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### Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform Proposal, 26 Mich. J. Gender & L. 1 (2019)

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PROPERLY ACCOUNTING FOR DOMESTIC  
VIOLENCE IN CHILD CUSTODY CASES: AN  
EVIDENCE-BASED ANALYSIS AND REFORM  
PROPOSAL

*Debra Pogrund Stark\**  
*Jessica M. Choplin, Ph.D.\*\**  
*Sarah Elizabeth Wellard\*\*\**

ABSTRACT

*Promoting the best interests of children and protecting their safety and well-being in the context of a divorce or parentage case where domestic violence has been alleged has become highly politicized and highly gendered. There are claims by fathers' rights groups that mothers often falsely accuse fathers of domestic violence to alienate the fathers from their children and to improve their financial position. They also claim that children do better when fathers are equally involved in their children's lives, but that judges favor mothers over fathers in custody cases. As a consequence, fathers' rights groups have engaged in a nationwide effort to reform the custody laws to create a presumption of equal parenting time, with no exception when one of the parents has engaged in domestic violence. Domestic violence survivors and their advocates, however, claim that the needs of survivors of domestic violence and their children to be*

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*safe and free from further abuse are not being met in custody cases, that their claims of abuse are not being believed, and that the harm when a parent commits domestic violence against the other parent is not being recognized and addressed by judges and the family law professional upon whom they rely.*

*This Article first presents a literature review, with articulated scientific standards applied to each of the pieces of research cited in this review, on what is happening outside of court and in court relating to domestic violence and best practices for taking domestic violence into account in these child custody cases. Among the key findings from this literature review are: (1) when a parent commits domestic violence against the other parent, this can cause serious long-term harm to children, (2) custody judgments tend to favor fathers over mothers because greater weight is placed on claims of alienation than on domestic violence claims, (3) long-term harms can be mitigated by evidence-based best practices, most notably, supporting non-abusive parents in their efforts to protect themselves and their children from further domestic violence, (4) family law judges and professionals must be trained on domestic violence and its nuances, as well as how to screen for domestic violence, to adequately support them, and (5) a component of this training is learning how to distinguish mutual “situational couple violence” for which “parallel parenting” custody arrangements might be feasible, from a pattern of “coercive abuse,” where sole decision-making and primary parenting time should be ordered to the non-abusive parent, and protective restrictions on parenting time should be ordered to the abusive parent.*

*The Article then reports on a fifty-state review of custody-related laws (laws determining which parent makes major decisions relating to the child, who is allocated primary parenting time, and whether protective restrictions shall be placed on the parenting time of a parent who has engaged in domestic violence). This review found serious gaps between what evidence-based best practices suggest, and what is currently required by law in many states. These gaps in the law, including the failure of the law to require domestic violence screening and training for judges and other family law professionals, contribute to poor custody decision-making by them that compromises the safety and welfare of domestic violence survivors and their children.*

*The Article then proposes nuanced law reforms that would align custody-related laws with evidence-based best practices for taking domestic violence into account in custody cases, including creating rebuttable presumptions, burdens of proof, and definitions of domestic violence that conform with these evidence-based best practices.*

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## INTRODUCTION

There is substantial evidence that family law judges, child representatives, guardians *ad litem*, and other family law professionals are not adequately taking domestic violence into account in child custody determinations.<sup>1</sup> Survivors of domestic violence are often either not believed or are viewed as being alienating rather than protective of their children.<sup>2</sup> When a father claims that the mother is alienating him from his children, that father is much more likely to obtain the custody order they are seeking (joint or sole custody of their children), even when the courts are aware that the father has committed domestic violence or di-

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1. See *infra* Section I.

2. Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts’ Treatment of Cases Involving Abuse and Alienation*, 35 LAW & INEQ. 311, 332 (2017).

rect abuse of the children.<sup>3</sup> Mothers are much less likely to obtain the custody order they are seeking (sole custody and protective restrictions on the parenting time of the other parent) when they allege domestic violence or direct abuse of their children and the father alleges alienation.<sup>4</sup> An estimated 58,000 children a year in the United States are court ordered into unsupervised contact with physically or sexually abusive parents following divorce.<sup>5</sup> The failure to protect children and domestic violence survivors continues even when one parent has been convicted beyond a reasonable doubt of domestic violence against the other parent. According to one study, joint legal custody orders (for shared decision-making by the parents) are the most common custody outcome—primary physical custody (physical placement) is given to the domestic abuse victim in only 60 percent of the cases.<sup>6</sup> There are no explicit provisions for the safety of the victim or children (such as ordering that placement exchange occur in a protected setting) in 70 percent of these cases.<sup>7</sup> These results are particularly problematic since there is strong evidence that exposure to domestic violence often causes long-term, serious harm to children, but can be mitigated when protective factors are present or pursued.<sup>8</sup>

As discussed in Section I, to reduce the harms to children from further exposure to domestic violence, courts need to grant custody orders that empower the non-abusive parent to protect their children from further harm. As explained in Sections I and II, when the domestic violence is based upon a pattern of coercive abuse, the custody orders should provide sole legal custody (i.e., decision-making) and primary physical custody (i.e., parenting time) to the non-abusive parent, unless that parent is not fit to parent. In addition, the custody orders should contain other protective measures, such as supervised exchanges of the children, attending and completing partner abuse intervention programs, and, in some cases, supervision or suspension of parenting time.<sup>9</sup>

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3. *Id.* at 320.

4. *Id.* at 328.

5. *Id.* at 313.

6. See Adrienne Roach, *Will Data Drive Change? Research Shines a Light on the Family Law System*, COALITION CHRONICLES (End Domestic Abuse WI, Madison, Wis.), June 2018, at 9; Tony Wilkin-Gibart, *Wisconsin Family Law and Domestic Abuse: Summary of Research Findings*, COALITION CHRONICLES (End Domestic Abuse WI, Madison, Wis.), June 2018, at 11.

7. See Wilkin-Gibart, *supra* note 6, at 11.

8. See *infra* Section I.A.

9. See *infra* Section I.

So why are guardians *ad litem* and child representatives recommending, and courts ordering, sole or joint custody and unrestricted parenting time to parents when there is evidence those parents have been engaging in a pattern of coercive abuse of the other parent that seriously endangers their children's health, safety, and well-being? To what extent is this due to gender bias and a lack of training on the dynamics of domestic violence? To what extent are judges failing to order protective conditions on parenting time because they are unaware of the danger of serious harm to children when one parent engages in domestic violence against the other parent? To what extent is it due to a failure to screen for and make findings on domestic violence? How do the various custody laws among the fifty states contribute to judges failing to order necessary protections?

As discussed in Section II, the presence of domestic violence is a factor in determining the "best interests of the child" in virtually every state's custody laws.<sup>10</sup> In addition, in 21 states and the District of Columbia, there is a rebuttable presumption against sole custody or joint legal custody to a parent who has engaged in "domestic violence."<sup>11</sup> And, 34 states expressly and clearly provide that domestic violence is a basis to order conditions and restrictions on parenting time.<sup>12</sup> To what extent are the statutory pre-conditions in these laws hindering a judge's ability to grant custody orders that adequately protect children and the parent victim of domestic violence? This question, along with those above, are key questions and problems that this Article will address.

Fathers' rights groups, on the other hand, view the situation very differently. They claim that courts favor mothers over fathers,<sup>13</sup> that mothers routinely falsely allege domestic violence or child abuse as part of a "gamesmanship of divorce"<sup>14</sup> to gain an economic advantage in the divorce or parentage case,<sup>15</sup> to get custody,<sup>16</sup> or to alienate the father

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10. See AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC & SEXUAL VIOLENCE, CHILD CUSTODY AND DOMESTIC VIOLENCE BY STATE (hereinafter "ABA 50 STATE REVIEW"), <http://www.ambar.org/cdsv>; see also discussion *infra* Section II.

11. See notes 446–467 *infra*.

12. See notes 513–546 *infra*.

13. STOP ABUSIVE AND VIOLENT ENVIRONMENTS, UNEQUAL JUSTICE IN THE CRIMINAL JUSTICE SYSTEM 1, 2 (2013), <http://www.saveservices.org/wp-content/uploads/SAVE-Criminal-Justice-System.pdf>.

14. STOP ABUSIVE AND VIOLENT ENVIRONMENTS, INCENTIVES TO MAKE FALSE ALLEGATIONS OF DOMESTIC VIOLENCE 1, 2 (2010), <http://www.saveservices.org/pdf/SAVE-Incentives-for-False-Allegations.pdf> [hereinafter INCENTIVES TO MAKE FALSE ALLEGATIONS].

15. *Id.* at 3.

16. *Id.* at 4.

from the child.<sup>17</sup> Fathers' rights groups also claim that children are harmed when they are separated from their father.<sup>18</sup> Furthermore, over the past few years, fathers' rights groups such as the National Parents Organization<sup>19</sup> and Stop Abusive and Violent Environments<sup>20</sup> have used these arguments to mount a national push for law reform that would create rebuttable presumptions of equal or shared parenting time and shared decision-making, without adding an exception for situations where one parent has engaged in domestic violence or direct child abuse.<sup>21</sup> To what extent are these claims valid and these policy proscriptions prudent or reckless?

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17. Richard Gardner argues that "when bona fide abuse is present, the [parental alienation syndrome] diagnosis is not applicable," but his concept has been applied even in situations where there has been abuse. Compare Richard A. Gardner, *Family Therapy of the Moderate Type of Parental Alienation Syndrome*, 27 AM. J. FAM. THERAPY 195, 201 (1999), with Meier & Dickson, *supra* note 2, at 316–18 (2017) ("In some cases, even expert validations of child abuse and comprehensive guardian *ad litem* confirmations of the validity of the abuse claims have been insufficient to overcome the seemingly irrebuttable presumption of falsity that flows from the label 'alienator.'").
  18. STOP ABUSIVE AND VIOLENT ENVIRONMENTS, WHAT IS THE COST OF FALSE ALLEGATIONS OF DOMESTIC VIOLENCE? 1, 4 (2010), <http://www.saveservices.org/downloads/False-DV-Allegations-Cost-20-Billion>.
  19. *About NPO: Who We Are*, NATIONAL PARENTS ORGANIZATION, <https://nationalparentsorganization.org/about-npo> (last visited Dec. 29, 2018).
  20. *About SAVE*, STOP ABUSIVE AND VIOLENT ENVIRONMENTS, <http://www.saveservices.org/info/about> (last visited Dec. 29, 2018).
  21. Michael Alison Chandler, *More Than 20 States in 2017 Considered Laws to Promote Shared Custody of Children after Divorce*, WASH. POST, Dec. 11, 2017, [https://www.washingtonpost.com/local/social-issues/more-than-20-states-in-2017-considered-laws-to-promote-shared-custody-of-children-after-divorce/2017/12/11/d924b938-c4b7-11e7-84bc-5e285c7f4512\\_story.html?utm\\_term=.dfe444c72175](https://www.washingtonpost.com/local/social-issues/more-than-20-states-in-2017-considered-laws-to-promote-shared-custody-of-children-after-divorce/2017/12/11/d924b938-c4b7-11e7-84bc-5e285c7f4512_story.html?utm_term=.dfe444c72175). See, e.g., KY. REV. STAT. ANN. § 403.270(2) (Westlaw through 2018 Reg. Sess.) (creating a "presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interest of the child," although domestic violence is still listed as one of a number of factors that the court shall consider). A bill was introduced in 2017 in Illinois to create a rebuttable presumption for equal parenting time with no exception for domestic violence. H.R. 4113, 100th Gen. Assemb., Reg. Sess. (Ill. 2017). Although it was adjourned *sine die*, another bill was introduced in 2019, amending the Illinois Marriage and Dissolution of Marriage Act by "recognizing that the involvement of each parent for equal time is presumptively in the children's best interests." H.R. 185, 101st Gen. Assemb., Reg. Sess. (Ill. 2019). No definite exception is listed for domestic violence, but the bill requires the court to "acknowledge that the determination of children's best interests, and the allocation of parenting time and significant decision-making responsibilities, are among the paramount responsibilities of our system of justice, and to that end . . . recognize that, in the absence of domestic violence or any other factor that the court expressly finds to be relevant, proximity to, and frequent contact with, both parents promotes healthy development of children." H.R. 185. In 2016, although the bill was ultimate-

The goal of this Article is to present the highest-quality, objective, scientific research<sup>22</sup> available to propose law reforms to the process of how child custody decisions are made. The term “child custody,” as used throughout this Article, refers to a court order on whether one parent will be granted the primary parenting time and decision-making of their child, or whether instead, the court orders that the parents will have more of a shared arrangement on parenting time and decision-making. The term “child custody” also sometimes refers to court orders on whether there should be any conditions or restrictions ordered on a parent’s parenting time to protect the child and other parent from the danger of serious harm that could occur without these protections in place.

Section I of this Article contains a literature review<sup>23</sup> of the harms to children when one parent engages in domestic violence against the other parent; ways to mitigate this harm and reduce the likelihood of co-occurrence of domestic violence and child abuse; and other best practices for taking domestic violence into account in child custody cases. Section I also includes an evidence-based analysis of fathers’ rights groups’ claims relating to domestic violence and child custody decisions. Section II explores the extent to which best practices have been implemented by state legislatures and state supreme courts. It also identifies gaps in mandating such best practices. In Section III, this Article proposes specific reforms to the laws among the 50 states and the District of Columbia relating to child custody that implement evidence-based best practices to better protect children and survivors of domestic violence from the danger of further serious harm. Among these best practices would be distinguishing “situational couple violence” from a “pat-

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ly vetoed by the governor and did not become law, a proposal for equal time sharing was approved overwhelmingly by Florida’s state legislature. S. 668, 118th Leg. (Fla. 2016).

22. We describe, in footnotes to each cited study, the limitations of the study to put the conclusions into proper context. In some cases, the results have been used in misleading ways and we indicate this issue in the text or footnote citing it.
23. Various forms of research have been included: meta-analyses (which statistically combine the results of many studies and are often considered to be the gold-standard in research), qualitative literature reviews (which describe the research that is reported in the literature, but do not combine results together as meta-analyses do), empirical results of original studies such as experiments (studies in which variables are manipulated to see how those manipulations affect measured outcomes), correlational research (studies that take data from a variety of measures and statistically parses the relationships between the measures) with regression analyses (statistical analyses that look at the relationships between measured variables), and structural equation modeling (a statistical analysis technique that is used to analyze the structural relationships between measured variables and latent constructs).

tern of coercive abuse,”<sup>24</sup> with different kinds and levels of protections to be put in place for each.

### I. A REVIEW OF THE LITERATURE ON “DOMESTIC VIOLENCE” IN CHILD CUSTODY CASES

First, it is important to be clear on the definition of “domestic violence.” The Centers for Disease Control and Prevention (CDC) notes the importance of applying a uniform definition when studying domestic violence<sup>25</sup> and taking steps to prevent it. We adopt the CDC definition:<sup>26</sup> “The term ‘intimate partner violence’ describes physical violence,<sup>27</sup> sexual violence,<sup>28</sup> stalking<sup>29</sup> and psychological aggression (including coercive acts)<sup>30</sup> by a current or former intimate partner.” This CDC definition of intimate partner violence is gender neutral, and domestic violence happens to men as well as women, but statistics reflect that women are primarily the victims of domestic violence and men are primarily the abusers.<sup>31</sup> In addition to this precise definition of domestic violence, the CDC classifies domestic violence as a “serious, preventable

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24. See discussion of these terms *infra* Section I.

25. The CDC actually uses the term “intimate partner violence” rather than “domestic violence,” but in this Article we refer to the phenomenon as “domestic violence” unless quoting from a source that uses another phrase such as “intimate partner violence.”

26. *Intimate Partner Violence: Definitions*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/definitions.html> (last updated Oct. 23, 2018) [hereinafter “CDC Definition of DV/Intimate Partner Violence”].

27. “Physical violence includes a range of behaviors from slapping, pushing or shoving to severe acts that include hit with a fist or something hard, kicked, hurt by pulling hair, slammed against something, tried to hurt by choking or suffocating, beaten, burned on purpose, used a knife or gun.” *Id.*

28. “Sexual violence: includes rape, being made to penetrate someone else, sexual coercion (non-physically pressured sex), unwanted sexual contact (such as groping), and noncontact unwanted sexual experiences (such as verbal harassment). Contact sexual violence is a combined measure that includes rape, being made to penetrate someone else, sexual coercion, and/or unwanted sexual contact.” *Id.*

29. “Stalking: victimization involves a pattern of harassing or threatening tactics used by a perpetrator that is both unwanted and causes fear or safety concerns in the victim.” *Id.*

30. “Psychological Aggression: includes expressive aggression (such as name calling, insulting or humiliating an intimate partner) and coercive control, which includes behaviors that are intended to monitor and control or threaten an intimate partner.” *Id.*

31. See *infra* Section I.F.

public health problem that affects millions of Americans.”<sup>32</sup> Legislators, judges, and other family law professionals need to be aware of this statement from a highly regarded government agency and research center.

Second, the scientific literature distinguishes different types or patterns of domestic violence.<sup>33</sup> Several taxonomies have been proposed, but we will primarily distinguish between two types: “situational couple violence” and “coercive abuse.” “Situational couple violence” can be a dangerous type of violence that happens by and between *both* intimate partners (i.e., it is mutual) that does not involve pervasive power and control.<sup>34</sup> It is often used to influence or even coerce the partner to do something in particular situations,<sup>35</sup> but coercion does not pervade the entire relationship.<sup>36</sup> Some believe it is the type of violence most frequently observed in the population at large,<sup>37</sup> but, as explained later in this Article, this belief is based upon certain general surveys of the population that have methodological flaws.<sup>38</sup> “Coercive abuse,” by contrast, involves one intimate partner engaging in patterns of controlling behavior that are not limited to particular situations; and instead, the coercion is pervasive in the relationship.<sup>39</sup> Coercive abuse involves violence, but extends beyond violence to include at least some of the following behaviors: intimidation; emotional abuse; isolation; minimizing, denying, and blaming; use of children; asserting male privilege; economic abuse; and

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32. CDC Definition of DV/Intimate Partner Violence, *supra* note 26.

33. Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476 (2008) (conducting a literature review on the distinctions between different types of domestic violence and how differentiating among the different patterns of domestic violence clarifies apparent paradoxes in the field); *see also* GOVERNOR’S COUNCIL ON DOMESTIC ABUSE & END DOMESTIC ABUSE WIS., DOMESTIC ABUSE GUIDEBOOK FOR WISCONSIN GUARDIANS AD LITEM: ADDRESSING CUSTODY, PLACEMENT, AND SAFETY ISSUES (2017), <https://www.wicourts.gov/publications/guides/docs/galguidebook.pdf>.

34. Kelly & Johnson, *supra* note 33, at 481.

35. Evan Stark, *Commentary on Johnson’s “Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 1024 (2006) [hereinafter Stark, *Commentary on Johnson*] (conducting a literature review on the distinctions between different types of domestic violence and how domestic violence cannot be viewed as simply a combination of discrete acts, but as a pattern of abuse).

36. Kelly & Johnson, *supra* note 33, at 479.

37. *Id.* at 485.

38. *See infra* Section I.F.

39. Kelly & Johnson, *supra* note 33, at 481.

coercion and threats.<sup>40</sup> Both situational couple violence and coercive abuse are harmful to children, but as we discuss in this Article, these two different types of domestic violence can have different implications for the kinds of protections courts should order in child custody cases.

A. *Exposure to Domestic Violence Can Cause Serious, Long-Term Harm to Children, but Can Be Mitigated When Protective Factors are Present or Pursued*

Based upon our review of the evidence-based literature, we conclude that the professionals involved in making “custody”<sup>41</sup> related decisions must be better educated<sup>42</sup> as to how exposure to domestic violence and granting custody to abusive parents can cause serious, long-term

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40. ELLEN PENCE & MICHAEL PAYMAR, EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL 3 (1993).

41. We use the term “custody” to refer to parenting time and decision-making during the legal process of separation and divorce and thereafter.

42. See Peter G. Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 60 JUV. & FAM. CT. 57, 62 (2003) [hereinafter Jaffe et al., *Common Misconceptions*] (presenting qualitative case studies of 62 adult female victims and 95 child victims of domestic violence, defined by separation from an abuser). Although the sample in this study was not chosen at random, it is representative of the population at hand and adds depth to ideas addressed in the literature; see also MICHAEL S. DAVIS ET AL., N.Y. LEGAL ASSISTANCE GROUP, CUSTODY EVALUATIONS WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE: PRACTICES, BELIEFS, AND RECOMMENDATIONS OF PROFESSIONAL EVALUATORS 84–85 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf> (describing multivariate regression analysis of 69 cases). Generalizability may be an issue in that all cases were from one state (New York), and all individuals studied were represented by informed counsel specializing in domestic violence, which may exemplify best-case scenarios). DANIEL G. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS’ BELIEFS ABOUT DOMESTIC ABUSE ALLEGATIONS: THEIR RELATIONSHIP TO EVALUATOR DEMOGRAPHICS, BACKGROUND, DOMESTIC VIOLENCE KNOWLEDGE AND CUSTODY-VISITATION RECOMMENDATIONS 116–35 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf> [hereinafter SAUNDERS ET AL., CHILD CUSTODY EVALUATORS’ BELIEFS] (discussing a two-part study, including multivariate analysis of surveys of 1187 professionals in fields related to custody cases—for example, judges, attorneys, and custody evaluators—and qualitative, semi-structured case-study interviews of 24 domestic violence survivors). Extensive analysis of findings showed robust statistical power and strong validity of measures used. ELLEN PENCE ET AL., BATTERED WOMEN’S JUSTICE PROJECT, MIND THE GAP: ACCOUNTING FOR DOMESTIC ABUSE IN CHILD CUSTODY EVALUATIONS 37 (2012), <http://www.bwjp.org/resourcecenter/resource-results/mind-the-gap-accounting-for-domestic-abuse-in-childcustody-evaluations.html> (detailing qualitative case analysis of 18 domestic violence-related custody evaluation reports from five states). Although sample size may limit generalizability of findings, the inquiry nevertheless provides useful insight.

harm to children.<sup>43</sup> Common misconceptions include the notions (1) that domestic violence is typically not an issue for couples who are in the process of divorce and are disputing child custody because once they are separated the violence will not continue; (2) that amongst women who are victims, domestic violence results in eventual separation; (3) that children exposed to domestic violence are not harmed so long as they are not directly injured; (4) that domestic violence is exclusively between adults and should not play a role in deciding child custody; (5) that assessment of needs of abused women and their children, and the effects caused by the perpetrator, can be satisfactorily conducted by family courts, attorneys, and mediation or other court services; (6) that legal and mental health services for female victims and their children who are separating from the perpetrator are readily available; and (7) that solutions and community assistance when separating from the perpetrator are limited for victims of domestic violence and their children.<sup>44</sup>

A thorough understanding of domestic violence and an appreciation for its importance in child custody determinations are necessary to produce better and safer determinations for children's welfare.<sup>45</sup> Additionally, professionals need better education on the protective factors

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43. See generally AMERICAN ACADEMY OF PEDIATRICS, ADVERSE CHILDHOOD EXPERIENCES AND THE LIFELONG CONSEQUENCES OF TRAUMA (2014), [https://www.aap.org/en-us/Documents/ttb\\_aces\\_consequences.pdf](https://www.aap.org/en-us/Documents/ttb_aces_consequences.pdf) (analyzing research supporting conclusions from a 1998 study by the Centers for Disease Control and Prevention documenting the negative long-term physiological and psychological effects of adverse childhood experiences on more than 17,000 middle-class Americans). Analysis suggests that adverse childhood experiences can “contribute significantly to negative adult physical and mental health outcomes and affect more than 60 [percent] of adults.” *Id.* at 1.

44. Jaffe et al., *Common Misconceptions*, *supra* note 42, at 58–64.

45. See Megan L. Haselschwerdt et al., *Custody Evaluators' Beliefs about Domestic Violence Allegations During Divorce: Feminist and Family Violence Perspectives*, 26 J. INTERPERSONAL VIOLENCE 1694, 1695–97 (2011) (discussing an experiment in which 23 custody evaluators were interviewed, and answers were coded for analysis to determine potential variables related to outcomes of evaluations and recommendations). Although the study is insightful, concerns arise based on ambiguous operational definitions, unclear criteria, and unexplored, potentially confounding, third variables; see also Nancy S. Erickson & Chris S. O'Sullivan, *Doing Our Best for New York's Children: Custody Evaluations When Domestic Violence is Alleged*, 23 N.Y. ST. PSYCHOLOGIST 9, 10–11 (2011) (analyzing a meta-analysis of three recent studies, each of which found to a reasonable degree of scientific certainty that an evaluator's lack of knowledge can lead to harm of the child or children involved in the dispute, and that domestic violence training is essential for custody evaluators to prevent this kind of lasting damage); SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42, at 116–25.

that can mitigate these harms.<sup>46</sup> Having a protective parent is particularly important,<sup>47</sup> but too often protective parents lose custody,<sup>48</sup> while

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46. See, e.g., Norman Garnezy & Ann Masten, *Chronic Adversities*, in CHILD & ADOLESCENT PSYCHIATRY 191, 194 (Michael Rutter et al. eds., 1994); Sandra A. Graham-Bermann et al., *Factors Discriminating Among Profiles of Resilience and Psychopathology in Children Exposed to Intimate Partner Violence (IPV)*, 33 CHILD ABUSE & NEGLECT 648 (2009) (presenting findings from multivariate cluster analysis of scores obtained from a sample of 219 children exposed to intimate partner violence within the last year). The study used validated measures of functioning and demonstrated statistical reliability. Ashley E. Owen et al., *Family Variables that Mediate the Relation Between Intimate Partner Violence (IPV) and Child Adjustment*, 24 J. FAM. VIOLENCE 433, 434 (2009) (detailing results of a study of 129 low-income, African-American mothers and children). While valuable, findings should be considered in limited context as data were collected from a single demographic group, results have an unclear direction of causality, and study authors warn of the potential for an inflated Type I Error rate; Emmy E. Werner, *High-Risk Children in Young Adulthood: A Longitudinal Study from Birth to 32 Years*, 59 AM. J. ORTHOPSYCHIATRY 72 (1989) (discussing longitudinal case studies of 698 individuals born on the island of Kauai, Hawaii in 1955.) Findings may be limited in terms of generalizability outside of this cohort. EMMY E. WERNER & RUTH S. SMITH, OVERCOMING THE ODDS: HIGH RISK CHILDREN FROM BIRTH TO ADULTHOOD 173–87 (1992) (further analyzing Werner, *supra*).
47. Jack P. Shonkoff & Andrew S. Garner, *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 PEDIATRICS e236 (2012), <http://pediatrics.aappublications.org/content/pediatrics/early/2011/12/21/peds.2011-2663.full.pdf> (exploring a review of the literature, drawing conclusions from 99 sources regarding the long-term consequences of psychological and physiological wellbeing).
48. Family courts are too often denying custody to protective mothers. See INTER-AM. COMM'N ON HUMAN RIGHTS, PETITION IN ACCORDANCE WITH INTER-AMERICAN COMMISSION ON HUMAN RIGHTS at ¶¶ 6–33, 444 (2007), <http://www.protectiveparents.com/Petition-on-Human-Rights.pdf> (petitioning for consideration based on reviews of academic literature and research studies finding that current child-custody practices are inherently biased against women/mothers to the extent that they constitute violation of the Charter of the Organization of American States, a Pan-American treaty); AMY NEUSTEIN & MICHAEL LESHER, FROM MADNESS TO MUTINY: WHY WOMEN ARE RUNNING FROM THE FAMILY COURTS-AND WHAT CAN BE DONE ABOUT IT (2005) (examining cases in which mothers who believed that their children had experienced sexual abuse at the hands of their fathers were doubted, distrusted, or punished for reporting their concerns to the court); NEUSTEIN & LESHER, *supra*, at xiii–xix; Joan S. Meier, *Getting Real about Abuse and Alienation: A Critique of Drozd and Olesen's Decision Tree*, 7 J. CHILD CUSTODY 219, 228–29 (2010) (presenting anecdotes from five cases in different state court systems in which mothers and children were not believed by the courts, with the children being removed in three of the five cases); Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 244 (2009) [hereinafter Meier, *A Historical Perspective*] (presenting criticisms of both Parental Alienation Syndrome and non-syndrome feelings of alienation in light of historical evidence of the resilient nature of parent-child

abusive parents receive custody,<sup>49</sup> because courts do a poor job of evaluating evidence.<sup>50</sup> In this section, we review and assess the scientific rigor

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relationships and studies showing a lack of empirical basis for alienation claims); Joaquin Sapien, *Call in Congress for Family Court Reform*, PROPUBLICA (Sept. 13, 2016), <https://www.propublica.org/article/call-in-congress-for-family-court-reform> (calling for family court reform after court-appointed psychologist failed to recognize a father's potential for dangerousness and failed to limit unsupervised visitation, despite the mother's pleas to the contrary and allegations of abuse, and the father drowned all three children during an unsupervised custody visit); Joaquin Sapien, *For New York Families in Custody Fights, a 'Black Hole' of Oversight*, PROPUBLICA (Mar. 17, 2017), <https://www.propublica.org/article/for-new-york-families-in-custody-fights-a-black-hole-of-oversight> (detailing an individual case study example in which injustice and a destructive aftermath arose from a court-appointed evaluator's lack of professional oversight or established professional standards for making custody determinations); Laurie Udesky, *Custody in Crisis: How Family Courts Nationwide Put Children in Danger*, 100REPORTERS (Dec. 1, 2016), <https://100r.org/2016/12/custody-2> (describing three cases wherein abusers gained custody over mothers despite objective evidence of child sexual and child abuse); GERALDINE B. STAHL ET AL., ABUSE ALLEGATIONS IN CUSTODY DISPUTES: THE EXPERIENCE OF PROTECTIVE MOTHERS (2011), <https://www.cprotectiveparents.org/research> (follow hyperlink under "California Protective Parents Association" section) (last visited Apr. 28, 2017) (examining survey of 66 mothers and one father, self-selected as "protective parents," of whom 98 [percent] felt discredited for trying to protect their children, and over 60 [percent] lost custody); Jennifer Backer, *The Strange Advocacy for "Parental Alienation Syndrome,"* PSYCHOL. TODAY: FOR THE LOVE OF WISDOM (Dec. 17, 2015), <https://www.psychologytoday.com/us/blog/the-love-wisdom/201512/the-strange-advocacy-parental-alienation-syndrome> (expounding on the idea that courts' consideration of so-called Parental Alienation Syndrome poses a risk to children as it lacks sufficient basis for reliability and there are "no studies that test the effectiveness of their recommended treatments").

49. See Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL. & L. 657, 668–71 (2002) [hereinafter Meier, *Domestic Violence*] (examining two case studies in the context of current literature). Courts are too often awarding custody to abusive fathers. See Sharon K. Araji & Rebecca L. Bosek, *Domestic Violence, Contested Child Custody and the Courts: Findings from Five Studies*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 6-2 to 6-31 (Mo Therese Hannah & Barry Goldstein eds., 2010) (exploring ideas garnered from small-scale survey experiment involving 34 victims of domestic violence from the Alaska court systems and meta-analysis of similar, related studies conducted in other states; alone, each study's generalizability may be limited, but in considered in conjunction they provide useful qualitative insight); SALLY F. GOLDFARB, UNITED NATIONS DIV. FOR THE ADVANCEMENT OF WOMEN, THE LEGAL RESPONSE TO VIOLENCE AGAINST WOMEN IN THE UNITED STATES OF AMERICA: RECENT REFORMS AND CONTINUING CHALLENGES 9 (2008), [http://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2008/expertpapers/EGMGPLVAW%20Paper%20\(Sally%20Goldfarb\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20(Sally%20Goldfarb).pdf) ("[I]t remains extremely rare for a court to deny a father access to his children, even when he has committed domestic violence."); LUNDY BANCROFT ET AL., THE BATTERER AS PARENT:

of the studies and data and discuss how to implement measures that protect children.

The American Academy of Pediatrics has documented that a parent committing domestic violence against the other parent in front of the child is a form of child abuse<sup>51</sup> that significantly contributes to negative physical and mental health outcomes in adulthood.<sup>52</sup> A home with daily violence wherein one partner (most commonly a man in cases of coercive abuse)<sup>53</sup> physically or verbally assaults the other partner (most commonly a woman)<sup>54</sup> in front of his or her children turns those children into victims of that violence as well.<sup>55</sup> Such environments negatively affect children who grow up in them,<sup>56</sup> and children who witness more family violence tend to suffer as a result.<sup>57</sup> However, child adjustment to domestic violence depends on factors associated with the child,

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ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 189–90 (2nd ed. 2012); Evan Stark, *Rethinking Custody Evaluation in Cases Involving Domestic Violence*, 6 J. CHILD CUSTODY 287, 296–99 (2009) [hereinafter Stark, *Rethinking Custody*] (reviewing literature analyzing outcomes and responses of family courts in domestic violence cases).

50. See Stark, *Rethinking Custody*, *supra* note 49, at 290 (noting that victims and children are not believed, even when police corroborate abuse).
51. See generally AMERICAN ACADEMY OF PEDIATRICS, *supra* note 43, at 1–5.
52. *Id.*
53. See *infra* Section I.F. for analyses of this gender difference.
54. According to statistics from 2015, in the United States, one out of every four women and one out of every ten men experienced “sexual violence, physical violence, and/or stalking by an intimate partner and reported an intimate partner violence-related impact during their lifetime.” CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF - UPDATED RELEASE 7 (2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf> (detailing findings from the National Intimate Partner and Sexual Violence Survey (NISVS) obtained from 10,081 completed random-digit-dial telephone surveys conducted in 2015). Although statistical validity analyses were performed to evaluate findings and reported data were found to be reliable, the findings should be considered in light of the self-selective nature of telephone surveys and the likelihood of a lowered response-rate or non-response bias due to factors such as stigma, current or continuing instances of abuse and trauma, and/or extant concerns related to safety. *Id.* at 12–14. Approximately 36.4 percent of women, or 43.6 million women, have experienced some type of intimate partner violence in their lifetime, with physical violence by an intimate partner being the most common type. *Id.* at 8. More than 36.4 percent of women reported “experienc[ing] psychological aggression by an intimate partner during their lifetime.” *Id.* at 7.
55. See AMERICAN ACADEMY OF PEDIATRICS, *supra* note 43.
56. See Roberta Hibbard et al., *Psychological Maltreatment*, 130 PEDIATRICS 372, 373–74 (2012) (reviewing the literature from 49 sources, placing emphasis on the recognition and identification of psychological maltreatment as a form of ACE, and the potential negative consequences it can have on child development).
57. Graham-Bermann et al., *supra* note 46.

the mother, and the family as a whole, as parental functioning is critical to the child's well-being.<sup>58</sup> Children who are more resilient tend to experience less violence, have fewer worries and fears, and tend to have mothers with more stable emotional health and better parenting skills.<sup>59</sup> At the other extreme, devastatingly, sometimes these children are murdered by the abusive parent.<sup>60</sup> As a result, contrary to current practices,<sup>61</sup> reducing children's exposure to domestic violence within a home needs to be one of the most important goals in determining custody. In determining what is in the best interests of the child, this should come first when considering whether to require protective measures that restrict or deny parenting time based upon a judgment that it would cause "serious endangerment" to the child's welfare. Courts are not doing this well within the United States<sup>62</sup> or internationally.<sup>63</sup> These circumstances

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58. *Id.*

59. *See id.*

60. *See* R. Dianne Bartlow, *Judicial Response to Court-Assisted Child Murders*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 12-1 to 12-42 (Mo Therese Hannah & Barry Goldstein eds., 2016) (presenting interviews with family court judges across 21 states, with emphasis on jurisdictions that had experienced child homicide at the hand of a parent who had been accused of domestic violence); Barry Goldstein, *What Can Be Learned From Court-Assisted Murder Cases?*, 5 FAM. & INTIMATE PARTNER VIOLENCE 369, 370 (2013) (analyzing errors in management and consideration of family court cases and the potential for this mishandling to have devastating consequences for the children whom the process is intended to protect); *U.S. Divorce Child Murder Data*, CTR. FOR JUDICIAL EXCELLENCE, <http://www.centerforjudicialexcellence.org/cje-projects-initiatives/child-murder-data> (last visited Jan. 12, 2019) (reviewing archival data collected by the Center for Judicial Excellence, finding that at least 665 children have been murdered by a parent since 2008). Cases were included based on news coverage mention of "divorce," "separation," "custody," "visitation," and/or "child support." *Id.*; *see also* 12/5/16 Press Release: 58 Children Murdered by a Parent Who Could Have Been Saved, CTR. FOR JUD. EXCELLENCE (Dec. 5, 2016), <http://www.centerforjudicialexcellence.org/2016/12/05/12516-press-release-58-children-murdered-by-a-parent-who-could-have-been-saved> (recounting 44 cases, including 58 children from across the United States between 2008 and 2016 in which the children were killed during court-ordered unsupervised contact with a parent, when the court had been made aware of allegations of that parent's dangerousness).

61. *How Many Children are Court-Ordered into Unsupervised Contact with an Abusive Parent after Divorce?*, LEADERSHIP COUNCIL ON CHILD ABUSE & INTERPERSONAL VIOLENCE (Sept. 22, 2008), <http://www.leadershipcouncil.org/1/med/PR3.html> (estimating that each year, 58,500 children are put at risk of physical or psychological harm during court-ordered unsupervised visitation with an abusive parent). While useful for illustrative purposes, the report uses a formula of estimations to reach a best-guess. STAHLY, *supra* note 48.

62. Jaffe et al., *Common Misconceptions*, *supra* note 42, at 57–58.

63. International Association of Victims of Parental Alienation, FACEBOOK (last visited Apr. 3, 2017), <https://www.facebook.com/groups/249283921943335>.

highlight the dire need to support parents who are making efforts to protect their children.<sup>64</sup>

In addition to seeking to reduce future domestic violence, courts need to consider protective factors that can reduce the harm to children who have already been exposed to domestic violence. Children tend to be harmed less when they are protected by a supportive, non-abusive parent<sup>65</sup> or have parents with good parenting skills.<sup>66</sup> Other factors such as family support; secure attachment to other caregivers; living in a supportive, safe, and close community;<sup>67</sup> and not experiencing other forms of trauma<sup>68</sup> contribute to children enduring less harm. These protective factors need to be considered in custody evaluations and evaluator recommendations.

