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WEIGHING THE DOMESTIC VIOLENCE FACTOR IN CUSTODY CASES: TIPPING THE SCALES IN FAVOR OF PROTECTING VICTIMS AND THEIR CHILDREN

*Kim Susser**

INTRODUCTION

In 1996, the New York State Legislature ("the Legislature") attempted to afford additional protection to domestic violence victims and their children involved in custody disputes by amending New York's Domestic Relations Law ("DRL") and the Family Court Act ("FCA") to mandate consideration of domestic violence when determining the best interests of the child in custody and visitation cases. Four years later, it is evident that the amendment failed to change the behavior of the courts or overcome the entrenched attitudes of many judges, attorneys and forensic evaluators regarding domestic violence.

The first Part of this Article contains a brief overview of the case law since the passage of the 1996 amendment and considers how courts applied the mandate to consider domestic violence as a factor in determining the best interests of the child. Part II addresses practical issues that arise when litigating custody cases where domestic violence is a factor. Part III uses three case studies to illustrate the failure of the amendment to create the necessary change intended by the Legislature and the need for legislative reform imposing a presumption against awarding custody to abusive parents. The final Part examines the inconsistency in the law between child

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protective cases and custody created by the amendment and policy initiatives in the area of domestic violence and custody.

The statute states in pertinent part that where there are allegations of domestic violence in any action for custody or visitation, "and such allegations are proven by a preponderance of the evidence, the court *must* consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section."¹ Case law delineates additional factors to consider when applying the best interest standard.² The best interest standard is elusive, however, and, as Justice Bernard Meyer stated in *Friederwitzer v. Friederwitzer*, "the only absolute governing custody of children is that there are no absolutes."³

Prior to enactment of the legislation in 1996, some courts considered domestic violence in the allocation of custody and visitation rights, although there were only four reported appellate cases in New York before 1985.⁴ Since then, domestic violence has been considered increasingly relevant in making these determinations.⁵ Appellate courts, for example, have consistently held that domestic violence witnessed by a child is a significant factor in determining custody and visitation.⁶ Courts have also considered acts of violence in determining a parent's fitness for custody.⁷ Domestic violence has also been considered a factor in relocation cases,⁸ was

1. Act of May 21, 1996, ch. 85, 1996 N.Y. LAWS 273, 275.

2. See *Eschbach v. Eschbach*, 436 N.E.2d 1260, 1264 (N.Y. 1982) (holding that, although the mother was not an unfit parent, the court is free to view the totality of the circumstances to determine the child's best interests); *Friederwitzer v. Friederwitzer*, 432 N.E.2d 765, 768 (N.Y. 1982) ("The standard ultimately to be applied remains the best interests of the child when all of the applicable factors are considered, not whether there exists one or more circumstances that can be denominated extraordinary."); *Nehra v. Uhlar*, 372 N.E.2d 4, 9 (N.Y. 1977) (holding that the father should be granted custody because he was awarded custody at time of divorce, he was a fit parent and the mother had obtained possession of the children by lawless self-help).

3. 432 N.E.2d at 768.

4. See Marjory M. Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State*, 3 CORNELL J. L. & PUB. POL'Y 221, 242 (1994).

5. New York appellate courts have published 13 decisions holding that domestic violence is relevant to the issues of custody and visitation between 1985 and 1994. See *id.*

6. See LEE ELKINS & JANE FOSBINDER, *NEW YORK LAW OF DOMESTIC VIOLENCE* 591 (1998).

7. See *Farkas v. Farkas*, N.Y. L.J., July 13, 1992, at 31 (Sup. Ct. July 13, 1992); *Rohan v. Rohan*, 623 N.Y.S.2d 390, 392 (App. Div. 1995).

8. See, e.g., *Mitchell v. Mitchell*, 619 N.Y.S.2d 182, 183 (App. Div. 1994); *Olmo v. Olmo*, 528 N.Y.S.2d 880, 881 (App. Div. 1988).

articulated as a basis to support supervised visitation⁹ and constituted "extraordinary circumstances" in cases where a non-biological party was seeking custody.¹⁰ Courts also viewed violence committed by a parent against a new partner as an important concern.¹¹

In 1996, the Legislature determined that piecemeal decision making was not a sufficient means toward justice and declared domestic violence a factor that *must* be considered in determining the best interests of a child.¹² The most significant aspects of the amendment are the specific findings regarding domestic violence set forth by the Legislature:

The legislature finds and declares that there has been a growing recognition across the country that domestic violence should be a *weighty consideration* in custody and visitation cases.

. . . .

The legislature recognizes the wealth of research demonstrating the effects of domestic violence upon children, even when the children have not been physically abused themselves or witnessed the violence. Studies indicate that children raised in a violent home experience shock, fear, and guilt and suffer anxiety, depression, low self-esteem, and developmental and socialization difficulties. Additionally, children raised by a violent parent face increased risk of abuse. A high correlation has been found between spouse abuse and child abuse.

. . . .

Domestic violence does not terminate upon separation or divorce. Studies demonstrate that domestic violence frequently escalates and intensifies upon the separation of the parties. Therefore, . . . great consideration should be given to the corrosive impact of domestic violence and the increased danger to the family¹³

These compelling findings enunciated by the Legislature call for stronger language than that in the amended statute itself. The amendment simply codifies domestic violence as a factor that must

9. See, e.g., *Irwin v. Schmidt*, 653 N.Y.S.2d 627, 629 (App. Div. 1997); *Richard C. v. Deborah A.*, N.Y. L.J., Nov. 27, 1995, at 36 (Fam. Ct. Nov. 27, 1995); *Antoinette M. v. Paul Seth G.*, 608 N.Y.S.2d 703, 704 (App. Div. 1994); *Anonymous G. v. Anonymous G.*, 517 N.Y.S.2d 985, 987 (App. Div. 1987).

10. See, e.g., *Peters v. Blue*, N.Y. L.J., June 23, 1997, at 29 (Fam. Ct. June 23, 1997); *Pratt v. Wood*, 620 N.Y.S.2d 551, 552 (App. Div. 1994).

11. See *TI v. PS*, N.Y. L.J., June 5, 1995, at 31 (Fam. Ct. June 5, 1995); *Kaplan v. Chamberlain*, N.Y. L.J., Sept. 17, 1993, at 27 (Fam. Ct. Sept. 27, 1993).

12. See Act of May 21, 1996, ch. 85, 1996 N.Y. LAWS 273, 273.

13. *Id.* at 273-74 (emphasis added).

be considered when determining the best interests of the child. The findings call for a rebuttable presumption against the award of custody to a parent found to have committed domestic violence. As many as eighteen states have adopted such a presumption.¹⁴

Although the Legislature explicitly rejected a presumption, the new law is clearly meant to impose restrictions on visitation and custody for one parent who has been found to have committed violence against the other parent. The legislative history plainly states domestic violence "*should be a weighty consideration.*"¹⁵ Domestic violence is the only factor specifically codified, thereby implying that courts minimizing or disregarding evidence of domestic violence are in derogation of the law.¹⁶ The problem lies in the reality that mandating judges to give a particular factor "weighty consideration" does not give much guidance. The statute has no teeth.

Although the statute's plain language states "domestic violence" is a factor,¹⁷ it does not limit domestic violence to the definition of a "family offense" as determined by Article Eight of the FCA.¹⁸ This is not an intentional omission on the part of the Legislature, as the statute later specifically refers to Article Eight when defining "family or household member."¹⁹ The Legislative findings also

14. Lynne R. Kurtz, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345, 1350 (1997); see also Katherine M. Reihing, *Protecting Victims of Domestic Violence and Their Children After Divorce: The American Law Institute's Model*, 37 FAM. & CONCILIATION CTS. REV. 393, 395 (1999). See also, e.g., ALA. CODE 1975 § 30-3-131 (Supp. 1999); ARIZ. REV. STAT. ANN. § 25-403 (West Supp. 1999); ARK. CODE ANN. § 9-13-101(c) (Michie 1997); COLO. REV. STAT. ANN. § 14-10-124 (1.5) (1999); DEL. CODE ANN. tit. 13, § 705A (Supp. 1998); FLA. STAT. ANN. § 61.13(2)(b)(2) (West Supp. 1999); HAW. REV. STAT. ANN. § 571-46(9) (Michie Supp. 1998); IDAHO CODE § 32-717B(5) (1996); LA. REV. STAT. ANN. § 9:364 (West Supp. 1999); MINN. STAT. ANN. § 518.17(2)(d) (West Supp. 1999); NEV. REV. STAT. § 125.480(5) (1998); N.J. REV. STAT. ANN. § 458:17 (1993); N.M. CENT. CODE § 14-09-06.2(1)(j) (1997); OKLA. STAT. ANN. tit. 10, § 21.1(D) (West 1995); TEX. FAM. CODE ANN. § 153.004 (West 1996); WASH. REV. CODE ANN. § 26.09.191 (2)(a)(iii) (West 1997); WIS. STAT. ANN. § 767.24(2)(b)(2)(c) (West 1993); WYO. STAT. ANN. § 20-2-113(a) (1999).

