FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

In the Matter of	:	
	:	Hon. Melody Glover
T[redacted] N[redacted]	:	
	:	Docket No. NN-[redacted]
Children Under Eighteen Years Of Age Alleged to be Neglected by	:	
	:	**NOTICE OF MOTION IN LIMINE**
T[redacted] G[redacted],	:	
Respondent.	:	

PLEASE TAKE NOTICE that upon the annexed affirmation of [redacted], Esq. dated July 10, 2023, and on all the prior papers and proceedings had herein, the undersigned will move *in limine* before this Court, at KINGS COUNTY FAMILY COURT, located at 330 Jay Street, Brooklyn, New York, at Part 10 on October 19, 2023 at 9:00 A.M. or as soon thereafter as counsel can be heard, for an order precluding from admission into evidence at fact-finding:

1) The highlighted portions of the marked St. John's Episcopal Hospital Records, attached hereto as Exhibit C; and
2) Excluding the testimony of D[redacted] A[redacted], Tri-County Care care manager, as to inadmissible hearsay and as to her own opinions about Ms. G[redacted]'s abilities and characteristics, both those opinions included in the petition and any similar opinion statements; and
3) Providing such other and further relief as the Court deems just and proper.

PLEASE ALSO TAKE NOTICE that these objections are based on Petitioner's Witness and Exhibit List and the marked records that have been produced thus far. Respondent

reserves the right to object to any marked records or documents not yet received by Respondent.

PLEASE TAKE FURTHER NOTICE that you are hereby required to respond to this notice if any party still seeks to introduce these items into evidence

Dated: Brooklyn, New York
July 10, 2023

[redacted], Esq.
Brooklyn Defender Services,
Family Defense Practice
Attorney for Respondent T[redacted] G[redacted]
177 Livingston Street, 7th Floor
Brooklyn, NY 11201
[redacted]

To: **CLERK OF COURT**

[redacted]
Attorney for Petitioner
Family Court Legal Services
330 Jay Street, 12th Floor
Brooklyn, New York 11201

[redacted].
Attorney for the Subject Child
Legal Aid Society
111 Livingston Street, 8th Floor
Brooklyn, NY 11201

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

In the Matter of	:	
	:	Hon. Melody Glover
T[redacted] N[redacted]	:	
	:	Docket No. NN[redacted]
Children Under Eighteen Years	:	
Of Age Alleged to be Neglected by	:	**AFFIRMATION IN SUPPORT OF MOTION IN LIMINE**
T[redacted] G[redacted],	:	
	:	
Respondent.	:	
	:	

[redacted], Esq., an attorney duly admitted to practice law in the State of New York, hereby says, under penalty of perjury:

1. I am an attorney with the Brooklyn Defender Services, 177 Livingston Street, 7th Floor, Brooklyn, New York, the attorneys for T[redacted] G[redacted], respondent in the above-captioned proceeding. As such, I am fully familiar with the facts and circumstances of this case.

2. I make this affirmation in support of Respondent's *motion in limine* seeking an order excluding **(**a) the highlighted portions of the St. John's Episcopal Hospital Records (Exhibit C), and 2) excluding the testimony of D[redacted] A[redacted] as to inadmissible hearsay and as to her own opinions about Ms. G[redacted]'s abilities and characteristics, both those opinions included in the petition and any similar opinion statements.

3. This affirmation is made upon information and belief, the sources of which include conversations and contact with Ms. G[redacted], all papers and proceedings heretofore filed and had in this matter, and counsel's own further research and investigation.

I. PROCEDURAL HISTORY

4. On February 21, 2023, the Administration for Children's Services ("ACS"), filed a neglect petition pursuant to Article Ten of the Family Court Act against Ms. G[redacted], alleging that she failed to provide proper supervision or guardianship. *See* Petition, attached hereto as Exhibit A. T[redacted] was remanded to the custody of ACS and placed in non-kinship foster care.

