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COUNTERSTATEMENT OF QUESTION PRESENTED ON THE CROSS-APPEAL

Whether the court below properly found that a mother, who has had custody of her six year-old child since birth, should retain custody where the mother is a fit parent, the child is thriving in her custody, the child is emotionally bonded to her stepsiblings, the mother has an exemplary record of compliance with visitation orders, the father previously voluntarily agreed that the mother should retain custody, and the forensic expert and law guardian both recommended that the mother retain custody?

Petitioner-Appellant-Respondent respectfully submits that the answer is yes.

PRELIMINARY STATEMENT

Six year-old A_____ V___-P_____ ("A___") has lived with her mother, Petitioner-Appellant-Respondent J_____ V___ ("Petitioner"), her entire life. During that time, she has grown into a talkative, bright, well-adjusted child. With the Referee's permission, during most of the 39-month custody and relocation trial in this case, Petitioner and A___ lived in Virginia with Petitioner's husband, J_____ L____, and his children, S_____ and S____. A___ developed a close emotional bond with her stepsiblings, and considers them to be her brother and sister.

During this time, Petitioner brought A___ to New York for every single scheduled visit with Respondent, and A___'s relationship with her father grew and strengthened. A___ thrived in the care of her mother, who is a full-time homemaker.

Respondent never visited A___ in Virginia. On numerous occasions, he failed to share important information about A___ with Petitioner. He insisted that she miss substantial amounts of time in preschool and kindergarten for visitation with him, and twice during her kindergarten year tried to force her to leave her school and friends and finish the school year in New York. Petitioner tried to accommodate Respondent's understandable desire to spend time with A___, while looking out for A___'s educational needs, by offering Respondent additional weekend visitation in Virginia in exchange for a modified visitation schedule under

which A___ would miss less school, but Respondent fought such a change. And this was neither the first nor the last time that Respondent failed to take advantage of all of the visitation he was offered or given.

Since Petitioner first sought permission to relocate, Respondent has made numerous serious allegations against Petitioner in an attempt to wrest custody of A___ away from her. Both the Referee and the impartial forensic evaluator found all of Respondent's claims to be unfounded, and the Referee rejected every attempt to remove A___ from Petitioner's custody.

Admittedly, Petitioner had some mental health issues years ago (before A___ was born), and she is currently in therapy and on mild medication to deal with the stress caused by these court proceedings. Nevertheless, all of the qualified expert witnesses agree that she is a fit parent who should continue to have custody of A___. Both the Law Guardian and the Referee concur with their assessment. Respondent apparently also concurred with their assessment—that is, until Petitioner sought permission to relocate with A___ to Virginia—since he twice agreed to settle the matter of custody and visitation by giving Petitioner sole legal and physical custody of A___.

Under these circumstances, Respondent has not shown a sufficient change in circumstances to justify a change of custody, nor has he shown that such a change

would be in A___'s best interests. By contrast, Petitioner has shown that relocation to Virginia will be in A___'s best interests. Accordingly, for the reasons explained more fully below and in Petitioner's opening brief, the Court should affirm that portion of the order appealed from that continues Petitioner's custody of A___ and reverse that portion of the order appealed from that denies Petitioner's relocation petition.

ARGUMENT[1]

I. RESPONDENT HAS NOT SATISFIED HIS BURDEN OF SHOWING THAT A CHANGE IN CUSTODY WOULD BE IN A___'S BEST INTEREST

The overriding consideration in deciding a custody dispute is the best interests of the child. See Eschbach v. Eschbach, 56 N.Y.2d 167, 171 (1982). The Court of Appeals has set forth certain factors for the lower courts to consider in applying this somewhat amorphous standard, including: the quality of the home environment and the parental guidance the custodial parent provides for the child; each parent's ability to provide for the child's emotional and intellectual development; each parent's financial status and ability parent to provide for the

[1]The complete procedural history of this action, and many facts that are relevant to both the relocation and custody issues, are fully set forth in Petitioner's opening brief ("Pet. Brief."). For the sake of brevity, Petitioner incorporates additional facts relevant to the custody issue in the argument section of this brief rather than in a separate counterstatement of facts relevant only to that issue.

child; the desire to keep siblings together; and the child's wishes. Id. at 171-73. Additionally, in the absence of "countervailing circumstances," priority is granted to the parent who first obtained custody by court order or voluntary agreement. Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 95 (1982). This Court has drawn other relevant factors from the Court of Appeals' decisions, including the length of time the challenged custody arrangement has been in effect, see Krebsbach v. Gallagher, 181 A.D.2d 363, 364 (2d Dep't), app. denied, 81 N.Y.2d 701 (1992), and the likelihood that each parent will foster the child's continued relationship with the noncustodial parent. See Lohmiller v. Lohmiller, 140 A.D.2d 497, 498 (2d Dep't 1988) (*mem.*); see also Ciannamea v. McCoy, 306 A.D.2d 647, 648 (3d Dep't 2003) (transferring custody to parent who had "a greater ability to handle the antagonistic nature of the parties' relationship in a positive manner for the welfare of the child." [internal quotation and citation omitted]).

"Custody of children should be established on a long-term basis; whenever possible, children should not be shuttled back and forth between divorced parents merely because of changes in marital status, economic circumstances or improvements in moral or psychological adjustment, at least so long as the custodial parent has not been shown to be unfit, or perhaps less fit, to continue as the proper custodian." Obey v. Degling, 37 N.Y.2d 768, 770 (1975). Many of the factors set

forth above further the goal of maintaining stability in the child's life. See Eschbach v. Eschbach, 56 N.Y.2d at 171, 173 (recognizing stability provided by giving priority to first custody determination and "stability and companionship" to be gained by keeping siblings together); Friederwitzer v. Friederwitzer, 55 N.Y.2d at 94 (priority awarded first award of custody results from conception that stability in a child's life is in his best interest and that prior determination reflects a considered and experienced judgment concerning all factors involved). All of these factors favor allowing Petitioner to retain custody of A___.

A. The Evidence Shows that Petitioner Can Provide A___ With a Better Home Environment than Respondent Can Provide and Can Better Provide for A___'s Emotional and Intellectual Development

1. Petitioner has consistently put A___'s best interests first, but Respondent has not always done so

All of the witnesses who testified at trial, including Respondent, agreed that A___ is a well-adjusted child. As Dr. M____ observed,

> [d]espite the tensions, A___ has adapted reasonably well to the shifting back and forth between homes, showing minimal separation anxiety over the last few months, and is generally an outgoing, happy child. She impressed me this way as well when I observed her with each of her parents. Even Respondent had to agree that as the primary care giver since A___'s birth, Ms. V___ needs to be given credit for raising A___ such that she has become a seemingly content, adaptable four year old.

(Second M____ Report, p.13; see also Tr. 3-16-03, 71:7-20; Tr. 11-25-02, 46:77-8; Tr. 9-8-03, 38:20-24; Tr. 12-16-03, 39:19-24; 162:18-19; Tr. 12-17-03, 38:25-39:9; Tr. 4-23-02, 113:23-24, 129:14; D&O, pp.30, 31).

Perhaps the strongest evidence of Petitioner's ability to put A___'s best interests first is the fact that she has consistently fostered A___'s relationship with Petitioner in numerous ways. For example, Dr. M____ noted that Petitioner had sought guidance from a psychologist to address A___'s separation issues, and "applaud[ed] this as a necessary first step in improving A_____'s relationship with her father . . . ." (First M____ Report, p.29). Petitioner's therapist, Barbara K____, testified that Petitioner has been a "bridge" to A___ developing a healthy relationship with Respondent, pointing to a number of occasions when Petitioner helped A___ put together projects to give to Respondent. (Tr. 4-16-02, 70:3-21). Petitioner gives Respondent pictures of A___ and gives him and his family A___'s artwork. (Tr. 9-10-03, 87:15-20, 88:14-21; Tr. 9-20-04, 106:5-19). Petitioner voluntarily complied with Dr. M____'s recommendation that Respondent have increased visitation with A___ until A___ started school by consenting to an order providing for such visitation. (Id., pp.30-32; 12-20-01 Order) And, of course, she (and her husband [Tr. 12-20-01, 36:16-18, 38:9-16, 39:5-18]) bore the entire burden of bringing A___ for visitation with Respondent while she and A___ were living in

Virginia, despite her wish that Respondent help facilitate the visitation by at least meeting her halfway between Virginia and New York. (Tr. 11-25-02, 52:20-53:4, 56:3-25).

By contrast, although A___ and Respondent have developed a close relationship over the last few years, Respondent's behavior, and the positions he took throughout the trial, make it clear that he has difficulty putting A___'s best interests instead of his own. He insisted that A___ miss at least 20% of kindergarten and 30% of preschool in order to come to New York for visits, and, even then, he left A___ with his parents. (Tr. 6-7-04, 39:7-40:15). He did not help her with her homework and or contact A___'s school to make up the schoolwork she was missing. (Tr. 12-16-03, 47:21-48:2; 8-9-04 Affidavit of Petitioner, ¶12). He twice tried to force A___ to return to New York during the school year. First, he waited until September 19, 2003—after the school year had already started—to seek an order directing that A___ be required to enroll in kindergarten in New York; if the Referee's October 24, 2003 Order granting that motion had not been stayed, A___ would have been pulled out of her kindergarten class in mid-semester. (See 10-24-03 Order). Second, in April 2004, when the stay of the October 24, 2003 order was vacated, he argued that A___ should leave her kindergarten class in Virginia and transfer to a school in New York, where she knew no one, for the

remaining two months of school. (Tr. 4-20-04, 106:19-107:2, 111:25-112:12).

In a related vein, Respondent has failed to take advantage of a number of opportunities to develop, maintain and enrich his relationship with A___. For example, Respondent chose not to avail himself of the April 12, 1999 visitation order, which provided for supervised visitation at the home of Petitioner's mother, resulting in a nine-month absence from her life. (Tr. 9-10-03, 68:4-13, 72:3-12, 73:18; Tr. 9-20-04, 94:12-25).[2] Dr. M____ stated that the problems Respondent had with A___ were due, in part, to this prolonged absence. (First M____ Report, p.16).