15. Act of May 21, 1996, ch. 85, 1996 N.Y. LAWS 273, 273 (emphasis added).

16. See Ilana Gruebel, *The Domestic Violence Factor in Child Custody and Visitation Determinations*, in LAWYER'S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM 171, 174 (Ronald E. Cohen et al. eds., 2d ed. 1998).

17. See Act of May 21, 1996, ch. 85, 1996 N.Y. LAWS 273, 273-74.

18. See N.Y. FAM. CT. ACT § 812 (McKinney 1999). Section 812 of the New York Family Court Act defines a family offense as "disorderly conduct, harassment [,] aggravated harassment[,], menacing[,], reckless endangerment, assault . . . or an attempted assault," as delineated by the relevant New York Penal Law provisions. *Id.* (amended effective Dec. 1, 1999 to include "stalking" as a family offense).

19. See Act of May 21, 1996, ch. 85, 1996 N.Y. LAWS 273, 275.

specifically refer to "physical or psychological violence."²⁰ As discussed later,²¹ one Westchester Family Court case adopted an expanded definition of domestic violence, which includes more than physical acts. Therefore, the definition of domestic violence as it is applied in custody cases is broader than the definition of domestic violence applied in family offense cases.²²

Oddly, the statute limits the consideration of domestic violence to acts committed against a "family or household member," as defined in Article Eight of the FCA.²³ Article Eight limits the definition of family or household member to a spouse, former spouse, those who have a child in common, or any relative, whether by blood or marriage.²⁴ This definition, however, omits paramours, even if they live with one of the parties. Although there is nothing to prevent a court from considering violence in such a context,²⁵ this limitation appears to be a significant oversight by the Legislature.

In 1998, the custody and visitation provisions of the DRL and FCA were further amended to prohibit courts from granting custody or visitation to any person convicted of murdering the child's parent.²⁶ Under this statute, the court is not even permitted to order temporary visitation pending the determination of a petition of custody or visitation.²⁷ Exceptions include situations where a child of suitable age and maturity consents to such an order and where the person convicted of the murder can prove that it was causally related to self-defense against acts of domestic violence perpetrated by the deceased.²⁸ By requiring the court to deny visitation between parent and child, as a matter of law, the statute constitutes "a dramatic change in the law."²⁹ In cases of murder, the Legislature willingly imposed a presumption against an award of custody,³⁰ but specifically rejected such a presumption in other

20. *Id.* at 274.

21. *See supra* notes 33-35 and accompanying text.

22. *See* J.D. v. N.D., 652 N.Y.S.2d 468 (Fam. Ct. 1996).

23. N.Y. FAM. CT. ACT § 827(vii).

24. *See id.* § 812.

25. *See* ELKINS & FOSBINDER, *supra* note 6, at 595.

26. *See* Act of July 27, 1999, ch. 378, 1999 N.Y. LAWS 1231, 1231-33.

27. *See id.* at 1232.

28. *See id.*

29. *See* ELKINS & FOSBINDER, *supra* note 6, at 67 (Supp. Mar., 1999) (citing John R. v. Marlene C., N.Y. L.J., Dec. 8, 1998, at 28 (Fam. Ct. Dec. 8, 1998)).

30. *See* Act of July 27, 1999, ch. 378, 1999 N.Y. LAWS.

domestic violence custody cases.³¹ This disparity is analogous to the criminal justice system's swift response to a domestic violence homicide, as opposed to its frequently cavalier treatment of domestic violence misdemeanors that, if treated with the same import, might serve to prevent a domestic violence homicide.

I. POST-AMENDMENT CASES

Much of the case law since the passage of the amendment fails to address the ultimate issue: How should courts apply the statutory mandate to give domestic violence the "weighty consideration" required by the FCA.³² With the exception of two lower court cases in Westchester County,³³ there has been little analysis of the statute or guidance as to the meaning of weighty consideration. One of those cases indicated that domestic violence under the statute is not limited to acts causing physical injury.³⁴ The court held that there was an "unmistakable pattern of power and control," and that "[e]conomic, verbal and sexual abuse, coupled with regular and frequent threats and intimidation, while more subtle in nature, are no less damaging than a physical blow."³⁵

The other case held against the recommendations of the court-appointed expert and the law guardian³⁶ to find that, although neither parent presented an ideal environment, custody should remain with the mother.³⁷ In that case, domestic violence was given the "weighty consideration" envisioned by the Legislature³⁸ over other factors presented by the facts of the case, including the expert's opinion that the mother was "evasive, anxious and histrionic."³⁹ This decision also holds that, when experts do not give sufficient weight to evidence of domestic violence, the court is free

31. See Act of May 21, 1996, ch. 85, 1996 N.Y. LAWS 273, 273-74 ("Rather than imposing a presumption, the legislature hereby establishes domestic violence as a factor . . .").

32. *Id.* at 273.

33. See *E.R. v. G.S.R.*, 648 N.Y.S.2d 257 (Fam. Ct. 1996); *J.D. v. N.D.*, 652 N.Y.S.2d 468 (Fam. Ct. 1996).

34. See *J.D.*, 652 N.Y.S.2d at 468 ("[D]omestic violence is not limited to overt acts of violence which cause physical injury. The Legislature implicitly recognized that domestic violence is not a static concept . . .").

35. *Id.* at 471.

36. A law guardian is defined as "an attorney who is assigned by a court to represent a child." NEW YORK STATE BAR ASSOC., REPORT OF THE TASK FORCE ON THE LAW GUARDIAN SYSTEM: THE PRIVATELY PAID LAW GUARDIAN 1 (1997).

37. See *E.R.*, 648 N.Y.S.2d at 261.

38. See Act of May 21, 1996, ch. 85, 1996 N.Y. LAWS 273, 273.

39. See *E.R.*, 648 N.Y.S.2d at 261.

to disregard their opinions provided it has convincing reasons to do so.⁴⁰

In an unreported decision in New York County, the court cited uncontroverted evidence of domestic violence as well as the father's failure to understand its damaging impact on the children in its award of custody to the mother.⁴¹ The court considered its legislative mandate, stating that "the stench of domestic violence permeated the trial," and credited testimony that the mother's relocation was out of her "desperate need to escape a violent relationship."⁴² Although no allegations of domestic violence were specifically pled, as required by the statute, the court conformed the pleadings to the proof evinced at trial.⁴³

In other cases that consider domestic violence, there was no examination of the legislative charge, but domestic violence was instead considered regardless of the legislative mandate. One judge recited a litany of factors that must be considered in determining a relocation case, yet never mentioned the amendment.⁴⁴ In an appellate case, the court relied on two pre-amendment cases, instead of the statute, and held that the father was "ill-suited to provide moral and intellectual guidance" to his children due to his acts of violence against their mother.⁴⁵ A third court cited a law review article, instead of the legislative findings in the amendment, to conclude that "young children exposed to domestic violence suffer a broad range of developmental and socialization difficulties."⁴⁶

As a practical point, it matters little whether courts rely on the statute itself or other material, rather, these decisions illustrate that even those judges inclined to give domestic violence the weighty consideration required, overlook the amendment because the language is not strong enough to warrant deliberation. The amendment was not needed for judges who appropriately exercise discretion in their contemplation of domestic violence, it was meant for those who do not. For judges who do not evaluate domestic violence, the mandate to consider it as a factor is insuffi-

40. *See id.*

41. *See* Anthony S. v. Kimberly S., Nos. V-1276-97, V-1747-97, V-1277-97, V-1278-97, 1998 WL 425464, at *4 (Fam. Ct. June 19, 1998).

42. *Id.* at *6.

43. *See id.*

44. *See In re* Juan C., N.Y. L.J., Oct. 12, 1999, at 29 (Fam. Ct. Oct. 12, 1999).

45. *See* Irvin v. Schmidt, 653 N.Y.S.2d 627, 629 (App. Div. 1997). *See also In re* Dejesus, 1999 WL 1215165 (N.Y. App. Div. Nov. 1, 1999).