5. The fact-finding hearing in this matter is scheduled to commence on October 19, 2023.

6. On March 24, 2023, counsel for Ms. G[redacted] served Petitioner with a discovery demand requesting updated discovery from Petitioner throughout the duration of the case, including expert witness notice as required by the C.P.L.R. *See* Discovery Demand, attached hereto as Exhibit G.

7. On April 13, 2023, Petitioner provided all counsel with a Witness and Exhibit list indicating who counsel's witnesses would be and which records ACS would be seeking to introduce into evidence at fact-finding. *See* Witness and Exhibit List dated April 13, 2023, attached hereto as Exhibit B. ACS's witness list includes D[redacted] A[redacted], Tri-County Care case manager. *Id.* The Petition contains the following allegations related to statements made by Ms. A[redacted]:

> "According to D[redacted] A[redacted], case manager at Tri-County Care OPWDD, the respondent mother is diagnosed with mild intellectual disability (MID). According to Ms. A[redacted], the respondent is aggressive. According to Ms. A[redacted], the respondent mother is very dependent and needs assistance making appointments, filling out paperwork, and simple tasks. According to Ms. A[redacted], prior to T[redacted] birth, Ms. A[redacted], made referrals for a parenting class for people with disabilities, an independent living program, and a supportive employment program for the respondent mother. According to Ms. A[redacted] the respondent mother did not comply with any of the referrals and is currently not in any of the services. According to Ms. A[redacted], the respondent mother is unable to care for the subject child T[redacted] without the referred services."

8. On March 2, 2023, Petitioner provided all counsel with the ORT and ACS investigative notes. On May 11, 2023, St. John's Episcopal Hospital records subpoenaed by Petitioner were erroneously sent to the courthouse. Counsel for Ms. G proposed redactions to highly sensitive, personal, and irrelevant information in the records to the Court on May 22, 2023, which were granted by this Court. Counsel for Ms. G subsequently produced redacted medical records to all counsel on May 24, 2023. On June 23, 2023, Petitioner produced marked St. John's Episcopal Hospital records to all counsel and on June 26, 2023, Petitioner produced marked and bate-stamped St. John's Episcopal Hospital records to all counsel. *See* Marked Pages of St. John's Episcopal Hospital Records, attached hereto as Exhibit C.

9. For the Court's reference, the records attached as Exhibit C contain pages of the St. John's Episcopal Hospital records on which Petitioner has marked information that they plan to offer into evidence. Petitioner has marked the portions of Exhibit C that Petitioner plans to introduce into evidence in red, and Respondent has highlighted portions of the attached records to which Respondent is objecting in yellow.

10. Ms. G asks that this Court issue an order 1) excluding the highlighted portions of the St. John's Episcopal Hospital Records (Exhibit C), and 2) excluding the testimony of D A as to inadmissible hearsay and the testimony of Ms. A as to her own opinions about Ms. G 's abilities and characteristics, both those opinions included in the petition and any similar opinion statements.

II. ARGUMENT

A. Objections to St. John's Episcopal Hospital Records

i. Exhibit C, Batestamp 009

This page contains one marked notation that Ms. G[redacted] received insufficient prenatal care. There is no indication that Ms. G[redacted] received prenatal care at St. John's Episcopal Hospital. Thus, the source and foundation for this information is unclear and the notation is inadmissible hearsay. *Progressive Ne. Ins. Co. v. Randazzo*, 808 N.Y.S.2d 262, 263 (2005) (trial court properly refused to admit portions of medical records which failed to identify the source of the information contained therein.); *Ginsberg by Ginsberg v. N. Shore Hosp*., 624 N.Y.S.2d 257 (2d Dep't 1995) ("where the source of the information on the hospital or doctor's record is unknown, the record is inadmissible")

ii. Exhibit C, Batestamp 016-021

This Psychiatric Consult is inadmissible because it does not qualify for the business records exception to the hearsay rule—it contains inadmissible hearsay, it was not made at or near the time of the occurrence described therein, it is a medical report containing opinions rather than a day-to-day record made in the ordinary course of business, and it was created for the purposes of litigation.

