

APPELLATE COURT
OF THE
STATE OF CONNECTICUT

A.C. 31300

GERALDINE WARNER

V.

CARISA BICKNELL

REPLY BRIEF OF RESPONDENT / APPELLANT

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STATEMENT RE: TRANSCRIPTS

The two (2) transcripts will be referred to by Transcript (“T1” and “T2”) and the Page (“p.”) number(s) where pertinent evidence, arguments and/or events are chronicled.

Cited As

December 1, 2008 (pp. 1-13)*

T1, p.____

May 11, 2009 (pp. 1-21)

T2, p.____

* The transcript dated “December 21, 2008” on the face-page is the transcript of a court appearance on December 1, 2008. See certification page showing “December 1, 2008.”

TABLE OF AUTHORITIES

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In re Michael A., 47 Conn.App 105, 703 A.2d 1146 (1997).....6, 13

Madigan v. Madigan, 224 Conn. 749, 620 A.2d 1276 (1993).....4, 10, 11

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Schult v. Schult, 40 Conn.App. 675, 672 A.2d 959 (1996).....6, 13

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REPLY TO APPELLEE'S BRIEF

NATURE OF THE PROCEEDINGS AND STATEMENT OF THE FACTS

The respondent / appellant, Carisa Bicknell ("Ms. Bicknell"), relies on the nature of the proceedings and statement of facts presented in her main brief.

ARGUMENT

The brief of the applicant / appellee, Geraldine Warner ("paternal grandmother"), is apparently divided into three introductory sections and three argument sections. Ms. Bicknell shall endeavor to address each section in the order presented within the paternal grandmother's brief.

I. Ms. Bicknell has not mischaracterized the appropriate standard for third party visitation orders.

In an introductory section in her brief, the paternal grandmother apparently argues that Ms. Bicknell has confused two different standards, one for custody applications and one for visitation applications. Appellee's Brief, p. 6. This is not the case. Rather, the paternal grandmother seems to have confused the proper standard for third-party visitation orders.

With respect to visitation, in Roth v. Weston, 259 Conn. 202, 222 (2002), a requirement was established obligating "any third party, including a grandparent..." to establish a "parent-like" relationship to satisfy the jurisdictional litmus test "to pass constitutional muster and to be consistent with the legislative intent." With respect to the constitutional issue, the question is *not* whether a given child should enjoy relationships with people other than the biological parents of the child. Roth v. Weston, 259 at 223. Rather, given the compelling interest at issue, the interests of the child are secondary to the rights of the parents. *Id.* (citations omitted). Further, there is also a requirement of an

allegation, in addition to proof thereof, that the denial of visitation rights to a given third party will cause the child in question “to suffer real and substantial emotional harm.” *Id.* at 226. These jurisdictional prerequisites, namely the nature of the “relationship” and the “harm,” must be proven by clear and convincing evidence. *Id.* at 232.

In the present case before this Court, the paternal grandmother failed to even allege that she has or had a parent-like relationship with the minor child and that denial of visitation would cause the child to suffer real and significant harm. (See page one of the Visitation Application, box “g.”) A2¹. Further, at no time did she ever even attempt to establish either of these two jurisdictional criteria at trial. In addition, she never alleged nor attempted to establish that Ms. Bicknell was an “unfit” parent. Rather, during the direct examination of the paternal grandmother at trial, it was established that she is the grandmother of Dominic, who was, at the time, eight years old, and that she had been visiting with Dominic at Southern Connecticut University since approximately April of 2008. T2, p. 5-6. With respect to the visitation at Southern Connecticut University, it was established during her direct examination that she was visiting with Dominic “every Saturday,” and then it changed to “every other week.” T2, p. 6. Therefore, the paternal grandmother’s argument fails.

II. Ms. Bicknell has not mischaracterized the nature of the third party visitation application as evidence.

The paternal grandmother suggests that Ms. Bicknell has mischaracterized the third party visitation application as evidence. Appellee’s Brief, p. 6. The paternal grandmother, however, seems to confuse the word “evidence” and the word “allege.” As discussed above, Roth v. Weston, *supra*, 259 Conn. at 222, mandates a requirement obligating “any

¹ “A” refers to the appendix submitted with Ms. Bicknell’s main brief.

third party, including a grandparent..." to establish a "parent-like" relationship to satisfy the jurisdictional litmus test "to pass constitutional muster and to be consistent with the legislative intent." Further, there is also a requirement of an allegation, in addition to proof thereof, that the denial of visitation rights to a given third party will cause the child in question "to suffer real and substantial emotional harm." *Id.* at 226. These jurisdictional prerequisites, namely the nature of the "relationship" and the "harm," must be proven by clear and convincing evidence. *Id.* at 232.