46. Christopher S. v. Ann Marie S., 662 N.Y.S.2d 200, 206 (Fam. Ct. 1997) (citing M.M. Pagelow, *The Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, MEDIATION Q., Summer 1990, at 346).

cient. The language of weighty consideration leaves too much discretion to an individual judge or expert. For example, the Appellate Division affirmed an award of custody to a father who admitted to being the subject of an order of protection and was ordered to complete a batterer's program.⁴⁷ One dissenting justice argued that the lower court erred as the record was "replete with domestic violence."⁴⁸ The dissent further contended that the lower court failed to "admit and adequately consider evidence relevant to serious incidents of domestic violence that bear on the father's fitness for custody."⁴⁹

In a matrimonial proceeding, another court held that several orders of protection issued on behalf of a mother were not sufficient evidence warranting consideration of the impact of domestic violence on her children.⁵⁰ It was not clear whether the orders of protection the judge was referring to were issued after a hearing or on consent. The striking point in this case was that there was a trial on the grounds for divorce and sufficient evidence was found to grant the mother a judgement based on cruel and inhuman treatment of her by the father which the court failed to consider in determining the best interests of the children. The underlying facts comprising the cruel and inhuman treatment were not set forth in the decision.

Some might posit that domestic violence is sufficiently addressed in a line of joint custody cases, which predate the amendment. Although case law clearly dictates that joint custody is not condoned in situations where domestic violence is found, the routes of analysis differ.⁵¹ In joint custody cases, courts reason that parents who are "severely antagonistic and embattled" should not be awarded joint custody since joint custody by definition requires joint decision-making.⁵² The rationale underlying the amendment to Section 240 of the DRL is based on the wealth of research demonstrating the harm to children exposed to violence, rather than the inability of parents to cooperate.

47. See *Smith v. Purnell*, 682 N.Y.S.2d 889, 890 (App. Div. 1998).

48. *Id.*

49. *Id.*

50. See *Walsh v. Walsh*, N.Y. L.J., Sept. 21, 1998, at 32 (Sup. Ct. Sept. 21, 1998).

51. See *supra* notes 34-50 and accompanying text.

52. *Braiman v. Braiman*, 378 N.E.2d 1019, 1019 (N.Y. 1978); see also *Spencer v. Small*, 693 N.Y.S. 727, 729 (App. Div. 1999) ("Clearly, there could not be an award of joint custody due to the violent relationship between these parties and respondent's lack of any positive effort to control his anger." (citation omitted)).

II. PRACTICE ISSUES

Incidents of domestic violence must be proven by a preponderance of the evidence in order to be considered as a factor under the statute.⁵³ Findings of prior family offenses in family court and criminal convictions should therefore be given a *res judicata* effect in a custody or visitation proceeding.⁵⁴ If there has been no prior finding or conviction, then the violence can be proven anew during the course of the custody trial.⁵⁵ Litigators ought to be wary of cases where the family offense is tried before a judge in family court, but the custody/visitation case is then referred to a Court Attorney Referee⁵⁶ who must consider, but has not actually heard, the testimony regarding domestic violence.⁵⁷ Although it is often less complicated for an attorney to prove the violence in a separate family offense proceeding and then use the finding as a tool for negotiating a settlement in the custody/visitation matter, if a settlement on the custody/visitation is not reached, the court hearing that case will not have heard the testimony about the domestic violence. In these situations, one can argue that, notwithstanding the *res judicata* effect, the trial court ought to hear the live testimony and have the opportunity to observe the demeanor of witnesses.

The statute and legislative history also provide material for cross examining expert witnesses who either minimize or disregard domestic violence in their custody/visitation recommendations. The American Psychological Association ("APA"), for example, has found that false reporting of family violence occurs infrequently

53. See *id.* at 275.

54. See *Tiffany A. v. Margaret J.*, 656 N.Y.S.2d 792, 795-96 (Fam. Ct. 1996) (holding that three prior determinations of parental unfitness serve as "res judicata on the question of [the mother's] fitness to parent, her right to custody and what is in the best interests of [the] children"). But cf. *Friederwitzer v. Friederwitzer*, 432 N.E.2d 765, 767 (N.Y. 1982) (indicating that on petition for change of custody "that no one factor, including the existence of [an] earlier decree or agreement, is determinative of whether there should, in the exercise of sound judicial discretion, be a change of custody").

55. See, e.g., *Hollister v. Hollister*, 678 N.Y.S.2d 820 (App. Div. 1998) (upholding lower court's determination that respondent did not substantiate domestic violence accusations by a preponderance of the evidence).

56. See N.Y. FAM. CT. ACT § 439 (McKinney 1999).

57. It is common practice for the New York City family courts to appoint Referees, who are lawyers, not judges, to hear custody and visitation cases. This is due to the shortage of judges in the New York City family court system. See Catherine J. Ross, *Unified Family Courts: Good Sense, Good Justice*, TRIAL, Jan. 1, 1999 at 30, 31 ("In New York City . . . there are only 41 sitting judges. These judges handle over 225,000 cases a year, or approximately 5500 cases annually for each judge. A system like this one cannot be expected to yield anything more than 'assembly-line justice.'").

and that the rate of false reports in custody cases is no greater than for other crimes.⁵⁸ Despite this, studies show that mental health professionals still believe that "as many as one in eight women are magnifying violence as a ploy in custody disputes."⁵⁹ Judges should not give weight to expert opinions where the expert has not shown an understanding of the psycho-social literature addressing the negative impact of domestic violence on children as set forth in the legislative history of the 1996 amendment.

It is imperative to introduce a copy of the legislative history to the court in your summation when litigating custody cases where domestic violence is an issue so that the court can better understand the rationale behind the amendment and accord it the proper weight. The legislative findings can be annexed to motions and referenced during the course of a trial. As will be seen below, however, good practice is not always enough to overcome the long-standing behaviors and attitudes impacting on these cases.⁶⁰

III. CASE STUDIES⁶¹

Many cases regarding custody and visitation emanate from the family court, a court in which most litigants appear *pro se* or with court-appointed counsel.⁶² Written opinions are not issued in most cases, and many are not appealed. Therefore, it is important to examine how cases are decided from a practitioner's point of view. Case studies reveal a more detailed picture of the lower court proceedings than those usually reflected in appellate opinions. I began practicing in this area in 1994, the year before this legislation passed. Using three cases, each in different boroughs of New York City and each post-dating the amendment, I will show the necessity for the imposition of a presumption against awarding custody to

58. See AMERICAN PSYCHOL. ASSOC., VIOLENCE AND THE FAMILY 12 (1996).

59. Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1120 (1996) (citing PETER G. JAFFE, CHILDREN OF BATTERED WOMEN 32-75 (1995)).

60. See discussion *infra* Part III.

61. Each case study is based upon a family court case in which the author represented the battered mother. Names, locations and key facts have been changed to protect the confidentiality of the parties. Written decisions and transcripts are on file with the author.

62. See, e.g., Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2047 (1999) ("The numbers of unrepresented litigants in family law cases have surged nationwide, with some reports indicating that eighty percent or more of family law cases involve at least one *pro se* litigant.").

abusive parents.⁶³ The mandate to give domestic violence a weighty consideration was ineffective in each of the cases.

In each case, a family offense petition was filed by the mother requesting an order of protection. In two of the cases, the custody or visitation trial proceeded contemporaneously with the family offense trial, and in the other the custody case immediately followed the family offense trial.

A. *Mr. S. v. Ms. B.*

The first case is a Bronx County matter in which, during a particularly vicious assault, the respondent pulled a clump of hair out of Ms. B.'s head. The parties were never married and never lived together, but had one child in common. There was a lengthy trial on the family offense case before a judge who later referred the custody case to a referee. The referee assigned a law guardian who appeared on the custody/visitation matter.

Ms. B. initiated the family offense proceeding, seeking an order of protection. Her petition alleged several incidents of domestic violence during which the child's father seriously assaulted her. A few months after she filed her family offense petition, Mr. S. filed petitions for paternity and custody. He never filed a family offense petition against Ms. B.

The judge first heard testimony on the family offense case. Ms. B. testified on her own behalf to an incident that took place in the respondent's mother's home. His mother often cared for the baby while Ms. B. was working and attending nursing school. When Ms. B. picked up the child one afternoon, Mr. S. appeared and they began arguing about child support. Mr. S. started cursing and pushed Ms. B. onto the couch while she held the baby. He choked her and pulled her hair with such ferocity that she was left with a two to three inch bald spot on her head. Ms. B. introduced medical records and photographs of the injuries to her head and neck. The medical records, including x-rays and a CAT scan, indicated a concussion, memory loss, muscle spasm, back pain, dizziness and hair loss. Mr. S. was left with scratches on his face from Ms. B.'s attempts to break free when he was choking her. Both parties were arrested for the incident. The criminal case against the mother was dismissed by the District Attorney's office and the criminal case against the father proceeded to a jury trial. He was acquitted on all charges.

63. See discussion *infra* Parts III.A-C.

In addition to testifying for himself, Mr. S.'s brother, sister and current girlfriend testified on his behalf, as did the arresting police officer, Mr. S.'s roommate and his psychologist. Mr. S. denied any violence on his part and maintained that the incident at his mother's home was initiated by the petitioner who had scratched his face. He also testified that on another occasion the petitioner threw a chair at him.

