acting out behavior, Ms Struk suggested that the mother contact the local battered women's program. This suggestion was made because the mother expressed fear as to what the father would do if a CPS report were filed. The mother expressed reluctance to seek such assistance, indicating that she had sought such assistance in the past and had been turned away because she had not been beaten and was not bruised or bleeding. How likely is it that an intake worker at a battered women's program would have turned the mother away for the reasons she advanced? On the other hand, could it be that the mother at that time truthfully answered the probing questions typically asked during intake and her claimed abuse was found to be insufficient?

9. The mother has adamantly denied ever telling the children that their father hit her while she was pregnant with Alex. The children, during the *in camera* interview, indicated otherwise.

The foregoing examples demonstrate a clear inclination on the part of the mother to do or say anything she feels may be necessary or beneficial in her attempt to exclude the father from the lives of these children. Her false, misleading and exaggerated statements, claims and allegations are not with respect to minor issues, but rather relate to the matters which are at the very heart of the controversy in this case.

Interestingly, when Katrina Yahraes, the mother's own therapist, was questioned regarding the likelihood that a person would lie, she indicated that one person would generally not lie about another person, unless the former was heavily invested in destroying the latter. The mother's purpose has been clear and consistent for the many years the parties have been before this Court.

While some issues have also been raised as to the father's credibility, throughout these proceedings he has provided information which proved to be far more reliable than that provided by the mother. Curiously, Rebecca Watson, the only person who allegedly actually observed the father acting in an inappropriate way – claiming to Dr. Sussman that she observed the father, angrily kicking at the door to the mother's home and uttering profanities -- failed to appear to testify on the mother's behalf on two scheduled appearances. On the other hand, Hanna Talmadge, another witness called by the mother, indicated that during the investigation into the sex abuse allegations, when the

father was confronted with claims regarding the massaging, he readily acknowledged that he had engaged in the massaging, and appeared to be sincere, wanting to cooperate and genuinely distraught about what was going on. And, perhaps most importantly, while he had many opportunities during this controversy to state to the contrary, the father has consistently acknowledged that the mother's basic parenting skills are very good.

CHARACTERIZATION OF THE PARTIES

The approach taken by counsel for the mother has been very simple. Prior to any finding, label the father as an "abuser" and repeat the use of that description as often as possible, notwithstanding the Court's repeated directions and admonitions not to do so. Indeed, even in Mr. Goldstein's summation, notwithstanding the Court's numerous specific oral and written directions not to do so[14], he continues to refer to the father as "abuser."

Having labeled the father as the "abuser," a series of experts was presented to describe the characteristics of an abuser - charismatic, outwardly friendly, convincing, cunning, dangerous and not worthy of belief.

Conversely, the mother has been labeled a "victim" from the time Mr. Goldstein became involved in this case. As such, her experts contend, among other things, that the mother is totally trustworthy, that the inconsistencies in her testimony and her persistent defiance of this Court's orders should be ignored and that her unwillingness to allow the father meaningfully participation in the lives of their children is justified.

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[14] In a letter to Mr. Goldstein from the court dated July 9, 2003, in addition to numerous prior warnings on the record in open Court, and in two written Supreme Court decisions, Mr. Goldstein was again specifically admonished not to refer to the father as "the abuser" in submissions to the Court, as there had been "no judicial finding in that regard"..

The position advanced on behalf of the mother is that once allegations of domestic violence are made, then everything that the alleged abuser has done or said is to be viewed as if he or she was actually an abuser. At the same time, the alleged victim should immediately be cloaked with an impervious shroud of purity and any inappropriate words or actions on the part of the alleged victim should be disregarded as a consequence of the alleged abuse.

If the Court were to accept this approach, it would be unnecessary for there ever to be a trial in any custody proceeding in which one parent alleges he or she is the victim of domestic violence.

LAW GUARDIAN'S RECOMMENDATIONS

The law guardian in this matter, a very respected attorney, with broad experience in family law, took an extremely active role in these proceedings since his appointment in October 2002.

In his written summation, he recommends that the father be granted sole custody of the children. He expressed his belief that the mother should continue to have supervised visitation for various reason, including the possibility that the mother might be a flight risk with the children. He went on to express his belief that a course of therapy should be undertaken in an attempt to address the problems which have been identified by the various forensic experts who evaluated all the parties and the children. The law guardian also recommends that the mother's contact with the children could be increased and, with some reservations, made less restrictive as her understanding of her role and the children's needs becomes more apparent to her.