On page two (2) of Ms. Warner's application for visitation, referenced above, Ms. Warner did not check box "g.," thereby alleging the existence of a parent-like relationship and that the denial of visitation would in turn cause the child to suffer real and significant harm. A2. At no time during any litigation in this matter did Ms. Warner *allege* that she ever maintained a parent-like relationship with Dominic nor did she ever allege that the denial of visitation would in turn cause Dominic to suffer real and significant harm.

Moreover, at no time during any litigation in this matter did Ms. Warner ever *prove* that she maintained a parent-like relationship with Dominic nor did she ever prove that the denial of visitation would in turn cause Dominic to suffer real and significant harm. Therefore, the paternal grandmother's argument fails.

III. The trial court did err and abuse its discretion. Further, the decision of the trial court was indeed a final decision.

The paternal grandmother seems to argue that there was "uncontroverted" evidence and given that Ms. Bicknell did not appear at the trial to present evidence, the Court properly decided the case based upon the evidence presented. Appellee's Brief, p. 7. Further, the paternal grandmother argues that the Court did not abuse its discretion. Appellee's Brief, p. 7. First, the paternal grandmother fails to define the "uncontroverted"

evidence. Second, it is clear, as argued above and in Ms. Bicknell's underlying brief, that the paternal grandmother failed to allege and prove the jurisdictional prerequisites, namely the nature of the "relationship" and the "harm." The paternal grandmother's argument misses the point. It is not Ms. Bicknell who has an obligation to prove these jurisdictional requirements. Rather, it is the paternal grandmother's burden. Even if Ms. Bicknell were physically present at the trial and chose to put on no evidence whatsoever, the paternal grandmother would still have the burden of alleging and proving the jurisdictional requirements for the Court to even entertain her prayers for relief.²

It is literally impossible to understand the logic of the paternal grandmother's argument that the decision of the trial court was not a final decision. Rather, it was a final decision. Indeed, a final judgment entered on May 11, 2009. The paternal grandmother goes on to assert that visitation order entered pursuant to C.G.S. § 46b-59 are never final. Appellee's Brief, p. 7. If this Court were to follow the logic of the paternal grandmother's argument, then there would be no appellate case law with respect to visitation issues where the children have yet to reach the age of majority. This argument defies logic and the law.

In Marone v. City of Waterbury, 244 Conn. 1, 15 (1998), the Court noted that in family law matters "...visitation orders are subject to modification but, nevertheless, are considered to be final appealable judgments." Indeed, even temporary orders of custody are considered final orders for purposes of appellate review, as "an immediate appeal is the only reasonable method of ensuring that the important rights surrounding the parent-child relationship are adequately protected." Madigan v. Madigan, 224 Conn. 749, 757 (1993).

² With respect to the reasons Ms. Bicknell was not present at the trial, Ms. Bicknell relies upon the arguments made in her main brief.

Regardless, in the present case, the appellant appeals from a final judgment in the trial court. Therefore, the paternal grandmother's argument fails.

IV. The trial court did err and abused its discretion. The paternal grandmother failed to prove her case at trial.

In this section, the paternal grandmother, first, seems to suggest that Ms. Bicknell should have filed a motion to open and modify the final judgment entered on May 11, 2009. Appellee's Brief, p. 8. Indeed, although this legal avenue may have been available to Ms. Bicknell if there were a substantial change in circumstances, she also maintained the legal authority to appeal such a final judgment. The paternal grandmother goes on to suggest that, "[Ms. Bicknell] must move to open the judgment and be denied that opportunity before the Appellate Court can review the trial court's decision." Appellee's Brief, p. 8. Yet, the paternal grandmother provides no authority for this proposition. Further, this proposition is inconsistent with Connecticut law. Again, as noted above, in Marone v. City of Waterbury, *supra*, 244 Conn. at 15, the Court noted that in family law matters "...visitation orders are subject to modification but, nevertheless, are considered to be final appealable judgments." Therefore, a court's denial of a motion to open a judgment is not a condition precedent to filing an appeal. Rather, the issuance of a final judgment is a condition precedent to filing an appeal. In the present case, given that there was a final judgement issued on May 11, 2009, Ms. Bicknell had the legal authority to appeal the decision.

