

**COURT OF APPEALS
STATE OF NEW YORK**

In the Matter of

TRENASIA J. (Anonymous),
ADMINISTRATION FOR CHILDREN'S SERVICES,

Respondents,

FRANK J. (Anonymous),

Appellant

(And Three Other Proceedings)

***AMICUS CURIAE* BRIEF OF THE BRONX DEFENDERS,
BROOKLYN DEFENDER SERVICE, CENTER FOR FAMILY
REPRESENTATION, INC., and NEW YORK
UNIVERSITY SCHOOL OF LAW FAMILY DEFENSE CLINIC**

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STATEMENTS OF INTEREST

Amici are legal advocacy and academic organizations who collectively have represented thousands of parents each year in New York City in abuse and neglect and termination of parental rights proceedings in Family Court. Amici have a strong interest in ensuring the integrity and accuracy of those proceedings. We submit this brief to present to the Court the perspective of family court practitioners regarding the risks posed by judicial expansion of the hearsay exception beyond the terms of the statute.¹

Amici strongly believe that findings of child neglect or abuse against parents or caregivers must be based on reliable evidence. Without such adherence to the rules of evidence, the child protection system will inflict needless harm and result in the unnecessary dissolution of indigent families. Child abuse and neglect proceedings implicate the fundamental constitutional liberty interests of a parent in the care and custody of one's children and of a child in the relationship with his or her parent. Amici argue that the judicial expansion of the hearsay exception is contrary to the statutory text and the legislative intent and that the risks of error and the threat to these constitutional interests posed by the expansion are not

¹Amici do not take a position as to those parts of the Appellate Division's decision addressing the "person legally responsible" analysis and regarding derivative neglect.

justified by any corresponding benefits.

Amicus Curiae **The Bronx Defenders (BXD)** employs a groundbreaking system of holistic representation to provide criminal defense, family defense, immigration, civil legal services, social work support and advocacy to indigent people in the Bronx. The attorneys, social workers, and parent advocates in BXD's Family Defense Practice are funded by New York City to represent parents and caregivers in Article 10 and Termination of Parental Rights proceedings in New York City Family Court, Bronx County. BXD has represented over 6,000 indigent parents and caregivers and represents an additional 1,000 parents each year. BXD is committed to providing quality legal representation to indigent parents accused of abuse and neglect and facing the possible termination of their parental rights, as well as to assisting families in accessing quality social services in order to keep children safe and out of state care.

The Bronx Defenders, a not-for-profit corporation, does not have any parents, subsidiaries, or affiliates. *See* Rule 500.1(f) of this Court.

As the largest Brooklyn-based legal services provider, Amicus Curiae **Brooklyn Defender Services (BDS)** provides comprehensive legal representation

to 45,000 low-income Brooklyn residents each year who are arrested, charged with abuse or neglect of their children or are in immigration detention. Funded by the City of New York, BDS's Family Defense Practice has been representing respondents in Article 10 cases in Kings County Family Court since 2007. BDS represents 1,000 new respondents each year - the vast majority of respondents in Brooklyn Family Court. Now in its eighth year, the family defense practice's interdisciplinary team of attorneys, social workers and parent advocates has served nearly 6,000 families and is currently representing over 1,900 families in Article 10 proceedings in Family Court.

Brooklyn Defender Services, a not-for-profit corporation, does not have any parents, subsidiaries, or affiliates. *See* Rule 500.1(f) of this Court.

Amicus Curiae New York University School of Law Family Defense Clinic was established in 1990 to train students to represent parents accused of child abuse and neglect and prevent the unnecessary break-up of indigent families. A pioneer of interdisciplinary representation in the field, the clinic teaches law and graduate-level social work students to collaborate to protect family integrity and help families access services that keep children safe and out of foster care. Under supervision, clinic students represent parents in New York City family courts in

child abuse and neglect and termination of parental rights proceedings. Clinic faculty teach, research, and write in the field of child welfare, advocate for policy reform, and train and provide technical support to parent advocates across the country.