While generally agreeing with the recommendations of Dr. Sussman, the law guardian, acknowledging the wishes of the children to have more contact with the mother, suggests that limited unsupervised contact with the children might be appropriate once the mother has invested in some counseling with the children's current therapist, Ina Berg, to insure that "she [the mother]

understands the parameters of her contact with the children and to address, what the first evaluation noted, the 'loyalty bind' Ms. Shockome placed the children in."

The law guardian also recommends that, whatever the Court's decision, it should be crafted in a manner which would require as little contact between the parties as possible, suggesting e-mail contact, except in the case of an emergency. He also recommends that any order be very specific regarding dates and times for visitation and telephone contact.

Before setting forth his recommendation, the law guardian reviewed the extensive procedural and factual history of this matter; the content of the three forensic evaluations which had been performed; the testimony of the various witnesses; and referenced the content of the two *in camera* interviews the Court conducted with the children.

The law guardian frankly acknowledged that if the mother's most recent allegations of domestic violence were credited, custody of the children should be placed with her. However, on this issue, the law guardian noted "With respect to the mother, I found her credibility to be lacking." In support of this conclusion the law guardian pointed to a number of specific instances in which the mother either misstated or exaggerated what the facts were on a particular issue.

While expressing an opinion that the mother's credibility is less reliable than that of the father, the law guardian noted that there were instances when the father's version of events was contradicted by other evidence presented. The law guardian pointed to outbursts of anger exhibited by the father which were reported to Dr. Sussman by Rebecca Watson, involving the father being observed banging on the mother's door and voicing expletives toward the mother.[15]

In submitting his recommendations, the law guardian noted the difficult challenges which

[15]As noted earlier, Rebecca Watson, scheduled to testify on the mother's behalf on two separate occasions, inexplicably failed to appear on either occasion.

this case has presented and also expressed his concern about the suffering and confusion which the children have experienced as a result of the restrictions placed on the mother's contact with them.

The law guardian noted that while the mother presented as a parent with the skills to provide for the children's basic educational and social needs, she is also a parent who "has placed her own agenda ahead of the welfare of the children and who has acted in an uncooperative manner with the father with reference to the children." He noted that the father, "while not the creative individual that the mother is, is more than capable of caring for the children."

The law guardian expressed concern that the mother failed to make court-ordered child support payments until it was involuntarily deducted from her pay, the mother claiming she felt no responsibility to pay the father the child support which had been directed, claiming that it was more important to pay her legal and expert fees in this case.

The law guardian also expressed his concern that the mother, though limited to supervised visitation, had, for at least two extended periods, elected not to exercise visitation with the children, knowing that the children wished to see her. The law guardian was not persuaded by the reasons proffered by the mother for her lack of visitation – that she could not afford the modest fees being charged; that she did so at the direction of her attorney; and, finally, that it was done as part of her "strategy" in this case.

IN CAMERA INTERVIEWS

The Court conducted two in camera interviews with the children. The first was conducted on May 27, 2003 and the second on January 22, 2004, following the conclusion of the trial. Prior to each interview the Court invited counsel for both parents to submit questions or areas of

questioning which they wished the Court to include in its discussions with the children. The substance of most of the submissions made by counsel was included in the Court's interviews with the children.

In each instance the children were interviewed separately, on the record and in the presence of the law guardian. The Court spent approximately an hour and a quarter with the children during the first interview and slightly more than one hour during the second interview. During each of the interviews the Court inquired of the children's understanding of truth and falsity and was satisfied that the children were aware of their obligation to tell the truth.

The Court assured the children that the specific content of their discussions would not be disclosed to their parents and it is for that reason that the Court will make only general comments regarding the content of its conversations with the children.

What was very clear during both interviews with each of the children was their love for both parents and their desire to spend a significant amount of time with each. Each also made it clear that they missed seeing their mother very much and expressed a desire to spend about an equal amount of time with each parent, at least one of them indicating the basic fairness of such an arrangement. While the children clearly miss spending time with their mother, they appear to have adjusted to the present arrangement. Both children, especially Alexander, wish for the time when the parents were together. Aside from some verbal arguments between their parents, and aside from one instance, which was related to the children by their mother, neither recalled any physical altercations between their parents. Neither child expressed any fear of either parent. Both children expressed a sense that, when disciplined by either parent, it was because they had done something wrong. Both recalled their half-sibling, Anders, to be a nice boy, with whom they did fun things and who neither harmed

nor frightened them in any way.