Later, when Respondent had longer, unsupervised visitation periods with A___, he did not always spend as much time as he could with her. For example, Respondent began taking A___ to the Austin Street Day Care Center in February 2001. (Tr. 3-12-03, 166:25-167:3). At that time, he had visits from Sunday at noon

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[2]Respondent claims that he did not comply with that order because he was afraid of being arrested. (id., 68:18-24). However, Respondent testified that he had an "excellent" relationship with Petitioner's mother (who was responsible for supervising the visitation under the April 12 Order) and her husband. (Tr. 3-12-03, 144:8-147:13). Moreover, as Referee Rood pointed out, Respondent's fears, and his filing of an "Application for Judicial Action" (in which he sought to change the visitation arrangements) only a week after entering into the April 12, 1999 consent order, did not relieve him from his obligation to comply with that order. (Tr. 9-10-03, 71:17-20). Thus, it is simply not true, as Respondent asserts, that, "when [he] sought permission to see [A___] in 1999, he chose the path of least resistance—supervised visits in an approved agency" (Brief for Respondent-Respondent-Appellant ["Resp. Brief"], p.48): the "path of least resistance" would have been compliance with the consent order that was already in place.

to Monday at 5:00 p.m. in alternate weeks and every Thursday for four hours. (11-28-00 Order, ¶¶1, 2). Yet he chose to leave A___ in a day care center during some of that time, even though he had a flexible work schedule. (Tr. 12-20-01, 86:6-10; Tr. 12-16-03, 37:15-38:4).[3] Moreover, Respondent has never visited A___ in Virginia, despite the numerous invitations Petitioner extended to him, thereby putting the entire burden of travel for visitation on Petitioner and A___. (Tr. 4-15-02, 60:24-61:7, 80:19-25). Under these circumstances, it would be in A___'s best interests to remain in her mother's custody. Compare Granata v. Granata, 289 A.D.2d 527 (2d Dep't 2001) (father, who was unhappy with visitation afforded to him, placed his own interests, and his desire to have his position vindicated, above the needs of his children, who suffered from his conduct and insensitivity) and Law Guardian Brief ("LG Brief"), p.17 ("I do not credit that [Respondent] has never gone to Virginia to understand his daughter's existence there. In my estimation, he should have gone, even if he was adamantly opposed to the relocation") with Tr. 12-16-03, 136:19-137:4 (. . . I also feel that if I did go to Virginia it would almost suggest to the court that I'm [*sic*] condoned the relocation the fact that I actually visited A__ [*sic*] in Virginia that this is where she lives, when in fact she's a New

[3]At first, Respondent pretended that he spent the whole time at the day care center with A___. (Tr. 4-15-02, 49:3-15, 22-25, 50:2-6). However, he later admitted that he "pick[ed] her up at the end of the day." (See Tr. 4-15-02, 50:4-6).

York resident . . . . No, I'm not standing on principal [*sic*], my daughter in my view, absolutely does not belong in Virginia."); see also Lohmiller v. Lohmiller, 140 A.D.2d at 498 (although father presented convincing evidence of loving relationship with his daughter, extensive testimony of mental health professionals, parties, and their acquaintances, supported court's determination that mother was better able to place child's needs before her own and to foster continued relationship with non-custodial parent).

Respondent's attempt to characterize Petitioner as a vindictive person who has attempted to deny Respondent access to A___ at every turn (see Resp. Brief, pp.27-35) relies on misrepresentation and omission, not on fact. For example, although he takes pain to stress that the Referee never entered an order allowing Petitioner to relocate to Virginia with A___ (id., p.38), he conveniently omits the fact that the Referee allowed Petitioner to reside in Virginia with A___ during most of the hearing (Tr. 12-20-01, 71:2-76:13), only first entering a contrary order in October 2003 (which this Court stayed the next month).

Respondent's other misrepresentations and misleading statements on this issue include his claims that: (1) Petitioner refused to consent in September 1999 to Respondent having visitation with A___ and sought to vacate the September 1999 Order directing visitation at Visitation Alternatives (Resp. Brief, p.8) (Petitioner

objected because no forensic evaluation had been conducted even though Judge Friedman had ordered one on June 28, 1999, and because the order allowed Respondent's parents to participate in the visitation at Sue Silverstein's[4] discretion even though Petitioner was afraid that they might remove A___ to Boca Raton, Florida, where they have a vacation home; Petitioner argued that the matter should have been adjourned pending completion of the forensics, and, consistent with the April 12, 1999 consent order, offered Respondent supervised visitation at Petitioner's mother's home [9-16-99 Affirmation of Robert T_____, ¶¶4-8; Tr. 9-15-99, 4:8-6:9, 9:5-9, 16-17, 10:13-17, 12:11-14, 15:10-25]);[5] (2) Sue Silverstein testified that Petitioner did not bring in proof that A___ was sick when visits were missed (Resp. Brief, p.9) (she also testified that the agency does not always require such proof and that, when they checked, A___'s pediatrician confirmed that A___ was sick [Tr. 9-11-03, 31:7-21]);[6] (3) Petitioner "alleged that the paternal grandmother leaves [A___] unattended in the car while shopping" (Resp. Brief, p.10) (A___ told Petitioner that Respondent's mother left her in the car while

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[4]She is the owner of Visitation Alternatives.

[5]In 1999, Petitioner's father, Herbert P_____, brought a separate proceeding seeking visitation with A___. (Tr. 6-7-04, 5-19; see also Tr. 9-20-04, 103:8-12).

[6]Respondent also inaccurately states that Ms. Silverstein was one of the Court's expert witnesses. (Resp. Brief, p.24). In fact, she was Respondent's witness.

shopping and Petitioner asked Respondent about it [Tr. 11-25-02, 45:13-18]); (4) Petitioner sued Dr. K____ after she learned that he provided "the father" with a letter "expressing his concerns" about the mother (Resp. Brief, p.14) (Petitioner sued Dr. K____ for breach of contract and breach of fiduciary duty after he breached Petitioner's confidentiality by sending a letter discussing the details of the parties' brief couples therapy to an attorney Respondent had consulted, and Dr. K____'s insurer settled the case for $5,500 [Tr. 3-12-03, 31:15-32:9, 34:17-19, Petitioner's Exh. H]); (5) Petitioner filed a complaint against the Austin Street Day Care Center after she discovered that respondent was sending A___ there (Resp. Brief, p.14) or because it "appeared to be helping [Respondent] develop a relationship with [A___]" (Resp. Brief, p.29) (Petitioner's mother filed a complaint against the center after Petitioner learned that its owner had administered a suppository to A___ [Second M____ Report, p.16]); (6) Petitioner enrolled A___ in a public school in New York purely out of vengeance (Resp. Brief, pp.40, 49) (the reasons for Petitioner's decision are explained at fn.12 of her opening brief);[7] (7) Petitioner's visitation was expanded in December 2001 and again in January 2002

[7]Respondent inaccurately states that, in September 2004, he filed a motion seeking to punish Petitioner for sending A___ to first grade in Virginia for two days. In fact, Respondent sought to hold Petitioner in contempt for failing to enroll A___ in school in New York. (9-9-04 OSC). When Respondent made his motion, school had not yet started. (Tr. 9-9-04, 48:15-19).

(Resp. Brief, p.16) (although this is correct, the way it is discussed in Respondent's brief implies that the second expansion was pursuant to a different court order than the first; in fact, the second expansion was pursuant to a phase-in plan contained in the December 20, 2001 Order, which was a consent order); (8) on July 29, 2002, the Referee ordered that Respondent have additional visitation in September and November of that year (Resp. Brief, p.16) (although this is technically accurate, Respondent does not acknowledge that this was a consent order [See Tr. 7-29-02, 33:2-18]); (9) in January 2004, petitioner sought to "curtail" Respondent's visits to run from Friday night to Sunday morning every other week (Resp. Brief, p.17) (Petitioner sought to change the visitation schedule so that A___ would not have to miss school, the visits would run until noon, and Petitioner offered Respondent a third weekend of visitation in Virginia each month to make up for the shortened alternate-weekend visitation [1-13-04 Affidavit of Petitioner, ¶¶8, 11 and accompanying Proposed Temporary Visitation Order, ¶2]); (10) the signature on the letter submitted with Petitioner's January 13, 2004 affidavit in support of her application to change the visitation schedule was "not that of [A___'s] teacher" (Resp. Brief, p.18) (Dr. Wagner, the director of A___'s school, testified that both signatures on the letter were written by one of the teachers who had signed it (Tr. 2-5-04, 72:15-73:9); (11) Respondent has had difficulty communicating with A___ by

telephone and e-mail because of blocks placed by Petitioner and her husband (Resp. Brief, pp.21, 40) (Respondent testified that he has daily telephone contact with A___ [Tr. 4-23-02, 111:20-112:13; see also First M____ Report, p.14]; Petitioner's husband put on a call blocker to avoid telemarketers and gave Respondent a code to bypass the block, but there were technical problems that were quickly straightened out [Tr. 11-26-01, 45:13-46:7]; Petitioner's husband blocked Respondent from contacting him on his work e-mail account but took the block off after 9/11, and he also gave Respondent his pager and home e-mail addresses, which were never blocked [id., 46:14-48:7]); (12) Petitioner never offered Respondent additional visitation time or agreed with his requests for additional time (Resp. Brief, p.28) (when A___ was a newborn, and before the parties filed custody petitions, Respondent and his parents saw A___ at Petitioner's apartment almost every day [Tr. 9-10-03, 59:3-20]; Petitioner entered into numerous consent orders concerning visitation, submitted numerous proposed orders offering Respondent additional visitation, and orally offered Respondent additional visitation [January 2004 Proposed Temporary Visitation Order, ¶C, Proposed Temporary Visitation Order submitted in August 2004, ¶S; Tr. 5-17-00, 13:4-8; Tr. 4-22-02, 98:18-99:8; Tr. 11-25-02, 54:15-56:19; Tr. 7-14-03 21:4-21, 62:63:8; Tr. 4-23-02, 129:15-25, 131:13-21, 142:9-25, 147:7-10; 4-12-99 Order; 6-15-99 Order; 6-28-99 Order; 2-27-01

Order; 4-23-01 Order; 7-16-01 Order; 12-20-01 Order; 7-29-02 Order; 7-14-03 Order]); (13) Petitioner "willfully" failed to perfect the 2003 Appeal (Resp. Brief, p.30) (there has never been a finding as to why the 2003 Appeal was not perfected);[8] (14) Dr. M____ testified that Petitioner has shown "no remorse and no apology for her actions" (Resp. Brief, p.48) (Dr. M____ stated that Petitioner was "able to recognize that she at least had a part to play in what happened between [her and Respondent]" [First M____ Report, p.25]).[9]

2. Respondent's challenges to Petitioner's emotional fitness to continue as A___'s custodial parent are meritless

Respondent's main challenge to Petitioner's ability to provide a stable home environment for A___, and provide for her emotional and intellectual development, centers around his theory that Petitioner is emotionally unstable, if not mentally ill.

