DOCKET NO. CUM-09-545

SUPREME JUDICIAL COURT
Sitting as the Law Court
STATE OF MAINE

[redacted]

Appellant,

v.

[redacted]

Respondent.

APPEAL FROM THE DISTRICT COURT,
CUMBERLAND COUNTY, MAINE
DOCKET NO. POR-PA-09-1142
Hon. JEFFERY MOSCOWITZ, District Judge

BRIEF OF APPELLANT

[redacted]

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FACTUAL BACKGROUND

I. Allegations and Investigation of Sexual Abuse Allegations

A. In the aftermath of a divorce, a child begins reporting sexual abuse from her father.

Plaintiff ("mother") and Defendant ("father") were married in May 2006. In November 2006, they had a daughter (referred to in this brief as "the child.") The father filed for divorce in June 2008 and the divorce judgment was entered on December 29, 2009. Under that judgment, Plaintiff received primary custody of the child. The child has apparently thrived: she has been described by one physician as "an incredibly articulate 2½ year old child who had exceptional verbal skills"[1] and "the singularly most articulate two year, eight month old I had ever met, both in clinical practice and in my personal life. She was amazingly articulate as a two year, eight month old."[2]

By June 2009, however, this "incredibly articulate" two-and-a-half year old child had begun displaying concerning behaviors and making disturbing comments about her interactions with her non-custodial father. She had begun licking her mother on the neck and face stating that her father did it to her.[3] She also had begun commenting to her mother about her father's penis and child's own "gina."[4] She told her mother that her father had "put [his] face in [her] gina (*Id.*); that her father put ice cream all over his body and asked her to lick it off (*Id.*); and that her father "poked her bum and has a humongous penis."[5]

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[1] Medical Evaluation, Appx. A0051.
[2] Tr. Vol. 1, 34:1-5.
[3] Psychosocial Evidentiary Assessment, Appx. A0054.
[4] *Id.*.
[5] *Id.*.

The child also made comments to her cat, which her mother observed and video recorded. The child told her cat about her father touching her "gina"[6] and said to her cat, at times in a sing-song voice, things such as "don't touch my gina with daddy's penis."[7]

The child made similar comments to an acquaintance, Polly Campbell (e.g., "I tell my kitty for papa not to poke me with his big penis on my gina").[8] Ms. Campbell responded by filing a report with the Maine Department of Health and Human Services.[9]

B. The investigations of the reported sexual abuse.

1. DHHS's attempts to investigate.

On July 13, 2009, DHHS sent Beth Fawcett, a child protective caseworker with less than a year's experience[10] to interview the child at her day care center. Ms. Fawcett met with the child, but the child did not respond to Fawcett's questioning about her father. After fifteen minutes, the child asked to see her mother. Upon a further attempt by Fawcett, the child became withdrawn and refused to speak with Fawcett.[11]

Fawcett tried again to interview the child two weeks later. Again, the child would not respond to Fawcett's questions regarding the father.[12] Soon thereafter, however, Fawcett received an email from Polly Campbell with a transcript of comments made by the child after Fawcett had left, including "poppy pok[ed] me in the gina," "It hurt," and "I cried. I wanted my mommy."[13]

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[6] *Id.*, Appx. A0055.
[7] *Id.*
[8] *Id.*.
[9] *Id.*
[10] Tr. Vol. 2, 76:7-8.
[11] Psychosocial Evidentiary Assessment, Appx. A0055.
[12] *Id.*, Appx. A0056.
[13] *Id.*

Having been stymied by the child's failure to respond to her method of questioning, Fawcett referred the investigation to specialists in sexual abuse investigation and diagnosis at The Spurwink Child Abuse Program in Portland, Maine.[14]

2. Spurwink's investigation and assessment.

Spurwink's forensic interviewing techniques are based on standards developed by, among others, the American Professional Society on Abuse of Children and the American College of Child and Adolescent Psychiatry.[15] Spurwink employs some of the most highly trained, highly experienced interviewers in the country.[16] As part of its standard sexual abuse investigation, Spurwink had the child undergo a Medical Evaluation by Co-Director Dr. Lawrence R. Ricci[17] (one of the nation's leading authorities on child abuse)[18] and a Psychosocial Evidentiary Assessment by Co-Director Joyce Wientzen, LCSW.[19]

In his medical evaluation, Dr. Ricci confirmed through a review of medical records that the child had been diagnosed with a urinary tract infection on June 27, 2009.[20] He found "no evidence of recent genital or rectal trauma," but cautioned that "the absence of specific physical findings in no way indicates that such abuse could not have occurred."[21]

Ms. Wientzen, who has conducted over two thousand forensic interviews of children, some seventy percent of which involving allegations of sexual abuse,[22] conducted a psychosocial assessment which included two interviews of the child, the first on July 28, 2009 and then again

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[14] *Id.*, Appx. A0052: ("Beth Fawcett, Department of Health and Human Services (DHHS) referred [the child] for a sexual abuse evaluation.")
[15] Tr. Vol. I, 37:20-38:6.
[16] Tr. Vol. I, 41:23 – 42:3.
[17] Appx. A0048-51.
[18] Tr. Vol. I, 96:16 – 22.
[19] Appx. A0052-59.
[20] Medical Evaluation, Appx. A0050.
[21] *Id.*, Appx. A0051.
[22] Tr. Vol. 2, 5:8-13. Earlier, Dr. Ricci had noted that "two-thirds of the cases we see where sexual abuse is alleged, we find no evidence of abuse." Tr. Vol. I, 47:6-8.

a week later, on August 4, 2009. The child responded quite differently to Ms. Wientzen's more experienced interviewing process than she had to Fawcett; in fact, she made several disclosures to Wientzen, including:

- "Papa poked me in gina."[23]
- "He poked me in my tummy."[24]
- When asked "where were you?" the child said "Papa poked me in gina last time. A room in papa's house."[25]
- When asked "What did he poke you with?" she stated "With his penis."

Wientzen noted that the father "adamantly denied that he has engaged in any inappropriate sexual touching of his daughter."[26] He further stated that "there is nothing that has occurred with [the child] that she could be misinterpreting or misunderstanding,"[27] a conclusion Wientzen ultimately agreed with, albeit to different effect.

After interviewing numerous other people, reviewing numerous records (including transcripts and GAL and evaluator reports) from the divorce proceedings, and information from abuse specialists who had worked with the mother during the divorce, the Spurwink "team" (Wientzen and Ricci along with nurse practitioner Hannah Pressler, psychologist Dr. Kelly Drach, and two other licensed social workers, Ellen Hurd and Kathy Harvey Brown)[28] met to reach consensus on the credibility of the allegations. Essentially, the question the Spurwink team had to resolve was whether the child had been coached or influenced in some other manner to make her statements, or whether she was actually reporting as accurately as she could true events she had experienced with her father.

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[23] Psychosocial Evidentiary Assessment, Appx. A0058.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] Tr. Vol. II, 7:11-18.