Although there were no allegations pending against Ms. B., Mr. S.'s roommate was permitted to testify, over objection, as to whether he had ever seen Ms. B. attack Mr. S. The issue arose again during Mr. S.'s testimony when he was asked about threatening messages left by Ms. B. on his answering machine. The respondent's testimony concerned alleged threats to take him to court for his failure to pay child support, which, even if true, do not constitute a criminal act nor address the issues of the case. During his defense, Mr. S. and his brother, who admitted to abusing heroin during the time period about which he was testifying, stated that on a different occasion, Ms. B. once threw a chair at Mr. S. Though apparently offered as an excuse for Mr. S.'s assaults upon Ms. B., the court effectively imputed a counter-claim against Ms. B., which the court later concluded was proven.

Had the allegations against Ms. B. been properly raised, she would have been served with a petition at least five days prior to the hearing and been given the same opportunity to defend herself as Mr. S. had to defend himself.⁶⁴ Armed with notice of the charges that the court considered against her, Ms. B. could have defended herself against the accusations by requesting pretrial disclosure, calling witnesses or introducing other evidence on her own behalf. Instead, she unwittingly relied on her strong documentary evidence in pursuit of an order of protection. Although she offered rebuttal witnesses to counter Mr. S.'s undocumented allegations, rebuttal testimony was not permitted.

At the conclusion of the family offense trial, the judge found that Mr. S. committed assault in the third degree, a family offense. He further found that Mr. S. had caused physical injury and that, therefore, aggravating circumstances existed. The judge issued a three year order of protection on behalf of Ms. B., the longest du-

64. Whether family offense charges are raised in a petition or as counter-claims, the person charged has a constitutionally based right to the notice necessary to present a defense. The FCA sets forth specific procedures for counter-claims which include service of a petition no later than five days prior to the return date. See N.Y. FAM. CT. ACT § 154(b) (McKinney 1999).

ration permissible under Article 8 of the FCA.⁶⁵ Although the court found aggravating circumstances and issued an order of protection, the judge went on to state in his oral findings of fact that the violence was “mutual.” Specifically, the court made the following findings:

1. I find it credible and that on the occasion in her — in his apartment . . . that Ms. B. did throw the chair, I find that she has acted [at] times in ways that were extremely inappropriate and — risky to the child.
2. I find that on occasion, Mr. S. also acted inappropriately in the presence of the child, and that both parents have contributed to the atmosphere of that, [sic] I think, have probably created impairment to the child.
3. I find in this case that the domestic violence was not unilateral, it was bilateral. . . .
4. The court also finds both parents are involved in a violent and unhealthy relationship and each parent is equally responsible for exposing the child to domestic violence.

Following an objection to the findings of fact because there was no petition against Ms. B., the judge responded, “I can tell you that there’s [sic] been a petition filed against your client. There is a very strong likelihood [that] mutual orders would have been considered, that is not before me, that is [moot].”

Time and again the court acknowledged that no allegations were pending against Ms. B. Nevertheless, the judge stated that if he could have, he would have issued a mutual order of protection. Luckily for Ms. B., the issuance of mutual orders of protection, without the filing of a petition, are illegal pursuant to section 841 of the FCA.⁶⁶ Mutual orders of protection are “yet another weapon” by which a batterer threatens and subdues his or her victim.⁶⁷ They send the message to the batterer that he is not responsible for his violent acts — she is. It was this message that led to legislation outlawing mutual orders of protection under these very circumstances. Nonetheless, this was the message that the court sent to Mr. S.

The impact of the decision was practically the same as if a mutual order of protection had been issued. The father and the law guardian attempted to use these findings against Ms. B. during the custody/visitation proceedings subsequently heard by a referee.

65. *See id.* § 842.

66. *See id.* § 841.

67. *See* OCA Report Supporting S-4025B, at 2 (N.Y. 1995).

Most importantly, the unauthorized findings made it impossible to use the legitimate finding against the father effectively, in the way that the Legislature intended. How could the referee give the domestic violence the weighty consideration mandated when the proceeding was clouded by the erroneous findings against Ms. B. from the family offense case?

Ms. B. appealed the findings. She argued that, although no order of protection was issued against her, she was harmed by the findings in the subsequent custody case. She argued that since she did not receive the notice of any cross-claims to which she was entitled, the findings must be stricken. Left standing, the findings could be used against her in any subsequent modification of custody or visitation proceeding.

The Appellate Division held that “in the absence of a written cross-petition by respondent as required by the FCA to provide petitioner-appellant with notice of her alleged responsibility for incidents of domestic violence the findings of the trial court on that issue were *gratuitous and unauthorized* and can be of *no dispositive effect* in any other litigation between the parties.”⁶⁸ The Appellate Division further held that the denial of the petitioner’s rebuttal witnesses was improper.⁶⁹

The custody and visitation case had already settled by the time the Appellate Division issued a decision. The mother obtained full custody and the father was granted visitation on alternate weekends from Saturday until Sunday, and one evening a week. The exchange of the child was to take place at a police precinct.

Of course, at the custody trial, the mother could have tried to re-litigate the domestic violence instead of settling, but there was a clear coercive effect that the unauthorized findings had on settlement negotiations. More importantly, if there were a trial, what weight could the referee really give to a finding against the respondent clouded by “unauthorized and gratuitous” findings about the petitioner?⁷⁰ The referee was prevented from giving weighty consideration to the findings against the respondent because there were findings against both parties. If there were a presumption imposed then the referee would have had no choice but to shift the

68. *Lorin B. v. Michael S.*, 679 N.Y.S.2d 11, 11 (App. Div. 1998) (emphasis added).

69. *See id.*

70. *Id.*

burden to the respondent to rebut the presumption.⁷¹ A presumption statute would address circumstances where each party accuses the other of violence and requires courts to determine who is the primary aggressor. Additionally, the mother had already testified at two trials by that time, one in criminal court and one in family court: how many times should she have to relive the violence?

The father was later arrested for violating the family court order of protection by going to the child's school and attempting to visit him. A jury convicted him of criminal contempt. The criminal court granted Mr. S. a conditional discharge and a three-year order of protection was issued on behalf of Ms. B. and the child, except during court ordered visitation.⁷² According to the Assistant District Attorney ("ADA") who prosecuted the case, the judge admonished the defendant not to "breathe or mutter" in Ms. B.'s direction, but denied the ADA's request for a split sentence of jail and probation.

Had the findings of fact on the family offense been limited to the mother's case, as the Appellate Division held they should have,⁷³ it is likely there would have been stricter limits placed on visitation. The father would have been held completely accountable for his behavior instead of getting the clear message that the mother was partially responsible.

B. *J. v. J.*

In this Queens County matter, there had been a severe and lengthy history of violence against the mother. She had filed several family offense petitions in Queens County Family Court in the past, all of which resulted in the respondent either consenting to the issuance of an order of protection without any admission of wrongdoing, or in a default judgement being issued against him. The family offense and custody cases were tried concurrently. The cases were before the judge for almost three years before they were resolved. The mother had previously agreed to allowing the father to have custody of the two children because she believed that if he had custody then he would stop abusing and continually stalking her. About one year after consenting to his having cus-

71. In some states the presumption may be rebutted by showing that he had completed a batterer's intervention program or extraordinary circumstances evidencing there is no risk of continuing violence. See Kurtz, *supra* note 14, at 1350.

72. The mother also filed a violation petition in the family court which was later withdrawn.

73. *Lorin B.*, 679 N.Y.S.2d at 11.

today, the children complained to her that their father was constantly yelling at them, treating them like "slaves" by forcing them to perform excessive chores in the household, and that he had hit one of them. Upon hearing her children's stories, the mother filed to modify the custody arrangement.

The allegations in the family offense case were that the respondent threatened her that "you better run for your life" and that he would "rather see the children in foster care" than with her. Her petition further alleged an incident occurring around Christmas of 1995, during which time he had choked her with a scarf in front of the children. The mother testified to years of violence, including the incidents contained in her previous family offense petitions. Two specific incidents to which she testified were that the father had hit her in the face with a two-by-four piece of wood, and that on a different occasion he had broken her ribs. Both of these assaults occurred years before the trial. It was these two most serious incidents that the judge, the law guardian and the court-appointed forensics expert found the least credible.

Mrs. J. was forced to move on several occasions because her husband constantly followed her, attempted to force his way into her apartment, and yelled and cursed at her outside her window. Each time she moved she kept her address confidential but the respondent always managed to find her.

During his interview with the probation officer ("P.O.") who was conducting the investigation and report that was ordered, the respondent *admitted* that indeed he had followed Mrs. J., and appeared at her apartment at 4:00 a.m. during the time the parties were separated. The respondent initially lied to the P.O. and denied following Mrs. J., stating, "I never follow her, she is not telling the truth." Upon further questioning by the P.O. as to how the respondent knew where Mrs. J. was living, "he smiled at the P.O. and stated, 'I followed her, I know everything about her.'" Despite evidence to the contrary, the respondent later denied in his testimony that he ever told the P.O. that he had followed Mrs. J., or that he found her at her apartment at 4:00 a.m., further undermining his credibility.