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[8]Petitioner's attorney explained in an affirmation submitted to this Court that, since the hearing had been ongoing since September 2001, she believed that a final decision was imminent enough that it would have rendered the 2003 Appeal moot and therefore neglected to perfect the appeal. (3-25-05 Affidavit of Louisa Floyd, ¶9). Petitioner's attorney took sole responsibility for this error. (Id., ¶10). Respondent may not be heard to complain that this affirmation is *dehors* the record, since there is no other way to rebut his misrepresentation concerning this issue. Moreover, Respondent himself has made allegations about facts that are *dehors* the record. (See Resp. Brief, p.28) [concerning Petitioner's actions after January 27, 2005]).

[9]Indeed, misrepresentations and misleading statements abound throughout Respondent's brief. For example, Respondent argues that Petitioner's judgment as a parent is questionable because, even though A___ had difficulty sleeping and got scared at night, A___'s room in Virginia was two floors below the rest of the family. (Resp. Brief, pp.12, 39, 50). In fact, A___ always slept with S____ (either in S____'s room or A___'s room), and there was a baby monitor in A___'s room. (Tr.4-17-02,20:12-21:3; Tr. 11-26-01, 15:17-16:3). Other inaccuracies will be noted as relevant.

The Referee—in accordance with the findings and recommendations of Dr. M____ and the Law Guardian—properly rejected this challenge, which relies heavily on Petitioner's conduct before A___ was born.

In September 1997—before Petitioner became pregnant with A___, and while she and Respondent were in what both Dr. M____ and Dr. K____ referred to as a "toxic" relationship (First M____ Report, pp.24, 27)—a psychologist who had treated Petitioner for three sessions had her admitted to a hospital for psychiatric evaluation following a telephone evaluation initiated by Respondent. (Id., pp.22-23; Tr. 9-10-03, 26:13-27:12). At the hospital, Petitioner was diagnosed with mild depression. (Id., p.23).

Petitioner's treating therapist, Barbara K____, diagnosed her in early 2000 with adjustment disorder with depressed mood, which indicates that Petitioner had a psychological reaction to a particular stressor. (Tr. 4-16-02, 50:24-52:5). This case was Petitioner's primary stressor. (Id., 52:7-16). Petitioner's treating psychiatrist, Dr. Victor R___, testified that, when he started treating Petitioner, she was depressed and anxious due to this litigation and that he prescribed mild medication for depression and anxiety. (Tr. 12-12-01, 80:5-81:23, 84:9-15). Petitioner has been compliant with her medication and therapy, and has shown significant improvement. (Tr. 12-12-01, 85:3-5; Tr. 4-16-02, 53:16-18, 54:15-22).

Barbara K____ testified that Petitioner is an attentive parent who is attuned to A___'s needs. (Tr. 4-16-02, 56:19-57:8). Dr. R___ also testified, based his work with Petitioner and his observations about her parenting when she had to bring A___ to her sessions, that Petitioner is a suitable parent and that relocation would be in the best interest of Petitioner and A___. (Tr. 4-15-02, 11:24-15:16). He had no concerns whatsoever about Petitioner's ability to parent A___. (Tr. 12-12-01, 82:13-17). Similarly, in his first report, Dr. M____ concluded that Petitioner was by then doing "much better . . . in terms of her psychological health" because she was no longer in a difficult relationship with Respondent, was in a supportive and compatible relationship with J___ L____, and had been receiving proper medication for depression and anxiety for some time. (First M____ Report, p.27).[10],[11]

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[10]Respondent's assertion that Dr. M____ "testified to a number of acts which [Respondent] has committed that are common in people suffering from [bipolar disorder]" (Resp. Brief, p.49) misleadingly implies that Dr. M____ supported Dr. K____'s belief that Petitioner has that disorder. (See *infra*). Furthermore, Respondent's contention that Dr. M____'s testimony grew more positive towards Respondent and negative towards Petitioner (Resp. Brief, p.18) does not take into account the fact that the statements that Respondent presumably is relying on to support this contention were, for the most part, made in response to hypothetical questions containing inaccurate facts and/or characterizations. (e.g., Tr. 4-27-04, 33:6-41:17, 125:11-18).

[11]The psychological testing Dr. M____ and a colleague conducted on the parties also supports the Referee's conclusion that A___ should remain in Petitioner's custody. (First M____ Report, pp.26-27). In particular, the results of an objective personality test showed that Petitioner's approach to the test was "open and cooperative" and "the report did not indicate any psychological problems or tendencies that would bear on custody . . . ." (Id., p.26). Respondent, on the other hand, answered the test questions in a way that made the test results unreliable: "This is a highly defensive profile of questionable validity. The client was extremely reluctant to disclose personal information and tended to minimize personal faults." (Id.). Although Dr.

The only expert whose testimony even potentially calls into question Petitioner's mental health status is that of Dr. Allan K____. Petitioner and Respondent saw Dr. K____ for couples counseling for six sessions in December 1997 and January 1998. (Petitioner's Exh. 7 [certified copy of GHI health insurance claim form]).[12] Dr. K____ has a masters degree in social work, but has had no training in child custody matters and has never conducted a forensic examination in a New York custody matter. (Tr. 3-12-03, 13:12-22, 14:2-4). Dr. K____ testified in March, 2003 based on his memory, because he is "very busy" and does not have time to make notes of his therapy sessions. (Tr. 3-12-03, 21:13-19).

Dr. K____ testified that, in his opinion, at the time he was treating the parties, Petitioner suffered from bipolar disorder. Dr. K____ opined that a legal position Petitioner took during this action, a dispute that Petitioner had with her husband's ex-wife, and Petitioner's response to the incident at A___'s New York day care center in which the center's owner gave A___ a suppository are all indicative of a person with a bipolar personality looking for revenge. (Tr. 3-12-03, 29:16-20:16, 35:22-36:6, 86:14-88:12). Dr. K____ did not support his "diagnosis" of Petitioner

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M____ noted that such defensiveness is not uncommon in custody cases, he contrasted it with Petitioner's more open and honest approach. (Id.).

[12]Dr. K____ inaccurately stated that he treated the parties for 10-12 sessions [Tr. 3-12-03, 17:3-5]).

with references to any accepted mental health treatise (such as the DSM-IV). None of Petitioner's other treating mental health professionals, who have treated Petitioner much more recently and for a much longer period, have diagnosed Petitioner as bipolar.[13]

Irwin v. Neyland, 213 A.D.2d 773 (3d Dep't 1995), is instructive. In Irwin, the father argued that he should have custody of his daughter, based on the mother's psychological instability and her psychiatric history. Id. at 773. The court refused to transfer custody of the otherwise "happy and relatively well-adjusted" child to the father, explaining that "[a]lthough [the father] sought to emphasize [the mother's] psychiatric history prior to the child's birth, Family Court correctly focused on [the mother's] present ability to provide for the child's emotional and intellectual development." Id. at 774. The court noted that Family Court had conditioned its award of continued custody upon the mother's continued participation in counseling and therapy to deal with her resentment concerning the father, with periodic progress reports to the court. Id. The court further commented that, although the record contained evidence of the mother's efforts to frustrate and impede the

[13]Dr. K____ could not have testified, as Respondent contends (Resp. Brief, p.6) that he found Respondent to be "an appropriate father," since he did not treat Respondent after A___ was born. Similarly, to the extent that his testimony could be construed to support Respondent's contention that "[h]e expressed his concerns about the mother as a parent . . . ," (id.), any such concerns would be similarly baseless since he never treated Petitioner after A___ was born.

father's visitation, it also established that the father enjoyed substantial and meaningful visitation, resulting in a strong parent-child relationship. Id.

Here, as in Irwin, Petitioner's past psychiatric history does not overcome the substantial evidence that she is currently well-able to provide for A___'s emotional and intellectual development. In Irwin, the court required the mother to undergo counseling to address her resentment concerning the father; here, Petitioner has already been in therapy for a number of years, and one result of that therapy is a dearth of evidence indicating that she has interfered with Respondent's visitation or his relationship with A___ over the last few years. Under these circumstances, the Court must reject Respondent's challenge to Petitioner's fitness based on her psychological health. See Lenczycki v. Lenczycki, 152 A.D.2d 621, 623 (2d Dep't 1989) (*mem*.) (trial court properly gave custody of child to wife, even though she had "documented psychological problems which her psychiatrist labeled as constituting an 'histrionic personality,'" and even though "both parties [had] engaged in conduct inimical to each other's welfare and antithetical to the best interests of their child," since "an award of custody should ultimately be based on the best interests of the child and not a desire to punish a recalcitrant parent").