a) <u>This report contains inadmissible hearsay from third parties.</u>

Statements from a third party in medical records, even if germane to diagnosis and treatment, are not admissible. *See Sermos v. Gruppuso*, 95 A.D.3d 985 (2nd Dept. 2012). Courts generally "prohibit the admission of a business record or a statement within such a record where the declarant is outside the business enterprise because the statement lacks the inherent trustworthiness or indicia of reliability to except it from the general prohibition against admitting an out-of-court statement asserted for the truth of the statement." *Hochhauser v. Elec. Ins. Co.*, 46 A.D.3d 174, 181 (2d Dep't 2007), *see also Matter of Leon RR*, 48 N.Y.2d 117, 123 (1979) ("Unless some other hearsay exception is available, admission may only be granted where it is

demonstrated that the informant has personal knowledge of the act, event or condition and he is under a business duty to report it to the entrant") (internal citations omitted).

This psychiatric consult was conducted by a resident psychiatrist, who also conducted collateral interviews with Ms. A[redacted], two ACS workers, Ms. G[redacted]'s mother, and other medical staff members. The marked information in the last paragraph on page 017 and the first paragraph of page 018 (from "Patient has developmental disability...." to "...does not know who pays for the pt's phone bill.") was reportedly obtained mostly from "ACS team and pt's case manager [Ms. A[redacted]]." Neither has a business duty to report information *to* the staff of the hospital. Therefore, that marked information is inadmissible hearsay. *See Sermos v. Gruppuso*, 95 A.D.3d at 985; *Hochhauser,* 46 A.D.3d at 181; *Matter of Leon RR*, 48 N.Y.2d at 123.

b) <u>This Consult does not qualify for the business records exception to the hearsay rule because it was not made in the regular course of business or at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, and it is a medical report that contains the doctor's opinions.</u>

The business records exception to the hearsay rule applies only if the court finds that the record was made in the regular course of business, that it was the regular course of such business to make it, and the record was made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. C.P.L.R. 4518(a), *see also In re Ramel Anthony S.*, 124 A.D.3d 445, 1 N.Y.S.3d 68, 69 (2d Dep't 2015) (error for Family Court to admit in evidence agency progress notes that were not made at the time of the events reported, or within a reasonable time thereafter); *Matter of Gregory M.*, 184 A.D.2d 252, 254, 585 N.Y.S.2d 193, 195 (1st Dep't 1992), aff'd, 82 N.Y.2d 588, 627 N.E.2d 500 (1993) (error to admit undated ballistics report in absence of evidence that "the entries were either contemporaneous with the testing or were made within a reasonable time thereafter")

Doctors' reports are not admissible under the business records exception to the hearsay rule when they contain summaries and opinions, as these reports are not the day-to-day records kept during the ordinary course of business that are covered by the exception. *Fortunato v. Murray*, 72 A.D.3d 817, 899 N.Y.S.2d 283 (2d Dept. 2010) (medical records containing routine information are admissible as business records, but medical reports containing a doctor's opinions are not); *Bronstein-Becher v. Becher*, 25 A.D.3d 796, 797, 809 N.Y.S.2d 140, 141 (2d Dep't 2006) ("medical reports, as opposed to day-to-day business entries of a treating physician, are not admissible as business records where they contain the doctor's opinion or expert proof."); *Rodriguez v. Zampella*, 346 N.Y.S.2d 558 (2d Dept 1973) (doctor's opinion and diagnosis were woven into his notations on the records, thus the evidence offered consisted of expert proof and should not have been admitted as evidence in chief); *Devon S. v. Aundrea B–S*, 3924 N.Y.S.2d 233 (Kings Cty. Fam. Ct. 2011). In *In re M.S.*, a neglect case with similar allegations to the instant case, the Court disregarded the opinions of a doctor, social worker, and other medical staff members about a mother's cognitive abilities in medical records offered into evidence at fact-finding—the Court stressed that none of those individuals were qualified as experts or testified at trial, so their opinions did not fall within the business records exception to the hearsay rule. 49 Misc.3d 1214A, 2015 WL 7288457, fn. 2. (Kings Cty. Fam. Ct. 2015). In *In re D. Children*, the Court noted that even in a hearing where hearsay was admissible, a counselor's opinion statements were admissible only as hearsay and entitled to almost no weight when the counselor did not testify— "Since the agency counselor did not testify and was not subject to cross-examination, it remains unclear what facts he relied on in forming his opinion; whether he was qualified to render such an opinion; whether his opinion was based on a reasonable degree

