No. 19-891

In The
Supreme Court of the United States

JOHN LEHMANN,

Petitioner,

v.

NICOLE HAIMS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Division, Supreme Court Of New York, Second Judicial Department

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the New York Courts' decision to award (i) physical and legal custody to the subject-child's maternal aunt; and (ii) therapeutic supervised access to the subject-child's biological father, violated the biological father's constitutional rights, where the trial Court determined "extraordinary circumstances" were present.

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INTRODUCTION

Following a fact-finding hearing, the Westchester County Family Court found that "extraordinary circumstances" existed and that it was in the Child's best interest to award residential custody to the maternal aunt (subject to the biological father's visitation) and joint legal custody to both parties, subject to the maternal aunt's final decision making authority.

The Appellate Division, Second Department, confirmed the Trial Court's finding of "extraordinary circumstances" but modified the Trial Court's Order to award sole legal custody of the Child to her maternal aunt and remanded the matter to the Family Court to specify a therapeutic supervised access schedule for the Child's biological father. The Appellate Division explained that the evidence presented to the Trial Court demonstrated the father had abused alcohol for nearly 20 years, had a history of relapses during prior attempts to gain sobriety, and was only at the beginning stages of treatment to achieve sobriety during this most recent period of abstinence. The Court further explained that given the antagonism and hostility between the parties, an award of joint legal custody was inappropriate. The New York State Court of Appeals dismissed the appeal upon the grounds that no substantial constitutional question was directly involved.

Both New York State and Federal Courts have long held that a parent's rights with respect to their children has never been regarded as absolute. At its core, Appellant seeks review of the New York State

Court's finding that "extraordinary circumstances" existed, even though such a finding is consistent with New York State law.

COUNTERSTATEMENT OF FACTS

Respondent ("Haims") is the maternal aunt of the subject Child, born November 25, 2011 (the "Child"). Appellant ("Lehmann") is the Child's biological father. Lehmann married the Child's biological mother ("Jolie") in September 2009 and they separated in September 2013.

On May 24, 2015, after Jolie became suddenly ill with a brain aneurysm, Haims took the Child to reside with her family in Pound Ridge, New York. Jolie died shortly thereafter on June 9, 2015. (D&O, Page 2). At the time of Jolie's death, the Child resided with Haims, Haims' husband, and the Child's two young cousins, whom the Child refers to as her "brothers" (Tr. Dec. 21, 2016, Page 24, Lines 16-24; Tr. Aug. 2, 2016, Page 21, Lines 19-22). During Jolie's life, the Child was always primarily cared for by Jolie, except for a brief period, when the Child lived with her maternal grandparents so that she could attend pre-school in White Plains. (D&O, Page 6). By Lehmann's own admission, he lived with [the Child] for approximately one year of her life and not since she was at least 16 months old." (D&O, Page 27).

On or about August 24, 2015, Haims filed a petition for custody of her niece based upon, *inter alia*,

Lehmann's extensive history of alcoholism, which according to the lower Court, remains untreated (D&O, Page 33) and her belief that it is in the Child's best interest that she remain her primary caretaker.

Time and time again, Lehmann chose alcohol over raising his daughter. The Family Court found that Lehmann "has not spent significant time with [the Child] because he drank excessively and was unable to control his alcoholism by becoming abstinent and sober. Throughout [the Child's] life, Lehmann was in and out of rehabilitation facilities and hospitals, with the most recent admission being six months prior to [Haims] filing her petition." (D&O, Page 28). He has also been diagnosed with acute pancreatitis, depression, alcohol dependence, and anxiety. (D&O, Page 28).

Lehmann's alcoholism continued through the summer of 2015, in the months immediately following Jolie's death. Between June and August 2015, Lehmann routinely came to the Haims residence to visit with the Child and was frequently observed to be intoxicated. Haims, her husband, the Child's maternal grandfather, and a family friend, all testified that "between the time of death of the Mother and the filing date of the petition, [Lehmann] appeared at [Haims'] residence under the influence, staggered into the pool, and [on one occasion] was not aware that he nicked his elbow to the extent it started bleeding." (D&O, Page 29). The Court found that Haims, her husband, and the Child's maternal grandfather "all testified credibly regarding the circumstances that caused [Haims] to file the instant petition" and that Lehmann's "actions prior

to the death of the Mother, and his behavior at [Haims'] home and at family functions, after the Mother's death, in addition to the documentary evidence presented, clearly showed [Lehmann's] unfitness to parent the Child when this case was filed." (D&O, Page 27). The Court did not find credible Lehmann's "testimony that he was not under the influence of alcohol when he cared for the child" as it was "inconsistent with other evidence admitted at the fact-finding hearing indicating that [Lehmann] drank daily, during work and after work." (D&O, Pages 27-28). The lower Court also did not believe that Lehmann "was forthright . . . regarding the amounts of alcohol he drank during the Child's first four years of life." (D&O, Page 28). Lehmann, seemingly unable to recognize the severity of his actions, only "begrudgingly admitted that his drinking negatively affected his relationship with and his ability to parent the Child." (D&O, Page 28). As a consequence of his drinking, Lehmann has "been in and out of rehabilitation facilities and hospitals since the Child's birth with the latest admission being six months prior to the filing date of the petition." (D&O, Page 28).