3. Respondent's challenges to Petitioner's credibility are ineffectual and irrelevant

Respondent argues that Petitioner is not credible based on two specific occasions on which Petitioner admitted to lying under oath in other proceedings. (Resp. Brief, pp.7, 40, 48). Petitioner testified that, after Respondent was arrested, on her report, for domestic violence in 1998, she signed a statement, that Respondent's criminal attorney drafted, stating that she had instigated the incident. (Tr. 4-22-02, 42:3-44:19; Tr. 9-20-04, 92:16-18). She explained that signed this statement with Respondent's knowledge and consent,[14] based on the representations of Respondent's attorney that Respondent would otherwise lose his job, and without consulting an attorney of her own. (Tr. 4-22-02, 42:3-44:19; Tr. 9-20-04, 90:19-92-24). In the second incident, in 1999, upon her then-attorney's advice, Petitioner lied in a child support case against Respondent. (Id., 57:3-23).

Although Respondent argues that Petitioner's testimony in this case is unworthy of belief, he does not cite any direct, or even circumstantial, evidence to support this accusation, nor does he cite any specific instances in which the parties' testimony actually conflicts. (Compare Resp. Brief, p.47 ["to the extent that

[14]When asked whether he requested that Petitioner sign the statement knowing that parts of it were false, Respondent replied: "Absolutely not. It was understated truth." (Tr. 9-10-03, 49:9-11).

[Respondent's] version of events differs from . . . [Petitioner's], the Court must find [Respondent's] version credible."]). Moreover, he cites no authority to support the proposition that two discrete instances of untruthfulness by a custodial parent, in non-custody proceedings, are sufficient, alone or in combination with other factors, to justify a change in custody.

B. If Petitioner Retains Custody, She is More Likely to Foster A____'s Relationship With her Noncustodial Parent than Respondent Would be if He Obtains Custody

Based on the parties' past conduct over the entire course of A____'s life (and not focusing, as Respondent does, on Petitioner's conduct before A____ was born and when she was an infant), it is clear that, if Petitioner retains custody, she is more likely to foster a relationship between A____ and her noncustodial parent than Respondent would be if he is granted custody. Such a conclusion is amply justified by the fact that Respondent has made a number of serious—yet entirely unfounded—allegations against Petitioner in an attempt to wrest custody of A____ away from her. See Greene v. Gordon, 7 A.D.3d 528 (2d Dep't 2004) (finding that father was more likely to assure meaningful contact between child and non-custodial parent where, among other things, while child was in her custody, mother filed petty or baseless violation petitions and made false allegations of child neglect); Janecka v. Franklin, 150 A.D.2d 755 (2d Dep't 1989) (*mem.*) (affirming hearing court's

determination that mother's "unbridled" anger and hostility towards father and his family rendered her less fit as custodial parent, since her attitude would substantially interfere with her ability to place her children's needs ahead of her own in fostering a continued relationship with noncustodial parent).

For example, Respondent alleged that, between November 2000 and early- to mid-2001 Petitioner—a certified medical assistant and emergency medical technician instructor (Tr. 4-22-02, 22:16-23:3)—abused A____ by having unnecessary and intrusive medical testing done. (First M____ Report, pp.9-10). He also claimed that Petitioner was trying to entrap him into a sexual abuse charge when she allegedly requested that he remove a "cotton ball" from A____'s vagina because A____'s pediatrician wanted a urine sample. (Id., p.12).[15] After thoroughly investigating these claims, Dr. M____ found them to be completely unfounded. (Id., pp.10-12).[16],[17]

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[15]Petitioner actually asked Respondent to clean A____ with peroxide on a cotton ball, so that a urine-collecting bag could be attached. (Tr. 4-15-02, 101:17-102:11). Dr. M____ confirmed that the pediatrician "did order a urine sample taken" and concluded that Respondent's suspicions were "unsupported." (First M____ Report, p.12).

On another occasion, Respondent did not administer a suppository to A____ because he was afraid of being accused of sexually inappropriate behavior. (Second M____ Report, p.16). Instead of asking medical personnel, his mother or Petitioner's mother to give A____ the medicine (as Petitioner had requested), Respondent asked the director of A____'s day care center to do it. (Id.).

[16]Petitioner made a number of allegations against Respondent (primarily concerning his temper and violent conduct) in 1998, during a period when Respondent was pressuring Petitioner

Respondent also alleged that Petitioner was trying to alienate A____ from him, based on fears and separation anxiety she began to exhibit in June 2000 and continued to exhibit at least until June 2001. (First M____ Report, p.13). Dr. M____ flatly rejected Respondent's assertions, explaining that there are a number of developmental and other reasons that a child of A____'s age (she was just shy of three at the time of Dr. M____'s first report) might experience heightened anxiety about separation from her mother. Dr. M____'s opinion that Petitioner has not tried, is not trying, and will not try to alienate A____ from Respondent, has been consistent over nearly three years, from his first report in June 2001 through his most recent testimony in April 2004. (See First M____ Report, p.22; Tr. 11-27-01, 44:23-45:15; Second M____ Report, p.14; Tr. 1-26-04, 37:15-39:18; Tr. 4-27-04,

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to have an abortion and refusing Petitioner's requests that he co-parent his child. (Tr. 4-22-02, 36:19-25, 37:1-10; Tr. 9-9-04, 109:5-8, 16-25, 110:2-8, 14-15; Tr. 9-20-04, 90:1-12). Petitioner also alleged that Respondent was involved in certain activities (including the creation of a local public access cable program) that called into question his fitness to be a custodial parent. (First M____ Report, pp.8-9). Although a newspaper reviewer described the show as "'surrealistic,'" "'creepy'" and "'disconcerting,'" Dr. M____ concluded that Respondent does not exhibit any underlying psychopathology that makes him unfit to be around A____ for an extended period. (Id., p.17).

[17]Contrary to Respondent's repeated insinuations and allegations (Resp. Brief, pp.11, 25, 30-31, 49, 50), Petitioner never claimed that Respondent abused A____ in September 2004. When Petitioner did not appear for a scheduled hearing date on September 20, 2004, her attorney explained that Petitioner had to take A____ to the doctor because she complained of double vision after returning from a visit with Respondent. (Tr. 9-20-04, 4:3-16, 6:4-18). Respondent explained that, while he was working the previous Saturday, his parents took A____ to a petting zoo, where she got a little "banged up." (Id., 6:21-7:7). The Referee decided, *sua sponte*, to order an investigation. (Id., 84:3-18).

74:18-76:11, 78:20-81:4).

In April 2002, Respondent sought temporary custody of A____, alleging that Petitioner had allowed her stepson, S_____ L____, to urinate on A____. (11-19-02 OSC). After holding a mid-trial hearing, Referee Rood denied the motion. (Tr. 11-26-02, 80:5-6).

As recently as September 2004—when the custody/relocation hearing had already been ongoing for three years and was very close to completion—Respondent sought temporary custody of A____ based on his unfounded allegation that Petitioner had violated the August 19, 2004 Order by failing to register A____ for first grade in New York. (Tr. 9-9-04, 47:10-22). Referee Rood denied this application. (Id., 70:6-8).

A finding that Petitioner would be more likely than Respondent to foster a relationship between A____ and her noncustodial parent is also supported by a number of instances in which Respondent did not share information with Petitioner about A____'s life. For example, Respondent did not initially inform Petitioner that he was taking A____ to the Austin Street Day Care Center during his visitation periods. (Tr. 4-15-02, 100:6-15; Tr. 9-10-03, 84:24-85:3). He did not invite Petitioner or any of her family to A____'s "graduation" from the day care center. (Id., 87:21-88:13; Tr. 9-8-03, 36:21-25; Tr. 9-20-04, 107:5-6). He registered

A____ at the Austin Street Day Care Center as A_____ P_____, although the parties had agreed to use the name V___-P_____. (Id., 84:24-85:11; Tr. 9-8-03, 36:21-25). He took A____ to a school to be interviewed and tested without informing Petitioner. (Tr. 12-16-03, 9:23-10:16). In 2004, he did not provide Petitioner with a brochure about Twin Oaks Day Camp, and did not provide the day camp with Petitioner's contact information. (Tr. 7-19-04, 82:20-25; 7-15-04 Affidavit of Petitioner, ¶¶4, 7). These actions, along with the many unfounded allegations Respondent has made against Petitioner, demonstrate Respondent's disinclination to place A____'s interests ahead of his own more strongly than any in-court platitudes he offered to the contrary. See King v. King, 225 A.D.2d 697 (2d Dep't 1996) (*mem.*) (Family Court properly determined that mother's anger and hostility toward father interfered with her own expressed wish to place son's best interests before her own need to express hostility and that father, therefore, was more likely to foster ongoing relationship between child and noncustodial parent).

C. Petitioner Should Retain Custody of A____ Because she has Been A____'s Primary Caretaker for A____'s Entire Life

Since New York law highly values stability in a child's life, New York courts are reluctant to transfer custody from a parent who has been the child's primary caretaker for most or all of the child's life, especially where, as here, a change in

custody will not significantly enhance the child's welfare. See Salvati v. Salvati, 221 A.D.2d 541, 542-43 (2d Dep't), app. dismissed, 221 A.D.2d 541 (2d Dep't 1995), app. denied, 88 N.Y.2d 803 (1996) (*mem.*) (Family Court did not give sufficient weight to fact that four-year-old child had resided with father his entire life and that father had been child's primary caretaker even before parties separated); Lobo v. Muttee, 196 A.D.2d 585, 587-88 (2d Dep't 1993) (*mem.*) (trial court did not give sufficient weight to facts that five-year old child had resided with father his entire life and that father had been child's primary caretaker after mother left marital residence); Del Papa v. Del Papa, 172 A.D.2d 798 (2d Dep't 1991) (*mem.*) (Supreme Court properly awarded custody of children to mother, who had been childrens' primary caregiver for most of their lives and who was available to care for children after school); Crowe v. Crowe, 176 A.D.2d 1216 (4th Dep't 1991) (*mem.*) (trial court erred in failing to accord any weight to stability and continuity that mother offered children by virtue of her role as primary caretaker); Carr v. Carr, 171 A.D.2d 776 (2d Dep't 1991) (*mem.*) (custody was properly awarded to wife given her role as primary care provider and her availability to children). As Petitioner has been A____'s primary caretaker for her entire life, this factor favors affirmance of that portion of the Decision and Order granting custody to Petitioner.