The children did not appear to be afraid or intimidated by speaking with the Court. Both were relatively open, relating both negative and positive things about each of their parents. Indeed, at least one child even expressed displeasure with the Court for the restrictions which have been placed on the child's contact with the mother. As to some of the areas of questioning, the Court had the sense of some reluctance on the part of the children to comment negatively about either parent. However, each made a point of commenting regarding certain inappropriate things which the mother had said about the father. These comments by the mother have clearly colored, in a negative way, the manner in which the children view their father.

APPLICABLE LAW

In deciding the issue of custody the primary consideration is what is in the best interests of the children based upon a review of the totality of the circumstances (See, e.g., ***Eschbach v. Eschbach***, 56 NY2d 167; ***Freiderweitzer v. Freiderweitzer***, 55 NY2d 89, 96; ***Obey v. Degling***, 37 NY2d 768). Neither parent has an inherent, prior right to custody (Dom. Rel. Law §§70, 240); ***Barkley v. Barkley***, 60 AD2d 954, aff'd 45 NY2d 936) and there is no set formula which can be applied in matters of this type. However, a number of factors have been delineated which should be considered by the Court in determining issues of custody and visitation. Among those factors, with none being an absolute, are: (1) the original placement of the child, (2) the length of that placement, (3) the child's desires, (4) the relative fitness of the parents, (5) the quality of the home environment, (6) the parental guidance given to the child, (7) the parent's financial status, and (8) his or her ability to provide for the child's emotional and intellectual development (***Kuncman v. Kuncman,*** 188 AD2d

517, 518).

The Court must also consider the care and affection of the respective parents toward the children, the availability and ability of the parent to provide for the children, as well as the stability and morality of the parents (See, e.g., ***Bliss v. Ach***, 56 NY2d 995; ***Jacobs v. Jacobs***, 117 AD2d 709; ***Alan G. v. Joan G.***, 104 AD2d 147).

Where there are issues of domestic violence the Court must "consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant" in determining the issue of custody (DRL §240(1); ***Wissink v. Wissink***, 301 AD2d 36).

The Court is mindful that an existing custody arrangement established by agreement should only be modified upon a showing that there has been a change of circumstances that makes modification "necessary to ensure the continued best interest of the children" (***Eschbach v. Eschbach***, 56 NY2d, 167, 171)[16].

When the circumstances permit, children are usually best served when they are nurtured by and have significant contact with both parents (***Daghir v. Daghir***, 82 AD2d 191, aff'd 56 NY2d 938; ***Olmo v. Olmo***, 140 AD2d 191).

It is important that neither parent engage in conduct which tends to disrupt regular contact between a child and both parents. Consideration should be given to the effect that an award of custody to one parent might have on the child's relationship with the other parent and the willingness

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[16]As this is an application to modify a prior, recent order of joint custody, entered on consent, the Court could have greatly restricted the scope of the mother's evidence to facts and events which occurred after the stipulation was entered (***Matter of F.D. v. P.D.***, NYLJ, 10/27/03, p. 20, col.1). Nevertheless, the Court granted the mother's attorney much greater latitude to permit a presentation of evidence and lay a foundation for expert testimony which he felt necessary to prove the mother's allegations, particularly with respect to domestic violence.

of a parent to assure meaningful contact between the children and the other parent (***Bliss v. Bliss***, supra at 998; ***Young v. Young***, 212 AD2d 114, 117-118). A custodial parent's interference with the relationship between a child and the noncustodial parent, which can take many forms ***(Young v. Young,*** 212 AD2d 114), has been considered an act so inconsistent with the best interests of a child as to ***per se*** raise a strong probability that the offending parent is unfit to continue to act as a custodial parent (See, e.g., ***Fallon v. Fallon,*** 4 AD3d 426; ***Dobbins v. Vartabedian***, 304 ad2d 665; ***Miller-Presutti v. Presutti***, 257 A.D.2d 562***; Matter of Gago v. Acevedo,*** 214 AD2d 565, lv. denied 86 NY2d 706; ***Landau v. Landau***, 214 AD2d 541, 542; ***Maloney v. Maloney***, 208 AD2d 603, 604; ***Leistner v. Leistner***, 137 AD2d 499; ***Entwistle v. Entwistle***, 61 AD2d 380, 384-385).

In ***Miller-Presutti v. Presutti,*** *supra*, the Appellate Division, Second Department, affirmed a transfer of custody to the father upon the Supreme Court's determination that the preexisting joint custody arrangement merely fostered "the endless battle between the parties" and would "only continue to fuel the mother's campaign to portray the father and his family in as evil a light as possible." The Supreme Court further considered as a significant factor, that the mother was "more likely to misuse or abuse the status which may accompany an award of primary custody."