Most concerning is Lehmann's flagrant disregard for the recommendations of the various medical professionals each time he was discharged from treatment. To maintain his sobriety, Lehmann was advised to "attend AA meetings, 90 within the first 90 days of discharge, integrate in a 12-step program, select a home group, obtain a sponsor, enroll and engage in therapy, participate in recreational activities in the recovery

community, and enroll in an intensive outpatient program." (D&O, Page 28). The Family Court, however, found that Lehmann was "indifferent" to these recommendations and his failure to follow through was based upon "his own feeling that he could achieve sobriety on his own." (D&O, Page 28). The lower Court concluded, Lehmann "has not built up any sober support group to achieve or maintain sobriety *and that continues to date.*" (D&O, Page 28).

As part of these proceedings, Lehmann and various other collateral sources were interviewed by Dr. Raymond Griffin, an expert in the field of addiction and substance abuse. (D&O, Page 9). "Dr. Griffin recommended that [Lehmann] take advantage of an intensive outpatient program and obtain a therapist because of [Lehmann's] relapse history and [Lehmann's] statement that he tends to isolate himself." (D&O, Page 9). He believed that Lehmann was "abstinent, but not sober" because, at the time of his testimony, Lehmann had not been enrolled in therapy for nine months, saw his psychiatrist only every three months, and while he attended Smart Recovery and AA, Dr. Griffin did not believe Lehmann would get much out of the programs if he was not committed to the principles of the program by working through the 12 steps of recovery without a sponsor." (D&O, Page 10). Lehmann failed to offer any testimony rebutting Dr. Griffin's reporting that Lehmann failed to follow Dr. Griffin's recommendations. (D&O, Page 30).

The Court did not find Lehmann's own psychiatrist, Dr. Centurion, to be credible. (D&O, Page 29). The

lower Court was particularly troubled by the fact that Dr. Centurion could not recall whether she had reviewed Lehmann's medical records and that her treatment is based upon Lehmann's own self-reporting. (D&O, Page 29). While Dr. Centurion prescribed Lehmann Antabuse, a medication designed to make the patient feel ill upon consuming alcohol, she did so based on Lehmann's own report that he was sober and she had no way of monitoring whether he actually took the medication. (D&O, Page 30). Dr. Centurion's testimony that she believed Lehmann "would be a great parent" and that he would "not have a problem parenting" the Child is directly contrary to the statements she made to Dr. Griffin, wherein she noted that she had "concerns about [Lehmann] having custody of the Child" and that she did not believe that [Lehmann] had any level of attachment to the Child except for a narcissistic one." (D&O, Page 30). Moreover, Dr. Centurion could not provide any explanation for the fact that she only maintained her notes until January 13, 2015, and that her records were completely devoid of any notes taken during the entire period of litigation or the period of time when Lehmann committed to obtaining sobriety. (D&O, Page 30). The Court further expressed concern over the fact that Lehmann was not taking sufficient steps to address his depression. The Family Court found that Lehmann "is completely reliant upon Dr. Centurion, who sees him every three months to determine whether he is going to remain on the medication or is in need of individual therapy . . . [Lehmann's] testimony that he does not discuss his depression with Dr. Centurion and does not feel he

needs a therapist, concerns this Court." (D&O, Page 32).

As a result of Lehmann's alcoholism, Haims' husband testified that neither he nor Haims ever left Lehmann alone with the Child. (Tr. Dec. 6, 2016, Page 58, Lines 7-10). During the proceedings, Lehmann's access was supervised (pursuant to Court order) by Ms. Carmen Candelario of Supervised Visitation Experts, who testified that "she smelled alcohol on [Lehmann] on three separate occasions" and that when she confronted him about this, he "stated that he drank the week prior to her smelling the alcohol in October 2015 and that she was smelling mouthwash in November 2016." (D&O, Page 31). While the results of Lehmann's October 27, 2015 alcohol test were negative, the test only covered a three-month period because Lehmann's "hair was too short and the nail sample was not sufficient to conduct a test. Significantly, [Lehmann] admitted that he was actively drinking through January 2016." (D&O, Page 31).

With respect to Lehmann's alcoholism, the Court decisively concluded, Lehmann "is unfit to be the sole custodian of the Child. Lehmann, who admitted that he is an alcoholic has not sufficiently addressed his alcoholism and has never been the primary caretaker of the Child." (D&O, Page 33). Lehmann "has not established that he has committed himself to a program to maintain sobriety" and his witnesses offered inconsistent testimony regarding the frequency and regularity with which he attends Smart Recovery or AA. (D&O, Page 33).

Ms. Candelario observed during her supervised access, that "there were specific instances where [Lehmann] was not equipped to handle the Child's anxiety" and he resisted Ms. Candelario's suggestion to forge a relationship with Dr. Behrman, the Child's therapist, to "understand the Child's emotional needs." (D&O, Page 31).

