19-891

No. 19-____

In the Supreme Court of the United States

JOHN LEHMANN,

Petitioner,

v.

NICOLE HAIMS,

Respondent.

On Petition for Writ of Certiorari to the New York Court of Appeals

PETITION FOR WRIT OF CERTIORARI

JOHN LEHMANN, ESQ
PETITIONER PRO SE
15 BANK STREET, APT 109D
WHITE PLAINS, NY 10606
(703) 597-2825
JC_LEHMANNJR@MSN.COM

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QUESTIONS PRESENTED

1. Did the New York courts' decisions to deprive a child's only living natural parent of physical and legal custody of his child, while granting such to a maternal non-parent relative, violate the parent and his child's constitutionally protected fundamental and natural (as opposed to state granted) rights?

2. Is the scope of fundamental and natural rights a substantial constitutional issue?

3. Was there "clear and convincing" evidence of extraordinary circumstances in the record sufficient to terminate Lehmann's parental rights at the time of the closing of the record?

PARTIES TO THE PROCEEDINGS

Petitioner

- John Lehmann

Respondent

- Nicole Haims

Interested Party

- Child (O.L.)

LIST OF PROCEEDINGS

Family Court of New York Westchester County
No. 143772
Nicole Haims v. John Lehmann
Date of Final Opinion: December 18, 2017

Supreme Court of the State of New York Appellate Division: Second Judicial Department
No. 2018-00090
In The Matter of Nicole Haims v. John Lehmann
Date of Final Order: April 24, 2019

State of New York Court of Appeals
No. SSD 64
In The Matter of Nicole Haims v. John Lehmann
Date of Final Order: October 17, 2019

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NEW YORK COURTS' OPINIONS BELOW

On August 24, 2015, the Family Court of New York for Westchester County ("FC") granted on an *ex parte* basis petitioner Nicole Haims' ("Haims") order to show cause to give her guardianship of John Lehmann's ("Lehmann") natural daughter ("daughter" or "the child") three months after the death of the child's natural mother and Lehmann's wife. File 143772; Docket G-11126-15 (App.80a). Thereafter, Lehmann has only been permitted paid for supervised access to his daughter.

On December 18, 2017, FC Judge Hahn[1] issued her Decision and Order ("D&O"), without a single citation to the record, granting the child's maternal aunt Haims physical custody of the child, while also granting Lehmann unsupervised visitation for 48 hours over every weekend on a gradually increasing schedule over seven months, plus most holidays. (App.10a) (Additionally, Haims and Lehmann were ordered to share legal custody of the child, with Haims having final say (thus Lehmann's views could be and were subsequently simply ignored by Haims). The D&O's finding of the existence of extraordinary

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[1] Haims' law firm donated a proportionately significant amount of money for FC Judge Hahn to run for office in an uncontested election in 2014. One must ask why a person would require funds for her FC judgeship campaign if she was the only candidate seeking election. FC Judge Hahn entered office approximately eight months prior to the *ex parte* petition being filed. This was never disclosed to Lehmann—he learned it from a New York website while writing this writ.

circumstances was based on: 1) Lehmann having purportedly "not sufficiently addressed his alcoholism"—despite being abstinent for nearly two years (verified by objective tests);[2] 2) according to the unrebutted testimony/report of Dr. Behrman (Lehmann's daughter's therapist hired and paid for by Haims) and Dr. Abrams (FC appointed psychiatrist), they predicted that changing the child's primary caretaker from Haims to Lehmann would cause psychological trauma due to loss issues (apparently this did not apply to the absence of her father or paternal family); and 3) Lehmann had "never been the primary caretaker" of his daughter. *Haims v. Lehmann*, File 143772, Docket V-11126-15. (App.60a). Per Haims' order to show cause seeking a temporary stay filed with the New York Appellate Division, Second Department ("AD2D"), the D&O was temporarily stayed and Lehmann continued to only be permitted supervised access to his daughter, which amounted to one hour per week. *Haims v. Lehmann*, File 2018-00090, Docket V-11126-15. (App.8a).

On April 24, 2019, the AD2D granted Haims sole physical and legal custody of the child and only allowing Lehmann to have supervised visitation with his daughter, asserting that there was a lack of a

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[2] According to the National Institute on Alcohol Abuse and Alcoholism, in the U.S. 14.1 million adults have an alcohol abuse disorder, only 6.5 percent of these people received treatment in the last year, and 10 percent of children live with a parent with alcohol problems (https://www.niaaa.nih.gov/publications/brochures-and-fact-sheets/alcohol-facts-and-statistics). Should this Court be prepared to remove 10 percent of children in this country from their natural parents via state agencies or the courts, as the New York courts have effectively ruled in this matter?

sound and substantial basis in the record for the FC D&O, with no citations to the record, despite Haims apparently being too bothered to even attend the oral argument. (App.2a) The AD2D simply stated its rationale to be that there "was evidence before the court that, among other things, the father had abused alcohol for nearly 20 years, had a history of relapses during prior attempts to attain sobriety, and was only at the beginning stages of treatment to achieve sobriety during this most recent period of abstinence." The AD2D made its finding of Lehmann to be an unfit parent and extraordinary circumstances to be present, despite his having negative test results for every single one of the over 100 tests for any alcohol use (over 52 which were completely random) that he was subjected to during the record period. Indeed, this critical fact was never even mentioned in the AD2D's opinion, nor did it enumerate what "among other things" it was referring to. *Haims v. Lehmann*, 171 AD 3d 1176. (App.5a).

On October 17, 2019, the New York Court of Appeals ordered that Lehmann's appeal of the AD2D's opinion be dismissed *sua sponte* upon the ground that no substantial constitutional question was directly involved, despite the right of a natural parent to have custody and to raise their child to be the most fundamental right. *Haims v. Lehmann*, SSD 64. (App.1a).