The paternal grandmother goes on to argue that because the parties entered into a temporary agreement in this case, the paternal grandmother is somehow excused from proving her case at trial. Appellee's Brief, p. 9. Yet, again, the paternal grandmother provides no authority for this proposition. What she seems to ignore is the fact that there was a trial where final orders were entered. What she also seems to ignore is the fact that

the temporary orders were subsumed into the final order after the trial. See In re Michael A., 47 Conn.App 105, 108 (1997); See Schult v. Schult, 40 Conn.App. 675, 692 (1996). Moreover, the paternal grandmother seems to propose that this court take into consideration the fact that there were one or more temporary agreements between the parties in this case. Appellee's Brief, p. 9. However, our Supreme Court has noted that certain temporary orders merge into final orders of the Court. Schult v. Schult, 40 Conn.App. at 692. Such temporary orders then become academic when final orders have entered, and appellate courts will not consider academic questions where appropriate relief may not be granted. Id. at 692.

The paternal grandmother goes on to argue that Ms. Bicknell is using an "inaccurate standard," in her brief, i.e., that Ms. Bicknell is using a standard for custody matters, not visitation matters. Appellee's Brief, p. 10. This seems to be a continuation of an argument that the paternal grandmother made earlier in her brief. Again, the paternal grandmother is mistaken. The standard, with respect to visitation, discussed above and in Ms. Bicknell's main brief is found in Roth v. Weston, *supra*, 259 Conn. at 222, which consists of a requirement obligating "any third party, including a grandparent..." to establish a "parent-like" relationship to satisfy the jurisdictional litmus test "to pass constitutional muster and to be consistent with the legislative intent." With respect to the constitutional issue, the question is *not* whether a given child should enjoy relationships with people other than the biological parents of the child. Id. at 223. Rather, given the compelling interest at issue, the interests of the child are secondary to the rights of the parents. Id. (citations omitted). Further, there is also a requirement of an allegation, in addition to proof thereof, that the denial of visitation rights to a given third party will cause the child in question "to suffer real

and substantial emotional harm.” *Id.* at 226. These jurisdictional prerequisites, namely the nature of the “relationship” and the “harm,” must be proven by clear and convincing evidence. *Id.* at 232.

The paternal grandmother argues that Ms. Bicknell argues that the December 8, 2008 order was a final order. Appellee’s Brief, p. 10. She characterizes Ms. Bicknell’s argument as a “ridiculous convenient position...” Appellee’s Brief, p. 10. However, during the court appearance of December 1, 2008, the parties reached an agreement that was made a court order. T1, p. 13. Thereafter, the Court (Burke, J.) engaged in a discussion with Attorney Claudette J. Narcisco, applicant’s counsel, and Carisa Bicknell, as referenced in the Statement of the Facts in Ms. Bicknell’s main brief. The Court (Burke, J.) order was clear and unambiguous. Specifically, there were no further report backs, court appearances or status conferences ordered. T1, p. 13. If there was a problem for the applicant with respect to receiving court ordered access with the minor child pursuant to the agreement, then she “**can have a motion and set it down.**” T1, p. 13 (emphasis added). Neither the applicant nor Attorney Narcisco filed any further motions with respect to this issue at any relevant time period. As a result thereof, there were to be no further court dates nor orders absent a motion first being filed to address such a future request or issue. T1, p. 13.

As a result thereof, if this case went to final judgment on December 1, 2008, then all future orders should be immediately vacated, as no motion to open was ever filed. Alternatively, if this case did not go to final judgment on December 1, 2008, then, pursuant to the order of the Court (Burke, J.), the only way this matter could be scheduled for a future court appearance would be through the filing of a motion. T1, p. 13. Specifically, the

Court (Burke, J.) stated, "***If there's no problem we don't need to come back, but if your client doesn't think that she's getting the two a month as provided for in the agreement then you can have a motion and set it down. Okay.***" T1, p. 13 (emphasis added). As a result thereof, the trial court erred, abused its discretion, and its findings had no reasonable basis in fact when the trial court scheduled this case for trial on May 11, 2009 in violation of the court orders of December 1, 2008.