In ***Plaza v. Plaza*** (305 AD2d 607), the Appellate Division, Second Department, affirmed an award of custody to the father where, among other things, the mother had defied the legal process by violating prior court orders and isolating the children from their father when they were in her custody. Additionally, the record had demonstrated that the father was the parent more likely to assure meaningful contact with the other parent. Also, in ***Janecka v. Franklin*** (150 AD2d 755, 757) the court awarded custody to the father noting that "the mother's 'unbridled' anger and hostility toward the [father] ... rendered her less fit as the custodial parent, since her attitude would

substantially interfere with her ability to place the needs of the children before her own in fostering a continued relationship with the noncustodial parent."

While the expressions of preference of the child should be considered in these matters (See, e.g., ***Eschbach v. Eschbach***, 56 NY2d 167; ***Roberts v. Roberts***, 122 AD2d 405; ***Benjamin v. Benjamin***, 114 AD2d 395; ***Lyons v. Lyons,*** 112 AD2d 232), those expressions of preference are not controlling and the weight to be accorded must be measured in light of the age, intelligence and maturity of the child, as well as the child's susceptibility to influence by either parent (***Ebert v. Ebert***, 38 NY2d 700; ***Robert T.F. v. Rosemary F.***, 184 AD2d 449).

The courts have consistently recognized the value of probation and forensic evaluations in custody and visitation matters (See, e.g., ***Bornholdt v. Alfieri,*** 201 AD2d 560; ***Vernon Mc. v. Brenda N.,*** 196 AD2d 823). At the same the time, the Court has discretion to determine the weight to be given to any conclusions reached by experts called on behalf of one party, based upon a review of the adequacy of the information provided that expert and on whether the conclusions were based on a "one-sided description of events" provided by that party (***Palumbo v. Palumbo***, 292 AD2d 358, lv. denied, 98 NY2d 692).

Finally, any custody determination depends to a very great extent upon the court's assessment of the credibility of the witnesses and of the character, temperament and sincerity of the parties (***Matter of Andrew Stratt v. Henry***, ___AD3___, NYLJ, 4/29/04, p. 27, col. 5; ***Canazon v. Canazon,*** 215 AD2d 652, lv. denied, 86 NY2d 710; ***Kuncman v. Kuncman,*** 188 AD2d 517, 518).

DISCUSSION AND FINDINGS

Based on the credible testimony and evidence and having observed and assessed the

demeanor, character and temperament of the witnesses as they testified, the Court finds as follows:

As previously discussed, when the parties initially appeared in this Court in 2001, it was the mother who successfully restricted the father's access to their children for many months, based on her later discredited claims that Anders, the father's older child, posed a serious threat to the parties' younger children. Later, when that proffered reason was found to be without basis, the mother advanced claims that the children were being sexually abused by the father.

As a result of these claims of sexual abuse, the Court again placed substantial restrictions on the father's contacts with the children which continued for an extended period of time. When the sex abuse allegations were determined by CPS to be without basis and "unfounded," and when the school nurse teacher testified that the mother had acknowledged to her that the mother herself had engaged in similar massaging of the children, the mother agreed, in the context of the Supreme Court custody proceeding, to a joint custodial arrangement with the father.

Within a matter of weeks of that settlement, the mother again sought to restrict the father's rights by filing a family offense petition. She obtained an ex parte temporary order of protection which had the practical effect of negating the recently agreed to settlement and again interfered with the father's contact with his children. That temporary order of protection, among other things, provided for visitation by the father "as the parties agreed." As an example of the manner in which the mother sought to use the authority which that order temporarily afforded her, she insisted that the father sign a detailed set of written conditions, which she had devised, before he would be allowed to have contact with the children.

Throughout the time the parties were before this Court and during the time the children were in the primary care of the mother, she repeatedly interfered with the father's telephone access to the

children. The father's calls were met with various excuses for the children's unavailability, such as: they are eating; they are bathing; they are doing their homework; they are getting ready for bed; or, they have gone to bed. Notwithstanding repeated pleas, warnings and later threats of serious consequences, the mother persisted.

It was only in this context, against this extensive background and after having received a forensic report which recommended that it was in the best interests of the children that custody be transferred to the father, that this Court removed the children from the mother's control and influence. The Court did so based upon the mother's persistent lack of understanding of the important role the father had to play in the best interests of the children, and not as an application of the discredited parental alienation syndrome or to punish the mother, as suggested by her attorney.