D. Petitioner Should Retain Custody of A____ Because She is Available to Personally Care for A____, Whereas Respondent is Not

Custody arrangements that allow a parent, rather than a third party, to care for the child are favored. Crowe v. Crowe, 176 A.D.2d at 1216-17; see also Carr v. Carr, 171 A.D.2d at 777 (basing award of custody, in part, on mother's availability to care for children); Klat v. Klat, 176 A.D.2d 922 (2d Dep't 1991) (*mem.*) (same); Del Papa v. Del Papa, 172 A.D.2d at 799 (same).[18] Here, because Petitioner is retired due to her on-the-job disability, she is available to personally care for A____ when A____ is not in school. By contrast, Respondent works full-time and, although he may have flexible hours, there is no evidence indicating that he would be available to act as A____'s primary caretaker during all of the hours when she is not in school. Therefore, this factor supports an award of custody in Petitioner's favor. (See also Tr. 4-27-04, 57:21-59:7 [testimony of Dr. M____]).

[18]Taking into consideration each party's availability to personally care for A____ does not violate the precept, set forth in Linda R. v. Richard E., 162 A.D.2d 48 (2d Dep't 1990), that the "best interests" standard must be evaluated on a gender-neutral basis. (Compare Resp. Brief, p.41). Indeed, the Second Department decided Klat, Carr and Del Papa—all of which considered the prevailing party's availability to care for the children at issue—after it decided Linda R. v. Richard E.

E. Respondent has not Shown an Overwhelming Need to Disrupt A____'s Relationships with her Stepsiblings

New York courts "will not disrupt sibling relationships unless there is an overwhelming need to do so." E.g., Krebsbach v. Gallagher, 181 A.D.2d at 348; see also Eschbach v. Eschbach, 56 N.Y.2d at 173. In Lobo v. Muttee, this court applied the preference for maintaining sibling relationships in the context of a case in which the child had bonded with his stepbrother and was assimilated into his father's new family. 196 A.D.2d at 586-87; see also Victor L. v. Darlene L., 251 A.D.2d 178 (1st Dep't), app. denied, 92 N.Y.2d 816 (1998) (granting custody to mother based on, *inter alia*, evidence of strong bond between child and her half-siblings, even though mother initially failed to recognize importance of father's role in child's life and potential effects of his absence); accord Aragon v. Aragon, 104 P.3d 756 (Wyo. 2005) (explicitly holding that strong public policy toward preservation of sibling relationships applies to stepsiblings); Wiskoski v. Wiskoski, 629 A.2d 996 (Pa. Super. 1993), app. denied, 639 A.2d 33 (Pa. 1994) (trial court's custody order improperly separated four-year-old child from his two stepbrothers; children were all raised as brothers and father offered no compelling reason to separate the boys).

A____ has an extremely close relationship with her stepsiblings, S____ and

S_____. Indeed, Dr. G_____ testified that A____ considers S____ and S_____ to be her sister and brother (Tr. 4-23-02, 18:9-24) and that, if those relationships ended, A____ would go through a grieving process that "could have life-long effects, because there's the issue of trust, then, in future relationships, there is attachment issues that can result from it." (Tr. 4-23-02, 19:3-16). The preference for maintaining sibling relationships therefore supports affirmance of that portion of the Decision and Order granting Petitioner custody of A____.

F. Petitioner is Entitled to Priority Under the April 12, 1999 and November 28, 2000 Custody Orders

"The priority which is accorded the first award of custody, whether contained in court order or voluntary agreement, results . . . from the conceptions that stability in a child's life is in the child's best interests and that the prior determination reflects a considered and experienced judgment concerning all of the factors involved." Friederwitzer, 55 N.Y.2d at 94. Here, Respondent agreed that Petitioner should retain custody of A____ in April 1999; in June 2000 (when the agreement underlying the November 28, 2000 Order was allegedly made in open court); and in November 2000 (when Respondent's attorney submitted to the Referee an order purporting to reflect the agreement the parties purportedly reached in June 2000). (4-12-99 Temporary Order Directing Custody, p.3; Tr. 6-20-00, 16:8-47:9; 11-28-

00 Order, p.1). Under these circumstances, and (as discussed more fully herein) because Respondent has failed to demonstrate sufficient countervailing circumstances to justify a change in custody, Petitioner is entitled to retain custody of A____. See, e.g., Diaz v. Diaz, 224 A.D.2d 614, 614 (2d Dep't 1996) (*mem.*); Salvati v. Salvati, 221 A.D.2d at 542; Lobo v. Muttee, 196 A.D.2d at 587.

Respondent may argue that the April 12, 1999 consent order is not subject to the rule giving priority to the parent first given custody by voluntary agreement of the parties because it is styled as a "temporary arrangement." However, that fact is irrelevant, as A____ has been in Petitioner's custody for her entire life. See Gary D.B. v. Elizabeth C.B., 281 A.D.2d 969 (4th Dep't 2001) (*mem.*) (even though prior custody orders were styled "temporary," children were in father's custody for three years pursuant to those orders, and for six years afterwards pursuant to judgment of divorce; accordingly, court should not have changed custody in absence of evidence that father was an unfit parent); see also Gorelik v. Gorelik, 303 A.D.2d 553 (2d Dep't 2003) (upholding trial court's award of custody to father based on, *inter alia*, evidence that child had thrived in his temporary custody).

Respondent may also argue that the agreement purportedly reached in open court in June 2000 and memorialized in the November 28, 2000 Order is not subject to the priority rule because Petitioner has raised certain challenges to that order (See

Pet. Brief, p.8).[19] Regardless of Petitioner's challenges to the order, the fact remains that in April 1999—a month after first petitioning for custody, and much closer in time to most of the conduct relating to Petitioner's mental health that Respondent now contends justifies a change of custody to him—Respondent entered into a consent order giving Petitioner temporary custody of A____. More than a year later, in both June and November 2000, Respondent still apparently believed that Petitioner was a fit parent, since he was willing to give Petitioner sole legal and physical custody of A____. (See Tr. 12-16-03, 104:22-105:4). As Dr. M____ pointed out,

> [w]hen all is said and done, Mr. P_____'s claims as to why a change in physical and legal custody should be granted do not stand up to scrutiny. Ms. V___ does have many things about her past behavior that are worrisome . . . , but Mr. P_____ was willing to overlook these problems as of November 2000. He says that this was only because

[19]Respondent states that the November 28, 2000 order "was submitted to the Court on notice to all parties and counsel which would memorialize the settlement." (Resp. Brief, p.12; see also id., p.14 [referring to the "execution" of a "custody agreement"]). According to the affidavit of service, Respondent served the notice of settlement and proposed order on Attorney T_____ on November 16, 2000—*three days after the Referee allowed him to withdraw in open court* (moreover, the Referee did not direct service of a proposed order until after Attorney T_____ had been excused from the courtroom) (Tr. 11-13-00, 3:24-5:13, 13:18-14:6). Additionally, the Order does not detail the visitation schedule for legal holidays, as the Referee directed on November 13, 2000. (See id., 13:18-14:6). Finally, even though she directed Respondent's counsel to submit a proposed order concerning the issues that had allegedly been settled on June 20, 2000 for submission on the next court date on December 21, 2000 (when Petitioner would be represented by counsel) (Tr. 11-13-01, 9:20-23, 13:18-14:6), Referee Rood signed the Order on November 28, 2000, only twelve days after it was allegedly served on Petitioner with notice of settlement, at a time when the Referee knew that Petitioner was not represented by counsel.

> Ms. V___'s mother was actively involved in child care and he trusted her to compensate for Ms. V___'s limitations as a parent. This may have been a factor in his mind when he granted her custody last year, but the fact is that he felt she was independently fit enough to remain the custodial parent, and he has not presented a compelling case that she has changed since then such that custody should be switched.

(First M____ Report, p.14; see also Tr. 11-27-01, 69:5-19, 96:20-25; D&O, p.31 [noting that Respondent agreed in November 2000 that Petitioner should have physical and legal custody of A____, and that the only thing that changed since then is Petitioner's desire to relocate to Virginia]).

Clearly, Respondent's current attempt to gain custody of A____ is not based on his view that it would be in A____'s best interest to be in his custody, rather than in Petitioner's custody. Rather, Respondent seeks a change of custody in retaliation for Petitioner's attempt to relocate with A____. The timing of Respondent's custody bid calls into question the good faith of the reasons Respondent has advanced in support of that bid. Cf. Ladizhensky v. Ladizhensky, 184 A.D.2d 756, 758 (2d Dep't 1992) (*mem.*) (noting the "persuasive fact" that, shortly after parties' divorce, father consented to mother's move to Florida with child due to demands of her employment, and he did not oppose another out-of-state relocation until mother remarried and sought to establish a new life for herself).