Judges and other professionals (child representatives, guardians *ad litem*, or custody evaluators) cannot rely on intuition in these cases, as many aspects of domestic violence are counterintuitive.<sup>69</sup> Instead, those

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64. See Stark, *Rethinking Custody*, *supra* note 49, at 297–98; Lundy Bancroft, *Organizing in Defense of Protective Mothers: The Custody Rights Movement*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 17-1 to 17-13 (Mo Therese Hannah & Barry Goldstein eds., 2010) (qualitatively investigating the underpinnings of the parents' rights/custody rights movement which undermine women's success in obtaining favorable outcomes in family court determinations).
65. Shonkoff & Garner, *supra* note 47.
66. Abigail H. Gewirtz, David S. DeGarmo & Amanuel Medhanie, *Effects of Mother's Parenting Practices on Child Internalizing Trajectories Following Partner Violence*, 25 J. FAM. PSYCHOL. 29 (2011) (detailing correlational research with regression analyses of findings from a short-term, longitudinal study of 35 mother-child pairs—with eligibility defined as mother's exposure to physical intimate partner violence within the past one to three weeks, where her child witnessed the incident—including interviews and parent-child observational task). Constructs were measured with validated instruments and results of prediction models use estimates with robust standard errors giving confidence to the reliability of findings. Graham-Bermann et al., *supra* note 46.
67. Garmezy & Masten, *supra* note 46; Graham-Bermann et al., *supra* note 46; Owen et al., *supra* note 46; Werner, *supra* note 46; Werner & Smith, *supra* note 46.
68. Graham-Bermann et al., *supra* note 46.
69. See Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219, 242–50 (1992); see generally Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733 (2002) (documenting situations in which incorrect intuitions on the dynamics of domestic violence, its causes, and impacts, affect judicial decisions on orders of protection and other legal decisions involving domestic violence); Debra Pogrund Stark & Jessica M. Choplin, *Seeing the Wrecking Ball in Motion: Ex Parte Protection Orders and the Realities of Domestic Violence*, 32 WIS. J.L. GENDER & SOC'Y 13 (2017) (review of how incorrect

in charge of making custody decisions need to rely upon well-designed, validated research. They need to be educated and trained on practices informed by this greater depth of validated understanding, rather than practices from poor intuition.<sup>70</sup> Thus, these professionals must be able to determine whether studies have been well-designed. For example, professionals should understand how science accumulates knowledge over time and give particular attention to meta-analyses that synthesize and assemble evidence accumulated by many scientific studies. They should also examine the definitions used in studies and how those definitions can impact policy implications; they must be aware when previous research has been invalidated (i.e., Parent Alienation Syndrome)<sup>71</sup> and must reject incorrect assumptions that are often held by the public at large (such as the belief that courts favor mothers).<sup>72</sup> Finally, they

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intuitions about domestic violence affect decisions on whether to grant emergency orders of protection and the cognitive psychology behind this).

70. There are many misconceptualizations and misunderstandings of domestic violence that lead to poor decision-making by courts. See Jaffe et al., *Common Misconceptions*, *supra* note 42 (finding that domestic violence is often overlooked by family courts in the decision-making process); Stark, *Rethinking Custody*, *supra* note 49, at 290.
71. DIANE M. PRANZO, CHILD CUSTODY AND VISITATION DISPUTES IN SWEDEN AND THE UNITED STATES: A STUDY OF LOVE, JUSTICE, AND KNOWLEDGE 67–83 (2013) (comparing the effects of cultural and social settings of the U.S. and Sweden, which use comparable legal standards in contested family court cases, on the perception of cases involving child custody and/or visitation rights); Rita Berg, *Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts*, 29 L. & INEQ. 5, 24–25 (2011) (exploring archival data from Minnesota courts to determine the effect of consideration of the concept of Parental Alienation Syndrome on family court cases decided by Minnesota court systems). Analysis of data reflects an “anti-mother gender bias.” However, it appears that the sample size is low, and data have not been analyzed to determine validity, reliability, or general applicability. Meier & Dickson, *supra* note 2, at 311 (reviewing literature on the concept of “Parental Alienation,” and exploring a multivariate empirical-mapping analysis of the ways in which family court systems have used it in custody determination cases). Study authors caution, however, that cases analyzed were selected because they had all progressed to the appeals process, which often does not occur in child custody cases, and thus the research may not be representative of the majority of family court cases (for example, these cases tend to skew towards the party with the financial resources to mount appeals and thus favor men). Additionally, findings were derived from coding of variables and conclusions completed by a single researcher rather than from a composite of scores by two or more independent researchers, potentially skewing results towards that lone researcher’s inevitable biases.
72. In fact, courts tend to favor fathers. See BATTERED MOTHERS’ TESTIMONY PROJECT, WELLESLEY CENTERS FOR WOMEN, BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS 3 (2002), <https://www.wcwoonline.org/vmfiles/execsumm4.pdf>. This report discusses a four-part study of one-to-one interviews of 40 battered mothers who had experienced family court litigation; analysis of written

must look beyond veneers of friendliness.<sup>73</sup> Knowing how to correctly evaluate studies ensures that professionals are relying on validated bodies of knowledge. There have been a great number of previous psychological research studies on the effects of domestic violence, child well-being, and child custody; however, not all of that research has equal validity. For instance, retrospective self-report studies are often conducted in this field of research, but findings must be taken in light of concerns about

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surveys completed by 31 advocates for battered women; five focus groups, comprising a total of 23 advocates and survivors of domestic violence, exploring the possible effects of demographic considerations on outcomes; and one-hour interviews of 16 individual state actors selected based on either identification by the women and/or advocates, or on the fact that they possessed specific knowledge of the family court system. *Id.* at 4. The study examined incidents in which the Massachusetts family courts violated basic human rights standards, and found that fathers who seek custody are favored over women because “mothers are held to a different and higher standard than fathers.” *Id.* at 3. Although the study is valuable, its authors note that the results are not corroborated for statistical validity, and also may not be generalizable outside of the state of Massachusetts. *Id.* at 5. Mary A. Kernic et al., *Children in the Crossfire: Child Custody Determinations among Couples with a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991, 1017 (2005) (detailing a retrospective cohort study of 324 cases with intimate partner violence and 532 cases without intimate partner violence that examined the effects of a history of intimate partner violence and determination of child custody agreements, as moderated by substantiation of the history of intimate partner violence (defined by a history of police reports, court records related to protection orders filed prior to the dissolution, and/or a notation of allegations or substantiation in the dissolution case file)). The ability to generalize findings, however, may be limited based on the fact that the study population consisted of individuals specifically from Seattle, where the male partner was the perpetrator of intimate partner violence and the female partner was the victim. MASS. SUPREME JUDICIAL COURT, GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS, *reprinted in* 24 NEW ENG. L. REV. 745, 748, 825 (1990) (reporting on The Gender Bias Study of the Court System in Massachusetts, an official report from the Massachusetts Supreme Judicial Court, which found that, despite the pervasive belief that mothers are favored in custody disputes, “[f]athers who actively seek custody obtain either primary or joint physical custody over 70 [percent] of the time”) (emphasis in original).

73. Allison C. Morrill et al., *Child Custody and Visitation Decisions When the Father has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1092, 1101 (2005) (discussing correlational research with regression analysis, finding that the presumption against custody to batterers was superseded by a heuristic in favor of the “friendly parent”). Scores were obtained from examination of 393 custody and visitation orders across six states in situations where the father had perpetrated intimate partner violence against the mother, as well as from a survey of 60 judges selected for having entered those orders. *Id.* at 1076. Extensive analysis of the relationships suggests statistical significance, although several of the measures used to survey the judges in this study have yet to be empirically validated.

the accuracy of the individual's report.<sup>74</sup> The goal of this Section is to identify the best available information about issues related to custody in cases that involve domestic violence, and analyze the policy implications and best practices for professionals suggested by that research.

### 1. Scientific Standards for Inclusion of Articles in this Literature Review

This Article presents the highest-quality objective, scientific research available. There are a few instances, however, where there are insufficient objective scientific studies on a topic, and we rely on preliminary scientific evidence or expert opinion gained over many years of working in the field. To address concerns over the robustness of the research, we have included notes on its quality in our footnotes. The best evidence for conclusions comes from meta-analyses that mathematically capture the results of many experiments and represent the gold standard in the field of psychology. This is followed by qualitative literature reviews.<sup>75</sup>

We also cite the empirical results of original studies such as experiments,<sup>76</sup> correlational research<sup>77</sup> with regression analyses,<sup>78</sup> and structural equation modeling.<sup>79</sup> For every study cited, we note whether it is (1) a meta-analysis; (2) a qualitative literature review; (3) an experiment; (4)

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74. Retrospective study designs are those in which “participants are required to evaluate exposure variables retrospectively using a self-reporting method, such as self-administered questionnaires.” Alaa Althubaiti, *Information Bias in Health Research: Definition, Pitfalls, and Adjustment Methods*, 9 J. MULTIDISCIPLINARY HEALTHCARE 211, 213 (2016).

75. Anthony Petrosino & Julia Lavenberg, *Systematic Reviews and Meta-Analyses: Best Evidence on “What Works” for Criminal Justice Decision Makers*, 8 W. CRIMINOLOGY REV. 1 (2007).

76. Experiments are studies in which variables are manipulated to see how those manipulations affect measured outcomes. See C. JAMES GOODWIN, *RESEARCH IN PSYCHOLOGY: METHODS AND DESIGN* 522 (4th ed. 2005).

77. Correlational research involves taking two or more variables and statistically parsing the relationships between them. KENNETH BORDENS & BRUCE ABBOTT, *RESEARCH DESIGN AND METHODS: A PROCESS APPROACH* 28 (8th ed. 2013).

78. Regression analysis is a statistical analysis that looks at the relationships between measured variables. GOODWIN, *supra* note 76, at 527.

79. Structural equation modeling is a method of multivariate statistical analysis which uses multiple regression analyses and factor analyses to analyze structural relationships between measured and latent variables, and to evaluate the dependencies between, and independent of, the factors. See TENKO RAYKOV & GEORGE A. MARCOULIDES, *A FIRST COURSE IN STRUCTURAL EQUATION MODELING* 1–2 (2000).

correlational research with regression analyses or structural equation modeling;<sup>80</sup> or (5) a case study.<sup>81</sup>

For literature reviews, we identify the number of studies evaluated. For original research such as experiments, correlational research, and case studies, we note the sample size and characteristics of the sample. We assess whether the sample is appropriate for the research question. We note operational definitions where appropriate. For example, if our analysis relied upon a study of victims/survivors, we note whether this classification was based upon self-identification or was there external verification (i.e., police calls to 911). If our analysis relied upon correlational research with all of the well-known shortcomings of correlational research, we note these shortcomings and whether the researchers collected the data themselves or whether it was archival,<sup>82</sup> as well as the source of the archival information (i.e., court cases). We note odd operational definitions, especially if they might have biased the conclusions. For example, we would be particularly skeptical of research that would classify cases where accusations of abuse could not be verified by independent, objective evidence as instances where the accused abuser was exonerated. We note any violations of established research design standards, confounding variables in experiments, obvious third variable issues in correlational research for which the researchers did not control, and validity issues (internal validity,<sup>83</sup> external validity,<sup>84</sup> face validity,<sup>85</sup> construct validity,<sup>86</sup> study mortality issues,<sup>87</sup> etc.). Lastly, we note any concerns over statistical significance and reliability.<sup>88</sup>

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80. Structural equation modeling is a statistical analysis technique used to analyze the structural relationships between measured variables and latent constructs. *Id.* at 1.

81. A case study discusses a specific instance of something or a small subset. These studies often serve to demonstrate the existence of a phenomenon without necessarily generalizing that phenomenon to the broader population. GOODWIN, *supra* note 76, at 520.

82. Both researcher-collected and archival data have benefits. When researchers collect their own data, often more is known and reported about the data collection processes, which can affect how data are interpreted. Archival data sets are often larger, which by the law of large numbers should produce more accurate means. *Id.* at 336–39.

83. Internal validity is a measure indicating that an experiment successfully isolated the factor of interest, meaning that no other variables could have created the observed effects on the dependent measures. *Id.* at 524.

84. External validity means that the study results apply broadly to the general population of interest, not just to the particular circumstances of that study. *Id.* at 522.

85. Face validity “occurs when a measure appears to be a reasonable measure of some trait.” *Id.*

86. Construct validity “occurs when the measure being used accurately assesses some hypothetical construct” and “refers to whether the operational definition used for independent and dependent variables are valid.” *Id.* at 520–21.

## 2. The Effects of Child Exposure to Domestic Violence

***Emotional effects.*** A common myth associated with domestic violence is that if children are merely exposed to domestic violence, and not physically harmed, there will be no serious, long-term adverse effects on these children. This notion is false. Children who witness domestic violence can suffer serious emotional symptoms including internalizing symptoms (e.g., anxiety, depression, fear, shame, social withdrawal, somatic complaints, bedwetting, poor concentration) and externalizing symptoms (e.g., aggression, impulsivity, bullying, criminal behaviors).<sup>89</sup> Several meta-analyses have been conducted that discuss the effects on children who witness domestic violence between parents.<sup>90</sup> Two studies led by CDC researchers found long-term negative effects on people who had adverse childhood experiences. The first, a study by Shanta R. Dube, found that there is a greater likelihood of adolescent substance use.<sup>91</sup> The second, a study led by Daniel P. Chapman, found a greater

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87. Sometimes participants leave a study early, and results can be explained by which participants left rather than any differences in independent or predictor variables. KENNETH S. BORDENS & BRUCE B. ABBOTT, *RESEARCH DESIGN AND METHODS: A PROCESS APPROACH* 265–66 (4th ed. 1999).
88. Sometimes results can happen by chance. Statistical analyses measure the likelihood that the obtained results were due to chance; if it is unlikely that the results are due to chance, then it is likely that they were due to differences in the independent or predictor variables. *Id.* at 442–44.
89. Jacquelyn C. Campbell & Linda A. Lewandowski, *Mental and Physical Health Effects of Intimate Partner Violence on Women and Children*, 20 *PSYCHIATRIC CLINICS N. AM.* 353, 361–62 (1997), [https://doi.org/10.1016/S0193-953X\(05\)70317-8](https://doi.org/10.1016/S0193-953X(05)70317-8).
90. See, e.g., Sarah E. Evans et al., *Exposure to Domestic Violence: A Meta-Analysis of Child and Adolescent Outcomes*, 13 *AGGRESSION & VIOLENT BEHAV.* 131, 131 (2008) (analyzing the results of six studies demonstrating a significant relationship between a child's exposure to domestic violence and his or her internalizing and externalizing of trauma symptoms); Stephanie Holt et al., *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature*, 32 *CHILD ABUSE & NEGLECT* 797, 797 (2008) (reviewing findings from 11 years of studies indicating that children exposed to domestic violence in the home are at greater risk for behavioral and emotional problems); Katherine M. Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 *J. CONSULTING & CLINICAL PSYCHOL.* 339, 339 (2003) (discussing findings from 118 studies demonstrating a significant relationship between exposure to domestic violence and harm to children); David A. Wolfe et al., *The Effects of Children's Exposure to Domestic Violence: A Meta-Analysis and Critique*, 6 *CLINICAL CHILD & FAM. PSYCHOL. REV.* 171, 171 (2003) (detailing indications from 41 studies finding that children's exposure to domestic violence is significantly correlated with emotional and behavioral problems).
91. Shanta R. Dube et al., *Adverse Childhood Experiences and the Association with Ever Using Alcohol and Initiating Alcohol Use during Adolescence*, 38 *J. ADOLESCENT HEALTH* 444, 444 (2006) (examining a retrospective self-report cohort-study of

risk of depression among adults who reported witnessing their mother being abused as children.<sup>92</sup>

Studies have found a relationship between adverse childhood experiences and emotional and physical health problems in adulthood.<sup>93</sup> Adverse childhood experiences include events such as children witnessing their mother being treated violently. This can result in physical and emotional consequences for the child when the body's stress response is repeatedly triggered by such events, and there is an absence of availability of adult protection.<sup>94</sup> For example, adverse childhood experiences have been associated with health concerns and lower life satisfaction, more frequent symptoms of depression and anxiety, tobacco product use, problematic alcohol use,<sup>95</sup> behaviors that place adults at risk for HIV infection, disabilities caused by health problems, as well as diabetes, heart attack, stroke, and heart disease.<sup>96</sup>

***Physiological effects.*** Biological responses to stress caused by domestic violence are not only immediately harmful to the child's health,

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8,417 adults across California who completed surveys about adverse childhood experiences). While the results seem to indicate a negative correlation between the number of adverse childhood experiences experienced and the age at which the individual first consumed alcohol, the study fails to account for confounding third variables outside of the family environment which may influence early introduction to alcohol.

92. Daniel P. Chapman et al., *Adverse Childhood Experiences and the Risk of Depressive Disorders in Adulthood*, 82 J. OF AFFECTIVE DISORDERS 217, 221 (2004) (examining a retrospective self-report cohort-study of 9,508 adults in California and found an increased risk of depressive disorders among those whose mothers had been battered).
93. Jennifer A. Campbell et al., *Associations Between Adverse Childhood Experiences, High-Risk Behaviors, and Morbidity in Adulthood*, 50 AM. J. PREVENTIVE MED. 344, 344–46 (2016) (analyzing data from the Behavioral Risk Factor Surveillance System, a telephone survey of 48,526 adults across five states, conducted by the CDC). Relationships between scores measuring ACE and risky behavior or comorbidity in adulthood were analyzed using multiple logistic regression analysis, controlling for covariates and relevant confounding variables. *Id.* at 344. Joshua Patrick Mersky et al., *Impacts of Adverse Childhood Experiences on Health, Mental Health, and Substance Use in Early Adulthood: A Cohort Study of an Urban, Minority Sample in the U.S.*, 37 CHILD ABUSE & NEGLECT 917, 917–20, 923 (2013) (reviewing adult survey data obtained from 1,142 participants (74.2% of all participants) from the Chicago Longitudinal Study, which tracks development of a cohort of individuals from low-income, urban families, born between 1979-1980). The main effects were analyzed with multivariate logistic regression and OLS regression, and the findings are statistically robust. *Id.* at 917. However, despite the longitudinal nature of the CLS study, adverse childhood experiences and outcomes were measured cross-sectionally for each individual, which means that results are “more safely interpreted as correlational than as causal.” *Id.* at 923.
94. Campbell et al., *supra* note 93 at 344; Mersky et al., *supra* note 93, at 917.
95. Mersky et al., *supra* note 93, at 917.
96. Campbell et al., *supra* note 93, at 345.

but the effects can also become chronic.<sup>97</sup> Adult health conditions, such as heart disease, obesity, and substance use disorders have been linked to adverse childhood experiences.<sup>98</sup> The release of the stress hormone, cortisol, is associated with adverse health effects among children who witness domestic violence.<sup>99</sup> The “fight or flight” response can be activated

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97. Shonkoff & Garner, *supra* note 47, at 235.

98. *Id.* at 237.

99. See Leah C. Hibbel et al., *Maternal Sensitivity Buffers the Adrenocortical Implications of Intimate Partner Violence Exposure During Early Childhood*, 23 DEV. & PSYCHOL. 689 (2011) (detailing a longitudinal study of 1,102 mother-infant pairs to examine children’s levels of cortisol (measured from saliva samples collected after an activity intended to stimulate an emotional response) between infancy and early childhood, with relation to intimate partner violence exposure). Findings indicate that children exposed to domestic violence did not have a normal decrease in cortisol reactivity after exposure to a stressful event and were not able to recover as quickly as compared to children who had not been exposed to violence in the home. *Id.* at 689. Limitations include the fact that this study examines only the epidemiological impact without relation to other potential extant psychobiological or psychological factors, and therefore many not afford a look at the whole picture. *Id.* at 698–99. On the other hand, the sample used in this study was representative of the population from which it was drawn, a lack of which presents a concern for generalizability in similar studies. *Id.* at 691. Melissa Sturge-Apple et al., *Interparental Violence, Maternal Emotional Unavailability, and Children’s Cortisol Functioning in Family Contexts*, 48 DEV. PSYCHOL. 237 (2012) (discussing findings from a study of 201 sets of mother-toddler dyads who had been exposed to domestic violence, in order to explore the relationships between the child’s adrenocortical response stimulated by emotional stress (as measured by salivary tests on three separate occasions), domestic violence (as measured by maternal report), and the mother’s emotional availability to the child (as measured by maternal report and objective observer evaluation)). Findings indicate that domestic violence and maternal emotional unavailability are both correlated with a child’s experienced adrenocortical response. *Id.* at 237. However, since the present inquiry only examined the mother-child relationship and does not take into account mediating or moderating effects of the child’s relationship with his or her father, conclusions cannot be generalized to instances where the father is the victim of domestic violence. Jennifer H. Suor et al., *Tracing Differential Pathways of Risk: Associations Among Family, Adversity, Cortisol, and Cognitive Functioning in Childhood*, 86 CHILD DEV. 1142 (2015) (discussing continued assessment of Sturge-Apple et al., *supra*, in the context of a prospective longitudinal study of 201 mother-child pairs where data were collected at 3 annual intervals). Findings suggest that exposure to greater amounts of domestic violence and maternal emotional unavailability are both predictive factors of cortisol reactivity, which is in turn correlated with lower levels of cognitive functioning by the time the child reaches the age of four. *Id.* at 1142. Nissa R. Towe-Goodman et al., *Interparental Aggression and Infant Patterns of Adrenocortical and Behavioral Stress Responses*, 54 DEV. PSYCHOL. 685 (2012) (examining a study and latent profile analysis of 735 infants from low socioeconomic status circumstances (selected from an already ongoing longitudinal research study of family dynamics and child development in low-income communities) exploring the relationships between physiological cortisol stress responses and domestic violence from both physiological and behavioral perspectives). Statistical analysis using a latent profile model

as the child experiences stressors throughout his or her life, causing the nervous system to overreact to any future stressful event.<sup>100</sup> This inhibits the child's ability to process their environment clearly and respond adaptively to minor, everyday stressors, as any environmental stressor is likely to trigger the child's stress response.<sup>101</sup>

***Transmission of Domestic Violence Trauma.*** Childhood exposure to domestic violence can result in the transmission of trauma- and stress-related symptoms. Several reviews and meta-analyses<sup>102</sup> have discussed the fact that domestic violence can become normalized and lead to intergenerational transmission of domestic violence as the child grows into adulthood and has a family of his or her own.<sup>103</sup> Behavioral

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showed that children who had been exposed to greater levels of domestic violence were more likely to have a greater cortisol stress response. *Id.* at 685. Nevertheless, study authors caution that methods used were both "exploratory and sample dependent." *Id.* at 695.

100. See Hibell et al., *supra* note 99; Sturge-Apple et al., *supra* note 99; Suor et al., *supra* note 99; Towe-Goodman et al., *supra* note 99.
101. See Hibell et al., *supra* note 99; Sturge-Apple et al., *supra* note 99; Suor et al., *supra* note 99; Towe-Goodman et al., *supra* note 99.
102. See generally Constance L. Chapple, *Examining Intergenerational Violence: Violent Role Modeling or Weak Parental Controls?*, 18 VIOLENCE & VICTIMS 143 (2003) (examining data from a 200-question self-report survey of 980 students in grades nine through eleven in Southerntown, Arkansas, who reported prior dating experience). Multivariate and bivariate analyses were performed to evaluate the relationships between parental violence, parental control, and dating violence. *Id.* at 151. See also Amy R. Murrell et al., *Characteristic of Domestic Violence Offenders: Associations with Childhood Exposure to Violence*, 22 J. FAM. VIOLENCE 523 (2007) (detailing a study of 1,099 adult male batterers ordered for assessment at a center for domestic violence to assess the correlation between type, severity, frequency of violent behavior perpetrated, and the amount of exposure to violence experiences during childhood (measured through retrospective self-report)). Although the results obtained in this study are congruent with findings from previous studies (positive correlation between experiencing violence as a child and perpetrating domestic violence as an adult), a shortcoming of this study is a lack of comparison/control group of non-violent individuals who had been exposed to violence as a child. *Id.* at 528–29. See also Kimberly A. Rhoades, *Children's Responses to Interparental Conflict: A Meta-Analysis of Their Associations with Child Adjustment*, 79 CHILD DEV. 1942 (2008) (expounding upon a meta-analysis of 71 studies coded to examine the relationship between scores obtained from measures of children's responses to interparental conflict and scores from measures of children's adjustment). Study authors note, however, that interpretation of the results is constrained by unclear direction of causality, and some methods of data collection used have not been empirically evaluated for accuracy. *Id.* at 11.
103. See generally Sandra M. Stith et al., *The Intergenerational Transmission of Spouse Abuse: A Meta-Analysis*, 62 J. MARRIAGE & FAM. 640 (2000) (detailing meta-analysis of 39 studies, totaling 12,981 individuals, examining the relationship between growing up in a home with violence and becoming part of a violent heterosexual marital relationship as an adult).

modeling is a type of intergenerational transmission whereby children who witness or experience violence engage in abusive behaviors themselves and may develop future psychopathology.<sup>104</sup> A study led by Amy R. Murrell, a member of the Clinical Psychology faculty at the University of North Texas in Denton, Texas, found that males who witness domestic violence in childhood tend to commit domestic violence later on in their lives in the same way that males who were abused during their own childhoods tend to abuse children in adulthood and commit more acts of general violence.<sup>105</sup> Similarly, offenders of dating violence tend to have a history of witnessing parental violence.<sup>106</sup>

These issues affect juvenile delinquency. Female juvenile delinquents are more frequently victims of physical and sexual abuse, neglect, and maltreatment as compared to males.<sup>107</sup> Male juvenile offenders, however, tend to commit more sexual and felony offenses against others, and the association between childhood victimization and later offending was found to be stronger among males.<sup>108</sup>

B. *Professionals Involved in Child Custody Decision-Making Need Special Training to Recognize, Understand, and Properly Evaluate Evidence of Domestic Violence and Claims of Alienation*

The counterintuitive aspects of domestic violence not only make it critical that scientific evidence—rather than intuition—is used in these child custody cases, but also that professionals use well-designed scientific research to set policy and to identify and follow best practices. Thus, professionals need to be educated and trained on topics related to domestic violence because untrained evaluators often make unwarranted

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104. Murrell et al., *supra* note 102, at 525.

105. *Id.*

106. Chapple, *supra* note 102, at 151–52.

107. Jessica J. Asscher et al., *Gender Differences in the Impact of Abuse and Neglect Victimization on Adolescent Offending Behavior*, 30 J. FAM. VIOLENCE 215, 215 (2015) (examining hierarchical logistic regression analysis of scores obtained on the Washington State Juvenile Court Assessment instrument by 10,111 minors ages 12 to 18 who had been found guilty of a criminal act by a juvenile court and were self-reported victims of abuse). Based on the nature of the study, findings must be considered in light of the fact that each individual in the sample was selected based on having committed a criminal offense, which may result in inflated apparent strength of the relationship between having experienced abuse and engaging in criminal behavior. *Id.* at 216.

108. *Id.* at 215.

assumptions, misinterpret evidence, and make poor decisions.<sup>109</sup> For example, untrained evaluators often assume that divorce will solve the domestic violence problem when, in fact, the purpose of domestic violence is often a desire for control, and separation from the abuser can actually exacerbate the problem.<sup>110</sup> Not understanding the long-term effects of exposure to domestic violence, these untrained evaluators assume that an abuser's relationship with children is separate from the relationship with the spouse and that domestic violence should not play a role in deciding child custody.<sup>111</sup> They may be unaware of the complexities of domestic violence that make family court, attorneys, and mediation or other court services inadequate assessors of the needs of abused women and their children.<sup>112</sup>

Untrained evaluators will also often overlook evidence due to erroneous beliefs about the nature of domestic violence incidences and their underlying causes.<sup>113</sup> Evaluators and judges tend to believe that survivors of domestic violence make false allegations, and this belief is correlated with these professionals holding other erroneous beliefs.<sup>114</sup> For example, a belief in false allegations of child abuse and/or domestic violence tends to vary based on a person's professional role. Judges, private attorneys, and custody evaluators are inclined to believe that mothers make false allegations, while professionals such as domestic violence workers and legal aid attorneys tend to believe that fathers make false allegations.<sup>115</sup>

Likewise, Michael S. Davis, Ph.D., Chris S. O'Sullivan, Ph.D., Kim Susser, JD, and Hon. Marjory D. Fields, JD, investigated the beliefs, the custody assessment process, and the recommendations of court-appointed psychologists, psychiatrists, and social workers who evaluated cases where allegations of domestic violence were present.<sup>116</sup>

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109. Erickson & O'Sullivan, *supra* note 45, at 10–11 (stating evaluators in the latter category tend to have “patriarchal” beliefs, which dictate their interpretations of the information they acquire); Haselschwerdt et al., *supra* note 45, at 1695–97; *see also* SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42.

110. Haselschwerdt et al., *supra* note 45, at 1712.

111. *Id.* at 1708–09.

112. *See* Jaffe et al., *Common Misconceptions*, *supra* note 42, at 62.

113. *Id.* at 59–62.

114. *See* SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42, at 8 (finding that examples of these inaccurate beliefs include the ideas that survivors of domestic violence wish to alienate children from the other parent; that domestic violence is not important in custody decisions; and that the child is affected when domestic violence survivors do not wish to co-parent).

115. LEORA N. ROSEN & MICHELLE ETLIN, THE HOSTAGE CHILD: SEX ABUSE ALLEGATIONS IN CUSTODY DISPUTES 99–119 (1996).

116. DAVIS ET AL., *supra* note 42, at iii.

The Davis et al. study found that evaluators' assessments were predicted by knowledge of domestic violence, and the parenting plans developed by evaluators did not reflect greater safety in cases where there was more severe physical, emotional, and social abuse between the couple.<sup>117</sup> Custody and visitation conclusions were influenced more by the evaluator's knowledge of domestic violence than the facts of the individual cases. This indicated that the outcome in court is largely dependent upon the evaluator rather than the circumstances of the case.<sup>118</sup>

Other investigations found that custody evaluators fail to determine whether domestic violence occurs as a result of a pattern of inflicting control and abuse by the perpetrator.<sup>119</sup> Custody evaluators then minimize the effects of domestic violence on children and are unable to gauge whether the perpetrator had the ability to engage in a parenting or co-parenting role.<sup>120</sup> This context can contribute to scenarios in which the best interests of the child are not adequately assessed. Instead, custody is recommended based on the presence of domestic violence, rather than on how children were affected by the violence.<sup>121</sup> All of these unwarranted assumptions, misinterpretations, poor decisions, and overlooked evidence can cause untrained evaluators to fail to believe victims.

Perhaps the most problematic of these erroneous beliefs is the now-invalidated Parental Alienation Syndrome framework, which posits that mothers invent allegations of abuse for the purpose of alienating children from their fathers and gaining custody.<sup>122</sup> This theory has been re-

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117. *Id.* at vii.

118. *See id.* at vii–viii.

119. *See id.* at vii.

120. PENCE ET AL., *supra* note 42, at 33.

121. *See id.* A number of studies have found that many custody evaluators lack meaningful expertise in domestic violence and child abuse, and often make recommendations that fail to fully take the abuse into account. *See* DAVIS ET AL., *supra* note 42, at i; PENCE ET AL., *supra* note 42, at 6; SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS *supra* note 42, at 120–21. Several other studies have found that custody evaluators tend to fall into two distinct groups: those who understand domestic violence and believe it is important in the custody context, and those who lack such understanding, are skeptical of abuse allegations, and believe the allegations are evidence of alienation. *See also* SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42, at 6 (finding that professional roles affected these judgments); HASELSCHWERDT ET AL., *supra* note 45, at 1967–69 (finding a difference between feminist custody evaluators and family violence custody evaluators); ERICKSON & O'SULLIVAN, *supra* note 45, at 10–11 (presenting evidence for the importance of expertise among custody evaluators).

122. *See* PRANZO, *supra* note 71, at 67, 69; Meier & Dickson, *supra* note 2, at 311; Berg, *supra* note 71, at 5.

peatedly discredited,<sup>123</sup> yet it continues to affect judicial decision-making.<sup>124</sup> An analysis of the outcomes of 238 cases of custody disputes that involved allegations of domestic violence and child abuse found that alienation claims were more likely to be raised by fathers than by mothers.<sup>125</sup> Proof of domestic violence and child abuse by the father did not improve a mother's chances of winning.<sup>126</sup> Claims of alienation were much more likely to lead to successful outcomes for fathers than proof of domestic violence and child abuse were likely to lead to successful outcomes for mothers.<sup>127</sup> Even today, the discredited Parental Alienation Syndrome framework causes courts to label the survivor parent as uncooperative or emotionally unstable.<sup>128</sup> As a result, the evaluator may erroneously conclude that the survivor will not establish a positive relationship with the other parent (i.e., the perpetrator) and may recommend that the abusive parent obtain custody or unsupervised visitation with the children despite a known history of violence.<sup>129</sup> These circumstances can occur particularly in situations where the evaluator minimizes the effect that violence can have on the children involved or believes that the survivor's behaviors and responses during the evaluation are a result of psychopathology, rather than an expected response by a person who has endured domestic violence.<sup>130</sup> There appears to be a heuristic bias in favor of the "nice," "friendly" parent who cooperates and does not "bad mouth" the other parent, even when the facts presented in such "bad mouthing" are demonstrated to be true.<sup>131</sup>

In addition to this heuristic bias, other counterintuitive features of domestic violence create situations wherein courts fail to recognize the dangers that victims experience and the dangers that persist even after separation. Courts also fail to see how children are harmed by exposure to domestic violence. Examples of the counterintuitive aspects of domestic violence include that domestic violence can happen to anyone

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123. CLARE DALTON ET AL., NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE'S GUIDE 14 n.28 (2006), [http://www.ncjfcj.org/sites/default/files/navigating\\_cust.pdf](http://www.ncjfcj.org/sites/default/files/navigating_cust.pdf); see also Meier, *A Historical Perspective*, *supra* note 48, at 239; Meier & Dickson, *supra* note 2, at 317.

124. Meier & Dickson, *supra* note 2, at 317.

125. *Id.* at 321, 323.

126. *Id.*

127. *Id.*

128. DALTON ET AL., *supra* note 123, at 25.

129. *Id.*

130. *Id.*

131. See Morrill et al., *supra* note 73, at 1101 (finding that the presumption against custody to batterers was superseded by a provision that favors the "friendly parent").

from any socioeconomic status and is often not due to the perpetrator having anger management problems, but rather a need for coercive control.<sup>132</sup> Not all domestic violence is physical, as there are several forms of abuse. A typical pattern of violence occurs in a cyclical trend where tension builds, abuse takes place, and the perpetrator makes apologies/excuses or amends to the victim.<sup>133</sup> The passage of time between instances of domestic violence does not indicate an end to danger for the victim and the notion that the victim has the choice to leave his/her spouse/partner or to call the police is a common misconception.<sup>134</sup>

Counterintuitively, victims of domestic violence often have numerous barriers that prevent them from fleeing abuse or ending the relationship, even when it is in order to ensure their safety. Women who have recently separated from an intimate partner report experiencing violent episodes at a rate 40 times greater than those who are still married.<sup>135</sup> Separation assault is a threat that keeps many victims from seeking safety.

Also counterintuitively, in addition to direct harms inflicted on victims, children can be severely harmed from exposure to domestic violence. It is unfortunately common for people to be uninformed about the numerous counterintuitive facts about domestic violence, which can cause them to fail to believe victims; underestimate the danger that victims endure, especially after having separated from their spouse/partner; and fail to understand the ways in which children can be harmed by exposure to domestic violence.

Untrained evaluators are also at risk of misinterpreting self-defense on the part of the victim as mutual fighting. Women in domestic violence situations tend to use violence as a form of self-defense more often than men need to use violence in self-defense.<sup>136</sup> Women report primary

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132. See Shannon Catalano, *Intimate Partner Violence in the United States*, U.S. BUREAU OF JUSTICE STATISTICS (2007), <https://www.bjs.gov/content/pub/pdf/ipvus.pdf> (demonstrating that domestic violence can happen to anyone by presenting information compiled by the U.S. Department of Justice, Bureau of Justice Statistics, including data from the National Crime Victimization Survey interviews with victims of crimes and the FBI's Supplementary Homicide Reports on the income of victims); see also GOVERNOR'S COUNCIL ON DOMESTIC ABUSE & END DOMESTIC ABUSE WIS., *supra* note 33, at 27.

133. See Catalano, *supra* note 132.

134. Catalano, *supra* note 132.

135. *Id.*

136. L. Kevin Hamberger & Sadie E. Larsen, *Men's and Women's Experience of Intimate Partner Violence: A Review of Ten Years of Comparative Studies in Clinical Samples: Part I*, 30 J. FAM. VIOLENCE 699 (2015) (discussing a systematic qualitative review of literature from 2002-2013 related to gender differences in intimate partner violence

reasons for intimate partner violence as being for the purposes of self-defense and retaliation, while both genders report emotional deregulation as a reason for intimate partner violence.<sup>137</sup> Many female perpetrators of domestic violence have experienced violence by their male partner in the past.<sup>138</sup> In domestic violence situations, women have a greater likelihood of being injured even if the male partner uses violence that contributes to a lesser likelihood for injury, such as slapping or pushing.<sup>139</sup> Female perpetrators are not necessarily more violent than male domestic violence perpetrators, but one study found that female perpetrators tend to use weapons against male victims more so than do male perpetrators.<sup>140</sup> Evaluators must be careful not to misinterpret self-defense on the part of the victim as mutual fighting.

Gender bias often takes place in custody dispute resolutions due to the belief that women are more likely to make false allegations of child abuse and domestic violence in order to alienate children from their fathers. These stereotypes are associated with sexist beliefs,<sup>141</sup> the notion that the world is a just place,<sup>142</sup> and the tendency to disbelieve,

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as measured in clinical samples). Study authors note that, since their research focused only on clinical samples, the findings may not be generalizable to the overall, non-clinical population. *Id.* at 715.