Amicus Curiae Center for Family Representation, Inc. (CFR) was established in 2002 to represent parents in child protective and termination of parental rights proceedings employing a model that teams an attorney, a social worker and a parent advocate (a parent who has had past personal experience being prosecuted in neglect proceedings). Since 2002, CFR has provided high quality defense to indigent parents as well as wrap-around social work support to insure that families are connected to services to help them avoid foster care or quickly and safely reunify with their children if their children are removed. CFR has represented more than 5000 parents in Manhattan and Queens family courts in child protective and termination proceedings and provides training and technical assistance to hundreds of practitioners each year in New York state and around the country on advocacy strategies that promote family preservation.

Center for Family Representation, Inc., a not-for-profit corporation, does not have any parents, subsidiaries, or affiliates. *See* Rule 500.1(f) of this Court.

ARGUMENT

The Family Court's expansion of Family Court Act §1046's hearsay exception is unsupported by the plain language of the statute, contrary to legislative intent, and unjustified by the interest in accurate and reliable fact-finding hearings, and should therefore be reversed by this Court. Hearsay, the canonical example of unreliable testimony, was made admissible by the Legislature in Article 10 cases in the case of children's statements for a specific purpose: protecting the child who was allegedly subjected to abuse or neglect from having to testify about that abuse or neglect in open court. The Family Court ruling in this case dramatically broadens the parameters of that explicit statutory exception, and in doing so undermines the Legislature's limited acceptance of the risks posed by unreliable hearsay testimony.

The Family Court's expansion of the hearsay exception is not only unsupported and unjustified but more importantly, it puts fundamental rights at risk. The interests at issue in Article 10 proceedings are of constitutional dimension for both parent and child and carry grave emotional, developmental, and psychological consequences for children. The admission of unreliable evidence--without the countervailing interests present in the contexts encompassed by the statutory exception--increases the risk of erroneous deprivation of

fundamental constitutional rights without a corresponding benefit. We respectfully urge this Court to clarify the narrow scope of admissibility of out-of-court statements in abuse and neglect proceedings under Article 10.

I. Hearsay is Unreliable and Inadmissible Unless a Specific Exception Applies.

It is black-letter law that “[o]ut-of-court statements which are offered for the truth of their content constitute hearsay, and may not be admitted unless they come within an exception to the hearsay rule.” *People v. Slaughter*, 189 A.D.2d 157, 159 (1st Dep’t 1993) (citing *People v. Nieves*, 67 N.Y.2d 125, 131 (1986)).

Hearsay has been treated as unreliable evidence in American courts since the era of the Founders. T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 Iowa L. Rev. 499, 530-37 (1999) (demonstrating that “[b]y the close of the eighteenth century, . . . the contours of the modern rule against hearsay were largely in place”).² As the New York Supreme Court of Judicature concluded two hundred

²Judicial concerns about hearsay evidence are of even earlier origin, stemming from Renaissance Italy and seventeenth and eighteenth-century England. See Mirjan Damaška, *Of Hearsay and its Analogues*, 76 Minn. L. Rev. 425, 434-36 (1992); John H. Wigmore, *The History of the Hearsay Rule*, 17 Harv. L. Rev. 437, 445-48 (1904); John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 Colum. L. Rev. 1168, 1187-88 (1996) (noting that “judges and jurists in the later seventeenth and eighteenth centuries understood that something was wrong with hearsay”).

years ago:

Hearsay testimony is from the very nature of it attended with all such doubts and difficulties, and it cannot clear them up. A person who relates a hearsay, is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities: he intrenches [sic] himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.

Coleman v. Southwick, 9 Johns. 45, 50 (N.Y. 1812) (Kent, C.J.).

The United States Supreme Court has observed that the concerns about the absence of cross-examination that underlie the hearsay rule take constitutional form in the Confrontation Clause, highlighting the significance of the rule. *See, Giles v. California*, 554 U.S. 353, 365 (2008) ("[I]t seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots.") (quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (plurality)).