JURISDICTION

This Court has jurisdiction to review this matter in that all appeals to the New York courts have been exhausted. The opinion of the New York Court of Appeals was entered on October 17, 2019. (App.1a). Moreover, it deals directly with the interpretation of the fundamental natural rights of parents and their children under the First, Fifth, and Fourteenth Amendments to the constitution. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

In September 2009, Lehmann and his now deceased wife were married. (Aug. 15, 2017, pp. 44-46, pp. 51-53). Approximately two years after the marriage in November 2011, their child was born. From the beginning of 2012 until May 2015, Lehmann had almost no substantive contact with the maternal family, including her sister Haims. Around March 2013, Lehmann and his wife physically (never legally) separated. The child continued to reside with Lehmann's wife in the marital home in Manhattan, with Lehmann living only blocks away. Except for a few short periods of disruption, Lehmann visited the child three

to five days each week for several hours after work and on weekends. (Aug. 15, 2017, p. 55, p. 57, pp. 63-64, pp. 66-67; Aug. 16, 2017, p. 18).

On May 24, 2015, Lehmann's wife suffered a brain aneurysm, was hospitalized, and eventually passed away on June 9, 2015. It was during this period of time that Lehmann began interacting with the marital side of the family again after 3½ years. Lehmann temporarily allowed his daughter to reside with Haims' family in Pound Ridge, New York from May 24, 2015 until he could obtain a suitably large enough, yet affordable, apartment in White Plains, New York for his daughter to come live with him. Lehmann visited the child every weekend for approximately eight hours at Haims' home, and he was in nearly daily communication with Haims and/or her husband throughout the summer of 2015. (May 9, 2017, p. 85-86). In August 2015, Lehmann moved to White Plains and also enrolled the child in a preschool there. (Aug. 15, 2017, p. 83-84). On August 21, 2015, Lehmann sent Haims a text message stating: "I paid for my lease in Wp today so I can either pick [the child] up or u drop her off and see the new place on the 5th or 6th. Ur Choice. I hope you know how much I appreciate how much u have done to help us out this last few months when I didn't have room for her." (RX-E). Three days later, Haims unexpectedly filed her guardianship petition for Lehmann's daughter, ridiculously characterizing this text message as "threatening." Thereafter, the time that the child has resided with Haims has been due to the very slow pace of the litigation. (Aug. 15, 2017, p. 64, p. 73, p. 80, p. 83, p. 85).

Lehmann was an involved and engaged co-parent while his wife was alive. Lehmann testified that he insured that his daughter's daily financial, medical, educational, physical, psychological, and emotional wants and needs were always met, as well as having also always planned for her future. (Aug. 15, 2017, pp. 55-57, p. 63, pp. 65-66, pp. 68-71). Despite not being the child's primary caregiver, her natural mother was, Lehmann was still deeply involved in her care and participated equally in every important decision in her life (*e.g.* where she would attend preschool, how she would be raised religiously in a two religion family, which pediatrician she should go to, etc). (Aug. 15, 2017, p. 63-66).

Haims produced no witnesses or documents contradicting Lehmann's testimony about his caretaking and parenting of the child, or a single witness who had any significant first-hand information about Lehmann during the 3½ years between the child's birth and Lehmann's wife's hospitalization. As such, Haims had absolutely no personal knowledge of what Lehmann did, the role he played in the child's life, or what time he spent alone with her. (May 9, 2017, pp. 68-69, pp. 83-84, p. 103, p. 117, p. 135). Despite this total lack of evidence from Haims, the FC gave no credence to what it described as Lehmann's "self-serving" testimony about his pre-May 2015 parenting of the child, and wrongly shifted the burden of proof onto him to show that he did in fact care for and parent his daughter during this period of time. (D&O at 27).

There is absolutely no evidence in the record that Lehmann has ever neglected the child, due to alcohol consumption or otherwise, besides Haims and her

witness' completely non-credible testimony about observing Lehmann in the summer of 2015. Haims did not produce a single disinterested third-party witness who testified as to having ever personally observed Lehmann intoxicated with his daughter.

The FC erroneously found that Lehmann's medical records indicating the quantity of alcohol that he purportedly admitted to having drunk on a daily basis to the hospital intake personnel, refuted Lehmann's testimony that after the separation from his wife, now almost 5½ years ago, he never cared for child O.L. while under the influence of alcohol. (D&O at 27-28). For example, the FC inexplicably found that according to the NY Presbyterian records, Lehmann had admitted that he had drunk "at least a liter of vodka daily for at least the past 3-4 years" (D&O at 11)—this FC finding was a totally incorrect reading of the exhibit, and indeed, Haims' FC summation brief (page 12) from which the FC cribbed this language even properly indicated "pint" not "liter" per day.

The FC also totally misstated Lehmann's testimony by finding that in 2013, he "drank most nights after work until sometime in January 2016." Lehmann clearly and accurately testified that following his treatment at Glenbeigh in January 2015, he greatly reduced his alcohol intake to approximately only once per week, and not consuming quantities sufficient to become inebriated. (Aug. 15, 2017, p. 196). By at least the first week in February 2016, Lehmann was completely abstaining from any alcohol consumption. (Aug. 16, 2017, p. 36). There was no evidence presented by Haims to contradict this testimony.

As FC-appointed CASAC evaluator Dr. Griffin (PhD) reported, Lehmann preferred to drink alone at night after work on nights when he did not see the child, or only after seeing her on the nights that he did. (CX-2). There is no credible admissible evidence in the record that Lehmann ever drank alcohol before or when taking care of the child by himself. The FC's inappropriate finding that Lehmann must have been intoxicated at some point while entrusted with his daughter's care was totally fabricated and unsupported by the record.