137. Jody M. Ross, *Personality and Situational Correlates of Self-Reported Reasons for Intimate Partner Violence Among Women Versus Men Referred for Batterers' Intervention*, 29 BEHAV. SCI. & L. 711 (2011) (examining results from a study of 30 women and 56 men referred for intervention after having committed an intimate partner violence offense). Results were obtained from a 45-minute computer survey and individual interview regarding relationship conflict. *Id.* at 714. Although findings afford useful insight, authors of this study warn that, because the sample of individuals studied were selected based on involvement in the criminal legal system, they may not be generalizable to the greater population of intimate partner violence offenders. *Id.* at 725.
138. Caroletta A. Shuler, *Male Victims of Intimate Partner Violence in the United States: An Examination of the Review of Literature Through the Critical Perspective*, 5 INT'L J. CRIM. JUST. 163, 166 (2010) (recounting a review of literature related to male victims of intimate partner violence perpetrated by female partners).
139. *Id.* at 166.
140. *Id.* at 169.
141. Daniel G. Saunders et al., *The Inventory of Beliefs About Wife-Beating: The Construction and Initial Validation of a Measure of Beliefs and Attitudes*, 2 VIOLENCE & VICTIMS 39 (1987) (reporting on stages of development and evaluation of validity, reliability, and scale dimensionality of an assessment measuring attitudes about "wife beating" (intimate partner violence) using data from 675 participants). Although five of the subscales constructed had sufficient internal reliability, three scales did not demonstrate robust internal reliability. *Id.* at 52.
142. Zick Rubin & Letitia Anne Peplau, *Who Believes in a Just World?*, 31 J. SOC. ISSUES 65 (1975) (reflecting on the concept of "Belief in a Just World" and findings which suggest that subscribers to the idea of a Just World are more likely to admire fortunate persons and disparage victims to preserve the internal consistency of the belief in

minimize, or disregard evidence of abuse.<sup>143</sup> As a result of these beliefs, evaluators often recommend that abusive fathers be given sole or joint custody or unsupervised visits with the children.<sup>144</sup> Mothers are often punished for reporting abuse and are held to stricter standards than are fathers.<sup>145</sup>

To accurately perform assessments to evaluate the best interests of the child and potential serious endangerment, evaluators must be aware of several factors: gender bias and domestic violence is an important issue in custody evaluations; post-separation violence occurs; screening and assessment can be dangerous; false allegations by a parent are rare; gender and personal biases can exist when investigating false allegations or when making recommendations; children's safety must be a priority emphasized over co-parenting; and coercive-controlling violence is a form of domestic violence.<sup>146</sup> It is critical to utilize evaluators that satisfy a representative sample of professionals to reduce any effects of bias.<sup>147</sup> Naïve evaluators of child custody tend to believe that parents falsely claim abuse. To avoid this error, evaluators need to be knowledgeable about domestic violence, and they need to be selected by appropriate

that Just World); Janet K. Swim, Wayne S. Hall & Barbara A. Hunter, *Sexism and Racism: Old-Fashioned and Modern Prejudices*, 68 J. PERSONALITY & SOC. PSYCHOL. 199 (1995) (discussing confirmatory factor analyses and subsequent replication study evaluating measures of gender and racial prejudice). Generalizability may be limited, as study participants were 683 and 788 (respectively) individuals who received extra credit in college courses for their participation in the study, and therefore their attitudes may not accurately reflect those of the general population. *Id.* at 201, 205.

143. Daniel G. Saunders, Richard M. Tolman & Kathleen C. Faller, *Factors Associated with Child Custody Evaluators' Recommendations in Cases of Intimate Partner Violence*, 27 J. FAM. PSYCHOL. 473, 477 (2013) (detailing a multivariate statistical analysis of responses to surveys completed by 465 child custody evaluators, used to assess the relationships between evaluators' background, beliefs, knowledge, and custody recommendations). Limitations of generalizability should be noted in terms of the fact that it is not known whether the sample provides a reasonable estimate of representativeness, and as a result of uncertainties regarding the direction of causality of results.
144. Meier & Dickson, *supra* note 2, at 313.
145. Rosen & Etlin, *supra* note 115 (detailing information on 206 cases (with a focus on five representative examples) of child maltreatment after courts acted with bias against the mother); Molly Dragiewicz, *A Left Realist Approach to Antifeminist Fathers' Rights Groups*, 54 CRIME L. & SOC. CHANGE 197, 201 (2010) (reviewing the Left Realist Approach to criminology, feminist criticisms of the approach, and Left Realist responses to those criticisms); Meier, *Domestic Violence*, *supra* note 49; SAUNDERS, ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42.
146. Haselschwerdt et al., *supra* note 45; SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42; *see also* GOVERNOR'S COUNCIL ON DOMESTIC ABUSE & END DOMESTIC ABUSE WIS., *supra* note 33.
147. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42.

means.<sup>148</sup> Evaluators should also understand the concept of the two types of violence (controlling and conflict-based) in order to make adequate recommendations, since they can often vary depending on the perspective of the evaluator.<sup>149</sup> Awareness can increase an assessor's focus on safety or can minimize the evaluator's perspective of the danger of domestic violence in custody cases.<sup>150</sup> Abuse allegations during custody evaluations should be investigated thoroughly. If credible testimony or other credible evidence supports allegations—taking into account the dynamics of domestic violence—the allegations should be afforded substantial weight in determining and pursuing the best interests of the child.

While it appears that many family law practitioners and custody evaluators falsely believe that fabricated allegations of domestic violence are common,<sup>151</sup> it is estimated that 35 percent of fathers and 18 percent of mothers make false allegations of domestic violence during custody cases.<sup>152</sup> In addition, evaluators often confuse an unsubstantiated allegation with a false allegation. An unsubstantiated allegation occurs when an accusing party cannot provide documentation of domestic violence as required by courts,<sup>153</sup> and there is evidence to believe that the child has not been abused or mistreated.<sup>154</sup> False allegations, on the other hand, include alleging domestic violence in order to gain an unfair advantage in a custody case or to alienate the other parent from the child/children.<sup>155</sup> In these cases, the person making the false claim does so maliciously and knowingly.<sup>156</sup> Regardless of the distinction, a requirement for substantiation of an abuse claim is contrary to the dynamics of domestic violence.<sup>157</sup> Survivors of domestic violence, specifically women, often do not report domestic violence to law enforcement

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148. *Id.*

149. Haselschwerdt et al., *supra* note 45, at 1712.

150. *Id.* at 1707.

151. *See id.*; SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42, at 14.

152. *Id.*

153. Haselschwerdt et al., *supra* note 45.

154. Nico M. Trocmé, *Major Findings from the Canadian Incidence Study of Reported Child Abuse and Neglect*, 27 CHILD ABUSE & NEGLECT 1427, 1430 (2003) (presenting findings from the Canadian Incidence Study of Reported Maltreatment, focusing on a subsample of 3,786 cases in which maltreatment was substantiated). The study provides enormous insight, but it should be noted that information was gathered from administrative reports, which, though they constitute records kept in the regular course of business, cannot be independently substantiated. *Id.* at 1433.

155. *See* Haselschwerdt et al., *supra* note 45, at 1698.

156. *See* Trocmé et al., *supra* note 154, at 1430.

157. *See* Haselschwerdt et al., *supra* note 45, at 1698.

or healthcare professionals before separating from their partner,<sup>158</sup> as they correctly fear that the report could be used against them.<sup>159</sup>

It is also important for the evaluator to be educated in the ways that coercively abusive intimate partners can often project a non-abusive image, can express denial, deflect blame, or minimize the abuse, and can resort to making false allegations (i.e., Parental Alienation Syndrome or child abuse/neglect)<sup>160</sup> in order to undermine the victim's credibility. Evaluators should also be cautious to not make unwarranted assumptions regarding a survivor's presentation, as not all victims will appear as scared or weak. Instead, they may demonstrate characteristics such as anger, irritability, strength of character, or even impassivity.<sup>161</sup> In cases where a couple reports to the evaluator that there has been fighting by both partners, the evaluator should assess for patterns of abuse from the interview and from legal records. Additionally, the evaluator should look for evidence of "defensive wounds," which are injuries sustained by a victim of a violent attack due to attempts at defending themselves against a perpetrator and are often found on the hands and forearms.<sup>162</sup> The evaluator should determine each partner's level of fear as well as any presence of post-traumatic stress symptoms.<sup>163</sup>

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158. *Id.*

159. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42, at 21.

160. Meier, *Getting Real About Abuse and Alienation*, *supra* note 48, at 228–30.

161. LEIGH S. GOODMARK, AMERICAN BAR ASSOCIATION, PROMOTING COMMUNITY CHILD PROTECTION: A LEGISLATIVE AGENDA (2002); Meier, *Domestic Violence*, *supra* note 49; Morrill et al., *supra* note 73; SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42, at 1, 116–35; BATTERED MOTHERS' TESTIMONY PROJECT, *supra* note 72.

162. LESTER ADELSON, THE PATHOLOGY OF HOMICIDE: A VADE MECUM FOR PATHOLOGIST, PROSECUTOR AND DEFENSE COUNSEL 490 (1974); KATHLEEN M. BROWN & MARY E. MUSCARI, QUICK REFERENCE TO ADULT AND OLDER ADULT FORENSICS: A GUIDE FOR NURSES AND OTHER HEALTH CARE PROFESSIONALS 28 (2010); BARRY A. J. FISHER & DAVID R. FISHER, TECHNIQUES OF CRIME SCENE INVESTIGATION 387 (2004); JOHN J. MILETICH & TIA LAURA LINDSTROM, AN INTRODUCTION TO THE WORK OF A MEDICAL EXAMINER: FROM DEATH SCENE TO AUTOPSY SUITE 26 (2010).

163. See Daniel G. Saunders, *Evaluating the Evaluators: Research-Based Guidance for Attorneys Regarding Custody Evaluations in Cases Involving Domestic Abuse*, 47 MICH. FAM. L.J. 8, 10 (2017).

C. *Proper Screening for Domestic Violence Is Necessary to Prevent Children from Continued Exposure to Domestic Violence or Direct Abuse and Neglect*

The first step toward protecting children who have been exposed to domestic violence is to identify when it has occurred. To identify these cases, allegations must be taken seriously. Statistics have demonstrated that a parent making intentionally false allegations of child maltreatment is a rare occurrence.<sup>164</sup> Based on countrywide data compiled annually by the Canadian Centre for Justice Statistics, there were an estimated 135,573 investigations into child maltreatment conducted in Canada in 1998.<sup>165</sup> In this study, information about alleged mistreatment was gathered from a random sample of child welfare service jurisdictions across Canada. Of the 7,672 cases analyzed, only four percent were judged by child welfare service workers to be intentionally false claims.<sup>166</sup>

In addition, allegations of domestic violence should be carefully evaluated and considered since there is a strong co-occurrence of child abuse/neglect and domestic violence; it has been found that among approximately 30 percent to 60 percent of families where domestic violence or child maltreatment has been identified, there is a significant likelihood that both forms of abuse occur.<sup>167</sup> Taking allegations seriously is critical to reducing harm to both the children and the non-abusive parent. Due to the dynamics of domestic violence, however, victims may not report incidences of abuse and violence even when they are questioned during an evaluation.<sup>168</sup>

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164. Trocmé et al., *supra* note 154, at 1435.

165. *Id.* at 1430.

166. *Id.* It is important to note that statistics on marital status and divorce rates were not considered in this study.

167. H. LIEN BRAGG, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD PROTECTION IN FAMILIES EXPERIENCING DOMESTIC VIOLENCE (2003), <https://www.childwelfare.gov/pubPDFs/domesticviolence.pdf>.

168. Chris O'Sullivan, *Estimating the Population at Risk for Violence During Child Visitation*, 5 DOMESTIC VIOLENCE REP. 65 (2000) (reporting findings from a study of archival custody (n=1692) and visitation cases (n=222), counselors' case records in felony domestic violence cases (n=97), and interviews with attorneys (n=20) who represented victims of domestic violence in the same jurisdictions); RICHARD B. FELSON & PAUL-PHILIPPE PARÉ, THE REPORTING OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT BY NONSTRANGERS TO THE POLICE 15 (2005) (examining trends of survey data from the National Violence Against Women Survey conducted by computer-assisted telephone interview, with a sample of 6,291 persons who had experienced physical assaults and 1,787 who had experienced sexual assaults, to examine the

Domestic violence survivors often correctly fear that they will not be believed and will be seen as alienating parents.<sup>169</sup> As in cases of childhood sexual assault, many children are hesitant to report or refrain from reporting altogether, but when asked directly about any abuse, children are more likely to disclose this information.<sup>170</sup> Often, reporting domestic violence can be dangerous, harmful, or used against the victim. At times the victim's attorney or mediator may advise him or her to refrain from disclosing domestic violence.<sup>171</sup> It is also common for victims to lack insight into how damaging child exposure to domestic violence is and believe that family separation is more damaging.<sup>172</sup> Thus, routine screening should be conducted. Appropriate screening for domestic violence in custody cases can help prevent further harm to the child, as intimate partners may use parenting time to abuse, neglect, or otherwise adversely affect the child and use the time spent in the exchange of the children as an opportunity to abuse their ex-spouse/partner.

According to recent findings, households in which domestic violence occurs have a 41 percent correlation with households also experiencing critical injuries or deaths due to child abuse and neglect.<sup>173</sup> To screen for domestic violence and assess the risk of future domestic violence, it is often necessary to employ diverse methods.<sup>174</sup> Interviews and observations can be conducted with children, parents, and other signifi-

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effects that the genders of perpetrator and victim, as well as their relationship to one another, have on likelihood of reporting the incident to the police); *see also* Michael A. Rodriguez et al., *Implications for Health Care Professionals*, 169, 337, 339 W.J. MED. (1998) (detailing results from a qualitative study of 51 women, divided into eight focus groups, who had been victims of domestic violence within the prior two years, where information about attitudes was elicited in the form of semi-structured, open-ended discussion questions posed to focus groups).

169. *See* Meier & Dickson, *supra* note 2, at 328–32.

170. Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?*, 11 PSYCHOL. PUB. POL'Y & L. 194, 197 (2005) (reviewing recent empirical data and literature related to patterns of abuse disclosure among adults, as compared to children's abuse disclosure patterns).

171. Meier & Dickson, *supra* note 2, at 328–32.

172. Rodriguez et al., *supra* note 168, at 339.

173. SUSAN SCHECHTER & JEFFREY L. EDLESTON, IN THE BEST INTEREST OF WOMEN AND CHILDREN: A CALL FOR COLLABORATION BETWEEN CHILD WELFARE AND DOMESTIC VIOLENCE CONSTITUENCIES 5 (1994); WASH. STATE SUPREME COURT GENDER & JUSTICE COMM'N., DOMESTIC VIOLENCE MANUAL FOR JUDGES 2-49 (rev. ed. 2016), <https://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/domViol/index> (follow the hyperlink for Chapter 2).

174. American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 AM. PSYCHOLOGIST 863, 866 (2010).

cant figures in the children's lives.<sup>175</sup> In addition, screening and assessment should involve reviewing criminal and civil court records, examining child protective service records, and using validated screening tools to determine risk.<sup>176</sup> Reports of abuse are significantly more likely in court settings where self-report intake questionnaires are administered.<sup>177</sup> Professionals in healthcare settings only need information from a few screening questions to detect domestic violence,<sup>178</sup> and normalizing statements are often effective in helping patients disclose any problems with domestic violence.<sup>179</sup> For example, healthcare professionals can ask a normalizing question in the following way: "I don't know if this is (or ever has been) a problem for you, but many of the clients I see are dealing with abusive relationships. Some are too afraid or uncomfortable to bring it up themselves, so I've started asking about it routinely."<sup>180</sup> These questions can lower an interviewee's defenses and allow the individual to tell evaluators what is really taking place.

Validated screening instruments should also be regularly and systematically employed to help detect domestic violence. The Spouse Assault Risk Assessment<sup>181</sup> and the Danger Assessment<sup>182</sup> are assessment

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175. See KATHLEEN C. BASILE ET AL., CTNS. FOR DISEASE CONTROL & PREVENTION, INTIMATE PARTNER VIOLENCE AND SEXUAL VIOLENCE VICTIMIZATION ASSESSMENT INSTRUMENTS FOR USE IN HEALTHCARE SETTINGS: VERSION 1.0 (2007), <https://www.cdc.gov/violenceprevention/pdf/ipv/ipvandsvscreening.pdf> (detailing available instruments and tools for assessing intimate partner violence and sexual violence victimization in clinical and healthcare settings); *but see* Miriam K. Ehrensaft & Dina Vivian, *Is Partner Aggression Related to Appraisals of Coercive Control by a Partner?*, 14 J. FAM. VIOLENCE 251 (1999) (addressing the idea that asking questions about coercive control, rather than physical assault, may produce inconsistent results based on the subjective nature of the perception of coercion and relationship control). While this study is useful, concerns about the external validity/generalizability of its results arise based on the fact that its sample exclusively included young college students in dating relationships, and findings may not apply to different demographic populations. *Id.* at 251.
176. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42, at 107–10.
177. See Robin H. Ballard, Amy Holtzworth-Munroe, Amy G. Applegate, and Connie J. A. Beck, *Detecting Intimate Partner Violence in Family and Divorce Mediation: A Randomized Trial of Intimate Partner Violence Screening*, 17 PSYCHOL. PUB. POL'Y L. 1, 20 (2011).
178. See, e.g., BASILE, *supra* note 175, at 66, 108.
179. See Daniel G. Saunders, *Research Based Recommendations for Child Custody Evaluation Practices and Policies in Cases of Intimate Partner Violence*, 12 J. CHILD CUSTODY 71, 73 (2015) [hereinafter Saunders, *Research Based Recommendations*].
180. *Id.*
181. P. Randall Kropp, *Intimate Partner Risk Assessment*, in VIOLENT AND SEXUAL OFFENDERS: ASSESSMENT, TREATMENT AND MANAGEMENT 36, 44 (Jane L. Ireland et al., eds., 2009) (reviewing literature on measures of Intimate Partner Violence risk assessments).

protocols developed for front-line workers and provide specific, standardized questions to detect past occurrences of domestic violence or degree of risk for future abuse. Lethality potential is measured with the validated Danger Risk Assessment,<sup>183</sup> while the validated Ontario Domestic Assault Risk Assessment (ODARA) measures non-lethal domestic violence<sup>184</sup> and the Spousal Assault Risk Assessment is a validated instrument used to measure assault risk.<sup>185</sup>

Coercive control can be evaluated by asking questions such as:

What happens when you try to make decisions that seem like your personal/private matters (like what to wear, how to handle something at work)? How does your spouse react? . . . What kind of freedom does your husband/wife give you to decide for yourself the things that you want to do, or places you want to go? . . . [and] in general, do you feel your husband/wife tries to control you? Please explain.<sup>186</sup>

Non-validated measures should not be used to screen for domestic violence. An example of such a non-validated measure includes the “5 P” model, which can incorrectly find that victims were making false statements or were too pathological to care for their own children. Using non-validated measures can lead to sole or joint custody being granted to abusers.<sup>187</sup> Certain questions on this measure (i.e., questions

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182. Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NAT'L INST. JUST. J., NOV. 2003 at 14, 15, <https://www.ncjrs.gov/pdffiles1/jr000250e.pdf> (discussing the Danger Assessment Tool and its abilities and limitations). Scores should be interpreted with caution: “83 percent of the women who were killed had scores of 4 or higher, but so did almost 40 percent of the women who were not killed. This finding indicates that practitioners can use the Danger Assessment (like all intimate partner violence risk assessment tools) as a guide in the process rather than as a precise actuarial tool.” *Id.* at 16.

183. *Id.*

184. See N. Zoe Hilton & Grant T. Harris, *How Nonrecidivism Affects Predictive Accuracy: Evidence from a Cross-Validation of the Ontario Domestic Assault Risk Assessment (ODARA)*, 24 J. INTERPERSONAL VIOLENCE 326, 330–35 (2008) (detailing methods and measures of accuracy for the ODARA, as re-tested on a sample of 391 individuals drawn from police incident archives in Canada). Results from this study demonstrate statistically significant cross-validation of the ability for results to differentiate domestic violence recidivists from non-recidivists. *Id.* at 334.

185. Kropp, *supra* note 180, at 44.

186. Saunders, *Research Based Recommendations*, *supra* note 179, at 75.

187. JANET JOHNSTON, VIVIENNE ROSEBY & KATHRYN KUEHNLE, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE 317 (2009); see also SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS, *supra* note 42.

relating to being followed) have improperly led evaluators to conclude that victims were suffering from personality disorders or other psychopathology (i.e., paranoia that someone is following her) when she is, in fact, not pathological, but is instead dealing with the reality and trauma of the abuse (i.e., abuser actually is stalking her).<sup>188</sup> Thus, because the results can make it appear as if the victim is suffering from pathology when she is not,<sup>189</sup> it may give her abuser an inappropriate advantage in court.<sup>190</sup>

As another important evidence-based recommendation in assessing whether a family suffers from domestic violence, evaluators should look for patterns of controlling and coercive behavior, rather than emphasizing isolated incidences of physical violence.<sup>191</sup> Studies have documented the fact that when evaluators conduct assessments that place particular focus on coercive-controlling violence, the parenting plans that result from those assessments provide a higher level of safety against domestic violence.<sup>192</sup> In addition, such emphasis typically results in a grant of custody to domestic violence-surviving mothers.<sup>193</sup>

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188. See KENNETH S. POPE, JAMES N. BUTCHER & JOYCE SEELEN, *THE MMPI, MMPI-2, & MMPI-A IN COURT: A PRACTICAL GUIDE FOR EXPERT WITNESSES AND ATTORNEYS* (3d ed. 2006).

189. See Fariha I. Khan, Toni L. Welch & Eric A. Zillmer, *MMPI-2 Profiles of Battered Women in Transition*, 60 *J. PERSONALITY ASSESSMENT* 100, 100 (1993) (examining a study in which the scores of 31 women residing in a domestic violence shelter in Pennsylvania obtained on an MMPI-2 protocol were compared and found to be significantly elevated on a number of particular scales). This may provide a good indication of psychological distress related to intimate partner violence, but may also provide the basis for misdiagnosis of pathology. The study authors caution that the sample size was too small to conduct meaningful statistical analysis on results and did not control for all considered confounding variables. *Id.* at 109–10. See also Lynne Bravo Rosewater, *A Critical Analysis of the Proposed Self-Defeating Personality Disorder*, *J. PERSONALITY DISORDERS* 190 (1987) (reviewing literature as to the importance of differentiating between the experience of situational distress and the existence of an enduring personality disorder).

190. Kay Bathurst, et al., *Normative Data for the MMPI-2 in Child Custody Litigation*, 9 *PSYCHOL. ASSESSMENT* 205, 209–10 (1997) (examining a study in which normative data were derived from archival records of child custody litigants in California to whom the MMPI-2 had been administered during the course of child custody determinations); POPE ET AL., *supra* note 188.

191. SAUNDERS ET AL., *CHILD CUSTODY EVALUATORS' BELIEFS*, *supra* note 42, at 8–11.

192. DAVIS ET AL., *supra* note 42.

193. SAUNDERS ET AL., *CHILD CUSTODY EVALUATORS' BELIEFS*, *supra* note 42.

Experts in the field recommend that evaluators meet with each parent separately on different interview days and times.<sup>194</sup> They recommend that parents should be asked pointed questions, including:

- 1) whether they would feel safe if the other parent was in the room;
- 2) whether they can recall the last time they and their partner were able to sit down together and have a conversation about the children;
- 3) how the relationship ended;
- 4) how well the child gets along with the other parent;
- 5) the types of activities in which the child enjoys participating with the other parent;
- 6) whether they would feel comfortable participating in a joint meeting at the child's school;
- 7) whether there have been any incidences of physical or verbal abuse;
- 8) whether there has ever been an order of protection filed; and
- 9) whether there are any restrictions from access to joint money/finances.<sup>195</sup>

Additionally, these experts recommend that the evaluator begin by developing a rapport with the child by discussing issues unrelated to the family discord.<sup>196</sup> After establishing a rapport with the child, the evaluator should explain to the child the evaluator's role and extent of confidentiality and emphasize that his or her main role is to help the child feel safe and protected.<sup>197</sup> In addition, the evaluator should ask the child several open-ended questions to gauge certain behavior patterns of the parents including: (1) what the child's favorite aspects are of going to their mom/dad's house; (2) how the child would feel if they were in the same room with their mom and dad; and, (3) if the child could have three wishes, what they would be.<sup>198</sup> It is also important for the evaluator to assess the child for any obvious signs of abuse, such as visible

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194. E-mail from Nicole Centracchio, Owner & Managing Partner, Reed Centracchio & Associates, LLC (Feb. 12, 2018) (on file with author). This information should be considered expert opinion without scientific verification. Future research should scientifically investigate the merit of these recommended practices.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

bruises, torn clothing, or presenting as withdrawn and refusing to speak.<sup>199</sup> Research indicates that drawing may facilitate young children's ability to talk about emotional experiences in clinical and legal contexts.<sup>200</sup> Drawings can help the child to communicate with the evaluator, meaning that having paper and crayons available can be helpful during the interview process.<sup>201</sup>

While screening children for domestic violence, child representatives must obtain the child's permission to share specifics of what is disclosed;<sup>202</sup> in the event that the evaluator is unable to obtain consent from the child, the evaluator must still advocate on the child's behalf and present a report to the court regarding ways to keep the child safe.<sup>203</sup> The only exceptions to this are cases that involve Rule 1.6.<sup>204</sup> In such cases, if a child representative reasonably believes that disclosure could prevent death or substantial bodily harm, disclosure is thereby necessary.<sup>205</sup> If the evaluator is a guardian *ad litem*, then he or she has an absolute right to tell attorneys and the court exactly what the child has stated during the evaluation. However, as a child representative or guardian *ad litem*, the evaluator has no duty of confidentiality for what is said by the parents during an evaluation.<sup>206</sup>

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199. Amy Swerdlin, Carol Berkowitz & Noah Craft, *Cutaneous Signs of Child Abuse*, 57 J. AM. ACAD. DERMATOLOGY 371, 373, 383 (2007) (reviewing literature relevant to “differentiating cutaneous signs of child abuse, including physical and sexual abuse, from mimickers of inflicted injury”); Centracchio, *supra* note 194.

200. Centracchio, *supra* note 194. *See generally* CATHY A. MALCHIODI, *BREAKING THE SILENCE: ART THERAPY WITH CHILDREN FROM VIOLENT HOMES* (2d. ed. 2004) (presenting art therapy techniques for children who have witnessed violence in their homes); Julien Gross & Harlene Hayne, *Drawing Facilitates Children's Verbal Reports of Emotionally Laden Events*, 4 J. EXPERIMENTAL PSYCHOL.: APPLIED 163 (1998). The work details a two-part study of New Zealanders of European descent, results of which indicated that engaging in the act of drawing increases a child's tendency to verbalize and facilitates communication of information about their own past experiences. *Id.* at 174–76. However, as authors note, subjects in the present study were from a non-clinical population. *Id.* Therefore, the findings cannot be generalized to situations in which a child has experienced or witnessed a traumatic event.

201. *Id.*

202. Centracchio, *supra* note 194.

203. *Id.*

204. *Id.*; *see also* Model Rules of Prof'l Conduct r. 1.6 (Am. Bar Ass'n, 1983).

205. *Id.*

206. *Id.*

D. *Evidence of Domestic Violence Requires Protective Features  
Relating to Custody*

Well-designed research on domestic violence also has important implications for best practices that judges and other professionals should follow in how they react to allegations of domestic violence in child custody cases. When allegations of domestic violence or other evidence of domestic violence exist that are consistent with the dynamics of domestic violence, custody evaluators should determine the extent to which children have already been harmed by exposure to domestic violence or harmed by direct abuse and neglect by the abusive parent, the likelihood of it continuing, and which of the following protective custody-related measures to recommend: (i) allocation of primary parenting time to the non-abusive parent; (ii) allocation of sole decision-making to the non-abusive parent; (iii) supervised parenting time and payment for supervision; (iv) supervised exchanges; (v) requiring exchanges to occur in protected settings; (vi) treatment programs, possibly including substance abuse programs, and requiring parents to not be under the influence of drugs or alcohol when children are placed with them; (vii) prohibitions on overnight physical placement of the child with the abusive parent; and (viii) requiring abusers to post bond for the safe return of the child, and other conditions the court determines necessary for the safety and well-being of the child and the victim.<sup>207</sup>

Using these protective measures is critical because of the strong evidence that coercively abusive intimate partners often use court proceedings over parenting time and decision-making, not to look out for the welfare of their children, but rather to further abuse or punish the other parent, or to induce their ex-spouse/partner to return to the relationship. As Brittany E. Hayes, an Associate Professor in the Department of Criminal Justice and Present Criminology at Sam Houston State University, pointed out, “in relationships where the abusive partner has children with his victim, the children can serve as tools for the abuser to continue his abusive behavior.”<sup>208</sup> Because the goal is to control and

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207. GOVERNOR’S COUNCIL ON DOMESTIC ABUSE & END DOMESTIC ABUSE WIS., *supra* note 33, at 91, 98, 131, 137, 140.

208. Brittany E. Hayes, *Abusive Men’s Indirect Control of Their Partner During the Process of Separation*, 27 J. FAM. VIOLENCE 333, 333 (2012) (reviewing a study and logistical regression analysis of 168 women in New York City who were involved in the family court system and had at least one child with a person against whom she had obtained an order of protection).

manipulate the mother, rather than to parent, abusers will use legal means to harass and manipulate. This starts as a bid for parenting time and involvement in decisions that they often ignore during the relationship. An example of this was pointed out by Rita Smith and Pamela Coukos in an article they co-authored while at the National Coalition Against Domestic Violence: “An abusive partner will often threaten to take the children in order to keep the mother in the relationship. If she leaves, he may continue efforts to harass and control her by manipulating custody litigation.”<sup>209</sup> This is why coercively abusive fathers are significantly more likely to seek sole custody of their children than non-coercively abusive fathers. They seek joint custody and more parenting time, not because they want to spend more time with the children, but rather, to perpetuate contact with the mother, monitor the mother’s actions, and exert control over. Thus, as Smith and Coukos reported, “Fathers who batter the mother are twice as likely to seek sole custody of their children than are nonviolent fathers.”<sup>210</sup> And they are often successful, because as Smith and Coukos also noted, “Despite a perception that the courts disproportionately favor mothers, one study has shown that fathers who fight for custody win sole or joint custody in 70 percent of these contests.”<sup>211</sup>

The manipulative behavior does not end with the court battle for the order of custody. Joint decision-making power gives the abuser a never-ending means to further the abuse and harassment. Both parents cannot provide authentic input into decisions under such circumstances, because equality between them is rare.<sup>212</sup> As Dana Harrington Conner, Associate Professor of Law and Director of the Delaware Civil Law Clinic, Widener University School of Law, noted, “The rarity of equality in decision-making between an abuser and his victim renders joint decision-making [on behalf of the child] unworkable.”<sup>213</sup> Under such conditions, the decision-making process is shaped more by the abuser’s

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209. Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, 36 JUDGES’ J. 38, 40 (1997) (reviewing the literature on this phenomenon, including government reports and reports from the American Psychological Association).

210. *Id.*

211. *Id.*

212. Dana Harrington Conner, *Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence*, 18 DUKE J. GENDER L. & POL’Y 223, 227 (2011).

213. *Id.* at 227.

attempts at control than by the welfare of the child, because abusers can use decisions as leverage.<sup>214</sup> As Conner noted:

When that joint custodian craves control, as batterers often do, the non-residential batterer may use his legal custodial power to exert control over the most ordinary decisions. Further, if he is not consulted about these commonplace issues a batterer may intimidate the victim, threaten her with legal action, or file with the court in an attempt to harass her through the legal process.<sup>215</sup>

Thus, an abuser may withhold consent for the child to receive counseling or medical procedures or for the child to participate in extra-curricular school activities until the victim concedes to his demands. And the manipulative behavior does not end with the mother, because as experts Lundy Bancroft, Jay G. Silverman, and Daniel Ritchie noted, batterers tend to be controlling and coercive in their direct interactions with children.<sup>216</sup> Likewise, abusers will frequently seek modifications to custody arrangements, and often fail to comply with court orders just to get at the mother.<sup>217</sup> As Smith and Coukos noted, an abusive parent is “likely to disrupt court-ordered visitation schedules as a way to continue the abuse of his former partner” and is “three times as likely to be arrear in child support.”<sup>218</sup> In short, when abusers are granted decision-making powers, decisions are not based on the child’s best interest, but are rather focused on perpetuating the abuse. Abusers can use courtroom conflicts over parenting decisions as a forum to do so.<sup>219</sup>

It is also a bad idea to involve abusive intimate partners in the decision-making process. As Conner pointed out:

A grant of joint legal custody assumes that both parents will make good choices about the welfare of their children. Such an assumption, however, is ill advised in cases involving batterers. A parent who makes poor decisions with regard to his own life is also likely to make poor decisions about his children . . . . Batterers often engage in other risky behavior, including abuse of drugs and alcohol, criminal behavior and

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214. *Id.* at 227, 258.

215. *Id.* at 258.

216. BANCROFT ET AL., *supra* note 49, at 8.

217. Smith & Coukos, *supra* note 209, at 40.

218. *Id.*

219. *Id.*

abuse of children. They fail to comply with court orders and have a general disregard for the law.<sup>220</sup>

Consequently, to protect children and the non-abusive parent from further harm in custody cases where one parent has been engaging in coercive abuse, the non-abusive parent should be granted the sole right to make decisions relating to their children, and courts should order appropriate protective measures to be placed on the parenting time of the coercively abusive parent.

*E. Importance of Appropriately Assessing and Addressing Mental Health Issues and Seeking Appropriate Intervention Programs*

Well-designed research has important implications for determining best approaches to handling mental health issues of domestic violence survivors and their children, as well as recommending various types of intervention programs for abusive parents. When domestic violence is detected, an evaluator should recognize that the survivor has experienced trauma and will be more likely to display symptoms of depression and anxiety.<sup>221</sup> These symptoms may be reactions to violence and controlling behavior by the perpetrator.<sup>222</sup> Survivors of domestic violence endure abuse, harassment, and threats of abuse, which often continue after the couple has separated.<sup>223</sup> In addition to the trauma associated with domestic violence, the survivor must also cope with the overwhelming stress and accompanying emotional symptoms related to the idea that they could potentially lose their children to the perpetrator.<sup>224</sup> Many times, a survivor's symptoms can be severe enough to meet criteria for complex PTSD: a severe form of PTSD characterized by symptoms such as difficulty regulating emotion, explosive anger, episodes of dissociation, negative self-perception, perception of the perpetrator as having total power over the survivor,

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220. Conner, *supra* note 212, at 256.

221. Nancy S. Erickson, *Use of the MMPI-2 in Child Custody Evaluations Involving Battered Women: What Does Psychological Research Tell Us?*, 39 FAM. L.Q. 87, 97 (2006) (finding women who have experienced intimate partner violence have elevated scores on the 2 and 7 scales, depression and anxiety, respectively).

222. *Id.* at 89 (“[R]esearch tends to support the hypothesis that a battered woman’s MMPI-2 profile often is a result of the abuse she has suffered.”).

223. Smith & Coukos, *supra* note 209, at 38–40.

224. Erickson, *supra* note 221, at 89 (“[The MMPI-2 profile] should not be viewed by child custody evaluators as evidence that [the mother] has personality traits indicating that she would not be a fit parent.”).

isolation and distrust of others, feelings of hopelessness, and a sense of despair.<sup>225</sup> These symptoms can overlap with Borderline Personality Disorder and Paranoid Personality Disorder traits, which may in turn be triggered or exacerbated by domestic violence experiences, as well as the survivor's own history of childhood abuse.<sup>226</sup> It is common for survivors of domestic violence to have a childhood history of abuse and trauma.<sup>227</sup> When they are able to achieve some measure of security in their lives, the symptoms of PTSD and depression often diminish, adding further support to the idea that symptoms are related to the trauma as opposed to underlying psychosis.<sup>228</sup>

Recognizing that the survivor has experienced trauma will help professionals avoid making tragic mistakes. For example, perhaps due to the failure to recognize the trauma that survivors have endured, evaluators are much more likely to recommend sole custody to the perpetrator if the survivor is portrayed as hostile and are also more likely to refer the survivor to counseling, parenting classes, and anger management classes.<sup>229</sup> During evaluations, when the survivor presents as guarded and engages with the evaluator in a negative manner, evaluators and judges often interpret this behavior as personality dysfunction even when the behaviors are a result of the survivor's fears and other symptoms of being victimized.<sup>230</sup>

When mothers struggle with depression, trauma symptoms, and other psychopathology, children also tend to have more problems themselves,<sup>231</sup> but attending to mental health needs can enhance protective factors. Children who have been exposed to domestic violence do better when they are protected by a supportive, healthy, non-abusive parent<sup>232</sup> with good parenting skills.<sup>233</sup> Situational factors such as family support and secure attachment to other caregivers, living in a supportive, safe,

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225. *Id.* at 104–08.

226. *Id.* at 88.

227. See generally Stith et al., *supra* note 103, at 640, 648–49.

228. Saunders, *Research Based Recommendations*, *supra* note 179, at 71, 73.

229. Jennifer L. Hardesty et al., *The Influence of Divorcing Mothers' Demeanor on Custody Evaluators' Assessment of Their Domestic Violence Allegations*, 12 J. CHILD CUSTODY 47, 55 tbl.1 (2015).

230. PRANZO, *supra* note 71, at 48.

231. Gewirtz et al., *supra* note 66, at 36; Graham-Bermann et al., *supra* note 46, at 649; Owen et al., *supra* note 46, at 434.

232. Shonkoff & Garner, *supra* note 47, at 237.

233. Gewirtz et al., *supra* note 66, at 30; Graham-Bermann et al., *supra* note 46, at 650.

and close community,<sup>234</sup> and not experiencing other forms of trauma<sup>235</sup> contribute to greater resiliency in children.

In addition to allocating primary parenting time to the non-abusive parent, the non-abusive parent can be referred to appropriate treatment if he or she is suffering from depression, PTSD, or other struggles that can impact parenting. Appropriate interventions can also be recommended for the children and the abusive parent; therapies such as Trauma-Focused Cognitive Behavioral Therapy (TF-CBT) appear to be the most effective.<sup>236</sup>

It is also important for evaluators to assess the typologies of perpetrators who commit intimate partner violence in order to identify appropriate interventions.<sup>237</sup> For example, an evaluator should examine

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234. Garnezy & Masten, *supra* note 46, at 194; Gewirtz et al., *supra* note 66, at 36; Owen et al., *supra* note 46, at 438; Werner, *supra* note 46, at 74.