This Court has recently emphasized the individual's interest in proceedings meeting a minimum standard of reliability, an interest of constitutional import in that "due process requires a minimum standard of reliability." *State v. Floyd Y.*, 22 N.Y.3d 95, 103 (2013). Accordingly, claims that particular forms of hearsay fall within an exception to the rule must be closely scrutinized to ensure that the admission of such evidence does not violate the respondent's constitutional due

process rights.³

II. The Legislature Enacted a Limited Exception to the Hearsay Rule for Children's Out-Of-Court Statements "Relating to any Allegations of Abuse or Neglect."

The Legislature departed from the usual exclusion of hearsay testimony in providing that "previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect."

Family Court Act §1046(a)(vi).

Senator Mary Goodhue explained the provision:

The purpose of this bill is to expressly provide that the child's testimony is not necessary as corroboration of out-of-court statements of the child admitted into evidence, but that any evidence shall be sufficient to corroborate the out-of-court statements as the basis of a family court fact finding of child abuse or neglect. Present law requires corroboration of any out-of-court statement which is to be the basis of a finding of abuse or neglect. This amendment does not change that standard, but specifies that any other evidence is sufficient to corroborate the previous statement, and that the testimony of the child is not necessary as corroboration.

Memorandum of Sen. Mary B. Goodhue on Family Court Act §1046, 1985 NY

³This Court has indicated that exceptions must be drawn on a categorical basis rather than by ad hoc assessment of reliability in the particular case, stating that "we are not prepared at this time to abandon the well-established reliance on specific categories of hearsay exceptions in favor of an amorphous 'reliability' test." *People v Nieves*, 67 N.Y.2d 125, 131 (1986).

Legis. Ann., at 259. Senator Goodhue, the sponsor of the bill, also specified that the provision was intended “to protect the child who is least able to protect himself, and unable to provide by oath what was done and who did it.” *Id.*

As the text of the statutory provision and Senator Goodhue's statement indicate, the Legislature enacted a limited exception to the hearsay rule for a specific purpose: to admit evidence of abuse and neglect without requiring the child to testify in open court. The statute explicitly limits the exception to "previous statements made by the child relating to any allegations of abuse or neglect" and requires corroboration to make a finding of abuse or neglect, as a safeguard against the familiar concerns about out-of-court statements.

III. The Family Court Unjustifiably Broadened the Exception.

The finding at issue in this case is based on out-of-court statements by the child regarding how long she stayed at Respondent-Appellant's home. These statements were testified to by a police officer recounting her questioning of both the child and another child living in Respondent-Appellant's home regarding the frequency of the child's visits. Inasmuch as the out-of-court statements did not relate "to any allegations of abuse or neglect"--which were directly testified to by the child at the fact-finding hearing--but rather to the length and frequency of the

child's visits to Respondent's home, the admission of this testimony was outside the exception provided by Family Court Act §1046. The admission of this hearsay testimony by the trial court is in significant tension with both the text of the statute and with the rationale given for instituting Family Court Act §1046's exception to the general exclusion of hearsay.

This Court has made clear that “[w]hen presented with a question of statutory interpretation, our primary consideration ‘is to ascertain and give effect to the intention of the Legislature.’ The statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning.” *Matter of DaimlerChrysler Corp. v Spitzer*, 7 N.Y.3d 653, 661 (2006) (quoting *Riley v County of Broome*, 95 N.Y.2d 455, 463 (2000)). In identifying that “plain meaning,” this Court has stated that “[t]he language of a statute is generally construed according to its natural and most obvious sense . . . in accordance with its ordinary and accepted meaning, unless the Legislature by definition or from the rest of the context of the statute provides a special meaning.” *Samiento v World Yacht Inc.*, 10 N.Y.3d 70, 78 (2008) (quoting McKinney's Cons Laws of NY, Book 1, Statutes § 94, at 191-194 (1971 ed.)). As these rulings clarify, the statutory language is the focus of the interpretive exercise and that language should be read consistent with its normal meaning, unless the

Legislature has provided a reason to do otherwise.

