**TABLE OF CONTENTS**

**Page**

TABLE OF AUTHORITIES iii

[PRELIMINARY STATEMENT 1](#_Toc507508132)

[BACKGROUND 1](#_Toc507508133)

[The Parties 1](#_Toc507508134)

[Pre-Trial Proceedings 2](#_Toc507508135)

[Trial on the Mother’s Family Offense Petition 11](#_Toc507508136)

[A. The Mother’s Testimony Regarding the Family Offenses 11](#_Toc507508137)

[B. The Father’s Testimony 12](#_Toc507508138)

[C. The Paternity Issue 13](#_Toc507508139)

[Trial on the Grandmother’s Family Offense Proceedings 14](#_Toc507508140)

[A. The Grandmother’s Testimony 14](#_Toc507508141)

[B. The Father’s Testimony and Subsequent Failures to Appear 15](#_Toc507508142)

[The Custody Proceedings 16](#_Toc507508143)

[A. The Mother’s Custody Petition 16](#_Toc507508144)

[B. The Grandmother’s Visitation Petition 17](#_Toc507508145)

[Decision and Order 20](#_Toc507508146)

[ARGUMENT 21](#_Toc507508147)

[I. THE IDV COURT ERRED IN CONCLUDING THAT THE PRESUMPTION OF LEGITIMACY HAD BEEN REBUTTED, WHEN THE RECORD DID NOT CONTAIN THE REQUIRED CLEAR AND CONVINCING EVIDENCE 21](#_Toc507508148)

[A. The Mother’s Testimony was Legally Insufficient to Rebut the Presumption of Legitimacy 22](#_Toc507508149)

[B. The Record Contained No Evidence of Non-Access 24](#_Toc507508150)

[C. The Evidence on which the IDV Court relied consisted only of Speculation by a Lay Witness and Hearsay Statements about a Purported DNA Test by a Witness the Court deemed not credible 25](#_Toc507508151)

[II. THE IDV COURT’S DECISION NOT TO GRANT CUSTODY LACKED A SOUND AND SUBSTANTIAL BASIS IN THE RECORD 28](#_Toc507508152)

[III. THE IDV COURT LACKED JURISDICTION TO RAISE THE ISSUE OF PATERNITY SUA SPONTE IN AN ARTICLE 6 CUSTODY PROCEEDING 33](#_Toc507508153)

[IV. THE IDV COURT ERRED BY FAILING TO ISSUE A CUSTODY RULING THAT WAS IN THE BEST INTERESTS OF THE CHILD 35](#_Toc507508154)

[V. THE IDV COURT ABUSED ITS DISCRETION BY VACATING ITS RULINGS WITHOUT AFFORDING APPELLANTS NOTICE AND AN OPPORTUNITY TO BE HEARD 40](#_Toc507508155)

[CONCLUSION 41](#_Toc507508156)

**TABLE OF AUTHORITIES**

**Page(s)**

Cases

Andrew T. v. Yana T*.*,   
74 A.D.3d 687 (1st Dep’t 2010) 39

Angela F. v. Gail WW*.*,   
113 A.D.3d 889 (3d Dept. 2014) 31

Anthony S. v. Kimberly S.,   
No. V-1276-97, 1998 WL 425464 (N.Y. Fam. Ct. June 19, 1998) 24

Ariel G. v. Greysy C.,   
133 A.D.3d 749 (2d Dep’t 2015) 24

Bruce W.L. v. Carol A.P*.*,   
46 A.D.3d 1471 (4th Dep’t 2007) 37

Christian N. v. Shante Jovan B.,   
132 A.D.3d 470 (1st Dep’t 2015) 36

Christopher YY. v. Jessica ZZ.,   
No. 522068, 2018 WL 541768 (3d Dep’t Jan. 25, 2018) 23

Clair v. Fitzgerald,   
63 A.D.3d 979 (2d Dep’t 2009) 40

Comm’r of Soc. Servs. ex rel. Edith S. v. Victor C.,   
91 A.D.3d 417 (1st Dep’t 2012) 37

Comm’r of Soc. Servs. ex rel. Maria G. v. Rafael V.,   
27 N.Y.3d 908 (2016) 36

Comm’r of Soc. Servs. ex rel. N.Q. v. B.C.,   
147 A.D.3d 1 (1st Dep’t 2016) 22, 34

Comm’r of Soc. Servs. v. Rafael V.,   
137 A.D.3d 516 (1st Dep’t 2016) 36

David G. v. Maribel G*.*,   
93 A.D.3d 526 (1st Dep’t 2012) 39

Frankel v. Stavsky,   
40 A.D.3d 918, 838 N.Y.S.2d 90 (2d Dep’t 2007) 40

Ghaznavi v. Gordon,   
163 A.D.2d 194 (1st Dep’t 1990) 24

Glenda G. v. Mariano M.,   
62 A.D.3d 536 (1st Dep’t 2009) 37

Hearst Corp. v. Clyne,50 N.Y.2d 707 (1980) 33

In re China S.,   
77 A.D.3d 568 (1st Dep’t 2010) 28

In re Duane II,   
151 A.D.3d 1129 (3d Dep’t 2017)  
, leave to appeal denied,   
29 N.Y.3d 918 (2017) 25

In re Lovely M*.*,   
70 A.D.3d 516 (1st Dep’t 2010) 39

In re Maria-Irene D.,   
153 A.D.3d 1203 (1st Dep’t 2017), leave to appeal denied sub nom.   
In re Maria-Irene D., No. 2017-1088, 2018 WL 894193 (N.Y. Feb. 15, 2018)  
 23

In re Poldrugovaz,   
50 A.D.3d 117 (2d Dep’t 2008) 25

Jackson v. Ricks,   
186 A.D.2d 1032 (4th Dep’t 1992) 26

Jean P. v. Roger Warren J.,   
184 A.D.2d 1072 (4th Dep’t 1992) 25

Juanita A. v. Kenneth Mark N.,   
15 N.Y.3d 1, 5 (2010) 36

Mannain v. Lay,   
27 N.Y.2d 690 (1970), aff’d, 27 N.Y.2d 690 (1970)  
 25

Matter of Fay’s Estate,   
44 N.Y.2d 137 (1978), appeal dismissed. 439 U.S. 1059,  
99 S. Ct. 820, 59 L.Ed. 2d 25 (1979) 22

Matter of Wilkins,   
180 Misc. 2d 568 (N.Y. Sur. Ct. 1999) 26

People v. Negron,   
91 N.Y.2d 788 (1998) 32

Seth P. v. Margaret D.,   
90 A.D.3d 1053 (2d Dep’t 2011) 37

Shondel J. v. Mark D.,   
7 N.Y.3d 320 (2006) 36, 37

Tarlow v. Tarlow,   
53 Misc. 2d 204, 277 N.Y.S.2d 952 (Fam. Ct. 1967) 35

Will of Ludwig,   
239 A.D.2d 122 (1st Dep’t 1997) 27

Yolanda R. v. Eugene I.G.,   
38 A.D.3d 288 (1st Dep’t 2007) 28, 31

Statutes

N.Y. Dom. Rel. L. § 70(a) 35

N.Y. Fam. Ct. Act § 417 23

N.Y. Fam. Ct. Act § 418 34

N.Y. Fam. Ct. Act § 522 34

Other Authorities

5 N.Y. Prac., Evidence in New York State and Federal Courts § 3:10 25

N.Y. Pattern Jury Instr.--Civil 1:64 25

PRELIMINARY STATEMENT

This is an appeal concerning an 8-year-old girl who has lived with her paternal Grandmother five days a week for most of her life – since she was 11 months old. Both the child and mother have permanent Orders of Protection against the child’s father, who is violent, homeless, and mentally ill. Despite this – and despite having found that it would be in the best interests of the child to do so – the IDV Court vacated a permanent award of custody to the mother with visitation to the Grandmother, on the fallacious premise that the presumption of legitimacy had been rebutted and that another man was somehow a necessary party. This was error, and this Court should reinstate the custody and visitation award the IDV Court wrongly vacated.