Lehmann testified that although occasionally drinking, including with Haims' family, he was never intoxicated in the summer of 2015. (Aug. 16, 2017, p. 21). Unlike Haims, Lehmann had no family or friends at that time in New York to bolster his testimony. However, what Lehmann has to support his testimony is much more reliable and not subject to bias—the negative result of a hair follicle test proving that he did not abuse (as opposed to use at all) alcohol between June 17, 2015 and September 16, 2015 by a lab designated by Haims. (RX-G).

The FC inexplicably found that Lehmann proffered the negative hair test result to refute visitation supervisor Carmen Candelario's ("Candelario") claim that she smelled alcohol on Lehmann when she first met with him in October 2015. (D&O at 31). He did not, as the hair test did not even cover October 2015; rather, Lehmann offered the negative hair test result to objectively refute Haims' witnesses' testimony about their purported observations of Lehmann being intoxicated on un-specified days in the summer of 2015. Thus, the FC clearly did not consider this critical

piece of objective scientific evidence correctly when weighing the credibility Haims' witnesses.

Marguerite DeFonte ("DeFonte"), a 30-year Haims family friend and former employee of her father, testified about her purported observations of Lehmann at the Villa Roma resort on Saturday July 18, 2015. (Dec. 19, 2016, pp. 70-71; Aug. 29, 2016, p. 73). DeFonte testified that she saw Lehmann at the pool bar inebriated and trying to get a drink while ignoring the child who was in the pool attempting to get his attention. (Dec. 19, 2016, pp. 58-59, pp. 71-72). This testimony was completely refuted by Haims' father's affidavit (RX-B para. 7) and Lehmann's testimony, which both indicated that nobody else from the family (including the child) accompanied them to the Villa Roma during weekend of July 18, 2015. (Aug. 15, 2017, p. 95). Moreover, Haims clearly knew that the child was not at the Villa Roma that day, as they were together at her home in Pound Ridge and Lehmann and Haims' father drove to see the child on Sunday. Instead of alerting the FC to the perjury and correcting the record, Haims in fact flagrantly exacerbated the issue by citing to it in her summation brief to the FC (page 4) and even in her brief to the AD2D (page 21).

The FC incorrectly found Haims witnesses' testimony to be credible about their purported observations of Lehmann being intoxicated on several non-specified days during the summer of 2015. (D&O at 29). Unlike Lehmann who has the negative hair follicle test result to support his testimony, there is absolutely no objective evidence corroborating Haims' friends and family witness' testimony, although they

had ample opportunity to obtain such. None of Haims' witnesses ever testified that they: (1) observed Lehmann drinking during the eight hours that he was at Haims' home each weekend to visit the child; (2) discussed their concerns with him or asked him to leave; or (3) took any pictures or videos of Lehmann supporting their claims.

Haims' father's testimony was also not credible, as he contradicted his own affidavit in support of the guardianship petition on a very critical factual point. In the affidavit (RX-B) he stated that he was very concerned about Lehmann's "alcohol abuse" and intended to discuss this concern with him over the weekend of July 18, 2015 when just he and Lehmann went to the Villa Roma. However, at trial Haims' father admitted that he did not actually initiate any such conversation that weekend, but rather served Lehmann wine at his home and drank with him at dinner. (Dec. 19, 2016, p. 43). Such conduct is hardly indicative of a person concerned about someone's "alcohol abuse," and totally contradicts the affidavit. The FC inexplicably found that Lehmann did not refute any of Haims' father's completely false claims about his purported improper conduct on this trip (D&O at 29), even though the objective hair test did and Lehmann testified that throughout the entire summer of 2015, he was never intoxicated. (Aug. 16, 2017, p. 21).

Lehmann began being treated by and working with his psychiatrist Dr. Centurion (MD) and his now-deceased therapist Andrew Park ("Park"), who was a manager for the NFL's substance abuse program, in 2013 to assist him in addressing and effectively treating

his then active alcoholism. (May 16, 2017, pp. 56-57, p. 61). Dr. Centurion's recovery program for Lehmann, which she designed in February 2016, included engaging in weekly one-on-one therapy with Park (May 16, 2017, pp. 58, 60, 67); attending two recovery meetings per week (May 16, 2017, pp. 67-69); and continuing to meet with her every three months to monitor his recovery progress and to ensure the medications she prescribed for him continued to be effective. (May 16, 2017, p. 61). Lehmann faithfully followed this program. (May 17, 2017, pp. 106-111, pp. 114-115).

After Park's death in September 2016 (thus he could not be a witness for Lehmann), pursuant to Dr. Centurion's recommendation, Lehmann continued to attend the recovery meetings and to meet with her. (May, 16, 2017, pp. 64, 71). Dr. Centurion testified that she did not recommend that Lehmann find a new therapist for weekly therapy after Park died, because she believed his eight months of recovery had gone very well and that he continued to be motivated to remain sober. Dr. Centurion stated that in her professional opinion Lehmann had abstained from any alcohol use and had been living a sober lifestyle. (May 16, 2017, p. 71).