During the meeting, the team members took several difficult issues into consideration. In addition to the medical examination, they considered the mental development of the child: although she was extraordinarily articulate, her "young developmental age" prevented her from "repeat[ing] the rules for answering questions appropriately . . . [or] identify[ing] an untruthful statement that was made to her."[29] The team also weighed the family context in which her statements had been made. As Ricci stated, "I gathered early on that this was a very high conflict case with a lot of legal sorts of minefields involved."[30] Wientzen noted, "There is always the potential for influence when a child is in the midst of a high level of parental conflict. The risk is greater the younger the child and the greater their susceptib[ility] to suggestion."[31] They even considered whether the number of adults who had questioned the child would have affected her crediblity.[32] The fact that the child had reported abuse to others was not given great weight: as Ricci testified, "We [assiduously] avoid conf[i]rmation bias, which is that someone goes into an interview with a predetermined idea."[33]

While the above factors were recognized as potentially confounding, the team identified several counterweights signifying the accuracy of the child's disclosures. The child's disclosures to Wientzen had come in response to open-ended questions, not questions that were leading or coached to create a higher likelihood of disclosure.[34] The descriptions the child gave of the events were important, too, because they lacked any ambiguity as to the nature of the contact she was reporting: "[Her] statements are clearly describing sexual contact. Alternative explanations such as hygienic touching would not explain her statements."[35] Perhaps most importantly,

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[29] Psychosocial Evidentiary Assessment, Appx. A0058.
[30] Tr. Vol. 1, 33:10-12.
[31] Psychosocial Evidentiary Assessment, Appx. A0059.
[32] *Id.*
[33] Tr. Vol 1, 40:10-12.
[34] Psychosocial Evidentiary Assessment, Appx. A0057-58; Tr., vol. 2, 9:21-10:7, 14:11-17.
[35] *Id.*, Appx. A0059.

however, the precision of the child's words bespoke their truth: "[T]he specificity of [the child]'s statements is quite compelling and difficult to dismiss merely as the result of suggestion."[36]

Having sifted through all the data, the Spurwink team's next task was to reach a conclusion as to whether the father posed a risk to the child and if so, how much. Spurwink classifies abuse allegations by the degree to which they are supported by available evidence. Thus, a case might be assessed as having "strong evidence of abuse," "moderate evidence," "don't know," or "no evidence of abuse."[37] Here, because of the child's statements, the "no evidence of abuse" category was not possible.[38]

Within the "don't know" category, Spurwink distinguishes between risk levels suggested by the clinical data:

> So, then, when we look at the don't know case, we say, "Okay. So, is this like a we don't know or a more worrisome don't know?" That—and that affects our recommendations. For example, if we're talking about supervised contact or no supervised contact. So a don't know where we say low risk don't know, we would say, "We don't have any recommendations about supervision. Whatever everybody else agrees to is fine with us." If we say, "The information given to us is of sufficient concern for us to arrive at a recommendation of no unsupervised contact," that would have been the best this case could have offered us in terms of an opinion.[39]

The trial court noted that this distinction made "perfect sense."[40]

But the Spurwink team did not place this case in the "don't know" category. Rather, they gave the stronger diagnosis of "moderate evidence" of sexual abuse.[41] Consequently, they "***strongly recommended that any contact that [the child] have with her father be supervised.***"[42]

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[36] *Id.*.
[37] Tr. Vol. 1, 52:1-9.
[38] Tr. Vol. 1, 52:12-14.
[39] Tr. Vol. 1, 52:15 – 53:3.
[40] Tr. Vol. 1, 53:4.
[41] Tr. Vol. 1, 63:24 – 64:25.
[42] Psychosocial Evidentiary Assessment, Appx. A0059 (emphasis added).

As Dr. Ricci noted, the "important piece" of the diagnosis was not so much the category in which the allegations had been placed, but the strong recommendation: As he noted, "we are confident, comfortable with our recommendation . . . which was no unsupervised contact between [the child] and her father."[43]

II. Procedural history.

A. On behalf of her daughter, the mother files a Complaint for Protection from Abuse Order.

Shortly after the Spurwink team issued its recommendation, the father—through counsel—advised the mother that he would no longer submit to supervised visitation. He demanded visitation with the child on August 14, 2009. In response, the mother filed a Complaint for Protection from Abuse on her daughter's behalf.[44] As described in the Complaint, the mother sought this protection based both on the child's reports of sexual abuse to her and others, and on her conversations with Wientzen about Spurwink's recommendation against any unsupervised contact.[45]

B. The hearing on the Complaint and the trial court's ruling from the bench.

The trial court held the hearing on the Complaint on October 6, 2009. The court heard evidence from four witnesses: Dr. Ricci, Ms. Wientzen, the father and the DHHS worker Beth Fawcett. Ms. Fawcett's testimony was essentially limited, however, to a collateral issue as to whether the mother had authorized her to speak to a psychologist, specifically, a non-treating psychologist who had been hired during the divorce proceedings by a guardian ad litem.[46] This psychologist did not testify at the hearing.

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[43] Tr. Vol. 1, 15-20.
[44] Complaint, Appx. A0009-12.
[45] *Id.*, Appx. A0011-12.
[46] Tr. Vol. 2, 88:21 – 89:9.

Dr. Ricci and Ms. Weintzen described the investigations (detailed above) and provided their expert opinions as to the weight of various data and information they gathered. The father repeated his denials of his daughter's reports of sexual abuse. After the evidence had concluded, the trial court took a brief recess and, when it returned, issued its ruling from the bench.

The qualifications, experience and expertise of the Spurwink experts was not contested: indeed, the trial court even took judicial notice of Dr. Ricci's qualifications.[47] Nonetheless, the court ultimately disregarded their conclusions. The reason, the court said, was a difference in how credibility was determined:

> Examiners and medical professionals make certain findings related to medical diagnosis and treatment. And that's a very different analysis from the analysis that a court has to make.[48]

Even though the Spurwink experts applied their undisputed expertise, case experience and professional standards over weeks of investigation, research and interviews to determine the risks posed to the child, the trial court apparently found its own assessment of their data to be a surer guide. The court found that, because of the child's age and cognitive development, her explicit disclosures to Wientzen did not "necessarily" constitute statements made "for the purposes of medical diagnosis and treatment"; thus, the child "***may*** not have had the motivation to be honest with the doctor, with the medical providers in speaking with them about this."[49] The court had indeed admitted the evidence of the statements made by the child as part of the Spurwink reports it accepted into evidence,[50] but despite the corroborating circumstances—the open-ended questioning, the lack of ambiguity and precision of her reports, noted by the Spurwink experts—the court suggested that the *only* evidence was the child's disclosures to

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[47] Tr. Vol. 1, 32:2-3.
[48] Tr. Vol. 2, 14-17.
[49] Tr. Vol. 2, 124:19 - 125:7 (emphasis added).
[50] Tr. Vol. 2, 20:19-20.

Wientzen: "The evidence, as I said, in this case is—consists of [the child's] statements to Ms. Wientzen, which were admitted pursuant to Rule 803-4."[51]

This evidence, the court said, was "extremely precarious evidence of an extremely serious allegation."[52] The "linchpin," according to the court, was "absolutely most importantly, [the child] wasn't able to really distinguish between the truth and a lie, which is essential."[53] In fact, Wientzen could not assess whether the child could distinguish truth from falsity. As she had noted, "Due to her developmental age, [the child] was not able . . . to participate in the interviewer's attempts to assess her understanding of the difference between a truth and a lie."[54] The court did not discuss the fact that the investigators, in reaching their conclusions, had already lowered the value of the child's disclosures from "strong" to "moderate" evidence, because of the challenge of assessing such a young reporter.[55]

The court did not base its ruling on a finding that there was testimony or any evidence refuting the allegations of abuse; in fact, the court's ruling does not mention any evidence submitted by the father at all.[56] Rather, the court found that the child, who did not actually testify and was never tendered as a witness, was not "a competent witness."[57] Because the court cited no evidence contradicting the child's statements, in order to rule that it could not find by a preponderance of the evidence that abuse occurred, it had to give the Spurwink experts' testimony *no* weight.[58]

C. Appellate jurisdiction.

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[51] Tr. Vol. 2, 124:19-21.
[52] Tr. Vol. 2, 125:21-22.
[53] Tr. Vol. 2, 125:14-16.
[54] Psychosocial Evidentiary Assessment, Appx. A0057.
[55] *See, e.g.,* Tr. Vol. 2, 22:18 – 23:15.
[56] Tr. Vol. 2, 123:1 – 126:2.
[57] Tr. Vol. 2, 125:8-10.
[58] Tr. Vol. 2, 125:22-25.