The paternal grandmother goes on to make additional arguments that that the paternal grandmother should, for some reason, be excused from proving her case. Appellee's Brief, p. 11. Further, the paternal grandmother seems to suggest that the Court is somehow excused from finding that it has jurisdiction to enter final orders. Appellee's Brief, p. 11. However, the paternal grandmother, again, provides no authority for such propositions.

The paternal grandmother continues by arguing that various statutes cited by Ms. Bicknell are inapplicable. Appellee's Brief, p. 11. Yet, the paternal grandmother misinterprets or fails to appreciate the legal discussion within Ms. Bicknell's main brief that lays out a discussion of the statutory and case law authority for third party cases. Ms. Bicknell's discussion of the law in her main brief is telescoping in nature and provides, not only breadth, but specificity as well. Regardless, Ms. Bicknell relies upon the authority cited herein and in her underlying brief to support her arguments.

Further, the paternal grandmother goes on to argue that since Conn. Gen. Stat. § 46b-56(a) states that courts may make orders granting visitation to grandparents that, for some reason, visitation should automatically be granted. Appellee's Brief, p. 11. Again, there is no meaningful analysis of this position offered by the paternal grandmother, and

further, it completely and entirely ignores the standard enunciated in Roth v. Weston, 259 Conn. 202 (2002). The paternal grandmother's assertion is contrary to the case law.³

The paternal grandmother seems to suggest that the only requirement that she needed to establish was the fact that she was indeed the paternal grandmother of the minor child. Appellee's Brief, p. 11. Again, this position is entirely contrary to the standard enunciated in Roth v. Weston, supra, 259 Conn. at 202, and the paternal grandmother's assertion, by itself, is contrary to the case law.⁴ Therefore, the paternal grandmother's argument fails.

V. A final judgment entered in the trial court, and this case has been properly appealed.

The paternal grandmother seems to continue arguing, now in a different section, that a final judgment never entered in this case. Appellee's Brief, p. 14. The paternal grandmother also asserts the position that Ms. Bicknell has made a procedural error by failing to file and prosecute a "Motion to Open and Modify Judgement based on appropriate statutory criteria." Appellee's Brief, p. 14. First, the paternal grandmother's argument that Ms. Bicknell had an obligation to file and prosecute a "Motion to Open and Modify Judgement" assumes that there was indeed a final judgment to open and modify. Regardless, a final judgment did enter in this case on May 11, 2009. See Record, p. 29. Second, the paternal grandmother provides no authority for this proposition nor does she provide a citation for what she terms "appropriate statutory criteria." Third, the paternal grandmother's position is entirely contrary to Connecticut law. Again, in Marone v. City of Waterbury, supra, 244 Conn. at 15, the Court noted that in family law matters "...visitation

³ Ms. Bicknell relies upon the case law cited in her main brief concerning this issue.

⁴ Ms. Bicknell relies upon the case law cited in her main brief concerning this issue.

orders are subject to modification but, nevertheless, are considered to be final appealable judgments.” Indeed, even temporary orders of custody are considered final orders for purposes of appellate review, as “an immediate appeal is the only reasonable method of ensuring that the important rights surrounding the parent-child relationship are adequately protected.” Madigan v. Madigan, *supra*, 224 Conn. at 757. Regardless, in the present case, the appellant appeals from a final judgment in the trial court. Therefore, the paternal grandmother’s argument fails.

The paternal grandmother, still within this section of her brief, goes on to discuss the prior court order of December 1, 2008. Appellee’s Brief, p. 15. The paternal grandmother goes on to argue that Judge Burke’s order was not reduced to writing, and therefore, for some reason, it need not be followed. Appellee’s Brief, p. 15. Yet, the paternal grandmother provides no authority for this assertion. Further, the paternal grandmother goes on to essentially argue that it was wrong for Ms. Bicknell to rely upon the language of Judge Burke’s order. Appellee’s Brief, p. 15. However, again, the paternal grandmother provides no authority for this position. Even if there were merit to the paternal grandmother’s argument that for some reason Judge Burke’s order should be ignored, her argument ultimately fails, as it completely and entirely ignores the fact that the paternal grandmother was the moving party and had an affirmative obligation at trial to establish the jurisdictional requirements by clear and convincing evidence. Roth v. Weston, *supra*, 259 Conn. at 232. Not only did the paternal grandmother fail to prove, or even allege, said jurisdictional requirements by clear and convincing evidence, but she failed to offer any evidence, testimonial or otherwise, to establish said jurisdictional requirements. Therefore, the paternal grandmother’s argument fails.