Notably, Lehmann did not reach out to Dr. Behrman until several months after the filing of the petition and made no effort to work with her until several months after the commencement of the fact-finding hearing. (D&O, Page 31). Incredibly, Lehmann "did not start to meet or speak with Dr. Behrman monthly until March 2017, three months after Dr. Behrman testified at the fact-finding hearing regarding his lack of efforts." (D&O, Page 31). By that time the Child had been under Dr. Behrman's care for 16 months.

Dr. Behrman concluded that the Child would not thrive in Lehmann's household because he exhibits a "lack of empathy for the Child." (D&O, Page 32). The lack of empathy similarly extends to Lehmann's new wife, Philine, who testified that if Lehmann were to be granted custody of the Child, they both planned to "change all of the Child's providers." (D&O, Page 32). Lehmann confirmed during his testimony that if he is awarded custody of the Child, the Child would have to move to White Plains (Tr. Aug. 15, 2017, Page 42, Lines 13-14), she would get new dentists and new doctors (Tr. Aug. 15, 2017, Page 42, Lines 21-24; Tr. Aug. 15, 2017, Page 103, Lines 21-25), and a new therapist (Tr. Aug. 16, 2017, Page 104, Lines 10-12). These actions are

directly contrary to Dr. Abrams' concern; to wit, "for a child to have a stable, loving home environment during the early years of life. Providing [the Child] with an empathic, emotionally connected, loving vibrant home environment will be critical for her psychological/ emotional development in order to give her the best chance possible to develop into a psychologically healthy, interpersonally secure and connected, and emotionally intact woman." (D&O, Page 23).

The Court was further concerned that neither Lehmann nor Philine "had any specific plans regarding maintaining the Child's relationship with [Haims]" and that Lehmann and his wife exchanged text messages "regarding seeking vengeance against the Mother's family." (D&O, Page 32).

Since Jolie's death, Haims and her family have worked together to provide for the Child and ensure that all her needs are met. The Family Court found that: "During the three-month period and since the filing date of the petition, [Haims] enrolled the Child in extracurricular activities, school, and in therapy with Dr. Behrman. [Haims] worked closely with Dr. Behrman to assist the Child in dealing with her grief over losing the Mother and Maternal grandmother. Petitioner implemented the coping skills recommended by Dr. Behrman for the Child to deal with her regressive behaviors, night terrors, and need for belonging. When the Child experienced educational difficulties during the school year, Petitioner arranged for the Child to have a tutor." (D&O, Page 29). Dr. Abrams found Haims to "have an excellent understanding of [the Child's]

physical, developmental, social, educational, and emotional needs." (D&O, Page 22). Further, Dr. Abrams "found that there was ample evidence to support [Haims'] concerns regarding [Lehmann's] ability to parent the Child and concerns about [Lehmann's] sobriety and mental state. Dr. Abrams recommended that [Lehmann] needed professional support to learn how to better parent." (D&O, Page 23).

Based upon the foregoing, the Trial Court found extraordinary circumstances existed to warrant a best interest determination and found that it is in the Child's best interest to award Haims physical custody, as she is best able to "meet the Child's physical, emotional, mental, and psychological needs [and] has been providing the Child a stable, consistent, and structured home environment." (D&O, Page 33). Lehmann did not show that he was *ever* the Child's primary caretaker or that his relationship with her would be adversely impacted if Haims were awarded custody. The evidence adduced at trial showed that Haims and her family made concerted efforts to foster the Child's relationship with Lehmann, while Lehmann did not offer any credible testimony that he would do the same. (D&O, Page 33).

Notwithstanding, the Trial Court also found it to be "in the best interest of the Child to award the parties joint legal custody with Petitioner having final decision-making authority over the Child's health, education, and general welfare matters after meaningful consultation with [Lehmann.]" (D&O, Page 33). The Court also directed, *inter alia*, that Lehmann's

"therapeutic supervised visitation with the Child shall conclude" effective December 31, 2017 (D&O, Page 35), and that Lehmann's "parenting time with the Child graduate to unsupervised access" to a schedule which ultimately provides him with access every single weekend from Friday at 7:00 p.m. until Sunday at 7:00 p.m. (D&O, Pages 33 & 35). The Court further believed that Lehmann's supervised therapeutic access with Dr. Benna Strober should conclude forthwith. (D&O, Page 34).

On December 29, 2017, Haims filed an Order to Show Cause with the New York Supreme Court Appellate Division—Second Department to stay enforcement of the portions of the Trial Court's order allowing Lehmann to have unsupervised access with the Child and awarding joint legal custody to the Haims and Lehmann. By Decision and Order on Motion dated February 2, 2018, the Appellate Division granted Haims' request for a stay as follows:

> ORDERED that the motion is granted, and enforcement of the eleventh, twelfth, and fifteenth through fortieth decretal paragraphs of the order dated December 18, 2017, is stayed and [Lehmann] shall continue to have supervised weekly visitation with the subject child, to be supervised by Benna Strober, pending hearing and determination of the appeal; and it is further,
>
> ORDERED that the first through fourth decretal paragraphs of the order to show cause of this Court dated December 29, 2017,

> in the above entitled matter are vacated forthwith.