of certainty; whether there were other possible explanations." 25 Misc.3d 1208(A), 2009 WL 3163217 at *11 (Kings Cty. Fam. Ct. 2009).

This psychiatric consult is hearsay not subject to the business records exception because it was not made at or near the time of the occurrence described therein, was not made in the ordinary course of business, and contains the opinions of the consulting doctors. The psychiatric consult notes were entered into the medical record on March 8, 2023, but the consult was conducted on February 16, 2023. Exhibit C, 016. Ms. G[redacted] was officially "discharged" from the hospital on February 11, 2023, but left the hospital with T[redacted] on February 16, 2023 to go to the PATH shelter intake. *See* St. John's Episcopal Hospital Records Excerpt, attached hereto as Exhibit D. The notes of this consult were entered into the record three weeks late, and thus were not made at or near the time of occurrence—this portion of the record is therefore inadmissible hearsay not covered by the business records exception. The capacity consult is also a doctor's report that contains the doctor's opinions, rather than a day-to-day record with routine information that is kept in the ordinary course of business. *In re M.S.,* 2015 WL 7288457, fn2. It was conducted five days after Ms. G[redacted] had a discharge order from the hospital, at the behest of ACS. *See infra* Section A.iii.C. This is not a typical record created in the ordinary course of business, but rather a report containing the opinions of doctors who will not be testifying before the Court, qualified as experts, or subject to cross-examination. The psychiatric consult thus does not qualify for the business records exception to the hearsay rule and does not have the indicia of reliability essential to a business record.

c) This Psychiatric Consult is inadmissible because it was created for the purposes of litigation.

This psychiatric consult is also inadmissible because hospital and ACS records show that it was created in anticipation of litigation. Medical reports are inadmissible when they are

created for purposes of litigation—"Doctors' reports are often prepared at the request of counsel on behalf of the parties. Such reports are generally material prepared for litigation and are not the systematic, routine, day-by-day type of records envisioned by the business records exception." *Wilson v. Bodian*, 130 A.D.2d 221, 229–30, 519 N.Y.S.2d 126 (2d Dep't 1987). *People v. Foster*, 27 N.Y.2d 47 (1970) ("Of course, records prepared solely for the purpose of litigation should be excluded"); *People v. Guidice*, 83 N.Y.2d 630 (1994); *Flaherty v. American Turners N.Y.*, 291 A.D.2d 256, 257-258 (1st Dept. 2002) (excluding physician's report prepared for specific litigation purpose).

On February 14, 2023, hospital social worker Valerie Vancol received a call from an ACS supervisor who stated that the ACS legal team would not be willing to take Ms. G[redacted]'s case to court with the information they had at the time, because the concerns the hospital had reported were not enough to present in court. Exhibit C, 179. Ms. Vancol spoke with the director of social work at the hospital and an ACS supervisor and wrote: "Mother and baby legally have rights that must be considered, and they cannot be separated. Therefore, discharge plan is for Mother and baby to be discharged to PATH." *Id*. That same day, CPS [redacted] separately spoke to Ms. Vancol and a Dr. Steinberg at the hospital. Selected ACS Case Notes, attached hereto as Exhibit E, at 1-2. CPS [redacted] documented in her notes that she twice asked hospital staff to document their concerns about Ms. G[redacted]'s care of Ti[redacted]. *Id*. ("CPS ask Dr. Steinberg is there any way that CPS can get in writing, what exactly the concerns were that were observed, Dr. Steinberg stated being that the concerns were not documented, the only documentation that they would have, would be from today...CPS explained to both Ms. Vancol and Dr. Steinberg that it is very imperative that CPS receives the concerns observed by the hospital in writing.") On February 15, 2023, one day later, Dr. Steven Rubel from the hospital's psychiatric team, who