BACKGROUND

The Parties

Jane Doe (the “Mother”) and John Doe (the “Father”) were married in Month 2009 in State X. The subject child, Child Doe, (the “Child”) was born thereafter on Date, 2010, while the Father and Mother were legally married. The father’s mother is Grandma Doe (the “Grandmother”), who was formerly married to Grandpa Doe (the “Grandfather”).

At the time the Child was born, the Father and Mother lived in State X in the same home as the Grandfather. When the Child was still an infant, in approximately Month 2010, the Mother moved with the Child to New York. (L at 16:3-17).[[1]](#footnote-2) The Father did not move with the Mother and Child.

In New York, the Mother reached an agreement with the Grandmother, who lives in the Town, whereby the Child would live with and be cared for by the Grandmother during the week while the Mother worked as a live-in nanny. The child would return to the Mother’s home on the weekends. (Id. at 27:21-24; S at 11:16-22, 22:18-23:18). In approximately 2011 or 2012, the Father moved from State X to New York and began to reside with the Grandmother. (L at 42:2-20). The Parties continued to maintain the schedule whereby the Child would live in the Grandmother’s home during the week and return to the Mother’s care on the weekends.

Pre-Trial Proceedings

On or about Date, 2013, the Mother arrived at the Grandmother’s home to pick up the Child as had been pre-arranged with the Grandmother. (Id. at 75:21-76:2). The Father was there and began arguing with the Mother. According to the Mother, in the presence of the Child, the Father pulled a knife on the Mother and threatened to kill her. (Id. at 17:6-13). The Child began screaming. The police arrived and talked to both parties. The Mother was then served with a custody petition the Father had filed two days earlier on DATE, 2013. (Id. at 19:10-15). In that Petition he stated he was the Father of the Child. The Father was later arrested and charged in connection with this incident. (  
REDACTED CITATION).

On or about July 30, 2013, the Mother filed a family offense petition against the Father and a petition for custody, both of which referred to the Father as the father of the Child. (REDACTED CITATION)  
. In the family offense petition, she alleged that the Father “threatened to kill me many times when we were married and living together. He beat me on numerous occasions and was scared to report it because of my status in this country. On Date 2013 and in the past he chased me with a knife and kept yelling repeatedly that he will kill me.” (REDACTED CITATION)

On or about Date, 2013, the Father filed a second petition for custody, alleging the Mother had threatened to strangle him and the Child and that she was involved in prostitution and drugs. (REDACTED CITATION).

On or about Date, 2013, the Family Court, Judge, entered a temporary order granting the Mother parenting time from Thursday to Saturday every week, which reflected her work schedule and her prior agreement with the Grandmother. This visitation arrangement essentially remained in place throughout the legal proceedings, and the Grandmother and Mother continue to amicably follow a similar arrangement. (REDACTED CITATION).

On or about Date, 2013, the Father filed a Family Offense Petition against the Mother based on the Date, 2013, incident, which had occurred over four months earlier. He alleged that she had threatened to harm him and the Child, but that he knew of “no physical abuse yet,” although he feared that “it [was] inevitable.” (REDACTED CITATION). He obtained a Temporary Order of Protection against the Mother. Sometime thereafter he filed for child support against the Mother. When the Parties saw each other in court on the child support matter and the Mother touched the child and said “hi Child,” the Father filed a police report and had the Mother arrested for violating the Temporary Order of Protection pertaining to him. (L at 31:12-23).

On or about Date, 2014, an incident occurred between the Father and the Grandmother in her home. As alleged in the police report filed by the Grandmother on Date, 2014, the Father ran towards the Grandmother, who had the Child in her arms at the time, screaming “Give me back my fucking child.” He then grabbed the Grandmother’s shoulder and swung her around, causing the child, who was having an asthma attack, to begin to cry and have difficulty breathing. It also caused substantial pain to the Grandmother’s arm and chest, (REDACTED CITATION) for which she subsequently sought medical treatment. The Father was arrested and charged with assault in the third degree, endangering the welfare of a child, menacing, and harassment in the second degree. (See id.). The Grandmother received a criminal temporary order of protection.[[2]](#footnote-3) (REDACTED CITATION). The child was three years old at the time.

Approximately one week later, on Date, 2014, the Father, who was homeless at the time, filed for, and was granted, a writ of habeas corpus permitting him to take the Child from the care of the Grandmother, where she had been residing in a safe and stable home for two-and-a-half years. (REDACTED CITATION) With police assistance, the Father appeared at the Grandmother’s home to remove the then three-year-old child from her bed. The police ultimately refused to remove the child from her home only because of inclement weather and the fact that the Father could not articulate where he intended to take the child despite the freezing temperatures. (B at 22:19-24).

On Date, 2014, the Father filed a family offense petition against the Grandmother, alleging she had “an unhealthy obsession with [the Child],” among other allegations.

On Date, 2014, the Grandmother filed for Custody; on Date, 2014, she filed an Order to Show Cause asking that the Father’s writ be vacated. In her filings she alleged that the Father was homeless, suffered from mental illness, and that he had attacked her while she was holding the child. She also alleged that he had been abusive to the child’s mother. (REDACTED CITATION). She attached the criminal complaint and temporary order of protection regarding the Father’s attack, a prescription made out to the Father for anti-depressants, and a suicide note written by the Father. (REDACTED CITATION). The Mother also filed an OTSC on the same day, with similar allegations. (REDACTED CITATION). Judge “Judy” signed the Grandmother’s order and granted temporary physical custody to the Grandmother on Date, 2014 (REDACTED CITATION). Judge Judy also granted temporary orders of protection to both the Grandmother and the Mother.

On Date, 2014, the family court cases as well as the criminal ones were heard in IDV by Judge Judy. As in his custody petition, the Father stated that he was “the father of the child in this case,” (A at 4:14-16), a fact which he continued to assert at each following appearance. Judge Judy extended the temporary orders of protection against the Father. The judge also extended a temporary order of custody to the Grandmother, which continued throughout the case. A lawyer from the Children’s Law Center was appointed to represent the Child.

The Grandmother filed a family offense petition against the Father, dated Date, 2014, based on the Date, 2014 and Date, 2013, incidents, discussed above. (REDACTED CITATION ). She was granted a Temporary Order of Protection.

On a subsequent appearance, on Date, 2014, the Child’s attorney (the “AFC”) conveyed to the Court that the child had stated she had “pretty much always” lived with the Grandmother and that she wished to maintain the current schedule, residing with the Grandmother in her home from Sundays to Thursdays, and with the Mother from Thursdays to Sundays. (B at 11:7-12:8). The AFC asserted that any visitation with the Father should be supervised. (Id. at 13:6-8, 26:23-24).

