A Case Study in Post-*Nicholson* Litigation

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In 2004, the New York State Court of Appeals handed down the landmark decision, *Nicholson v. Scoppetta*, the culmination of a federal class action lawsuit initiated in 2000 on behalf of victims of domestic violence and their children. [1] In its unanimous decision, New York's highest court held, in part, that a court reviewing a Family Court Act article 10 petition *may not* find "a respondent parent responsible for neglect based on evidence of two facts only: that the parent has been the victim of domestic violence, and that the child has been exposed to that violence." The Court of Appeals held that "more is required for a showing of neglect under New York law than the fact that a child was exposed to domestic abuse against the caretaker. Answering the question in the affirmative, moreover, would read an unacceptable presumption into the statute, contrary to its plain language."[2]

The Court also ruled that, as in other neglect cases, a court must consider whether the domestic violence victim exercised "a *minimum* degree of care, not maximum, not best, not ideal" and "*under the circumstances then and there existing*." The Court emphasized that there must be proof of harm or danger of harm to the children and the focus must be on "serious harm or potential harm." The harm cannot be merely possible; it must be near or impending. The Court rejected the presumption of emotional harm from witnessing domestic violence because not every such child suffers such harm.

The Court also addressed the question of removals of children from victims of domestic violence, a very important issue which I have not dealt with in my

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[1] *Nicholson v. Scoppetta,* 3 N.Y.3d 357, 820 N.E.2d 840, 787 N.Y.S.2d 196 (2004). The litigation included a two month trial involving 44 witnesses, hundreds of exhibits, thousands of pages of discovery, numerous depositions and many fully briefed motions. The background of the case is set forth in an article by lead trial counsel for the plaintiff mothers, my esteemed colleague, David Lansner.

[2] *See Nicholson*, 3 N.Y.3d at 368, 820 N.E.2d at 844, 787 N.Y.S.2d at 200.

current practice. However, at the time *Nicholson* was brought, the City and other New York jurisdictions routinely removed children from victims of domestic violence on the assumption that children exposed to domestic violence were necessarily harmed. The *Nicholson* litigation challenged that myth and the Court of Appeals addressed that issue in great detail.

As a member of the *Nicholson* trial team representing the mothers in the class action litigation – and like many advocates and academics – I had high hopes that this decision would eliminate the "pitiless double abuse" of being both a victim of domestic violence and a respondent in a neglect case because of your victimization.[3]

Domestic Violence Victims Still Subject to CPS Scrutiny

I left private practice in New York City and, after having children of my own, returned to work in the legal department of a domestic violence agency in a New York suburban county. After almost four years since *Nicholson v. Scoppetta* was decided, I recently found myself representing yet another battered mother charged with neglecting her children by "engaging in domestic violence" and failing to engage in domestic violence counseling services. More troubling was that the investigation and prosecution evidenced a victim-blaming mentality and an apparent adherence to a checklist model of safety planning which did not take my client's individual circumstances into account.

The facts of my case were fairly simple and very similar to many of the *Nicholson* Plaintiffs.[4] My client a victim of domestic violence and only one incident of domestic violence took place while the children were present in the household. In both the neglect petition and in the Child Protective Services ("CPS") investigation, no facts supporting actual or imminent harm were ever proffered. When my client was assaulted and her children were present in the household, she permanently severed her relationship with her assailant.

Our Application of *Nicholson*

My friend jokes that you should never let the facts get in the way of a good story. This adage seems to apply to child welfare cases as well, but instead of a good story, it can lead to real injustice. In my recent case, the actual facts of what had transpired between the victim and her assailant were very different from what CPS recorded in its investigation and different again from what was alleged in the neglect petition.

Upon accepting the case, our first step was to reach out to opposing counsel. But, the repeated misrepresentation of our client's case became the facts in the

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[3] *See* Justine Dunlap, *Judging Nicholson: An Assessment of Nicholson v. Scoppetta*, 82 Denv. U. L. Rev. 671, 680 (2005).

[4] Some facts are withheld to protect the client's privacy.

minds of the Assistant County Attorney, and the CPS caseworker. Our attempts to correct their misunderstanding of the case were not accepted which impeded an early settlement.