The Court also restricted the ability of the mother to remove the children from the Court's jurisdiction. As noted above, the Court was and continues to be of the belief that the mother represents a flight risk if she were allowed to have the children in an unsupervised setting. Of particular concern is that the mother has previously utilized unsubstantiated claims of sexual abuse to interfere with the father's contact with the children. If the mother were to take the children to Rhode Island, where her boyfriend lives, or some other state or location and raise those issues, triggering the emergency jurisdiction of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), a court hearing those allegations and not fully familiar with the background of this matter might prevent the return of the children until a thorough investigation was completed. Of even greater concern is the fact that the mother has many friends and relatives abroad. Based on the manner in which the mother has flaunted prior court orders, a flight from this country with the children would not be beyond her capacity.

Even after the mother was restricted to supervised visitation, she persistently questioned and refused to abide by the set of guidelines and rules with which she had agreed to comply as a condition for the visitations to occur. As a result of her noncompliance with program rules, the mother was dismissed from the free YWCA Supervised Visitation Program which operates in the Family Court building.

The Court then permitted her to have visitation supervised by Little Angels, a supervised visitation program which typically requires a $25.00 per hour fee. The mother claimed that this modest fee was more than she could afford, notwithstanding the fact that she was reportedly paying or obligating herself to pay present counsel $1,000.00 per day of trial, in addition to lodging and other expenses. Even at a time when that supervised visitation program reduced or eliminated its fees to accommodate the mother's claimed inability to pay, the mother then, allegedly on advice of counsel, refused to visit with the children, claiming it was unsafe to do so beeause the method of transfer posed a risk of violence by the father. This claim was made notwithstanding that there have not been allegations of physical violence between the parties for many years and that the Court followed the precise recommendation of the supervised visitation program as to how the exchange was to take place.[17] The mother, by her own decision and actions, did not have contact with the children for an extended period of time, including her daughter's birthday and the entire Christmas 2003 holiday period. The mother's claim that the father in some way attempted to prevent even the supervised visits was not supported by any credible evidence.

The mother has also stated that her refusal to visit was part of her "strategy" in this case.

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[17]Counsel for the mother tried to make it appear that the visitation was supervised to protect the mother from the father, and attempted to convince the director of that program to structure the visitation exchanges accordingly. In fact, the supervised visitation was to protect the children from the mother's inappropriate conduct.

Though clearly able to do so, the mother's failure to visit consistently with the children occurred notwithstanding her knowledge that the children missed and wished to see her and notwithstanding her awareness that her failure to contact them was making a difficult time in their lives even more difficult. The mother's own witnesses testified that it was better for the mother to see the children in a supervised setting than not to see them at all. Dr. Sussman testified that the mother's failure to exercise visitation with this knowledge was inconsistent with someone who really wanted to get her children back. Accordingly, the mother's claim that she has been deprived of contact with the children rings hollow.

The mother, who was declared "mother of the year" by one of the groups who has advocated for and supported her throughout these most recent proceedings, refused to pay child support when ordered to do so, claiming it was more important to pay her legal and expert fees. Among other things, this resulted in the electricity to the home in which her children were residing being temporarily interrupted. For an extended period of time the mother also refused to comply with a Court order that directed that she provide the father, who suffers with diabetes and skin cancer, with health insurance available through her employer. In contrast, she acknowledged that when the children were living with her, the father made voluntary child support payments to her.

The extent of the mother's obsession with interfering with the father's right of participation in the lives of these children is equaled only by her present counsel's obsession with advancing domestic violence as the cause of all the problems in this case. This latter obsession is perhaps best exemplified by the comments of mother's counsel, contained in his summation, in which he opines that the reason his recently acquired canine companion was vicious toward him was the result of domestic violence to which the animal was most certainly exposed in the home of its prior owner!

The mother's primary claims as to the father's alleged abuse since their separation have related to his contacting her by phone or otherwise to discuss matters relating to the children. The mother has so convinced herself that she should be in absolute control of the manner in which the children are raised and the contacts that they should have with the father, that any challenge to that control is perceived by her to be a form of harassment. The Court personally observed the mother's adverse reaction, in the courtroom, to any suggestions that the father should have meaningful participation in the lives of the children. The Court does not say that the mother's beliefs in that regard are contrived, simply that those beliefs are inappropriate, wrong and clearly not in the best interests of the children.