By Decision and Order dated April 24, 2019, following the perfection of the appeal, the Appellate Division, Second Department modified the Trial Court's Decision and Order by awarding Haims sole legal custody of the Child and continuing Lehmann's therapeutic supervised parental access with the Child. The Appellate Division held:

> Here, we agree with the Family Court's determination that the maternal aunt sustained her burden of demonstrating the existence of extraordinary circumstances. 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 court should not have awarded joint legal custody of the child to the parties given the hostility and antagonism between them. Under the circumstances, the court should have awarded sole legal custody of the child to the maternal aunt. The award of sole physical custody of the child to the maternal aunt is in the best interests of the child and is supported by a sound and substantial basis in the record.
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> The determination of parental access is entrusted to the sound discretion of the Family

> Court, and an award of parental access will not be disturbed unless it lacks a sound and substantial basis in the record. Here, the court's determination discontinuing the father's therapeutic supervised parental access with the child and awarding the father unsupervised parental access with the child, after only two months of therapeutic supervised parental access between the father and the child and without some mechanism in place to ensure the father's continued sobriety, lacked a sound and substantial basis in the record. (*citations omitted*).

By Decision dated October 17, 2019, the New York State Court of Appeals dismissed Lehmann's appeal, *sua sponte*, "upon the ground that no substantial constitutional question is directly involved."

REASONS FOR DENYING THE PETITION

The decisions of the New York Courts do not conflict with any decision of this Court nor does it present any other compelling reasons for certiorari. In essence, Lehmann asks this Court to determine whether a state court erred in its application of well-established precedent. Therefore, the petition should be denied.

Review Is Not Warranted to Consider Whether The New York State Courts Correctly Applied A Settled Rule to The Particular Issues in This Case

Indeed, this Court has long recognized the fundamental liberty interest involved in cases affecting the rights of a parent to care for their children. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *see also Prince v. Massachusetts*, 321 U.S. 158 (1944). However, this Court has never held that such interest is unfettered, without limitation. For example, in *Lehr v. Robertson*, 463 U.S. 248 (1983), this Court held, "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *quoting Caaban v. Mohammed*, 441 U.S. 380, 397 (1979); *see also Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (Where this Court concluded that despite both biological parenthood and an established relationship with a young child, a father's due process liberty interest in maintaining some connection with that child was not sufficiently powerful to overcome a state statutory presumption that the husband of the child's mother was the child's parent and the biological father could even be denied visitation).

In *Troxel v. Granville*, 530 U.S. 57, 88-90 (2000), a case in which the majority held that a Washington State statute, which permitted "any person" to petition for visitation rights violated due process, Justice Stevens noted in his dissenting opinion, that while the Court has long recognized fundamental liberty interests implicated by the challenged action:

A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as parens patriae, and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection.

. . .

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel . . . The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in

> fact motivated by an interest in the welfare of the child.
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> The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily. (*citations omitted*) (*emphasis added*).

See also Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation.").

More than forty years ago, New York State's highest Court held that a parent may be denied custody in favor of a nonparent where there exists "extraordinary circumstances" coupled with a finding that custody to the nonparent is in the child's best interest. *Bennett v. Jeffreys*, 356 N.E.2d 277 (1976). The Court, recognizing that biology is not dispositive in the determination of custody, reasoned:

> The day is long past in this State, if it had ever been, when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead, in the

> extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody. Indeed, analysis of the cases reveals a shifting of emphasis rather than a remaking of substance. This shifting reflects more the modern principle that a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude. *Id*. at 281.

Essentially, Lehmann asks this Court to overrule the New York State Court's finding that "extraordinary circumstances" existed. However, such a finding is consistent with New York State law, and in any event, it is not the function of this Court to correct errors in the application of precedent. *See* F. Frankfurter & J. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (1928) ("The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case . . . If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved").

The New York Courts Correctly Applied Well Established Precedent

Where an "extraordinary circumstances" analysis is warranted, New York Courts do not ascribe to a "one size fits all" approach. It is incumbent upon the Court to consider "the cumulative effect of all issues present in a given case and not view each factor in isolation." *Pettaway v. Savage*, 87 A.D.3d 796 (3rd Dep't 2011). To determine whether extraordinary circumstances are present, a Court should consider "the totality of the circumstances including the length of time the child has lived with the nonparent, the quality of the relationship and the length of time the biological parent allowed custody with a nonparent to continue without attempting to assume the parental role." *K.B. v. J.R.*, 26 Misc.3d 465 (Kings Cty. Sup. Ct. 2009); *Cade v. Roberts*, 141 A.D.3d 583 (2nd Dep't 2016).

In prior cases, extraordinary circumstances have been established based upon the combined effect of factors including the child's psychological bonding and attachments, the prior disruption of the parent's custody, separation of siblings and potential harm to a child, as well as the parent's neglect or abdication of responsibilities and the child's poor relationship with the parent. *Pettaway*, 87 A.D.3d at 798; *Rodriguez v. Rodriguez*, 150 A.D.3d 1016 (2nd Dep't 2017).