The mother timely filed a Notice of Appeal on October 27, 2009. The transcript was timely ordered.

This Court's jurisdiction is predicated on Me. Rev. Stat. Ann. Tit. 14 § 1901(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the district court's decision to deny the child's request for an order of protection under Maine's Protection from Abuse statute was clear error, in that the court did not "liberally construe and apply" the statute when it denied the order despite uncontroverted expert opinion that there was substantial evidence that the father had sexually molested the child, the court pointed to no contradictory evidence, and substituted its own inexpert speculations for the in-depth expert assessment?

ARGUMENT

THE TRIAL COURT CLEARLY AND ERRONEOUSLY DISREGARDED THE EVIDENCE AND THE PROTECTION FROM ABUSE STATUTE'S MANDATE FOR LIBERAL CONSTRUCTION TO PROTECT VICTIMS OF ABUSE.

The Protection from Abuse Act ("the Act") ensures that physical or sexual abuse within the family can be ended by means of a civil judicial intervention, focused purely on protection of the victim rather than punishment of the perpetrator. As a remedial statute, the Act must be liberally construed and applied to promote its remedial and protective purpose. In this case, far from construing the PFA Act liberally, the trial court rejected ample and uncontradicted expert evidence that a child needed protection. The court also inappropriately replaced the experts' assessments with what was, in essence, its own inexpert speculation. This was clear error. The ruling should be reversed, and an order of protection should be entered.

I. The Protection from Abuse Act Must be Liberally Construed to Fulfill its Protective Purpose.

The Act's protective purpose must be the touchstone of any decision regarding issuance of an order of protection:

> The court shall ***liberally construe and apply*** this chapter [Protection from Abuse] to promote the following underlying purposes:
>
> 1. RECOGNITION. To recognize domestic abuse as a serious crime against the individual and society, producing an unhealthy and dangerous family environment, resulting in a pattern of escalating abuse, including violence, that frequently culminates in intrafamily homicide and creating an atmosphere that is not conducive to healthy childhood development;
>
> 2. PROTECTION. To allow family and household members who are victims of domestic abuse to obtain expeditious and effective protection against further abuse so that the lives of the nonabusing family or household members are as secure and uninterrupted as possible.[59]

As this Court has declared, the Act was passed for "the express statutory purpose of protecting the victim."[60] The urgent need for more vigorous and accessible legal protections for all victims of abuse, adult or child was noted in the Maine State Legislature's accompanying resolution stating that "domestic violence is a pervasive and atrocious problem in Maine and nationwide."[61]

Maine's legislative commitment to protect abused family members from further abuse places it in the company of numerous other state legislatures that have specifically instructed their courts to give broad application to the protective purposes of their enactments.[62] But the Legislature's intent cannot be realized without the judiciary's cooperation.

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[59] Me. Rev. Stat. Ann. tit. 19, § 4001 (2009) (emphasis added).
[60] *State v. Falcone*, 760 A.2d 1046, 1048-49 (Me. 2000).
[61] Final Report of the Commission to Study Domestic Violence (2001) http://www.maine.gov/legis/opla/domesviol.PDF, Appendix A.
[62] *See, e.g., In re Marriage of Nadkarni*, 93 Cal. Rptr. 3d 723, 734 (Cal. Ct. App. 2009) (reversing trial court's dismissal of complaint, noting that the California legislature intended for its Domestic Violence Prevention Act to be "broadly construed"); *Cruz-Foster v. Foster*, 597 A.2d 927, 929 (D.C. 1991) (reversing and remanding a denial of CPO extension, noting that D.C.'s protection order statute must be "liberally construed in furtherance of its remedial purpose."); *Sperle v. Orth*, 763 N.W.2d 670, 675 (Minn.App.,2009) (reversing and remanding where trial court denied order of protection from abuse when trial court which would otherwise have required "victims of domestic abuse to remain in abusive relationships in order to qualify for relief under the Domestic Abuse Act," and giving liberal construction to the remedial Domestic Abuse Act); *Brandt v. Brandt*, 523 N.W.2d 264, 265 (N.D. 1994) (extending protection of statute to children, noting that North Dakota's domestic violence protection statute is to be "liberally construed to protect victims other than adults"); *Swenson v. Swenson,* 490 N.W.2d 668, 670 (Minn.App.1992) (affirming order of protection, stating that the Domestic

Had the trial court here liberally construed the Act as required to protect the child victim, it could not have denied this protection order. As will be seen, there was essentially uncontested, objective evidence supporting the request, and there was no evidence refuting it (apart from Respondent's self-serving denial, to which the court did not refer). By nonetheless refusing to issue a protective order, the court chose to put the risk of its own error on the child seeking protection rather than on the adult who experts believed was abusing the child. If such a result is consistent with the requirement to "liberally construe and apply. . . to protect" then that requirement is actually meaningless.

II. The Court Substituted its Own Unsupported Speculation for the Specific Expert Assessments of this Child.

In child sexual abuse cases, the need for expert assessment is critical .[63] This is necessary in part because "there often are no witnesses [to child sexual abuse] except the victim."[64] The lack of other witnesses is especially problematic when the victim is very young, such as the child in this case. A young child may not be able to articulate instances of abuse in

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Abuse Act, as a remedial statute, "receives liberal construction in favor of the injured party"); *Simmons v. Dixon*, 240 S.W.3d 608, 612 (Ark. Ct. App. 2006) (affirming an order of protection, noting that the Arkansas domestic violence statute's purpose was "broad"); *Raynes v. Rogers*, 955 A.2d 1135, 1140 (Vt. 2008) (affirming a finding of abuse, noting that Vermont's "Abuse Prevention Act . . . must be liberally construed to 'suppress the evil and advance the remedy intended by the Legislature.'") (citations omitted); *see also* ALA. CODE § 30-5-1 (2009) (State's domestic violence statute is to be liberally construed and applied); IDAHO CODE ANN. § 39-6302 (2009) (same); ILL. COMP. STAT. 60/102 (2009); KAN. STAT. ANN. § 60-3101 (2009); N.J. STAT. ANN. § 2C:25-18 (2009) (encouraging "broad" application of the remedies available under its domestic violence statutes).

[63] 4 *Child Custody and Visitation Law and Practice* Ch. 31 § 31.12(2)(a) (Matthew Bender, Rev. Ed. 2010) ("If an allegation of abuse has been made, it is difficult to imagine that a case would be tried without [expert witnesses]").