was involved in the creation of the psychiatric consult, wrote in his notes: “At time of eval, patient was on conference call with Ms. A [redacted] (OPWDD) and Ms. [redacted] (ACS). Both insisted on being present with the patient during the evaluation and did not want to evaluate the patient without them. Upon their request, the treatment team scheduled a meeting tomorrow, 2/16, to discuss about the patient’s disposition. They don’t want the patient to be discharged with the baby until they meet with team.” Exhibit C, 027.

On February 16, 2023, CPS [redacted]s notes document that she went to the hospital, along with ACS worker Desmangle and Ms. A [redacted]. Exhibit E at 3. There, they met with Dr. Rubel and Resident Venkata Siva. Hospital social worker Vancol informed the group that “no one would be participating from the [hospital] social work team and the BM and child are ready for discharge...Dr. Rubel placed a call to Ms. Vancol’s supervisor Ms. Jackie L. Ms. Jackie L. stated no one from social work is joining meeting and she does not even know why the psychiatry team is there. CPS team informed Ms. Jackie that the social work team requested Dr. Rubel to assess the BM...Jackie stated the mother and baby will be discharged today.” *Id*. On February 16, 2023, the attending psychiatrist wrote in his notes that they were originally told the psychiatric consult was for fetal demise, but "[w]e found out later the real reason for the consult [and] that the patient had a discharge order a few days prior to us doing the consult.” Exhibit C, 018. On February 22, the hospital social work supervisor, Jackie Lutchmidat, spoke to the ACS investigative team and shared: “as part of parent’s rights, they could not perform any evaluations without BM’s consent and admitted that the psych was contacted, but this eval was not authorized and thus the discussion the psych had with BM is not documented." Exhibit E at 5-7. However, the note documenting this psychiatric consult was entered into the medical record anyway on March 8, three weeks after Ms. G [redacted]’s and T [redacted]’s discharge. Exhibit C, 016.

As described above, the records show that this psychiatric consult—an assessment of Ms. G's capacity to care for T—was conducted after the ACS investigative team explicitly requested additional documentation from hospital staff, on the same day ACS told a hospital social worker that the hospital's reported concerns did not provide sufficient basis to bring the case to court. According to hospital records, an ACS investigative worker insisted on being present during the psychiatric consult. The consult was conducted a full four to five days after Ms. G had a discharge order from the hospital. The director of social work at the hospital told ACS that the consult was performed without Ms. G's consent, in violation of her rights as a hospital patient, and therefore would not be entered into the record. The consult was then entered anyway into the medical record, three weeks after Ms. G had physically left the hospital with T The records suggest that this psychiatric consult was prepared for the purposes of litigation, at the request of ACS and without Ms. G's consent. It is clear that it does not have the indicia of reliability typical to a business record. Additionally, given the unusual circumstances surrounding the creation of this psychiatric consult, it is substantially more prejudicial than probative. Therefore, this consult should be excluded in its entirety.

iii. Exhibit C, Batestamp 183

Counsel objects to the highlighted statements, which are hearsay statements made by D A, Ms. G's case manager from Tri-County Care, to hospital staff. As described *supra* Section A.ii.a., statements from a third party in medical records, even if germane to diagnosis and treatment, are not admissible. Ms. A has no business duty to report to St. John's Episcopal Hospital, the entity who produced and maintained the records. Therefore, Ms. A' statements in the medical records are inadmissible hearsay that lack the indicia of reliability to qualify for the business records exception. Additionally, these statements are double

hearsay—the foundation of Ms. A[redacted]' statements is unclear and there is no indication that Ms. A[redacted] statements are based upon her personal observations.