The Grandmother’s attorney also opposed unsupervised visitation by the Father, based on the fact that the Grandmother did not believe the Child was safe in his care. It appeared that he was homeless – he had even appeared in court with a suitcase. (B at 15:21-16:6). When he had cared for the Child in the past, he frequently dressed her inappropriately for the weather and did not care for her asthma properly. The Grandmother also raised concerns regarding the Father’s mental health. (Id. at 15:12-16).

The Court noted that the Father had a criminal history in State X, and ordered a mental health evaluation of the father and a court-ordered investigation (“COI”) of his home. (Id. at 18:19-21, 24:3-13). The Court ordered supervised visits with the Father to be conducted on a weekly basis by Comprehensive Family Services. (Id. at 26:20-27:19).

At this appearance, the issue of paternity came up briefly. The Mother’s attorney asserted that the Father was posting on Facebook that he may not be the Child’s Father. The Judge interrupted to note that because the Mother was legally married to the Father at the time of the Child’s birth, “it’s assumed that it’s his child.” (Id. at 25:16-26:2). The AFC stated that the Child “recognizes him as [her] Father” and that “It’s too late for [the Father] to raise the issue.” (Id. at 26:5-8).

Several court appearances followed, and the temporary orders were extended at each one. As of an appearance on Date, 2014, the Father had completed only two supervised visits. The Father was not present at the date, 2014 appearance, and his attorney could not explain his absence. Therefore, the Court dismissed all of his petitions. (DD at 3:1-7:15).

At an appearance on Date, 2014, the Father pled guilty to the violation of harassment for the incident occurring on Date, 2013, admitting he had threatened to kill the Mother and waved a kitchen knife at her. (E at 19:16-23). A final two-year order of protection was granted on behalf of the Mother.

Over the next several court appearances on the family court matters, the Father continued to behave erratically. On several occasions he stated he had refiled custody or visitation petitions, but the Court found no record of them (H at 4:13-5:9; I at 12:6-12). On Date, 2014, the Father did not appear and his attorney informed the Court that the Father was ill in the hospital and unsure whether he would survive, but the attorney could provide no documentation regarding the illness. (G at 2:25-4:8). Two months later on Date, 2015, the Father appeared, and the court admonished the Father for his behavior in court, including laughing and muttering. (H at 11:20-12:1). The Father’s attorney asked to be relieved on Date, 2015, stating that his client had asked him to take actions that were not “possible or ethical.” The Court relieved the attorney. (I at 3:21-9:8).

A new attorney was assigned for the Father, and, after several more appearances, trial was scheduled to begin on Date, 2015. Though the Court had re-ordered supervised visits on Date, 2015, after the Father re-filed for custody, as of the start of trial, no further visits had taken place. (K at 3:25-4:18). When the case was first called on Date, 2015, the Father was not present and his attorney stated that he had moved to State Y. The Grandmother’s attorney noted that the Grandmother had been receiving mail that appeared to be medical bills addressed to the Father from various hospitals in New York, State A and State B. (L at 6:16-7:11).

The Father finally appeared later that afternoon and requested an adjournment because he did not “feel like going forward [that] afternoon,” as he had traveled a long way and wanted to discuss matters with his attorney. (Id. at 10:24-12:16). The Attorney for the Child, supported by the attorneys for the Mother and Grandmother, opposed the application, noting that the Father’s conduct in arriving late and claiming insufficient time to speak to his attorney appeared to be a delay tactic. (Id. at 12:18-13:8). The Judge denied the Father’s request, and the trial on the Mother’s Family Offense Petition began that day Date, 2015, continuing on Date, 2015, and Date, 2016.

Trial on the Mother’s Family Offense Petition

## The Mother’s Testimony Regarding the Family Offenses

The Mother testified as to the domestic violence she suffered at the hands of the Father. Regarding Date, 2013 incident, she explained that when she went to pick the Child up at the Grandmother’s home, the Father was there and they began arguing “because he didn’t want me to take her and we [got] into a big argument and then he ended up pulling a knife on me and I called the cops.” (L at 18:10-16). She was holding the Child, age three, at the time. (Id. at 18:17-19, 28:10-15). The mother also testified to a prior incident in New York where the Father had “choked” her under a train station. (Id. at 21:14-22:13, 47:3-5).. She further testified that when they lived in State X, he would shout at her and hit her numerous times, including while she was pregnant with the Child. (Id. at 22:19-25, 26:4-11). She never sought medical attention or called the police because of the Father’s constant threats that he would have her deported for being in the United States illegally. (Id. at 22:12-23:17, 54:13-20).

## The Father’s Testimony

The Father denied that he had ever threatened to kill the Mother or to harm her in any way, although he volunteered that he had “threatened to divorce her,” “threatened to sleep with all of her sisters,” and “threatened to sleep with her mother.” (M at 42:3-16). When the Mother arrived at the Grandmother’s home on Date, 2013, they argued about her taking the Child. The Father testified that in the midst of this argument, the Mother cursed at him and said that he was not the Father of the Child and that she had a DNA test on her phone that proved the Grandfather was the father. (M at 45:1-11; O at 7:3-10). However, the Father testified that he “paid this no mind” because he always had known the Child as his daughter. The Father said the Mother whispered to him “your father’s wood was better than yours,” and then told the Father to hit her. He said that he would not give her the satisfaction. She then ran screaming that he had a knife although he had no knife and had not threatened her. He was later arrested and pled guilty because he was coerced to do so by his attorney. (M at 45:1-25; O at 9:4-11:20).

He denied ever raising his voice to the Mother except on this one occasion, and further denied ever having had a physical altercation with her. (M at 53:21-55:17; O at 12:18-20). The Father “didn’t have to threaten her to have her deported” because “[s]he knew.” (M at 55:4-5).

On Date, 2016, the trial on the Mother’s family offense petition was concluded, and the court reserved decision. (O at 20:21-22).

## The Paternity Issue

On cross examination, the Mother testified that she was already pregnant when she married the Father. (L at 35:3-5). She also testified that during the argument on Date, 2013, she had told him that “Child is not his.” (Id. at 51:8-11). She testified that she was sure that the Father was not the biological father of the Child, and that she had told him this on prior occasions. (Id. at 51:13-52:1). However, she understood that the Child was legally his because the Child was born in the marriage and so she “left it like that.” (Id. at 52:11-16). She also testified that at the appearance on the Father’s child support petition, she did not tell the judge that the Father was not the father of the Child. (Id. at 59:1-23).

After the Mother left the stand on Date, 2014, the Court stated:

I recognize[d] there’s a legal presumption in this state that if you are legally married the person to whom you are legally married is the father, but we have a witness who now says under oath she doesn’t believe he is, and if he’s not the father then, quite frankly, [Grandmother] has no connection to this child, at all, so I don’t know what you want to do about this.

I mean, quite frankly, I could dismiss both of these petitions and we could go forward and continue on the family offense petition and you can go to Family Court and have a paternity test because, quite frankly, if this gentleman’s not the father of this child, then before I could grant custody I have to notify the legal father or the court system does.