Lehmann first met and began dating Philine in January 2016. She was a fourteen-year veteran social studies teacher at a private all-girls school in the Bronx. Philine and Lehmann were engaged in the spring of 2017 and married on July 1, 2017—making Lehmann's daughter her step-child. She has never been an alcohol drinker. (Aug. 9, 2017, p. 13, 15, 20-21, 23). Philine testified that she had never seen Lehmann consume alcohol; they did not keep any alcohol in

their apartment; and Lehmann had faithfully followed Dr. Centurion's recovery program. (Aug. 9, 2017, pp. 22-27; Aug. 15, pp. 23-25). Moreover, Philine testified that she has no concerns about Lehmann relapsing and that he is the kindest man she has ever known—for example finding lots of activities and preparing mini holiday celebrations for his daughter at their very limited paid for visitations—he is humble and always looking out for other people above himself, he does not have an ego, he has a "Midwest kind of mentality," he is not narcissistic, he keeps his emotions guarded and does not wear them on his sleeve but he certainly has emotions, and that she has "never felt safer with anyone else both emotionally or physically in [her] life." (Aug. 9, 2017, pp. 21-22, pp. 28-29, p. 37, pp. 91-92).

For over a year, as part of the FC ordered CASAC analysis of Lehmann, Dr. Griffin, on a random basis, instructed Lehmann to provide urine samples at least once per week to be tested for any alcohol and drug use.[3] Dr. Griffin occasionally instructed Lehmann to provide a urine sample more than once in a given week—meaning that there was never a time period when Lehmann was not subject to possible testing. (Aug. 15, p. 26-27; CX-2; RX-H). Dr. Griffin testified that the urine tests had a look-back period of five days. The testing took place from July 2016 through July 2017. All of these tests returned negative results. (Sept. 26, 2017, pp. 63-64, p. 68, p. 74).

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[3] Urine tests have been fully accepted as reliable in New York. *See People v. Oehler,* 821 N.Y.S.2d 380, 381 (County Ct. 2006), *aff'd,* 52 A.D.3d 955 (3rd Dept. 2008). Lehmann has never used an illegal drug.

In September 2017, Dr. Griffin testified that in his professional opinion Lehmann had been verifiably abstinent throughout the year-long urine testing period. (Sept. 26, 2017, pp. 72-73). At the same time, Dr. Griffin also testified that due to a lack of substantive communication with Lehmann for over a year, he could not say if Lehmann was at that point "sober" as he defined the term—as person embracing recovery as opposed to just abstaining from all use. (Sept. 26, 2017, pp. 73-74).

Lehmann also passed breathalyzer tests with a two-day look-back period on over 60 occasions, administered by FC appointed visitation supervisor Candelario between 2015 and 2017.[4] Candelario testified that she has extensive experience in administering such tests, and that they have historically always been reliable. According to Candelario, every one of the breathalyzer tests that she administered on Lehmann returned a negative result for the presence of alcohol. (May 17, 2017, pp. 13-21). Despite these constant negative test results, Candelario testified that on two occasions prior to visitations (in July 2016 and November 2016), she believed that she smelled alcohol on Lehmann. However, on both of these occasions, like every other time she administered a breathalyzer test on Lehmann, the machine returned a negative result for alcohol, even when retested, including when a different machine was used for the retest. (May 17, 2017, p 37, p. 63). Candelario testified that she had never before, in her 38 year NYPD and social worker career, encountered a similar situation where she

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[4] Breathalyzer tests have been fully accepted as reliable in New York. *People v Donaldson*, 36 A.D.2d 37, (4th Dept. 1971).

believed that she smelled alcohol, yet the breathalyzer testing always returned a negative result. (May 17, 2017, p. 37, p. 63). Clearly, Candelario smelled exactly what she wanted to smell in order to help convince the FC that Lehmann's daughter should remain with Haims. Despite this, the FC once again erroneously failed to give the objective scientific data the significant weight that it deserved, and instead inexplicably found Candelario to be a credible witness, and relied heavily on her testimony. (D&O at 31).

Dr. Griffin in making his findings and conclusions in his report improperly relied heavily on inadmissible hearsay provided to him orally by Haims, as well as the contents of the petition exhibits that were never authenticated or admitted into evidence during the trial. Dr. Griffin's December 2016 report stated that Haims, who had no substantive personal contact with Lehmann between January 2012 and May 2015, "[w]ent into great detail about the history between her sister and [] Lehmann and how for years [her sister] was pleading with [] Lehmann to get help and be sober." There is absolutely nothing in the record substantiating these facts—and Haims had no personal knowledge of such. According to the report, Haims also "provided documents" to Dr. Griffin, such as "various motions and legal documents submitted to the [FC]." All of these documents contained hearsay, including hundreds of pages of purported text messages between Lehmann and his deceased wife, "which [according to Dr. Griffin] detail[ed] the complete history of [] Lehmann's addiction and the impact it had on [his deceased wife] and the entire family."

In connection with his evaluation of Lehmann, Dr. Griffin requested that Philine and Lehmann's co-worker complete questionnaires about their observations and views of Lehmann. (May 10, 2017 pp. 24-25; Aug. 9, 2017, p.40-43). Dr. Griffin's report included an index of the collateral information that he considered in conducting his evaluation of Lehmann, purportedly including information that was disclosed by "contacts provided by both parties in this matter. The information supplied was reviewed and given full consideration in the formulation of the conclusion of this report." (CX-2). This statement by Dr. Griffin was false. According to his "List of Sources of Information," Dr. Griffin did not consider the extensive questionnaires that he requested Philine and Lehmann's co-worker complete about their observations and knowledge of Lehmann, nor were their answers ever mentioned in the substance of the report, unlike those of Haims' witnesses who completed questionnaires. (CX-2).

The FC appointed Dr. Abrams (PhD) as its expert to conduct forensic psychological evaluations of Haims and Lehmann, but not Lehmann's daughter. (CX-1). These evaluations took place in July 2016—one and a half years before the D&O was entered—when Lehmann was in a very different place in his life with regard to his recovery (then only six months sober) and marital status/home-life situation (having only been dating Philine for seven months).[5] Like Dr.