B. **Objections to the Testimony of D[redacted] A[redacted], Including but not Limited to Ms. A[redacted]' Statements Cited in the Petition**

This Court should preclude Petitioner from offering Ms. A[redacted]' testimony about her own opinions about Ms. G[redacted]'s abilities and characteristics, both those opinions included in the petition and any similar opinion statements; and from offering her testimony to inadmissible hearsay.

a. Petitioner should be precluded from offering improper lay opinion testimony by Ms. A[redacted].

Petitioner has alleged that Ms. G[redacted] failed to provide adequate guardianship and supervision to T[redacted], based in part on the opinions of Ms. A[redacted] about Ms. G[redacted]'s parenting capacity—Ms. G[redacted] objects to the anticipated testimony by Ms. A[redacted] as to these opinions at fact-finding.[1] These statements constitute improper lay opinion testimony pertaining to subject matter that requires expert knowledge for which Ms. A[redacted] is not qualified to give her opinion, and for which ACS has not presented the requisite documentation to attempt to qualify Ms. A[redacted] as an expert. Allowing Ms. A[redacted] to testify to the opinions included in the petition would permit conclusory testimony about the ultimate issue in this case, and would thus allow Ms. A[redacted], a lay witness, to put forth an expert opinion she is not qualified to make and usurp the function of the fact-finder.

[1] Specifically, Ms. G[redacted] objects to the following opinion statements: "According to Ms. A[redacted], the respondent is aggressive. According to Ms. A[redacted], the respondent mother is very dependent and needs assistance making appointments, filling out paperwork, and simple tasks...According to Ms. A[redacted], the respondent mother is unable to care for the subject child T[redacted] without the referred services."

As a general principle of common-law evidence, "lay witnesses must testify only to the facts and not to their opinions and conclusions drawn from the facts." *People v. Russell*, 165 A.D.2d 327, 332 (2d Dept. 1991), *aff'd* 79 N.Y.2d 1024 (1992), *see also Matter of Sara B.*, 41 A.D.3d 170 (1st Dept. 2007) (social worker who was not qualified as an expert was properly precluded from offering an opinion as to a respondent's parental fitness in a child protective proceeding); *Edwin R. v. Maria G.*, 175 A.D.3d 11196 (1st Dept. 2019) (child life specialist who was not qualified as an expert was properly precluded from offering an opinion as to a respondent's parental fitness and was limited to testifying only to their relationship with respondent and the services respondent received). For a lay opinion to be properly permissible, it "must be demonstrated that (1) facts which constitute the opinion are incapable of description; (2) the subject matter does not require expert knowledge; and (3) the witness is qualified to give his opinion." *People v. Sanchez*, 129 Misc.2d 91, 92 (Fam. Ct. Bronx Cty. 1985). The facts giving rise to the opinion must be such that it would be "impossible to accurately describe the facts without stating an opinion or impression." *Russell*, 165 A.D.2d at 332. However, "[i]t is up to the trier of fact to draw the appropriate inferences arising from the facts. *Sanchez,* 129 Misc.2d at 92.

Opinion evidence may also be admissible when it is properly offered by an expert. Opinion testimony by an expert is admissible when the conclusions to be drawn from the facts depend on professional or scientific knowledge or skill not within the range of ordinary training or intelligence. *People v. Cronin*, 60 N.Y.2d 430,432 (1983). An expert witness "must be qualified to testify in this area through training, experience, and the use of reliable methodology through which is his or her conclusions are reached," and must "demonstrate that the conclusions made are the product of that methodology or system of analysis." *Matter of Nicole V.*, 123

A.D.2d 97 (1st Dept. 1986). And, if a party intends to offer an expert opinion, it must take active steps to put the opposing party on notice, including designating a witness as an expert, disclosing the subject matter of the expert's testimony, the facts and opinions upon which the expert is expected to testify, the qualifications of the expert, and the summary of the grounds for the expert's opinion. C.P.L.R. 3101 (d)(1)(i).