(Id. at 76:23-77:12). The AFC responded that, in a paternity proceeding in family court, “based on my interviews with [Child] I would be obligated to assert estoppel and be against it because she only recognizes at this time [Father] as her father.” (Id. at 77:14-17).

Trial on the Grandmother’s Family Offense Proceedings

## The Grandmother’s Testimony

Trial on the Grandmother’s family offense petition began on Date, 2016. The Grandmother testified that on or about Date, 2014, at her home, while the Grandmother was holding the Child, the Father came at her and grabbed the Grandmother’s shoulders and swung her around, while cursing at her. The Father grabbed the Child and the Grandmother allowed him to take her to avoid her being hurt. (O at 24:25-25:20). The Child began crying and the Father took her into the bedroom with him, where she continued to cry for approximately 15 minutes. (Id. at 26:12-27:15). The Grandmother testified that as a result of the incident, she suffered pain and reduced mobility in her arms, and that she sought treatment at the hospital and took painkillers. The Grandmother’s medical records were admitted into evidence. (Id. at 29:10-30:2). The Grandmother subsequently went to the police and the Father was arrested, and the Grandmother also filed the present family offense petition. (Id. at 30:3-13).

The Grandmother testified that on or about Date, 2013, a Thursday, the Mother arrived to pick up the Child for the weekend, as had been the arrangement between the Grandmother and Mother since the Child was eleven months old. (Id. at 32:10-20). The Grandmother heard a commotion, including the Child screaming and crying. (Id. at 33:13-19). She saw the Mother running into her room holding the child (age three) and saying that the Father had “pulled a knife.” (Id. at 38:14-39:22).

The Grandmother testified that she had other concerns regarding the Father’s interactions with the Child. The Father had started taking her out at different hours of the day and night without dressing her properly. (Id. at 30:23-25, 42:19-21).She was concerned about the Child’s safety due to the Father’s erratic and irrational behavior. (Id. at 30:19-32:3, 42:9-22).

## The Father’s Testimony and Subsequent Failures to Appear

On Date, 2016, the Father began, but did not complete, his direct testimony on the Grandmother’s family offense petition. Thereafter, the Father failed to appear at the continued trial date on Date, 2016, and, through counsel, claimed to be ill. The Court granted an adjournment and stated that it would strike the Father’s testimony if he did not appear on the next court date. On Date, 2016, the Father again failed to appear and his attorney stated he had not heard from him. Accordingly, the Court struck the father’s testimony and took an adverse inference against him for his failure to appear. (R at 5:22-6:4). The Court deemed the family offense matter submitted. (R at 12:1-2).

The Custody Proceedings

On the following court date, Date, 2016, the Father again failed to appear without explanation, and the Court proceeded to an inquest on the issue of custody. (S at 3:9-4:17).

## The Mother’s Custody Petition

The Mother testified that she married the Father on Date, 2009, and has two children, the Child, Child (age 6), and an infant, Infant Doe, whom Child loves. (Id. at 10:7-12, 13:19-21). She was employed as a certified nursing assistant, and lived in a two-bedroom apartment with her boyfriend and her son. (Id. at 10:15-20, 11:5-8). Child had a good relationship with her boyfriend. (Id. at 15:2-5). When she moved here from State X, the Mother was working as a nanny, so the Child began staying with the Grandmother most of the time. (Id. at 11:16-12:2). Prior to that time, the Mother had been the primary caretaker of the Child. (Id. at 12:8-10). The Grandmother and the Mother chose the Child’s current school together. (Id. at 14:2-4). The Mother cared for her medical needs when the Child was with her. (Id. at 15:20-24). The Mother had taken a parenting class. (Id. at 13:6-7). The Mother testified she believed it was in the Child’s best interests for her to have legal custody, but that she would foster a relationship between her daughter and the Grandmother through phone calls and visits. (Id. at 12:20-24). She testified that she and the Grandmother remain on good terms, and communicate every day about issues involving the Child. (Id. at 15:25-16:5).

Upon conclusion of the Mother’s testimony, the Court indicated that it was taking judicial notice of the criminal case involving the Father which resulted in an Order of Protection in favor of the Mother and drew a negative inference against the Father not being there. (Id. at 17:22-19:23). The Court then found that it would be in the Child’s best interest to issue a final order of legal and physical custody to the Mother. (Id. at 19:16-20:18).

## The Grandmother’s Visitation Petition

On consent, the Court converted the Grandmother’s custody petition to one for visitation. (Id. at 17:15-20, 30:17-20). The Grandmother testified that she had lived in her current home in Town since 1958 and that she worked for the [REDACTED]. The Child had lived with her since she was 11-months old, approximately five days per week, since the Mother and Child moved to New York. (Id. at 22:5-25) The Grandmother had originally suggested to the Mother that the Child live with her because of issues with daycare and in order to administer her asthma medication, as the Grandmother is also asthmatic. (Id. at 23:4-15). At the Grandmother’s home, the Child has her own room and attends school nearby. (Id. at 23:19-25). The Grandmother enrolled her in school, takes her to school and picks her up. (Id. at 24:1-4). The Grandmother makes food for the Child during the week and makes sure she is dressed and bathed. (Id. at 24:24-25:3). The Grandmother described her relationship with the Mother as “very good,” elaborating that “she’s more like a daughter to me than daughter-in-law.” (Id. at 25:4-7).

The Grandmother filed the present petition because of “issues with the dad.” (Id. at 26:4-6). The Father had “made it known . . . that if he got Child, he would go underground with her and we would not see her anymore.” (Id. at 26:6-9). The Child had “wound up in the emergency room four times with [the Father] because he would take her out.” (Id. at 26:11-12). He would take her out at night, coming back at 3 or 4 a.m. in inappropriate clothing. (Id. at 26:14-16). The Child “was being harmed by his behavior.” (Id. at 26:21-22). The Father told her “you have no standing, you’re just a grandmother,” and that prompted her decision to come to Court. (Id. at 26:25-27:). The Grandmother testified that she “just want[s] what’s the best for [the Child].” She had no issues with the Mother, but was concerned about what the Father was doing. (Id. at 27:6-9).

The Grandmother further testified that if the Mother were to decide to move the Child to school in Town 2, she would have no issue with that, but would like to see the Child on the weekends “or whatever we come up with.” (Id. at 28:10-19).

The attorneys for the Child and Mother then explained that if the Child does change schools to Town 2, the Grandmother was seeking visitation at a minimum of two weekends per month, with other visitation as arranged between the Mother and Grandmother. (Id. at 29:17-30:16). The Court drew an adverse inference against the Father for failure to appear. (Id. at 30:24-25). It found that the Grandmother “has built a particular relationship and a bond with her granddaughter,” and therefore it was “certainly in the child’s best interests for me to issue a final order of visitation for the paternal grandmother,” in addition to the final custody order already granted to the Mother. The court continued, finding that:

the order that has been agreed to by the parties I believe is one that continues to foster the child’s well-being which is that she will continue to reside with the paternal grandmother until the conclusion of the school year, that the parties will continue until that time to agree upon whatever visitation is appropriate for the custodial mother.

After the conclusion of the school year, if the parties decide that it’s in the child’s best interests for her now to be living during the week with the mother, the grandmother will have a minimum of two weekends a month visitation with the child and any more that the parties wish to agree on in terms of vacation or holidays or weekends.