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[5] *See Nevarez v. Pina*, 154 A.D.3d 854, 856 (2nd Dept. 2017) (finding an expert report to be outdated); *Noonan v. Noonan*, 109 A.D.3d 827, 829 (2nd Dept. 2013) (finding that "the Family Court placed undue emphasis on the forensic evaluation, which

Griffin's report, Dr. Abram's report was also improperly influenced by hearsay statements from Haims and documents never authenticated or put into evidence that Haims provided to him. There were numerous findings in the report completely based on what Haims claimed that her deceased sister purportedly had told her about Lehmann.

Critically, the FC wrongly relied on Dr. Abram's unsupported conclusion that changing the child's primary caretaker from Haims to Lehmann "would cause profound trauma to [the child], who has already experienced enormous loss" in deciding that extraordinary circumstances existed. (D&O at 33). Apparently, according to Dr. Abrams, the child losing regular and consistent contact with her father, who had actively co-parented her for 3½ years prior to Haims' petition, was not yet another loss for the child. The FC also incorrectly relied on Dr. Abrams' generalized and unsupported view that "it cannot be emphasized enough, how important it is for a child to have a stable, loving home environment during the early years of life," when her father and step-mother could clearly provide such—and her father did so before she was stolen by Haims. (D&O at 23).

Contrary to the FC's incorrect finding that Dr. Abrams conducted a one-on-one interview and evaluation of Lehmann's daughter (*i.e.* "In his interview with the Child . . . "), which may have given him insight into Lehmann's daughter as an actual person, not just as a generalized young child who had lost a parent, this did not happen. (D&O at 23). The FC never ordered

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was completed almost two years prior to the court's determination.").

Dr. Abrams to conduct a psychological evaluation of the child, who was and is still not aware of the litigation, and in fact he did not perform such an interview and evaluation of her. The FC completely fabricated this fact. The only substantive contact that Dr. Abrams ever had with the child was while he observed her interacting with Haims and Lehmann separately for 45 minutes each in a small conference room. Despite this lack of personal one-on-one communication with and analysis of the child, Dr. Abrams improperly made several unfounded findings and conclusions in his report about Lehmann's daughter's specific psychological and emotional needs. He also included an entire page in his report, not about Lehmann, but another person in name with different issues being analyzed—this is very indicative of the lack of care he took on this matter. The FC thereafter erroneously adopted these in rendering the D&O. (D&O at 22-23).

Dr. Abrams reported that his mandate was "to conduct an evaluation to respectfully assist [the FC] in deciding what was in the best interests of [the child]." In reaching his conclusions, Dr. Abrams improperly compared Haims and Lehmann's purported parenting history and capabilities against each other to determine who would make the "better" or "best" parent for the child going forward—a consideration that is totally irrelevant in a custody case between a parent and nonparent until extraordinary circumstances have first been proven to exist.[6] Under New York law, Lehmann cannot be prejudiced in this

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[6] *See Bailey v. Carr*, 125 A.D.3d 853 (2nd Dept. 2015) ("A parent cannot be displaced merely because another person would do a better job of raising the child.").

action, or displaced as his daughter's custodial parent, simply because Haims wants custody of her, has raised two sons, does not work, and has two regular "baby-sitters"/domestic servants to help her care for the child and the rest of the household. Lehmann's daughter is his only child and he works to support his family. (Dec. 21, 2016, p. 24; August 9, 2017, pp. 104-108).

In his report, Dr. Abrams never indicated that he observed or perceived anything evidencing that Lehmann's daughter did not love, did not want to be with each other, or that she was in any way fearful of her father. In fact, he found quite the opposite. Dr. Abrams made numerous highly positive observations about Lehmann, as well as his relationship and interactions with his daughter. These observations included that Lehmann scored in the high average range of intellectual functioning in the global cognitive capacity range; did not exhibit any signs or symptoms of any gross neuropsychological deficits (including narcissism); and did not exhibit any signs or symptoms of any underlying psychotic process. Dr. Abrams also noted that Lehmann has a good stable employment history; appeared capable of meeting his family's financial needs; and lives in a nice residence. (CX-1). Most importantly, Dr. Abrams observed the love that both Lehmann and his daughter have for each other and the psychological and emotional bonds that they share despite the significant constraints on their time and interactions together. In fact, Dr. Abrams reported that he observed that: (1) Lehmann "appeared to have an adequate understanding of [] [his daughter's] developmental, physical, social, educational and emotional needs;" (2) Lehmann "appeared to know how and when to set appropriate limits with [the child];"

(3) Lehmann and his daughter's psychological and emotional bonds with each other were strong; (4) the child was visibly happy to see her father and she gave him a hand-drawn card for his birthday—the day he observed them together; (5) Lehmann and the child both communicated that they loved each other; (6) Lehmann interacted and connected with his daughter in a more emotional and warm manner than he did with adults; (7) the child demonstrated that she clearly needs her father to play a steady and constant role in her life; and (8) Lehmann's daughter even commented while being observed interacting with Haims that she wished her father was there. (CX-1). None of these findings are consistent with a conclusion that Lehmann is neither a capable or fit parent for his daughter, and they were not included in the FC D&O or the AD2D's opinion.

Candelario testified that she did not believe Lehmann had adequately addressed his alcoholism, based on what he had communicated to her. (May 17, 2017, p. 44). What was lost in this testimony and on the FC was that Candelario was not a therapist or psychologist who Lehmann was required to provide information to concerning his recovery—she was appointed to insure the child's safety during visitation, nothing more. As such, Lehmann did not provide her with much information about his recovery program, efforts, and progress. Thus, Candelario did not have sufficient information to give a reasoned opinion about Lehmann's recovery efforts worthy of being given any weight.