Four experts testified at the trial. The first was a school guidance counselor, a qualified social worker, with whom the children discussed witnessing specific incidents of their father's abuse against their mother. The second was the court appointed psychologist who found the mother "hysterical" in her rendering of the domestic violence. He met with the children for twenty minutes each,

and recommended that custody be awarded to the father. The third expert was a psychologist retained by the mother with court ordered funds, but who was only permitted to evaluate the mother and children. The father refused to be seen by her as she was the mother's witness. She recommended that custody be awarded to the mother and supervised visitation granted to the father. The last expert was the children's social worker from a private agency where the family had been referred after reports were made against the father to the Administration for Children's Services ("ACS"). Her testimony was primarily factual in nature regarding statements made by the father and children in counseling, and the children's psychological diagnosis of depression and anxiety. She had not seen the mother in counseling.

A certificate of conviction against the father for harassment of his current girlfriend in Connecticut was introduced into evidence. The underlying facts of that incident could not be established, but the father admitted that he and his girlfriend indeed had a fight, and that the incident occurred in front of the children. In addition, as a result of several reports to the ACS regarding the children, the father attended individual counseling for several months. These reports were also admitted into evidence. The father admitted to hitting one of the children with a belt. After determining that an "Alternatives to Violence" program was necessary, the caseworker referred the father to such a program. The father never attended, and the caseworker never followed up.

The law guardian had represented the children during the earlier proceedings and resumed his representation on the current case. Although he supported granting custody to the mother, the law guardian did not believe that the domestic violence had occurred. In his written summation, he stated that the mother's history of domestic violence was "troubling in that its details traveled beyond the realm of credibility." Although his position throughout the trial was that his clients wished to live with their mother, he never conducted his questioning of the parties in a manner that would have supported the children's position, nor did he present any evidence to that effect. The children were six and seven years old at the commencement of the case. The bases for his supporting that custody be granted to the mother were his clients' wishes and, that although the children maintained a stable residence and did well in school while living with their father, their daily routine was "littered with verbal disputes, yelling, displays of anger from the father which are intimidating and sometimes frightening to them and

sometimes result in hitting, yanking of arms, and physical pushing and restraining.” The law guardian repeatedly noted his grave concern that the mother would be unable to prevent her negative feelings about Mr. J. from interfering with the children’s relationship with their father.

At one point during the trial, the judge stated specifically that no statutory mandate to consider domestic violence was necessary because case law already required the court to do so. Ultimately though, the court held that “none of the major parties were credible.” In particular, the court found the mother “grandiose and histrionic,” and her testimony, with respect to the history of violence, incredible. The court characterized the father as a “nominalist” with “poor impulse control.”⁷⁴

In a somewhat inconsistent written opinion, the judge dismissed the family offense case, holding that the petitioner did not prove the allegations by a preponderance of the evidence. He then granted custody to the mother and issued an order of protection on behalf of her and the children under the custody docket. Although the court did not believe that the father physically abused and stalked the mother, it found that he did verbally abuse her, issuing the order of protection on that basis. The court relied heavily on its two *in camera* interviews with the children. The court further noted that the children presented conflicting statements depending on whom they were speaking to and when. The court did not give weight to one child’s report of domestic violence because he could not discern whether it was her actual experience, or whether she heard about it and incorporated it into her belief system. Custody was awarded to the mother because she provided emotional stability for the children and because the father was found to have used excessive corporal punishment on one of the children.

The court gave no indication in its written decision of how much weight, if any, was given to the harassment conviction against the father in which his current paramour was the complainant. This incident alone could have provided the basis for a change in cus-

74. It is unclear why the court referred to the respondent as a “nominalist.” The dictionary defines “nominalism” as “[t]he doctrine that abstract concepts, general terms, or universals have no objective reference but *exist only as names*.” THE AMERICAN HERITAGE DICTIONARY 845 (2d College ed. 1991) (emphasis added). The court’s statement may allude to the respondent being a father in name only. In the context of the decision, however, it seems that the judge may have instead meant “minimalist,” referring to the respondent’s attempts to minimize the allegations of domestic violence and corporal punishment.

tody.⁷⁵ Domestic violence against a partner who is not the other parent must be considered in a best interest determination.⁷⁶

Ironically, the court granted Mrs. J. more relief than she would have if the order of protection had been awarded on the family offense case. Protective orders issued pursuant to a custody action, as this one was, are in effect until the youngest child turns eighteen years of age.⁷⁷ Had the order been issued under Article 8 of the FCA, the maximum duration could only have been three years.⁷⁸

A legal presumption alone would not have changed the outcome of this case because the court simply did not believe the mother's testimony about the violence. Nonetheless, had the court applied the legislative findings, then it might have found Mrs. J.'s rendering of the violence more plausible. For example, the timing of the incidents she relayed was consistent with the fact that violence generally escalates upon separation. Also, the statements from the children as to the father's verbal abuse and corporal punishment are consistent with the finding that there is a high correlation between spousal and child abuse.⁷⁹ The testimony of her guidance counselor revealed that one of the children was exhibiting suicidal ideation. According to the mother's expert and the children's own social worker, both children were exhibiting signs of depression and anxiety. These symptoms can all arise from long-term exposure to domestic violence.⁸⁰ The mother's relinquishment of custody to the father in an attempt to avoid further violence is also consistent with typical domestic violence cases.⁸¹ Much of the evidence brought before the court was consistent with the impact of domestic violence. Viewed within the framework of the legislative findings, together with the imposition of a presumption against awarding custody to a batterer, this evidence would have compelled the court to grant custody of the subject children to Mrs. J. unless Mr. J. could rebut the presumption.

75. See *Irwin v. Schmidt*, 653 N.Y.S.2d 627, 628-29 (1997) ("Notably, evidence of the father's acts of domestic violence against his current wife demonstrated that he possesses a character which is ill-suited to the difficult task of providing his young children with moral and intellectual guidance.").

76. See *id.*

77. See N.Y. DOM. REL. LAW §240(3) (McKinney Supp. 1999).

78. See N.Y. FAM. CT. ACT § 828 (McKinney 1999).

79. See Act of May 21, 1996, ch. 85, 1996 N.Y. LAWS 273, 274.

80. See *id.*

81. See *Zorza*, *supra* note 59, at 1124.

Some of the facts of this case study parallel the Westchester case discussed earlier.⁸² In that case, the expert also found the mother "evasive, anxious and histrionic," and recommended an award of custody to the father.⁸³ That court, however, found that the mother's frequent crying "was heartfelt, not histrionic,"⁸⁴ and rejected the psychologist's recommendation in part based upon the fact that he skimmed over instances of domestic violence. In this case, the expert and the judge also found the mother "hysterical," but the court was unable to fit her behavior into a framework that incorporates the dynamics of domestic abuse. Many battered women suffering post-traumatic stress disorder are mislabeled as histrionic.⁸⁵

The court, the law guardian and the court-appointed expert all raised typical questions regarding the mother's credibility about the two most severe assaults. All three failed to understand how her injuries healed without medical treatment and therefore concluded she had lied or exaggerated. Although Mrs. J.'s cousin corroborated the incident in which Mr. S. hit Mrs. J. with a two-by-four, and Mrs. J. testified that she went to a private doctor for her broken ribs, neither the court nor the law guardian believed she could have possibly sustained such injuries and not sought treatment.⁸⁶ The law guardian further questioned why those two incidents were not specifically alleged in the mother's earlier family offense petitions. The fact that Mrs. J. had sought orders of protection and had drafted the earlier petitions without representation, that Mr. J. had a later conviction against him for harassing his current paramour and had admitted to stalking Mrs. J., and that the children were complaining of verbal abuse and corporal punishment did nothing to enhance her credibility with the court, the law guardian or the expert. These factors were not viewed together in the context of domestic abuse, instead they were perceived in a disjointed manner. The legislative history sets forth many fundamental tenets of the dynamics and impact of domestic violence on women and children. Courts should look to it for guidance in un-

82. See *E.R. v. G.S.R.*, 648 N.Y.S.2d 257 (Fam. Ct. 1996); see also *supra* notes 34-50 and accompanying text.

83. *E.R.*, 648 N.Y.S.2d at 261.

84. *Id.*

85. See PETER G. JAFFE & R. GEFFNER, CHILDREN EXPOSED TO MARITAL VIOLENCE THEORY, RESEARCH, AND APPLIED ISSUES 379 (G.W. Holden et al. eds., 1998).