235. Graham-Bermann et al., *supra* note 46, at 658.

236. Colleen E. Cary & J. Curtis McMillen, *The Data behind the Dissemination: A Systematic Review of Trauma-Focused Cognitive Behavioral Therapy for Use with Children and Youth*, 34 CHILD & SERVS. REV. 748 (2012) (detailing findings of three meta-analyses of 10 studies to determine if Trauma-Focused Cognitive Behavioral Therapy (TF-CBT) was effective in reducing symptoms of Post-Traumatic Stress Disorder (PTSD), depression, and behavioral problems). Findings were consistent amongst meta-analyses: although immediately after the completion of treatment it appeared that TF-CBT was efficacious for reducing symptoms of all three conditions, only symptoms of PTSD continued to be ameliorated a year after treatment completion. Study authors caution that limitations include the fact that both the number of studies included in the meta-analysis and number of subjects in each study sample were relatively small, as well as the fact that none of the studies examined the effect of the length of time spent in treatment, on treatment outcome. *Id.*; Judith A. Cohen, Anthony P. Mannarino & Satish Iyengar, *Community Treatment of Posttraumatic Stress Disorder for Children Exposed to Intimate Partner Violence: A Randomized Controlled Trial*, 165 ARCHIVES PEDIATRIC & ADOLESCENT MED. 16, (2011) (reviewing randomized double-blind control trial of 124 7-14 year-old children with five or more intimate partner violence-related PTSD symptoms and whose mother was the victim of intimate partner violence, in order to evaluate the effectiveness of TF-CBT as compared to standard treatment for children with intimate partner violence-related PTSD). Although the findings indicate that TF-CBT is more effective in reducing symptoms, they are limited in terms of internal validity as a result of a significantly high (39.5 percent) rate of attrition. *Id.*

237. Amy Holtzworth-Munroe & Gregory L. Stuart, *Typologies of Male Batterers: Three Subtypes and the Differences Among Them*, 116 PSYCHOL. BULL. 476 (1994) (reviewing available literature and studies on domestic violence to determine via factor analysis if batterers can be typified). Although corroboration exists to support the notion that there are three main batterer typologies, these findings cannot be empirically validated, and their value lies primarily in the qualitative analysis they provide. *Id.* Olga Cunha & Rui Abrunhosa Gonçalves, *Intimate Partner Violence Offenders: Generating A Data-Based Typology of Batterers and Implications for Treatment*, 5 EUR. J. PSYCHOL. APPLIED TO LEGAL CONTEXT 131 (2013) (discussing

whether an abusing parent is only committing the abuse within the family or whether he or she is violent in all of their relationships, including those outside of the home (i.e., engaging in road rage).<sup>238</sup> Abuse of an intimate partner is often correlated with alcohol or substance abuse behaviors and disorders, and is also associated with an escalation of violence.<sup>239</sup> By knowing the typology of the abuser, an

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a study in which data were obtained from the self-reports of 187 adult males criminally sentenced for intimate partner violence-related offenses.) Concurrent with Holtzworth-Munroe & Stuart, *supra*, cluster analysis (Ward's method) indicated the presence of three empirical subtypes; nevertheless, as with the imprecise nature of cluster analysis conclusions are subject to the clustering methods used. *Id.* Charlie Stoops et al., *Development and Predictive Ability of a Behavior-Based Typology of Men Who Batter*, 25 J. FAM. VIOLENCE 325, (2009) (examining a study in which information was gathered from a biopsychosocial assessment and from archival records from offender databases maintained by both the county and the state for 671 men who had been convicted of crimes related to battering their female partners). Similarly, and in accord with Holtzworth-Munroe & Stuart, *supra*, cluster analysis signaled the existence of three typologies of batterers; however, authors note that the sample examined is not typical of the intimate partner violence perpetrator, and that data were collected by a number of different probation officers, and a lack of uniformity of and/or control over the process may have influenced the results. *Id.*

238. Holtzworth-Munroe & Stuart, *supra* note 237, at 481–93.

239. Kenneth E. Leonard, *Domestic Violence and Alcohol: What is Known and What Do We Need to Know to Encourage Environmental Interventions?*, 6 J. SUBSTANCE USE 235 (2001) at 235 (reviewing a comprehensive analysis of available literature, surveys, and research studies related to the effect of alcohol on domestic violence). While this study makes a compelling case for the positive correlation between alcohol use and domestic violence, conclusions rest on the premise that there is a causal or even facilitative relationship. *Id.* The study's author concedes that it is not actually established by stating "[t]he case for this rests on whether alcohol has any causal or facilitative effects on domestic violence." *Id.* Additionally, operational definitions are somewhat muddled in that differentiation is not made between alcohol use, amount of alcohol consumed, the presence of alcohol abuse disorders, intoxication, and/or other potentially confounding factors. *Id.* Nevertheless, the analysis provides significant benefit in identifying critical areas for future research. *Id.* See also Gregory L. Stuart et al., *Examining a Conceptual Framework of Intimate Partner Violence in Men and Women Arrested for Domestic Violence*, 67 J. STUD. ON ALCOHOL 102 (2006) at 102 (discussing a survey study of 409 men and women referred to batterer intervention programs). Structural equation modeling was used to analyze interrelationships between the perpetrator's gender and a number of measured characteristics; although findings strongly suggest that problematic alcohol use contributes to the perpetration of domestic violence, authors note that they did not corroborate participants self-reports of either their own alcohol use and intimate partner violence or their partner's use of alcohol. *Id.* See also Gregory L. Stuart et al., *The Role of Drug Use in a Conceptual Model of Intimate Partner Violence in Men and Women Arrested for Domestic Violence*, 22 PSYCHOL. ADDICTIVE BEHAV. 12–24 (2008) at 12 (discussing results from further analysis of Stuart et al., *Examining a Conceptual Framework*, *supra*, to determine if problematic drug use is likewise statistically correlated with perpetration of intimate

evaluator can better recommend appropriate interventions. In particular, evidence has been found to support the notion that there are three types of batterers: (1) Family-Only batterers, (2) Dysphoric/Borderline batterers, and (3) Generally Violent/Antisocial batterers.<sup>240</sup> Family-Only batterers are found in up to 50 percent of domestic violence cases,<sup>241</sup> and are primarily violent within the family.<sup>242</sup> They have few, if any, pathologies, and they are the least likely of all domestic violence perpetrators to have witnessed or been victimized during their own childhood.<sup>243</sup> They perpetrate the least severe forms of violence/abuse and are described as “normal” by others.<sup>244</sup> Dysphoric/Borderline batterers are found in approximately 25 percent of cases and are typically violent within the family, but may also commit general violence.<sup>245</sup> This type of batterer also is likely to have psychiatric problems, is emotionally volatile, and is likely psychologically distressed, often with depression or anger issues.<sup>246</sup> These batterers may have substance abuse issues and may have been victims or witnesses of domestic violence during their own childhoods.<sup>247</sup> For these individuals, batterer intervention programs may need to be combined with additional mental health services and substance abuse programs to increase the likelihood of change, improve future behavior patterns, and decrease the rate of recidivism.<sup>248</sup> Generally Violent/Antisocial batterers are present in approximately 25 percent of cases of domestic violence, with family violence being only part of the general violence that is committed by these individuals.<sup>249</sup> Antisocial batterers often have criminal records, have significant psychiatric problems, abuse substances, are the most likely to have been victimized or witnessed domestic violence in childhood, and perpetrate the most severe and chronic violence/abuse.<sup>250</sup> These individuals require criminal justice

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partner violence for both male and female offenders). Interpretation of conclusions should take into consideration that measured variables were based on the “perpetrators’ perceptions of partner behavior.” [emphasis in original]. *Id.*

240. Holtzworth-Munroe & Stuart, *supra* note 237, at 481.

241. *Id.* at 481–82.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Mike Feinerman, Working with People Who Batter (Feb. 15, 2012) (unpublished PowerPoint presentation).

249. Holtzworth-Munroe & Stuart, *supra* note 237, at 482.

250. *Id.*

intervention and intense mental health and substance abuse services, as they are often very dangerous to others.<sup>251</sup>

Partner Abuse Intervention programs seek to change the attitudes and behaviors of abusive intimate partners. Some studies have suggested that these programs are helpful in reducing incidences of domestic violence,<sup>252</sup> while other studies question the utility of these programs.<sup>253</sup>

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251. Feinerman, *supra* note 248.

252. See, e.g., Julia C. Babcock, et al., *Does Batterers' Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment*, 23 CLINICAL PSYCHOL. REV. 1023 (2004); Martha Coulter & Carla VandeWeerd, *Reducing Domestic Violence and Other Criminal Recidivism: Effectiveness of a Multilevel Batterer's Intervention Program*, 24 VIOLENCE & VICTIMS 139 (2009) (expounding on a nine-year analysis of recidivism (as measured by re-arrest rates) of 17,999 batterers assigned to one of six batterers' intervention programs). Although findings strongly suggest that these Batterer Intervention Programs (BIPs) are correlated with lower rates of re-offense than for individuals who had not completed treatment, this must be considered in light of the potential confounding fact that the type of individuals who are not diligent with program completion are also the type more likely to reoffend, as well as the consideration that re-arrest rates are not tantamount to re-offense rates, and may instead reflect a better ability to avoid detection. *Id.*; Christopher Eckhardt et al., *The Effectiveness of Intervention Programs for Perpetrators and Victims of Intimate Partner Violence*, 4 PARTNER ABUSE 196 (2013) (discussing meta-analysis of 39 randomized or quasi-experimental studies in which the research design compared a particular BIP to a pertinent comparison group). Study authors found that current research in this area is extremely limited, and that the current available research is often fraught with methodological problems, implementation problems, and other limitations. *Id.*; Lynette Feder & David B. Wilson, *A Meta-Analytic Review of Court-Mandated Batterer Intervention Programs: Can Courts Affect Abusers' Behavior?*, 1 J. EXPERIMENTAL CRIMINOLOGY 239 (2005) (examining meta-analysis of 15 research studies (representing four experimental and six quasi-experimental studies) evaluating the effectiveness of post-arrest mandated BIPs (each of which had a rigorous experimental or quasi-experimental design, as well as a sufficient amount of data to conduct statistical analysis of effect size); results were mixed, but study authors express concern over generalizability, bias, and validity of the findings); Nicola McConnell, et al., *Caring Dads Safer Children: Families' Perspectives on an Intervention for Maltreating Fathers*, 7 PSYCHOL. VIOLENCE 406 (2017) (reviewing results of the Caring Dads Safer Children (CDSC) (a weekly intervention program designed to change behavior of abusive fathers in order to protect partners and children) and data obtained from 121 partners and 26 children of abusive men in England, Northern Ireland and Wales, as well reports of those men's attitudes and behavior towards their children). Although the inferences of this analysis provide evidence to support the notion that CDSC may reduce risks to the family, limitations include the facts that findings are based on a small sample of children, and that one of the measures used to evaluate fathers' attitudes has not been evaluated for statistical validity or reliability. *Id.* Daniel G. Saunders, *Group Interventions for Men Who Batter: A Summary of Program Descriptions and Research*, 23 VIOLENCE & VICTIMS 156 (2008) (reviewing recent research related to components, methods, effectiveness, and cultural sensitivity of BIPs). The study's author concludes that there are few available studies which provide reliable conclusions,

The reasons behind the small effects in some studies of partner abuse intervention programs include factors such as: (i) unidentified and untreated substance abuse,<sup>254</sup> (ii) lack of full time employment and income,<sup>255</sup> (iii) ethnicity and culture,<sup>256</sup> and (iv) a lack of a “stake in conformity” wherein individuals who have less to lose and are not in danger of losing a job, a marriage, or a stable home, are less motivated to conform to the expectations of intervention programs.<sup>257</sup> Whether

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- although the concepts of matching offender-type to treatment-type, as well as increasing cultural appropriateness, have shown promising results. *Id.* Katreena L. Scott & Vicky Lishak, *Intervention for Maltreating Fathers: Statistically and Clinically Significant Change*, 36 CHILD ABUSE & NEGLECT 9 (2012) (discussing a study of 98 fathers who had neglected or abused their children or who had exposed their children to domestic violence in the Caring Dads (CDSC) batterers’ intervention program in Ontario, Canada, to determine the efficacy of community-based group-treatment for this population). The amount of change from pre-intervention to post-intervention was analyzed for statistical significance; although results from this study are encouraging in that they suggest the possibility of effective treatment. *Id.* Nevertheless, findings need to be interpreted in light of the fact that data obtained came from the fathers’ own unsubstantiated reports. *Id.* Gabrielle Davis, *Custody Evaluators’ Beliefs About Domestic Violence*, BATTERED WOMEN’S JUST. PROJECT (2011) (reviewing meta-analysis of 22 studies on the effectiveness of BIP treatment for adult male domestic violence perpetrators; authors note a high level of variability in the quality and validity of studies in this area of research, as well as an overall trend of small effect sizes in studies that have been conducted).
253. *See, e.g.*, Babcock et al., *supra* note 252; Eckhardt et al., *supra* note 252; Feder & Wilson, *supra* note 252.
254. LARRY BENNETT ET AL., PROGRAM COMPLETION, BEHAVIORAL CHANGE, AND RE-ARREST FOR THE BATTERER INTERVENTION SYSTEM OF COOK COUNTY ILLINOIS: FINAL REPORT TO THE ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY 3 (2005), <http://www.icjia.state.il.us/assets/pdf/ResearchReports/CookCountyDVInt.pdf>.
255. *Id.* at 35–36.
256. *Id.* at 36 (demonstrating more effectiveness for Latinx individuals than for whites or African Americans).
257. LAWRENCE W. SHERMAN ET AL., POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS (1992) (analyzing studies of the efficacy of mandatory arrest in cases of domestic violence, demonstrating that arrest does not necessarily reduce the incidence of domestic violence among unemployed individuals); JEFFREY FAGAN, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS (1995), <https://www.ncjrs.gov/pdffiles/crimdom.pdf>; Richard A. Berk et al., *The Deterrent Effect of Arrest in Incidents of Domestic Violence: A Bayesian Analysis of Four Field Experiments*, 57 AM. SOC. REV. 698 (1992) (Overview of six studies examining whether arrests for domestic violence discourage future violence and/or protect victims). Although the majority of data support both of the hypotheses, two of the six do not support these conclusions, meaning that Bayesian Analysis was conducted only on studies confirming a given premise. *Id.*

culturally-matched intervention programs provide increased efficiency is controversial and more research is needed.<sup>258</sup>

A partner abuse intervention program in Cook County, Illinois, has demonstrated promising results.<sup>259</sup> There has been a 73.4 percent completion rate in the studied programs,<sup>260</sup> and completion of the program has contributed to a reduction in incidences of re-arrest by 63 per-

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258. See, e.g., Samuel R. Aymer, *A Case for Including the "Lived Experience" of African American Men in Batterers' Treatment*, 15 J. AFR.-AM. STUD. 352 (2011) (reviewing literature on the cultural experiences that shape the beliefs and attitudes of African American men regarding domestic violence, how culturally-promoted chauvinistic attitudes contribute to perpetration of domestic violence, and how consideration of these societal influences should be incorporated into treatment and intervention for African American male batterers). Evidence of race-related stress exists to substantiate the idea that sociocultural influences from African American culture may impact the likelihood of intimate partner violence. *Id.* Congruent with Williams, *infra*, the study's author notes that more studies are needed to better understand and address the needs of this particular population. *Id.* José Rubén Parra-Cardona et al., "En el Grupo Tomas Conciencia (In Group You Become Aware)": *Latino Immigrants' Satisfaction With a Culturally Informed Intervention for Men Who Batter*, 19 VIOLENCE AGAINST WOMEN 107 (2013) (reviewing a qualitative study of interviews of 21 Latino adult males who participated in batterer intervention programs designed to be culturally informed). Findings are limited by the fact that information gathered from batterers' self-reports was not corroborated, and that the study's small sample size prevents generalizability of conclusions to greater populations. *Id.* Bernadine Waller, *Broken Fixes: A Systematic Analysis of the Effectiveness of Modern and Postmodern Interventions Utilized to Decrease IPV Perpetration Among Black Males Remanded to Treatment*, 27 AGGRESSION & VIOLENT BEHAV. 42 (2016) (exploring findings from a systematic review of studies including African American male offenders' recidivism and attrition rates). Although many current interventions have enormous benefit, many are also disproportionately ineffective for African American individuals as a result of a failure to properly accommodate considerations related to ethnic and racial sociocultural influence. *Id.* Oliver J. Williams, *Ethnically Sensitive Practice to Enhance Treatment Participation of African American Men Who Batter*, 73 FAMILIES IN SOC'Y 588 (1992) (examining whether ethnically sensitive approaches to standard BIPs have an effect on the success of those interventions for African American males). As the author notes, literature in this area is lacking, but this provides a useful qualitative overview and direction for future research. *Id.* But see Edward W. Gondolf, *Outcomes of Case Management for African-American Men in Batterer Counseling*, 23 J. FAM. VIOLENCE 173 (2008) (examining a quasi-experimental evaluation of an archival sample of 482 cases of African American adult males who had previously been enrolled in BIPs to determine whether the implementation of case management had an effect on outcomes of intervention). Although findings suggest that case management does not lead to a significant improvement on the effects of intervention, multivariate analysis was unable to control for the characteristics of offenders in either the case-management or no-case-management conditions. *Id.*

259. BENNETT ET AL., *supra* note 254, at 4.

260. *Id.*

cent.<sup>261</sup> Issues related to having a “stake in conformity” were the most important correlates of success in the intervention programs.<sup>262</sup>

F. *An Evidence-Based Analysis of Fathers’ Rights Group Claims  
Relating to Domestic Violence and Custody Issues*

The claim by fathers’ rights groups that courts favor mothers over fathers is based on studies that have found “gender parity” in anonymous surveys wherein women report committing violence against their partners at the same rate that men report committing violence against their partners.<sup>263</sup> Thus, they reason that while only 50 percent of perpetrators are male, 77 percent of those who are arrested are male.<sup>264</sup> From this, they claim that there is a gender bias against men.<sup>265</sup> There is indeed a large scientific literature demonstrating “gender parity” including meta-analyses.<sup>266</sup> The studies on which these meta-analyses and other literature reviews showing “gender parity” use questionnaires wherein women’s answers did not differ from men’s answers, apparently because those questions reflected situational couple violence.<sup>267</sup> Many researchers have made the distinction between situational couple violence and coercive abuse, finding that men are more likely to perpetrate violence involving coercive abuse.<sup>268</sup> As a counter-argument to the evidence of a coercive abuse distinction, fathers’ rights groups point to studies that asked about motivation for situational couple violence, and women as well as men say that they commit violence to try to get their partners to do something (i.e., coerce their partners).<sup>269</sup> However, trying to get

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261. *Id.* at 51–52.

262. Berk et al., *supra* note 257; Sherman et al., *supra* note 257; Fagan, *supra* note 257.

263. See, e.g., STOP ABUSIVE AND VIOLENT ENVIRONMENTS, PREDOMINANT AGGRESSOR POLICIES: LEAVING THE ABUSER UNACCOUNTABLE? 6 (2013) [hereinafter PREDOMINANT AGGRESSOR POLICIES], [http://www.saveservices.org/pdf/SAVE-Predominant\\_Aggressor.pdf](http://www.saveservices.org/pdf/SAVE-Predominant_Aggressor.pdf).

264. MATTHEW R. DUROSE ET AL., U.S. DEP’T OF JUSTICE, FAMILY VIOLENCE STATISTICS 2 (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>.

265. PREDOMINANT AGGRESSOR POLICIES, *supra* note 263.

266. John Archer, *Sex Differences in Aggression Between Heterosexual Partners: A Meta-Analytic Review*, 126 PSYCHOL. BULL. 651 (2000).

267. See generally Michael P. Johnson et al., *Intimate Terrorism and Situational Couple Violence in General Surveys: Ex-Spouses Required*, 20 VIOLENCE AGAINST WOMEN 186 (2014).

268. See, e.g., Suzanne Swan, et al., *A Review of Research on Women’s Use of Violence with Male Intimate Partners*, 23 VIOLENCE & VICTIMS 301 (2008).

269. Murray A. Straus, *Dominance and Symmetry in Partner Violence by Male and Female University Students in 32 Nations*, 30 CHILD. & YOUTH SERV. REV. 252, 254 (2007).

partners to do something is not the same as the type of constant surveillance and threats described as coercive abuse by victims of domestic violence.<sup>270</sup> Even Murray A. Straus, a “gender parity” advocate, admitted that “the adverse effects of being a victim of domestic violence are much greater for women than for men” with greater injuries and economic vulnerabilities;<sup>271</sup> that women have more reasons to be afraid;<sup>272</sup> that cultural norms sanctioning violence against women must be changed;<sup>273</sup> and that because of women’s greater injuries and legitimate fear, police and hospital statistics reflect greater levels of abuse of women by men.<sup>274</sup>

Because of these factors, even if there were “gender parity” in initiating violence against intimate partners, greater levels of abuse of women by men would rise to the level of violating the law. Furthermore, recently-developed questionnaires have found differences in levels of violence perpetrated by men versus women, indicating that the questionnaires which suggested “gender parity” were not well-designed and missed critical ways in which violence is gendered.<sup>275</sup> It is also noteworthy that the concept of “gender parity” focuses only on measuring the amount of abuse that men and women commit, and does not address whether family law courts apply the same standards to women as to men. Nevertheless, fathers’ rights groups allege that courts favor women over men in divorce and parentage cases without any valid empirical support, while a careful review of actual court cases (rather than the questionable calculations suggested by the fathers’ rights group analyses) demonstrate that courts are actually biased against women.<sup>276</sup> Research found that raising abuse claims worked against women; that fathers were

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270. Kimberly A. Crossman & Jennifer L. Hardesty, *Placing Coercive Control at the Center. What Are the Processes of Coercive Control and What Makes Control Coercive?*, 8 PSYCHOL. VIOLENCE 196 (2018).

271. Murray A. Straus, *Thirty Years of Denying the Evidence on Gender Symmetry in Partner Violence: Implications for Prevention and Treatment*, 1 PARTNER ABUSE 332, 336 (2010).

272. *Id.* at 347.

273. *Id.* at 348.

274. *Id.* at 347.

275. See Sherry Hamby, *Self-Report Measures That Do Not Produce Gender Parity in Intimate Partner Violence: A Multi-Study Investigation*, 5 PSYCHOL. VIOLENCE (2014). Examination of wording of items on behavioral checklists and self-report measures found that earlier-established methods tend to be worded in such a way that they fail to adequately take into account the high occurrence of false-positives that produce asymmetrical reflections of victimization scores based on gender. *Id.* By contrast, wording that reduces false positives (e.g., qualifiers like “not including horseplay or joking around”, “when my partner was angry”, or “not joking”) provides more accurate results and gender parity in measurement. *Id.*

276. Meier & Dickson, *supra* note 2, at 228–31.

more likely to win when abuse claims were raised than when no abuse claims were raised because abuse claims were seen as attempts by mothers to “alienate” fathers from children. Claims of “alienation” trumped claims of abuse even when courts accepted the evidence of abuse and were much more likely to be successful when raised by fathers than when raised by mothers (demonstrating a gender bias in favor of fathers).<sup>277</sup>

The next problematic claim of the fathers’ rights groups is that mothers routinely falsely allege domestic violence or child abuse. They have gone so far as to claim that, “In about 70 [percent] of cases, the allegation is deemed to be unnecessary or false.”<sup>278</sup> They often base claims like this on studies like the one conducted by experts Janet R. Johnston, Soyoung Lee, Nancy W. Olesen, and Marjorie G. Walters in 2005, which looked at rates in which claims could be substantiated from court records.<sup>279</sup> The unjustified inference is that 100 percent of all cases that could not be substantiated from court records alone were false, and not just false, but rather “deemed” to be false (a claim the authors never made).<sup>280</sup> These unsubstantiated cases were never deemed to be false.<sup>281</sup> A comparable methodology on the opposite side of this debate is to look at conviction rates for false allegations, cases where allegations were proven to be false. One such study from the United Kingdom found six convictions for false allegations out of 111,891 cases where there were allegations of domestic violence, or a false allegation rate of 0.005 percent.<sup>282</sup> Neither of these methods of estimating frequencies of false allegations is a good estimate of the prevalence of false allegations in the population.<sup>283</sup>

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277. *Id.*

278. INCENTIVES TO MAKE FALSE ALLEGATIONS, *supra* note 14, at 1.

279. Janet R. Johnston et al., *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283–94 (2005).

280. *Id.*

281. *Id.* at 284–85. “Child protection workers substantiated 27 [percent] of allegations against fathers, suspected another 27 [percent], believed that 1.3 [percent] were false, and the remainder unfounded.” *Id.* The authors made a clear distinction here between the 73 percent of allegations that were unsubstantiated and the 1.3 percent that were deemed to be false. *Id.* For the fathers’ rights groups to ignore this difference and claim that all 73 percent of allegations were false is not intellectually honest.

282. Alison Levitt, *Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations*, CROWN PROSECUTION SERVICE EQUALITY AND DIVERSITY UNIT 3 (2013).

283. *See id.* One method ignores all allegations that could not be proven true using unreasonably difficult criteria and the other ignores all allegations that could not be proven false using unreasonably difficult criteria.

The actual methodology used by Johnson et al. in *Allegations and Substantiations of Abuse in Custody-Disputing Families* was to have three clinical psychologists and three clinical social workers review court documents from the divorce proceedings of highly conflicted families.<sup>284</sup> These trained raters looked for evidence of domestic violence in court documents such as child protective service reports, self-admissions, eyewitness reports taking into account the credibility of the witnesses, expert testimony, medical records, police reports, arrests, plea bargains, and criminal convictions.<sup>285</sup> The researchers then looked at whether these ratings lined up with allegations.<sup>286</sup> They found that there were allegations against the father in 55 percent of cases, and 41 percent of those cases were substantiated.<sup>287</sup> By contrast, there were allegations against the mother in 30 percent of cases, and 15 percent of those cases were substantiated. The actual levels of substantiation are of secondary interest here because, given the private contexts in which much domestic violence is perpetrated, it is not surprising that many cases could not be substantiated. The question was whether allegations were well-founded.<sup>288</sup> Not every case of actual abuse would have child protective service reports, self-admissions, and eyewitness reports taking into account the credibility of the witnesses, expert testimony, medical records, police reports, arrests, plea bargains, or criminal convictions. For fathers' rights groups to then automatically claim that 100 percent of those unsubstantiated cases are false is intellectually dishonest.

The more interesting result from the Johnson et al. study is that, contrary to the claims of the fathers' rights groups, not only were there more allegations against fathers than against mothers, but the allegations against fathers were substantiated at a higher rate than the allegations against mothers.<sup>289</sup> These differences were statistically significant.<sup>290</sup> Furthermore, the motivations that the fathers' rights groups ascribe to women (i.e., that it is all part of a "gamesmanship of divorce," to gain an economic advantage in the divorce or parentage case, or to get custody) are all based upon anecdotes and arguments that incentives are in

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284. Johnston et al., *supra* note 279, at 286.

285. *Id.* at 287.

286. *Id.*

287. *Id.* at 288–89.

288. *Id.* at 283.

289. *Id.* at 288–89.

290. *Id.* at 289.

place for women to do so.<sup>291</sup> They offer no proof that women actually do so.<sup>292</sup>

The fathers' rights group claim that is most directly relevant to the policy prescriptions that we advocate in this Article, however, involves research on the well-being of children under joint versus sole custody. There have been many studies demonstrating that children are often better off in joint custody situations (defined in most of these studies as spending at least 25 percent of the parenting time with each parent).<sup>293</sup> But these studies—even if they looked at the degree of conflict in the marriage or in the divorce, and even if they looked at violence in the relationship—have not looked at the degree of abusive, coercive control in the relationship.<sup>294</sup> One study published in 2015 by Swedish experts Malin Bergström, Emma Fransson, Bitte Modin, Marie Berlin, Per A. Gustafsson, and Anders Hjern, used a large national survey of children in Sweden to investigate the well-being of children in joint physical custody (“approximately equal”) compared to children living only or mostly with one parent and to children in nuclear families.<sup>295</sup> They found that children in joint physical custody were better off than children living only or mostly with one parent (with children in intact nuclear families best off).<sup>296</sup> A key limitation with this study is that it did not separate out many of the variables that previous research indicated affects both the viability of joint physical custody and outcomes for children.<sup>297</sup> They did not control for parents' mental health, addictions, violence, or abuse.<sup>298</sup> This study did look at socio-economic status, but the study measured it by asking the children to rate their satisfaction with

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291. INCENTIVES TO MAKE FALSE ALLEGATIONS, *supra* note 14, at 2.

292. *Id.*

293. Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCHOL. 91 (2002).

294. Linda Nielsen, *Re-Examining the Research on Parental Conflict, Coparenting, and Custody Arrangements*, 23 PSYCHOL., PUB. POL'Y, & L. 211, 212 (2017).

295. Malin Bergström et al., *Fifty Moves a Year: Is There an Association between Joint Physical Custody and Psychosomatic Problems in Children?*, 69 J. EPIDEMIOLOGY & COMMUNITY HEALTH 769 (2015) (correlational study of survey results). Primary problems with this study include the possibility of reverse causation and third variables; of note, this study had an extremely large sample size (N = 147,839), increasing confidence in results. *Id.*

296. *Id.*

297. *Family Law Reform Conference Gathers Leading Researchers and Practitioners*, NATIONAL PARENTS ORGANIZATION (Nov. 19, 2014), <https://nationalparentsorganization.org/component/content/article/16-latest-news/22067-family-law-reform-conference-gathers-leading-researchers-and-practitioners> (last visited Dec. 29, 2018).

298. *See* Bergström et al., *supra* note 295.

their material resources, rather than using objective measures of socio-economic status.<sup>299</sup> Nevertheless, even using this measure to control for socio-economic status caused a large reduction in the effect of joint physical custody on positive outcomes for children.<sup>300</sup>

Notwithstanding the weaknesses in this study, fathers' rights groups, such as the National Parents Organization, have pointed to these results to argue that courts should place children in joint physical custody.<sup>301</sup> Meta-analyses of children's well-being in joint versus sole custody situations are consistent with the view that children who come from families where joint custody is a viable option, taking into account all relevant factors, are better off, but the inference that courts should, therefore, place children with abusive parents without considering the abuse is not justified. Joint custody is only likely to be a viable option when there has not been coercive control in the relationship. Bergström et al. and the other studies that have looked at this topic have failed to look at or control for levels of coercive control. The benefits of joint custody have not been supported and have been shown to be contradicted in these very different types of situations.<sup>302</sup> For example, a large-scale study of joint physical custody (defined as 35 percent or more nights with each parent) versus sole physical custody arrangements in Australia found that children did less well in joint than in sole custody situations when mothers "expressed safety concerns."<sup>303</sup>

A number of studies have looked at the degree of "conflict" in the marriage or post-divorce and how it affects the well-being of children in joint legal custody versus sole legal custody situations.<sup>304</sup> Note that "conflict" cannot serve as a proxy for either situational couple violence or coercive abuse, since the studies failed to distinguish between them. These studies have generally found that even controlling for such conflict, children are still better off in joint custody situations.<sup>305</sup> Sometimes situational conflict can be reduced post-divorce after decisions are laid out

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299. *Id.* at 769.

300. *Id.*

301. NATIONAL PARENTS ORGANIZATION, *supra* note 297.

302. Linda Nielsen, *Shared Physical Custody: Summary of 40 Studies on Outcomes for Children*, 55 J. DIVORCE & REMARRIAGE 613, 623 (2014).

303. JUDY CASHMORE ET AL., SOCIAL POLICY RESEARCH CENTER, SHARED CARE PARENTING ARRANGEMENTS SINCE THE 2006 FAMILY LAW REFORMS 52 (2010), [https://www.sprc.unsw.edu.au/media/SPRCFile/2\\_AG\\_Shared\\_Care.pdf](https://www.sprc.unsw.edu.au/media/SPRCFile/2_AG_Shared_Care.pdf).

304. Marjorie Linder Gunnoe & Sanford L. Braver, *The Effects of Joint Legal Custody on Mothers, Fathers, and Children Controlling for Factors that Predispose a Sole Maternal Versus Joint Legal Award*, 25 L. & HUM. BEHAV. 25 (2001); Bauserman, *supra* note 293.

305. Gunnoe & Braver, *supra* note 304, at 25; Bauserman, *supra* note 293, at 91.

in the parenting decree and the parents have fewer issues to disagree over, such that children can benefit from joint legal custody arrangements.<sup>306</sup> These studies, however, did not seek to identify situational couple violence or coercive abuse situations, let alone to control for them.<sup>307</sup> Furthermore, the studies that have tried to control for conflict shed no light on the benefits of joint versus sole legal custody in divorces that involve coercive control, because victims of coercive control are often afraid to report conflict when doing so could infuriate the abusive intimate partner and lead to heightened abuse.<sup>308</sup>

Even situational couple violence can harm children. The interactions necessary to coordinate joint custody create new, additional instances where violence can occur, and individuals who resort to violence to resolve conflicts are more likely to be deficient or abusive parents and poor role models.<sup>309</sup> In situations involving coercive abuse as we have defined it earlier,<sup>310</sup> there is no way to make joint legal custody (joint decision-making) or joint physical custody (equal or roughly equal parenting time) tenable, because abusers will use continuing interactions to attempt to undermine the other parent and to continue the coercive abuse.<sup>311</sup>

In 2008 Peter G. Jaffe, Janet R. Johnston, Claire V. Crooks, and Nicholas Bala published a review of the scientific literature on the different types of domestic violence and situations in which there has been domestic violence and their risks.<sup>312</sup> They then proposed different parenting arrangements that might be possible under these different situations.<sup>313</sup> Per Jaffe et al., joint legal and joint physical custody is only appropriate in a situation where there has been very low levels of violence, the violence was situational and is now in the past, the traumas have been resolved, and there has been a substantial history of successful co-parenting.<sup>314</sup> They describe another possible parenting arrangement

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306. Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 502, 511 (2008) [hereinafter Jaffe et al., *Custody Disputes*].

307. Kelly & Johnson, *supra* note 33.

308. See Smith & Coukos, *supra* note 209.

309. Jaffe et al., *Custody Disputes*, *supra* note 306, at 502 (reviewing the most pertinent research on custody issues in cases involving domestic violence, paying particular attention to the different subtypes of domestic violence and how each subtype affects custody issues).

310. See *supra* notes 39, 40 and accompanying text.

311. Jaffe et al., *Custody Disputes*, *supra* note 306.

312. Jaffe et al., *Common Misconceptions*, *supra* note 42.

313. *Id.*

314. See *id.* at 511 tbl.2.

called “parallel parenting” that can be appropriate for situational couple violence cases (as contrasted with coercive abuse cases) where the domestic violence was moderate to low on potency.<sup>315</sup>

Jaffe et al. provide numerous details on when parallel parenting is appropriate and how it should be structured to promote the best interests of the child and protect the parent who is a survivor of domestic violence.<sup>316</sup> Under a parallel parenting arrangement, the parenting plan is drawn up by dividing decision-making responsibilities between the parents, with different decision-making issues allocated to each parent. The basic idea is that the parenting plan should provide for clear boundaries and separation between the parents, and a time-sharing schedule that requires minimal communication between the parents and seeks to avoid direct parent-parent contact, but still provide stability and continuity in the child’s life.<sup>317</sup> The parallel parenting can provide joint or sole legal and physical custody (if joint, the time-share schedule should meet all of the above described criteria).<sup>318</sup> Each parent’s access to the child would include unsupervised day or overnight visits, with a range of time sharing between the parents as specified by the court.<sup>319</sup> The access would also be structured for natural transition times and to minimize disruption to the child’s school, social, and extra-curricular activities.<sup>320</sup> The court order for access should explicitly detail the times, dates, places of exchange, holidays, etc., so that after the plan is drawn up, little communication is required and the parents can avoid as much direct face-to-face contact as possible.<sup>321</sup> The court order on parenting time would require adherence to the details of the order and not require flexibility or compromise regarding exchanges of the children.<sup>322</sup> The protocols would be in place to avoid conflict and to prohibit threats of any violence and sabotage between parents. Permanent restraining orders would remain in place, including restraints from taking the child out of the area without the other parent’s consent, neutral places of exchange that are safe and comfortable for the child (such as a neutral relative, visiting center, school, or library) and structured telephone access to the child.<sup>323</sup> The court order on parenting time would also include rules for

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315. *See id.* at 512 tbl.2.

316. *See id.*

317. *See id.*

318. *See id.*

319. *See id.*

320. *See id.*

321. *See id.*

322. *See id.*

323. *See id.*

communicating emergency and other necessary information between the parents using technology that enables the communications to be monitored by the court.<sup>324</sup> Parents would not be allowed to communicate through the child.<sup>325</sup> Finally, the parenting order would include a procedure (such as use of a parenting coordinator) for resolving any new issues not addressed in the parenting order.<sup>326</sup>

The authors agree with all of these aspects of parallel parenting as described by Jaffe et al., but have a concern with their statement that parallel parenting emphasizes consistent, safe child-care practices within separate homes, rather than common practices. Without sufficient common practices within the two separate homes, the child's life may become so inconsistent between two households that the child could be harmed by this lack of consistency. We thus recommend that the goal of creating adequate common practices also be emphasized under parallel parenting. To reflect this goal, we recommend that the term "parallel parenting" be revised to "structured independent parenting time" to emphasize that the parenting order on parenting time will include adequate details and structure to promote common practices sufficient to safeguard the child's emotional and physical well-being. Research has demonstrated that the absence of a consistent bedtime routine can negatively impact child development and behavior.<sup>327</sup> Similarly, a lack of uniformity in rules and explanations across settings has also shown to be consistent with the development of child behavioral problems.<sup>328</sup>

In other situations, Jaffe et al. argue that the best evidence to date on the well-being of children in cases involving domestic violence is sole legal and primary physical custody to the non-violent parent.<sup>329</sup> Jaffe et al. also addressed how to respond to cases involving higher levels of situational couple violence, and concluded that in such cases, supervised exchange may be sufficient to reduce the likelihood of further abuse during the exchange of the child.<sup>330</sup> Per Jaffe et al., there might be some cases where there has been coercive abuse when supervised visiting time

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324. *See id.*

325. *See id.*

326. *See id.*

327. Jodi A. Mindell et al., *Developmental Aspects of Sleep Hygiene: Findings from the 2004 National Sleep Foundation Sleep in America Poll*, 10 SLEEP MEDICINE 771, 771–78 (2009); *see also* Ronald E. Dahl & Daniel S. Lewin, *Pathways to Adolescent Health Sleep Regulation and Behavior*, 31 J. ADOLESCENT HEALTH 175, 175–81 (2002).