Most importantly, over the years, at times in a subtle manner and perhaps at times in an unthinking way, the mother has through her words and actions given the children the impression that the father does not know how to parent and is a bad person. Her messages to the children about the father include, he does not feed you the right things; he dresses you in appropriately for the weather; he does not make sure you get enough sleep; he does not properly attend to you when you are sick; he calls to speak with you at the wrong time; and, he has been bad to Mommy. Accordingly, when those who had contact with the children noted that the children sometimes indicated a sense of insecurity in the father's care, those feelings could well have been the direct product of the mother's inappropriate suggestions to the children. Even when the visits were being supervised, the mother had to be reminded again and again that she was discussing matters with the children that were inappropriate. Rather than accept the rules and enjoy her time with the children, she repeatedly violated and challenged the very guidelines which she had reviewed, signed and agreed to accept.

On a number of occasions counsel for the mother, when questioning various expert witnesses,

asked whether exposing the children to the extreme domestic violence which the mother now claims took place, would have had a greater negative impact on the children than the instances in which the father alleges that he could not get through on the telephone and the alleged negative statements the mother has made about the father. The answer to such a question is obvious. However, this is but another example of the manner in which mother's counsel has sought to twist and distort the facts in order to create the impression that even if the mother had done some of the things the father alleges, her actions pale in comparison to the father's alleged abuse.

Contrary to the image the mother's counsel has sought to create, the record demonstrates that the mother has engaged in an unrelenting and persistent course of conduct which sought to control and restrict the father's relationship with the children and to create an image of the father in the eyes of the children as an incompetent and dangerous individual.

The mother has persistently, through her words and actions, expressed the belief that her way of raising the children is the only right way. As Dr. Sussman indicated in her report, the mother is "rigid in her approach to the world" and "seems to have difficulty seeing that there may be ways to do things other than the way she sees fit." More importantly, she has used every means at her disposal to exclude the father from their lives. As each argument she put forth was discredited, another was advanced.

The one common opinion expressed by the independent experts called upon to evaluate the parties is the mother's unwillingness to accept the father as a meaningful part in the lives of these children and that the mother has directly and indirectly denigrated the father to them.

In order to accept the position advanced on behalf of the mother, the Court would, among other things, have to reject the opinions given by three separate forensic experts, including the

evaluator selected from among the experts suggested by the Director of the Second Department Law Guardian Panel and whose opinion was unshaken after several days of unrelenting cross-examination by the mother's counsel. In addition, to accept the position advanced on behalf of the mother, the Court would also have to reject the findings of the CPS investigation and the recommendations of the Law Guardian.

On the other hand, to accept the position advanced by the mother, the Court would have to adopt the opinions of the mother's experts, most of whom never spoke with the father or the children and who based their opinions on the unverified and uncorroborated self report of facts and events provided by the mother, whose own credibility has been found to be lacking.

In accepting the opinions advanced by the mother's experts the Court would also be accepting opinions based on a systematic and almost unrelenting application of "confirmation bias," characterized by their viewing virtually everything which the father did in the lives of the mother and the children in a negative light, when neutral or even positive interpretations were equally applicable. This practice was repeatedly condemned as inappropriate by the mother's own counsel and at least one of the mother's experts.

To accept the mother's position the Court would also have to adopt the opinions advanced by those experts who testified against the father on the issue of sexual abuse, who, among other things, were never provided with information that the mother also massaged the children. As to the same issue, the Court would have to accept the concerns expressed by Linda Meeker, the nurse teacher, who testified on behalf of the mother and who measured virtually every word she spoke while testifying to avoid saying something which might harm the mother's position. Ms. Meeker based her concerns about the children's conduct on a series of incidents reported to her, without

knowing the context in which most of those incidents took place and who herself, for whatever reason, forgot that she had testified during the earlier Supreme Court trial that the mother had acknowledged to this witness that she had massaged the children in a similar way.

Throughout these proceedings the mother's attorney has repeatedly and unrelentingly accused the Court of being biased and prejudiced against the mother. A review of the entire record of this Court's contact with these parties dispels those charges. Until it became clear to the court that the mother was using the Court to systematically curtail the father's contact with the children, this Court, in every instance provided the mother with the relief which she requested.

"Prejudice" and "bias" are defined as an unfavorable judgment or opinion formed before the facts are known or an opinion held in disregard of facts. In this case, it was only after this Court repeatedly relied upon the truth of assertions made by the mother, assertions which later proved to be without basis; only after this Court repeatedly admonished the mother to discontinue her interference with the father's contacts with the children, admonitions which were consistently ignored; and, only after a forensic evaluation recommended that it would be in the best interests of the children to transfer residential care of the children to the father, that the Court directed such temporary transfer of custody.