(Id. at 31:7-25). The Court continued that she believed the Child was “very lucky” to have “two very loving caring women in her life who have clearly put their interests aside to do what’s in the best interests of the child.” (Id. at 32:2-5).

\*\*\*

At no point during the inquest held on Date, 2016 did the Court mention concerns about the Child’s biological parentage or suggest that another person was a necessary party to these proceedings.

Decision and Order

On Date, 2017, the Court issued a formal Decision and Order on the pending petitions. The Court issued a final two-year Order of Protection on the Mother’s family offense petition, requiring the Father “to stay away from his wife and child.” (REDACTED CITATION). The Court also issued a final two-year, full stay-away order of protection on the Grandmother’s family offense petition on behalf of the Grandmother. (Id. at 8).

However, unexpectedly, the Court vacated the Mother’s final order of custody and the Grandmother’s final order of visitation and dismissed those petitions, *nunc pro tunc.* (Id. at 9). In explanation, the Court noted that the Mother had said repeatedly in her testimony that the Father was not the biological father of the Child; rather, the Grandfather, was the Father.[[3]](#footnote-4) The Court found that the Mother’s sworn testimony rebutted the presumption of legitimacy, and that it could not “find [the Mother] credible in the rest of her testimony, but discount her unequivocal statements contesting paternity.” (Id.). Therefore, the Court stated, it “*must* vacate” the final orders of custody and visitation “because the [C]hild’s biological father was not given notice and an opportunity to be heard on the custody petition.” (Id.).

Accordingly, there are currently no orders regarding visitation or custody current in effect with respect to the Child.

ARGUMENT

# THE IDV COURT ERRED IN CONCLUDING THAT THE PRESUMPTION OF LEGITIMACY HAD BEEN REBUTTED, WHEN THE RECORD DID NOT CONTAIN THE REQUIRED CLEAR AND CONVINCING EVIDENCE

The IDV Court’s vacatur of its custody and visitation orders was erroneous. It is undisputed that the Child’s parents were married when she was born, thus bestowing upon the Child a presumption of legitimacy. Even though there was no testimony concerning non-access to the Mother at the time of conception, the IDV Court, relying solely on the Mother’s testimony, held that the presumption of legitimacy had been rebutted. (Decision at 8) (ruling that mother’s testimony as to her belief “rebuts the legal presumption that a child of a marriage is presumed under New York law”)); see also (L at 76:23-77:2) (“I recognize there’s a legal presumption in this state that if you are legally married the person to whom you are legally married is the father, but now we have a witness who says under oath she doesn’t believe he is . . . .”).

The IDV’s court’s finding that the presumption had been overcome was reversible error for at least three reasons: first, testimony of one party alone is not adequate to rebut the presumption of legitimacy; second, there was no proof of non-access or other evidence capable of rebutting the presumption; and third, the IDV Court did not have before it any DNA test, much less proof of the reliability of such a test.

## The Mother’s Testimony was Legally Insufficient to Rebut the Presumption of Legitimacy

“‘There is an established legal presumption that every person is born legitimate,’ a presumption which ‘operates . . . in any case in which legitimacy is in issue.’” Comm’r of Soc. Servs. ex rel. N.Q. v. B.C., 147 A.D.3d 1, 5 (1st Dep’t 2016)  
 (quoting Matter of Fay’s Estate, 44 N.Y.2d 137, 141-42 (1978)  
, appeal dismissed. 439 U.S. 1059, 99 S. Ct. 820, 59 L.Ed. 2d 25 (1979)  
). This presumption, which is “one of the strongest and most persuasive (presumptions) known to the law,” Matter of Fay’s Estate, 44 N.Y.2d at 142, has been codified by Section 417 of the New York Family Court Act: “A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of this article regardless of the validity of such marriage.” N.Y. Fam. Ct. Act § 417; see also In re Maria-Irene D., 153 A.D.3d 1203, 1205 (1st Dep’t 2017)  
, leave to appeal denied sub nom. In re Maria-Irene D., No. 2017-1088, 2018 WL 894193 (N.Y. Feb. 15, 2018)  
 (recognizing application of presumption of legitimacy in case involving same-sex married couple, because being born at time when parties were married “giv[es] rise to the presumption that the child is the legitimate child of both” parents); Christopher YY. v. Jessica ZZ., No. 522068, 2018 WL 541768, at \*4 (3d Dep’t Jan. 25, 2018)  
 (presumption of legitimacy extends to child as “product of the marriage,” rather than biology).

Here, there was and is no dispute that the Mother and Father were married at the time the Child was born. (L at 15:9-16:13, 24:17-20, 35:3-17). As such, the Child was properly entitled to the presumption of legitimacy. N.Y. Fam. Ct. Act § 417. Indeed, the IDV Court recognized this fact at an earlier hearing. (B at 25:16-26:11). However, the IDV Court ultimately held that the presumption of legitimacy had been rebutted solely by the Mother’s testimony.

Testimony on the topic of paternity, however, is not sufficient to overcome the presumption of legitimacy. For example, in Anthony S. v. Kimberly S., No. V-1276-97, 1998 WL 425464 (N.Y. Fam. Ct. June 19, 1998)  
, the trial court rejected the mother’s assertion that the man with whom she was having an affair at the time of marriage was the father, based on a record similar to the one here. 1998 WL 425464, \*7-8 (“The Court rejects the mother’s assertion that Anthony S. is not the father of Abegayl. She testified to an adulterous relationship with another man and claims her former paramour is the father. However, the facts are that she was living with the father during her time of infidelity and when the child was conceived . . . The mother’s testimony was devoid of sufficient facts to overcome the presumption as outlined above . . . .”). Thus, the IDV Court erred when it found that the presumption had been rebutted, based on the Mother’s testimony alone.

## The Record Contained No Evidence of Non-Access

“To rebut the presumption of legitimacy, access [to the mother at the time of conception] must be disproved by clear and convincing evidence.” Ghaznavi v. Gordon, 163 A.D.2d 194, 195 (1st Dep’t 1990)  
; see also Ariel G. v. Greysy C., 133 A.D.3d 749, 751 (2d Dep’t 2015)  
 (“[T]he Support Magistrate properly denied the petition and dismissed the proceeding on the ground that the petitioner failed to present evidence that the husband lacked access to the mother during the time of the child’s conception, and thus failed to overcome the presumption of legitimacy by clear and convincing evidence.”); Jean P. v. Roger Warren J., 184 A.D.2d 1072, 1072 (4th Dep’t 1992)  
 (“access by the husband must be disproved by clear and convincing evidence”).[[4]](#footnote-5)

In the instant case, there was not a shred of evidence of non-access. While the Child was born less than nine months after the Parties were married, there was no evidence that their relationship did not begin prior to the date of their marriage. The Mother testified that she was living with the Father when the Child was born, and did not suggest any physical incapability or other reason for non-access. Thus, the record did not contain clear and convincing evidence of a lack of access, so as to rebut the presumption. See Mannain v. Lay, 33 A.D.2d 1024, (2d Dep’t 1970)  
, aff’d, 27 N.Y.2d 690 (1970)  
 (mother’s testimony as to infidelity did not establish non-access by husband and therefore did not rebut presumption).