See Banks v. Banks, 285 A.D.2d 686 (3rd Dep't 2001) ("extraordinary circumstances" is far broader than that single inquiry and the Court found "extraordinary circumstances" present based upon the untimely

demise of the biological father; the poor relationship between the child and their biological mother; withdrawal of the parent from the child's life as evidenced by the lack of participation in school and other extracurricular activities; the sporadic visitation (often terminated early by request of one or more of the children); the specific needs of the older child, bereavement and alcohol/drug abuse, the disruption of custody for a prolonged period of time and attachment of the child to the custodian, the psychological bonding of the child to the custodian and the potential harm to the child); *see also Arnold v. Arnold*, 147 A.D.3d 946 (2nd Dep't 2017) (Where, the Appellate Division found that the aunt sustained her burden of demonstrating extraordinary circumstances based upon*, inter alia*, the father's prolonged separation from the subject child and lack of involvement in her life for so many years, as well as the father's failure to contribute to the child's financial support. The Court stated that the award of custody to the maternal aunt would be in the best interests of the child and is supported by a sound and substantial basis in the record). *See also Pettaway*, *supra*, at 799) ("Extraordinary circumstances" found where the father did not attend the child's school conferences or special education meetings until after the mother's death, did not know the names of the child's teachers, and also found it would be "extremely unlikely" that the father would foster a relationship between the child and her sister and the "others who have become her true family").

Lehmann incorrectly posits that consideration of psychological harm to the Child is "irrelevant to an extraordinary circumstances determination in New York." *See Lehmann br.* at pg. 31. Courts have routinely found the existence of "extraordinary circumstances" where there existed a separation between the natural parent and the child along with evidence that other family members have, in effect, become that child's "psychological parents" and that a return to the biological parent would be harmful to the child. *See Melody J. v. Clinton Cty. Dep't of Soc. Servs.*, 72 A.D.3d 1359 (3rd Dep't 2010) (Where the Court noted that, as one of the factors examined, the need to foster stability in the young child's life). In *Curry v. Ashby*, 129 A.D.2d 310 (1st Dep't 1987), where the child began to live with her maternal aunt after her mother was tragically killed in a subway accident, the Court found "extraordinary circumstances" present even though it was established her biological father could provide a suitable living accommodation and exercised weekend access while the mother was living. The testimony revealed that the child only lived with her father for "a maximum of a year and a half—some six months prior to [the Child's] first birthday, and for a period of less than a year when [the Child] was three years old" and the Court heavily weighed the child's preference to remain with her maternal aunt and her brother, stating,

> In part this preference is related to her warm, affectionate relationship with her younger brother with whom she has lived most of her life, an affection that is fully reciprocated. In part it appears to result from her sense of

> happiness and security in her aunt's home. Although she expresses love for her father and his wife, and their children, in particular the youngest child, it is quite clear that she does not feel as comfortable and happy in her father's home as she feels in the home in which she is presently living. *Id*. at 313.
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> . . .
>
> It is also clear that the respondent, by nature of her close relationship to [the Child's] mother, and her ongoing affectionate relationship to [the Child] herself, was in fact extremely well-fitted at a tragic time in the child's life to provide her, as well as her brother, with a stable, loving and caring environment. There can be no doubt that respondent and her husband have done precisely that, and that [the Child] and her brother are happy, content and secure in their aunt's home. It is further clear that [the Child] does not wish to be separated from her brother and removed from what has become her new home, and that she regards the proposed removal with acute anxiety. We believe that these critical facts justify the conclusion that the separation of [the Child] from her brother and her removal from a home in which she is happy and secure, against her strongly expressed wishes, would at a minimum inflict on her a severe emotional blow. *Id*. at 314-315.

In light of the foregoing, the Court held:

> [The Child's] welfare would be drastically affected, and that she would sustain a

> significant emotional injury, with a clear possibility of ongoing harmful consequences, if she were to be separated from the brother with whom she has lived most of her life, and to whom she is bound by the most profound feelings of affection and intimacy, and if she were to be removed at an emotionally vulnerable time in her life from a home in which she and her brother found emotional security in the aftermath of their tragic loss, to live with a parent with whom she had not lived for many years prior to her mother's death, and with whom she may never in fact have lived. These findings, strongly supported by the record, compel the conclusion that there are here present extraordinary circumstances which require that the custodial issue be determined on the basis of the best interests of the child, as to which issue the Family Court's determination was clearly supported by the evidence. *Id*. at 318.