The FC incorrectly relied heavily on the child's Haims selected and paid for therapist Dr. Behrman's

testimony, and admonished Lehmann for not communicating more often with her to learn about the child's psychological and emotional issues. (D&O at 31). Lehmann did try to communicate with Dr. Behrman; however, such communications were not productive. (Aug. 15, 2017, p. 30-31, 37). In her December 2016 testimony, Dr. Behrman described the child as vibrant, engaging, chatty, playful, and active and that she was doing well and "thriving while in emotional recovery" from the loss of her mother and her maternal grandmother in 2015. (Dec. 20, 2016, p. 12). Apparently, according to Dr. Behrman, Lehmann's daughter basically losing almost all connection to her only living parent was perfectly acceptable and not injurious to her at all.

Dr. Behrman has taken every position possible to restrict the child from interacting with and learning about her father and her paternal family, and has never observed them interact together.[7] For example, per Dr. Behrman's advice, the child has never even been informed that Lehmann obtained an apartment with a bedroom set up for her so she could come live with him after her mother died. Dr. Behrman believed that revealing such might cause the child anxiety, due to the stability she feels while living with Haims being called into question. (Dec. 20, 2016, p. 14). Dr. Behrman's approach has been totally inconsistent with fostering the child's relationship with Lehmann.

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[7] *See Campbell v. Brewster*, 9 A.D.3d 620, 622 (3rd Dept. 2004) (finding the "Family Court properly gave the testimony [of a social worker] little weight inasmuch as the social worker failed even to observe petitioner and the child together.").

According to the record, Lehmann met with Dr. Behrman six times. (May 16, 2017, p. 124). At the first meeting in April 2016, despite having never substantively communicated with Lehmann or observed he and his daughter together (Dec. 20, 2016, p. 40), Dr. Behrman expressed her view (and reiterated it in her testimony) that if Lehmann had any "empathy" for his daughter (*i.e.* seeing the world through her eyes), he would do what was in her best interests by withdrawing his opposition to Haims' petition for custody and allow his daughter to remain with Haims permanently. (Aug. 16, 2017, p. 15-16). This view was insane—Lehmann was entitled constitutionally to custody of his natural daughter. In essence, Dr. Behrman suggested a no-win "Catch 22" situation for Lehmann. In her view, in order for Lehmann to qualify as a sufficiently fit parent for his daughter he must be able to empathize with her, but in order for Lehmann to demonstrate his empathy for her, he must give up pursuing custody of her. This "heads I win, tails you lose" conclusion underscores Dr. Behrman's utter lack of credibility. Dr. Behrman's "Catch 22" opinion was repeated at every one of the other five meetings Lehmann had with her, during which he was provided with very little information about the child. (May 16, 2017, pp. 125-126; Aug. 15, 2017, pp. 30-31, p. 37). Lehmann was interested in having a dialogue about his daughter and her treatment, if it would have been productive, but Dr. Behrman was not interested in having such with Lehmann, nor did she ever request to observe the child with Lehmann. (Dec. 20, 2016 p. 40). Despite all of this, the FC chastised Lehmann for the lack of communication between Dr. Behrman and himself.

When Lehmann and Philine were engaged in the spring of 2017 and again when they were married in July 2017, Lehmann requested that she be permitted to attend the meetings with Dr. Behrman to hopefully gain some more insight about the child. Despite these requests, Philine was not permitted to attend any of Lehmann's meetings with Dr. Behrman through at least August 2017. (Aug. 9, 2017, pp. 31-32; Aug. 15, 2017, pp. 126-127). Dr. Behrman claimed to be concerned that the child would become anxious about Philine's role with regard to her and the stability of her life being called into question; yet, Dr. Behrman did not take issue with Lehmann's daughter calling her uncle "Dad." (Aug. 15, 2017, pp. 7-10). Dr. Behrman even went so far as to request that Lehmann remove his wedding ring during visitation to ensure that Philine remained hidden. (Aug. 9, 2017, p. 129-130). Despite Dr. Behrman purportedly working with the child to acclimate her to "other living situations," by finding ways to cope with any changes that occur, apparently Dr. Behrman chose to not work with child O.L. to learn coping skills with regard to the paternal side of her family. (Dec. 20, 2016, pp. 14-15). Rather, Dr. Behrman consistently advocated continuing to limit Lehmann and his daughter's contact with each other and the paternal side of her family. (Aug. 15, 2017, pp. 7-9).

The FC put great emphasis on what it perceived the parties' level of willingness to foster a relationship between the child and the other side of the family to be, if awarded physical custody of her. The FC improperly found that neither Lehmann nor Philine "had any specific plans regarding maintaining the child's relationship with" the maternal side of the

family. (D&O at 32). Contrary to this finding, Lehmann testified that they understood that the maternal side of the child's family would continue to be very important people in the child's life and that Lehmann had always intended for his daughter to know both sides of her family. (Aug. 9, 2017, p. 110, p. 125; Aug. 15, 2017, pp. 42-44). Lehmann also stated that he would have no objection to his daughter celebrating high Jewish holidays with the Haims while celebrating Christian ones with his family. Given the court orders and Dr. Behrman's views, Lehmann's daughter has not spent a single holiday (including her birthdays, Christmas, Easter, or even Father's Day) with the paternal side of her family.[8] (Aug. 15, 2017, pp. 42-44).

When Haims was asked on direct how she fosters Lehmann and his daughter's relationship, Haims only offered: "I try to prepare her for her time with her dad" and "we supervise the phone call [to make sure she's attentive]." (May 9, 20117, p. 60). Complying with a FC order is not voluntarily fostering a relationship. Haims also testified that she did not voluntarily inform Lehmann (even via text) of almost anything important related to his daughter's life. (May 10, 2017, pp. 14-15, pp. 61-71).