86. The medical records were unavailable because the incident occurred almost six years earlier and the doctor was no longer working at the same location.

derstanding these dynamics, and apply the findings to the facts before them.

The APA recognizes that a victim of domestic violence is likely to be at a disadvantage in custody cases if the court does not consider the history of violence since "behavior that would seem reasonable as protection from abuse may be misinterpreted as signs of instability. Psychological evaluators not trained in domestic violence may contribute to this process by ignoring or minimizing the violence and by giving pathological labels to women's responses to chronic victimization."⁸⁷ This heightened disbelief of battered women, coupled with misinterpretation of their behavior are two important reasons to impose a presumption against allowing a parent who commits acts of domestic violence to have custody. Battered women need help to overcome the image they sometimes present in court or during psychological evaluations. A victim may re-enact her adaptations to living in a hostile environment when she is in court, "becoming agitated, over-emotional or stupefied into silence. Attorneys as well as judges often react negatively to such behavior, particularly if the abusive partner appears calm, collected and sure of himself."⁸⁸ This dynamic cries out for the scales of justice to be tipped in favor of protecting victims and their children, for the imposition of a presumption, in order to compensate for negative expert and judicial reactions.

Although awarded visitation on alternate weekends and holidays, Mr. J. moved to Florida shortly after losing custody and has not seen his children since.

C. *M. v. M.*

The third case was tried in Kings County. Here, the father had to be continually removed from the courtroom due to his outbursts. The visitation trial commenced shortly after the family offense trial. The father was ineligible for appointed counsel and appeared *pro se* on both cases. This case was also before the court for almost three years before its resolution.⁸⁹ The parties were divorced.

87. AMERICAN PSYCHOL. ASSOC., *supra* note 58, at 100.

88. Evan Stark, *Building a Domestic Violence Case*, in *LAWYER'S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM* (Anne M. Lopatto & James C. Neely eds., 1st ed. 1995).

89. Generally, family offense cases in New York City do not take quite that long to conclude. When the custody case is tried concurrently with the family offense case, however, they take significantly longer.

In this case, the judge made a finding of assault on the family offense case, and found aggravating circumstances based on the physical injury suffered by the mother. The court issued a three year order of protection on behalf of the mother and child, excepting court-ordered visitation. The mother testified that the respondent pushed and shoved her, kicked her, struck her in the face with a closed fist and grabbed her throat. The couple's four-year-old child witnessed this assault at the home of the child's babysitter. The mother vividly described her daughter's reaction to witnessing the assault, stating that the child was crying and screaming for her father to stop. The mother testified that she had bruises on her legs and her face was red and swollen. Although Mr. M. was arrested for this assault, the criminal case was adjourned in contemplation of dismissal and an order of protection was issued for one year. This is a common result for misdemeanor cases involving domestic violence in criminal court.⁹⁰

Mrs. M. also testified about incidents of domestic violence that occurred early in the relationship. In 1992, while pregnant with the subject child, the father threatened to burn Mrs. M. with an iron she was using at the time. After the child was born, he threatened to kill Mrs. M. and kicked at the apartment door while standing outside the apartment. During this time period, he cursed at her and called her a "whore" and a "bitch" in front of the children.⁹¹ During his cross-examination of Mrs. M., the respondent called her a "money-hungry dog" and a "lesbian."

The court took judicial notice that Mrs. M. had an order of protection in place almost every year since she first sought one in 1992. These orders were issued either on consent or as a result of the respondent's default.

The mother presented expert testimony by the child's social worker who described the specific impact the domestic violence had on the subject child, including nightmares and clingy, later aggressive, behavior. The social worker, who specialized in domestic violence, also testified to the negative effects that domestic violence has on children in general. She submitted reports to the court almost every time the case was heard, urging the court to direct Mr. M. to complete a batterer's intervention program.

90. In 1998, approximately 25% of the misdemeanor cases in Kings County were adjourned in contemplation of dismissal and orders of protection were issued for one year. See Office of Court Administration, Criminal Records Information Management Systems.

91. The mother also had an older son who had a different father.

A police officer testified to witnessing injuries, a bloody lip and swollen eye, suffered by the father's current live-in paramour. The officer testified that the girlfriend identified the respondent as the perpetrator of her injuries and that the respondent was arrested in the apartment they shared. The officer also testified that the respondent tried to resist arrest by flailing his arms. The officer's testimony was particularly relevant because Mr. M. testified as to his relationship with this particular girlfriend. He stated that she would act as a role model along with him, helping him impart his family values to his daughter.

Evidence was also presented regarding issues other than domestic violence. The father never lived with the child. When she was born, he visited a few times a week for a short time, but always in the presence of the mother or maternal grandmother. There was a long period of time during which he did not see the child at all because orders of protection were in place against him. He filed for visitation twice, but both cases were dismissed when he failed to appear.

In his closing argument, the law guardian supported a continued order of supervised visitation, and highlighted to the court the father's uncontrollable behavior in the courtroom. Although the law guardian stated that his client wished to see her father in an unsupervised setting and acknowledged that the supervised visitation had continued without major incident, he cited two reasons for making a recommendation contrary to his client's wishes. First, his client's young age rendered her unable to appropriately consider her own safety. Second, the numerous gifts her father bestowed on her, even after the court had admonished him to cease this behavior, had improperly influenced the child's thinking.

The court ordered unsupervised visitation for the father on alternate Sundays from 10:00 a.m. until 5:00 p.m.

Mrs. M. appealed the visitation ruling, arguing that the family court did not give the incidents of violence sufficient weight as required by the statute. Although the Appellate Division granted a stay of the lower court ruling, ultimately the court affirmed the order for unsupervised visitation, holding that Mrs. M. failed to show any detrimental effect on the child.⁹² Apparently, the expert witness' testimony and the law guardian's recommendation were insufficient. The Appellate Division's failure to hold that domestic violence constitutes a detrimental effect is at odds with the legisla-

92. See *Mackey v. Mackey*, 696 N.Y.S.2d 695, 695 (App. Div. 1999).

tive findings in the statute that clearly state that "a home environment of constant fear where physical or psychological violence is the means of control . . . must be contrary to the best interests of the child."⁹³ The legislative findings also enumerate specific harms to children resulting from domestic violence.⁹⁴ This issue is analyzed further in the following discussion.

IV. DISCUSSION

The enactment of a legal presumption, in addition to the strong legislative findings already in existence, would have changed the outcome in all of the cases presented. It is particularly notable that in the cases in the Bronx and in Brooklyn, the same judge who determined there was violence in the course of the family offense case later discounted his own findings in the custody case. This paradox could not have arisen if a presumption were imposed. The finding that a family offense was committed would have automatically triggered the presumption against awarding custody to the person against whom those findings were made. In Queens, had the court and the expert applied the legislative findings to the facts presented, the mother's testimony of violence would have made sense to them. It is likely that the court would have made a finding that the father committed acts of domestic violence, again triggering the presumption.

The Brooklyn and Queens cases share a long history of violence perpetrated by the respective respondents.⁹⁵ In both cases, the petitioners had prior orders of protection from the family court. The orders were issued either on consent of the respondents, or upon their default. These orders were issued prior to the enactment of the Family Protection and Domestic Violence Intervention Act of 1994,⁹⁶ and the expanded relief currently available under that law.⁹⁷ In part because of the limited relief available prior to that legislation, there was no incentive to hold a hearing. Orders were typically issued for one year with the condition that the respondent not commit a family offense against the petitioner. Thus, there had never been a hearing in either case, even though several protective orders were issued throughout the years. Quick dispositions, without due deliberation, often lead to tolerance of unacceptable be-

93. Act of May 21, 1996, ch. 85, 1996 N.Y. LAWS 273, 274.

94. *See id.* at 273-74.

95. *See supra* Parts III.B-C.

96. Ch. 222, 1994 N.Y. LAWS 2232.

97. *See* N.Y. FAM. CT. ACT §§ 841-842 (McKinney 1999).

havior. The permissive posture of the courts, the police and the community at large contributes to the continuation of intra-familial violence.⁹⁸ A hearing, on the other hand, gives weight to the issues and holds batterers accountable for their behavior. Holding a hearing would probably empower the victim to return to court if the order were violated. Furthermore, it is likely that after a hearing the court may have made an order better fashioned to "provide meaningful protection."⁹⁹ Last, a hearing would have likely prevented the extended custody trials both parties and the children had to endure if the court had appropriately considered the domestic violence when rendering its initial custody and visitation orders. At the very least, it would have limited the time period addressed in the course of the later trials.