G. If this Court Finds that Petitioner and Respondent are Equally Fit Parents, and that All of the Other Factors are Equivocal, Stability becomes the Pivotal Factor, and that Factor Favors Continuing Petitioner's Custody of A____

Where both parents are equally fit, and examination of the remaining factors discussed herein produces no clear preference in favor of either parent, stability becomes the pivotal factor in a custody determination, Lumbert v. Lumbert, 229 A.D.2d 683, 684 (3d Dep't 1996), because "the maintenance of the status quo is a positive value which, while not decisive in and of itself, is entitled to great weight." Moorehead v. Moorehead.197 A.D.2d 517, 519 (2d Dep't 1993), app. dismissed, 82 N.Y.2d 917 (1994) (*mem.*); see also Bishop v. Lansley, 106 A.D.2d 732, 733 (3d Dep't 1984) (*mem.*) (awarding sole custody to mother, with whom children had "resided for an extensive period of time," since stability that would result from continuing present arrangement was an important consideration). Thus, even if this Court finds that Petitioner and Respondent are equally fit, and that examination of the other factors discussed herein produces no clear preference in favor of either parent, it must affirm the Referee's award of custody to Petitioner because such a result will result in stability in A____'s life. See Diaz v. Diaz, 224 A.D.2d at 615 (where parents were equally fit, child's interests would best be served by awarding custody to father, since child had lived with him for previous two years and he

continued to reside in county where child attended parochial school from kindergarten through second grade).

H. A____ Wants to Continue Living With Petitioner

In making custody determinations, the court should consider the expressed preference of the child, with due regard to the child's "age and maturity" and "the potential for influence having been exerted on the child." Eschbach v. Eschbach, 56 N.Y.2d at 173; see also, e.g. Schouten v. Schouten, 155 A.D.2d 461 (2d Dep't 1989) (*mem.*) (considering preference of 7- and 10-year old children). Although the parties are not privy to the transcripts of the Referee's *in camera* interviews with A____, in the Decision and Order, the Referee stated that A____ "would like to continue living with her mother." (D&O, p.31). While A____'s preference is not entitled to a great deal of weight, since she was only five and six years old at the time of the *in cameras*, this Court should nevertheless consider it in conjunction with all of the other factors discussed herein.

I. The Law Guardian and All of the Experts Qualified to Render an Opinion Concerning A____'s Best Interests Agree that Petitioner Should Retain Custody

In custody matters, the recommendation of a court-appointed expert, although not determinative, is entitled to a great deal of weight, see, e.g., Linda R. v. Richard E., 162 A.D.2d at 56, especially when it is in accord with the recommendation of

the Law Guardian. See Severoe E. v. Lizzette C., 157 A.D.2d 726 (2d Dep't 1990) (*mem.*) (noting that Family Court failed to explain its apparent conclusion that Law Guardian's opinion was to be disregarded, since it was well-founded and therefore entitled to great respect); Harvey v. Share, 119 A.D.2d 823 (2d Dep't 1986) (*mem.*) (custody award that disregarded recommendations of forensic expert, law guardian, county probation department and county department of mental health lacked a sound and substantial basis in record).

Dr. M____, an experienced psychologist who has done over 1,000 custody evaluations (Tr. 4-27-04, 79:18-21), thoroughly evaluated the custody and relocation issue not once, but twice. He had extensive psychological testing done on the parties and interviewed them several times over more than a year. (First M____ Report, pp.1-2, 25, 26-7; Second M____ Report, p.4). He observed each of them with A____ more than once and interviewed third parties. (First M____ Report, pp.1-2, ; Second M____ Report, p.4). All counsel had ample and multiple opportunities to question him under oath. He never wavered from his recommendation that Petitioner should retain custody of A____. (First M____ Report, p.28; Second M____ Report, p.18; Tr. 4-27-04, 11:24-25, 108:12-16).[20]

[20]Dr. M____'s testimony that A____ would probably recover emotionally if Respondent were to be awarded custody (Tr. 1-26-04, 5:14-21) and that Respondent could handle the job of being the custodial parent (Tr. 3-16-04, 62:4-5) does not undercut his recommendation that

Indeed, every expert involved in this case (except Dr. K____, who treated Petitioner only for a brief period before A____ was born) testified that A____ should remain in her mother's custody. Dr. G_____'s testimony that Petitioner should retain custody of A____ is particularly significant because she has treated every member of the L____ household, including Petitioner and A____. (Second M____ Report, p.12; Tr. 11-25-02, 30:24-31:4). The Law Guardian also strongly recommended that Petitioner retain custody of A____: indeed he could not "fathom" shifting custody away from her. (12-28-04 Law Guardian Summation ["LG Summation"], p.4). The Referee agreed, stating that Petitioner "has done a good job" with A____. (D&O, p.31).

It is true, as Respondent contends (see Resp. Brief, at p.46) that the recommendations of the court-appointed expert and the Law Guardian are not dispositive. However, such recommendations are entitled to great weight, especially where, as here, they are supported by other expert and non-expert testimony in the record.[21]

Petitioner should retain custody of A____, and certainly does not rise to the level of a finding of parental unfitness required to justify transferring custody to Respondent.

[21]Although Respondent cites many cases to support general propositions concerning custody and relocation determinations, he makes absolutely no effort to draw any factual parallels between those cases and the instant case. Since the validity of most of these general propositions is not at issue, it is not necessary to comment on these cases, beyond noting that some of the propositions advanced (*e.g.*, that any professional opinions strongly based on a young child's

II. THE REFEREE ERRED IN DENYING PETITIONER'S RELOCATION PETITION, BOTH AS A MATTER OF FACT AND AS A MATTER OF LAW

A. Petitioner's Failure to Perfect her 2003 Appeal Does not Estop her from Challenging the Referee's Denial of her Relocation Petition

Preliminarily, the Court should reject, on both the facts and the law, Respondent's perfunctory argument that Petitioner's failure to perfect her appeal from the Referee's October 24, 2003 Order requiring A____ to transfer to a New York school for the remainder of kindergarten estops her from challenging the Referee's denial of her relocation petition. (See Resp. Brief, p.38). As a matter of fact, the question presented on this appeal is different than the question presented in the 2003 appeal. In this appeal, the issue is whether, in light of all the relevant circumstances, Petitioner should be allowed to permanently relocate to Virginia with A____. In the 2003 appeal, the issue was whether the Referee could properly enter an interim order requiring A____ to attend kindergarten in New York before the hearing was completed.

As a matter of law, "an appellate court has the authority to entertain a second appeal in the exercise of its discretion, even where a prior appeal on the same issue

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expressed preferences should be discounted [Resp. Brief, p.47]) are either inapplicable, or only marginally applicable, under the facts of this case; other cases cite applicable propositions, but are easily distinguishable, on the facts, from this case.

has been dismissed for failure to prosecute." Faricelli v. TSS Seedman's, Inc., 94 N.Y.2d 772, 774 (1999) (*mem.*). This Court has not hesitated to exercise its discretion under Faricelli in cases involving far less compelling issues than a child's future. See Kader v. City of New York, 16 A.D.3d 461 (2d Dep't 2005) (indemnification); Rose v. Horton Medical Center, 5 A.D.3d 459 (2d Dep't 2004) (vicarious liability); Podbielski v. KMO-361 Realty Assocs, 294 A.D.2d 552 (2d Dep't), app. denied, 98 N.Y.2d 613 (2002) (indemnification); Andino v. Samenga, 287 A.D.2d 425 (2d Dep't 2001) (existence of attorney-client relationship in legal malpractice action); Vecchio v. Colangelo, 274 A.D.2d 469 (2d Dep't 2000) (*mem.*) (breach of contract). Therefore, even if the present appeal and the 2003 appeal did present the same issue, this Court could, and should, exercise its discretion to hear this appeal.[22]

B. Respondent's Opposition to Relocation is Factually Unsupported

Respondent argues that Petitioner should not be allowed to relocate with A____ because Petitioner has consistently opposed and obstructed the development of a meaningful relationship between A____ and Respondent. As discussed more fully above and in Petitioner's moving brief, that contention is simply untrue and

[22]Furthermore, we note that Respondent did not move to dismiss either Petitioner's appeal from the Referee's August 19, 2004 interim Order or this appeal. Therefore, Respondent's estoppel argument is arguably barred by the doctrines of waiver and/or laches.

unsupported by the record.

Respondent further argues that relocation was properly denied because Petitioner intends to interfere in A____'s relationship with Respondent in the future. This contention is also untrue and unsupported by the record. Dr. M____ testified that, if Petitioner intended to thwart the father/child relationship, she would have not been able to stop herself from interfering with the visits already and that her record of bringing A____ for each and every visit was a strong indication of her future behavior in this regard. (Tr. 4-27-04, 28:24-29:7, 78:16-90:22). Dr. G_____ testified that she had never seen any signs that Petitioner wanted to interfere with Respondent's relationship with A____. (Tr. 4-23-02 16:15-25). Dr. M____, Respondent and Respondent's father (Herbert P_____) all testified that Respondent's relationship with A____ greatly improved during the period when she spent most of her time in Virginia in the V___-L____ household. (Tr. 11-25-02, 53:23-54:14; Tr. 12-16-03, 16:19-18:6, 58:7-12; Tr. 12-17-03, 67:22-25, 71:10-17, 172:21-23; Tr. 6-7-04, 65:17-68:5).

Respondent also contends that "there is no extensive testimony that relocation offers [A____] emotional and economic benefits that outweigh those of residing in close proximity to her father and entire extended family." (Resp. Brief, p.37). This argument is flawed for many reasons.