[64] *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 107 S.Ct. 989, 1003 (1987); s*ee also* Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027, 2033 (1994) ("Child sexual abuse prosecutions present distinctive evidentiary problems. Typically, these cases pit the word of a young, often traumatized child against that of a seemingly respectable abuser. Because most child sexual abuse occurs in private, the child victim is usually the only eyewitness.")

great detail.[65] Corroborating physical or medical evidence "is found in only ten to fifteen percent of confirmed sexual abuse cases."[66] It is thus often up to experts to provide what cannot be obtained elsewhere: a grounded systematic and educated assessment of the risks confronting a child.[67] Credible expert opinions about child sexual abuse are thus indispensable for an accurate assessment of child sexual abuse.

The *right* expertise is just as indispensable, because the investigation of child sexual abuse allegations is "an extremely specialized field"[68] that "absolutely" requires" specialized training.[69] Without the benefit of the necessary specialized knowledge and experience, a court's task of determining the risk to a child could present insuperable conceptual challenges. The accuracy of its ruling would be more a function of chance than of the evidence.

The experts who testified in this case—Spurwink's Ricci and Wientzen—have and routinely draw on that specialized knowledge and extensive experience, as demonstrated by their work and testimony in this very case. The team regularly evaluates children's development and "ability to report events."[70] They employ special criteria to assess reliability in each case, criteria that are supported by experimental and clinical studies.[71] They also frequently train law enforcement and case workers, and give conference presentations on, their technique for forensic

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[65] Askowitz, *supra*, at 2033.
[66] *Id.* at 2034.
[67] *See, e.g.,* Sandra Morgan Little, CHILD CUSTODY & VISITATION LAW AND PRACTICE (LEXISNEXIS, 2005), ("If an allegation of [child] abuse has been made, it is difficult to imagine that a case would be tried without [expert witnesses]"); *see also* Ann M. Haralambie, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES (SHEPHARD'S/MCGRAW-HILL,1993), PP. 175-176 ("It is almost impossible to present a sexual abuse case without appropriate expert testimony. . . Particularly in light of the growing judicial skepticism of sexual abuse allegations in domestic litigation, it is essential that a properly qualified expert evaluate the allegations").
[68] Haralambie, *supra,* at 175.
[69] Tr. Vol. 1, 41:1-4.
[70] Tr. Vol. 1, 38:17-20.
[71] Tr. Vol. 1, 45:7-16.

interviews of minors in sexual abuse cases.[72] Their expertise led them to conclude that, despite her young age, the child here was "incredibly" articulate and that her disclosure and the surrounding circumstances warranted classification at their second highest risk level: "moderate" evidence of abuse. Their expert evaluation and investigation (including the review of "hundreds and hundreds of pages of documents")[73] revealed evidence that was so clear that they "strongly" recommended against unsupervised contact between the child and her father.[74] The child was unable to participate in an assessment of her ability to discriminate truth from falsehoods, but these experts accounted for that fact by interpreting her statements "more conservatively."[75] This limitation did not require rejecting her report altogether: As they noted after their weeks of gathering information and thousands of previous investigations, a two year old is not *incapable* of telling the truth: the child's developmental stage did not mean that she could make *no* credible disclosure.[76]

The trial court took no issue with the expert witnesses' credibility, expertise, methods or conclusions. Instead, the court asserted that it was required to examine information differently from the way such experts would—although, as the evidence showed, the experts did indeed "evaluate bias, motive to fabricate and other circumstantial evidence or circumstances that assist in determining what the facts really are."[77] The court *conceded* they had.[78] The only distinction between the court's review and the experts' review related to their opinions about the credibility

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[72] Tr. Vol. 2, 5:14 – 6:9.
[73] Tr. Vol. 1, 98:22 – 99:6.
[74] Psychosocial Evidentiary Assessment, Appx. A0059; Tr. Vol. 1, 64:15-21; Vol. 2, 19:18-24.
[75] Tr. Vol. 2, 23:10-15.
[76] Tr. Vol. 2, 22:18 – 23:9.
[77] Tr. Vol. 2, 124:10-14.
[78] *Id.*

of the child, *who did not testify*.[79] Unlike Wientzen, who spoke personally to the child, and unlike the team, who applied their knowledge and experience in precisely such matters to the circumstances in this case, the trial court ruled, in effect, that an unusually articulate two year old is incapable of truthfully telling others that her father poked his penis in her vagina.

As the evidence indisputably shows, the Spurwink specialists' expert assessment looked deeper into the facts, and did so with much greater professional resources and precision, than the trial court possibly could by hearing a single day's worth of testimony. As this Court stated decades ago, "[E]xpert opinion[s] cannot arbitrarily be ignored and the inexpert opinions of the [factfinders] be substituted in place thereof in any matter which is within the realm of the expertise."[80] Although factfinders are not bound by an expert's opinion, *id.*, judgments should be set aside where they are based on a factfinder's arbitrary substitution of its own opinions for the uncontroverted opinions of experts in the field.[81] Other jurisdictions have applied this principal in circumstances very similar to those in this case: in *Wilkins v. Ferguson*,[82] for example, the D.C Court of Appeals reversed *without remand* a lower court's refusal to make a finding of sexual abuse against a child and to restrict visitation, because several mental health experts had recommended only supervised visitation.

Here, where the court was required to construe and apply the Act liberally; where trained specialists had conducted a thorough and expert vetting of the child's statements and the circumstances in which they were made, including the reasons such statement could be doubted; and where the uncontradicted expert opinion was that the father should be permitted only supervised visits with his child because of the substantial evidence of abuse; the trial court's

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[79] Although this Court understandably gives deference to trial court assessments of *witness* credibility, there is no basis for applying that same deference to a trial court's assessment of a non-witness's credibility.
[80] *Thompson v. Johnson*, 270 A.2d 879, 882 (Me. 1970).
[81] *Id.* at 882
[82] 928 A.2d 655 (D.C. 2007).

refusal to extend the State's protection to this child under a purely civil, protective statute, was clear error.

III A Finding of No Abuse In This Case Essentially Strips The Act Of Its Ability To Protect Young Children, Contrary to the Mandate to Liberally Construe the Act to Protect Victims.

To affirm the trial court's holding that abuse was not proven by a preponderance of the evidence under the facts of this case would essentially strip the PFA Act of any power to protect young children from abuse. This would exacerbate the problem the Maine Legislature's blue ribbon domestic violence Commission has already warned about: "The current protection from abuse process is not structured necessarily to protect children; there is no system providing adequate protection when there are allegations of abuse to children, although there is such a system protecting the parent."[83] Because often the child is the only eyewitness to her abuse, because she may be very young, and because corroborating physical evidence will usually be lacking, courts must often rely on the expertise of those trained and experienced in determining the risk of future abuse. Here, where the child indeed was the only eyewitness, and so young as to prompt the court to proclaim her an incompetent witness, the mother gave the trial court precisely the evidence it needed: two experts in child abuse issues, who testified that the father should not be allowed to have unsupervised visits with his daughter. The defense presented no expert to contradict Dr. Ricci and Ms. Wientzen's conclusions. To let this ruling stand is to set an impossibly high bar for those who seek to lawfully protect their young children. And if uncontroverted expert testimony is not enough to prove abuse by a preponderance of the evidence, Maine's PFA Act is utterly incapable of protecting the majority of child victims of sexual abuse. Such a result cannot be squared with the legislative command to construe and apply the act liberally *to protect.*

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[83] *Id.*, p. 17 (addressing the difficulties associated with child testimony).