See also Mary H. v. Helen P., 131 A.D.2d 571 (2nd Dep't 1987) (Extraordinary circumstances existed where the maternal great aunt and uncle were "indisputably the psychological parents of the child" based upon the evaluations of Court-appointed psychiatrists that illustrated a great risk of the child experiencing "psychological and physical trauma" if returned to the custody of her mother and the psychological bond between the child and the maternal great aunt and uncle, together with the extended separation between the child and her mother and the risk to the child); *see also Barcellos v. Warren-Kidd*, 57 A.D.3d 984 (2nd Dep't

2008) (Extraordinary circumstances existed based upon, *inter alia*, an extended disruption of custody between the mother and the child, the mother's physical limitations, and the risk of emotional and physical harm to the child if custody were restored to the mother, where the record demonstrated that the paternal aunt provided the child with a stable, nurturing, and supportive home environment, the child thrived in her care, and with whom the child bonded psychologically); *see also Roberta P. v. Vanessa J.P.*, 140 A.D.3d 457 (1st Dep't 2016) (Family Court properly found maternal grandmother demonstrated requisite extraordinary circumstances to seek custody of subject child where evidence showed that maternal grandmother, not parents, cared for child on daily basis for prolonged period, over 24 months, and child resided in her home during that period for most of his life; child's best interests found in remaining with maternal grandmother where she provided child with loving and stable home and child wished to remain with her, while father never cared for child on daily basis and intended on uprooting child from home, moving across country).

Lehmann further incorrectly states that whether the biological parent acted as primary caretaker to the subject child is "irrelevant to an extraordinary circumstances determination in New York." *See Lehmann br.* at pg. 31. In order to make a finding of extraordinary circumstances, it can be established that the parent has voluntarily relinquished care and control of the child, and same can be established by assessing the

parent's behavior. *Matter of Suarez v. Williams*, 26 N.Y.3d 440 (2015); *Gilchrest v. Patterson*, 55 A.D.3d 833 (2nd Dep't 2008). It is not required to make a finding that the parent has relinquished *all* care and control of the subject child. *Suarez*, 26 N.Y.3d at 445-446. Pertinent inquiries to determine whether the parent has in fact voluntary relinquished care and control of the child are: (1) the "quality and quantity of contact between the parent and the child" and (2) "whether the parent makes important decisions affecting the child's life, as opposed to merely providing routine care on visits." *Id*. at 451. In *Suarez*, the child's grandparents sought custody of the child after the child lived with them for four (4) years. *Id*. at 445. The mother had joint legal custody of the child with the child's father, yet the child persisted to reside with his grandparents. *Id*. The Court of Appeals held that the Family Court properly assessed the quality and quantity of contact the child had with his mother and the respective roles of the child's mother and the grandparents in the child's life, particularly regarding decisions impacting the child's life such as school choice. *Id*. at 452-453. The voluntary relinquishment of care and control of a child constitutes extraordinary circumstances, permitting a Court to examine the totality of the circumstances to determine which custodial arrangement would be in the child's best interests. *Id*. at 453.

There can be no doubt that since the death of the Child's biological mother, Haims, her husband, and their two children, stepped in to fill the void. Haims took in the Child after Jolie suffered a brain aneurism

and died. She came up with a plan, under the guidance of a mental health professional, about how to break the news of the Child's mother's death to the Child. The Child continued to reside with Haims through the summer of 2015 and Haims remained by her side during the time of the passing of the Child's maternal grandmother. Haims enrolled the Child in therapy with Dr. Behrman to assist the child in dealing with the loss of the Child's mother and grandmother. (D&O, Page 3). Haims was in close contact with the Child's therapist and they frequently discussed the Child's "grief, the Child's nightmares and night terrors, and regressive behavior the Child was exhibiting after her Court ordered Face Time access with [Lehmann]." *Id*. Significantly, the Court found that Haims implemented the recommended coping skills for the child to deal with "her regressive behaviors, night terrors, and need for belonging." *Id*. at 29.

Dr. Abrams, the Court appointed neutral forensic psychologist, found Haims to be "encouraging and educationally guided in her approach, utilizing age-appropriate language" and found Haims to "have an excellent understanding of [the Child's] physical, developmental, social, educational, and emotional needs." *Id*. at 22. He emphasized the importance "for a child to have a stable, loving home environment during the early years of life. Providing [the Child] with an empathic, emotionally connected, loving vibrant home environment will be critical for her psychological/emotional development in order to give her the best chance possible to develop into a psychologically

healthy, interpersonally secure and connected, and emotionally intact woman." *Id*. at 23. Dr. Abrams ultimately concluded that it would be "profoundly irresponsible for anyone to allow [the Child] to be exposed to another major set of changes in caretakers." *Id*. at 23-24.

Because of his alcoholism and his inability to become sober, Lehmann only lived with the Child for approximately one year of her life, and not since she was 16-months old. He also rarely spent time with the Child alone, outside the presence of Jolie (when she was living), the Haims, or her family. In fact, he did not produce any "witnesses that observed his interactions with the Child for any part of her life except for the visits supervised by Ms. Candelario." (D&O, Page 27). Nor did the Court believe Lehmann's testimony concerning the amount of time he actually spent with the Child before the mother's death, stating that his claims were inconsistent with the other evidence, which showed he drank on a daily basis, both during and after work. Furthermore, Lehmann "reported to Dr. Griffin that the Mother found him asleep on the couch when he was supposed to be watching the Child" leading the Court to believe that Lehmann was not forthright "regarding the amounts of alcohol he drank during the Child's first four years of life." *Id*. at 28.