First, Respondent has set up a false dichotomy, as A____ will not necessarily see her father and paternal extended family outside of the times when Respondent otherwise has visitation just because she lives near them. Furthermore, as discussed more fully below, the only times during scheduled visitation periods when A____ might theoretically be able to see her paternal family if she lives in New York, when she would not be able to see them if she lives in Virginia, are during her four-hour Wednesday visits with Respondent (subject, of course, to her homework and other after-school activities) and a few additional hours on Friday and Sunday nights. By contrast, as discussed more fully *infra*, at Point II.D., if A____ lives in Virginia, Respondent (and, presumably, the rest of his family, should they choose to travel with Respondent) can be with A____ there for at least 30 extra hours a month.[23]

Second, Respondent's argument on this point is based on Dr. M____'s testimony that he doesn't know of any other benefits to *Petitioner's* living in Virginia other than being married to her husband. (Resp. Brief, p.37). All that means is that Petitioner has no job or extended family in Virginia. As all of the mental health experts (save Dr. K____, who has not treated Petitioner since January 1998) testified, Petitioner will reap substantial emotional benefits if she is able to

[23]Even assuming that A____ sleeps for 12 hours during that period, that leaves 18 additional hours Respondent can spend with A____ while she is awake.

live with her loving and supportive husband. As in Tropea's companion case, Browner v. Kenward, "the emotional advantages that petitioner would realize from proximity to" her main source of moral support "would ultimately enhance the child's well-being." 87 N.Y.2d 727, 735 (1996).[24]

Moreover, all of this says nothing about the emotional benefits A____ would receive if relocation is permitted. Briefly, although Respondent points out that A____'s extended family is in New York (Resp. Brief, pp.31, 37, 40), he ignores the fact that, in Virginia, A____ has a stepfather and, more importantly, two stepsiblings whom she considers to be her brother and sister.[25] These emotional bonds cannot be disregarded on the ground that the Referee allowed A____ to spend the majority of her time in Virginia, but did not technically allow her to relocate there: the Court cannot deny the reality of A____'s life in Virginia, as Respondent and (to a lesser extent) the Law Guardian, have done.[26]

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[24]In Browner, the Petitioner was dependent on her parents for moral support (id. at 735); here, all the testimony indicates that Petitioner's husband is her main source of emotional support. (E.g., Tr. 11-25-02, 57:15-19).

[25]The Law Guardian acknowledges these benefits, but gives them extremely short shrift (stating only that he "sees the benefits of A____'s living in her new, mixed family" [LG Brief, p.26]).

[26]The testimony of Dr. M____ and Dr. G_____ on this issue is discussed more fully at pp.42-45 of Petitioner's opening brief.

C. Respondent's Argument Against Relocation Relies on Pre-Tropea Cases that Applied the Outdated "Exceptional Circumstances" Test

The legal argument Respondent has advanced to support his contention that relocation will deprive him of meaningful access to A____ focuses almost exclusively on the frequency of visitation. (See Resp. Brief, pp.31-35). To bolster his argument, he cites a number of cases that discuss the importance of "regular" or "frequent" visitation.[27] However, these cases are inapposite for a number of reasons.

First, many of those cases were decided before Tropea and applied the "exceptional circumstances" test that the Court of Appeals explicitly rejected in Tropea. See Rodriguez v. Gasparino, 281 A.D.2d 739 (2d Dep't 1995); Radford v. Propper, 190 A.D.2d 193 (2d Dep't 1993); Wiles v. Wiles, 171 A.D.2d 398 (4th Dep't 1991); Meier v. Meier, 156 A.D.2d 348 (2d Dep't 1989), app. dismissed, 75 N.Y.2d 946 (1990); Daghir v. Daghir, 82 A.D.2d 191 (2d Dep't 1981), aff'd, 56 N.Y.2d 938 (1982). Any comments about the importance of regular and frequent

[27]In a number of instances, Respondent has cited a case for a proposition, when he should, more accurately, have indicated that he was quoting directly from the case. This is true for Respondent's citations to Rodriguez v. Gasparino (Resp. Brief, p.33), Sawyer v. Sawyer (id., p.34) and Nehra v. Uhlar (id., p.51 [two unattributed quotes, plus one additional quote that is slightly mangled and that, in its accurate form, is completely inapposite because it deals with jurisdictional issues as between Switzerland and New York]).

visitation cannot be divorced from the fact that they appear in cases applying an outdated analysis that was strongly anti-relocation. Moreover, in Tropea, the Court of Appeals rejected the idea that there is anything talismanic about the frequency of visitation when it recognized that "there are undoubtedly many cases where less frequent but more extended visits over summers and school vacations would be equally conducive, or perhaps even more conducive, to the maintenance of a close parent-child relationship, since such extended visits give the parties the opportunity to interact in a normalized domestic setting." Tropea v. Tropea, 87 N.Y.2d 727, 738 (1996).

Furthermore, as mentioned above, Respondent can actually have more weekend time with A____ if relocation is allowed than he presently receives under the Decision and Order, since Petitioner seeks (and sought as early as August 2004) an order giving Respondent a third weekend of visitation per month in Virginia, at his option and with a commensurate reduction in his child support. (Pet. Brief, pp.56-57). Respondent cannot deny that it would be extremely meaningful for A____ to be able to share her home, her life, her friends and her activities with him. Of course, since Respondent never deigned to participate in A____'s life in Virginia during the course of the trial, perhaps it is more important for him to insist on having frequent contact with A____ than it is to have meaningful contact with her.

Additionally, it is no surprise that Respondent's cursory argument that the Referee was not obligated to consider whether it is possible and/or feasible for Respondent to make a parallel move to Virginia to be near his daughter (Resp. Brief, pp.36-37) is unsupported by any authority, since it is not a legal argument at all. Respondent's argument is simple: he doesn't *want* to move, even (as Respondent himself concedes) for a "job that at worst would be considered a lateral move" because he has no friends or other family in Virginia. (See Tr. 12-16-03, 54:6-23).

D. The Law Guardian's Opposition to Relocation Relies on Inaccurate Facts and Unwarranted Assumptions

The Law Guardian's current opposition to relocation is premised on incorrect facts, unsupported assumptions, and a misapplication of the factors set forth in Tropea. First, at the time of his summation, the Law Guardian's opposition to relocation was not unqualified: he recommended against relocation *unless* "the mother's submission meticulously sets forth a scenario which allows for father/daughter contact beyond which I have analyzed within this summation." LG Summation, p.11) (emphasis supplied).[28] In fact, when the Law Guardian wrote

[28]The Law Guardian assumed that A____ would be with Respondent every other weekend from late Friday through mid-day Sunday, a substantial period of time during holidays and summary vacation, and on the additional holidays resulting from G____'s calendar as a Jewish day school. (Id., p.7).

this, Petitioner had already submitted (in August 2004) a proposed temporary visitation order giving Respondent more visitation than the Law Guardian assumed in his summation: under the proposed order, Respondent's visitation would last until 5:30 p.m. on Sunday and Respondent would have visitation with A____ one additional weekend per month in Virginia, at his option. (Proposed Temporary Visitation Order, annexed to 8-9-04 Affidavit of Petitioner).[29] Moreover, the Law Guardian's contention that one reason Respondent would not have enough time with A____ is because alternate weekend visitation in New York would end "in the early afternoon on Sundays" (LG Brief, p.16; see also LG Brief, p.25) does not acknowledge the relief sought in Petitioner's opening brief, which provides that the visits will end at 5:30 p.m. (Pet. Brief, p.54). The Law Guardian's current support for the Referee's denial of Petitioner's relocation petition (See LG Brief, pp.12-27) ignores these facts and represents a change of position with respect to this issue.

Second, the Law Guardian's current opposition to relocation gives undue weight to Petitioner's supposed "attitude" towards visitation and not enough weight to the fact that, as he himself conceded, Petitioner "has been consistent in bringing A____ [for visitation], much to her credit." (LG Summation, p.11). Petitioner

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[29]Encouraging visitation between A____ and Respondent in Virginia is particularly important in light of the Law Guardian's disapproval of Respondent's refusal to visit A____ in Virginia during the course of these proceedings. (See LG Summation, p.8).

resided with A____ in Virginia from January 2002 until August 2004, and she hoped that Respondent would assume some of the burden of A____'s transportation between New York and Virginia; nevertheless, her record of bringing A____ for visitation—during the years when she was *solely* responsible for all long-distance travel—is nearly unblemished. (E.g., Tr. 12-16-03, 29:7-10, 58:3-8, 87:23-88:4). In the same vein, Petitioner's "attitude" with respect to this issue has not caused her to alienate A____ from Respondent.[30] Yet Respondent has continued to maintain: "I feel that she's been brainwashed." (Tr. 12-16-03, 108:20-21). Significantly, Respondent also "feel[s] that . . . *constant brainwashing . . . will continue whether or not A__ [sic] is in New York or in Virginia*. (Id., 108:21-23) (emphasis supplied). The Law Guardian dismisses the significance of Petitioner's compliance with all visitation, opining that she only complied because the "eyes of the court" were on her. (LG Brief, pp.10, 17, 18, 24). The "eyes of the court" were not on Petitioner when she asked Respondent to co-parent while pregnant with A____, invited him to be present at A____'s birth (Tr. 9-10-03, 57:13-57),

[30]If the Court is inclined to examine the parties' attitudes towards facilitating visitation, it should also consider Respondent's refusal to accommodate Petitioner's request that he meet Petitioner halfway between New York and Virginia for a visit immediately following the death of Petitioner's mother-in-law, since Petitioner was busy helping her husband's family in Virginia. (Tr. 9-9-03, 131:11-132:13). This is just one action that reflects Respondent's determination to promote his own convenience above A____'s best interests.

welcomed his visits during the first few months of A____'s life, and brought A____ to his parents' home for Rosh Hashana, Thanksgiving and Hanukkah in 1998. Perhaps more importantly, the "eyes of the court" will *always* be on Petitioner, since violation of a visitation order can justify a change of custody or a finding of civil contempt. See Entwistle v. Entwistle, 61 A.D.2d 380, 384 (2d Dep't 1978) (contempt); Berkman v. Berkman, 57 A.D.2d 542 (2d Dep't), app. dismissed, 42 N.Y.2d 910 (1977) (*mem.*) (change of custody). Therefore, the Law Guardian's "fears" (LG Summation, p.9), like Respondent's "suspicions," that Petitioner will attempt to interfere with visitation in the future (compare id. with First M____ Report, p.22) are, as Dr. M____ recognized, "just that" (First M____ Report, p.22), and do not provide a valid basis for denying relocation.[31] Cf. Crowe v. Crowe, 716 A.D.2d at 1217 (stating that, while some of mother's past actions were

[31]Another basis for the Law Guardian's opposition to relocation is his contention that Petitioner "filed two motions in an effort to minimize [Respondent's] contact with [A____]." (LG Brief, p.18). However, neither of these motions provides support for the Law Guardian's position.

