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Appeals Court to Weigh Duty of Abused Mother; A Closely Watched Case Addresses Whether Letting Children See Violence Equals Neglect

By John Caher

[ALBANY] – Does a battered woman’s failure to prevent her children from witnessing her own abuse automatically imply neglect?

That question is at the center of a pivotal case that will confront the Court of Appeals when the judges of the state’s highest court open their September session this afternoon.

Nicholson v. Scopetta, 113, is a nationally watched case on the state’s obligation to protect children, and whether its obligation to take protective action is implicated when a woman will not or cannot leave an abusive relationship.

The case came to Albany via the Second Circuit U.S. Court of Appeals, which certified three questions. The case is rooted in a class action in which Eastern District Judge Jack B. Weinstein enjoined New York City from removing children because they witnessed beatings inflicted upon their mother.

“The government may not penalize a mother, not otherwise unfit, who is battered by her partner, by separating her from her children; nor may children be separated from the mother, in effect visiting upon them the sins of their mother’s batterer,” Judge Weinstein wrote.

The judge found that removing children who witness abuse, without further evidence of physical or psychological harm, violates due process and the constitutional safeguard against unreasonable seizures.

After that ruling and the imposition of an injunction, New York City and its child welfare administrator filed an interlocutory appeal with the Second Circuit, which resulted in certification of three questions:

§ Does the definition of a “neglected child” in the Family Court Act include “instances in which the sole allegation of neglect is that the parent” or guardian “allows the child to witness domestic abuse against the caretaker?”

§ Can the harm or potential harm suffered by a child who witnesses domestic abuse constitute a “danger” or “risk” to the child’s life or health as defined the Act?”

§ Is the fact that the child witnessed abuse sufficient to show that removal is necessary and in the best interests of the child, or “must the child protective agency offer additional, particularized evidence to justify removal?”

Advocacy and legal groups nationwide are watching this case. The Court of Appeals has accepted a total of nine amicus curiae briefs from various interested parties. The Court is expecting an overflow crowd and has announced that a Webcast of the entire proceeding will be available by tomorrow morning at www.courts.state.ny.us/ctapps.

Scheduled to argue are Assistant Corporation Counsel Alan G. Krams for the city; David J. Lansner of Lansner & Kubitschek in Manhattan for the mothers; and Judith D. Waksberg of the Legal Aid Society in Manhattan for the children.

Mr. Krams, in his brief, insists that the city does not summarily remove children only because they witnessed abuse. He said removals are conducted on a case-by-case basis.

However, he said “parents are expected to do more than refrain from affirmative misconduct that may injure their children. They must also protect their children from dangers created by others ...”

Mr. Lansner does not dispute that point.

But he disagrees with the city’s apparent assumption that its welfare agents are better suited to determine a child’s best interests than the battered parent. He also said the city’s practice of removing children from abusive households wrongly assumes the mother has a better choice than to remain in the relationship.

“[S]eparation does not equal safety,” Mr. Lansner said in his brief. “Leaving is not an appropriate safety plan for many mothers because it actually may increase danger to mothers and children.”

Ms. Waksberg said the Court should not conclude that “the mere existence of domestic violence in the home” is “sufficient to show that the children’s physical, mental, or emotional condition has been or is at risk of being impaired.”

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– John Caher can be reached at <mailto:jcaher@amlaw.com>

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