Testimony pertaining to the capacity of a parent with an intellectual disability to effectively parent is technical, specialized, and expert in nature, and is thus inadmissible when offered by a lay witness. Evaluating the parental fitness and capacity of those with intellectual disabilities in the child welfare context is the domain of experts—it is a specific subset of research that is comprehensively studied by specialized professionals with advanced doctoral degrees and years of experience in research and clinical capacities.[2] Researchers have set forth a process of assessing parental capacity that is objective and rigorous, anchored in empirical evidence and case studies, and "informed, fair, and grounded in established disability theory and practice."[3] Providing an opinion about Ms. G[redacted]'s ability to parent falls in the purview of an expert, not a lay witness.

On information and belief, Ms. A[redacted] holds the job title of Care Manager with Tri-County Care, a contracted provider through OPWDD. According to a job posting on the Tri-County Care website for Ms. A[redacted]' position, attached herein as Exhibit F, someone who qualifies for this position need only a four-year undergraduate degree, with no specific

[2] *See generally* Budd, K.S., *Assessing Parenting Capacity in a Child Welfare Context,* Children and Youth Services Review, 27(4), 429-444 (2005) (Describes the components of a clinical model used by mental health professionals to evaluate a parent's mental health and parenting capacity); Budd, K.S. & Holdsworth, M.J., *Issues in Clinical Assessment of Minimal Parenting Competence*, Journal of clinical child psychology, 25(1), 2-14 (1996) (Discusses clinical and methodological issues inherent in assessing minimal parenting competence).

[3] Maurice Feldman & Marjorie Aunos, *Comprehensive, Competence-Based Parenting Assessment for Parents with Learning Difficulties and Their Children*, (2010) (provides a comprehensive methodology for a research-based parenting assessment process that balances children's rights to safety and nurture with the rights of their parents).

requirement for a specialization in intellectual disability or mental health. *Id.* According to this same job posting, the typical knowledge, skills, and abilities required by a Care Manager include "excellent interpersonal skills, advanced ability to communicate in both verbal and written manner, computer software skills, ability to organize, schedule, and utilize time well, and capability to analyze situations accurately and take effective action." *Id.*

The petition cites Ms. A[redacted]' statements that Ms. G[redacted] is "very dependent and needs assistance making appointments, filling out paperwork, and simple tasks," and "is unable to care for the subject child T[redacted] without the referred services." Exhibit A. Ms. A[redacted] statements are improper lay opinions and are therefore not competent evidence as required by Family Court Act § 1046. The facts giving rise to these lay opinions are fully "capable of description," *Sanchez*, 129 Misc.2d at 92. Ms. A[redacted] is certainly permitted to testify about the factual observations that gave rise to her opinion, *Matter of Darnell T.*, 134 Misc. 636, 638 (Fam. Ct. Suffolk Cty. 1987), but may not testify as to her conclusions from those facts. Ms. A[redacted] would of course be permitted to testify to specific instances in which she witnessed Ms. G[redacted] exhibit certain relevant behaviors or make certain statements, to personal observations of Ms. G[redacted]'s interactions with T[redacted], or to instances when Ms. G[redacted] behaved in a certain way that indicated she needed assistance with a specific task. Ms. A[redacted] may not, however, testify to her own opinions about Ms. G[redacted]'s character or abilities based on these specific instances. Similarly, Ms. A[redacted] is not permitted to make blanket statements regarding Ms. G[redacted]'s disposition. Accordingly, Ms. A[redacted]' testimony that Ms. G[redacted] is "aggressive" also should not be permitted, as it is an improper lay opinion and irrelevant without more context. The minimal probative value of referring to a [redacted]-year-old woman of color, who has been dealing with multiple bureaucracies and administrative systems associated with supports for

people with disabilities and limited financial means, as "aggressive," with no supporting context, is also significantly outweighed by its prejudicial effect. Because it is up to the trier of fact to draw the appropriate inferences, Ms. A[redacted]' testimony should be limited only to her specific interactions with Ms. G[redacted] and her own factual observations.