Dated: April 20, 2010

Respectfully Submitted,

By.:_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Appellant's Brief have been served this ___ day of April, 2010, via US Mail, first class, postage prepaid, upon the following:

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FACTUAL BACKGROUND

I. Allegations and Investigation of Sexual Abuse Allegations

A. In the aftermath of a divorce, a child begins reporting sexual abuse from her father.

Plaintiff ("mother") and Defendant ("father") were married in May 2006. In November 2006, they had a daughter (referred to in this brief as "the child.") The father filed for divorce in June 2008 and the divorce judgment was entered on December 29, 2009. Under that judgment, Plaintiff received primary custody of the child. The child has apparently thrived: she has been described by one physician as "an incredibly articulate 2½ year old child who had exceptional verbal skills"[1] and "the singularly most articulate two year, eight month old I had ever met, both in clinical practice and in my personal life. She was amazingly articulate as a two year, eight month old."[2]

By June 2009, however, this "incredibly articulate" two-and-a-half year old child had begun displaying concerning behaviors and making disturbing comments about her interactions with her non-custodial father. She had begun licking her mother on the neck and face stating that her father did it to her.[3] She also had begun commenting to her mother about her father's penis and child's own "gina."[4] She told her mother that her father had "put [his] face in [her] gina (*Id.*); that her father put ice cream all over his body and asked her to lick it off (*Id.*); and that her father "poked her bum and has a humongous penis."[5]

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[1] Medical Evaluation, Appx. A0051.
[2] Tr. Vol. 1, 34:1-5.
[3] Psychosocial Evidentiary Assessment, Appx. A0054.
[4] *Id.*.
[5] *Id.*.

The child also made comments to her cat, which her mother observed and video recorded. The child told her cat about her father touching her "gina"[6] and said to her cat, at times in a sing-song voice, things such as "don't touch my gina with daddy's penis."[7]

The child made similar comments to an acquaintance, Polly Campbell (e.g., "I tell my kitty for papa not to poke me with his big penis on my gina").[8] Ms. Campbell responded by filing a report with the Maine Department of Health and Human Services.[9]

B. The investigations of the reported sexual abuse.

1. DHHS's attempts to investigate.

On July 13, 2009, DHHS sent Beth Fawcett, a child protective caseworker with less than a year's experience[10] to interview the child at her day care center. Ms. Fawcett met with the child, but the child did not respond to Fawcett's questioning about her father. After fifteen minutes, the child asked to see her mother. Upon a further attempt by Fawcett, the child became withdrawn and refused to speak with Fawcett.[11]

Fawcett tried again to interview the child two weeks later. Again, the child would not respond to Fawcett's questions regarding the father.[12] Soon thereafter, however, Fawcett received an email from Polly Campbell with a transcript of comments made by the child after Fawcett had left, including "poppy pok[ed] me in the gina," "It hurt," and "I cried. I wanted my mommy."[13]

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[6] *Id.*, Appx. A0055.
[7] *Id.*
[8] *Id.*.
[9] *Id.*
[10] Tr. Vol. 2, 76:7-8.
[11] Psychosocial Evidentiary Assessment, Appx. A0055.
[12] *Id.*, Appx. A0056.
[13] *Id.*

Having been stymied by the child's failure to respond to her method of questioning, Fawcett referred the investigation to specialists in sexual abuse investigation and diagnosis at The Spurwink Child Abuse Program in Portland, Maine.[14]

2. Spurwink's investigation and assessment.

Spurwink's forensic interviewing techniques are based on standards developed by, among others, the American Professional Society on Abuse of Children and the American College of Child and Adolescent Psychiatry.[15] Spurwink employs some of the most highly trained, highly experienced interviewers in the country.[16] As part of its standard sexual abuse investigation, Spurwink had the child undergo a Medical Evaluation by Co-Director Dr. Lawrence R. Ricci[17] (one of the nation's leading authorities on child abuse)[18] and a Psychosocial Evidentiary Assessment by Co-Director Joyce Wientzen, LCSW.[19]

In his medical evaluation, Dr. Ricci confirmed through a review of medical records that the child had been diagnosed with a urinary tract infection on June 27, 2009.[20] He found "no evidence of recent genital or rectal trauma," but cautioned that "the absence of specific physical findings in no way indicates that such abuse could not have occurred."[21]

Ms. Wientzen, who has conducted over two thousand forensic interviews of children, some seventy percent of which involving allegations of sexual abuse,[22] conducted a psychosocial assessment which included two interviews of the child, the first on July 28, 2009 and then again

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[14] *Id.*, Appx. A0052: ("Beth Fawcett, Department of Health and Human Services (DHHS) referred [the child] for a sexual abuse evaluation.")
[15] Tr. Vol. I, 37:20-38:6.
[16] Tr. Vol. I, 41:23 – 42:3.
[17] Appx. A0048-51.
[18] Tr. Vol. I, 96:16 – 22.
[19] Appx. A0052-59.
[20] Medical Evaluation, Appx. A0050.
[21] *Id.*, Appx. A0051.
[22] Tr. Vol. 2, 5:8-13. Earlier, Dr. Ricci had noted that "two-thirds of the cases we see where sexual abuse is alleged, we find no evidence of abuse." Tr. Vol. I, 47:6-8.

a week later, on August 4, 2009. The child responded quite differently to Ms. Wientzen's more experienced interviewing process than she had to Fawcett; in fact, she made several disclosures to Wientzen, including:

- "Papa poked me in gina."[23]
- "He poked me in my tummy."[24]
- When asked "where were you?" the child said "Papa poked me in gina last time. A room in papa's house."[25]
- When asked "What did he poke you with?" she stated "With his penis."

Wientzen noted that the father "adamantly denied that he has engaged in any inappropriate sexual touching of his daughter."[26] He further stated that "there is nothing that has occurred with [the child] that she could be misinterpreting or misunderstanding,"[27] a conclusion Wientzen ultimately agreed with, albeit to different effect.

After interviewing numerous other people, reviewing numerous records (including transcripts and GAL and evaluator reports) from the divorce proceedings, and information from abuse specialists who had worked with the mother during the divorce, the Spurwink "team" (Wientzen and Ricci along with nurse practitioner Hannah Pressler, psychologist Dr. Kelly Drach, and two other licensed social workers, Ellen Hurd and Kathy Harvey Brown)[28] met to reach consensus on the credibility of the allegations. Essentially, the question the Spurwink team had to resolve was whether the child had been coached or influenced in some other manner to make her statements, or whether she was actually reporting as accurately as she could true events she had experienced with her father.

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[23] Psychosocial Evidentiary Assessment, Appx. A0058.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] Tr. Vol. II, 7:11-18.