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[8] Indeed, even Lehmann's parents were shunned by Haims from contact with their granddaughter since February 2017 when they did not respond to Lehmann's daughter's assertion on a phone call that Haims and her husband were her "mommy and daddy." This is quite possibly the most offensive thing that could be said to the Lehmann family—and it was clearly endorsed and encouraged by Haims—no fault of Lehmann's daughter.

The FC inexplicably found that Lehmann failed to identify how his relationship with his daughter would be harmed if Haims was awarded custody of her—one would think such would be obvious given the animosity between the parties due to this litigation, which was acknowledged by the FC and AD2D. (D&O at 33). According to the FC, Lehmann "did not establish that there would be any adverse effect to [Lehmann and his daughter's] relationship, if [Haims] were awarded physical custody." Apparently, the FC believes that there is a "no harm, no foul" rule in New York by which the non-parent gets to keep custody of the child, simply because the FC perceives that the parent's relationship with the child will not be harmed. Such a legal principal not only violates New York law, but also the fundamental and natural constitutional rights of both the parent and child.

REASONS FOR GRANTING THE PETITION

This litigation has violated Lehmann's natural and fundamental constitutionally protected parental rights to have custody of his natural daughter. His daughter was stolen from him by Haims and the New York judicial system.[9] Specifically, Lehmann and his daughter's First (a parent's freedom of association, educational decisions, and religious decisions with regard to their natural children), Fifth (due process),

[9] New York was one of two states to receive a "F" for parental rights by the National Parents Organization https://www.nationalparentsorganization.org/images/2019_NPO_Shared_Parenting_Report_Card_v11_10172019.pdf

and Fourteenth (applying such rights to the states) Amendments' rights were violated by the state of New York. The constitution guarantees the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *See, e.g. Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (finding that "[t]he rights to conceive and to raise one's children have been deemed essential, basic civil rights of man, and rights far more precious than property rights. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.") (citations omitted); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."). "The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). The Fourteenth Amendment's "Due Process Clause, like its Fifth Amendment counterpart, guarantees more than fair process. The Clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citations omitted).

"Once affirmed on appeal, a New York decision terminating parental rights is final and irrevocable.

[] Few forms of state action are both so severe and so irreversible." *Santosky,* at 759. "At such a proceeding, numerous factors combine to magnify the risk of erroneous fact finding. Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. . . . [T]he court possesses unusual discretion to under weigh probative facts that might favor the parent." *Smith v. Organization of Foster Families*, 431 U.S., 816, 835 n.36 (1977).

This Court has often ruled on the issue of paternal rights and should take this opportunity to do so again given the New York courts' failures to protect Lehmann and his daughter's constitutional rights in this custody matter. *See Woodby v. INS*, 385 U.S. 276, 282 (1966) ("judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment"). As the dissent pointed out, "the standard of proof is a crucial component of legal process, the primary function of which is 'to minimize the risk of erroneous decisions.") "[T]he Constitution permits a State to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child." *Troxel v. Granville*, 530 U.S. 57, 63 (2000). There was not sufficient proof of parental unfitness, harm, or even potential harm to the child in this matter. Indeed, the FC ruled that Lehmann should have unsupervised visitation with his daughter for 48 hours every weekend—it would not have done so if it actually believed that any of these factors existed.

This Court found "that a preponderance standard [does not] fairly distribute [] the risk of error between parent and child . . . For the natural parents, however, the consequence of an erroneous termination is the unnecessary destruction of their natural family. A standard that allocates the risk of error nearly equally between those two outcomes does not reflect properly their relative severity." *Santosky*, at 765. [A] "clear and convincing evidence standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns . . . such a standard adequately conveys to the fact-finder the level of subjective certainty about his factual conclusions necessary to satisfy due process." *Id.* at 769. "Given the weight of the private interests at stake, the social cost of even occasional error is sizable. *Id.* at 764.

"The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into on going family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 753-54.

The AD2D only cited two irrelevant cases, besides the use of alcohol being involved in them, in rendering

its decision. *See Herrera v Vallejo*, 107 AD3d 714 (2nd Dept. 2013); *Rodriguez v Delacruz-Swan*, 100 AD3d 1286 (3rd Dept. 2012). In *Herrera,* the court found extraordinary circumstances existed where the parent had prior neglect findings arising from her abuse of alcohol; made a highly unsafe and unstable living situation from abuse of alcohol; and engaged in domestic violence towards the child. There have never been any neglect findings, any proven unsafe living situation, or domestic violence towards Lehmann's daughter in this matter. Lehmann, an attorney, lives in a very safe and stable household with his wife and would always protect his daughter from neglect or any type of violence—that is a primary responsibility of a father. In *Rodriguez* the court found extraordinary circumstances where the mother engaged in a drunken brawl with "the maternal aunt, both of whom had been drinking heavily . . . and the child, then just shy of nine years old, sustained various injuries when she attempted to intervene." Nothing like this has ever happened here. These cases have no relevance to the case before the Court, given how distinguishable they are.

The New York Courts have violated Lehmann's Fourteenth Amendment rights as applying the First and Fifth Amendments to the states in the following manners:

FIRST, because Haims has exclusive decision-making over Lehmann's daughter, she is raising her solely in her family's religious faith, which differs from that of the paternal side of the family—even asking Lehmann to pay for her religious training in the maternal family's faith.

SECOND, Haims controls all medical and educational decisions regarding Lehmann's daughter.

THIRD, Lehmann is not permitted to associate unsupervised, with his daughter despite there having been no substantive issues ever taking place. He now generally sees her for one hour per week on a supervised ($250) basis and none of his family members, including her step-mother, are now, as decided unilaterally by Haims, allowed to attend.