First, in her September 1999 order to show cause, Petitioner did not seek, as the Law Guardian asserts, to "stop the supervised visitation" (LG Brief, p.18) (the relief Petitioner sought, and her reasons for making the motion, are discussed more fully at pp.10-11, *supra*). Second, in January 2004, Petitioner sought a modification of the visitation schedule because A____ was falling behind in kindergarten, not preschool, and the Law Guardian's view of the merits of that application is unavoidably colored by his opinion that kindergarten is "indeed deemed child care—day care . . . it is not officially school at this point." (Tr. 7-14-03, 22:9-16). Furthermore, as noted above, Petitioner offered Respondent a third weekend of visitation in Virginia to make up for the shortened alternate-weekend visitation.

"questionable," she should not be denied custody based upon the "mere speculation or suspicion" that she might "abscond with the children").

Furthermore, although the Law Guardian briefly mentioned that Tropea requires the court to consider the possibility of a parallel move by the noncustodial parent (LG Brief, p.13), he does not examine the feasibility of Respondent—a single man with no other children—moving to Virginia to be near A____.[32] Indeed, in light of Respondent's December 2003 testimony that he goes to his office once a week, and does 55% of his work from home (Tr. 12-16-03, 37:20-38:4, 168:2-6; 169:10-15), it seems possible that Respondent might be able to move to Virginia to be near A____ *and* keep his job.

The Law Guardian's position on relocation is also undermined by his failure to take into account, or his inaccurate recollection of, a number of significant facts. For example, perhaps if he considered the visitation provided for in the April 12, 1999 consent order (which is not even mentioned in his brief); Respondent's failure show up for the visitation to which he was entitled under that order; or the fact that, in her motion to vacate the Referee's September 15, 1999 visitation order, Petitioner actually objected only to the location of the supervised visitation with Respondent

[32]This is not surprising, since the Referee inaccurately stated on the record that it was improper to consider the possibility of a parallel move by Respondent. (See Tr. 4-27-04, 163:2-164:3).

and to the fact that Respondent's parents might be allowed visitation, he would not have concluded that Petitioner has been "less that [*sic*] enthusiastic" about Respondent's visitation with A____. (LG Brief, p.10; see also id., p.26).

Moreover, the Law Guardian's position concerning relocation is based on the assumption that a few hours less of visitation per week (which is, after all, the only difference between the visitation schedule Petitioner proposed in August 2004 and the schedule contained in the Decision and Order) will have a measurably negative effect on A____'s relationship with Respondent. Indeed, the Law Guardian reasoned that, "given that the father has diligently and conscientiously built up his relationship with A____, to A____'s benefit, I cannot see how it would be in A____'s best interests to now let that diminish." (LG Brief, p.16). This recommendation creates a "catch-22" that, in effect, punishes Petitioner for following Dr. M____'s recommendations, which—as Dr. M____ explicitly stated—were intended to strengthen the relationship between A____ and Respondent so that "bi-monthly visits from Friday night to Sunday night can occur without weakening A_____'s relationship with her father" (First M____ Report, p.32) and ignores Respondent's repeated testimony about the strength of his bond

with A____. (Tr. 12-16-03, 73:24-75:8, 106:12-25, 108:4-6, 115:4).[33] Such a precedent would provide a strong disincentive for custodial parents to foster the development and continuation of their child(ren)'s relationships with the non-custodial parent during the pendency of custody proceedings.

Furthermore, although it is true, as the Law Guardian notes, that most of the cases cited in Petitioner's opening brief are from outside the Second Department (LG Brief, p.21), this fact is irrelevant, as all of the Departments follow Tropea.[34] Moreover, this Court has frequently held that relocation requiring a child of A____'s age to travel 5-6 hours for visitation did not deprive the noncustodial parent of regular and meaningful access to the child. E.g., Schouten v. Schouten,

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[33]In April 2004, Dr. M____ stated that he was adhering to the recommendations made in his second report (which include allowing relocation to Virginia). (Tr. 4-27-04, 173:10-14). To the extent, however, that Dr. M____'s testimony that day (in response to numerous hypothetical questions posed primarily by Respondent's counsel) could be construed as conflicting with his stated support for relocation, it should be noted that his apparent conclusion that the only way to ensure sufficient contact between Respondent and A____ was to require A____ to live in New York (see id., 172:14-20) does not take into account the possibility that Respondent might move to Virginia, especially since the Referee—improperly interpreting the law on this issue—stated in open court that the possibility of Respondent relocating to Virginia was "not an issue." (Id., 163:2-164:3).

[34]In his brief, the Law Guardian does not discuss any of Petitioner's cases from outside the Second Department. (See LG Brief, pp.21-24). Moreover, his attempt to distinguish Miller v. Pipia, 297 A.D.2d 362 (2d Dep't 2002) (see LG Brief, pp.23-24) is unavailing. Here, as in Miller, Petitioner has supported Respondent's visitation with A____, and her main source of emotional support is outside New York. That Petitioner receives a small disability pension, while the Petitioner in Miller could not find work in New York, does not detract from the fact that the living arrangements available to A____ in Virginia are more comfortable than those available to her in New York. (See Pet. Brief, p.46).

155 A.D.2d at 462 (allowing 258-mile relocation with 7- and 10-year-old children); Blundell v. Blundell, 150 A.D.2d 321, 323-24 (2d Dep't 1989) (*mem.*) (allowing relocation from Garden City to Londonderry, New Hampshire with 6- and 9-year-old children; court rejected father's argument that his scheduled visitation periods, which included alternate weekends, would be "less than ideal" because children would be tired from traveling, stating that Londonderry was "within a reasonable distance of the [father's] current residence" in Floral Park); Zaleski v. Zaleski, 128 A.D.2d 865 (2d Dep't), app. denied, 70 N.Y.2d 603 (1987) (*mem.*) (allowing relocation from Long Island to Syracuse with 11-, 10- and 7-year old children; even though move decreased frequency of father's visits, mother proposed "liberal" visitation schedule under which father would have visitation during Easter and Christmas breaks and for entire summer).

Two cases are particularly illuminating. In Ladizhensky v. Ladizhensky, the mother sought to relocate to Kansas City with the parties' 8-year-old child; in opposition, the father sought custody of the child. 184 A.D.2d at 756. This Court found that the mother's desire to relocate was not intended to inhibit the father's reasonable access to his son, but was premised on her new husband's job in Kansas City, her failure to find suitable employment or an accredited chiropractic school in the New York metropolitan area, and her good-faith desire to improve the quality of

life for her child. Id. at 757. The Court commented favorably on the fact that the mother had expressed her desire to promote the father's visitation and had submitted a "liberal" visitation schedule. Id. at 758. The Court further stated that "while the move may decrease the frequency of the defendant's visits, . . . the proposed visitation schedule will afford him regular and meaningful access to the child." Id. The Court found that it was of "particular significance" that the parties were divorced when the child was 18 months old, and that the longest visits between father and child lasted for a month. Id. Accordingly, the Court concluded that the mother should retain custody, and allowed her to relocate with the child. Id. at 757-58.

The facts of Smith v. Finger, 187 A.D.2d 711 (2d Dep't 1992), app. dismissed in part, denied in part, 82 N.Y.2d 704 (1993) (*mem.*), are indistinguishable, for all practical purposes, from the facts of this case. In Smith, the mother sought to relocate with her almost-five-year-old son to a Virginia suburb of Washington, D.C. to be with her new husband. Id. at 303. The father sought to enjoin the relocation or, in the alternative, to obtain custody of his son. Id. During the pendency of the applications, the parties agreed that the child would reside with the mother in Virginia and visit with the father on the weekends. Id.

This Court held that the trial court properly awarded custody to the mother

and allowed her to relocate, since the relocation would not effectively curtail the father's visitation rights or deprive him of regular and meaningful access to his son. Id. The court noted that the court-appointed psychiatrist favored the relocation and testified that the mother was the party who was more likely to encourage the child to maintain a healthy relationship with his noncustodial parent. Id. The court also noted that the mother's desire to relocate was not motivated by a bad-faith desire to curtail the father's visitation. Id. The court awarded the father "liberal visitation on alternate weekends, on the Jewish holy days, during one half of the Christmas recess and during the summer months, except for an eight-day period to be designated by the [mother]."[35]

Here, as in Smith, Petitioner has a good-faith desire to live with a new husband who is settled in the Washington, D.C. suburbs. Here, as in Smith, the mother was permitted to reside in Virginia with the child during the pendency of the action. Here, as in Smith, although the father previously had slightly more frequent visitation, a schedule giving the father visitation on alternate weekends, (many) Jewish holy days (as well as some secular holidays), a substantial portion of the child's school-year vacations (here, two-thirds of those vacations) and a majority of

[35]In light of the numerous factual similarities between Smith and this case, the two cases are not distinguishable based solely on the fact that, in Smith, the parties' separation agreement explicitly allowed relocation to Washington, D.C. See id. at 712-13.

the child's summer vacation will not effectively curtail the father's visitation rights or deprive him of regular and meaningful access to his child. Therefore, as in Smith, the Court should allow Petitioner to relocate to Virginia with A____.[36]

[36]In his opposition brief, Respondent did not even attempt to distinguish any of the cases cited in Petitioner's opening brief. Lest he be tempted to do so, or to address the cases cited herein, in his remaining brief, we note that that brief is solely for reply on the cross-appeal and is thus limited to addressing the custody issue.

CONCLUSION

For all the foregoing reasons, Petitioner-Appellant-Respondent respectfully requests that this Court modify the January 27, 2005 Decision and Order and the Order of Custody and Visitation of even date as set forth in her opening brief; as so modified, affirm those orders; and grant such other, further and different relief as may be just and proper.

Dated: May 13, 2005
New York, New York

Respectfully Submitted ,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR §670.10.3(f)

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