

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

X

What's her name o/b/o
Child,

Petitioner,

**AFFIRMATION IN
SUPPORT OF MOTION**

-against-

Index No. O-06-0000

What's his name,

Respondent.

X

JOHN M. ZENIR, ESQ., an attorney duly licensed to practice law before the Courts of the State of New York does hereby affirm the following to be true based upon my review of the pertinent law and documents provided to me by the Court:

1. On July 17, 2003, I was assigned to represent the Respondent in this Order of Protection matter.
2. This matter was commenced by a duly verified Petition which was also signed by counsel for Petitioner on July 17, 2003. **(Copy Attached)**.
3. The Petition should be dismissed on its' face because it is jurisdictionally defective for several reasons.
4. Family Court is a statutory Court without equity powers whose jurisdiction is controlled by the Family Court Act. Section 812 of the Family Court Act [FCA] **(copy attached)** specifically enumerates the

jurisdiction of the Court as it relates both to the parties and the subject matter of a Family Offense Petition seeking an Order of Protection. FCA, Section 812.1(a) thru (d) sets forth who may bring a Family Offense Petition—the parties must be “members of the same family or household”, and these terms are defined as follows: “persons related by consanguinity or affinity, persons legally married to one another, persons formerly married to one another, and persons who have a child in common regardless whether such persons have been married or have lived together at any time”. Petitioner does not fall into any of these categories. If the legislature had wanted to grant standing to the aunt of a child it would have done so. The appropriate forum to pursue the allegations of March, 1998, was either in Criminal Court, or by way of a neglect Petition brought by the government. To attempt to bring a Family Offense Petition five and one half years after an alleged incident is contrary to the spirit and intent of Article 8 of the Family Court Act.

5. Further, FCA, Section 812.1, outlines the crimes which may be the subject of a Family Offense Petition. The are: “disorderly conduct, harassment in the first or second degree, aggravated harassment in the second degree, stalking in the first thru fourth degrees, menacing in the second and third degree, reckless endangerment, assault in the second and third degree, or an attempted assault between spouses or former spouses, or between parent and child, or between members of the same family or household”.

The Petition claims “sexual abuse” and refers the Court to a Police Complaint dated April 1, 1998, which alleges that a complaint of Sodomy in First Degree was alleged. Neither of these two crimes are legally cognizable as Family Offenses. I also ask the Court to note that the complainant in the Police Complaint of April 1, 1998 is not the Petitioner in the Family Offense Petition. Petitioner herein attempts to gain an Order of Protection based upon an incident that she had no direct involvement with, which occurred five years ago. Additionally, I ask the Court to also note the last line of the Police Complaint which states that the child was taken to a hospital and examined by a doctor who determined that the child was “fine”. Lastly, this Court is eminently aware that if a mandated reporter such as a hospital physician thought there was the possibility that a child was the subject of sexual contact, that doctor would immediately contact CPS.

6. Case law amply supports Respondent’s position. Sexual Abuse is not a Family Offense, Jones v. Jones, 302 NYS 2d 130 (3rd dept., 1999); nor is incestual rape & sodomy, Matter of Patrick B.P., 427 NYS 2d 694; nor is sodomy, first degree or sexual abuse, first degree, People ex rel Doty v. Krueger, 295 NYS 2d 581, Affirmed, 302 NYS 2d 605, Appeal Dismissed, 309 NYS 2d 932. Additionally, in the case of People v. Abrams, 341 NYS 2d 515, the Court held that there was no legislative intent to place the crimes of sodomy and sexual abuse within the parameters of FCA, Section 812.

WHEREFOR, your Affirmant requests the Court grant the relief requested in the within motion in its' entirety.

John M. Zenir
Attorney for Respondent
22 NYCRR 130-1.1-a

Dated: July 28, 2003.
Mineola, New York