## **The Evidence on which the IDV Court relied consisted only of Speculation by a Lay Witness and Hearsay Statements about a Purported DNA Test by a Witness the Court deemed not credible**

The presumption of legitimacy will not be overcome in the absence of proof that would render the presumption of legitimacy “wholly incompatible with reason and common sense.” Matter of Wilkins, 180 Misc. 2d 568, 571 (N.Y. Sur. Ct. 1999)  
. No such evidence existed here.

The Mother, a lay witness, offered what could only be her own speculative opinion that the Father was not the Child’s biological father. The mother did not testify that she had ever taken a DNA test.[[5]](#footnote-6) The allusion to the existence of such a test came from the Father – a witness whom the IDV Court deemed not credible. The Father did not claim that he had even ever seen the test. Instead, he stated that in the midst of a heated argument he had been told a DNA test that was on a “phone.” In the same argument, he claimed, the Mother taunted him about his sexual performance. (M at 45:1-25).

Critically, neither the Mother nor anyone else sought to enter the result of any DNA test into evidence. Nor, given the absence of any such test, was there any effort made to establish the reliability of such evidence. Absent such testimony, the record was insufficient to find that the presumption of legitimacy had been rebutted. Cf. Jackson v. Ricks, 186 A.D.2d 1032, 1032 (4th Dep’t 1992)  
 (presumption was not overcome by combination of mother’s testimony that she had committed infidelity and results of HLA blood test); Will of Ludwig, 239 A.D.2d 122, 123 (1st Dep’t 1997)  
 (affirming finding that presumption was rebutted where “the scientific tests clearly established his non-paternity”).

In the case at bar, the evidence fell far short of the “borderline” test results that were held to be insufficient in Jackson v. Ricks, where the court – unlike the IDV Court here – had an opportunity to examine both the tests and testimony about the test’s reliability. Here, the evidence consisted of (1) an unreliable party’s hearsay testimony about a purported test and (2) an opposing party’s subjective belief. There was no verification or expert vetting. This limited evidence did not meet the “clear and convincing” standard.

There are sound reasons why the statutory presumption of legitimacy should not be able to be overcome by such evidence, including statements – even sworn statements – of subjective belief. To do so would allow years of established paternity to be willfully upended at the whim of anyone who chooses to testify that someone else could be a child’s father. This was not the legislature’s intent.

Because the evidence in the record does not establish, by clear and convincing evidence, that the Father either lacked access to the Mother at the time of conception or that he is not the biological father, the IDV Court erred when it concluded that the presumption of legitimacy had been overcome.

# THE IDV COURT’S DECISION NOT TO GRANT CUSTODY LACKED A SOUND AND SUBSTANTIAL BASIS IN THE RECORD

An IDV court’s custody decision is evaluated based on whether the ruling was supported by a sound and substantial basis in the record. In re China S., 77 A.D.3d 568 (1st Dep’t 2010)  
. Where the record indicates that the custody decision failed to take relevant facts into account, deference to the IDV court is not warranted. See Yolanda R. v. Eugene I.G., 38 A.D.3d 288, 290 (1st Dep’t 2007)  
 (custody decision based on record that did not contain essential facts to determine child’s best interests lacked sound and substantial basis in the record, and was not entitled to deference).

In the present case, the IDV Court decided, based on the evidence, that the Child’s interests would be best served by a final order awarding legal and physical custody to the Mother. (S at 19:16-20:18). She further found that the Grandmother “has built a particular relationship and a bond with her granddaughter,” and therefore it was “certainly in the child’s best interests for me to issue a final order of visitation for the paternal grandmother.” (Id. at 30:17-31:25). These rulings were supported by ample record evidence, including abundant evidence of the Child’s long-standing, loving relationship with her Grandmother, with whom she has lived nearly all her life, except on weekends. The record evidence also showed the Child’s attachment to her Mother and younger brother, and the existence of a very positive and close relationship between the Mother and Grandmother.

The Court’s custody decision was also supported by the evidence of marriage at the time of the Child’s birth, pursuant to which the IDV Court was empowered to treat the Father as the Child’s father by applying the presumption of legitimacy.

The decision that it was in the Child’s best interest to make a permanent custody and visitation ruling was also amply supported by the record. There was danger to the Child if a custody order was not issued. The record showed that in the past, the Father – who was violent, mentally ill, homeless, and had criminal charges pending against him – was able to obtain a writ of habeas corpus, which would have allowed him to remove the three year-old Child from her home with the aid of the police. The Grandmother testified to the Father’s intent to disappear with the Child, and to the worsening of her asthma after spending time with the Father in the past. Had the police not refused to provide the Father with further aid, because of the freezing weather and his inability to say where he planned to take her, the Child would have been carried from her Grandmother’s warm and loving home by a mentally ill person and treated inappropriately and abusively at best.

Absent a permanent order, the exact same scenario could recur this year or next, and the Mother and Grandmother would be powerless to stop it. In sum, the evidence fully supported a permanent order of custody to the Mother and a permanent order granting the Grandmother visitation.

The IDV Court opted to ignore all this record evidence, however, based on the flawed premise that the Mother’s testimony somehow trumped every other fact in the record. This was reversible error.

The Mother’s testimony was insufficient to rebut the presumption of legitimacy as a matter of law. See Section I, supra. As a second, independent error, however, the IDV Court further erred by allowing the Mother’s testimony to be determinative, instead of carrying out its duty to evaluate the record evidence as a finder of fact. See(Decision at 9). The court stated, “the Court fails to see how it could find Ms. Doe credible in the rest of her testimony, but discount her unequivocal statements contesting paternity.” But this was not an accurate description of the Court’s responsibility to evaluate the evidence. Here, when the Mother testified about her experience with the Father’s violence, and her loving relationships with the Child and the Grandmother, the Mother was testifying about what she knew, saw, and heard. Moreover, her testimony was corroborated by police reports and the Grandmother.

By contrast, when the Mother testified that she believed another man was the Child’s biological father, she gave no basis for her belief, apart from her subjective feelings. And there was no scientific corroboration whatsoever. Accordingly, the Court was entitled to – indeed, required to – accept the Mother’s corroborated, firsthand testimony, but discount her subjective, uncorroborated statements. See, e.g., Angela F. v. Gail WW*.*, 113 A.D.3d 889, 890-91 (3d Dept. 2014)  
 (where family court judge relied solely on absence in record of an investigative report about husband, rather than court’s evaluation of record facts, decision lacked a sound and substantial basis in record); Yolanda R., 38 A.D.3d at 289-90 (holding that deference to trier of fact was not warranted, because court based its decision on “ancillary” considerations instead of weighing the facts that were actually germane to the issue).

The deference that appellate courts typically accord to fact and credibility findings in a custody hearing is not warranted here. The IDV court made no specific findings about the Mother’s testimony on the topic of paternity, or other record facts relevant to paternity. Instead, the linchpin of the IDV Court’s decision was the faulty premise that once it had deemed *any* portion of the Mother’s testimony to be credible, it was compelled to accept her testimony regarding paternity. While not suggesting that the Mother lied, the fact that a witness is credible does not mean that a fact-finder must credit the entirety of his or her testimony. The finder of fact “is entitled to assess the credibility of witnesses and determine, for itself, what portion of their testimony to accept and the weight such testimony should be given.” People v. Negron, 91 N.Y.2d 788, 792 (1998)  
.[[6]](#footnote-7) Here, the IDV Court was still required to make its own independent determination, based on the record as a whole. It could not merely substitute its perception of the Mother’s credibility for an analysis of the relevant facts in evidence, including the fact that the Mother did not testify to having a DNA test, and the lack of a record of such a test or proof of scientific reliability.