FCA §1046 specifies that the exception is for a child's statements "relating to any allegations of abuse or neglect," the ordinary and accepted meaning of which is that the statements must be in some way about the abuse or neglect. Any broader meaning of "relating to" would encompass every statement sought to be admitted in an Article 10 proceeding and would effectively eliminate the hearsay rule in those proceedings. This outcome is clearly contrary to the Legislature's intent to limit the exception to a specific and limited category of out-of-court statements. Likewise, as noted above, the bill's Sponsor stated that the "purpose of this bill" was to provide that corroborated out-of-court statements could serve "as the basis of a family court fact finding of child abuse or neglect." Sen. Goodhue Mem. at 259. She elaborated that the provision protects the child "unable to provide by oath what was done and who did it." *Id.* This explanation of legislative intent confirms that the statements are to be admitted for the purpose of finding abuse or neglect, addressing "what was done and who did it," and not any other matter that may be at issue in the Article 10 proceedings.

The question at issue in this case, whether Respondent was a "Person Legally Responsible" (PLR) under Family Court Act §1012(a), further demonstrates that the expansion of the exception is unjustified. Whether someone

is a PLR is a matter that rarely if ever would require the child's testimony, as there will always be non-child testimony evidence on that issue. Admitting the child's out-of-court statements on this issue is inapposite to the legislative concern about the child testifying, and is irrelevant to the exception's purpose of protecting children from having to testify about abuse. This Court has observed that abuse of children "is difficult to detect because the acts are predominantly nonviolent and usually occur in secret rendering the child the only witness. Moreover, once abuse is uncovered it is difficult to fix blame, not only because of the lack of evidence but also because of the reluctance or inability of victims to testify." *Matter of Nicole V.*, 71 N.Y.2d 112, 117 (1987). As these concerns are not present in the context of the PLR determination, which involves matters that are not hidden or difficult to prove, there is no justification for extending the hearsay exception to that issue.

The expansion of the hearsay exception at issue here is not only beyond that provided for--and intended by--the Legislature, but is in tension with the legislative scheme. Section 1046 specifies that the out-of-court statements cannot suffice to make out a finding of abuse or neglect, but must be corroborated by other evidence. This provision reflects the legislature's reluctance to accord too dispositive a role for the hearsay evidence. Expanding the exception to allow

hearsay regarding other matters at issue in the proceeding straightforwardly conflicts with that intent. Additionally, in a case like this one, in which the child did testify about the abuse, the interest in protecting the child from having to testify is inapplicable, further demonstrating the incompatibility of the expansion of the exception with the purpose of the exception.

IV. The Family Court's Expansion of the Exception Raises the Risks of Error and Harm to Constitutional Rights with No Corresponding Benefit.

The lack of support for the Family Court's expansion of §1046's hearsay exception in the statutory text, in legislative intent, or in the interests underlying the exception demonstrates that the expansion is unjustified and unsupported. More than that, the expansion is dangerous and harmful. Hearsay has historically been inadmissible because it is not reliable evidence, and the exceptions to the rule recognize particular contexts where the out-of-court statements present reduced reliability concerns or where the value of the testimony to the judicial proceeding is seen to outweigh the risks of unreliability.⁴ The extension of legislatively-created exceptions beyond their specified terms dramatically increases the risk of

⁴This Court has explained that “[r]eliability is the sum of the circumstances surrounding the making of the statement that render the declarant worthy of belief.” *Nucci v. Proper*, 95 N.Y.2d 597, 603 (2001).

unreliable testimony and the risk of error of the fact-finding proceeding, with no corresponding benefits.

In Article 10 proceedings, the admission of unreliable hearsay testimony is not only an evidentiary error that calls into question the accuracy of the family court's fact-finding process, but also threatens harm to significant constitutional interests of both parent and child. The U.S. Supreme Court has emphasized that "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures." *Santosky v. Kramer*, 455 U.S. 745, 760-61 (1982). This Court has likewise found that respondents have a procedural due process interest in not being subjected to a deprivation in a proceeding bearing an unjustifiably high risk of error. *Floyd Y.*, 22 N.Y.3d at 103. Further, because the deprivation in an Article 10 proceeding would be to Respondent's custody of the child and to the child's interest in a parent's daily care, there is a substantive constitutional interest at stake as well, an interest for which the Supreme Court has insisted upon protections. *See, e.g., Santosky*, 455 U.S. at 758-59; *Stanley v. Illinois*, 405 U.S. 645 (1972).