During the meeting, the team members took several difficult issues into consideration. In addition to the medical examination, they considered the mental development of the child: although she was extraordinarily articulate, her "young developmental age" prevented her from "repeat[ing] the rules for answering questions appropriately . . . [or] identify[ing] an untruthful statement that was made to her."[29] The team also weighed the family context in which her statements had been made. As Ricci stated, "I gathered early on that this was a very high conflict case with a lot of legal sorts of minefields involved."[30] Wientzen noted, "There is always the potential for influence when a child is in the midst of a high level of parental conflict. The risk is greater the younger the child and the greater their susceptib[ility] to suggestion."[31] They even considered whether the number of adults who had questioned the child would have affected her crediblity.[32] The fact that the child had reported abuse to others was not given great weight: as Ricci testified, "We [assiduously] avoid conf[i]rmation bias, which is that someone goes into an interview with a predetermined idea."[33]

While the above factors were recognized as potentially confounding, the team identified several counterweights signifying the accuracy of the child's disclosures. The child's disclosures to Wientzen had come in response to open-ended questions, not questions that were leading or coached to create a higher likelihood of disclosure.[34] The descriptions the child gave of the events were important, too, because they lacked any ambiguity as to the nature of the contact she was reporting: "[Her] statements are clearly describing sexual contact. Alternative explanations such as hygienic touching would not explain her statements."[35] Perhaps most importantly,

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[29] Psychosocial Evidentiary Assessment, Appx. A0058.
[30] Tr. Vol. 1, 33:10-12.
[31] Psychosocial Evidentiary Assessment, Appx. A0059.
[32] *Id.*
[33] Tr. Vol 1, 40:10-12.
[34] Psychosocial Evidentiary Assessment, Appx. A0057-58; Tr., vol. 2, 9:21-10:7, 14:11-17.
[35] *Id.*, Appx. A0059.

however, the precision of the child's words bespoke their truth: "[T]he specificity of [the child]'s statements is quite compelling and difficult to dismiss merely as the result of suggestion."[36]

Having sifted through all the data, the Spurwink team's next task was to reach a conclusion as to whether the father posed a risk to the child and if so, how much. Spurwink classifies abuse allegations by the degree to which they are supported by available evidence. Thus, a case might be assessed as having "strong evidence of abuse," "moderate evidence," "don't know," or "no evidence of abuse."[37] Here, because of the child's statements, the "no evidence of abuse" category was not possible.[38]

Within the "don't know" category, Spurwink distinguishes between risk levels suggested by the clinical data:

> So, then, when we look at the don't know case, we say, "Okay. So, is this like a we don't know or a more worrisome don't know?" That—and that affects our recommendations. For example, if we're talking about supervised contact or no supervised contact. So a don't know where we say low risk don't know, we would say, "We don't have any recommendations about supervision. Whatever everybody else agrees to is fine with us." If we say, "The information given to us is of sufficient concern for us to arrive at a recommendation of no unsupervised contact," that would have been the best this case could have offered us in terms of an opinion.[39]

The trial court noted that this distinction made "perfect sense."[40]

But the Spurwink team did not place this case in the "don't know" category. Rather, they gave the stronger diagnosis of "moderate evidence" of sexual abuse.[41] Consequently, they "***strongly recommended that any contact that [the child] have with her father be supervised.***"[42]

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[36] *Id.*.
[37] Tr. Vol. 1, 52:1-9.
[38] Tr. Vol. 1, 52:12-14.
[39] Tr. Vol. 1, 52:15 – 53:3.
[40] Tr. Vol. 1, 53:4.
[41] Tr. Vol. 1, 63:24 – 64:25.
[42] Psychosocial Evidentiary Assessment, Appx. A0059 (emphasis added).

As Dr. Ricci noted, the "important piece" of the diagnosis was not so much the category in which the allegations had been placed, but the strong recommendation: As he noted, "we are confident, comfortable with our recommendation . . . which was no unsupervised contact between [the child] and her father."[43]

II. Procedural history.

A. On behalf of her daughter, the mother files a Complaint for Protection from Abuse Order.

Shortly after the Spurwink team issued its recommendation, the father—through counsel—advised the mother that he would no longer submit to supervised visitation. He demanded visitation with the child on August 14, 2009. In response, the mother filed a Complaint for Protection from Abuse on her daughter's behalf.[44] As described in the Complaint, the mother sought this protection based both on the child's reports of sexual abuse to her and others, and on her conversations with Wientzen about Spurwink's recommendation against any unsupervised contact.[45]

B. The hearing on the Complaint and the trial court's ruling from the bench.

The trial court held the hearing on the Complaint on October 6, 2009. The court heard evidence from four witnesses: Dr. Ricci, Ms. Wientzen, the father and the DHHS worker Beth Fawcett. Ms. Fawcett's testimony was essentially limited, however, to a collateral issue as to whether the mother had authorized her to speak to a psychologist, specifically, a non-treating psychologist who had been hired during the divorce proceedings by a guardian ad litem.[46] This psychologist did not testify at the hearing.

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[43] Tr. Vol. 1, 15-20.
[44] Complaint, Appx. A0009-12.
[45] *Id.,* Appx. A0011-12.
[46] Tr. Vol. 2, 88:21 – 89:9.

Dr. Ricci and Ms. Weintzen described the investigations (detailed above) and provided their expert opinions as to the weight of various data and information they gathered. The father repeated his denials of his daughter's reports of sexual abuse. After the evidence had concluded, the trial court took a brief recess and, when it returned, issued its ruling from the bench.

The qualifications, experience and expertise of the Spurwink experts was not contested: indeed, the trial court even took judicial notice of Dr. Ricci's qualifications.[47] Nonetheless, the court ultimately disregarded their conclusions. The reason, the court said, was a difference in how credibility was determined:

> Examiners and medical professionals make certain findings related to medical diagnosis and treatment. And that's a very different analysis from the analysis that a court has to make.[48]

Even though the Spurwink experts applied their undisputed expertise, case experience and professional standards over weeks of investigation, research and interviews to determine the risks posed to the child, the trial court apparently found its own assessment of their data to be a surer guide. The court found that, because of the child's age and cognitive development, her explicit disclosures to Wientzen did not "necessarily" constitute statements made "for the purposes of medical diagnosis and treatment"; thus, the child "***may*** not have had the motivation to be honest with the doctor, with the medical providers in speaking with them about this."[49] The court had indeed admitted the evidence of the statements made by the child as part of the Spurwink reports it accepted into evidence,[50] but despite the corroborating circumstances—the open-ended questioning, the lack of ambiguity and precision of her reports, noted by the Spurwink experts—the court suggested that the *only* evidence was the child's disclosures to

[47] Tr. Vol. 1, 32:2-3.
[48] Tr. Vol. 2, 14-17.
[49] Tr. Vol. 2, 124:19 - 125:7 (emphasis added).
[50] Tr. Vol. 2, 20:19-20.

Wientzen: "The evidence, as I said, in this case is—consists of [the child's] statements to Ms. Wientzen, which were admitted pursuant to Rule 803-4."[51]

This evidence, the court said, was "extremely precarious evidence of an extremely serious allegation."[52] The "linchpin," according to the court, was "absolutely most importantly, [the child] wasn't able to really distinguish between the truth and a lie, which is essential."[53] In fact, Wientzen could not assess whether the child could distinguish truth from falsity. As she had noted, "Due to her developmental age, [the child] was not able . . . to participate in the interviewer's attempts to assess her understanding of the difference between a truth and a lie."[54] The court did not discuss the fact that the investigators, in reaching their conclusions, had already lowered the value of the child's disclosures from "strong" to "moderate" evidence, because of the challenge of assessing such a young reporter.[55]

The court did not base its ruling on a finding that there was testimony or any evidence refuting the allegations of abuse; in fact, the court's ruling does not mention any evidence submitted by the father at all.[56] Rather, the court found that the child, who did not actually testify and was never tendered as a witness, was not "a competent witness."[57] Because the court cited no evidence contradicting the child's statements, in order to rule that it could not find by a preponderance of the evidence that abuse occurred, it had to give the Spurwink experts' testimony *no* weight.[58]

C. Appellate jurisdiction.

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[51] Tr. Vol. 2, 124:19-21.
[52] Tr. Vol. 2, 125:21-22.
[53] Tr. Vol. 2, 125:14-16.
[54] Psychosocial Evidentiary Assessment, Appx. A0057.
[55] *See, e.g.*, Tr. Vol. 2, 22:18 – 23:15.
[56] Tr. Vol. 2, 123:1 – 126:2.
[57] Tr. Vol. 2, 125:8-10.
[58] Tr. Vol. 2, 125:22-25.

