

116 Fed.Appx. 313

This case was not selected for publication in the
Federal Reporter.

United States Court of Appeals,
Second Circuit.

Sharwline NICHOLSON, individually and on
behalf of her infant children, Destinee Barnett and
Kendell Coles, infants, and on behalf of all others
similarly situated; Destinee Barnett, Kendell
Coles, infants; Sharlene Tillett, individually and on
behalf of infants Winston Denton and Uganda
Gray; Ekaete Udoh, individually and on behalf of
her infant children, Edu Udoh, Ima Udoh, Nsikak
Udoh and Asuno Udoh; and J.A. and G.A., infants
on behalf of all others similarly situated, Plaintiffs-
Appellees,

v.

Nicholas SCOPPETTA, individually and as
Commissioner of Administration for Children's
Services; City of New York; George E. Pataki, as
Governor of the State of New York; John E.
Johnson; and State of New York, Defendants-
Appellants,

Nat Williams, individually and as manager; Bethy
Victorin; Denise Degannes; Samuel Halstion; Lisa
Clark; Howard Safir; Vivian Lopez, also known as
Jane Lopez; Arlene Irizarry; Vincent Stropoli;
Brian Martin, also known as James Roe; Jonathan
Lippman; Jane Doe, individually and attorney for
the Administration for Children's Services; John
Doe, individually and as Police Officers; YMSI
Holloway, individually and as Supervisor; Cheryl
Constantine, individually and as Supervisor; Nidia
Cordero, individually and as Supervisor; Dorabella
Delamothe, individually and as Manager; Shakira
Panther-Wilbur, individually and as caseworker;
Sylvia Parris, individually and as a caseworker for
the Administration for Children's Services; Jane
Dorabella, individually and as supervisor for the
Administration for Children's Services; and John
Tai, individually and as supervisor for the
Administration for Children's Services,
Defendants,

Safe Horizon, Amicus.

Nos. 02-7079(L), 02-7329(CON), 02-7419(CON),
02-7086(CON), 02-7412(CON), 02-7088(CON),
02-7414(CON), 02-7119(CON).

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Nov. 30, 2004.

ON CONSIDERATION WHEREOF, IT IS HEREBY
ORDERED, ADJUDGED, AND DECREED that the case
be and hereby is REMANDED to the district court.

Attorneys and Law Firms

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Lawrence E. Jacobs (Frank S. Moseley, Zachary S. McGee, Kelli Stenstrom, Michael Farbiarz, Elliot Moskowitz, John Gaffney, on the brief), Davis Polk & Wardwell, New York, NY, Michael Miller, Norman L. Reimer, New York County Lawyers' Association, New York, NY, on behalf of Amicus Curiae New York County Lawyers' Association.

Present: WALKER, Chief Judge, OAKES, and KATZMANN, Circuit Judges.

AMENDED SUMMARY ORDER

****1** Defendants-Appellants City of New York and the Administration for Children's Services ("ACS"), the City's chief child-welfare administrator, appeal a preliminary injunction issued by the United States District Court for the Eastern District of New York (Weinstein, J.). The district court found that the ACS "systematically and repeatedly removed children" from a custodial parent based solely on a finding that the custodial parent was a victim of domestic violence and allowed the child to witness that violence. *In re Nicholson*, 181 F.Supp.2d 182, 184 (E.D.N.Y.2002). Holding that this practice

violated plaintiffs' due process and Fourth Amendment rights, the district court enjoined the defendants-appellants, *inter alia*, from removing or seeking to remove children "solely because the mother is a victim of domestic violence except in cases where the child is in such imminent danger to life or health that he or she must be removed and there is not reasonably sufficient time to obtain a court order." *Id.* at 182, 190-91. Familiarity with the facts and procedural history of this case, as set forth in our decision in *Nicholson v. Scoppetta*, 344 F.3d 154, 158-64 (2d Cir.2003), is assumed.

Having found that the Family Court Act is "fairly susceptible to an interpretation by the New York Court of Appeals that would avoid or significantly alter the substantial constitutional questions presented in this appeal," we certified the following questions to the New York Court of Appeals:

1. Does the definition of a "neglected child" under N.Y. Family Ct. Act § 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?
2. Can the injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a *316 parent or other caretaker constitute a "danger" or "risk" to the child's "life or health," as those terms are defined in the N.Y. Family Court. Act §§ 1022, 1024, 1026-1028?
3. Does the fact that the child witnessed such abuse suffice to demonstrate that "removal is necessary," N.Y. Family Court. Act §§ 1022, 1024, 1027, or that "removal was in the child's best interests," N.Y. Family Ct. Act §§ 1028, 1052(b)(i)(A), or must the child protective agency offer additional, particularized evidence to justify removal?

****2** *Nicholson*, 344 F.3d at 176-77. The New York Court of Appeals accepted certification, *Nicholson v. Scoppetta*, 1 N.Y.3d 538, 807 N.E.2d 283, 775 N.Y.S.2d 233 (N.Y.2003) (mem.), and has now rendered its decision on the certified questions, *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 787 N.Y.S.2d 196, 820 N.E.2d 84 (2004).

In its opinion, the New York Court of Appeals made clear that a child's exposure to domestic violence against their caretaker is, standing alone, insufficient to constitute "neglect" under New York law. *Nicholson*, 3 N.Y.3d at 359, 787 N.Y.S.2d 196, 820 N.E.2d 840. The New York Court of Appeals also examined whether the emotional harm, if any, suffered by a child exposed to domestic

violence might warrant the “trauma of removal,” and set forth the calculus for ascertaining when removal is appropriate. The court wrote:

The court must do more than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child’s best interest.

Additionally, the court must specifically consider whether imminent risk to the child might be eliminated by other means....

Id. at 358. Moreover, the decision clarified that this calculus varies depending upon the mechanism used for removal-whether it be by consent, post-petition order, *ex*

parte order, or emergency removal without a court order, *id.* at 358-and noted that “it must be a rare circumstance in which the time would be so fleeting and the danger so great that emergency removal would be warranted,” *id.* at 358. However, the New York Court of Appeals did not apply their analysis to the trial record at hand. *Id.* at 358 n. 5.

Accordingly, we REMAND this case to the district court for reconsideration in light of the opinion of the New York Court of Appeals.¹

All Citations

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Footnotes

- 1 We note that the district court has already amended that portion of the preliminary injunction that dealt with attorney fees. See *Nicholson v. Williams*, 294 F.Supp.2d 369, 370-71 (E.D.N.Y.2003) (excising attorney fee requirements from the preliminary injunction).