Viewed as a whole, the record did not provide a sound and substantial basis to decide that a permanent order of custody was not in the best interests of the Child. To the contrary, the Child needs a permanent order of custody. Moreover, the IDV Court itself acknowledged that the Mother’s testimony was not conclusive on paternity, and that a significant assumption underlying her testimony (that the Father was not the biological father) had not actually been proven. (Decision at 9 (referring to hypothetical scenario “if” the Father is not the biological father)). But contradicting itself, the IDV Court’s decision to withhold a custody and visitation order based on the purported “absence” of a necessary party could only mean that the Father was not the biological father, since he had received both notice and an opportunity to be heard. Thus, the decision that the biological father was somehow “missing” from the proceedings, and the consequent decision not to grant custody on that basis, lacked a sound and substantial basis in the record.[[7]](#footnote-8)

# THE IDV COURT LACKED JURISDICTION TO RAISE THE ISSUE OF PATERNITY SUA SPONTE IN AN ARTICLE 6 CUSTODY PROCEEDING

The IDV Court vacated its custody and visitation rulings based on its finding that “the child’s biological father was not given notice and opportunity to be heard on the custody petition.” By ordering that it could not grant custody relief in the absence of the biological father, the IDV Court implicitly determined that the Father (who had been given notice and participated in the custody proceedings) was not the biological father.

“It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal.” SeeHearst Corp. v. Clyne, 50 N.Y.2d 707, 713 (1980)  
. No person before the IDV Court requested any relief regarding paternity. Though the Mother testified that she did not believe the Father was the biological father, she never sought any judicial declaration to that effect, including when the Father sought custody. When a party seeks to challenge paternity under the statute – which did not occur in the case at bar – the burden of proof lies with the party attempting to disprove legitimacy. Comm’r of Soc. Servs. ex rel. N.Q., 147 A.D.3d at 6. Here, neither the Mother nor the Father challenged paternity, and no one sought to carry the burden of proof to rebut the presumption. Given the absence of any pending request for relief regarding paternity or filiation, the IDV Court should not have raised the Father’s paternity or raised the issue of DNA testing sua sponte in an Article 6 proceeding for custody and visitation.

While the Family Court Act contains two provisions authorizing DNA testing, neither provision applies to the custody proceedings in which the parties in this case appeared before the IDV Court. Section 418 of the Family Court Act permits a court to authorize DNA testing “on its own motion” in the context of a support proceeding. That provision is specific to support and arises from the need to avoid a child being supported unnecessarily by the State when there is a parent who could provide support. Section 522 of the Family Court Act, pertaining to paternity proceedings, enumerates a specific list of parties who may commence a paternity proceeding. Other than in the limited circumstance of children receiving welfare assistance from the State, which is not applicable here, the legislature left it to the discretion of parents, the child, and would-be parents whether to commence such an action. No person on whom the statute conferred standing to adjudicate paternity sought a ruling on that issue from the IDV Court. Thus, the Family Court lacked jurisdiction to address the issue. SeeTarlow v. Tarlow, 53 Misc. 2d 204, 205-06, 277 N.Y.S.2d 952, 954 (Fam. Ct. 1967)  
 (where statute enumerates parties who may commence an action, the enumeration is presumed to be exclusive, and family court lacks jurisdiction to grant relief other than as has been authorized by statute).

# THE IDV COURT ERRED BY FAILING TO ISSUE A CUSTODY RULING THAT WAS IN THE BEST INTERESTS OF THE CHILD

Section 70(a) of the Domestic Relations law provides that when making a custody determination, “the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness . . . .” Despite its own finding that permanent custody and visitation orders were in the best interest of the Child, the IDV Court refused to order such relief based on extraneous considerations.

As noted above, the presumption of legitimacy was not rebutted. The presumption exists to eliminate precisely the type of uncertainty and interference with settled relationships that the IDV Court’s action created here. Had the IDV Court properly applied the presumption, it would have issued a custody and visitation ruling and never become sidetracked by the issue of whether someone other than the Father might be the Child’s biological parent.

Putting the presumption aside, however, the IDV court also had a second mechanism at its disposal to avoid leaving the Child’s custody and visitation status uncertain: equitable estoppel. This State has “long applied the doctrine of estoppel in paternity and support proceedings.” Shondel J. v. Mark D., 7 N.Y.3d 320, 326 (2006)  
. To the extent the IDV Court undertook to rule on issues of fatherhood despite the lack of any pending paternity action, its mandate to do what was in the best interest of the child should have led it to apply an estoppel.

In determining to apply the doctrine of estoppel, the “‘paramount’ concern in such cases ‘has been and continues to be the best interests of the child.’” Juanita A. v. Kenneth Mark N., 15 N.Y.3d 1, 5 (2010)  
 (quoting Shondel J., 7 N.Y.3d at 326). Courts routinely find it to be in the best interests of the child to estop a party from establishing or denying paternity after a parent-child relationship has been formed and the child recognizes the challenged parent as his or her mother or father. See Comm’r of Soc. Servs. v. Rafael V., 137 A.D.3d 516, 516-17 (1st Dep’t 2016)  
, leave to appeal denied sub nom. Comm’r of Soc. Servs. ex rel. Maria G. v. Rafael V., 27 N.Y.3d 908 (2016)  
 (estoppel appropriate where child considered mother’s husband to be her father); Christian N. v. Shante Jovan B., 132 A.D.3d 470 (1st Dep’t 2015)  
 (estoppel appropriate where, “[a]lthough petitioner testified that he questioned whether he was the child’s father, for the first three years of the child’s life, the father maintained a father-son relationship with him, held himself out to be the father of the child, permitted the child to call him ‘daddy,’ and provided the mother with support for the child. In addition, the child believes that petitioner is his father”); Comm’r of Soc. Servs. ex rel. Edith S. v. Victor C., 91 A.D.3d 417, 418 (1st Dep’t 2012)  
 (estoppel appropriate where child recognized respondent as her father and respondent’s mother always held herself out as child’s grandmother); Glenda G. v. Mariano M., 62 A.D.3d 536, 536 (1st Dep’t 2009)  
 (“where respondent assumed the role of a parent, albeit somewhat limited, and led the child to believe he was his father, the court properly concluded that the best interests of the child required that respondent be estopped from denying paternity”); Seth P. v. Margaret D., 90 A.D.3d 1053, 1054 (2d Dep’t 2011)  
 (estopping mother from denying father’s paternity where she had permitted father to hold himself out as such and permitted children to develop a relationship with father and paternal grandmother). The doctrine of equitable estoppel applies even when biological paternity has been disproven by a DNA test. See Shondel J., 7 N.Y.3d at 320; Bruce W.L. v. Carol A.P*.*, 46 A.D.3d 1471, 1471 (4th Dep’t 2007)  
.