The mother timely filed a Notice of Appeal on October 27, 2009. The transcript was timely ordered.

This Court's jurisdiction is predicated on Me. Rev. Stat. Ann. Tit. 14 § 1901(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the district court's decision to deny the child's request for an order of protection under Maine's Protection from Abuse statute was clear error, in that the court did not "liberally construe and apply" the statute when it denied the order despite uncontroverted expert opinion that there was substantial evidence that the father had sexually molested the child, the court pointed to no contradictory evidence, and substituted its own inexpert speculations for the in-depth expert assessment?

ARGUMENT

THE TRIAL COURT CLEARLY AND ERRONEOUSLY DISREGARDED THE EVIDENCE AND THE PROTECTION FROM ABUSE STATUTE'S MANDATE FOR LIBERAL CONSTRUCTION TO PROTECT VICTIMS OF ABUSE.

The Protection from Abuse Act ("the Act") ensures that physical or sexual abuse within the family can be ended by means of a civil judicial intervention, focused purely on protection of the victim rather than punishment of the perpetrator. As a remedial statute, the Act must be liberally construed and applied to promote its remedial and protective purpose. In this case, far from construing the PFA Act liberally, the trial court rejected ample and uncontradicted expert evidence that a child needed protection. The court also inappropriately replaced the experts' assessments with what was, in essence, its own inexpert speculation. This was clear error. The ruling should be reversed, and an order of protection should be entered.

I. The Protection from Abuse Act Must be Liberally Construed to Fulfill its Protective Purpose.

The Act's protective purpose must be the touchstone of any decision regarding issuance of an order of protection:

> The court shall ***liberally construe and apply*** this chapter [Protection from Abuse] to promote the following underlying purposes:
>
> 1. RECOGNITION. To recognize domestic abuse as a serious crime against the individual and society, producing an unhealthy and dangerous family environment, resulting in a pattern of escalating abuse, including violence, that frequently culminates in intrafamily homicide and creating an atmosphere that is not conducive to healthy childhood development;
>
> 2. PROTECTION. To allow family and household members who are victims of domestic abuse to obtain expeditious and effective protection against further abuse so that the lives of the nonabusing family or household members are as secure and uninterrupted as possible.[59]

As this Court has declared, the Act was passed for "the express statutory purpose of protecting the victim."[60] The urgent need for more vigorous and accessible legal protections for all victims of abuse, adult or child was noted in the Maine State Legislature's accompanying resolution stating that "domestic violence is a pervasive and atrocious problem in Maine and nationwide."[61]

Maine's legislative commitment to protect abused family members from further abuse places it in the company of numerous other state legislatures that have specifically instructed their courts to give broad application to the protective purposes of their enactments.[62] But the Legislature's intent cannot be realized without the judiciary's cooperation.

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[59] Me. Rev. Stat. Ann. tit. 19, § 4001 (2009) (emphasis added).
[60] *State v. Falcone*, 760 A.2d 1046, 1048-49 (Me. 2000).
[61] Final Report of the Commission to Study Domestic Violence (2001) http://www.maine.gov/legis/opla/domesviol.PDF, Appendix A.
[62] *See, e.g.*, *In re Marriage of Nadkarni*, 93 Cal. Rptr. 3d 723, 734 (Cal. Ct. App. 2009) (reversing trial court's dismissal of complaint, noting that the California legislature intended for its Domestic Violence Prevention Act to be "broadly construed"); *Cruz-Foster v. Foster*, 597 A.2d 927, 929 (D.C. 1991) (reversing and remanding a denial of CPO extension, noting that D.C.'s protection order statute must be "liberally construed in furtherance of its remedial purpose."); *Sperle v. Orth*, 763 N.W.2d 670, 675 (Minn.App.,2009) (reversing and remanding where trial court denied order of protection from abuse when trial court which would otherwise have required "victims of domestic abuse to remain in abusive relationships in order to qualify for relief under the Domestic Abuse Act," and giving liberal construction to the remedial Domestic Abuse Act); *Brandt v. Brandt*, 523 N.W.2d 264, 265 (N.D. 1994) (extending protection of statute to children, noting that North Dakota's domestic violence protection statute is to be "liberally construed to protect victims other than adults"); *Swenson v. Swenson*, 490 N.W.2d 668, 670 (Minn.App.1992) (affirming order of protection, stating that the Domestic

Had the trial court here liberally construed the Act as required to protect the child victim, it could not have denied this protection order. As will be seen, there was essentially uncontested, objective evidence supporting the request, and there was no evidence refuting it (apart from Respondent's self-serving denial, to which the court did not refer). By nonetheless refusing to issue a protective order, the court chose to put the risk of its own error on the child seeking protection rather than on the adult who experts believed was abusing the child. If such a result is consistent with the requirement to "liberally construe and apply. . . to protect" then that requirement is actually meaningless.

II. The Court Substituted its Own Unsupported Speculation for the Specific Expert Assessments of this Child.

In child sexual abuse cases, the need for expert assessment is critical .[63] This is necessary in part because "there often are no witnesses [to child sexual abuse] except the victim."[64] The lack of other witnesses is especially problematic when the victim is very young, such as the child in this case. A young child may not be able to articulate instances of abuse in

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Abuse Act, as a remedial statute, "receives liberal construction in favor of the injured party"); *Simmons v. Dixon*, 240 S.W.3d 608, 612 (Ark. Ct. App. 2006) (affirming an order of protection, noting that the Arkansas domestic violence statute's purpose was "broad"); *Raynes v. Rogers*, 955 A.2d 1135, 1140 (Vt. 2008) (affirming a finding of abuse, noting that Vermont's "Abuse Prevention Act . . . must be liberally construed to 'suppress the evil and advance the remedy intended by the Legislature.'") (citations omitted); *see also* ALA. CODE § 30-5-1 (2009) (State's domestic violence statute is to be liberally construed and applied); IDAHO CODE ANN. § 39-6302 (2009) (same); ILL. COMP. STAT. 60/102 (2009); KAN. STAT. ANN. § 60-3101 (2009); N.J. STAT. ANN. § 2C:25-18 (2009) (encouraging "broad" application of the remedies available under its domestic violence statutes).

[63] 4 *Child Custody and Visitation Law and Practice* Ch. 31 § 31.12(2)(a) (Matthew Bender, Rev. Ed. 2010) ("If an allegation of abuse has been made, it is difficult to imagine that a case would be tried without [expert witnesses]").