A. Unintended Consequences on Child Protective Cases

Ironically, the legislative findings meant to help battered mothers in custody disputes are used by courts and child protective officials rely upon to pursue neglect and abuse cases against them under Article Ten of the FCA.¹⁰⁰ In these child protective cases, the Appellate Division has held that exposure to domestic violence is harmful enough to warrant a finding of neglect,¹⁰¹ without expert testimony. Regardless of any actions that they may have taken to protect their children, mothers can be found guilty of neglect or abuse under a strict liability standard, because of their "failure to protect" their children against the harm that results from exposure to domestic violence. Courts seem to require a greater showing of harm in private custody matters between parents. The appellate decision in *Mrs. M.*'s case illustrates this point.¹⁰²

It is the child protective cases, however, where state intervention is a factor, that ought to require a greater showing of harm. State control routinely results in the placement of children into foster

98. See Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of Passive Battered Mother and the 'Protected Child' Neglect Proceedings*, 58 ALB. L. REV. 1087, 1104 (1995).

99. *Leffingwell v. Leffingwell*, 448 N.Y.S.2d 799 (App. Div. 1982).

100. See N.Y. FAM. CT. ACT § 1012(f).

101. See *In re Deandre T.*, 676 N.Y.S.2d 666, 667 (App. Div. 1998) (holding that expert testimony is not required to establish that children are neglected through a pattern of domestic violence); *In re Lonell J.*, 673 N.Y.S.2d 116, 117-18 (App. Div. 1998) (stating that proof of pattern of domestic violence by the father against the mother and witnessed by their older child is sufficient to establish neglect absent expert testimony).

102. See *Mackey v. Mackey*, 696 N.Y.S.2d 695, 695 (App. Div. 1999).

care, without offering much assistance to a battered mother.¹⁰³ The standards in these two types of cases are completely different — a finding of child neglect requires proof of impairment of a physical, mental or emotional condition,¹⁰⁴ whereas custody determinations rest on the best interests of the child. Certainly if there is neglect then it may not be in the child's best interest for the neglectful parent to maintain custody, but the converse is not necessarily true. Just because it is not in the child's best interest to be in the custody of one parent does not mean that the parent is neglectful. Appellate courts, however, have held that severe domestic violence between parents in the presence of the child creates imminent danger of impairment "as a matter of common sense," and no expert testimony is required to make a determination of neglect.¹⁰⁵

In some private custody/visitation cases, the Appellate Division requires a showing of a "detrimental effect" before limiting visitation, as in Mrs. M's case discussed above.¹⁰⁶ In others, evidence of a history of domestic violence was sufficient to support an order for supervised visitation.¹⁰⁷ The court of appeals held that "absent exceptional circumstances, such as those which would be inimical to the welfare of the child . . . appropriate provision for visitation or other access by the noncustodial parent follows almost as a matter of course."¹⁰⁸ The language in the legislative history of the 1996 amendment makes it abundantly clear that domestic violence *is* inimical to the welfare of the child. Therefore, no further showing of exceptional circumstances should be necessary. The court of appeals decision in *Tropea v. Tropea*,¹⁰⁹ rejecting a three-tiered test, absent exceptional circumstances, in custody relocation cases, further calls into question whether *all* custody/visitation issues should be determined by the best interest standard.

103. See, e.g., V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 249 (1996).

104. See N.Y. FAM. CT. ACT § 1012(f).

105. *In re Athena M.*, 678 N.Y.S.2d 11, 12 (App. Div. 1998); see also *Deandre T.*, 676 N.Y.S.2d at 666; *Lonell J.*, 673 N.Y.S.2d at 116.

106. See *Mackey*, 696 N.Y.S.2d at 695; see also *Thaxton v. Morro*, 635 N.Y.S.2d 796, 798 (App. Div. 1995) ("[W]hile denial of visitation to a noncustodial parent is a drastic remedy, it will be ordered where there exist compelling reasons and substantial evidence showing that such visitation is detrimental to the children."); *Janousek v. Janousek*, 485 N.Y.S.2d 305, 308 (App. Div. 1985).

107. See *Hugo T. v. Jeannine F.*, 671 N.Y.S.2d 259 (App. Div. 1998); *In re Dejesus*, 1999 WL 1215165 (N.Y. App. Div. Nov. 1, 1999).

108. *Weiss v. Weiss*, 418 N.E.2d 377, 380 (N.Y. 1981).

109. 665 N.E.2d 145 (N.Y. 1996).

Courts have held that expert testimony is necessary to determine the degree to which a child has been affected by domestic violence, the prospect of emotional harm to the child if visitation were granted or denied and the extent to which the abuse is indicative of a general psychological problem which may pose a risk to the child.¹¹⁰ This rationale is inconsistent with appellate case law that holds domestic violence constitutes neglect, without the necessity of expert testimony.¹¹¹ Nor does it provide a rationale for the ruling in the third case where there *was* expert testimony as to both the general harm resulting from exposure to domestic violence and the extent to which the individual child was affected by witnessing the assault on her mother. In that case, the Appellate Division did not explicitly hold that expert testimony was insufficient to establish a detrimental effect, it held that the visitation decision was within the sound discretion of the family court and would “not be set aside unless it lack[ed] a substantial basis in the record.”¹¹²

Although the child protective cases hold that expert testimony is not necessary to prove that exposure to domestic violence constitutes harm,¹¹³ no appellate court has yet to hold that acts of domestic violence between parents, even in the presence of the child, are sufficient as a matter of law to support a finding of neglect. In each of the appellate cases finding neglect, evidence was introduced showing actual impairment to the child’s emotional condition as a result of the domestic violence.¹¹⁴

The imposition of a presumption against awarding custody to an abusive parent would make the law more consistent with the child protective rationale set forth in the recent appellate cases, however, the child protective cases also need to be reexamined. The answer is not simply that expert testimony should be required in child protective cases, but that the strict liability standard should be replaced with a reasonable person standard that takes into account a battered mother’s particular situation.¹¹⁵ Otherwise, there is no distinction between the victim and the abuser; both are viewed as equally liable. The unique circumstances facing battered women must be considered in child protective cases just as they must be in

110. See *ELKINS & FOSBINDER*, *supra* note 6, at 613.

111. See *Athena M.*, 678 N.Y.S.2d at 11; *Deandre T.*, 676 N.Y.S.2d at 666; *Lonell J.*, 673 N.Y.S.2d at 116.

112. See *Mackey*, 696 N.Y.S.2d at 695.

113. See *Athena M.*, 678 N.Y.S.2d at 11; *Deandre T.*, 676 N.Y.S.2d at 666; *Lonell J.*, 673 N.Y.S.2d at 116.

114. See *ELKINS & FOSBINDER*, *supra* note 6, at 78 (Supp. Mar. 1999).

115. See *Miccio*, *supra* note 98, at 1097; *Enos*, *supra* note 103, at 229.

custody cases. Battered mothers are not passive; rather, they engage in strategic, logical behavior as they attempt to stop the violence or leave. The major variable, however, the violent man, is outside their realm of control. Staying in the home, especially given the lack of resources and social supports for leaving, should never be read as accepting violence.¹¹⁶ The battered mother knows far too well that violence does not end upon separation, but tends to escalate.¹¹⁷

The 1996 amendment does not distinguish between custody and visitation. In most domestic violence cases, visitation should be supervised until the non-custodial parent can show he has completed a treatment program.¹¹⁸

The studies showing a high correlation between spouse and child abuse should not surprise those familiar with Article Ten of the FCA that provides for derivative findings on siblings in neglect cases.¹¹⁹ The rationale for derivative findings is that, if one child is being abused, it is likely the other children are also being abused, or may be soon. The burden is on the parent to show the circumstances giving rise to the findings of abuse against one child no longer exist as to the other child.¹²⁰ It is not a far leap to find that if a man is abusing his wife then he is also likely to abuse his children. Like the burden in the derivative neglect cases, the burden in custody cases should shift to the abusive parent to show that he has taken steps to remedy the condition and is no longer a threat to the physical or emotional well-being of the child.

B. Parent Education Programs

Parent education programs are designed to educate litigants about the effect of custody litigation on their children. The goal is to inform parents about the problems associated with divorce or separation and "encourage[s] parents to assume responsibility for creating a post-divorce environment in which their children are their first priority."¹²¹ These programs stress the positive influence of co-parenting where children can enjoy a supportive relationship with both parents. Research shows this is often true in non-violent

116. See SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE* (1982).

117. See Act of May 21, 1996, ch. 85, 1996 N.Y. LAWS 273.

118. See AMERICAN PSYCHOL. ASSOC., *supra* note 58, at 99.

119. See N.Y. FAM. CT. ACT § 1046(a)(i) (McKinney 1999).

120. See *In re B.B.M.*, N.Y. L.J., Feb. 16, 1999, at 25 (Fam. Ct. Feb. 16, 1999).

121. PEACE (PARENT EDUCATION AND CUSTODY EFFECTIVENESS) PROGRAM AND CURRICULUM MANUAL 1 (1995).

families.¹²² The imposition of parent education programs is an important approach for the non-battered population.