328. Alejandra Ros Pilarz & Heather D. Hill, *Unstable and Multiple Child Care Arrangements and Young Children's Behavior*, 29 EARLY CHILD. RES. Q. 471, 471–82 (2015).

329. Jaffe et al., *Common Misconceptions*, *supra* note 42, at 61–62.

330. *Id.* at 514.

might be sufficient to protect the child, such as when there has been treatment for substance abuse or acute mental illness and the child wants contact or will gain from the parent's continued involvement.<sup>331</sup> In most cases where there has been coercive abuse, however, contact between the parents or between the abusive parent and the child should be suspended, until the causes for the coercive abuse have been addressed.<sup>332</sup>

To distinguish between situational couple violence and coercive abuse, it is best to look beyond singular violent episodes, as both types of domestic violence involve violent episodes.<sup>333</sup> In coercive abuse, abusers typically blame the victim for the violence as well as the injuries, hospital or emergency room visits, or 9-1-1 calls; or they use jealousy to justify what happened.<sup>334</sup> Coercive abuse often involves intimidation, such as looks, actions, or gestures to make the victim afraid, smashing things or destroying property to send a signal to the victim, abusing pets to send a signal to the victim, or displaying weapons to send a signal to the victim.<sup>335</sup> Coercive abuse often involves threats: making or carrying out threats to do something or to hurt the victim, threats to commit suicide, threats to get the victim to drop charges, or threats to get the victim to do illegal things.<sup>336</sup> There is also often emotional abuse, such as put-downs or name-calling, humiliating the victim (especially in public), use of insults to make the victim feel bad about herself or himself, mind games, and guilt trips for common behaviors.<sup>337</sup> Coercive abusers also often strive to isolate the victim, limit their access and involvement in the outside world, control what they do, who they see or talk to, what they read, and where they go.<sup>338</sup> They often treat victims as servants.<sup>339</sup> The victim of coercive abuse is often afraid of the abuser.<sup>340</sup> There is often financial abuse, such as not allowing the victim to work outside the home.<sup>341</sup> Bank accounts or other financial assets may only be in the abuser's name, such that the victim does not have any access to

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331. *Id.*

332. *Id.* at 515.

333. Stark, *Commentary on Johnson*, *supra* note 35 (reviewing literature on the distinctions between different types of domestic violence and how domestic violence should not be viewed as simply a combination of discrete acts, but rather as a pattern of abuse).

334. PENCE & PAYMAR, *supra* note 40, at 3.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

money.<sup>342</sup> Victims are sometimes kept ignorant of family income and denied access to that family income.<sup>343</sup> If the victim has some income of her own, the abuser may take it.<sup>344</sup> If the victim needs money, she may be required to ask for it, or she might be given an allowance.<sup>345</sup>

Abusers in coercive abuse cases also often abuse the judicial system.<sup>346</sup> They might threaten to report the victim to child protective services or other government agencies when the supposed infraction would not have normally led to such an action.<sup>347</sup> They might threaten to use the court system to get custody and take the children, not because they are interested in parenting, but rather to keep the victim in the relationship.<sup>348</sup> They will often use court proceedings over parenting time and decision-making, not to look out for the welfare of their children, but rather to further abuse or punish the other parent, or to induce their ex-spouse/partner to return to the relationship.<sup>349</sup> They might file court petitions that are nominally in the children's interest, but are better explained as an attempt to coerce the former spouse.<sup>350</sup> They might request court motions that perpetuate contact with the mother, allow them to monitor the mother's actions, and allow them to exert control over the mother.<sup>351</sup> They may likewise use court-ordered joint decision-making as leverage to get the victim to act as the abuser wishes or threaten to bring legal action when the abuser is not consulted about commonplace parenting issues.<sup>352</sup> They may withhold consent for the child to participate in activities such as extracurricular school activities or procedures, such as counseling or medical procedures, until the victim concedes to the abuser's demands.<sup>353</sup> They may disrupt court-ordered visitation schedules as a way to continue coercion or abuse.<sup>354</sup> They are also often in arrears in court-ordered child support and they

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342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. Smith & Coukos, *supra* note 209 (reviewing the literature on this phenomenon including government reports and reports from the American Psychological Association).

347. PENCE & PAYMAR, *supra* note 40, at 3.

348. Smith & Coukos, *supra* note 209, at 38.

349. *Id.*

350. *Id.*

351. Jaffe et al., *Custody Disputes*, *supra* note 306, at 503.

352. Smith & Coukos, *supra* note 209, at 38.

353. Jaffe et al., *Custody Disputes*, *supra* note 306, at 503.

354. Smith & Coukos, *supra* note 209, at 38.

disobey court orders.<sup>355</sup> They are often controlling and coercive in their direct interactions with children, such as requiring children to act in ways that are not associated with common good parenting practices.<sup>356</sup> Finally, coercive abuse often correlates with other behaviors, such as poor decision-making for him or herself and the children, drug and alcohol abuse, criminal behavior, abuse of children, failure to comply with court orders, and general disregard for the law.<sup>357</sup> Thus, coercive abuse can be differentiated from situational couple violence when one looks at the entire pattern of the relationship and other personal traits.

## II. AN EXAMINATION OF THE EXTENT THAT IDENTIFIED BEST PRACTICES ARE REQUIRED BY LAW

As detailed in Section I, in order to properly take domestic violence into account in custody cases, professionals who work on custody cases (family law attorneys, judges, guardians *ad litem*, child representatives, and other custody evaluators) should be required to receive special training on the nature and dynamics of domestic violence, preferably as provided in the Wisconsin Guide<sup>358</sup> or other evidenced-based resources.<sup>359</sup> In addition to this mandatory training, best practices would also include requiring that guardians *ad litem*, child representatives, and other custody evaluators properly screen for domestic violence and child abuse and investigate any allegations of domestic violence or child abuse, per evidence-based training. Finally, guardians *ad litem*, child representatives, and other custody evaluators should be required to recommend one or more protective measures when there is evidence that children have been exposed to domestic violence or child abuse. The level of protection should be tailored to address past harm experienced and to help prevent the danger of future serious harms to the child or non-abusive parent.

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355. *Id.*

356. PENCE & PAYMAR, *supra* note 40, at 3.

357. Conner, *supra* note 212, at 223, 227.

358. See GOVERNOR'S COUNCIL ON DOMESTIC ABUSE & END DOMESTIC ABUSE WIS., *supra* note 33.

359. This includes the counter-intuitive nature of domestic violence, its impact on survivors, the danger of serious harm to children from exposure to domestic violence, how to properly screen for and investigate claims of domestic violence and child abuse, and many other aspects as detailed in Wisconsin's Domestic Abuse Guidebook. See GOVERNOR'S COUNCIL ON DOMESTIC ABUSE & END DOMESTIC ABUSE WIS., *supra* note 33.

Previous research found that when judges received Specialized Domestic Violence Training and recommendations for some of the Protective Measures from family law professionals, they were more likely to see the need for at least some of the Protective Measures and to order and enforce some Protective Measures (i.e., they were more likely to give mothers sole physical custody, but less likely to restrict fathers' visitation).<sup>360</sup> This result demonstrates both the benefits of training and the need to further educate judges on why the remaining Protective Measures are so important.

This Section reviews the extent to which states have enacted legislation or supreme court rules that require Specialized Domestic Violence Training, Domestic Violence Screening and Investigation, and Protective Measures in child custody cases. It also identifies gaps among the states in mandating these evidence-based best practices.

*A. To What Extent Do States Require Family Law Judges to Receive Training on Domestic Violence?*

Based upon a review of state legislation and supreme court rules, we have found that only the District of Columbia<sup>361</sup> and 11 states clearly require, without waiver, that family law judges receive domestic violence training: California,<sup>362</sup> Connecticut,<sup>363</sup> Kentucky,<sup>364</sup> Nevada,<sup>365</sup> New

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360. Morrill et.al, *supra* note 73, at 1097.

361. D.C. CODE ANN. § 11-1104(c) (Westlaw through Jan. 11, 2019) (“The chief judge, in consultation with the presiding judge of the Family Court, shall carry out an ongoing program to provide training in family law and related matters for judges . . . and shall include in the program information and instruction regarding the following: . . . (B) Family dynamics, including domestic violence . . . (E) Recognizing the risk factors for child abuse.”); D.C. CODE ANN. § 11-1732A(f) (Westlaw through Jan. 11, 2019) (“The chief judge, in consultation with the presiding judge of the Family Court of the Superior Court, shall ensure that all magistrate judges of the Family Court receive training to enable them to fulfill their responsibilities, including specialized training in family law and related matters.”).

362. CAL. R. CT. 10.464(a) (“Each judge . . . who hears criminal, family, juvenile delinquency, juvenile dependency, or probate matters must participate in appropriate education on domestic violence issues as part of his or her requirements and expectations under rule 10.462. Each judge or subordinate judicial officer whose primary assignment is in one of these areas also must participate in a periodic update on domestic violence as part of these requirements and expectations.”).

363. CONN. GEN. STAT. ANN. § 46b-38c(j) (Westlaw through Jan. 1, 2019) (“The Judicial Department shall establish an ongoing training program for judges . . . to inform them about the policies and procedures of sections 46b-1, 46b-15, 46b-38a to 46b-38f, inclusive, and 54-1g, including, but not limited to, the function of the family violence intervention units and the use of restraining and protective orders.

Jersey,<sup>366</sup> New Mexico,<sup>367</sup> New York,<sup>368</sup> Oklahoma,<sup>369</sup> South Carolina,<sup>370</sup> Tennessee,<sup>371</sup> and West Virginia.<sup>372</sup> Minnesota requires that domestic

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Such training program shall include an examination of the factors that contribute to a family being at risk for episodes of domestic violence within the family.”).

364. KY. REV. STAT. ANN. § 21A.170 (Westlaw through 2018 Reg. Sess.) (“The Supreme Court shall provide, at least once every two (2) years, in-service training programs for Circuit Judges, District Judges, and domestic relations and trial commissioners in: . . . (2) Dynamics of domestic violence, effects of domestic violence on adult and child victims, legal remedies for protection, lethality and risk issues, model protocols for addressing domestic violence, available community resources and victims services, and reporting requirements.”).
365. Admin. Office of the Courts, *Judicial Education Overview*, NEV. JUDICIARY, [https://nvcourts.gov/AOC/Programs\\_and\\_Services/Judicial\\_Education/Overview](https://nvcourts.gov/AOC/Programs_and_Services/Judicial_Education/Overview) (last visited Feb. 14, 2019) (“Continuing judicial education on the causes, effects, and dynamics of domestic violence for all District Court judges, Justices of the Peace, Municipal Court Judges, and Domestic Relations Masters”); *see also* JUD. EDUC. REQUIREMENTS: ST. OF NEV. APP. A, [https://nvcourts.gov/AOC/Programs\\_and\\_Services/Judicial\\_Education/Documents/Important\\_Documents/Judicial\\_Education\\_Requirements/](https://nvcourts.gov/AOC/Programs_and_Services/Judicial_Education/Documents/Important_Documents/Judicial_Education_Requirements/) (last updated Nov. 2018) (stating that “[a]ll District Court Judges, Justices of the Peace, Municipal Court Judges, and Domestic relations Masters” must have as part of required training “continuing judicial education on the causes, effects, and dynamics of domestic violence”).
366. N.J. STAT. ANN. § 2C:25-20b(1) to (2) (Westlaw through L.2018, c. 169 and J.R. No. 14) (“The Administrative Office of the Courts shall develop and approve a training course and a curriculum on the handling, investigation and response procedures concerning allegations of domestic violence . . . . The Administrative Director of the Courts shall be responsible for ensuring that all judges and judicial personnel attend initial training within 90 days of appointment or transfer and annual inservice training as described in this section.”).
367. N.M.R.A. 18-204G(2) (“Annual training for metropolitan, district and appellate court judges, domestic violence special commissioners and domestic relations hearing officers shall include appropriate training in understanding domestic violence, as determined by the Judicial Continuing Education Committee.”).
368. N.Y. CT. R. § 17.4 (“Each judge or justice in a court that exercises criminal jurisdiction, including town and village justices, each judge of the Family Court, and each justice of the Supreme Court who regularly handles matrimonial matters shall attend, every two years, a program approved by the Chief Administrator of the Courts addressing issues relating to domestic violence.”).
369. There is a statute in place requiring the Oklahoma Supreme Court to establish a rule that requires training that “includes” domestic violence training. OKLA. STAT. ANN. tit. 10A, § 1-8-101A (Westlaw through 2d Legis. Sess. of 58th Leg.) (“The Supreme Court is required to establish by rule, education and training requirements for judges, associate judges, special judges, and referees who have juvenile docket responsibility. Rules shall include, but not be limited to, education and training relating to juvenile law, child abuse and neglect, foster care and out-of-home placement, domestic violence, behavioral health treatment, and other similar topics.”). However, the Supreme Court rules regarding Mandatory Judicial Continuing Legal Education do not contain any specific requirements regarding domestic violence training. OKLA. M.C.L.E.R. 1.

violence training be provided but does not state whether family court judges are required to attend such training, so it is not included on the list.<sup>373</sup> Texas' requirements for the training of judges on domestic violence are unclear in terms of whether a judge in a divorce or parentage child custody case would be included in the requirement.<sup>374</sup>

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370. S.C. CODE ANN. § 16-25-100 (Westlaw through 2018 Reg. Sess.) (“Magistrates, municipal court judges, family court judges, and circuit court judges shall receive continuing legal education on issues concerning domestic violence. The frequency and content of the continuing legal education is to be determined by the South Carolina Court Administration at the direction of the Chief Justice of the South Carolina Supreme Court.”).
371. TENN. CODE ANN. § 38-12-107 (Westlaw through 2018 Reg. Sess.) (“All state and local court administrators, court clerks, and judges, with personnel who are likely to encounter situations involving domestic violence, shall adopt a policy regarding domestic violence and provide initial and continuing education concerning the dynamics of domestic violence, and the handling and response procedures concerning allegations of domestic violence to all judges and court personnel who are likely to encounter allegations of domestic violence.”); TENN. CODE ANN. § 38-12-109 (Westlaw through 2018 Reg. Sess.) (“The administrative office of the courts shall establish a policy regarding, and a continuing education curriculum concerning, domestic violence and shall provide continuing education on domestic violence to all judges and court personnel throughout the state who are likely to encounter situations of domestic violence. The administrative office of the courts may adopt the policy and training curriculum developed by the domestic violence state coordinating council, and may revise the policy and training curriculum at its discretion.” § 38-12-109).
372. W. VA. CODE ANN. § 48-27-1104 (Westlaw through 2018 1st Extraordinary Sess.) (“All circuit court judges may and magistrates and family courts [sic] shall receive a minimum of three hours training each year on domestic violence which shall include training on the psychology of domestic violence, the battered wife and child syndromes, sexual abuse, courtroom treatment of victims, offenders and witnesses, available sanctions and treatment standards for offenders, and available shelter and support services for victims.”).
373. MINN. STAT. ANN. § 480.30 (Westlaw through 2018 Reg. Sess.) (“The Supreme Court’s judicial education program must include ongoing training for district court judges on child and adolescent sexual abuse, domestic abuse, harassment, stalking, and related civil and criminal court issues. The program must include the following: (1) information about the specific needs of victims; (2) education on the causes of sexual abuse and family violence; (3) education on culturally responsive approaches to serving victims; (4) education on the impacts of domestic abuse and domestic abuse allegations on children and the importance of considering these impacts when making parenting time and child custody decisions under chapter 518; and (5) information on alleged and substantiated reports of domestic abuse, including, but not limited to, Department of Human Services survey data.” § 480.30).
374. TEX. GOV’T CODE ANN. § 22.110 (2017 Reg. and 1st Called Sess. of 85th Leg.) (“The court of criminal appeals shall assure that judicial training related to the problems of family violence, sexual assault, trafficking of persons, and child abuse and neglect is provided.”). A judge is exempt from the training requirements if the judge “files an affidavit stating that the judge or judicial officer does not hear any cases

The training statutes in the District of Columbia,<sup>375</sup> Minnesota,<sup>376</sup> Texas,<sup>377</sup> and West Virginia<sup>378</sup> combine domestic violence training with required training related to forms of abuse. The state of Washington has tested pilot programs which contain mandatory domestic violence training.<sup>379</sup> Both Georgia and Idaho allow for the creation of courts focused on domestic violence issues and provide for certain domestic violence training for the judges in those courts.<sup>380</sup> While we did not engage in a multi-county search within any state for any county level mandatory domestic violence training, we did discover one in Georgia.<sup>381</sup> We assume there may be other counties in other states that require domestic violence training for their family law judges.

Arizona is not included in the list of 11 states with mandatory training of family law judges on domestic violence because there is the possibility of waiving it, but this waiver is only in limited circumstances and temporary in nature, so this approach is much better than merely

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involving family violence, sexual assault, trafficking of persons, or child abuse and neglect.” § 22.110. It appears this training is intended for judges in criminal cases or in child abuse and neglect cases.

375. See D.C. CODE ANN. § 11-1104(c) (Westlaw through Jan. 11, 2019); D.C. CODE ANN. § 11-1732A(f) (Westlaw through Jan. 11, 2019).

376. See MINN. STAT. ANN. § 480.30 (Westlaw through 2018 Reg. Sess.).

377. See TEX. GOV'T CODE ANN. § 22.110 (2017 Reg. and 1st Called Sess. of 85th Leg.).

378. See W. VA. CODE ANN. § 48-27-1104 (Westlaw through 2018 1st Extraordinary Sess.).

379. WASH. REV. CODE ANN. § 26.12.804 (Westlaw through 2018 Reg. Sess.) (stating that the judges of the superior judicial districts with unified family court pilot programs shall require initial training and continuing training for judges in unified family court regarding “childhood development . . . and mental illness”); N.Y. JUD. LAW § 212.2(n) (LexisNexis through 2019) (repealed 2018) (requiring “[t]raining about domestic violence” for judges hearing orders of protection in family court).

380. IDAHO CODE ANN. § 32-1409(a) (Westlaw through 2018 2d Reg. Sess. of 64th Leg.) (stating that in Idaho “the district court in each county may establish a domestic violence court,” and if such a court is created, a “committee shall recommend policies and procedures for domestic violence courts addressing eligibility, identification and screening, assessment, treatment and treatment providers, case management and supervision, judicial monitoring, supervision of progress and evaluation. The committee shall also solicit specific domestic violence court plans from each judicial district, recommend funding priorities for each judicial district and provide training to ensure the effective operation of domestic violence courts.” § 32-1409(a).); GA. COMM'N ON FAMILY VIOLENCE, GEORGIA DOMESTIC VIOLENCE COURTS BEST PRACTICES (2017).

381. SUPER. CT. FULTON CTY. FAM. DIV. R. 1000-3 (“Each Judicial Officer shall receive twenty (20) hours of training, including four (4) hours of domestic violence training.”).

“recommending” domestic violence training for judges handling child custody cases.<sup>382</sup>

The following five states recommend that judges obtain training on domestic violence but do not absolutely require it: Alabama,<sup>383</sup> Georgia,<sup>384</sup> Idaho,<sup>385</sup> Illinois,<sup>386</sup> and Maryland.<sup>387</sup> For example, the

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382. Under Arizona law, training of judges on domestic violence is required as part of New Judge Orientation and can only be waived under limited circumstances. ARIZ. CODE OF JUD. ADMIN. § 1-302(F)(2) (“Upon request, the chief justice, the chief judge, the presiding judge of the superior court in each county, or their designees may grant exemptions to judges and employees of their court for temporary circumstances, including but not limited to: (a) Medical or other physical conditions preventing active participation in educational programs; (b) Extended, approved leave of absence; (c) Military leave; (d) Extended jury duty; (e) Temporary medical waivers for defensive tactics courses, in accordance with ACJA § 6-107.”). See ARIZ. SUP. CT., DOMESTIC VIOLENCE TRAINING FOR JUDGES, (2007), [http://azmag.gov/Portals/0/Documents/pdf/cms.resource/RDVC\\_2007\\_08-16\\_DV-Training-for-Judges71064.pdf?ver=2007-08-16-105700-000](http://azmag.gov/Portals/0/Documents/pdf/cms.resource/RDVC_2007_08-16_DV-Training-for-Judges71064.pdf?ver=2007-08-16-105700-000).
383. ALA. R. MANDATORY JUD. EDUC. I.1, II.2, <http://judicial.alabama.gov/docs/library/rules/ManJEd.pdf> (providing that judicial training credits will be given for programs that address a variety of topics and domestic violence is an approved topic).
384. GA. COMM’N ON FAM. VIOLENCE, *supra* note 380.
385. IDAHO CODE ANN. § 32-1409(1) to (2) (West through 2018 2d Reg. Sess. of 64th Leg.) (stating that each county can establish a “domestic violence court” and that “[t]he committee shall also solicit specific domestic violence court plans from each judicial district, recommend funding priorities for each judicial district and provide training to ensure the effective operation of domestic violence courts”); IDAHO DOMESTIC VIOLENCE CTS., IDAHO DOMESTIC VIOLENCE CT. POLICIES & GUIDELINES, ATTACHMENT A [https://isc.idaho.gov/dv\\_courts/DV\\_Court\\_Policies\\_and\\_Guidelines\\_revised\\_4.15.pdf](https://isc.idaho.gov/dv_courts/DV_Court_Policies_and_Guidelines_revised_4.15.pdf) (last updated April 2015) (“It is critical that a judge selected to serve on a domestic violence court be highly interested in taking on the job and willing to be educated on the complex issues surrounding domestic violence.”).
386. ILL. SUP. CT. R. 908(c) (“Judges who, by specific assignment or otherwise, may be called upon to hear child custody or allocation of parental responsibilities cases should participate in judicial education opportunities available on these topics, such as attending those sessions or portions of the Education Conference, presented bi-annually at the direction of the Supreme Court, which address the topics described in paragraph (a) of this rule. Judges may also elect to participate in any other Judicial Conference Judicial Education Seminars addressing these topics, participate in other judicial education programs approved for the award of continuing judicial education credit by the Supreme Court, complete individual training through the Internet, computer training programs, video presentations, or other relevant programs. ILL. SUP. CT. R. 908(c). The Chief Judges of the judicial circuits should make reasonable efforts to ensure that judges have the opportunity to attend programs approved for the award of continuing judicial education credit by the Supreme Court which address the topics and issues described in paragraph (a) [allocation of child custody and parental responsibility] of this rule.” ILL. SUP. CT. R. 908(c).).
387. IN THE COURT OF APPEALS OF MARYLAND: ADMINISTRATIVE ORDER ON CONTINUING EDUCATION OF JUDGES, MAGISTRATES, AND COMMISSIONERS (2016),

Illinois Supreme Court Rules state that judges hearing child custody or allocation of parental responsibilities cases “should” participate in judicial education opportunities on the topics of domestic violence issues and child sexual abuse issues, but does not require that such training sessions be provided and attended.<sup>388</sup> Some states require judicial continuing education without specifying whether it includes domestic violence.<sup>389</sup>

The results of this research, with only 11 states clearly requiring family law judges to receive training on domestic violence without waiver, reflect a profound failure to apply evidence-based best practices to achieve the goal of adequately taking domestic violence into account in child custody cases. Requiring such training is a major part of the law reform recommended in Section III.

B. *To What Extent Do States Require Guardians ad litem, Child Representatives, or Other Custody Evaluators to Receive Training on Domestic Violence and to Screen for Domestic Violence in Their Child Custody Cases?*

Based primarily upon a review of the legislation and state supreme court rules in each state, 13 states clearly require guardians *ad litem*, child representatives, or other custody evaluators, without waiver, to receive domestic violence and/or child abuse and neglect training in a child custody case: Arkansas,<sup>390</sup> California,<sup>391</sup> Connecticut,<sup>392</sup> Idaho,<sup>393</sup>

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<https://mdcourts.gov/sites/default/files/admin-orders/20160606continuingedofjudgesmagistratescommissioners.pdf> (stating that the training program “shall focus” on issues including “domestic violence”).

388. ILL. SUP. CT. R. 908.

389. For example, the state of Wisconsin requires all judges to complete continuing education. WIS. SUP. CT. R. 33.02. There is a section named “Required programs” that only covers attending the “Wisconsin judicial college, the criminal law-sentencing institute and the prison tour.” WIS. SUP. CT. R. 32.04. Wisconsin also requires Municipal judges to complete training at a “municipal judge orientation institute, review institute or graduate institute developed by the judicial education office.” WIS. SUP. CT. R. 33.04. The Maine Commission on Domestic and Sexual Abuse “may make recommendations on legislative and policy actions, including training of the various law enforcement officers, prosecutors and judicial officers responsible for enforcing and carrying out the provisions of this chapter, and may undertake research development and program initiatives consistent with this section.” ME. REV. STAT. ANN. tit. 19-A, § 4013 (Westlaw through 2017 2d Reg. Sess. and 2d Spec. Sess. of 128th Leg.).

390. ARK. ADMIN. ORD. § 15.1(b)(1) (2016) (Westlaw through 2016).

391. CAL. GOV'T CODE § 68555 (Westlaw through 2018 Reg. Sess.) (“The Judicial Council shall establish judicial training programs for individuals who perform duties

Indiana,<sup>394</sup> Maine,<sup>395</sup> Minnesota,<sup>396</sup> Missouri,<sup>397</sup> New Hampshire,<sup>398</sup> New York,<sup>399</sup> Ohio,<sup>400</sup> Oklahoma,<sup>401</sup> and Virginia.<sup>402</sup> The following states only recommend domestic violence and/or child abuse training: Alaska,<sup>403</sup> Illinois,<sup>404</sup> Kansas,<sup>405</sup> Maryland,<sup>406</sup> and Wisconsin.<sup>407</sup>

In Alaska,<sup>408</sup> Arizona,<sup>409</sup> Kansas,<sup>410</sup> and Maryland,<sup>411</sup> the initial training can be waived. Among the group of 20 states with required or

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in domestic violence matters, including, but not limited to, judges, referees, commissioners, mediators, and others as deemed appropriate by the Judicial Council . . . . The training programs shall include a domestic violence session in any orientation session conducted for newly appointed or elected judges and an annual training session in domestic violence.”); CAL. R. OF CT. 10.464(a) (Westlaw through Dec. 15, 2018).

392. Conn. Gen. Stat.

393. IDAHO JUV. R. 35(e) (2018), <https://isc.idaho.gov/ijr35>.

394. IND. CODE ANN. § 31-9-2-50 (Westlaw through 2018 Second Regular Session and First Spec Session of the 120th General Assembly).

395. ME. R. GUARDIAN AD LITEM R. 2(b)(2)(A)(iv) (Westlaw through amendments received through March 1, 2019).

396. Minn. Guardian Ad Litem Program Requirements and Guidelines, [https://mn.gov/guardian-ad-litem/assets/GALP%20PROGRAM%20REQUIREMENTS\\_tcm27-364018.pdf](https://mn.gov/guardian-ad-litem/assets/GALP%20PROGRAM%20REQUIREMENTS_tcm27-364018.pdf) (Last revised Dec. 19, 2018).

397. Standards with Comments for Guardians Ad Litem in Missouri Juvenile and Family Court Matters, (complete text of an Order entered by the Supreme Court of Missouri en banc on September 17, 1996 establishing standards for GALs in Missouri courts) <http://mija.org/images/resources/publications/GALStd.doc>.

398. N.H. R. CH. GAL 303.02(b)(1)(k), [http://www.gencourt.state.nh.us/rules/state\\_agencies/gal300.html](http://www.gencourt.state.nh.us/rules/state_agencies/gal300.html).

399. Become an Attorney for the Child, N.Y. App. Div. 4th Jud. Dep’t.

400. OHIO SUP. R. 48(D)(11) (Westlaw through amendments received through February 15, 2019).

401. OKLA. STAT. ANN. tit. 43 § 1-8-101(A)(1) (LEXIS through Nov. 1, 2013); Guardian Ad Litem Bd. Laws and Rules §303.02(b)(1)(k) (last visited Mar. 18, 2019) [http://www.gencourt.state.nh.us/rules/state\\_agencies/gal300.html](http://www.gencourt.state.nh.us/rules/state_agencies/gal300.html).

402. Standard to Govern the Appointment of Guardians Ad Litem Pursuant to Section 16.1-266, Code of Va., Judicial Council of Va., [http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal\\_standards\\_children.pdf](http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_standards_children.pdf).

403. ALASKA R. CINA 11(c) (Westlaw 2006).

404. ILL. SUP. CT. R. 906(c).

405. KAN. SUP. CT. R. 110A.

406. MD. RULES ANN. tit. 9, Ch. 200, App. § 4 (Westlaw 2018).

407. WIS. SUP CT. R. 35.03.

408. ST. OF ALASKA, GUIDELINES FOR CONT. AND CT. APPOINTED GUARDIANS AD LITEM IN CHILD IN NEED OF AID PROC. 5–6 (2007), [http://doa.alaska.gov/opa/pdfs/07\\_contract\\_gdlines.pdf](http://doa.alaska.gov/opa/pdfs/07_contract_gdlines.pdf) (The Office of Public Advocacy “may waive all or part of the initial training requirement for a new guardian ad litem depending on background or experience.”).

409. ARIZ. REV. STAT. ANN. § 40.1.J (West 2014) (“Attorneys shall provide the judge with an affidavit of completion of the six (6) hour court approved training requirement

recommended training on domestic violence or child abuse, the number of hours of initial training for these topics ranged from six to 18.<sup>412</sup> The following are the 20 states<sup>413</sup> where the guardian *ad litem*, child representative, or child's attorney is required or recommended to receive training on domestic violence or child abuse (with footnotes for each state containing the language requiring or recommending such training): Alaska,<sup>414</sup> Arizona,<sup>415</sup> Arkansas,<sup>416</sup> California,<sup>417</sup> Connecticut,<sup>418</sup>

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prior to or upon their first appointment as attorney or guardian ad litem for a child after the adoption of this rule unless a waiver of this requirement has been obtained from the presiding judge of the juvenile court in which the appointment is to be made.”).

410. KAN. SUP. CT. R. 110A (“The appointing judge may waive the prerequisite education when necessary to make an emergency temporary appointment. The educational requirements must be completed within 6 months after appointment.”).
411. MD. RULES ANN. TIT. 9, CH. 200, APP. § 4 (West 2018) (stating that “[u]nless waived by the court, an attorney appointed as a Child’s Best Interest Attorney, Child’s Advocate Attorney, or Child’s Privilege Attorney should have completed at least six hours of training that includes the following topics: . . . (e) recognizing, evaluating, and understanding evidence of child abuse and neglect; (f) family dynamics and dysfunction, domestic violence, and substance abuse”).
412. ARIZ. ST. JUV. CT. R. 40.1(j) (requiring 6 hours of initial guardian ad litem training); CAL. ST. FAM. JUV. R. 5.242(c)-(d) (initially requiring “at least 12 hours of applicable education and training” with an additional requirement that counsel “must complete during each calendar year a minimum of eight hours of applicable education and training”); IDAHO JUV. R. 35(e)(1) (requiring “at least 30 hours” of “pre-service training”); ILL. SUP. CT. R. 906 (stating that “[p]rior to appointment the attorney shall have 10 hours in the two years prior to the date the attorney qualifies for appointment”); KAN. SUP. CT. R. 110A(b)(1)(A) (requiring 6 hours of initial training); LA. SUP. CT. R. XXXIII, pt. 3, sub. I, §3(A)(3) (requiring 6 hours of training each year); OHIO SUP. CT. R. 48(E)(2) (requiring 6 hours of initial training); ME. R. FOR GUARDIANS AD LITEM 2(b)(2)(B) (requiring 18 hours of initial training); MD. RULES ANN. tit. 9, Ch. 200, App. § 4 (Westlaw 2018) (requiring 6 hours of initial training).
413. This list also includes Arizona, a state that requires training but permits waiver of that requirement in limited circumstances.
414. ALASKA R. CT. 11(C), (2016) <https://public.courts.alaska.gov/web/rules/docs/cina.pdf> (“(2) The guardian ad litem should have an understanding of the following as appropriate to the case: (A) child development from infancy through adolescence; (B) the impact of child abuse and neglect on the child.”).
415. ARIZ. REV. STAT. ANN. § 40.1J (West 2014). “All attorneys and guardians ad litem shall complete at least eight (8) hours each year of ongoing continuing education and training.” § 40.1(J). The “[e]ducation and training shall be on juvenile law and related topics, such as . . . the effects of the trauma of parental domestic violence upon children and other issues concerning abuse and/or neglect of children.” § 40.1(J). However, the initial training requirement can be waived by the court. § 40.1(J).
416. ARK. ADMIN. ORDER 15.1(B)(1) (2016) (stating that “[p]rior to appointment,” to represent children “an attorney shall have” initial and continuing training and the “[i]nitial training must include: . . . Dynamics of abuse and neglect; . . . Family dy-

Idaho,<sup>419</sup> Illinois,<sup>420</sup> Indiana,<sup>421</sup> Kansas,<sup>422</sup> Maine,<sup>423</sup> Maryland,<sup>424</sup> Minnesota,<sup>425</sup> Missouri,<sup>426</sup> New Hampshire,<sup>427</sup> New York,<sup>428</sup> Ohio,<sup>429</sup> Oklahoma,<sup>430</sup> Virginia,<sup>431</sup> West Virginia,<sup>432</sup> and Wisconsin.<sup>433</sup>

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namics, which may include but is not limited to, the following topics: substance abuse, domestic violence and mental health issues”).

417. CAL. R. OF CT. ANN. § 5.242(C) (West 2018). “[B]efore being appointed as counsel for a child in a family law proceeding, counsel must have completed at least 12 hours of applicable education and training which must include all the following subjects: . . . (3) Spec issues in representing a child, including the following: . . . (C) Recognizing, evaluating and understanding evidence of child abuse and neglect, family violence and substance abuse, cultural and ethnic diversity, and gender-specific issues; (D) The effects of domestic violence and child abuse and neglect on children.” § 5.242(C).
418. CONN. GEN. STAT. ANN. CH. 815(E) § 46B-38C(J) (West 2019). “The Judicial Department shall establish an ongoing training program for . . . guardians ad litem . . . to inform them about the policies and procedures of sections 46b-1, 46b-15, 46b-38a to 46b-38f, inclusive, and 54-1g, including, but not limited to, the function of the family violence intervention units and the use of restraining and protective orders. Such training program shall include an examination of the factors that contribute to a family being at risk for episodes of domestic violence within the family.” CH. 815(E) § 46B-38C(J).
419. GUARDIAN AD LITEM PROGRAMS, 35 IDAHO JUV. R. § (E) (2012) (“(1) Each [guardian *ad litem*] Program shall require that volunteers complete at least 30 hours of required pre-service training and 12 hours of required in-service training per year (2) Pre-service training shall include the following topics: . . . (C) Dynamics of families including mental health, substance abuse, domestic violence, and poverty.”).
420. ILL. SUP. CT. RULE ANN. § 906(C) (West 2018) “Certification requirements may address minimum experience requirements for attorneys appointed by the court to represent minor children.” § 906(C) “In addition, the qualifications may include one or all of the following which are recommended: (1) Prior to appointment the attorney shall have 10 hours in the two years prior to the date the attorney qualifies for appointment in approved continuing legal education courses in the following areas: . . . family dynamics, including substance abuse, domestic abuse, and mental health issues. (2) Periodic continuing education in approved child related courses shall be required to maintain qualification as an attorney eligible to be appointed.” § 906(C).
421. IND. CODE ANN. § 31-9-2-50(B) (West 2018). “‘Guardian ad litem’ . . . means an attorney . . . who: . . . (3) has completed training appropriate for the person’s role, including training in: (A) the identification and treatment of child abuse and neglect.” § 31-9-2-50(B).
422. KAN. SUP. CT. R. ANN. 110A § (B)(1)(B) (West 2019) “Areas of education [for a Guardian *ad litem*] should include, but are not limited to: dynamics of abuse and neglect . . . .” R. ANN. 110A § (B)(1)(Kansas requires initial and continuing training although initial training can be waived for an emergency temporary appointment. R. ANN. 110A § (B)(2).
423. ME. CT. RULES FOR GUARDIANS AD LITEM § 2(B) (West 2018) (stating that guardian ad litem “must have attended” a core training program which covers the “dynamics of domestic abuse and its effect on children”).