Having no other obvious options, we decided to litigate. The pleadings contained only vague statements such as the domestic violence was ongoing, with no specific date references, other than the single incident that caused our client to permanently sever her relationship with the abuser. As an initial step, we served a demand for discovery, a demand for expert witnesses and a demand for witness information. In response, we received CPS' case file, but no more. The case file didn't offer an explanation for the allegations in the petition and contained no allegation as to any harm to the children caused by the victim parent's behavior. These deficiencies, in turn, led us to serve a demand for a bill of particulars.[5]

We also made a motion to dismiss the petition or, in the alternative, for summary judgment, which relied heavily on *Nicholson*'s core holdings. In our motion, we emphasized that: (1) a mother may not be held responsible for neglect based merely on evidence that she was a victim of domestic violence and that her child may have witnessed the violence; (2) her failure to comply with services does not constitute neglect (3) the failure to allege harm or the threat of harm to the children is fatal to a neglect charge; and (4) the lack of a causal connection between any alleged harm and the victim parent's actions is also fatal. We also attempted to highlight the fact that a domestic violence victim's actions must be viewed in light of what she knew about her particular situation, including the risks of leaving the perpetrator.[6] We emphasized that failure to comply with service recommendations does not constitute neglect.[7] We also made a motion to dismiss because the aid of the court was no longer needed.[8] If the purpose of the proceeding is to protect children and not to punish parents, then it follows that "there is no need to expend judicial resources on the family."[9]

Finally, since we did not know if the Court would grant our dispositive motion in advance of trial (if at all), we made a motion for leave to take the deposition of the CPS caseworker and her supervisor.[10]

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[5] In New York, a party can be required to serve a bill of particulars on those items which the party has the burden of proof – it amplifies the pleadings. *Connelly v. Warner*, 248 A.D.2d 941, 670 N.Y.S.2d 293 (4th Dep't 1998). CPS has the burden of proving that the allegations in the petition rise to the level of neglect as defined by the Family Court Act.

[6] *See Nicholson*, 3 N.Y.3d at 371, 820 N.E.2d at 847, 787 N.Y.S.2d at 203.

[7] *See also Matter of H/R Children*, 302 A.D.2d 288, 756 N.Y.S.2d 166 (1st Dep't 2003).

[8] NY FCA § 1051(c) provides for dismissal if the Court determines its aid is no longer needed.

[9] *See* Jill Zuccardy, *Representing Domestic Violence Victims in Child Welfare Cases*, Lawyers Manual on Domestic Violence, 5th Ed. 2006. This article is an excellent resource for anyone litigating a *Nicholson* type case.

[10] Proceedings brought under the Family Court Act are considered special proceedings and as such are governed by Article 4 of the CPLR, which requires the parties to seek the Court's permission to conduct certain types of discovery, including depositions. CPLR §408. The Family Court Act itself "authorizes liberal disclosure in child protective proceedings," *In the Matter of*

The Assistant County Attorney did serve a bill of particulars, but it included only objections and no substantive responses, leading us to serve a motion to compel. The penalties for failure to serve a proper bill of particulars include, but are not limited to, an order (1) deeming all relevant facts resolved for the purposes of the action in favor of the party obtaining the order; (2) prohibiting the disobedient party from supporting or opposing designated claims, from using certain evidence and certain witnesses; or (3) striking out certain sections of the pleadings or rendering a judgment by default against the disobedient party.[11,12] The Court denied our motions to dismiss and for depositions, but ultimately, with two weeks to go before trial, it granted our motion to compel. The County complied with the order and the amended bill of particulars clarified the factual basis for the County's cause of action, allowing us to better prepare for trial.

As part of our trial preparation, we determined that we needed the aid of an expert to educate the Court and CPS. Our goal was for the expert to focus on the inherent flaws in blaming the victim—and in particular blaming our client—for not leaving her abuser sooner. The expert could explain that leaving abusive relationships does not decrease the probability that additional violence will occur again and the risk of severe or fatal injury increases with separation from the abuser. Our expert was also prepared to testify that a victim of domestic violence is in the best position to assess her safety and her children's safety and it is dangerous for CPS to second guess and blame a victim of domestic violence.[13]

Tricia K, 160 Misc.2d 935, 936, 611 N.Y.S.2d 978, 979 (Kings Cty. Fam. Ct. 1994) and permits the application of CPLR §3101 and § 3102 disclosure to child protective proceedings. FCA §1038(d); *See also*, *In re Crystal "AA",* 271 A.D.2d 771, 705 N.Y.S.2d 208 (3rd Dep't 2000) "Unless otherwise proscribed by this article, the provisions and limitations of article 31 of the civil practice law and rules shall apply to proceedings under this article." FCA §1038(d). In addition, the notes following FCA §1038(d) indicate that depositions are included in the list potential disclosure devices available to parties. *See* McKinney's FCA §1038; Practice Commentaries, 1998 Main Volume, by Douglas J. Besharov.