A parent's abuse of alcohol, among other factors, has been found to contribute towards a finding of extraordinary circumstances. *See Herrera v. Vallejo*, 107 A.D.3d 714 (2nd Dep't 2013). In *Scott L. v. Bruce N.*, 126 A.D.2d 157 (1st Dep't 1987), the Court was

similarly faced with a situation where the maternal aunt and uncle sought custody of the subject children, following the death of the mother, over the objection of their biological father. As in the instant action, the petitioner in that case "provided for the girls' physical, educational and emotional needs" and the children expressed a clear preference to be with the maternal uncle. In accordance with the *Bennett v. Jeffreys* framework, the Court was called upon to determine whether the father's extensive history with substance abuse constituted an "extraordinary circumstance." In that case, the father had a long history of drug and alcohol abuse, and while enrolled in a drug treatment program, there was evidence of drug use in the preceding year. This fact, coupled with the precarious emotional condition of the child, the guarded prognosis for his ultimate recovery, his depressed mental state, and his impaired relationship with his children, led the First Department to conclude "extraordinary circumstances" existed sufficient to proceed with a best interest analysis. In reversing the Family Court, the Appellate Division held, "Indeed, if the instant matter does not present the sort of extraordinary circumstances contemplated by the Court of Appeals in *Bennett v. Jeffreys, supra*, it is difficult to conceive of a situation that would." *Id*. at 161. *See also Rodriguez v. Delacruz-Swan*, 100 A.D.3d 1286 (3rd Dep't 2012) (Where the Appellate Court affirmed the Family Court's decision to award primary physical custody to the paternal grandmother over the biological mother's objection because "by her own admission, the mother has a longstanding history of alcohol abuse. Although

she successfully completed a drug treatment course in 2008, the mother conceded she continued to drink, did not attend the required number of Alcoholics Anonymous meetings and, with the exception of such meetings, was not in treatment at the time of the hearing [and the Court was further concerned by the Mother's] limited insight into both her treatment needs and the effect that her behavior has upon her child's well-being." *Id*. at 1289; *see also Lisa UU. v. Sarah VV.*, 132 A.D.3d 1094 (3rd Dep't 2015) (Extraordinary circumstances found where the mother has not consistently maintained sobriety, including at time of hearing, and her drug use affected her ability to provide sufficient care).

Here, the Court specifically addressed how Lehmann's alcoholism affected his ability to parent while the mother was still alive:

> [Lehmann] has not spent significant time with the Child because he drank excessively and was unable to control his alcoholism by becoming abstinent and sober. By [Lehmann's] own admission, he lived with the Child for approximately one year of her life and not since she was at least 16 months old. Further, [Lehmann] rarely spent time with the Child outside the home or presence of the Mother, the maternal grandparents, or Petitioner. [Lehmann] produced no witnesses that observed his interactions with the Child for any part of her life except for the visits supervised by Ms. Candelario. [Lehmann] has never been the primary care taker of the child.

> The Court does not find [Lehmann's] testimony credible regarding the parenting time he spent with the Child leading up the death of the Mother, but rather finds it self-serving. [Lehmann's] testimony that he was not under the influence of alcohol when he cared for the Child is inconsistent with other evidence admitted at the fact-finding hearing indicating that [Lehmann] drank daily, during work and after work.

Id. 27-28.

The Decision and Order then detailed the various rehabilitation facilities and hospitals where Lehmann was admitted for the treatment of his alcoholism, including White Plains Hospital, where Lehmann was diagnosed with acute pancreatitis as a result of his alcoholism, Gracie Square Hospital, where he was diagnosed with depression, alcohol dependence, and anxiety, Endeavor House, where Lehmann admitted to drinking approximately a half-liter of vodka daily, New York Presbyterian Weill Cornell Hospital, where he was and diagnosed with alcohol induced pancreatitis and alcohol withdrawal, and Glenbeigh rehabilitation facility. *Id*. at 28.

Nevertheless, Lehmann brazenly ignored the recommendations of both Dr. Griffin and the various rehabilitation facilities, to achieve and maintain sobriety. Specifically, Lehmann was advised to attend AA meetings, follow a 12-step program, obtain a sponsor, engage in therapy and with the recovery community and to enroll in an intensive outpatient program. He was

indifferent to all of the foregoing, even though these steps would best ensure he did not relapse, which was a significant concern. Instead, Lehmann operated under the assumption that he could best achieve sobriety on his own. The Court was unpersuaded.

When questioned about his drinking, the Court did not afford weight to Lehmann's testimony when he stated that he never drank before he spent time with the child and that he only drank on occasion in the summer of 2015, following Jolie's death. Lehmann's testimony was belied by the testimony of Haims, her husband, the child's maternal grandfather, and Haims' friend, who all witnessed different instances in which Lehmann "appeared at [Haims'] residence under the influence" both in and out of the presence of the Child and, on one occasion, "staggered into the pool, and was not aware that he nicked his elbow to the extent that it started bleeding." *Id*. at 28.

Rather than adhere to the recommendations above, Lehmann argued his sessions with his therapist, Dr. Centurion, which occurred once every two to three months and were based upon self-reporting, was a sufficient check on his sobriety. Dr. Centurion admitted she could not verify if Lehmann was taking his medication and she believed Lehmann could not effectively be a single parent.