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424. MD. CODE ANN., FAM. LAW § 9-200, app § 4 (Westlaw through all legis. from the 2018 Reg. Sess. of the General Assembly) (“Unless waived by the court, an attorney appointed as a Child’s Best Interest Attorney, Child’s Advocate Attorney, or Child’s Privilege Attorney should have completed at least six hours of training that includes the following topics: . . . (e) recognizing, evaluating, and understanding evidence of child abuse and neglect; (f) family dynamics and dysfunction, domestic violence, and substance abuse.”).
425. MINN. GUARDIAN AD LITEM PROGRAM REQUIREMENTS & GUIDELINES (Non-statutory) (2015), [https://mn.gov/guardian-ad-litem/assets/GALP%20PROGRAM%20REQUIREMENTS\\_tcm27-364018.pdf](https://mn.gov/guardian-ad-litem/assets/GALP%20PROGRAM%20REQUIREMENTS_tcm27-364018.pdf) (requiring at least 6 hours of “training on domestic and family violence”).
426. See Standards *supra* note 395, at 16.0 (“No person shall be appointed as guardian ad litem without first completing twelve hours of specialized training. Thereafter, to continue to be appointed as a guardian ad litem a person shall complete six hours of specialized training annually . . . . The specialized training shall include . . . Dynamics of child abuse and neglect issues . . . Family and Domestic Violence issues”).
427. N.H. REV. STAT. ANN. § 490-C:6 (West 2018). “Court Appointed Special Advocates (CASA) of New Hampshire shall be accountable to the guardian ad litem board for complying with the training requirements established by the board under RSA 490-C:5, I(d) and for the actions of its volunteer members who are appointed by the court as guardians *ad litem*.” § 490-C:6.; see also Office of Prof'l Licensure and Certification, GUARDIAN AD LITEM BD. RULES § 302.02 (stating that training shall “[e]ncompass instruction in at least the following areas: . . . Domestic violence training”).
428. See N.Y. RULES OF THE CHIEF JUDGE ANN. LAW § 7.1(A) (West 2018) (“Each of the Appellate Divisions shall by January 1, 1980 promulgate rules pertaining to the establishment and operation of a panel of lawyers qualified for assignment as law guardians to represent minors in proceedings in Family Court.”); see also N. Y. App. Div., 4th Jud. Dep’t, *Become an Attorney for the Child*, <https://ad4.nycourts.gov/afcl/prospective>. (“When you are accepted to the training program you will be given access to the domestic violence videos on-line. You must view four segments of domestic violence training online to be eligible for designation to a county panel.” *Id.*).
429. OHIO ADMIN. CODE 48 (West 2018) (stating that the “pre-service course shall include training on all the following topics: . . . (c) Preventing child abuse and neglect including, but not limited to, assessing risk and safety; (d) Family and child issues including, but not limited to, family dynamics, substance abuse and its effects, basic psychopathology for adults and children, domestic violence and its effects”).
430. OKLA. STAT. tit. 43, § 107.3(A)(4) (Westlaw through legis. of the Second Reg. Sess. of the 56th Legislature 2018) (“[T]he Administrative Director of the Courts shall develop a standard operating manual for guardians ad litem which shall include, but not be limited to, legal obligations and responsibilities, information concerning child abuse, child development, domestic abuse, sexual abuse, and parent and child behavioral health and management including best practices.”).
431. Standard to Govern the Appointment of Guardians Ad Litem Pursuant to Section 16.1-266 I.B.1.f.
432. W. VA. RULES OF PRACTICE AND PROCEDURE FOR FAMILY COURT. app. § B(1) (Guidelines for Guardians Ad Litem in Fam. Ct.) (stating that, “Every guardian ad litem shall complete eight (8) hours of continuing legal education credits every two years provided by the West Virginia Supreme Court comprising of: understanding

Wisconsin is the only state where the guardian *ad litem*, child representative, or custody evaluator is clearly required by supreme court rule or legislation to screen for domestic violence in the divorce or parentage custody cases on which they are working.<sup>434</sup> Finding only one state that requires screening to be performed by a professional that courts rely upon in making child custody decisions is shocking in light of the prevalence of domestic violence within society and its harmful impact on children. As explained in Section I, screening for domestic violence in child custody cases is necessary since many survivors of domestic violence do not self-report. In addition, it is not difficult or time-consuming to perform basic screening for domestic violence, especially when trained on how to do it. Several states suggest that screening should be done but do not clearly require it to be done.<sup>435</sup>

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the stages of child development from early childhood through adolescence; recognizing the signs and symptoms of abuse and neglect and their effects upon children; recognizing the signs and characteristics of domestic violence and their effects upon children”).

433. WIS. SUP. CT. R. 35.03 (2003) (Approval of Guardian Ad Litem Education) (stating that “[t]he board of bar examiners shall approve, as family court guardian ad litem education, courses of instruction at a law school in this state and continuing legal education activities that the board determines to be on any of the following subject matters: . . . 4. The dynamics and impact of family violence”). However, the statute does not specifically require guardians ad litem to be trained in domestic violence. See WIS. STAT. § 767.407(4) (Westlaw through 2017 Act 370) (stating “[t]he guardian ad litem shall investigate whether there is evidence that either parent has engaged in interspousal battery, as described in s. 940.19 or 940.20(1m), or domestic abuse, as defined in s. 813.12(1)(am), and shall report to the court on the results of the investigation.”).

434. *See id.*

435. In Delaware, the guardian ad litem statute requires the guardian ad litem to represent the best interests of the child and to “[p]resent evidence to the court in support of his or her position” DEL. CODE tit. 29, § 9007A(c) (Westlaw through 82 Laws 2019); DELAWARE COURTS, CHILD ADVOCATE MANUAL 13–15 (2007), [https://courts.delaware.gov/childadvocate/trmanual/Chapter5\\_073107.pdf](https://courts.delaware.gov/childadvocate/trmanual/Chapter5_073107.pdf). In Georgia, a guardian ad litem is required to ascertain the child’s best interests and “[i]n determining a child’s best interests, a guardian ad litem shall consider and evaluate all of the factors” that include “(3) Evidence of domestic violence in any current, past, or considered home for such child” GA. CODE ANN. § 15-11-105(b) (Westlaw through the 2018 reg. and Spec legis. sess. 2014). In Maine, the guardian ad litem has additional powers that can be granted by a court including: “Arranging for the assessment of any physical, sexual, developmental, and/or emotional risks to or abuse of the child by utilizing risk assessment tools; evaluations, assessments, and reports; medical records; observation; and interviews with appropriate persons” ME. CT. RULES FOR GUARDIANS AD LITEM, R. 4. In West Virginia, the court can appoint a [guardian *ad litem*] and “[t]he court shall specify the terms of the appointment, including the lawyer’s role, duties and scope of authority.” W. VA. CODE § 48-9-302(a) (Westlaw through legis. of the 2018 First Extraordinary Sess.); If there are “substantial allega-

Two states do not require screening but state that screening can be court-ordered.<sup>436</sup> As noted in Section I, there are many reasons why survivors of domestic violence might not self-report but may in fact share this information when domestic violence screening is properly performed. For these reasons, it is problematic that domestic violence screening by a guardian *ad litem* does not clearly appear to be a requirement (and thus unlikely to be performed) in any states other than Wisconsin.

In summary, research found only 13 states that require guardians *ad litem*, child representatives, or other custody evaluators to receive domestic violence and/or child abuse and neglect training without waiver in child custody cases. Only one state explicitly requires domestic violence screening. These results reflect a disturbing failure to apply evidence-based best practices to achieve the goal of protecting children and survivors of domestic violence from further harm in child custody cases. It is critical that these family law professionals receive training on domestic violence and screen for domestic violence in *every* child custody case. This goal cannot be achieved without at least clearly mandating these requirements and providing a mechanism to ensure that the mandated requirements are being performed.

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tions of domestic abuse have been made, the court shall order an investigation under section 9-301 or make an appointment under subsection (a) or (b) of this section, unless the court is satisfied that the information necessary to evaluate the allegations will be adequately presented to the court without such order or appointment.” *Id.*; see also W. VA. FAM. CT. R. 47 (stating that when “the court is presented with substantial allegations of domestic abuse, serious allegations of abuse and neglect, serious issues relating to the child’s health and safety, or allegations involving disproving a child’s paternity, a guardian ad litem shall be appointed by the court for the children” and that in regard to “[i]nvestigations by Guardians Ad Litem,” W. Va. Code § 48-9-301, § 48-9-302, and the Guidelines for Guardians Ad Litem in Family Court set forth in Appendix B of these rules shall govern investigations by guardians ad litem”).

436. ME. CT. RULES FOR GUARDIANS AD LITEM (2015), [https://mebaroverseers.org/regulation/bar\\_rules.html?id=638955](https://mebaroverseers.org/regulation/bar_rules.html?id=638955) (stating that one of the guardian ad litem’s “Additional Powers” that require a court order include “(G) Arranging for the assessment of any physical, sexual, developmental, and/or emotional risks to or abuse of the child by utilizing risk assessment tools; evaluations, assessments, and reports; medical records; observation; and interviews with appropriate persons); W. VA. CODE § 48-9-302 (c) (Westlaw through legis. of the 2018 First Extraordinary Sess.) (stating that “[w]hen substantial allegations of domestic abuse have been made, the court shall order an investigation under section 9-301 or make an appointment under subsection (a) or (b) of this section, unless the court is satisfied that the information necessary to evaluate the allegations will be adequately presented to the court without such order or appointment”).

*C. To What Extent Do State Laws Relating to Child Custody Cases  
Take Domestic Violence Into Account Consistent with  
Evidence-Based Best Practices?*

Requiring family law professionals involved in child custody cases to be trained on domestic violence and to screen for domestic violence is a necessary, but not sufficient, step to better protect children and parent survivors of domestic violence. It is also necessary to apply evidence-based practices to the child custody laws in each state. Custody laws should empower family law judges to make child custody decisions that protect both children and their parent survivors of domestic violence.

As described in the evidence-based literature review in Section I, when there is a pattern of coercive abuse, it would be harmful and dangerous to award primary or shared parenting time and shared parenting decision-making to an abusive parent. A parent who has engaged in a pattern of coercive abuse is likely to use the parenting time and parenting decision-making as a means to further harm the parent victim of domestic violence, rather than act in the best interests of the child.<sup>437</sup> There is also evidence that such parents will engage in violence or other forms of abuse against the other parent during their parenting time with their children, particularly during the exchange of the children, and in communicating about or with their children.<sup>438</sup> They are also more likely to neglect or directly abuse their children during their parenting time as a means to punish the other parent or seek to induce that parent to return to them.<sup>439</sup>

For these reasons, it is important that courts order primary parenting time (referred to by some states as “physical custody”) and sole decision-making (referred to by some states as “legal custody”) to the parent survivor of domestic violence, and order protective measures relating to the parenting time (referred to by some states as “visitation”) of the parent who has engaged in a pattern of coercive abuse.<sup>440</sup> In this Section, we review the child custody laws in each state to determine to what extent their child custody laws recognize and adequately address these dangers and harms.

The key standard that judges apply in determining physical and legal custody in the custody statutes is the “best interests of the child.”<sup>441</sup>

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437. See *supra* Section I.

438. See *supra* Section I.

439. See *supra* Section I.

440. See ABA 50 STATE REVIEW, *supra* note 10.

441. See *id.*

The “best interests of the child” standard is the term used to encompass all of the various specific factors noted in the statutes that courts should consider when determining child custody, and any other factors that might apply to the custody case before them.<sup>442</sup> In recognition of the harm to children from exposure to domestic violence, according to the an American Bar Association 50 State Review, domestic violence is a factor in determining the “best interests of the child” in virtually every state’s custody laws.<sup>443</sup> But, this factor is just one factor. Other factors, such as the “friendly parent factor” (the extent to which a parent fosters a cooperative relationship with the other parent when it comes to making decisions on their children and parenting generally) have been demonstrated to override the domestic violence factor, especially when the person accused of domestic violence or child abuse has alleged parental alienation.<sup>444</sup>

### 1. A Survey of the States

In recognition of the importance of the impact of exposure to domestic violence on the “best interests of the child,” 21 states and the District of Columbia have created a rebuttable presumption against sole or joint legal or physical custody to a parent who has engaged in

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442. *See id.* Although Louisiana does not have domestic violence listed as a factor, it does have a rebuttable presumption that specifically references “family violence” and “domestic abuse.” LA. STAT. § 9:364(A) (Westlaw through the 2018 Third Extraordinary Sess.) (stating that “[t]here is created a presumption that no parent who has a history of perpetrating family violence, as defined in R.S. 9:362, or domestic abuse, as defined in R.S. 46:2132, or has subjected any of his or her children, stepchildren, or any household member, as defined in R.S. 46:2132, to sexual abuse, as defined in R.S. 14:403(A)(4)(b), or has willingly permitted another to abuse any of his children or stepchildren, despite having the ability to prevent the abuse, shall be awarded sole or joint custody of children”).

443. Minnesota does not list domestic violence as a best interest factor, but it does have a separate rebuttable presumption that it is not in the best interest of the child for a parent who has committed domestic violence to have custody. MINN. STAT. ANN. § 518.17(b)(9) (Westlaw through the end of the 2018 Regular Sess.); South Dakota does not list domestic violence as a factor, but it does have a rebuttable presumption based on “assault” or “domestic abuse.” S.D. CODIFIED LAWS § 25-4-45.5 (Westlaw through the 2018 Reg. and Spec Sess.) (stating that “[t]he conviction or history of domestic abuse creates a rebuttable presumption that awarding custody to the abusive parent is not in the best interest of the minor”).

444. Meier & Dickson, *supra* note 2, at 328–32.

domestic or family violence, as defined in their statutes.<sup>445</sup> They include: Alabama,<sup>446</sup> Alaska,<sup>447</sup> Arizona,<sup>448</sup> Arkansas,<sup>449</sup> California,<sup>450</sup> Delaware,<sup>451</sup> District of Columbia,<sup>452</sup> Florida,<sup>453</sup> Hawaii,<sup>454</sup> Idaho,<sup>455</sup> Iowa,<sup>456</sup>

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445. This information is based upon THE ABA 50 STATE REVIEW, *supra* note 10, from which we began our research for this information. We checked the statutes noted in that review and checked for accuracy and for any updates as of August 30, 2018.
446. In Alabama, there is a rebuttable presumption that applies to “sole custody, joint legal custody, or joint physical custody” and as to which parent the child resides with. ALA. CODE § 30-3-131 (Westlaw through 2018-579) (stating that “[i]n every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption by the court that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of domestic or family violence”); § 30-3-133 (2017) (stating that “[i]n every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption by the court that it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic or family violence in the location of that parent’s choice, within or outside the state”).
447. ALASKA STAT. § 25.24.150(g) (Westlaw through the 2018 Second Reg. Sess. of the 30th Leg.) (stating that “[t]here is a rebuttable presumption that a parent who has a history of perpetrating domestic violence against the other parent, a child, or a domestic living partner may not be awarded sole legal custody, sole physical custody, joint legal custody, or joint physical custody of a child”).
448. ARIZ. REV. STAT. ANN. § 25-403.03 D (Westlaw through the First Spec. and Second Reg. Sess. of the Fifty-Third Leg. 2018) (stating that “[i]f the court determines that a parent who is seeking sole or joint legal decision-making has committed an act of domestic violence against the other parent, there is a rebuttable presumption that an award of sole or joint legal decision-making to the parent who committed the act of domestic violence is contrary to the child’s best interests”).
449. ARK. CODE ANN. § 9-13-101(c)(2) (Westlaw through 2018 Fiscal Sess. and Second Extraordinary Sess. of the 91st Ark. General Assembly) (stating that “[t]here is a rebuttable presumption that it is not in the best interest of the child to be placed in the custody of an abusive parent in cases in which there is a finding by a preponderance of the evidence that the parent has engaged in a pattern of domestic abuse”).
450. CAL. FAM. CODE § 3044(a) (Westlaw through Ch. 1016 if the 2018 Reg. Sess.) (stating that “[u]pon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child’s siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011”).
451. DEL. CODE ANN. tit. 13 § 705A(a)(b) (Westlaw through 82 Laws 2019) (stating that “there shall be a rebuttable presumption that no perpetrator of domestic violence shall be awarded sole or joint custody of any child” and that “there shall be a rebuttable presumption that no child shall primarily reside with a perpetrator of domestic violence”).
452. D.C. Code Ann. § 16-914(2) (Westlaw through Jan. 11, 2019) (stating that “there shall be a rebuttable presumption that joint custody is not in the best interest of the

Louisiana,<sup>457</sup> Massachusetts,<sup>458</sup> Minnesota,<sup>459</sup> Mississippi,<sup>460</sup> Nevada,<sup>461</sup> North Dakota,<sup>462</sup> Oklahoma,<sup>463</sup> Oregon,<sup>464</sup> South Dakota,<sup>465</sup> Texas,<sup>466</sup> and Wisconsin.<sup>467</sup>

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child or children, if a judicial officer finds by a preponderance of the evidence that an intrafamily offense as defined in § 16-1001(8) . . . has occurred.” “Intrafamily offense” is defined as “interpersonal, intimate partner, or intrafamily violence.”) D.C. Code Ann. § 16-1001 (Westlaw through Jan. 11, 2019).

453. FLA. STAT. ANN. § 61.13(2)(c)(2) (Westlaw through the 2018 Second Reg. Sess. of the 25th Leg.) (stating that “[e]vidence that a parent has been convicted of a misdemeanor of the first degree or higher involving domestic violence, as defined in s. 741.28 and chapter 775, or meets the criteria of s. 39.806(1)(d), creates a rebuttable presumption of detriment to the child”).
454. HAW. REV. STAT. ANN. § 571-46 (a)(9) (Westlaw through the end of the 2018 Second Spec. Sess.) (stating that “[i]n every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that family violence has been committed by a parent raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence”).
455. IDAHO CODE ANN. § 32-717B (5) (Westlaw through the 2018 Second Reg. Sess. of the 64th Idaho Leg.) (stating that “[t]here shall be a presumption that joint custody is not in the best interests of a minor child if one (1) of the parents is found by the court to be a habitual perpetrator of domestic violence as defined in section 39-6303, Idaho Code”).
456. IOWA CODE ANN. § 598.41(1)(b) (Westlaw through legislation from the 2018 Reg. Sess.) (stating that “if the court finds that a history of domestic abuse exists, a rebuttable presumption against the awarding of joint custody exists”).
457. LA. STAT. ANN. § 9:364(A) (Westlaw through the 2018 Third Extraordinary Sess.) (stating that “[t]here is created a presumption that no parent who has a history of perpetrating family violence, as defined in R.S. 9:362, or domestic abuse, as defined in R.S. 46:2132, or has subjected any of his or her children, stepchildren, or any household member, as defined in R.S. 46:2132, to sexual abuse, as defined in R.S. 14:403, or has willingly permitted another to abuse any of his children or stepchildren, despite having the ability to prevent the abuse, shall be awarded sole or joint custody of children”).
458. MASS. GEN. LAWS ANN. ch. 208, § 31A (Westlaw through Act 450 of the 2018 Legis. Sess. 2018) (stating that “[a] probate and family court’s finding, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent”).
459. MINN. STAT. ANN. § 518.17 subdiv. 1(b)(9) (Westlaw through the end of the 2018 Reg. Sess.) (stating that “the court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child. However, the court shall use a rebuttable presumption that joint legal custody or joint physical custody is not in the best interests of the child if domestic abuse, as defined in section 518B.01, has occurred between the parents”).
460. MISS. CODE ANN. § 93-5-24 (9)(a)(1) (Westlaw through the 2018 Reg. and First Extraordinary Sess.) (stating that “[i]n every proceeding where the custody of a child is in dispute, there shall be a rebuttable presumption that it is detrimental to the child

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- and not in the best interest of the child to be placed in sole custody, joint legal custody or joint physical custody of a parent who has a history of perpetrating family violence”).
461. NEV. REV. STAT. ANN § 125C.230(1) (Westlaw through all 608 Chapters of the Seventy-Ninth Reg. Sess. 2017), (stating that “[e]xcept as otherwise provided in NRS 125C.210 and 125C.220, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody of a child has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child”).
462. N.D. CENT. CODE ANN. § 14-09-06.2 (1)(j) (Westlaw through the 2017 Reg. Sess. of the 65th Legis. Assemb.) (stating that “[i]f the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded residential responsibility for the child”).
463. OKLA. STAT. ANN. tit. 43 § 109.3 (Westlaw through legis. of the Second Reg. Sess. of the 56th Leg. 2018) (stating that “[i]n every case involving the custody of, guardianship of or visitation with a child, the court shall consider evidence of domestic abuse, stalking and/or harassing behavior properly brought before it” and “[i]f the occurrence of domestic abuse, stalking or harassing behavior is established by a preponderance of the evidence, there shall be a rebuttable presumption that it is not in the best interest of the child to have custody, guardianship, or unsupervised visitation granted to the person against whom domestic abuse, stalking or harassing behavior has been established”).
464. OR. REV. STAT. ANN § 107.137(2) (Westlaw through the emergency legis. of the 2018 Reg. Sess. and all Legis. of the 2018 1st Spec Sess.) (stating that “if a parent has committed abuse as defined in ORS 107.705, other than as described in subsection (6) of this section, there is a rebuttable presumption that it is not in the best interests and welfare of the child to award sole or joint custody of the child to the parent who committed the abuse”).
465. S.D. CODIFIED LAWS § 25-4-45.5. (Westlaw through 2018 Reg. and Spec. Sess.) (stating that “[t]he conviction or history of domestic abuse creates a rebuttable presumption that awarding custody to the abusive parent is not in the best interest of the minor”).
466. TEX. FAM. CODE ANN. § 153.004(b) (Westlaw through the end of the 2017 Reg. and First Called Sess. of the 85th Leg.) (stating that “[i]t is a rebuttable presumption that the appointment of a parent as the sole managing conservator of a child or as the conservator who has the exclusive right to determine the primary residence of a child is not in the best interest of the child if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child”).
467. WIS. STAT. ANN. § 767.41(2)(d) (Westlaw through 2017 Act 370) (stating that “if the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20(1m), or domestic abuse, as defined in s. 813.12(1)(am), pars. (am), (b), and (c) do not apply and there is a rebuttable presumption that it is detrimental to the

It is important to note the varying definitions of “domestic violence,” “family violence,” or other similar terms used in the state statutes among the 21 states and District of Columbia that have created a rebuttable presumption against custody to the abusive parent. Some states narrowly define “domestic violence,” “family violence,” or other term used in the child custody statute that would trigger the rebuttable presumption. For example, the statute might require a criminal conviction for a crime relating to domestic violence or the grounds for termination of parental rights, as in Florida.<sup>468</sup> This requirement is highly problematic since, for a variety of reasons, it is very rare that domestic violence will lead to a criminal conviction when it occurs.<sup>469</sup> In addition, of the 21 states that create the rebuttable presumption that it is not in the best interest of the child to grant legal or physical custody to a parent who has engaged in domestic violence, some only include instances of physical violence (or placing someone in reasonable fear of such physical violence) or sexual assault.<sup>470</sup>

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child and contrary to the best interest of the child to award joint or sole legal custody to that party”).

468. FLA. STAT. ANN. § 61.13(2)(c)(2) (Westlaw through the 2018 Second Reg. Sess. of the 25th Leg. 2018) (stating that “[e]vidence that a parent has been convicted of a misdemeanor of the first degree or higher involving domestic violence, as defined in s. 741.28 and chapter 775, or meets the criteria of s. 39.806(1)(d), creates a rebuttable presumption of detriment to the child”).
469. Many domestic violence survivors do not report or assist with the prosecution of a domestic violence related crime due to a variety of reasons, including economic dependence on the abuser or fear of the abuser. A 2015 survey by the National Domestic Violence Hotline found that a quarter of women who had called police to report domestic violence or sexual assault would not call again in the future, with 80 percent reporting they feared the police would not believe them or would not do anything about the violence. TK Logan & Roberta Valente, *Who Will Help Me? Domestic Violence Survivors Speak Out About Law Enforcement Responses*, THE NATIONAL DOMESTIC VIOLENCE HOTLINE (April 2015), <http://www.thehotline.org/resources/law-enforcement-responses>. From 2006 to 2015, only 56 percent of non-fatal domestic violence incidents were reported to the police according to the Bureau of Justice statistics. Catalano, *supra* note 132.
470. ARK. CODE ANN. § 9-15-103(4) (Westlaw through all laws of the 2018 Fiscal Sess. and 2018 Second Extraordinary Sess.) (stating, “[d]omestic abuse’ means: (A) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members; or (B) Any sexual conduct between family or household members, whether minors or adults, that constitutes a crime under the laws of this state.”); IOWA CODE ANN. § 236.2(2) (Westlaw through legis. from the 2018 Reg. Sess. of the 87th Gen. Assemb.). “Domestic abuse’ means committing assault as defined in section 708.1 [criminal assault] under any of the following circumstances: (a) The assault is between family or household members who resided together at the time of the assault; (b) The assault is between separated spouses or persons divorced from each other and not residing together at

Indeed, the North Dakota Supreme Court in *Zuraff v. Reiger* affirmed a ruling by the lower court granting primary residential custody to the father, despite evidence of domestic violence, because the domestic violence did not cause serious bodily injury, and, therefore, did not trigger a presumption against sole or joint custody to the father.<sup>471</sup> Narrowly defining the kind of abusive conduct that triggers the rebuttable presumption to either physical violence or physical violence that causes serious bodily injury is highly problematic. It fails to take into account evidence of the serious harm to children and the non-abusive parent from the many other forms of coercive. In addition, this definition for domestic violence might not be met if the physical violence has not taken place recently, under statutes which add a timing requirement.<sup>472</sup>

Another problem with requiring physical or sexual abuse is that there may be a lack of evidence of abuse that took place a long time ago. In addition, as explained in Section I, when there has been a pattern of coercive abuse, the act of separating alone can be the basis for future physical violence, even though no recent act of physical or sexual violence has occurred.<sup>473</sup> As the authors have explained in prior articles,

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the time of the assault; (c) The assault is between persons who are parents of the same minor child, regardless of whether they have been married or have lived together at any time; (d) The assault is between persons who have been family or household members residing together within the past year and are not residing together at the time of the assault.” *Id.*; MASS. GEN. LAWS ANN. ch. 208, § 31A (Westlaw through Act 450 of the 2018 Legis. Sess.). “For the purposes of this section, ‘abuse’ shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing bodily injury; or (b) placing another in reasonable fear of imminent bodily injury. “Serious incident of abuse” shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing serious bodily injury; (b) placing another in reasonable fear of imminent serious bodily injury; or (c) causing another to engage involuntarily in sexual relations by force, threat or duress.” *Id.*; OR. REV. STAT. ANN. § 107.705(1) (Westlaw through the emergency legis. of the 2018 Reg. Sess. and all Legis. of the 2018 1st Spec Sess.). Abuse means the occurrence of one or more of the following acts between family or household members: (a) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury; (b) Intentionally, knowingly or recklessly placing another in fear of imminent bodily injury.” *Id.*

471. *Zuraff v. Reiger*, 911 N.W.2d 887, 892 (N.D. 2018).

472. CAL. FAM. CODE § 3044 (a) (Westlaw through Ch. 1016 of 2018 Reg. Sess.) (stating that rebuttable presumption applies to “domestic violence within the previous five years against the other party seeking custody of the child, or against the child or the child’s siblings”); N.D. CENT. CODE ANN. § 14-09-06.2 (1)(j) (Westlaw through the 2017 Reg. Sess. of the 65th Legis. Assemb) (stating that the presumption is triggered when “there exists a pattern of domestic violence within a reasonable time proximate to the proceeding”).

473. *See supra* Section I.

there is often a looming danger that will likely ignite after a domestic violence survivor leaves a coercively abusive intimate partner.<sup>474</sup> Some states require more than one act of domestic violence, or one serious physical injury from the domestic violence, as a precondition to applying the rebuttable presumption.<sup>475</sup> In contrast, some states pick up and more fully develop the concept of a pattern or history of domestic violence as the basis for the rebuttable presumption, or in the alternative, apply the presumption not only for one serious physical injury but also for attempts to cause serious injury.<sup>476</sup> Some states

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474. See Stark & Choplin, *supra* note 69.

475. ALASKA STAT. ANN. § 25.24.150(g)(h) (Westlaw through the 2018 Second Reg. Sess. of the 30th Leg.) (stating that presumption only applies when a “parent has a history of perpetrating domestic violence,” which exists if “the court finds that, during one incident of domestic violence, the parent caused serious physical injury or the court finds that the parent has engaged in more than one incident of domestic violence”); LA. STAT. ANN. § 9:364 (A) (Westlaw through the 2018 Third Extraordinary Sess.) (stating that the presumption is limited to when there is “a history of perpetrating family violence” which is when the court “finds that one incident of family violence has resulted in serious bodily injury or the court finds more than one incident of family violence”).

476. See, e.g., ARIZ. REV. STAT. ANN. § 25-403.03(D) (Westlaw through the First Spec and Second Reg. Sess. of the Fifty-Third Leg. 2018) (stating that the presumption only applies if “a person commits an act of domestic violence” which occurs “if that person does any of the following: (1) Intentionally, knowingly or recklessly causes or attempts to cause sexual assault or serious physical injury; (2) Places a person in reasonable apprehension of imminent serious physical injury to any person; (3) Engages in a pattern of behavior for which a court may issue an ex parte order to protect the other parent who is seeking child custody or to protect the child and the child’s siblings”); ARK. CODE § 9-13-101 (C)(1)(2) (Westlaw through law pass in the 2018 Fiscal Sess. and the Second Extraordinary Sess. of the 91st Ark. Gen. Assemb.) (providing for rebuttable presumption when there is a “pattern of domestic abuse”); IDAHO CODE ANN. § 32-717B(5) (West 2018) (limiting rebuttable presumption to when “one (1) of the parents is found by the court to be a habitual perpetrator of domestic violence”); IOWA CODE ANN. § 598.41(1)(b) (Westlaw through legislation from the 2018 Reg. Sess.) (limiting rebuttable presumption to when there is “a history of domestic abuse”); MASS. GEN. LAWS ANN. ch. 208 § 31A (Westlaw through Act 450 of the 2018 Leg. Sess. (requiring a “pattern or serious incident of abuse” for the presumption); MISS. CODE ANN. § 93-5-24 (9)(A)(1) (Westlaw through the 2018 Reg. and First Extraordinary Sess.) (limiting presumption to when there is “a parent who has a history of perpetrating family violence”). The court may find a history of perpetrating family violence if the court finds, by a preponderance of the evidence, one (1) incident of family violence that has resulted in serious bodily injury to, or a pattern of family violence against, the party making the allegation or a family household member of either party.” *Id.*; TEX. FAM. CODE ANN. § 153.004(b) (Westlaw through the end of the 2017 Reg. and First Called Sess. of the 85th Leg.) (limiting rebuttable presumption to when there is “a history or pattern of past or present child neglect, or physical or sexual abuse”); WIS. STAT. ANN. § 767.41(2)(D) (Westlaw through 2017

exclude from the presumption situations where both parents have been abusive,<sup>477</sup> but seek to distinguish true mutual fighting from a situation where one parent is the primary aggressor and the other parent is the primary victim.<sup>478</sup> Excluding from the presumption situations where both parents have been abusive is appropriate when there is true mutual fighting. This would be in contrast to the situation where one party is the predominant aggressor, and the other's use of violence is primarily defensive in nature or consists of occasional acts of retaliation. Even when there is mutual fighting, one state applies the rebuttable

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Act 370) (stating that rebuttable presumption applies only when "a party has engaged in a pattern or serious incident of interspousal battery").

477. ARIZ. REV. STAT. ANN. § 25-403.03(D) (Westlaw through the First Spec and Second Reg. Sess. of the Fifty-Third Leg. 2018) (stating that "this presumption does not apply if both parents have committed an act of domestic violence"); *see also* ARIZ. REV. STAT. ANN. § 13-3601(B) (Westlaw through the First Spec and Second Reg. Sess. of the Fifty-Third Leg. 2018) (stating that "an act of self-defense that is justified under chapter 4 of this title is not deemed to be an act of domestic violence.").
478. DEL. CODE ANN. tit. 13, § 705A(d) (Westlaw through 82 Laws 2019, ch. 2, 4). "In those cases in which both parents are perpetrators of domestic violence, the case shall be referred to the Division of Family Services of the Department of Services for Children, Youth and their Families for investigation and presentation of findings." *Id.* "Upon consideration of such presentation, and all other relevant evidence, including but not limited to, evidence about the history of abuse between the parents and evidence regarding whether [one] parent has been the primary aggressor in the household, the court shall decide custody and residence pursuant to the best interests of the child." *Id.*; NEV. REV. STAT. ANN. § 125C.230(2) (Westlaw through all 608 Chapters of the Seventy-Ninth Reg. Sess.). "[I]f after an evidentiary hearing held pursuant to subsection 1 the court determines that more than one party has engaged in acts of domestic violence, it shall, if possible, determine which person was the primary physical aggressor." *Id.* "[I]f it is not possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 1 applies to each of the parties." *Id.* "If it is possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 1 applies only to the party determined by the court to be the primary physical aggressor." *Id.*; WIS. STAT. ANN. § 767.41(2) (Westlaw through 2017 Act 370). If "both parties engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20(1m), or domestic abuse, as defined in s. 813.12(1)(am), the party who engaged in the battery or abuse for purposes of the presumption under subd. 1. is the party that the court determines was the primary physical aggressor." *Id.* "If the court must determine under subd. 2. which party was the primary physical aggressor and one, but not both, of the parties has been convicted of a crime that was an act of domestic abuse, as defined in s. 813.12(1)(am), with respect to the other party, the court shall find the party who was convicted of the crime to be the primary physical aggressor." *Id.* "The presumption under subd. 1. does not apply if the court finds that both parties engaged in a pattern or serious incident of interspousal battery or domestic abuse but the court determines that neither party was the primary physical aggressor." *Id.*

presumption in favor of the parent who is determined to be less likely to commit domestic violence again.<sup>479</sup> One state statute does not impose a rebuttable presumption against custody to a parent who has engaged in domestic violence, and instead prohibits custody (joint or sole) to a parent who has been convicted of murder in the first or second degree against the other parent or a sibling.<sup>480</sup>

A slightly larger number of states, however, do not create a rebuttable presumption against custody by the parent who has committed domestic violence, with the following 28 states providing that domestic violence is only a factor in determining the best interests of the child: Connecticut,<sup>481</sup> Georgia,<sup>482</sup> Illinois,<sup>483</sup> Indiana,<sup>484</sup> Kansas,<sup>485</sup>

479. ALASKA STAT. ANN. § 25.24.150(i) (Westlaw through the 2018 Second Reg. Sess. of the 30th Leg.). “If the court finds that both parents have a history of perpetrating domestic violence under (g) of this section, the court shall either (1) award sole legal and physical custody to the parent who is less likely to continue to perpetrate the violence and require that the custodial parent complete a treatment program; or (2) if necessary to protect the welfare of the child, award sole legal or physical custody, or both, to a suitable third person if the person would not allow access to a violent parent except as ordered by the court.” *Id.*; LA. STAT. ANN. § 9:364(D) (Westlaw through the 2018 Third Extraordinary Sess.) (stating that “[i]f the court finds that both parents have a history of perpetrating family violence, custody shall be awarded solely to the parent who is less likely to continue to perpetrate family violence”); MISS. CODE ANN. § 93-5-24(9)(b)(ii) (Westlaw through the 2018 Reg. and First Extraordinary Sess.) (stating that “[i]f the court finds that both parents have a history of perpetrating family violence, but the court finds that parental custody would be in the best interest of the child, custody may be awarded solely to the parent less likely to continue to perpetrate family violence”).

480. N.Y. DOM. REL. LAW § 240 1-c(a) (Westlaw through 2019) (stating that “no court shall make an order providing for visitation or custody to a person who has been convicted of murder in the first or second degree in this state, or convicted of an offense in another jurisdiction which, if committed in this state, would constitute either murder in the first or second degree, of a parent, legal custodian, legal guardian, sibling, half-sibling or step-sibling of any child who is the subject of the proceeding”).

481. CONN. GEN. STAT. ANN. § 46b-56 (a),(c) (Westlaw through 2018 Reg. Sess.) (stating that in making or modifying an order for “custody or care of minor children” the court must consider “the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child”).

482. GA. CODE ANN. § 19-9-3 (a)(3) (Westlaw through the 2018 Extra Sess. of the Gen. Assemb.) (listing 17 factors in determining the best interest of the child, with one factor being evidence of family violence).