But the research on children of divorce and on children exposed to domestic violence developed as two separate branches, leading to conflicting advice for battered women.¹²³ Where domestic violence is present, a co-parenting relationship and the impact of conflict often represents a negative influence on children.¹²⁴ Referring battered women to parent education programs places them in a situation where they are advised to promote a relationship and set aside their past conflicts with a spouse who may be a danger to themselves and their children. Battered mothers and children share the same interest: Safety first. Many times it is the safety of their children that prompts battered women to seek judicial redress in the first place. "Children are a central focus in decisions battered women make about leaving the batterer or staying in the abusive relationship."¹²⁵ The best way to protect children is by assisting mothers in safety planning and holding offenders accountable for their behavior.

Suggesting to the battered woman that it may be best to share custody or allow unsupervised visitation in an effort to maintain an amiable relationship with her abuser for the sake of the child, can be very dangerous. It takes an enormous amount of courage for a battered woman to seek court intervention. Questioning her decision by referring her to a program which tends to emphasize cooperation with her batterer is counterproductive. The woman may start to believe that her batterer really should have unsupervised visitation, or even custody, as illustrated by the case of Mrs. J. and her children when she relinquished custody to her abusive husband, thinking this would prevent him from stalking her.¹²⁶ She may begin to believe that since the children really want to visit him, as Mrs. M.'s young child wanted to visit Mr. M, that she ought to withdraw her request for supervised visitation.¹²⁷ A battered mother may begin to believe that maybe the judge is right; after all, he referred her to the parent education program, and he is *the* authority figure. Society would never condone referring a rape victim to a program that sends her the message that she ought to cooper-

122. See JAFFE & GEFFNER, *supra* note 85, at 378.

123. See *id.* at 378.

124. See *id.*

125. *Id.* at 377.

126. See *supra* Part III.B.

127. See *supra* Part III.C.

ate with her assailant. Referrals to these programs are a poor substitute for judicial action. When the court fails to intervene it deepens a battered woman's sense of isolation and can be even more psychologically damaging. "The court's desire to smooth things over acts further to victimize the battered woman."¹²⁸

Cases where domestic violence is an issue must be screened out — whether the violence occurred in the past, or is ongoing. Again, violence does not end upon separation; it tends to escalate.¹²⁹ If referrals are to be made at all, they must be made on the consent of the parties, and litigants who decline to attend should not be penalized. Referrals to these programs ought to be made after the appointment of counsel so that the individual interests of the parties will be represented. As a seasoned attorney, I feel pressured when asked to consent to my client's attendance at a program. It must be almost impossible for a litigant to feel she has the option of not attending.

C. Specialized Domestic Violence Parts

Other changes in the New York City family courts will also advance the concerns of the new law, and the way domestic violence is handled in general. Chief Judge Judith Kaye has brought a new awareness to the issues facing victims by creating specialized domestic violence parts in each New York City family court.¹³⁰ Although judges assigned to these parts have no special training, the specialized parts raise the consciousness of those participating in the system to the unique problems presented by domestic violence.¹³¹ In some boroughs, the judges who sit in the specialized domestic violence parts meet regularly with advocates, court officials, district attorneys and judges from the criminal court domestic violence parts thereby promoting communication and coordination.¹³² One of the greatest needs for families experiencing violence is coordinated services.¹³³

128. Zorza, *supra* note 59, at 1120 (citing PETER JAFFE ET. AL., CHILDREN OF BATTERED WOMEN 108 (1990)).

129. See Act of May 21, 1996, ch. 85, 1996 N.Y. LAWS 273.

130. See Editorial, *Kaye Puts Order in the Court*, N.Y. DAILY NEWS, July 19, 1998, at 48.

131. See *id.*

132. See *id.*

133. See JAFFE & GEFFNER, *supra* note 85, at 394.

V. LEGISLATIVE PROPOSAL

Under the law, judges who do not understand the nature and effects of domestic violence on children and their mothers are left too much discretion.¹³⁴ The Legislature was unable to create the social change it desired because it failed to use language lawyers and judges understand. In order to overcome entrenched attitudes, legal reform must be clear. The Appellate Division also has not clearly defined exactly what constitutes "weighty consideration."¹³⁵ Only by implementing the language of a legal presumption can legislation alter individual behavior.¹³⁶

Many advocates, myself included, fear the backlash a presumption might create; batterers know far too well how to manipulate the legal system to gain further control over their victims.¹³⁷ A presumption statute must include additional language to protect victims of domestic violence. Permitting rebuttal of the presumption through evidence of a history of abuse by the other party is a necessary start. Although there will be cases in which the presumption is used against a victim of domestic violence, it is likely that the numbers of victims and their children who will benefit from the protection is far greater than the number of batterers who will succeed in manipulating the system.

The new law, although helpful, has had little impact on the way family court judges determine custody cases in which domestic violence is an issue.¹³⁸ Although the Legislature specifically rejected a rebuttable presumption against granting custody to a parent found to have committed acts of domestic violence, it is apparent that a presumption is necessary in order to meet the goals advanced by the Legislature.¹³⁹ In addition to the proof by example afforded by the three cases presented in Part III, the National Council of Juvenile and Family Court Judges,¹⁴⁰ along with the American Bar As-

134. See Kurtz, *supra* note 14, at 1359.

135. See *supra* notes 34-50 and accompanying text.

136. See David Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1154 (1995) (discussing Martha Minow, *Words and the Door to the Land of Change: Law, Language and Family Violence*, 43 VAND. L. REV. 1665 (1990)).

137. See Zorza, *supra* note 59, at 1120.

138. See discussion *supra* Part III.

139. See Kurtz, *supra* note 14, at 1365-66; Catherine F. Klein & Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 954-59 (1993).

140. See MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 401 (1994) (providing that in custody suits there is a rebuttable presumption that it is not in the best interest of the child to be in custody of the perpetrator of family violence).

sociation¹⁴¹ and the United States Congress¹⁴² all support a statutory presumption against awarding custody to an abusive parent.

CONCLUSION

Many new laws and policies are emerging in the area of domestic violence. In 1994, the Legislature passed the Family Protection and Domestic Violence Intervention Act — a complete overhaul of laws dealing with domestic violence in both the civil and criminal arena.¹⁴³ The Legislature declared that domestic violence is now a crime.¹⁴⁴ It is unfortunate that batterers are not always considered criminals when they seek custody of their children. If convicted of a stranger crime, courts are known to accord weight to the batterer's criminal history.¹⁴⁵ When the victim is the child's mother, it seems to be another story.

All the new reform in the arena of domestic violence addresses the difference between domestic violence and most other assaultive behavior — in the former, the victim and perpetrator have or had an intimate relationship. Custody determinations do not seem to account for this unique aspect. The framework in which custody decisions are made is still the same regardless of the 1996 legislation. Women are expected to cooperate with their batterers for the sake of the child. Attempts at protection can be seen as interfering with access, and interfering with access may result in an award of custody to the abusive parent.¹⁴⁶

141. See Howard Davidson, *The Impact of Domestic Violence on Children: A Report to the President of A.B.A.*, 1 (1994).

142. See H.R. Con. Res. 172, 101st Cong. (1990).

143. Family Protection and Domestic Violence Intervention Act of 1994, Ch. 222, 1994 N.Y. LAWS 2704 (granting concurrent jurisdiction between the family and criminal courts, providing for mandatory arrest, notice to victims, establishes technological advances and training for courts and law enforcement personnel).

144. See *id.*

145. See *Hyde v. Hudor*, No. 84077, 1999 WL 971927, at *2 (N.Y. App. Div. Oct. 28, 1999) (weighing respondent's plea of guilty to assault in the third degree and resisting arrest along with other factors in award of custody to petitioner); *In re Nicole F.*, 634 N.Y.S.2d 78, 79 (App. Div. 1995) ("In view of respondent's long and violent criminal history, including at least three felony convictions for assault, none of which had been disclosed or discovered prior to the agreement of the parties to release the two-year-old child to his custody . . . Family Court erred in granting respondent unsupervised visitation."). But see *Ronald F. v. Lawrence G.*, 694 N.Y.S.2d 622, 627 (Fam. Ct. 1999) (awarding custody where "[t]here is absolutely no evidence in this record which indicates that the petitioner's past criminal history has had an adverse effect upon the children").

146. See *ELKINS & FOSBINDER*, *supra* note 6, at 617; *Daghir v. Daghir*, 441 N.Y.S.2d 494 (App. Div. 1981).

The New York law on custody is helpful to children who are exposed to domestic violence, but the negative impact on children must be given more weight when determining custody and visitation. The legislative mandate to give domestic violence “weighty consideration” is not enough to overcome entrenched attitudes about domestic violence. The language of the statute should be changed to create a presumption against awarding custody to abusive parents so that judges, lawyers, social workers and psychologists will change their behavior accordingly.