Here, the record before the IDV Court contained no indication that any person other than the Father sought to be recognized as the Child’s father, and the Mother did not seek to challenge paternity. The Child is now eight years old, and has always viewed the Father as her father. The Father has always held himself out to the Child and the world as her father. Indeed, the Child has lived with the Father’s mother for most of her life. A stronger case for estoppel cannot be imagined.

Viewed properly, there was no need for the IDV Court to resort to principles of estoppel. However, insofar as the IDV Court felt the need to address the Mother’s testimony, it should have applied the doctrine of equitable estoppel in order to enable the issuance of orders that were in the Child’s best interest.

The application of estoppel would have been amply supported by the record evidence. Specifically, the record showed that the Child in this case, though young, recognizes the Father as her father. See, e.g., (B at 26:5-11; DD at 6:18-19). The record also shows that the Child recognizes the Father’s mother, GRAND MOTHER, as her grandmother, a belief the Mother has actively encouraged. Likewise, the Mother also described the Father repeatedly as the Child’s “father.” See, e.g., (REDACTED CITATION) (Petition for Custody)). The Father has made court filings seeking custody as the Child’s father. And even though the testimony showed that the Mother and Father lived with the Grandfather for the first few months of the Child’s life (and thus he was surely aware of her existence), the record contained no indication that he had ever sought to be established as the Child’s biological father. Furthermore, as a practical matter, the Child has resided the majority of her life in a stable environment with the woman she believes is her paternal grandmother, Grandmother.

Given this overwhelming evidence, it would certainly have been in the best interests of the Child to apply the doctrine of estoppel to prevent the Mother from questioning the Child’s paternity and enabling the entry of permanent orders governing custody and visitation. See David G. v. Maribel G*.*, 93 A.D.3d 526 (1st Dep’t 2012)  
 (family court was empowered to find estoppel and deny DNA test based on record alone, without need for hearing, where another man was listed on birth certificate and child believed he was her father, and petitioner had waited to communicate with child and did not provide financial support).

Finally, even if the issue of paternity had been properly before the IDV Court – which it was not – the required evidentiary hearing as to whether it would be in the Child’s best interests to order a DNA test was not held. Instead, the Court’s Order effectively forced the parties to pursue unwanted DNA testing or forfeit their rights to obtain permanent custody and visitation without considering the Child’s best interests. See Andrew T. v. Yana T*.*, 74 A.D.3d 687 (1st Dep’t 2010)  
 (“In all cases involving the issue of paternity, the ‘paramount concern’ is the child’s best interests, and an order directing genetic testing therefore should not be entered prior to a hearing on the child’s best interests”); In re Lovely M*.*, 70 A.D.3d 516, 516 (1st Dep’t 2010)  
 (“The court erred in ordering DNA testing without first conducting a hearing to determine whether DNA testing would be in the child’s best interests”). This was in error.

# THE IDV COURT ABUSED ITS DISCRETION BY VACATING ITS RULINGS WITHOUT AFFORDING APPELLANTS NOTICE AND AN OPPORTUNITY TO BE HEARD

A court may grant relief different from the relief sought in the papers only if it is “‘warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party.’” Clair v. Fitzgerald, 63 A.D.3d 979, 980 (2d Dep’t 2009)  
 (quoting Frankel v. Stavsky, 40 A.D.3d 918, 918, 838 N.Y.S.2d 90 (2d Dep’t 2007)  
). Here, this standard was plainly not met. The relief granted by the IDV Court was completely different from the relief requested by the parties. The proof did not support a finding that the presumption of legitimacy had been rebutted, nor that vacating the existing final custody and visitation rulings was in the best interests of the Child. Indeed, the IDV Court never suggested that the “best interest” findings it had made were incorrect in any way. There was severe prejudice. The Child, Mother, and Grandmother were prejudiced by the loss of the safety and security the final orders afforded to them and their family relationships, which clearly was not in the Child’s best interests.

Since no request had been made to vacate the rulings or to issue any type of paternity ruling, the parties had no notice that these issues were being considered, and were not afforded an opportunity to correct the IDV’s Court’s mistakes of law and fact. Under these circumstances, the vacatur was reversible error.

CONCLUSION

For all the foregoing reasons, the Court should reverse the IDV Court’s decision vacating the final orders of custody and visitation, and reinstate those orders in order to provide the finality these parties deserve after nearly five years of litigation.

Dated: Date, 2018

Respectfully Submitted,

*Attorneys for Petitioner-Respondent .*

**CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing Brief of Petitioner-Respondent Grandmother. was prepared on a computer using Microsoft Word.

*Type*: A proportionally spaced typeface was used, as follows:

Name of Typeface: Times New Roman  
Point Size: 14  
Line Spacing: Double

*Word Count*. The total number of words in this brief, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, proof of service, certificates of compliance, caption, or any authorized addendum containing statutes, rule, regulations, etc. is 10,229.

Dated: Date, 2018

1. For purposes of consistency, Petitioner-Respondent adopts the CITATION nomenclature with respect to the transcripts of the proceedings below set out on page 6, footnote 1, of Appellant’s brief. [↑](#footnote-ref-2)
2. This criminal case was later dismissed. [↑](#footnote-ref-3)
3. The Court incorrectly noted that the Mother had testified “she had a DNA test to prove [this].” However, the Mother in fact did not testify she had such a DNA test. Rather, the Father, whom the Court did not find credible, had testified that the Mother told him she had a DNA test, which he did not say he had ever seen, and which he said he “paid no mind” because the Child was his. (M at 45:1-25834028). [↑](#footnote-ref-4)
4. “Clear and convincing evidence is a higher, more demanding standard than the preponderance standard and it is evidence that is neither equivocal nor open to opposing presumptions.” In re Duane II, 151 A.D.3d 1129, 1131 (3d Dep’t 2017)  
   , leave to appeal denied, 29 N.Y.3d 918 (2017)  
    (internal quotations and CITATIONs omitted); In re Poldrugovaz, 50 A.D.3d 117, 127 (2d Dep’t 2008)  
    (“Clear and convincing evidence is defined as follows: ‘a party who must establish (his, her) case by clear and convincing evidence must satisfy [the trier of fact] that the evidence makes it highly probable that what (he, she) claims is what actually happened’”) (quoting N.Y. Pattern Jury Instr.--Civil 1:64); 5 N.Y. Prac., Evidence in New York State and Federal Courts § 3:10 (“It has been suggested that clear and convincing evidence be explained to the jury as evidence which makes the existence of a fact ‘highly probable’ or ‘much more probable than its falsity.’”). [↑](#footnote-ref-5)
5. On cross examination, the Mother responded yes to the question “*if* this Court were to order a DNA test, it’s your testimony that the test would show that he’s not the biological father of your daughter?” (REDACTED). The Mother did not testify, however, that any such test had already been taken. [↑](#footnote-ref-6)
6. The Negroncase recognized a limited exception for circumstances where the testimony of a single witness necessarily establishes a related proposition, such as where testimony includes both the element of a greater and lesser included offense. That was not the situation here, where the Mother’s credible testimony on which Judge Judy relied to establish the facts of the family offense and custody petition was not the same proof that would establish paternity of a person other than the Father. [↑](#footnote-ref-7)
7. In addition, as Appellant’s brief points out, pp. 54-55, a decision on permanent custody would have no prejudice to any putative biological father as he would not be bound by the outcome of a proceeding in which he had no opportunity to participate. [↑](#footnote-ref-8)