FOURTH, "extraordinary circumstances" have never been defined by the New York Legislature, so it is up to the discretion of elected FC judges, who accept donations from law firms practicing before them, even in uncontested campaigns—this is quite simply a bribe.

FIFTH, two of the three reasons provided by the FC finding Lehmann unfit (never been the child's "primary" care giver[10] and predicted psychological

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10 *See Nellie R. v. Betty S.*, 187 A.D.2d 597, 598 (2nd Dept. 1992). New York courts have repeatedly found that extraordinary circumstances do not exist, thus requiring that the parent be given custody of their child, even though the parent never, or only for a very short period of time, served as the child's primary caretaker. *E.g. In re Adoption of Male Infant L*, 61 N.Y.2d 420 (1984) (mother who initially surrendered her child at birth to the non-parent, shortly thereafter changed her mind, and was awarded custody of her then four year old daughter); *Esposito v. Shannon*, 32 A.D.3d 471 (2nd Dept. 2006) (father who moved from New York to Florida when the child was two years old was awarded custody of his then 12 year old daughter following the other parent's death); *Sellers v. Brown*, 155 A.D.3d 1047 (2nd Dept. 2017) (father who had never lived with or been the primary caretaker of the child was awarded custody of his then five year old daughter following the other parent's death); *Milli v. Morreale*, 83 A.D.2d 173 (4th Dep't. 1981) (father who separated

damage to a child from removing the child from the home and care of a non-parent to that of a natural parent)[11] are irrelevant to an extraordinary circumstances determination in New York.

SIXTH, the FC did not make a single citation to the trial testimony or record, and made numerous errors in its factual findings that are unsupported by the record.

SEVENTH, Haims filed an *ex parte* guardianship petition, which included over a hundred pages of cherry-picked pages of text messages purportedly

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from the mother five months after the birth of the child, resulting in the father remaining in Italy while the mother and child resided in New York, was awarded custody of his then 3½ year old daughter following the mother's death).

[11] *E.g. Milli v. Morreale*, 83 A.D.2d 173 (4th Dep't. 1981) (finding a lack of extraordinary circumstances despite a psychiatrist predicting that transferring custody to the parent from the non-parent would be "devastating to [the child's] psychological development," "a psychological disaster," and that such a shift would cause "tremendous regression"); *Burghdurf v. Rogers*, 233 A.D.2d 713 (3rd Dep't. 1996) (finding lack of extraordinary circumstances despite a psychologist's testimony that it would be in the child's best interests for custody to remain with the non-parent, and further "that a change in custody would be psychologically damaging to the child."); *Campbell v. Brewster*, 9 A.D.3d 620, 621-22 (3rd Dept. 2004) (finding the non-parent's "claim that the potential [negative] psychological impact of disturbing the child's long-standing [approximately three years] placement with her shortly after the [child's] mother was murdered," when the father filed for custody "soon" after the mother's death, did not constitute extraordinary circumstances). A child's need of "emotional and nurturance" support from the non-parent following the death of a parent does not qualify as an extraordinary circumstance. *See LaCroix v. Deyo*, 113 Misc.2d 89 (Family Ct. 1981), *affd* 88 A.D.2d 1077 (3rd Dept. 1982).

between Lehmann and his now deceased wife that were never authenticated or admitted into evidence, and over 12 false accusations that Haims, nor any of her witnesses, had any personal knowledge of.

EIGHTH, Haims provided these purported non-authenticated or admitted text messages to the FC, the FC's experts, and the attorney for the child—who has never had a substantive conversion with Lehmann, while having had many with Haims' counsel, including before every hearing.

NINTH, Dr. Griffin ignored the questionnaires of Lehmann's witnesses, while giving credence to Haims' witnesses' questionnaires and oral interviews with Haims, who in fact had no first-hand knowledge about what she divulged.

TENTH, Haims failed to alert the FC about DeFonte's known perjury, and even cited to it in her briefs. Lehmann's daughter was with Haims at her home the weekend of July 18, 2015, not at the Villa Roma resort with Lehmann, as DeFonte claimed in her testimony.

ELEVENTH, there is nothing in the record proving any potential or actual harm by Lehmann towards his daughter.

TWELFTH, the FC took issue with Dr. Centurion only producing documents from the child's birth up till August 24, 2015 (the petition date) when that was exactly what the FC ordered to be turned over.

THIRTEENTH, the AD2D reviewed the AFC's requested Dr. Strober report, post the FC D&O in December 2017, which completely contained un-cross examined hearsay from Haims and Dr. Strober regard-

ing what Lehmann told his daughter about his marriage to Philine six months earlier and her unobserved by anyone but Haims purported reaction to such post visitation.

FOURTEENTH, Dr. Behrman made her conclusion that Lehmann's daughter should remain with Haims even prior to meeting with Lehmann or ever observing Lehmann and the child together.

FIFTEENTH, the AD2D did not mention the hair and over 100 other totally negative objective tests Lehmann was subjected to. The FC misunderstood the hair test's importance in refuting Haims' witnesses' claims regarding the summer of 2015.

SIXTEENTH, the FC allowed Dr. Griffin to create a legal distinction between objective abstinence as opposed to subjective sobriety.

SEVENTEENTH, The FC invented a "no harm, no foul" child custody law.

CONCLUSION

Please grant this Writ of Certiorari, and ultimately return Lehmann's daughter to his custody. Both of their constitutional rights have been violated by the New York courts. It is time to concretely establish a parent's and their natural children's rights under the constitution. People change.

Respectfully submitted,

JOHN LEHMANN, ESQ.
PETITIONER PRO SE
15 BANK STREET, APT 109D
WHITE PLAINS, NY 10606
(703) 597-2825
JC_LEHMANNJR@MSN.COM

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