The Legislature has specified that the purpose of an Article 10 proceeding is

"to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being." Family Court Act §1011. A crucial element in achieving that goal is to make the most accurate determination possible of which children are at risk of such harms. A judicial proceeding that magnifies the risk of error with no corresponding gain in protection of children is in direct conflict with that goal.

Like the parent, children reap the benefits of having an intact family and have strong interests in reducing the risk of error in Article 10 proceedings. The child is faced with the risk of erroneous deprivation and separation from their parent in Article 10 proceedings, as well as with harm to the child's interests in family integrity and autonomy. As Justice Harlan has emphasized, "[H]ere we have not an intrusion into the home so much as on the life which characteristically has its place in the home. . . . The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." *Poe v. Ullman*, 367 U. S. 497, 551-52 (1961) (Harlan, J., dissenting) (internal quotations omitted).⁵

⁵Justice Stewart has likewise observed that "If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so

These risks are magnified insofar as the proceedings present the threat of removal and placement in foster care. Though removal appears to have not been at issue in the family court proceeding here, it is unquestionably at issue in many Article 10 cases. The best available research finds “better outcomes when children on the margin of placement remain at home” than being placed in foster care.

Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 Am. Econ. Rev. 1583, 1584 (2007).⁶ Studies consistently

was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on ‘the private realm of family life which the state cannot enter.’” *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in the judgment) (quoting *Prince v. Massachusetts*, 321 U. S. 158, 166 (1944)); see also *Moore v. City of East Cleveland*, 431 U.S. 494, 504-05 (1977) (plurality opinion of Powell, J.) (“Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.”).

⁶Professor Doyle, an economist at the MIT Sloan School of Management, finds that “Children assigned to investigators with higher removal rates are more likely to be placed in foster care themselves, and they are found to have higher delinquency rates, along with some evidence of higher teen birth rates and lower earnings.” Doyle, 97 Am. Econ. Rev. at 1607. In a later study, Professor Doyle found results suggesting that “among children on the margin of placement, children placed in foster care have arrest, conviction, and imprisonment rates as adults that are three times higher than those of children who remained at home.” Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. Pol. Econ. 746, 748 (2008). In subsequent research, Professor Doyle found results suggesting “that placing children in foster care increases their likelihood of becoming delinquent during adolescence and requiring emergency healthcare in the short term.” Joseph

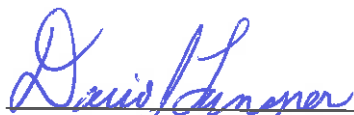
reveal the dramatic benefits to children of attachment and connection to parents and family, and underscore the harms posed by unnecessary removal from the family home. See, e.g., Phillip R. Shaver, Mario Mikulincer & Brooke C. Feeney, *What's Love Got to Do with It? Insecurity and Anger in Attachment Relationships*, 16 Va. J. Soc. Pol'y & L. 491 (2009) (summarizing attachment theory and reporting results of studies showing that separation of children from parents by divorce or parental imprisonment disrupts attachment relationships and is associated with negative behavioral and mental health outcomes). The Legislature has determined that the harm to the child of being required to testify as to abuse or neglect justifies an exception to the hearsay rule, and is consistent with these constitutional rights. In contrast, the Family Court's extension of that exception for statements about other issues creates a significant risk of children being separated from their parents with no corresponding benefit to their well-being.

J. Doyle, Jr., *Causal Effects of Foster Care: An Instrumental-Variables Approach*, 35 Children & Youth Services Rev. 1143, 1149 (2013); see also Catherine R. Lawrence, Elizabeth A. Carlson & Byron Egeland, *The Impact of Foster Care on Development*, 18 Dev. & Psychopathology 57, 71-72 (2006) (finding “results support[ing] a general view that foster care may lead to an increase in behavior problems that continues after exiting the system”).

CONCLUSION

We respectfully ask this Court to reject the expansion of the hearsay exception by the family courts and to prevent the harms that would accompany that expansion by holding that out-of-court statements by a child can only be admitted if they address the issue of abuse or neglect, as the plain language of the statute provides.

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