483. 750 ILL. COMP. STAT. 5/602.7 (b)(11) (Westlaw through P.A. 100-1179, of the 2018 Reg. Sess. of the 100th Gen. Assemb.) (stating that in making a decision concerning the “allocation of parental responsibilities: parenting time” the court must consider “the physical violence or threat of physical violence by the child’s parent directed against the child or other member of the child’s household”); 750 ILL. COMP. STAT. 5/602.7 (b)(14) (West 2018) (“the occurrence of abuse against the child or other

Kentucky,<sup>486</sup> Maine,<sup>487</sup> Maryland,<sup>488</sup> Michigan,<sup>489</sup> Missouri,<sup>490</sup>  
 Montana,<sup>491</sup> Nebraska,<sup>492</sup> New Hampshire,<sup>493</sup> New Jersey,<sup>494</sup> New

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- member of the child's household"); and 750 ILL. COMP. STAT. 5/602.5 (13)(West 2018) ("the occurrence of abuse against the child or other member of the child's household").
484. IND. CODE ANN. § 31-17-2-8(7) (West 2018). "The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent." *Id.* "The court shall consider all relevant factors, including the following: . . . (7) Evidence of a pattern of domestic or family violence by either parent." *Id.*
485. KAN. STAT. ANN. § 23-3203(A) (Westlaw through the 2018 legis. sess.) (stating that "[i]n determining the issue of legal custody, residency and parenting time of a child, the court shall consider all relevant factors, including, but not limited to: . . . (9) evidence of domestic abuse"); "There shall be a rebuttable presumption that it is not in the best interest of the child to have custody or residency granted to a parent who: (b) is residing with an individual who has been convicted of abuse of a child, K.S.A. 21-3609, prior to its repeal, or K.S.A. 21-5602, and amendments thereto." KAN. STAT. ANN. § 23-3205 (Westlaw through the 2018 legis. sess.).
486. KY. REV. STAT. ANN. § 403.270 (2) (West 2018) <http://www.lrc.ky.gov/statutes/statute.aspx?id=48320> (stating that the court shall consider domestic violence when making custody decisions).
487. ME. REV. STAT. tit. 19-A, § 1653(3)(L) (Westlaw through the 2017 Second Reg. Sess. and Second Spec Sess. of the 128th Leg.) (stating that the court must consider "domestic abuse between the parents" and "child abuse").
488. MD. CODE ANN., FAM. LAW § 9-101.1(b) (Westlaw through all legis. from the 2018 Reg. Sess. of the Gen. Assemb.) (stating that the court must consider "evidence of abuse by a party against: (1) the other parent of the party's child; (2) the party's spouse").
489. MICH. COMP. LAWS ANN. § 722.23 (Westlaw through P.A.2018, No. 545 of the 2018 Reg. Sess., 99th Michigan Leg., 2018) ("[B]est interests of the child' means the sum total of the following factors to be considered, evaluated, and determined by the court: . . . (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.").
490. MO. ANN. STAT. § 452.375(2) (Westlaw through the end of the 2018 Second Reg. Sess. and First Extraordinary Sess. of the 99th Gen. Assemb.). "When the parties have not reached an agreement on all issues related to custody, the court shall consider all relevant factors and enter written findings of fact and conclusions of law, including, but not limited to, the following: . . . (6) The mental and physical health of all individuals involved, including any history of abuse of any individuals involved."
491. MONT. CODE ANN. § 40-4-212(1) (Westlaw through chapters effective, Oct. 1, 2017 sess.). "The court shall determine the parenting plan in accordance with the best interest of the child." *Id.* "The court shall consider all relevant parenting factors, which may include but are not limited to: . . . (f) physical abuse or threat of physical abuse by one parent against the other parent or the child." *Id.*
492. NEB. REV. STAT. ANN. § 43-2923(6) (Westlaw through the end of the 2nd Reg. Sess. of the 105th Leg. 2018). "In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of the foregoing factors and: . . . (d) Credible evidence of abuse inflicted on any family or household member." *Id.*

Mexico,<sup>495</sup> New York,<sup>496</sup> North Carolina,<sup>497</sup> Ohio,<sup>498</sup> Pennsylvania,<sup>499</sup> Rhode Island,<sup>500</sup> South Carolina,<sup>501</sup> Tennessee,<sup>502</sup> Utah,<sup>503</sup> Vermont,<sup>504</sup>

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493. N.H. REV. STAT. ANN. § 461-A:6 (Westlaw through Chapter 379 of the 2018 Reg. Sess., 2018) (“In determining parental rights and responsibilities, the court shall be guided by the best interests of the child, and shall consider the following factors: . . . (j) Any evidence of abuse, as defined in RSA 173-B:1, I or RSA 169-C:3, II, and the impact of the abuse on the child and on the relationship between the child and the abusing parent.”).
494. N.J. STAT. ANN. § 9:2-4(C) (Westlaw through L.2018) (“In making an award of custody, the court shall consider but not be limited to the following factors: . . . the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent.”).
495. N.M. STAT. ANN. § 40-4-9.1 (A-B) (Westlaw through the end of the Second Reg. Sess. of the 53rd Leg.). “There shall be a presumption that joint custody is in the best interests of a child in an initial custody determination.” *Id.* “In determining whether a joint custody order is in the best interests of the child, in addition to the factors provided in Section 40-4-9 NMSA 1978, the court shall consider the following factors: . . . (9) whether a judicial adjudication has been made in a prior or the present proceeding that either parent or other person seeking custody has engaged in one or more acts of domestic abuse against the child, a parent of the child or other household member.” *Id.* Although domestic violence is only a factor, the statute does provide that “[I]f a determination is made that domestic abuse has occurred, the court shall set forth findings that the custody or visitation ordered by the court adequately protects the child, the abused parent or other household member.” *Id.*
496. N.Y. DOM. REL. LAW § 240(1)(a) (Westlaw through 2019) (“Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party . . . 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.”).
497. N.C. GEN. STAT. ANN. § 50-13.2(a) (Westlaw through S.L. 2018-145 of the 2018 Reg. and Extra Sess. of the Gen. Assemb.). “An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child.” *Id.* “In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party.” *Id.*
498. OHIO REV. CODE ANN. § 3109.04(F)(2) (Westlaw through Files 115 to 117, 119, 120, 122 to 154, 156, 158, 159, 162 to 165, 167, 169, 170 and 172 of the 132<sup>nd</sup> Gen. Assemb. (2017-2018).) (“In determining whether shared parenting is in the best interest of the children, the court shall consider all relevant factors, including, but not limited to, the factors enumerated in division (F)(1) of this section, the factors enumerated in section 3119.23 of the Revised Code, and all of the following factors: . . . (c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent.”).
499. 23 PA. STAT. AND CONS. STAT. ANN. § 5328(a) (Westlaw through 2018 Reg. Sess. Act 164) (“In ordering any form of custody, the court shall determine the best inter-

Virginia,<sup>505</sup> Washington,<sup>506</sup> West Virginia,<sup>507</sup> and Wyoming.<sup>508</sup> As explained earlier, a statutory approach that makes domestic violence

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- est of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following: . . . (2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.”)
500. 15 R.I. GEN. LAWS ANN. § 15-5-16(g) (Westlaw through Chapter 2 of the Jan. 2019 Sess.) (“[T]he court, when making decisions regarding child custody and visitation, shall consider evidence of past or present domestic violence.”).
501. S.C. CODE ANN. § 63-15-40(A) (2008) (“In making a decision regarding custody of a minor child, in addition to other existing factors specified by law, the court must give weight to evidence of domestic violence.”).
502. TENN. CODE ANN. § 36-6-106(A) (Westlaw through the end of the 2018 Second Reg. Sess. of the 110th Tenn. Gen. Assemb.). “In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, the determination shall be made on the basis of the best interest of the child.” *Id.* “The court shall consider all relevant factors, including the following, where applicable: . . . (11) Evidence of physical or emotional abuse to the child, to the other parent or to any other person.” *Id.*
503. UTAH CODE ANN. § 30-3-10.2(2) (Westlaw through the 2018 Second Spec Sess.) (“In determining whether the best interest of a child will be served by ordering joint legal or physical custody, the court shall consider the following factors: . . . (i) any history of, or potential for, child abuse, spouse abuse, or kidnapping.”).
504. VT. STAT. ANN. tit. 15, § 665 (Westlaw through the end of the 2017 adjourned sess. and the first Spec. sess. 2018) (stating that in entering “an order concerning parental rights and responsibilities of any minor child of the parties . . . the court shall be guided by the best interests of the child and shall consider at least the following factors: . . . (9) evidence of abuse, as defined in section 1101 of this title, and the impact of the abuse on the child and on the relationship between the child and the abusing parent.”).
505. VA. CODE ANN. § 20-124.3 (Westlaw through the end of the 2018 Reg. Sess. and 2018 Sp. Sess. I) (“In determining best interests of a child for purposes of determining custody or visitation arrangements including any pendente lite orders pursuant to § 20-103, the court shall consider the following: . . . (9) Any history of family abuse as that term is defined in § 16.1-228 or sexual abuse.”).
506. WASH. REV. CODE ANN. § 26.09.191(1) (West 2017) (stating that “[t]he permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct: . . . (c) a history of acts of domestic violence as defined in RCW 26.50.010(3)”).
507. W. VA. CODE ANN. § 48-9-209(a) (West 2005) (stating that “[i]f either of the parents so requests, or upon receipt of credible information thereof, the court shall determine whether a parent who would otherwise be allocated responsibility under a parenting plan: . . . (3) Has committed domestic violence, as defined in section 27-202.”).
508. WYO. STAT. ANN. § 20-2-201(c) (Westlaw through chapters effective March 15 of the 2019 Gen. Sess. of the Wyo. Leg.). “The court shall consider evidence of spousal abuse or child abuse as being contrary to the best interest of the children.” *Id.* “If the

only a factor in determining the best interests of the child, versus creating a rebuttable presumption about what is in the best interest of the child, fails to adequately take domestic violence into account, particularly in situations where the domestic violence includes a pattern of coercive abuse.<sup>509</sup> Colorado takes a position in between creating a rebuttable presumption and providing for domestic violence to be just a factor in determining the best interests of the child. Colorado's statute requires the court to consider as its "primary concern" the safety and well-being of the child and the abused party when the other party has committed domestic violence.<sup>510</sup>

In addition to a rebuttable presumption to grant sole decision-making and primary parenting time to the survivor of domestic violence, courts should also consider whether to order further protective measures relating to the parenting time of parents who have engaged in domestic violence. This is due to the large body of evidence that children exposed to domestic violence are in danger of serious and long-term harm when a protective parent is not being supported.<sup>511</sup> As detailed and documented in Section I, there is a likelihood of further domestic violence if the parents continue to have significant contact with each other in situational couple violence situations. There is also a likelihood that abuse will escalate after the couple separates when there has been a pattern of coercive abuse.

To what extent do states, in their child custody laws, require courts to order restrictions or conditions on parenting time to protect children and the parent survivor of domestic violence from further harm? Based on a review of the Resource Center on Domestic Violence: Child Protection and Custody, a Project of the Family Violence and Domestic Relations Program of the National Council of Juvenile and Family Court Judges (2013) (hereinafter the "NCJFCJ Chart"), and a review of state legislation,<sup>512</sup> the following 34 states expressly and clearly refer to

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court finds that family violence has occurred, the court shall make arrangements for visitation that best protects the children and the abused spouse from further harm."

*Id.*

509. *See supra* Section I.D.

510. COLO. REV. STAT. ANN. § 14-10-124 (West 2017).

511. *See supra* Section I.

512. DALTON ET AL., *supra* note 123. The NCJFCJ Chart is labeled "CONDITIONS ON VISITATION IN CASES INVOLVING DOMESTIC AND FAMILY VIOLENCE" and lists 42 states and the District of Columbia with statutory cites and statutory language. It appears to have excluded states that did not contain the subject matter of the chart. We have independently researched the laws in the chart and the additional eight states not in the chart, and the results of this research are included in this article. In some cases, the laws reflected in the chart have been repealed

domestic violence, domestic abuse, or family violence (including abuse of the other parent) as a basis to restrict or provide conditions on parenting time to protect the child or parent victim of domestic violence: Alabama,<sup>513</sup> Alaska,<sup>514</sup> Arizona,<sup>515</sup> California,<sup>516</sup> Colorado,<sup>517</sup> Florida,<sup>518</sup>

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or the statutory language has been modified. In some cases, the statutory language is from a state's order of protection/domestic violence statute rather than from their domestic relations/divorce statute. Thus, the list of states we present for providing domestic violence as a basis to restrict or provide conditions on visitation/parenting time is less than the 42 states listed in the chart. We also found some examples of states not in the list that provide for domestic violence as a basis to restrict or provide conditions on visitation/parenting time.

513. ALA. CODE § 30-3-135 (Westlaw through Act 2018-579) (“A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made.”).
514. ALASKA STAT. ANN § 25.20.061 (Westlaw through the 2018 Second Reg. Sess. of the 30th Leg.). “If visitation is awarded to a parent who has committed a crime involving domestic violence, against the other parent or a child of the two parents, within the five years preceding the award of visitation the court may set conditions for the visitation, including: (1) the transfer of the child for visitation must occur in a protected setting; (2) visitation shall be supervised by another person or agency and under specified conditions as ordered by the court; (3) the perpetrator shall attend and complete, to the satisfaction of the court, a program for the rehabilitation of perpetrators of domestic violence that meets the standards set by the Department of Corrections, or other counseling; the perpetrator shall be required to pay the costs of the program or other counseling; (4) the perpetrator shall abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours before visitation; (5) the perpetrator shall pay costs of supervised visitation as set by the court; (6) the prohibition of overnight visitation; (7) the perpetrator shall post a bond to the court for the return and safety of the child; and (8) any other condition necessary for the safety of the child, the other parent, or other household member.” *Id.*
515. ARIZ. REV. STAT. ANN. § 25-403.03(F) (Westlaw through the First Spec and Second Reg. Sess. of the Fifty-Third Leg. 2018). “If the court finds that a parent has committed an act of domestic violence, that parent has the burden of proving to the court’s satisfaction that parenting time will not endanger the child or significantly impair the child’s emotional development.” *Id.* “If the parent meets this burden to the court’s satisfaction, the court shall place conditions on parenting time that best protect the child and the other parent from further harm.” *Id.* “The court may: (1) Order that an exchange of the child must occur in a protected setting as specified by the court; (2) Order that an agency specified by the court must supervise parenting time. If the court allows a family or household member to supervise parenting time, the court shall establish conditions that this person must follow during parenting time; (3) Order the parent who committed the act of domestic violence to attend and complete, to the court’s satisfaction, a program of intervention for perpetrators of domestic violence and any other counseling the court orders; (4) Order the parent who committed the act of domestic violence to abstain from possessing or consuming alcohol or controlled substances during parenting time and for 24 hours before parenting time; (5) Order the parent who committed the act of domestic violence to pay a fee for the costs of supervised parenting time; (6) Prohibit overnight parenting time; (7) Require

Georgia,<sup>519</sup> Hawaii,<sup>520</sup> Indiana<sup>521</sup> Kentucky,<sup>522</sup> Louisiana,<sup>523</sup> Maine,<sup>524</sup> Maryland,<sup>525</sup> Massachusetts,<sup>526</sup> Michigan,<sup>527</sup> Minnesota,<sup>528</sup> Mississippi,<sup>529</sup>

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- a bond from the parent who committed the act of domestic violence for the child's safe return; (8) Order that the address of the child and the other parent remain confidential; (9) Impose any other condition that the court determines is necessary to protect the child, the other parent and any other family or household member." *Id.*
516. CAL. FAM. CODE § 3100(c) (Westlaw through all laws through Ch. 1016 of 2018 Reg.Sess.) ("If visitation is ordered in a case in which domestic violence is alleged and an emergency protective order, protective order, or other restraining order has been issued, the visitation order shall specify the time, day, place, and manner of transfer of the child so as to limit the child's exposure to potential domestic conflict or violence and to ensure the safety to all family members.").
517. COLO. REV. STAT. ANN. § 14-10-124(4)(IV)(e) (Westlaw through laws effective Sept. 1, 2018 of the Second Reg. Sess. of the 71st Gen. Assemb.) ("When the court finds by a preponderance of the evidence that one of the parties has committed child abuse or neglect or domestic violence, in formulating or approving a parenting plan, the court shall consider conditions on parenting time that ensure the safety of the child and of the abused party.").
518. FLA. STAT. ANN. § 61.13(C)(2) (Westlaw through the 2018 Second Reg. Sess. of the 25<sup>th</sup> Leg.) ("If the court determines that shared parental responsibility would be detrimental to the child, it may order sole parental responsibility and makes such arrangements for time sharing as specified in the parenting plan as will best protect the child or abused spouse from further harm. Whether or not there is a conviction of any offense of domestic violence or child abuse or the existence of an injunction for protection against domestic violence, the court shall consider evidence of domestic violence or child abuse as evidence of detriment to the child.").
519. GA. CODE ANN. § 19-9-7(a) (Westlaw through the 2018 Reg. and Spec Legis. Sess.) ("A judge may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made.").
520. HAW. REV. STAT. ANN. § 571-476 (Westlaw through the end of the 2018 Second Spec Sess.) ("(10) A court may award visitation to a parent who has committed family violence only if the court finds that adequate provision can be made for the physical safety and psychological well-being of the child and for the safety of the parent who is a victim of family violence; (11) In a visitation order, a court may" listing several protective measures including supervised parenting time and supervised exchanges).
521. IND. CODE ANN. § 31-17-2-8.3 (West 2017) ("If a court finds that a noncustodial parent has been convicted of a crime involving domestic or family violence that was witnessed or heard by the noncustodial parent's child there is created a rebuttable presumption that the court shall order that the noncustodial parent's parenting time with the child must be supervised.").
522. KY. REV. STAT. ANN. § 403.320(2) (West 2011) ("If domestic violence and abuse . . . has been alleged, the court shall, after a hearing, determine the visitation arrangement, if any, which would not endanger seriously the child's or the custodial parent's physical, mental, or emotional health.").
523. LA STAT. ANN. § 9:364(E) (Westlaw through the 2018 Third Extraordinary Sess.) ("If the court finds that a parent has a history of perpetrating family violence, the court shall allow only supervised child visitation with that parent").

Missouri,<sup>530</sup> Nebraska,<sup>531</sup> Nevada,<sup>532</sup> New Hampshire,<sup>533</sup> New Mexico,<sup>534</sup>  
North Carolina,<sup>535</sup> North Dakota,<sup>536</sup> Oklahoma,<sup>537</sup> Pennsylvania,<sup>538</sup>

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524. ME. REV. STAT. ANN. tit. 19, § 1653(6) (Westlaw through the 2017 Second Reg. Sess. and Second Spec Sess. of the 128th Leg.) (“Conditions of parent-child contact in cases involving domestic abuse. The court shall establish conditions of parent-child contact in cases involving domestic abuse . . . . In an order of parental rights and responsibilities, a court may: [statute lists six specific conditions on parenting time and a general catch all].”).
525. MD. CODE ANN., FAM. LAW § 9-101.1(c) (Westlaw through 2018 Sess.) (“If the court finds that a party has committed abuse against the other parent or the party’s child, the party’s spouse, or any child residing within the party’s household, the court shall make arrangements for custody or visitation that best protect (1) the child who is the subject of the proceeding; and (2) the victim of the abuse.”).
526. MASS. ANN. LAWS ch. 208 § 31A(i) (LEXIS through Act 450 of the 2018 Leg. Sess.) (“Imposing any other condition that is deemed necessary to provide for the safety and well-being of the child and the safety of the abused parent.”).
527. MICH. COMP. LAWS ANN. § 722.23(k) (Westlaw through 2018 Leg. Sess.) (“Domestic violence, regardless of whether the violence was directed against or witnessed by the child.”).
528. MINN. STAT. ANN. § 518.175 (Subd. 1a)(a) (Westlaw through 2018 Sess.) (“If a parent requests supervised parenting time under subdivision 1 or 5 and an order for protection under chapter 518B or a similar law of another state is in effect against the other parent to protect the parent with whom the child resides or the child, the judge or judicial officer must consider the order for protection in making a decision regarding parenting time.”).
529. MISS. CODE ANN. § 93-5-24(9)(d)(ii) (Westlaw through the 2018 regular and first extraordinary session) (“A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made.”).
530. MO. ANN. STAT. § 452.410(2)(6) (Westlaw through the end of the 2018 Second Regular Session and First Extraordinary Session of the 99th General Assembly) (“Custody and visitation rights shall be ordered in a manner that best protects the child and any other child or children for whom the parent has custodial or visitation rights, and the parent or other family or household member who is the victim of domestic violence from any further harm.”).
531. NEB. REV. STAT. ANN. § 43-2934(2) (Westlaw through the end of the 2nd Regular Session of the 105th Legislature 2018) (“When making an order or parenting plan for custody, parenting time, visitation, or other access in a case in which domestic abuse is alleged and a restraining order, protection order, or criminal no-contact order has been issued, the court shall consider whether the best interests of the child, based upon the circumstances of the case, require that any custody, parenting time, visitation, or other access arrangement be limited to situations in which a third person, specified by the court, is present, or whether custody, parenting time, visitation, or other access should be suspended or denied.”).
532. NEV. REV. STAT. ANN. § 125C.230(1)(b) (Westlaw through the end of the 2nd Regular Session of the 105th Legislature 2018) (“Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.”).

Rhode Island,<sup>539</sup> South Carolina,<sup>540</sup> Texas<sup>541</sup> Vermont,<sup>542</sup> Washington,<sup>543</sup> Wisconsin,<sup>544</sup> West Virginia,<sup>545</sup> and Wyoming.<sup>546</sup> Providing specific stat-

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533. N.H. REV. STAT. ANN. § 461-A:6(1)(j) (Westlaw through 2018 Sess.) (“Any evidence of abuse, as defined in RSA 173-B:1, I or RSA 169-C:3, II, and the impact of the abuse on the child and on the relationship between the child and the abusing parent.”).
534. N.M. STAT. ANN. § 40-4-9.1(B)(9) (Westlaw through the end of the Second Regular Session of the 53rd Legislature) (“If a determination is made that domestic abuse has occurred, the court shall set forth findings that the custody or visitation ordered by the court adequately protects the child.”).
535. N.C. GEN. STAT. ANN. § 50-13.2(b) (Westlaw through S.L. 2018-145 of the 2018 Regular and Extra Sessions of the General Assembly) (“Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child. If the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence, in accordance with the provisions of G.S. 50B-3(a1)(1), (2), and (3).”).
536. N.D. CENT. CODE ANN. § 14-09-29(2) (Westlaw through the 2017 Regular Session of the 65th Legislative Assembly and results of the Nov. 6, 2018, election) (“If the court finds that a parent has perpetrated domestic violence and that parent does not have residential responsibility, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, the court shall allow only supervised parenting time with that parent unless there is a showing by clear and convincing evidence that unsupervised parenting time would not endanger the child’s physical or emotional health.”).
537. OKLA. STAT. tit. 43, § 111.1(3) (Westlaw through legislation of the Second Regular Session of the 56th Legislature 2018) (“The court may award visitation by a noncustodial parent who was determined to have committed domestic violence . . . if the court is able to provide for the safety of the child and the parent who is the victim of that domestic violence.”).
538. 23 PA. STAT. AND CONS. STAT. ANN. § 5328(a)(2) (Westlaw through 2018 Regular Session Act 164) (“The present and past abuse committed by a party or member of the party’s household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.”).
539. tit. 15 R.I. GEN. LAWS § 15-5-16 (g)(1) (2018) (“[T]he court, when making decisions regarding child custody and visitation, shall consider evidence of past or present domestic violence. Where domestic violence is proven, any grant of visitation shall be arranged so as to best protect the child and the abused parent from further harm.”).
540. S.C. CODE ANN. § 63-15-50(A) (Westlaw through 2018 Act No. 292) (“A court may award visitation to a person who has been found by a general sessions, magistrates, municipal, or family court to have committed domestic violence . . . or in cases in which complaints were made against both parties, to the person found by a general sessions, magistrates, municipal, or family court to be the primary aggressor . . . only if the court finds that adequate provision for the safety of the child and the victim of domestic violence can be made.”).
541. TEX. FAM. CODE ANN. § 153.004(c) (Westlaw through 2017 Regular and First Called Sessions of the 85th Legislature) (“The court shall consider the commission of

utory support to impose protective conditions and restrictions on parenting time based upon domestic violence is a strong way to take domestic violence into account in child custody cases. It would help empower domestic violence survivors to protect themselves and their

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- family violence or sexual abuse in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator.”); TEX. FAM. CODE ANN. § 153.004(d)-(d)(1) (Westlaw through 2017 Regular and First Called Sessions of the 85th Legislature) (“The court may not allow a parent to have access to a child for whom it is shown by a preponderance of the evidence that: (1) there is a history or pattern of committing family violence during the two years preceding the date of the filing of the suit or during the pendency of the suit.”); TEX. FAM. CODE ANN. § 153.004(d-1)-(d-1)(2) (Westlaw through 2017 Regular and First Called Sessions of the 85th Legislature) (“Notwithstanding Subsection (d), the court may allow a parent to have access to a child if the court: (1) finds that awarding the parent access to the child would not endanger the child’s physical health or emotional welfare and would be in the best interest of the child; and (2) renders a possession order that is designed to protect the safety and well-being of the child and any other person who has been a victim of family violence committed by the parent and that may include a requirement that”) (proceeding to list four protective measures including supervised parenting time and supervised exchanges of the child).
542. VT. STAT. ANN. tit. 15, § 665a(a) (Westlaw through all acts of the Adjourned Session of the 2017-2018 Vermont General Assembly and all acts of the First Spec Session of the Adjourned Session of the 2017-2018 Vermont General Assembly 2018) (“If within the prior ten years, one of the parents has been convicted of domestic assault or aggravated domestic assault against the other parent, or has been found to have committed abuse against a family or household member . . . the court may award parent-child contact to that parent if the court finds that adequate provision can be made for the safety of the child and the parent who is a victim of domestic violence.”).
543. WASH. REV. CODE ANN. § 26.10.160(2)(a) (Westlaw through Chapter 4 of the 2019 Regular Session) (“Visitation with the child shall be limited if its found that the parent seeking visitation has engaged in any of the following conduct: . . . (iii) a history of acts of domestic violence as defined in RCW 26.50.010(3)”).
544. WISC. STAT. ANN. § 767.41(6)(g) (Westlaw through 2017 Act 370) (“If the court finds . . . that a party has engaged in . . . domestic abuse . . . And the court awards periods of physical placement to both parties, the court shall provide for the safety and well-being of the child and for the safety of the party who was the victim of the battery or abuse. For that purpose the court . . . shall impose one or more of the following appropriate”) (proceeding to list seven specific protective conditions on parenting time and an eighth catch all).
545. W. VA. CODE § 48-27-509(a) (Westlaw through legislation of the 2018 First Extraordinary Session) (“A court may award visitation of a child by a parent who has committed domestic violence only if the court finds that adequate provision for the safety of the child and the petitioner can be made.”).
546. WYO. STAT. ANN. § 20-2-201(c) (Westlaw through March 15 of the 2019 General Session) (“The court shall consider evidence of spousal abuse or child abuse as being contrary to the best interest of the children. If the court finds that family violence has occurred, the court shall make arrangements for visitation that best protects the children and the abused spouse from further harm.”).

children from further harm. But as noted earlier in the context of states with rebuttable presumptions against custody to an abusive parent, some of these states narrowly define domestic violence, which can reduce the ability of domestic violence survivors to obtain protective conditions or restrictions on parenting time.<sup>547</sup>

In addition to these 34 states, four other states' custody laws could be construed to be referring to domestic violence as a basis to impose protective restrictions or conditions on parenting time, but the language in their statutes is not as clear as in the statutes of the 34 states noted above. These four states are: Arkansas,<sup>548</sup> Oregon,<sup>549</sup> New York,<sup>550</sup> and Virginia.<sup>551</sup>

547. See *supra* notes 446-467 and accompanying text.

548. ARK. CODE ANN. § 9-13-101(c)(1) (Westlaw through the 2018 Fiscal Session and the Second Extraordinary Session of the 91st Arkansas General Assembly) (If a party to an action concerning custody of or a right to visitation with a child has committed an act of domestic violence against the party making the allegation . . . the circuit court must consider the effect of such domestic violence upon the best interests of the child . . . together with such facts and circumstances as the circuit court deems relevant in making a direction pursuant to this section.”).

549. As previously noted, Oregon creates a rebuttable presumption that it is not in the best interests and welfare of the child to award sole or joint custody of the child to a parent who committed abuse against a family or household member. OR. REV. STAT. ANN. § 107.137(2) (Westlaw through 2018 Regular Session). In OR. REV. STAT. ANN. § 107.101 (Westlaw through 2018 Regular Session), “It is the policy of this state to: . . . (5) Consider the best interests of the child and the safety of the parties in developing a parenting plan.” OR. REV. STAT. ANN. § 107.101 (Westlaw through 2018 Regular Session). While this language does not explicitly refer to “domestic violence” or other forms of intimate partner abuse, when it refers to the “safety of the parties” (which parties would typically be the parents) it seems likely it is including safety concerns due to domestic violence. This would then serve as the basis to condition parenting time by directing courts to consider the safety of the parents when determining how parenting time should be structured.

550. N.Y. DOM. REL. LAW § 240(1)(a) (Westlaw through L.2019) (In any action or proceeding brought . . . (3) for a divorce . . . . Where either party to an action concerning custody of or a right to visitation with a child alleges . . . the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party . . . 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 and state on the record how such findings, facts and circumstances factored into the direction.”). The statutory language does not make clear whether the direction referred to in this statute includes denial of or restriction of the right to visitation.

551. VA. CODE ANN. §20-124.3 (Westlaw through 2018 Regular Session) (“In determining best interests of a child for purposes of determining custody or visitation arrangements including any pendente lite orders pursuant to §20-103, the court shall consider the following: . . . 9. Any history of family abuse as that term is defined in

The 34 states that have expressly and clearly required or authorized their courts to condition or restrict the parenting time of a parent who engages in domestic violence much better enable domestic violence survivors to protect themselves and their children from further abuse and harm than do the following 12 states that fail to do so in their divorce or parentage statutes: Connecticut,<sup>552</sup> Delaware,<sup>553</sup> Idaho,<sup>554</sup> Illinois,<sup>555</sup> Iowa,<sup>556</sup> Kansas,<sup>557</sup> New Jersey,<sup>558</sup> Montana,<sup>559</sup> Ohio,<sup>560</sup> South Dakota,<sup>561</sup> Tennessee,<sup>562</sup> and Utah.<sup>563</sup>

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§16.1-228 or sexual abuse.”). The reference to “visitation arrangements” could include ordering protective measures due to the family violence, which would include domestic violence. But the statute is not clearer.

552. CONN. GEN. STAT. ANN. § 46b-56(a) (Westlaw through P.A. 14-3) (discussing the court’s ability to “award custody to either parent or a third party . . . subject to such conditions and limitations as it deems equitable,” without specifically referencing domestic violence as a basis for such conditions or limitations).
553. DEL. CODE ANN. tit. 13, § 728(a) (Westlaw through 82 Laws 2019) (requiring courts to “permit and encourage the child to have frequent and meaningful contact with both parents unless the Court finds, after a hearing, that contact of the child with 1 parent would endanger the child’s physical health or significantly impair his or her emotional development,” and further stating that “[t]he court shall specifically state in any order denying or restricting a parent’s access to a child the facts and conclusions of such a denial or restriction,” without expressly referencing domestic violence as a basis for such a finding).
554. IDAHO CODE ANN. § 32-717E (Westlaw through First Reg. Sess. of 65th Leg.) (failing to mention domestic violence in this section where it refers to cases in which a court has ordered supervised parenting time or supervised exchanges or transfers of the children). *But see* IDAHO CODE ANN. § 32-717B(5) (Westlaw through First Reg. Sess. of 65th Leg.) (mentioning a presumption that joint custody is not in the best interests of a minor child if one of the parents is found to be a habitual perpetrator of domestic violence, but not directly referencing a need for restrictions on parenting time based upon domestic violence).
555. 750 ILL. COMP. STAT. ANN. 5/603.10(a) (Westlaw through P.A. 99-90) (explaining that “[a]fter a hearing, if the court finds by a preponderance of the evidence that a parent engaged in any conduct that seriously endangered the child’s mental, moral, or physical health or that significantly impaired the child’s emotional development, the court shall enter orders as necessary to protect the child,” and specifying a non-exhaustive list of eight specific restriction on parenting time, plus a ninth catch-all, without express reference to domestic violence as the kind of conduct that would trigger this finding); *but see id.* at (a)(8) (“requiring a parent to complete a treatment program for perpetrators of abuse . . . or for other behavior that is the basis for restricting parental responsibilities under this Section,” and thus opening the door for the argument that such abuse could be the basis for restricting parenting time).
556. While the Iowa Code requires courts to “consider, in the award of visitation to a parent of a child, the criminal history of the parent if the parent has been convicted of a sex offense against a minor,” IOWA CODE ANN. § 598.41A (Westlaw through Feb. 19, 2019), and provides that courts shall not “[a]ward visitation rights to a child’s parent who has been convicted of murder in the first degree of the child’s other parent, unless the court finds that such visitation is in the best interest of the child,”

## 2. Illinois: A Case Study

Another way to evaluate the different approaches to taking domestic violence into account in child custody laws is to consider two specific states and the ability of a domestic violence survivor in each state to pro-

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- IOWA CODE ANN. § 598.41B (Westlaw through Feb. 19, 2019), there was no express reference to domestic violence as the basis for conditions or restrictions on visitation or parenting time under the Iowa Code.
557. KAN. STAT. ANN. § 23-3208 (Westlaw through 2018 Reg. Sess.) (explaining parents are entitled “to reasonable parenting time unless the court finds, after a hearing, that the exercise of parenting time would seriously endanger the child’s physical, mental, moral or emotional health,” without referencing domestic violence as a basis for this finding).
558. N.J. STAT. ANN. § 9:2-4.1 (Westlaw through L.2019, c. 35) (specifying sexual assault of a child as a basis to deny visitation rights); *compare* N.J. STAT. ANN. § 9:2-4 (Westlaw through L.2019, c. 35) (listing domestic violence as a factor for determining custody, but not as a basis to condition or restrict parenting time).
559. MONT. CODE ANN. § 40-4-218 (Westlaw though chapters effective, Oct. 1, 2017 sess.) (explaining “if the court finds that in the absence of the order the child’s physical health would be endangered or the child’s emotional development significantly impaired, the court may order supervised visitation by the noncustodial parent,” without referencing domestic violence as a basis for supervised visitation).
560. OHIO REV. CODE ANN. § 3109.051(D) (Westlaw through Files 115 to 117, 119, 120, 122 to 154, 156, 158, 159, 162 to 165, 167, 169, 170 and 172 of the 132nd Gen. Assemb. 2018) (listing factors to be considered when determining whether to grant parenting time to a parent pursuant to this section, none of which directly refer to domestic violence, although one factor addresses criminal convictions involving an act that resulted in a child being an abused child or a neglected child).
561. S.D. CODIFIED LAWS §25-4A-10 (Westlaw through 2018 Reg. and Spec Sess.) (“Supreme Court to promulgate guidelines for noncustodial parenting time.”). This contains no reference to domestic violence in its charge to the South Dakota Supreme Court to promulgate guidelines to be used statewide for minimum noncustodial parenting time in divorce or any other custody action or proceeding. *Id.*
562. TENN. CODE. ANN. §36-6-301 (Westlaw through the end of the 2018 Second Reg. Sess, of the Tenn. Gen. Assemb.) (“If the court finds that the non-custodial parent has physically or emotionally abused the child, the court may require that visitation be supervised or prohibited until such abuse has ceased or until there is no reasonable likelihood that such abuse will recur.”). There is no reference to domestic violence as the basis for supervising or prohibiting visitation. *Id.*
563. UTAH CODE ANN. §30-3-34.5 (Westlaw through the 2018 Second Spec. Sess.). (Under the “Supervised parent-time” heading: “Considering the fundamental liberty interests of parents and children, it is the policy of this state that divorcing parents have unrestricted and unsupervised access to their children. When necessary to protect a child and no less restrictive means is reasonably available however, a court may order supervised parent-time if the court finds evidence that the child would be subject to physical or emotional harm or child abuse . . . from the noncustodial parent if left unsupervised with the noncustodial parent.”) There is no reference to domestic violence being the basis for ordering supervised parenting time. *Id.*

protect themselves and their children from further harm. Illinois broadly defines what conduct constitutes domestic violence and can trigger an order of protection, and it provides very protective temporary orders on child custody under its orders of protection.<sup>564</sup> However, the child custody laws in Illinois that apply in a divorce or paternity action are quite different.<sup>565</sup> The child custody laws in Illinois that apply in a divorce or paternity action make it very difficult for survivors of domestic violence to obtain needed protections for themselves and their children.

A parent perpetrating domestic violence is just one of many factors that courts are required to consider when determining the best interests of the child for purposes of ordering custody in a divorce or parentage case in Illinois.<sup>566</sup> There is no rebuttable presumption in Illinois against joint or sole decision-making or primary or significant parenting time to a parent who engages in domestic violence as there are in 21 other states. And, because there is evidence that courts accord much more weight to the “friendly parent” factor (which parent better fosters a

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564. 750 ILL. COMP. STAT. 60/103(1) (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.) (“‘Abuse’ means physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation”); 750 ILL. COMP. STAT. 60/214(b)(5)—(6) (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.) (each section contains a rebuttable presumption that awarding physical care and possession of the minor child, or the temporary allocation of parental responsibilities and decision-making, respectively, to a respondent in an order of protection who has engaged in “Abuse” would not be in the minor child’s best interest); 750 ILL. COMP. STAT. 60/214(b)(7) (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.) (provides that: “the court shall restrict or deny respondent’s parenting time with a minor child if the court finds that respondent has done or is likely to do any of the following: (i) abuse or endanger the minor child during parenting time; (ii) use the parenting time as an opportunity to abuse or harass petitioner or petitioner’s family or household members; . . . (iv) otherwise act in a manner that is not in the best interest of the minor child.”). *Id.*

565. 750 ILL. COMP. STAT. 5/602.5, /602.7, /603.10 (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.).

566. *See* CH. 750 ILL. COMP. STAT. ANN. 5 / 602.5(C)(13) (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.). § 602.5 is entitled “Allocation of parental responsibilities: decision-making” and provides: “(c) Determination of child’s best interests. In determining the child’s best interests for purposes of allocating significant decision-making responsibilities, the court shall consider all relevant factors, including, without limitation, the following: . . . (13) the occurrence of abuse against the child or other member of the child’s household.” *Id.*; CH. 750 ILL. COMP. STAT. ANN. 5 / 602.7(B)(14) (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.). § 602.7 is entitled “Allocation of parental responsibilities: parenting time” and provides: “In determining the child’s best interests for purposes of allocating parenting time, the court shall consider all relevant factors, including, without limitation, the following: . . . (14) the occurrence of abuse against the child or other member of the child’s household.” *Id.*

positive relationship of the child with the other parent), than the factor of domestic violence,<sup>567</sup> not having a rebuttable presumption against custody to a parent who has engaged in domestic violence makes it less likely that a court will accord appropriate weight to the domestic violence.<sup>568</sup>

As discussed in Section I, there is substantial evidence that judges place more weight on the “friendly parent” factor and claims of alienation than they do to claims of domestic violence, and even claims of direct abuse of the child. Judges in a divorce or paternity case often view claims of domestic violence skeptically<sup>569</sup> and wonder whether the parent alleging the domestic violence is lying or exaggerating, either to gain an economic advantage in the divorce or parentage case or out of animus. This has been documented to lead judges to treat a protective parent as an alienating parent and to order child custody in line with what the abusive parent has sought, rather than the abused parent.<sup>570</sup> As explained in Section I, when a parent is a survivor of domestic violence, especially a pattern of coercive abuse, it is not appropriate for a court to require that parent to “cooperate” with the abusive parent. This is because the abusive parent often uses parenting time and decision-making as a means to further abuse the other parent rather than act in the best interests of the child. Furthermore, the contacts necessary to cooperate can lead to dangerous interactions and abusive communications.<sup>571</sup>

Another key problem with domestic violence being just a factor, versus creating a rebuttable presumption, is that judges and the professionals they rely upon fail to realize how harmful repeated and/or severe domestic violence by one parent against the other parent is to children. With a rebuttable presumption, a court would have to accord significant weight to domestic violence in its child custody decisions.

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567. See Meier & Dickson, *supra* note 2, at 315, 331.

568. See CH. 750 ILL. COMP. STAT. ANN. 5 / 602.5(C)(11) (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.) and CH. 750 ILL. COMP. STAT. ANN. 5 / 602.7(B)(13) (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.) (both including as a factor “the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.”).

569. One anecdote on this is quite telling. One author of this Article, Stark, presented on the topic of taking domestic violence into account in child custody cases in a training session for child representatives. The first question she received, from a family a law judge also in attendance, was: How can we know when a person claiming domestic violence is telling the truth and not making the claim to get a better deal in the divorce?

