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Local Commissioners Memorandum

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To:	Local District Commissioners
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Subject:	Summary of New York State Court of Appeals Decision, Nicholson, et al. v. Scopetta, et al.
Contact Person(s):	See Page 4
Attachments:	None
Attachment Available On – Line:	N/A

I. Purpose

The purpose of this memo is to provide social services districts with a summary of the recent New York State Court of Appeals decision in Nicholson, et al. v. Scopetta, et al. , which answers three specific questions regarding the meaning of State law governing child protection in cases where there are allegations of domestic violence.

II. Background

The case initially was brought in federal court by parents whose children had been removed from their homes by the New York City Administration for Children's Services (ACS) in child protective cases involving domestic violence. The United States District Court for the Eastern District of New York held that ACS, as a matter of policy, removed children from mothers who were victims of domestic violence solely because they allowed their children to witness the abuse. ACS appealed that decision to the United States Court of Appeals for the Second Circuit (Second Circuit). In reviewing the case, the Second Circuit decided that it could not determine the appeal until the New York State Court of Appeals answered three certified questions regarding what New York Law requires in relation to child protective services cases involving victims of domestic violence, 344 F.3d 154 (C.A.2, 2003). The New York State Court of Appeals (Court) issued its decision answering the three certified questions on Tuesday, October 26, 2004. The Court's decision was based on its interpretation of existing State statutory law.

III. Program Implications

First Certified Question

> Does the definition of a "neglected child" under Family Court Act (FCA) §1012(f), (h) include instances in which the sole allegation of neglect is that the parent or other person legally responsible for the child's care allows the child to witness domestic abuse against the caretaker?

The Court answered no and held that more is required under New York law for a finding of neglect against a victim of domestic violence than proof of the fact that the child witnessed domestic violence against the victim. The Court held that for the family court to find neglect there must be "proof of actual (or imminent danger of) physical, emotional or mental impairment to the child." Imminent danger of impairment must be near or impending, not merely possible. The Court also provided guidance on the meaning of the term "minimum degree of care." The Court described the term as referring to a baseline of proper care that all parents must meet regardless of lifestyle, social position or economic position and noted that the standard is minimum degree of care, not maximum or ideal care. In addition, the Court held that there must be "a link or causal connection" between the allegation of neglect and the circumstances that allegedly produced the impairment or imminent danger of impairment of the child. This is consistent with the State's long-standing understanding and interpretation of the statutes and is not a departure from the policy the State has previously promulgated.

For impairment of emotional health to be established, the statute requires that the "impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child," FCA §1012(h). The Court established an objective reasonable person standard to determine whether a parent exercised a minimum degree of care: "[W]ould a reasonable and prudent parent have so acted, or so failed to act, under the circumstances then and there existing." This standard includes consideration of "the special vulnerabilities of the child." The Court also noted that, while expert testimony may often be necessary to show impairment of emotional health or imminent risk thereof and to show that the impairment or risk is clearly attributable to the failure of the parent to exercise a minimum degree of care, the statute does not require such testimony. This is an important clarification, as earlier case law has sometimes suggested that expert testimony was essential to a showing of neglect based on impairment or imminent danger of impairment of a child's emotional health.

The Court concluded that, for a victim of domestic violence, the fact-based inquiry must be made based upon the severity and frequency of the violence and the resources and options available to the victim, and must include consideration of the risks attendant to leaving, risks attendant to staying and suffering continued abuse, and risks attendant to seeking assistance through government channels, criminal prosecution of the abuser and relocation. The Court gave two examples of where a victim of domestic violence could be found to have neglected her child: where the mother acknowledged the child knew of repeated violence and had reason to be afraid of the batterer, yet the victim allowed the batterer to return to their home several times; and where the child was regularly or continuously exposed to extremely violent conduct between the parents and there was proof of the fear and distress of the child as a result of long exposure to the violence. However, the Court was clear that if the sole allegation is that the mother was abused (i.e., was a victim of domestic violence) and the child witnessed the abuse, a showing of

neglect could not be made. In order to maintain a charge of child neglect, there would have to be proof that the child was actually harmed or placed in imminent danger of harm because of the mother's failure to exercise minimal care.

Second Certified Question

> Can the injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a parent or other caretaker constitute "danger" or "risk" to the child's "life or health," as those terms are defined in FCA §§1022, 1024, 1026-1028?

The Court re-stated this question to ask whether emotional injury from witnessing domestic violence can rise to a level that establishes an "imminent danger" or "risk" to a child's life or health, so that removal is appropriate either by court order or as an emergency removal without a court order. In answer to the second certified question, the Court held that before issuing a removal order, the family court must do more than identify imminent risk of serious harm. The family court must weigh whether the harm can be mitigated by reasonable efforts to prevent removal and must determine whether removal is in the best interests of the child by balancing the risk if the child stays in the home against the harm removal might cause the child. The Court also held that the mere fact a child witnessed domestic violence is not a presumptive or sufficient basis for removal. The Court specifically rejected the use of the doctrine of "safer course" where there is a "dearth of evidence" of actual harm to the child or as a "watered-down, impermissible presumption" that if a child has witnessed domestic violence they are harmed. The "safer course" doctrine has been used as the justification for a determination to keep a child in care pending the full factfinding hearing on the alleged abuse or neglect when there is any question whether the child will be safe if he or she remains at home.

The Court clearly stated that where the circumstances are not so exigent, such as where it is alleged that the child has been emotionally harmed, the agency should "bring a petition and seek a hearing prior to removal of the child" under FCA §1027 (emphasis in the original). If the agency believes there is insufficient time to file a petition and hold a preliminary hearing, an *ex parte* application may be made to the family court under FCA §1022 only if the parent is absent or the parent has been asked and has refused to consent to removal and was told that an *ex parte* order would be sought. In addition, such an application should be made then only if the child appears to suffer from abuse or neglect of a parent to the extent that immediate removal is necessary to avoid imminent danger to the child's life or health. Finally, the Court emphasized that emergency removal without a court order under FCA §1024 may only be used in the most urgent circumstances of very grave danger to the life or health of the child. The Court established a stringent standard. Emergency approval is appropriate where the danger is so immediate and so urgent that the child's life or safety will be at risk before an *ex parte* order can be obtained. To further illustrate this standard, the Court cited with approval the holding in *Gottleib v. County of Orange*, which required that there must be persuasive evidence of serious ongoing abuse based upon the best investigation reasonably possible under the circumstances, and that the agency has reason to fear imminent recurrence. *Gottleib v. County of Orange*, 871 F.Supp 625 (S.D.N.Y., 1994). The Court further held that it would be a rare circumstance where emergency removal would be justified where the injury at issue is emotional injury or, even more remotely, the risk of such injury caused by witnessing domestic violence.

Third Certified Question

> Does the fact that the child witnessed such abuse suffice to demonstrate that "removal is necessary" FCA §§1022, 1024, or 1027or that "removal was in the child's best interests" FCA §§1028, 1052(b)(i)(A), or must the child protective agency offer additional, particularized evidence to justify removal?

The Court determined that there must be separate, case specific evidence to support the determination of removal, including, where appropriate, evidence of efforts made to prevent or eliminate the need for removal and the impact of the removal on the child. Although competent expert testimony regarding a child's emotional condition may be submitted to show that "any impairment of emotional health is clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child", expert testimony is not required to establish emotional harm to a child.

IV. Additional Information

Social services districts must provide child protective services in accordance with the Court of Appeals decision. OCFS anticipates providing additional information pertaining to the practice implications of the decision at a later date.

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