Ordinarily, the Court avoids statements regarding counsel for either party. However, present counsel for the mother has conducted himself in a manner which has so negatively pervaded the atmosphere that some comment is necessary.

From the outset the tactics of the mother's attorney have been clear. First, attempt to have this Court recuse itself on baseless grounds and thereby eliminate an important historical perspective on the case. Second, lay the foundation for appellate review by accusing the Court of bias and

incompetence; by charging that the entire local response to domestic violence is inept; by claiming that all the independent evaluators utilized by the Court were not properly attuned to issues of domestic violence; and then by presenting numerous experts, whose expertise was clouded by their roles as advocates on behalf of the mother.

The Court has received many, many letters from the mother's counsel which not only request various forms of relief, but contain insulting, accusatory and derogatory comments about the Court and others involved in this case. All of the correspondence has been made part of the record, as a review of this correspondence is necessary to understand the environment in which this matter has proceeded. The disdain, disrespect and contempt which he has shown toward the Court, opposing counsel, the law guardian, the Supervised Visitation Program, the evaluators and everyone else who did not agree with his views, have created a climate which, unfortunately, makes it very difficult for this Court to fashion any type of order which requires the cooperation of the mother to address the best interests of the children. The uncompromising attitude and singular focus which counsel for the mother has taken from the outset has made any meaningful discussion toward a resolution impossible. One of the most unfortunate results of counsel's approach, including his "strategy" that the mother not utilize supervised visitation, is that the children for extended periods of time have been deprived of contact with the mother which they otherwise would have enjoyed.

In a case where the mother's persistent and longstanding disrespect for numerous Court orders has been a main issue, counsel's attitude, approach and actions have so poisoned the atmosphere, that the Court has little confidence that the mother, against this background, would likely adhere to any future orders which this Court might issue.

While counsel has the right and obligation to vigorously advocate on behalf of his client, Mr.

Goldstein's conduct throughout this matter has far exceeded the bounds of propriety.

DECISION AND HOLDING

Based upon the foregoing it is clear to this Court that there has been a change of circumstances since entry of the joint custody order warranting modification. The acrimonious relationship between the parties and their inability to communicate with respect to the children make a joint custody arrangement unworkable (***Palumbo v. Palumbo***, supra). The Court's earlier hope that the mother would comply with the letter and spirit of the Supreme Court joint custody order has not been realized.

One of the most difficult aspects of this case is the fact that the children are closely bonded to the mother and would like to have more contact with her. For the most part, the mother has provided them with good, wholesome and beneficial care over the years. Except for the mother's ongoing, persistent and obsessive attempts to systematically exclude the father from the children's lives and demonize him, she could be viewed as a very good custodial parent. To his credit, the father has never seriously challenged the mother's abilities in that regard.

At the same time, the children have adjusted to living with the father and, considering all of the circumstances of this case, have been doing remarkably well in his care since he obtained temporary custody in January 2003.

This Court has no reasonable expectation that if custody were placed with the mother there would be anything other than a continuation of the course of conduct in which she has engaged since 2000. The mother has defied every reasonable effort this Court had made to resolve the conflict between these parents in a manner which would permit the children to have significant quality

contact with both of them. The Court is of the further opinion that if the mother were granted custody she would be far more likely to misuse or abuse the authority which such award would provide. On the other hand, the father has demonstrated an ongoing willingness to foster a positive relationship between the children and the mother.

Since the parties have been before the Court, its goal has been to permit both parents to share a significant amount of quality time with their children and to allow each parent to play an important part in their lives. Achieving this goal is the continued hope and desire of the Court. Unfortunately, based upon the mother's conduct in the past, this goal has been extraordinarily difficult to achieve.

Based on the totality of the circumstances and for all of the reasons stated herein, the Court, in the best interests of the children, awards the father sole custody of the parties' children and grants the mother supervised contact as set forth below.

The children clearly need both parents. The conditions and directions set forth below are intended to achieve a normal and positive relationship between the children and both parents.