[11] *See* CPLR §3042(c), (d); CPLR § 3126.

[12] Judges are often reluctant to order penalties on the first application, however, where an order to provide a proper bill of particulars is ignored, courts readily impose sanctions. *See, e.g., Glanville v. Lets Care Again Daycare, Inc.*, 40 A.D.3d 580, 833 N.Y.S.2d 402 (2d Dep't 2007) (finding a pattern of willfulness where plaintiffs failed to serve a bill of particulars upon demand, failed to timely comply with a preliminary conference order and failed to timely oppose a motion).

[13] In our case, the caseworker's actions, at times, put our client at further risk. For example, immediately after the assault, our client separated from the abuser and left the marital residence until she could establish that her assailant was permanently gone from the residence. Within days of the assault, the CPS caseworker insisted that our client meet her at the marital residence. When our client explained she was not sure if it was safe, the caseworker said that she had to come and bring her children. Feeling that she had no other options, our client came with her children but brought along other family members for protection. After she arrived, the caseworker told her that the caseworker had called the marital residence less than an hour before my client arrived, the father had picked up the phone.

Even though the Court denied our motion to dismiss, the motion succeeded in drawing attention to the real facts of our client's case and educating the Judge about the impact of domestic violence on our client. We succeeded in putting her actions in the proper light and had set the stage for trial and settlement.

On the day of trial, the Judge worked with the parties throughout the day to broker a settlement, providing for a consent finding with an adjournment in contemplation of dismissal ("ACD"). In essence, the finding would be held in abeyance for a six month supervisory period (the ACD period) during which time our client would be subject to CPS supervision. At the conclusion of the supervisory period, the case would be dismissed against her. While the client wanted—and we felt strongly about her ability—to vindicate her rights at trial, the time that it would take to complete the trial would exceed the amount of supervision set forth in the settlement.[14] The settlement that we were ultimately able to negotiate was a good option for the client and one that may not have been available but for the litigation we pursued. The fact that both the Court and CPS knew that we had a very strong case that we were fully prepared to litigate clearly influenced the settlement discussions.

Lessons Learned

In this case, we challenged CPS with ordinary litigation techniques, which provoked extraordinary responses. The motion practice we pursued in Family Court, considered routine in most other courts, was viewed as being litigious by the County. Opposing counsel expressed feeling papered to death – a phrase I heard often while litigating Article 10 cases in New York City against the Administration for Children's Services ("ACS"). Other child welfare practitioners in our area cautioned us that written motions, applications to take depositions and demands for a bill of particulars in neglect cases were rarely done in this practice.

Because I work in the legal department of a comprehensive domestic violence services agency that has an ongoing relationship with CPS, I have a new view of this work. This vantage point may afford me and my colleagues the opportunity to reach out to CPS early in a child welfare investigation and long before litigation commences. Indeed, since resolution of the court case, our agency has engaged in discussions with the County Attorney and CPS offices to enhance our ability to work more collaboratively in this regard. As a result, additional channels of communications with both offices have been opened to allow us to clarify the facts of a case and advocate for clients prior to litigation. Because our ability to fully litigate these cases on behalf of domestic violence victims has become known, we hope that we will be able to work with CPS early in their investigations and perhaps deter inappropriate prosecutions.

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[14] The practice of this Family Court is for the trial to be scheduled on non-consecutive days over the course of months with CPS supervision remaining in place pending the outcome.

Our county's CPS and County Attorney offices are still learning about *Nicholson* and the dynamics of domestic violence and child welfare. We will continue to litigate compelling *Nicholson*-type cases, to the extent permitted by our limited resources. But, litigation will not be our only avenue for change. Both CPS and the County Attorney have expressed an interest in receiving training from our agency, which may go a long way toward educating their staff on the meaning of *Nicholson* and addressing entrenched attitudes, which often lag far behind the law.

Advice To Practitioners

- Analyze the petition carefully. Does it state a cause of action under the standards set by *Nicholson*? Consider making a demand for a bill of particulars.

- Obtain and review the CPS case file. Analyze the evidence CPS will present and develop your client's response.

- Do your own investigation. Talk to experts who can guide you in developing your theory of the case and/or serve as a trial expert.

- Use any existing relationship with CPS to pursue any non-litigation channels. Consider drafting an advocacy letter to CPS.

- Consider making discovery motions, motion to dismiss, motions for summary judgment and motions *in limine* (e.g., to limit CPS from introducing expected hearsay testimony at trial or on other evidentiary issues).

- Develop relationships with law firms who can offer pro bono assistance.