VI. There was a due process violation by proceeding with the trial. It is immaterial as to whether Ms. Bicknell moved to open the judgment. This appeal should not be dismissed.

In the last section of her brief, the paternal grandmother again repeats several arguments that have been addressed. The paternal grandmother again starts her argument in this section by suggesting that there is an affirmative obligation for Ms. Bicknell to have filed a motion to open and modify the judgment before such a case is "ripe" for appeal. Appellee's Brief, p. 17. Yet, again, there is no authority for this proposition. Again, in Marone v. City of Waterbury, *supra*, 244 Conn. at 15, the Court noted that in family law matters "...visitation orders are subject to modification but, nevertheless, are considered to be final appealable judgments." Indeed, even temporary orders of custody are considered final orders for purposes of appellate review, as "an immediate appeal is the only reasonable method of ensuring that the important rights surrounding the parent-child relationship are adequately protected." Madigan v. Madigan, *supra*, 224 Conn. at 757. Regardless, in the present case, the appellant appeals from a final judgment in the trial court. Therefore, the paternal grandmother's argument fails.

Again, the paternal grandmother repeats an argument already made, namely that that Judge Burke's order was not reduced to writing, and therefore, for some reason, it need not be followed. Appellee's Brief, p. 18. Yet, the paternal grandmother provides no authority for this assertion. Further, the paternal grandmother goes on to essentially argue that it was wrong for Ms. Bicknell to rely upon the language of Judge Burke's order. Appellee's Brief, p. 18. However, again, the paternal grandmother provides no authority for this position. The paternal grandmother goes on to suggest that Ms. Bicknell is not pleased that the paternal grandmother was granted unsupervised visitation. Appellee's Brief, p. 19.

The paternal grandmother goes on to make other allegations that are factually inaccurate and/or immaterial to this appeal, namely that Ms. Bicknell is trying to wear the grandmother down, that Ms. Bicknell has violated court orders, etc. Appellee's Brief, p. 19. The problem is that the paternal grandmother's argument entirely misses the point. Even if there were merit to the paternal grandmother's argument that for some reason Judge Burke's order should be ignored, her argument ultimately fails, as it completely and entirely ignores the fact that the paternal grandmother was the moving party and had an affirmative obligation at trial to establish the jurisdictional requirements by clear and convincing evidence. Roth v. Weston, *supra*, 259 Conn. at 232. Not only did the paternal grandmother fail to prove, or even allege, said jurisdictional requirements by clear and convincing evidence, but she failed to offer any evidence, testimonial or otherwise, to establish said jurisdictional requirements.

The paternal grandmother goes on to make the bold assertion that she does not need to adhere to the jurisdictional criteria in this case. Appellee's Brief, p. 19. However, the paternal grandmother misstates the jurisdictional criteria. She states that she does not need to prove (1) a "parent like relationship" "or" (2) "unfit mother." Appellee's Brief, p. 19. This, however, is not the correct standard. As discussed above, Roth v. Weston, *supra*, 259 Conn. at 222, mandates a requirement obligating "any third party, including a grandparent..." to establish a "parent-like" relationship to satisfy the jurisdictional litmus test "to pass constitutional muster and to be consistent with the legislative intent." Further, there is also a requirement of an allegation, in addition to proof thereof, that the denial of visitation rights to a given third party will cause the child in question "to suffer real and substantial emotional harm." *Id.* at 226. These jurisdictional prerequisites, namely the

nature of the “relationship” and the “harm,” must be proven by clear and convincing evidence. Id. at 232.