The principal subject of Ms. A[redacted]' opinions is Ms. G[redacted]'s capacity to care for T[redacted]—ACS has not attempted to designate Ms. A[redacted] as an expert, and it is clear that Ms. A[redacted] lacks the requisite training, education, and experience to provide an expert opinion about whether Ms. G[redacted] has the ability to parent. The Court should limit opinion testimony at fact-finding only to individuals whom counsel has properly designated as experts and who have been qualified as experts by the Court. On March 24, 2023, counsel for Ms. G[redacted] submitted a discovery demand requesting that Petitioner set forth the statutorily required information for each expert witness they intended to testify at trial. Exhibit G. ACS did not designate Ms. A[redacted] as an expert, nor did they produce any report related to the scope of her testimony, the qualifications of Ms. [redacted] authorizing her to provide such a testimony, or a summary of the grounds for her expert opinion, as required under the CPLR. Thus, Petitioner has not taken the necessary steps to offer Ms. A[redacted]' testimony regarding a field that is the purview of experts.

Even if Petitioner had attempted to qualify Ms. A[redacted]' as an expert, Ms. A[redacted]' knowledge of parenting capacity falls well below the threshold that would allow for an admissible expert opinion under *Cronin*. The skills and qualifications delineated in Ms. A[redacted]' job description demonstrate that the training required of a care manager is completely different than the scientific and clinical knowledge required to competently assess the parenting capacity of someone with an intellectual disability. Ms. A[redacted]' conclusions are not the

product of a methodology or system of analysis. The knowledge and skills necessary to opine on parental fitness and capacity can only be developed and acquired beyond a bachelor's degree, through extensive clinical education and research. A conclusion of parental fitness made by anyone who is not a demonstrated expert in this specific field inherently lacks the necessary intellectual rigor and empirical basis, and should not be credited by this Court. ACS did not appropriately designate Ms. A[redacted] as an expert witness, and even if she were so designated, it is clear that she could not properly be qualified as an expert—thus, Ms. A[redacted]' may not testify to her opinions.

For the above reasons, Ms. A[redacted]' testimony should be so limited to her personal interactions with Ms. G[redacted] and the services she provided as Ms. G[redacted]'s care manager. Ms. A[redacted]' testimony about her opinions regarding Ms. G[redacted]'s parental fitness and disposition would be inadmissible lay opinion testimony about the ultimate issue in this case that would invade the Court's role as trier of fact.

b. Petitioner should be precluded from offering inadmissible hearsay through Ms. A[redacted]' testimony.

Petitioner has also relied upon hearsay statements made by Ms. A[redacted] in the petition, and should be precluded from offering inadmissible hearsay through Ms. A[redacted]' testimony at fact-finding.[4] As a fact witness, Ms. A[redacted] may testify as to her observations and personal knowledge, but not as to information obtained from other service providers whose testimony is not being offered before this Court. Ms. A[redacted] is a care manager who coordinates Ms. G[redacted]'s evaluations and services, but does not provide those evaluations or services herself. Therefore, Ms. A[redacted]' testimony as to service providers' statements about Ms. G[redacted]'s

[4] Specifically, Ms. G[redacted] objects to Ms. A[redacted]' testifying to the following statements in the petition on the basis that they are inadmissible hearsay: "the respondent mother is diagnosed with mild intellectual disability"; "the respondent mother did not comply with any of the referrals and is currently not in any of the services." Exhibit A.

compliance with services, or evaluators' conclusions about Ms. G[redacted]'s diagnosis, would be inadmissible hearsay.

III. CONCLUSION

For the reasons set forth above, Petitioner must be precluded from introducing the highlighted portions of Exhibit C and offering the testimony of D[redacted] A[redacted] to the above-described statements in the petition.

Respectfully submitted,

[redacted]

Dated: Brooklyn, New York
July 10, 2023