570. Meier & Dickson, *supra* note 2, at 328, 331.

571. See *supra*, Section I.D.

In an extreme example of what can go wrong without a rebuttable presumption against custody to a parent who has committed domestic violence, an Illinois appellate court affirmed child custody to a father convicted of voluntary manslaughter for strangling to death the mother of his children.<sup>572</sup> Upon release from prison, the father brought an action for child custody against the maternal aunt and uncle who had been caring for their two nieces while the father was incarcerated.<sup>573</sup> The case is also an example of what can go wrong when judges and other family law professionals involved in custody decisions fail to be trained on the nature and dynamics of domestic violence and its harmful impact on children.

There was ample evidence in the case described by the appellate court that the father, James, had been violent with the mother, Carol, and with their children, Dana and Tracy, in ways that were harmful to the children and deadly to the mother. Carol had filed a petition for dissolution of marriage and obtained an ex parte order of protection on December 21, 1984, based upon her sworn allegation that the day before, James had grabbed and thrown her in a violent manner to the floor and struck her.<sup>574</sup> A neighbor of James and Carol who baby-sat for the children testified at the custody case that on the evening James killed Carol, the children ran into her house and begged her to go over to their house because James was choking Carol.<sup>575</sup> Both children were crying and screaming.<sup>576</sup> The neighbor further testified that when she went to the house James told her that there had been a fight but that everything was all right.<sup>577</sup> The children then went inside the house with James.<sup>578</sup> The witness also testified that Dana had told her about another fight between Carol and James, at which point the other daughter, Tracy, told Dana she should not have said anything to her.<sup>579</sup> Another person who had known Carol and James for many years—and had a child of the same age—testified that prior to December 1984, she observed Dana with a black eye and both children with bruises on their buttocks.<sup>580</sup> The marks were black and blue and Carol showed her a paddle that had been

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572. *In re Lutgen*, 532 N.E.2d 976, 987 (Ill. App. Ct. 1988).

573. *Lutgen*, 532 N.E.2d at 979.

574. *Lutgen*, 532 N.E.2d at 977.

575. *Lutgen*, 532 N.E.2d at 978.

576. *Lutgen*, 532 N.E.2d at 978.

577. *Lutgen*, 532 N.E.2d at 978.

578. *Lutgen*, 532 N.E.2d at 978.

579. *Lutgen*, 532 N.E.2d at 979.

580. *Lutgen*, 532 N.E.2d at 979.

broken.<sup>581</sup> This witness also testified that she observed injuries on Carol, but had not personally witnessed the incidents in which these injuries were inflicted.<sup>582</sup> One of Carol's brothers testified that he observed bruises on Carol's arm and knee but had no personal knowledge as to how these were inflicted. He testified that Carol was afraid of James and that as a result she appeared very uneasy, scared, and nervous, and she also was losing weight.<sup>583</sup>

James testified at the custody case that he observed Carol and a man sitting in a pick-up truck hugging and kissing the night of the killing, but upon his return at home he did not say anything to her about what he had observed and instead telephoned his father.<sup>584</sup> He stated that later Carol told him he could not take the children out for the evening as they had planned.<sup>585</sup> James stated that he insisted that he was going to take them out as planned, while Carol again stated that he was not going to take them.<sup>586</sup> James stated at the time of his arrest and testified that Carol grabbed him and began choking him; he grabbed her and pushed her back; she came at him again and he grabbed her neck and choked her and then threw her down to the floor; he told the children to stay out in the living room because he did not want them to see what was happening; Carol got up again and started choking him; he kept choking her until she fell down a second time and began bleeding through the nose; he called his father who advised him to call the paramedics; and she was pronounced death at the hospital.<sup>587</sup>

To a person trained on the nature and dynamics of domestic violence, these statements would not be credible. In light of the evidence of Carol's prior injuries, and her statement to her brother of her fear of her husband, it was highly unlikely that she would have initiated violence against him. There was no reference to any evidence presented by James that Carol had ever attacked and injured him before. There was no evidence discussed in the opinion on any wounds to James from Carol trying to strangle him, or of the size and weight of each parent and how that impacted the likelihood that Carol could have strangled James or put him in reasonable fear that she could do so. And yet, notwithstanding this, and voluntary manslaughter conviction,<sup>588</sup> the court's descrip-

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581. *Lutgen*, 532 N.E.2d at 979.

582. *Lutgen*, 532 N.E.2d at 979.

583. *Lutgen*, 532 N.E.2d at 979.

584. *Lutgen*, 532 N.E.2d at 977-78.

585. *Lutgen*, 532 N.E.2d at 978.

586. *Lutgen*, 532 N.E.2d at 978.

587. *Lutgen*, 532 N.E.2d at 978.

588. *Lutgen*, 532 N.E.2d at 978.

tion of what happened that night implied that this was a mutual fighting situation. For example, the court stated: “Other than the *tragic circumstances* [emphasis added by the authors] which resulted in the death of Carol, James has an unblemished record.”<sup>589</sup> It is also odd that the court found that James had an unblemished record in light of the emergency order of protection granted against him the day he killed his wife.

In determining who should have custody of the children upon James’ release from prison, the trial court applied the following six best interests of the child factors using the standard under Illinois law:<sup>590</sup>

- a. “the wishes of the child’s parent or parents as to his custody”

This case balanced the wishes of a parent who strangled and killed the other parent, against the wishes of the maternal aunt and uncle of the children with whom the children had been living in a peaceful and healthy home without domestic violence while the father was incarcerated.

- b. “the wishes of the child as to his custodian”

There was testimony that the two girls loved their father and their aunt and uncle, with one child stating she preferred their father and the other ultimately stating a preference for the aunt and uncle, but wanting to be with her sister no matter what.<sup>591</sup> At first blush it might seem puzzling that the children expressed a desire to live with their father, without describing any fear. After all, they had seen their father strangling their mother. They had also been punished by their father with corporal punishment that left bruise marks visible to others.

It appears there are several possible reasons for the children not expressing fear to live with their father after he returned from prison. Although the children had in fact seen or heard some of what happened on the night their father killed their mother (testimony of the neighbor the children ran to her crying and screaming that their father was choking their mother), what they were told later by their paternal grandmother appears to have been a sanitized/normalized version of

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589. *Lutgen*, 532 N.E.2d at 986.

590. 750 I.L.C.S. 5/602, IL ST ch. 750, § 5/602 (repealed by P.A. 99-90, § 5-20, eff. Jan. 1, 2016).

591. *Lutgen*, 532 N.E.2d at 982.

what their father had done. The paternal grandmother testified that she told the children it was wrong that their mother would not let them go out as they had planned to (i.e., the mother was at fault for the fight).<sup>592</sup> The father testified in the custody case that if his children asked him about what happened to their mother, he would tell them that their mother and he “had an argument; that there was pushing and shoving; and he ‘took her (Carol) to the floor.’”<sup>593</sup> This is an unlikely story by the father of mutual fighting, and the father’s attempt to justify and normalize the deadly domestic violence he perpetrated that killed their mother.

c. “the interaction and interrelationship of the child with his parent, his siblings and any other person who may significantly affect the child’s best interests”

There was little testimony noted in the appellate decision that focused on this factor. James’s counsel stipulated that the aunt and uncle were proper custodial parents for the children. There was little discussion of the father’s relationship to his children.

d. “the child’s adjustment to his home, school, and community”

There was remarkably positive evidence of how the children were doing after their mother was killed by their father, while living with their aunt and uncle. There was testimony from a child mental health specialist who performed a psychiatric evaluation that “[t]he children had benefitted from their placement with the Tranel. The Tranel handled the children well.”<sup>594</sup> The principal of the school testified that the children had adjusted well to the school.<sup>595</sup>

e. “the mental and physical health of all individuals involved”

There was little discussion and no evidence of any issues with the mental and physical health of the aunt and uncle. The child mental health specialist hired to evaluate the mental and physical health of the

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592. *Lutgen*, 532 N.E.2d at 981.

593. *Lutgen*, 532 N.E.2d at 982.

594. *Lutgen*, 532 N.E.2d at 983. (Eugene and Debra Tranel, Carol’s brother and sister-in-law, were award custody of Tracy and Dana while James was incarcerated.)

595. *Lutgen*, 532 N.E.2d at 979.

children did not find either child suffering from any diagnosable psychiatric illness.<sup>596</sup> The same mental health specialist met with the father and reported that he was shy, anxious, and a bit of a “perfectionist.”<sup>597</sup> It is unclear what testing the mental health specialist ran to determine the mental and physical health of the children and the father. The expert’s observation that the father was a “perfectionist” might be more accurately perceived as being coercively controlling by someone trained on domestic violence, depending upon what exactly was happening in the home when things were not done precisely in the way the father expected.

f. “the physical violence or threat of physical violence by the child’s potential custodian, whether directed against the child or directed against another person but witnessed by the child”

The trial court’s ultimate ruling to provide custody to the father, and the appellate court’s review of this ruling, placed very little weight upon evidence presented that the mother had been the victim of physical violence by her husband (both the night she was strangled to death by her husband and the evidence of physical violence before then).<sup>598</sup> There was also little weight placed or concern raised with the level of corporal punishment that the father inflicted on his children.<sup>599</sup> This is the case even though the father acknowledged that he was the sole person to discipline the children, and there was evidence that his discipline was sometimes performed in ways that left bruise marks. There was no exploration of the circumstances, the need to discipline the children in this fashion to determine, or if the corporal punishment was reasonable or abusive under the law.

In affirming the trial court’s decision, the appellate court noted that the determination of child custody rests largely within the broad discretion of the trial court and its decision will not be disturbed on appeal unless the award is contrary to the manifest weight of the evidence or unless the court abused its discretion.<sup>600</sup> The key evidence that the appellate court focused on when affirming the trial court were: (i) the wishes of the “sole surviving parent” (an ironic way to describe a hus-

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596. *Lutgen*, 532 N.E.2d at 983.

597. *Lutgen*, 532 N.E.2d at 983.

598. *Lutgen*, 532 N.E.2d at 987.

599. *Lutgen*, 532 N.E.2d at 986 (“The attempt to show that James was an abusive parent is not supported by the evidence.”).

600. *Lutgen*, 532 N.E.2d at 986.

band who has strangled his wife to death) who was determined to be a fit parent; (ii) the wishes of the children (per the appellate court, while the aunt and uncle used best efforts to provide for the children, still the children felt they did not receive equal treatment with their cousins); (iii) the recommendation of the child representative for custody to the father; and (iv) that psychological testing that did not argue against placing the child with the father.<sup>601</sup>

In terms of the best interest factor relating to physical violence, the appellate court stated: “While the court did hear testimony regarding the circumstances of Carol’s death, that is still only one of the factors . . . had the legislature wished to make this factor all controlling, it could have done so by appropriate legislation.”<sup>602</sup> The appellate court stated that another court had already punished James for the wrong he committed in the criminal case, but this case involves a decision as to the custody of his children where the key focus is on what is in the best interests of the children.<sup>603</sup> The appellate court, the trial court, and the attorney for the children failed to see how being ordered to live with a father who engaged in prior violence against the mother, and then deadly domestic violence against her in the presence of the children, would not be in the best interests of the children. The appellate court seemed to buy into the father’s story that the killing was an accident as a result of mutual fighting by referring to James killing Carol as the “tragic circumstances which resulted in the death of Carol.”<sup>604</sup> By misunderstanding what likely happened here, that the father engaged in repeated violence against Carol, placing Carol in fear of James, rather than mutual fighting, the court failed to appreciate the likelihood that the children would be exposed to further violence by their father with future intimate partners.<sup>605</sup> This in turn led the court to fail to see the connection of James’s violence future harm to the children.

This case is a good illustration of the need for judges and child representatives to be trained on the nature and dynamics of domestic vio-

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601. *Lutgen*, 532 N.E.2d at 987.

602. *Lutgen*, 532 N.E.2d at 987.

603. *Lutgen*, 532 N.E.2d at 987.

604. *Lutgen*, 532 N.E.2d at 970.

605. As explained in Section I, those who perpetrate a pattern of coercive abuse often continue to do so after separation. This can be the case even when there is an order of protection in place. “Among jail inmates convicted of family violence, 45 [percent] had been subject to a restraining order at some point in their life.” Matthew R. Durose et al., *Family Violence Statistics: Including Statistics on Strangers and Acquaintances*, BUREAU OF JUSTICE STATISTICS, 3, June 2005, <https://www.bjs.gov/content/pub/pdf/fvs08.pdf>.

lence, its harmful impact on children, and best practices to protect children and the non-abusive parent from further harm. This training should include how to distinguish a mutual fighting situation from a domestic violence situation where one person is the victim and the other is the primary aggressor. This case is also an example of why courts need a rebuttable presumption against sole or joint custody to a parent who has engaged in a pattern of coercive domestic violence. Creating this rebuttable presumption against granting primary parenting time to a parent who engages in domestic violence will help courts apply appropriate weight to this type of harmful conduct. It can also help children who have been exposed to domestic violence learn that such conduct is not acceptable for them to live with or to engage in when they grow up. It should also make it less likely they will be exposed to further domestic violence, especially if the parenting time of the parent who engages in domestic violence is conditioned on the ordering of protective measures designed to reduce the children's exposure to further domestic violence.

As explained in Section I, even when the parent survivor of domestic violence is granted primary parenting time and sole decision-making, evidence-based best practices would counsel the ordering of protective restrictions or conditions on the parenting time of the abusive parent tailored to the nature of the domestic violence that has occurred. But, under Illinois law, the burden of proof of showing harm to the child is on the parent seeking protective measures.<sup>606</sup> There is no presumption of serious harm to children from exposure to domestic violence, as is consistent with the large body of data discussed in Section I, and as articulated in some states' child custody laws.<sup>607</sup> As noted earlier, this forces the survivor of domestic violence to bring in an expert to testify on the body of data (noted in Section I) of the serious harms that children experience from exposure to domestic violence. A typical survivor of domestic violence would not know how to do that or be able to afford to do that.

The Illinois statute fails to explicitly refer to domestic violence in the section establishing the standards for restricting parenting time, in contrast to the 35 states that do.<sup>608</sup> This failure to even refer to domestic

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606. See *In re Marriage of Fields*, 283 Ill. App. 3d 894, 904–05 (1996) (holding, in a case involving allegations and evidence of sexual assault of a minor by her father, that the custodial parent carries the burden of proving by a preponderance of the evidence that visitation with the non-custodial parent would seriously endanger the child).

607. See CH.750 ILL. COMP. STAT.§ 5/603.10 (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.) (detailing restrictions of parental responsibilities).

608. CH.750 ILL. COMP. STAT.§ 5/603.10 (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.). However, §603.10(a)(8) refers to orders that include “requiring a parent

violence as a basis for ordering restrictions on parenting time makes arguing for such a result even more difficult. Section 603.10(a) of the Illinois Marriage and Dissolution of Marriage Act provides that the court shall enter orders as necessary to protect the child “if the court finds by a preponderance of the evidence that a parent engaged in any conduct that seriously endangered the child’s mental, moral, or physical health or that significantly impaired the child’s emotional development.”<sup>609</sup> Section 602.7 states: “it is presumed both parents are fit and the court shall not place any restrictions on parenting time as defined in Section 600 and described in Section 603.10,<sup>610</sup> unless it finds by a preponderance of the evidence that a parent’s exercise of parenting time would seriously endanger the child’s physical, mental, moral, or emotional health.”<sup>611</sup>

In light of these serious gaps in taking domestic violence into account in the statutory standards set for allocating parenting decision-making and parenting time, and of requiring or even permitting restrictions on parenting time, it is highly unlikely that a family law judge would order any type of protective measures that could be construed as restrictions on parenting based solely upon a parent’s commission of domestic violence against the other parent. This is the case especially if the judge and the family law professionals they rely upon lack adequate training on domestic violence and on the danger of serious harms to children when it is occurring. And as noted earlier, under Illinois law, judges, guardian *ad litem*, and child representatives are not required to receive training on domestic violence. Instead, the Illinois Supreme Court Rules only recommend such training.<sup>612</sup> Family law judges in Illinois historically have not ordered significant restrictions or conditions on parenting time, such as supervised parenting time, based solely on exposure to domestic violence. However, there have been cases in which

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to complete a treatment program for perpetrators of abuse” CH.750 ILL. COMP. STAT. §5/ 603.10(A)(8) (West 2018). By providing this as an example of an order for the protection of a child implies that parents who commit such abuse can be subject to this type of order when such abuse is considered to seriously endanger a child’s mental, moral, or physical health, or significantly impair the child’s emotional development (the standard set forth for orders as necessary to protect the child).

609. 750 ILCS 5/603.10.

610. CH. 750 ILL. COMP. STAT. § 603.10 (Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.). It is important to note that the restrictions listed in 603.10 do not include only supervised parenting time, but also includes less invasive conditions such as the exchange of children through an intermediary and the restraining of a parent’s communication with or proximity to other parents or the child.

611. 750 ILCS 5/602.7.

612. See *supra* notes 386 and 404.

they might order supervised parenting time when a parent is engaged in direct physical abuse or sexual abuse of their child.<sup>613</sup>

### 3. Arizona: A Case Study

The state of Arizona falls on the other end of the spectrum in terms of legal protections to domestic violence survivors and their children in custody cases. Like Illinois, Arizona broadly defines domestic violence in its custody laws.<sup>614</sup> However, unlike Illinois, Arizona is among the 21 states whose laws create a rebuttable presumption against primary parenting time or joint or sole decision-making to a parent who has engaged in domestic violence. Equally important, under Arizona law, once a court finds that domestic violence has occurred, the court places the burden on the parent who has committed the domestic violence to prove that any parenting time to them will not endanger the child or significantly impair their child's emotional development.<sup>615</sup> Indeed, even

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613. The author listed first on the heading of this piece has worked with many family law attorneys in Illinois. Many of these attorneys have reported to her that it is conventional wisdom that judges will not order restrictions on parenting time, and in particular, supervised visitation, based solely on the children being exposed to domestic violence, but might due to direct abuse of the child, in particular, proven sexual abuse of the child.

614. The Arizona custody law expansively defines domestic violence to include any one of the following: "(1) Intentionally, knowingly or recklessly causes or attempts to cause sexual assault or serious physical injury. (2) Places a person in reasonable apprehension of imminent serious physical injury to any person. (3) Engages in a pattern of behavior for which a court may issue an *ex parte* order to protect the other parent who is seeking child custody or to protect the child and the child's siblings." A.R.S. § 25-403.03D. To give a sense of how the standard for an order of protection is satisfied, which in turn affects the definition of domestic violence under § 25-403.03(D)(3), see, *Ralph v. Alberti*, 2015 Ariz. Super. LEXIS 1643 (father regularly and excessively sent the mother harassing text messages and acted in a threatening manner to her at the time of exchanges of the children, had been arrested with large amounts of weapons and narcotics, had threatened her, had in the past threatened suicide, and vandalized her property and stalked her, leading the court to find that there had been significant domestic violence or child abuse pursuant to § 25-403.03 due to the father's threatening, intimidating and harassing behavior under A.R.S. § 25-403.03(D)(2) and (3), that this evidence of domestic violence is contrary to the best interest of the children, and that the father had not met his burden of proof to the court's satisfaction that his unsupervised parenting time will not endanger the children nor significantly impair the child's emotional development).

615. AZ REV. STAT. § 25-403.04(F) (Westlaw through the First Spec. and Second Reg. Sess. of the Fifty-Third Leg, 2018). "If the court finds that a parent has committed an act of domestic violence, that parent has the burden of proving to the court's satisfaction that parenting time will not endanger the child or significantly impair the

when the parent satisfies the burden to show that some form of parenting time will not endanger their child or significantly impair the child's emotional development, under Arizona law, the court must then "place conditions on parenting time that best protect the child and the other parent from further harm."<sup>616</sup> The combination of these laws in Arizona should make it much easier for a survivor of domestic violence to obtain court orders with features designed to protect them and their children from further abuse through the parenting time and parenting decision-making of the parent who has perpetrated domestic violence.

The Arizona statute lists nine conditions on parenting time that a court may order when a parent has engaged in domestic violence: (1) exchanges of the child in a protected setting; (2) supervised parenting time and the conditions during that parenting time; (3) order the person who committed the domestic violence to attend and complete a program of intervention for perpetrators of domestic violence; (4) abstain from alcohol or controlled substances during parenting time and for 24 hours before parenting time; (5) to pay a fee for the costs of parenting time; (6) prohibit overnight parenting time; (7) require a bond from the parent who committed the domestic violence for the child's safe return; (8) order that the address of the child and the other parent remain confidential; or (9) impose any other condition that the court determines is necessary to protect the child, the other parent and any other family or household member.<sup>617</sup> These conditions enable a court to tailor its order of protective measures to address the specific forms of abuse that have occurred already or are likely to occur in the future.

In many respects, the child custody laws in Arizona are the complete opposite of the child custody laws in Illinois. And, in light of these differences in laws, it is far more likely for a court to order one or more of the protective measures described above under Arizona law than under Illinois law when a parent commits domestic violence.

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child's emotional development." *Id.* "If the parent meets this burden to the court's satisfaction, the court shall place conditions on parenting time that best protect the child and the other parent from further harm." *Id.*

616. *Id.*

617. AZ REV. STAT. § 25-403.04(F) (Westlaw through the First Spec. and Second Reg. Sess. of the Fifty-Third Leg. 2018). "If the court finds that a parent has committed an act of domestic violence, that parent has the burden of proving to the court's satisfaction that parenting time will not endanger the child or significantly impair the child's emotional development." *Id.* "If the parent meets this burden to the court's satisfaction, the court shall place conditions on parenting time that best protect the child and the other parent from further harm." *Id.*

It should also be noted that in Arizona, training judges on issues related to domestic violence is required as part of New Judge Orientation and can only be waived under very limited, temporary-in-nature circumstances.<sup>618</sup> Under Illinois law, such training of judges is only recommended—not required.<sup>619</sup> Thus it is far more likely that family law judges are trained on domestic violence in Arizona than in Illinois. Arizona law also requires attorneys and guardians *ad litem* to receive training that would include domestic violence, but provides that such training can be waived without clarifying the basis for a waiver.<sup>620</sup> So, depending upon the basis accepted for waiving this requirement and how often it is waived, it is unclear to what extent Arizona’s required training on domestic violence for guardians *ad litem* leads to more training than in Illinois where such training is recommended but not required. As discussed earlier, training on domestic violence is very important for judges, and the family law professionals they rely upon, to make decisions consistent with the nature, dynamics, and realities of domestic violence and its impact on children. But legislation that is based upon best practices for taking domestic violence into account could be another way to provide “training” to judges and other family law professionals. Such legislation should also help lead to better outcomes. The best approach would be to combine required training with protective laws that properly take domestic violence into account.

### III. NECESSARY LAW REFORMS TO IMPLEMENT EVIDENCE-BASED BEST PRACTICES

Based upon the Literature Review in Section I and the summary and analysis of laws among the states in Section II, we recommend the following law reforms:

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618. See Ariz. Admin. Code of Jud. Admin. § 1-302(F)(2) (2016) (stating that “[u]pon request, the chief justice, the chief judge, the presiding judge of the superior court in each county, or their designees may grant exemptions to judges and employees of their court for temporary circumstances, including but not limited to: (a) Medical or other physical conditions preventing active participation in educational programs; (b) Extended, approved leave of absence; (c) Military leave; (d) Extended jury duty; (e) Temporary medical waivers for defensive tactics courses, in accordance with ACJA § 6-107.”; see also DOMESTIC VIOLENCE TRAINING FOR JUDGES, *supra* note 382).

619. See *supra* note 386, ILL. SUP. CT. R. 908(c).

620. See *supra* note 409, ARIZ. REV. STAT. ANN. § 40.1.J (Westlaw through the First Spec. and Second Reg. Sess. of the Fifty-Third Leg. 2018).

1. Each state should require its family law judges, child representatives, guardians *ad litem*, and custody evaluators to receive initial training on domestic violence and continuing training each year to cover the topics in Section I and in the Wisconsin Guidebook and to incorporate evolving evidence-based best practices.
2. Each state should require its child representatives, guardians *ad litem*, and custody evaluators to screen for domestic violence in each of their custody cases using the best practices noted in Section I.
3. Each state's child custody laws should define "domestic violence" broadly, as in the CDC definition, and should also take into account the subcategories of: (a) "situational couple violence," which may include mutual violence that is situational in nature and far more likely to end once the couple is no longer living together if contacts between the parents are minimized, and (b) a pattern of coercive abuse, which can include physical or sexual violence, and other forms of coercive abuse as described in Section I, which abuse is far more likely to continue or escalate after the separation.
4. Each state's child custody laws should provide for a rebuttable presumption that sole or joint decision-making and primary parenting time is not in the best interests of children and should not be granted to a parent who has engaged in domestic violence when it includes a pattern of coercive abuse against the other parent.
5. Each state's custody laws should provide that for cases involving situational couple violence, there is a rebuttable presumption to structure parenting time under the concept of "parallel parenting" as detailed in Jaffe et al. and described in Section I of this article (minimal contacts between the parents), but with a stronger emphasis on the goal of requiring more common practices within the two households as necessary for the child's physical and emotional well-being (this type of parenting plan, which would include further parenting time details to achieve

this goal, could be called “structured independent parenting time” to better capture this emphasis).

6. Each state should provide in its child custody laws that if a parent engages in a pattern of coercive abuse, that parent has the burden of proving to the court’s satisfaction that any parenting time with that parent will not endanger the child or significantly impair the child’s emotional development. If the parent meets this burden to the court’s satisfaction, the court shall place conditions on parenting time that best protect the child, the other parent, and other members of the household, from further harm. The child custody law should then require the court to determine which conditions should be placed on the parenting time of the parent who has engaged in domestic violence, to protect the child, other parent, and other members of the household, from further harm. The child custody law should include a list of protective features from which the court may choose so the court can tailor the protections ordered to prevent further domestic violence and address the harms already experienced.<sup>621</sup>
7. The burden of proof in finding that domestic violence has occurred for purposes of child custody decisions should be preponderance of the evidence, as in other civil cases. The burden of proof should be on the party alleging the abuse. The burden of proof to rebut the presumptions described in suggested reforms 4 and 5 above should be on the party seeking to rebut those presumptions.

While not the focus of this article, the law reforms proposed should also cover situations of direct abuse of children, if they are not already

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621. The law reform described in paragraph six is already the approach under the child custody laws in Arizona. While only a few other states expressly place the burden of showing no endangerment or significant impairment to the child from parenting time on the parent who has engaged in domestic violence, a large number of the statutes among the 34 states that clearly identify domestic violence as a basis to condition or restrict parenting time word this in a way that in fact presumes this harm and directs the court to address it. For example, the statutes in Alabama, Mississippi, Georgia, South Carolina, Vermont, Virginia, and West Virginia state: “A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and parent who is a victim of domestic or family violence can be made.” *See supra* Section II.C.

adequately covered in the child custody laws, since there is a strong body of evidence that children suffer serious harm as a result of directly experiencing physical, sexual, and emotional abuse, committed by a parent.<sup>622</sup>

The studies reviewed in Section I support the above described law reform proposals. The 50-state review of laws in Section II supports the need for these reforms to address the gaps between evidence-based best practices and current laws in place among the 50 states and the District of Columbia.

As with any law reform, legislators will be concerned about the costs in implementing the reforms proposed. However, the costs for the screening and training described can be contained by the fashion in which it is implemented. The screening for domestic violence by child representatives, guardians *ad litem*, and custody evaluators can be completed as discussed in Section I by adding a few important questions to the interviews they normally perform. The act of screening for domestic violence should not add any costs to the process. When allegations of domestic violence come up through this screening, this would lead to extra efforts of investigation, which will add to the time and cost of the process for recommending custody arrangements. But this follow-up is a cost to prevent harm that would be no different than following up on any other alleged harms or unsafe conditions for children (such as allegations that a parent was intoxicated while caring for their child). And the cost to society in not screening for and protecting survivors of domestic violence and their children would far exceed the extra costs in time in investigating the allegations.<sup>623</sup> Furthermore, the domestic violence training recommended for judges, guardians *ad litem*, child repre-

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622. PSYCHOANALYTIC PSYCHOTHERAPY AFTER CHILD ABUSE: THE TREATMENT OF ADULTS AND CHILDREN WHO HAVE EXPERIENCED SEXUAL ABUSE, VIOLENCE, AND NEGLECT IN CHILDHOOD (Daniel McQueen et al. eds., Karnac 2008); Alexandra Cook et al., *Complex Trauma in Children and Adolescents*, 35 PSYCHIATRIC ANNALS 390 (2005); Tara Richards et al., *Intimate Partner Violence and the Overlap of Perpetration and Victimization: Considering the Influence of Physical, Sexual, and Emotional Abuse in Childhood*, 67 J. CHILD ABUSE & NEGLECT 240 (2017); Jerusha Sanjeevi et al., *A Review of Child Sexual Abuse: Impact, Risk, and Resilience in the Context of Culture*, 27 J. CHILD SEXUAL ABUSE 622 (2018).

623. According to the CDC, the lifetime per-victim cost from intimate partner violence is \$103,767 for women and \$23,414 for men, with a lifetime economic cost to the U.S. population of \$3.6 trillion, based on 32 million women and 12 million men who are victims of intimate partner violence during their lives. The \$3.6 trillion in economic cost estimate includes: \$2.1 trillion (59 percent) in medical costs, \$1.3 trillion (37 percent) in lost productivity among victims and perpetrators, \$73 billion (two percent) in criminal justice costs, and \$62 billion (two percent) in other costs, such as victim property or loss. *Intimate Partner Violence: Consequences*, *supra* note 27.

sentatives, and custody evaluators could be added to the existing annual training they receive. The training could be arranged by those who already organize such training conferences in collaboration with those who have been extensively trained on domestic violence as it relates to custody decision-making. Building on what already exists can reduce the added expenses from providing this essential training.

The recommendations on reforming child custody laws are nuanced and balanced. For certain situational couple violence, “parallel parenting” time as described in Jaffe et al. is recommended,<sup>624</sup> but with the adjustments we recommended in Section I. We call this parenting time arrangement “structured independent parenting time.”<sup>625</sup> For former couples who have engaged in mutual, situation based violence, but who have a good relationship with their children, this approach facilitates the goal of promoting safe and healthy parent-child relationships. With fewer opportunities to communicate, the former couple should have fewer conflicts that are harmful to their children and themselves.

However, when there is evidence of a pattern of coercive abuse, which is likely to continue and even escalate after the couple separates, heightened protections are recommended. In these situations, a series of law reforms should lead judges to order sole decision-making and primary parenting time to the survivor of this kind of domestic violence, with restrictions and conditions on parenting time for the parent engaged in this kind of domestic violence, tailored to the likely further abuse or violence that would occur if the protections were not in place. Courts should be required to consider whether ordering various types of preventative programs for parents who commit domestic violence would help reduce the likelihood of further domestic violence and whether ordering therapeutic programs for parent survivors of domestic violence and their children would help address the harms from prior domestic violence.

Courts and other family law professionals may be concerned with their ability to make the distinction between situational couple violence and a pattern of coercive abuse. But, this underscores the need for initial

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624. The parallel parenting time we recommend would be based upon what was described in Jaffe et al., 2008, *supra* note 306, but with a greater emphasis on a parenting plan that provides the details necessary to create common practices in the two independent households as needed for the child’s emotional and physical welfare. We refer to this modification of parallel parenting as “structured independent parenting time.”

625. See *supra* Section I (discussion of structured independent parenting time that also emphasizes some common practices during parenting time); *supra* note 327 and accompanying text (support for this need in the context of consistent bed time routines); *supra* note 328 and accompanying text (uniformity in rules and explanations).

and continuing domestic violence training to help these professionals make the best decisions possible for children and their parents when there is evidence of abuse and violence in the family. It is anticipated that fathers' rights organizations and their advocates will generally object to the proposed law reforms that take domestic violence into account in child custody cases and to better enable the non-abusive parent to protect themselves and their children from the danger of further domestic violence. They will likely claim that mothers often make up abuse allegations for financial gain and to alienate the children from their father, that judges already favor mothers in custody cases, and that children benefit from equal parenting time. However, as detailed in Section I, data do not support the claims that women often make up allegations of abuse and that courts favor women over men in custody cases. The data collected reflects the contrary. Judges place too much weight on alienation claims and fail to credit or place proper weight on evidence of domestic violence and child abuse. And, as detailed in Section I, there is substantial evidence that children are harmed from parenting time with a parent who engages in domestic violence.

Fathers' rights advocates may also claim that the proposed law reforms violate a parent's rights to their children. But the law reforms proposed are based in large part upon existing laws in many states. In addition, the law reforms proposed that would have the strongest impact on parenting would be triggered only by a pattern of coercive abuse, the type most likely to continue even after the couple separates. For cases of mutual, situational, domestic violence, if the parents have good relationships with their children, the proposal provides for the mutual, and less invasive protective measure of parallel parenting (using a structured, independent parenting time plan), to reduce the likelihood of future domestic violence and facilitate significant parent-child time with each parent. Thus, the law reforms proposed should not be construed as impermissible violations of parental rights.

#### CONCLUSION

Promoting the best interests of children and protecting them from serious endangerment in the context of a divorce or parentage case has become highly politicized and gendered. There are claims by fathers' rights groups that mothers often falsely accuse fathers of domestic violence to gain leverage in custody cases, to procure financial advantage,

or to alienate the fathers from their children.<sup>626</sup> They also claim that children do better when fathers are equally involved in their children's lives, but that judges favor mothers over fathers in custody cases.<sup>627</sup> Fathers' rights groups have engaged in a nationwide effort to reform the custody laws to create a presumption of equal parenting time, with no exception when one of the parents has engaged in domestic violence.<sup>628</sup> In the meantime, domestic violence survivors and their advocates claim that the needs of survivors of domestic violence and their children to be safe and free from further abuse are not being met in custody cases, that their claims of abuse are not being believed, and that the harm to their children from being exposed to domestic violence is not recognized and addressed by judges.<sup>629</sup>

This Article presented a literature review to assess treatment of domestic violence and best practices for taking domestic violence into account in child custody cases.<sup>630</sup> Our key findings include:

- (i) domestic violence can cause serious, long-term harm to children, and there is a strong co-occurrence of domestic violence with physical injury to children, and child abuse;
- (ii) judges favor fathers over mothers in custody cases (granting the custody in the fashion the fathers seek over what the mothers seek) by placing greater weight upon claims of alienation by fathers over claims of domestic violence by mothers, especially when the judges are not trained on domestic violence and hold traditional gender norms and believe the world is a just place;
- (iii) the long-term harms to children from domestic violence can be mitigated when protective factors are present or pursued, which include supporting the non-abusive parents in their efforts to protect themselves and their children from further domestic violence;
- (iv) to effectuate this support, family law professionals must be thoroughly trained on both the basics of domestic violence and the many counter-intuitive nuances of domestic

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626. *See supra* Section I.

627. *See supra* Section I.

628. *See supra* Section I.

629. *See supra* Section I.

630. *See supra* Section I.

violence, with custody evaluators, guardians *ad litem*, and child representatives needing to screen for domestic violence in all of their custody cases;

- (v) a key component of this training is learning how to distinguish situational couple violence, which might be able to be safely addressed through “parallel parenting” type custody orders, from situations where there has been a pattern of coercive abuse based upon a general goal of control in all matters, and which will likely continue and escalate after separation; and
- (vi) in cases with a pattern of coercive abuse there should be a rebuttable presumption that courts order sole decision-making and primary parenting to the non-abusive parent, and protective conditions and restrictions being placed on the parenting time of the coercively abusive parent.<sup>631</sup>

The review of state custody laws in the United States reflects substantial gaps between the practices and rules that evidence-based policies suggest, and the actual laws in place in most states.<sup>632</sup> Only one state requires custody evaluators, guardians *ad litem*, or child representatives to screen for domestic violence.<sup>633</sup> Only 11 states clearly require without waiver that family law judges—and only 13 states clearly require without waiver that custody evaluators, guardians *ad litem*, or child repre-

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631. *See supra* Section I. This proposal focuses on the situations where the domestic violence constitutes a pattern of coercive abuse or situational couple violence as we have defined these terms, and seeks to supplement and enhance existing statutory protections in child custody cases in those two situations. If the act(s) of domestic violence do not fit within those two categories, then they should be addressed under existing statutory standards relating to best interests of the child, any rebuttable presumptions on custody based upon domestic violence as defined in those statutes, the standard for the ordering of restrictions or conditions on parenting time due to domestic violence (if so referenced in the statute), or under the general standard for such restrictions or conditions on parenting time as worded in the applicable state. Having said that, we recommend that state legislation that clearly empowers courts to order restrictions or conditions on parenting time as necessary and appropriate to promote the safety and well-being of the child and the safety of the parent victim of domestic violence should be the norm, and states with legislation, like in Illinois, that require a higher level of harm before a court can order restrictions or conditions on parenting time should be modified to conform with this norm.

632. *See supra* Section II.

633. *See supra* Section II.

sentatives—receive training on domestic violence.<sup>634</sup> Only 21 states and the District of Columbia created in their custody statutes a rebuttable presumption against sole or joint custody to a parent who has engaged in domestic violence as defined in their statutes.<sup>635</sup> And, while 34 states clearly and explicitly refer to domestic violence (or domestic abuse or family violence against the other parent) as a basis to condition or restrict parenting time of a non-custodial parent,<sup>636</sup> some of these states' statutes that create rebuttable presumptions, or refer to domestic violence as a basis to condition or restrict parenting time, narrowly define domestic violence or do not require, but only permit, the court to order any conditions or restrictions.<sup>637</sup> These gaps in the law, and in requiring domestic violence screening and training, contribute to poor custody decision-making by judges to the detriment of the safety and welfare of domestic violence survivors and their children.<sup>638</sup> Nuanced and balanced law reforms would align the laws with evidence-based best practices for taking domestic violence into account in child custody cases.<sup>639</sup> If enacted and implemented, these law reforms should lead to safer, healthier, and better outcomes in child custody cases for families throughout the United States. ✿

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634. *See supra* Section II. Our searches relating to required training focused on custody statutes and state supreme court rules. It is possible that additional states require such training but from other sources of law; *see also supra* note 422 (Indiana requires training on child abuse and neglect but not on domestic violence).

635. *See supra* Section II.

636. *See supra* Section II.

637. *See supra* Section II.

638. *See supra* Section II.

639. *See supra* Section III.