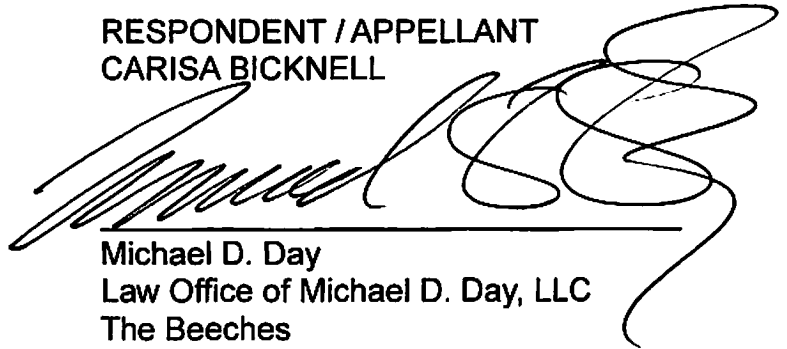
The paternal grandmother also seems to suggest that because there were temporary orders entered, she is somehow excused from establishing the jurisdictional criteria at trial. Appellee’s Brief, p. 19. Again, the paternal grandmother supplies no authority for this proposition. What she seems to ignore is the fact that there was a trial where final orders were entered. What she also seems to ignore is the fact that the temporary orders were subsumed into the final order after trial. See In re Michael A., supra, 47 Conn.App at 108; Schult v. Schult, supra, 40 Conn.App. at 692. The paternal grandmother seems to propose that this court take into consideration the fact that there were one or more temporary agreements between the parties in this case. Appellee’s Brief, p. 19. However, our Supreme court has noted that certain temporary orders merge into final orders of the Court. Schult v. Schult, supra, 40 Conn.App. at 692. Such temporary orders then become academic when final orders have entered, and appellate courts will not consider academic questions where appropriate relief may not be granted. Id. at 692. Moreover, the result of the paternal grandmother’s assertion is that courts can enter orders without having jurisdiction to enter orders. This argument defies logic and the law. See Roth v. Weston, supra, 259 Conn. at 232.

The paternal grandmother continues to argue that this appeal should be dismissed. Appellee’s Brief, p. 20. For the reasons argued above, this appeal should not be dismissed. Further, this Court already addressed the request to dismiss this appeal in the paternal grandmother’s motion to dismiss, which this Court denied.

VII. Conclusion

For the reasons discussed above and those discussed in Ms. Bicknell's main brief, the decision of the trial court should be reversed, and this case should be remanded with the direction to dismiss the application for visitation.

RESPONDENT / APPELLANT
CARISA BICKNELL

A handwritten signature in black ink, appearing to read "Michael D. Day", is written over a horizontal line. The signature is stylized and extends to the right of the line.

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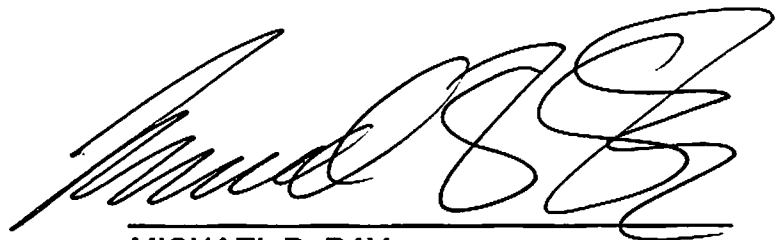
APPELLATE COURT

STATE OF CONNECTICUT

JULY 8, 2010

CERTIFICATE OF FORMAT AND SERVICE

Pursuant to Practice Book § 67-2, the undersigned certifies that the reply brief of the respondent / appellant in the above-captioned case complies with all format provisions and further certifies that a copy of said document was mailed first class postage prepaid this 8th day of July, 2010 to THE HONORABLE CYNTHIA SWIENTON, NEW HAVEN SUPERIOR COURT, 235 CHURCH STREET, NEW HAVEN, CONNECTICUT 06510; CLAUDETTE J. NARCISCO, ESQ., JURIS NO. 102008, 36 MAIN ST., SUITE 5B, EAST HAVEN, CONNECTICUT 06512, TELEPHONE: 203-469-5664, FACSIMILE: 203-469-0279; GERALDINE WARNER, 694 APT 4 WOODWARD AVE., NEW HAVEN, CONNECTICUT 06512; AND GUARDIAN AD LITEM, CHILDREN'S LAW CENTER INC., 30 ARBOR STREET, HARTFORD , CONNECTICUT 06106 in accordance with Connecticut Practice Book § 62-7.



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