The continuation of supervised contact for the mother is a temporary situation and its duration to a large extent is within the mother's control. The Court would genuinely prefer that the mother's contact with the children be less restrictive than set forth below. Once the mother can demonstrate to the Court that, in the best interests of the children, she is willing and able to accept and promote the father's role in the children's lives, a more normalized schedule of contact between the mother and children can be implemented. It is the hope of this Court that this goal can be accomplished as soon as possible. Accordingly, the Court orders that:

1. The mother shall continue to have visitation supervised by such public or private agency as may be available to the parties, at a frequency of at least once each week for a period of not less than two nor more than eight hours on any given day, and shall be at a time and location consistent with the schedule and availability of the supervising agency and the parties. The schedule for the

mother's contacts with the children shall be on fixed days and for fixed hours and the Court shall be notified as soon as these arrangements have been made through the supervising agency. Once established, there shall be no deviation from that schedule, except in writing, signed by both parties or by Court order.

a. During her contacts with the children, it shall be a violation of this order for the mother to speak in a derogatory manner about the father, to promote the children's dissatisfaction with the father or to criticize his parenting skills to the children.

b. The mother shall pay the costs for such visits.

c. The supervising agency shall periodically provide progress reports to the Court, law guardian and counsel.

d. The father shall be responsible for transporting the children to the visitation exchange location and the parties shall arrive on time for all visitation exchanges.

2. The mother may send letters to the children, without interference by the father, once each week, provided that copies of all letters to the children are also mailed to the law guardian. In any event, copies of all correspondence, addressed to the children, shall be preserved by the law guardian to permit future review by the Court, should it become necessary.

3. Except in the case of an emergency relating to the children or one of the parties, all communications between the parties shall be in writing by letter or e-mail and shall be preserved in a form which will permit future review. Such written communications shall relate only to matters concerning the health, education, religion and the general welfare of the children.

4. The parties shall stay away from each other, each others' homes and places of employment and shall only have such peaceful contacts and communications as are specifically permitted by the terms of this order.

5. The children shall continue in therapy with their current therapist, Ina Berg, until discharged by the therapist in consultation with the father.

6. The mother and father shall each engage in therapy[18], with separate therapists, who shall communicate with one another for the purpose of establishing a regime of treatment which will have as its primary therapeutic goals: that the children have a healthy relationship with each parent; that the mother be able to accept the role of the father in the children's lives and have unsupervised contact with the children; and that the other issues raised in the forensic reports be addressed. The law guardian shall provide the therapists with copies of the forensic reports. The therapists shall also consult with the children's therapist, Ina Berg, to the extent that such contacts may be deemed appropriate and beneficial to carry out the therapeutic goals set forth herein. Counsel for the parties

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[18] See, ***Matter of Williams v. O'Toole***, 4 AD3d 371; ***Landau v. Landau***, 214 AD2d 541).

shall, on or before June 11, 2004, exchange and submit the names of three therapists to the Court and the law guardian, together with their CV's, rates and availability. If the parties are unable to agree on the two therapists to be utilized, the Court will make a determination based on the submissions. Each party shall remain in therapy until discharged by his or her therapist.

7. Each party shall execute such releases as may be necessary to carry out the terms of this order and permit the professional contacts and exchanges outlined.

8. The mother shall be entitled to copies of all written reports and information from the children's school teachers and health care providers and other individuals involved in the children's education and health care. However, the parties' contact with the children's therapist shall be limited to such contacts as the therapist deems necessary and appropriate for treating the children.

9. Both parents are directed to comply with "Bill of Rights for Children Whose Parents are Separated," attached hereto and made a part hereof, except to the extent that the mother, for the present, may not have telephone contact with the children.

10. Neither parent may remove the children from the United States. The Law Guardian shall notify the Immigration and Naturalization Services of this restriction in whatever format the INS requires.

11. All appointments of counsel shall continue for one year from the date of this decision and order.

12. To protect the parties' children, the Court, in the strongest terms, urges the parties, counsel and those associated with the parties to refrain from making public or other comments which are likely to cause embarrassment, anxiety or other harm to the children.

13. All conditions set forth above shall continue until further order of the Court.

The foregoing shall constitute the decision and order of the Court regarding all applications pending before the Court.

SO ORDERED.

Dated: Poughkeepsie, NY
May 10, 2004

HON. DAMIAN J. AMODEO
Judge of the Family Court

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of an order entered in the office of the Clerk of the Family Court of the State of New York in the County of Dutchess on May 10, 2004.

Peter A. Palladino
Chief Clerk of the Court

NOTICE OF APPEAL

PLEASE TAKE NOTICE THAT the Family Court Act provides that an appeal may be taken from an order of this Court to the Appellate Division, Second Department. Section 1113 of the Family Court Act provides that the appeal must be taken no later than thirty (30) days of receipt of the order by appellant in court , 35 days from the date of mailing of the order to the appellant by the clerk of the court, or 30 days after service by a party or the law guardian upon the appellant, whichever is earliest.

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