[64] *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 107 S.Ct. 989, 1003 (1987); s*ee also* Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027, 2033 (1994) ("Child sexual abuse prosecutions present distinctive evidentiary problems. Typically, these cases pit the word of a young, often traumatized child against that of a seemingly respectable abuser. Because most child sexual abuse occurs in private, the child victim is usually the only eyewitness.")

great detail.[65] Corroborating physical or medical evidence "is found in only ten to fifteen percent of confirmed sexual abuse cases."[66] It is thus often up to experts to provide what cannot be obtained elsewhere: a grounded systematic and educated assessment of the risks confronting a child.[67] Credible expert opinions about child sexual abuse are thus indispensable for an accurate assessment of child sexual abuse.

The *right* expertise is just as indispensable, because the investigation of child sexual abuse allegations is "an extremely specialized field"[68] that "absolutely" requires" specialized training.[69] Without the benefit of the necessary specialized knowledge and experience, a court's task of determining the risk to a child could present insuperable conceptual challenges. The accuracy of its ruling would be more a function of chance than of the evidence.

The experts who testified in this case—Spurwink's Ricci and Wientzen—have and routinely draw on that specialized knowledge and extensive experience, as demonstrated by their work and testimony in this very case. The team regularly evaluates children's development and "ability to report events."[70] They employ special criteria to assess reliability in each case, criteria that are supported by experimental and clinical studies.[71] They also frequently train law enforcement and case workers, and give conference presentations on, their technique for forensic

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[65] Askowitz, *supra*, at 2033.
[66] *Id.* at 2034.
[67] *See, e.g.*, Sandra Morgan Little, CHILD CUSTODY & VISITATION LAW AND PRACTICE (LEXISNEXIS, 2005), ("If an allegation of [child] abuse has been made, it is difficult to imagine that a case would be tried without [expert witnesses]"); *see also* Ann M. Haralambie, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES (SHEPHARD'S/MCGRAW-HILL,1993), PP. 175-176 ("It is almost impossible to present a sexual abuse case without appropriate expert testimony. . . Particularly in light of the growing judicial skepticism of sexual abuse allegations in domestic litigation, it is essential that a properly qualified expert evaluate the allegations").
[68] Haralambie, *supra*, at 175.
[69] Tr. Vol. 1, 41:1-4.
[70] Tr. Vol. 1, 38:17-20.
[71] Tr. Vol. 1, 45:7-16.

interviews of minors in sexual abuse cases.[72] Their expertise led them to conclude that, despite her young age, the child here was "incredibly" articulate and that her disclosure and the surrounding circumstances warranted classification at their second highest risk level: "moderate" evidence of abuse. Their expert evaluation and investigation (including the review of "hundreds and hundreds of pages of documents")[73] revealed evidence that was so clear that they "strongly" recommended against unsupervised contact between the child and her father.[74] The child was unable to participate in an assessment of her ability to discriminate truth from falsehoods, but these experts accounted for that fact by interpreting her statements "more conservatively."[75] This limitation did not require rejecting her report altogether: As they noted after their weeks of gathering information and thousands of previous investigations, a two year old is not *incapable* of telling the truth: the child's developmental stage did not mean that she could make *no* credible disclosure.[76]

The trial court took no issue with the expert witnesses' credibility, expertise, methods or conclusions. Instead, the court asserted that it was required to examine information differently from the way such experts would—although, as the evidence showed, the experts did indeed "evaluate bias, motive to fabricate and other circumstantial evidence or circumstances that assist in determining what the facts really are."[77] The court *conceded* they had.[78] The only distinction between the court's review and the experts' review related to their opinions about the credibility

[72] Tr. Vol. 2, 5:14 – 6:9.
[73] Tr. Vol. 1, 98:22 – 99:6.
[74] Psychosocial Evidentiary Assessment, Appx. A0059; Tr. Vol. 1, 64:15-21; Vol. 2, 19:18-24.
[75] Tr. Vol. 2, 23:10-15.
[76] Tr. Vol. 2, 22:18 – 23:9.
[77] Tr. Vol. 2, 124:10-14.
[78] *Id.*

of the child, *who did not testify*.[79] Unlike Wientzen, who spoke personally to the child, and unlike the team, who applied their knowledge and experience in precisely such matters to the circumstances in this case, the trial court ruled, in effect, that an unusually articulate two year old is incapable of truthfully telling others that her father poked his penis in her vagina.

As the evidence indisputably shows, the Spurwink specialists' expert assessment looked deeper into the facts, and did so with much greater professional resources and precision, than the trial court possibly could by hearing a single day's worth of testimony. As this Court stated decades ago, "[E]xpert opinion[s] cannot arbitrarily be ignored and the inexpert opinions of the [factfinders] be substituted in place thereof in any matter which is within the realm of the expertise."[80] Although factfinders are not bound by an expert's opinion, *id.*, judgments should be set aside where they are based on a factfinder's arbitrary substitution of its own opinions for the uncontroverted opinions of experts in the field.[81] Other jurisdictions have applied this principal in circumstances very similar to those in this case: in *Wilkins v. Ferguson*,[82] for example, the D.C Court of Appeals reversed *without remand* a lower court's refusal to make a finding of sexual abuse against a child and to restrict visitation, because several mental health experts had recommended only supervised visitation.

Here, where the court was required to construe and apply the Act liberally; where trained specialists had conducted a thorough and expert vetting of the child's statements and the circumstances in which they were made, including the reasons such statement could be doubted; and where the uncontradicted expert opinion was that the father should be permitted only supervised visits with his child because of the substantial evidence of abuse; the trial court's

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[79] Although this Court understandably gives deference to trial court assessments of *witness* credibility, there is no basis for applying that same deference to a trial court's assessment of a non-witness's credibility.
[80] *Thompson v. Johnson*, 270 A.2d 879, 882 (Me. 1970).
[81] *Id.* at 882
[82] 928 A.2d 655 (D.C. 2007).

refusal to extend the State's protection to this child under a purely civil, protective statute, was clear error.

III A Finding of No Abuse In This Case Essentially Strips The Act Of Its Ability To Protect Young Children, Contrary to the Mandate to Liberally Construe the Act to Protect Victims.

To affirm the trial court's holding that abuse was not proven by a preponderance of the evidence under the facts of this case would essentially strip the PFA Act of any power to protect young children from abuse. This would exacerbate the problem the Maine Legislature's blue ribbon domestic violence Commission has already warned about: "The current protection from abuse process is not structured necessarily to protect children; there is no system providing adequate protection when there are allegations of abuse to children, although there is such a system protecting the parent."[83] Because often the child is the only eyewitness to her abuse, because she may be very young, and because corroborating physical evidence will usually be lacking, courts must often rely on the expertise of those trained and experienced in determining the risk of future abuse. Here, where the child indeed was the only eyewitness, and so young as to prompt the court to proclaim her an incompetent witness, the mother gave the trial court precisely the evidence it needed: two experts in child abuse issues, who testified that the father should not be allowed to have unsupervised visits with his daughter. The defense presented no expert to contradict Dr. Ricci and Ms. Wientzen's conclusions. To let this ruling stand is to set an impossibly high bar for those who seek to lawfully protect their young children. And if uncontroverted expert testimony is not enough to prove abuse by a preponderance of the evidence, Maine's PFA Act is utterly incapable of protecting the majority of child victims of sexual abuse. Such a result cannot be squared with the legislative command to construe and apply the act liberally *to protect*.

[83] *Id.*, p. 17 (addressing the difficulties associated with child testimony).

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Respectfully Submitted,

By.:_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Appellant's Brief have been served this ___ day of April, 2010, via US Mail, first class, postage prepaid, upon the following:

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