The Court's "extraordinary circumstances" analysis addressed Lehmann's unfitness, stating, "based on the totality of the circumstances, [Lehmann] is unfit to be the sole custodian of the Child. Lehmann, who

admitted that he is an alcoholic has not sufficiently addressed his alcoholism and has never been the primary caretaker of the Child." (D&O, Page 33). The Court reasoned, "there are several compelling factors to support the granting of Petitioner's application [including] . . . [Lehmann's] actions prior to the death of the Mother and his behavior at Petitioner's home and at family functions, after the Mother's death." These facts combined with the documentary evidence presented evidence his unfitness to parent. *Id*. at 27.

As Lehmann acknowledges in his brief, "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." *quoting Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276 (1966). Here, the record before the New York Courts was robust and provided a sufficient basis for an award of legal custody to the Haims and supervised therapeutic access to Lehmann.

Lehmann Asks This Court to Apply A Standard of Review Unsupported by Case Law

Lehmann's reliance upon *Santosky v. Kramer*, 455 U.S. 745 (1982), for the proposition that the Court erred by applying a "preponderance standard," is misplaced. In *Santosky*, the Court held that the "preponderance standard" then set forth in the Family Court Act was not stringent enough to satisfy the constitutional requirements of the due process clause in cases

of permanent neglect. The Court reasoned that the more stringent "clear and convincing evidence" standard should apply in cases where a state seeks to "sever completely and irrevocably the rights of parents in their natural child." Here, unlike in *Santosky*, the underlying proceedings were not brought under § 614 of the New York Family Court Act (Permanent Neglect), rather it was brought under § 651 (petitions for custody and visitation of minors). Lehmann's rights as a parent were not severed completely and irrevocably nor were his rights permanently terminated, as he maintains therapeutic supervised access with the Child. Thus, the "clear and convincing evidence" standard (now embodied in Family Court Act § 622) does not apply.

The New York State Court Decision is Not "Final" Within the Meaning of 18 U.S.C. § 1257(a)

As this Court held in *Flynt v. Ohio*, 451 U.S. 619, 620 (1981):

> Consistent with the relevant jurisdictional statute, 28 U.S.C. § 1257, the Court's jurisdiction to review a state-court decision is generally limited to a final judgment rendered by the highest court of the State in which decision may be had. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-477, 95 S.Ct. 1029, 1036, 43 L.Ed.2d 328 (1975). In general, the final-judgment rule has been interpreted "to preclude reviewability . . . where anything further remains to be determined by a State

> court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State."

In the case at bar, prior to New York's highest Court dismissing the appeal, *sua sponte*, on the ground that no substantial constitutional question is directly involved, the Appellate Division: (i) confirmed the Family Court's finding that Haims sustained her burden of demonstrating the existence of extraordinary circumstances; (ii) awarded sole legal custody of the Child to Haims; and (iii) reversed the lower court's award of unsupervised access to Lehmann, and *remitted the matter to the Family Court to specify a schedule for continued therapeutic supervised access*. Here, there can be no question that the Decision and Order is nonfinal in nature, insofar as the matter was remitted to the Family Court for further proceedings to determine a therapeutic supervised access schedule for Lehmann and the Child. The Appellate Division felt it was an abuse of discretion by the Family Court to discontinue supervised therapeutic access after only two months, without some mechanism in place to ensure Lehmann's continued sobriety.

Lehmann did not raise the issue of "fundamental and natural rights" in the New York Courts

S. Ct. Rule 14(1)(g)(i) requires the Appellant to specify when the federal questions sought to be reviewed were raised in the lower courts and the method and manner in which such questions were passed on by those Courts. Lehmann did not provide that

information, likely because the constitutional issues raised in his instant petition were not raised at trial or in the Appellate Division. In fact, the first and only time this issue was raised was in the Notice of Appeal dated May 31, 2019 to the New York Court of Appeals, requesting that the Court hear his appeal "as of right" because it "directly involved the construction of the constitution of the state or of the United States."

As set forth in *Adams v. Robertson*, 520 U.S. 83, 86 (1997), with very rare exceptions, "we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *See also Heath v. Alabama*, 474 U.S. 82, 87 (1985) ("We decline to decide the issue because petitioner did not claim lack of jurisdiction in his petition to the Alabama Supreme Court and he raised the claim for the first time in his petition to this Court."). The Court in *Adams v. Robertson* (*supra*, at 86-87) continued:

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here." We have described in different ways how a petitioner may satisfy this requirement. In some cases, we have focused on

> the need for petitioners either to establish that the claim was raised "'at the time and in the manner required by the state law,'" or to persuade us that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment. In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time." (*citations omitted*).

In the case at bar, none of the New York State Courts actually decided the constitutional questioned presented by Lehmann in his instant Petition. Accordingly, it is respectfully submitted that this Court should deny Lehmann's Petition for Certiorari.

CONCLUSION

Lehmann's Petition should be denied.

Respectfully submitted,

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