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Litigating Custody and Visitation in Domestic Violence Cases

by Kim Susser

*Studies indicate that children raised in a violent home experience shock, fear, and guilt and suffer anxiety, depression, low self-esteem, and developmental and socialization difficulties. Additionally, children raised by a violent parent face increased risk of abuse. A high correlation has been found between spouse abuse and child abuse.**

Custody and visitation disputes occur frequently in cases with a history of domestic violence. For victims, such disputes often mean renewed abuse by the batterer. In the course of legal proceedings, victims may be pathologized or stigmatized; their parental fitness may even be questioned. These “high-conflict” contested custody or visitation cases can only be understood within the context of a family’s history of domestic violence. When attorneys and judges understand the dynamics of domestic violence, they are less likely to misconstrue the effects of abuse as indicia of the victim’s parental unfitness or instability, and are better able to make appropriate custody and visitation determinations based on the best interest of the child.

The American Psychological Association recognizes that victims of domestic violence are at a disadvantage in custody cases if the court does not consider the history of violence:

> [B]ehavior that would seem reasonable as protection from abuse may be misinterpreted as signs of instability. Psychological evaluators not trained in domestic violence may contribute to this process by ignoring or minimizing the violence and by giving pathological labels to women’s responses to chronic victimization. Terms such as “parental alienation” may be used to blame the women for the children’s reasonable fear of or anger toward their violent father.[1]

This tendency to regard allegations of domestic violence with skepticism and disbelief, coupled with misinterpretation of victims’ behavior, is the primary reason that custody cases are so challenging for attorneys representing victims. Battered women need help to present themselves in ways that do not undermine their credibility, whether in court or during interviews with attorneys or other professionals. A traumatized victim, in the stress of the courtroom, may revert to responses learned from living in a hostile environment, such as “becoming agitated, over-emotional or stupefied into silence.” Attorneys and judges often “react negatively to such behavior, particularly if the abusive partner appears calm, collected and sure of himself.”[2]

Many judges and attorneys do not fully understand the impact of battering on parenting. The belief that any negative impact on the children ends once the parties have separated is simply wrong.[3] The parenting style of men who abuse their partners has been shown to be authoritarian and rigid,[4] marked by the same controlling behavior that is associated with domestic violence.[5]

**L, 1996, ch 85 at 273-74*

Even though courts now recognize and treat domestic violence as unlawful when considering criminal, family offense and child protective cases, this view does not carry over to child custody and visitation cases.[6] The unequivocal data revealing the negative impact battering has on children is too often minimized or ignored in the context of a custody or visitation proceeding. The notion that an abusive parent is better than no second parent is a powerful force in determining visitation and often outweighs safety considerations. It is rare that a final order of suspended or supervised visits is entered.

Too often a court, after finding aggravating circumstances on an Article 8 family offense proceeding, will then grant the abusive parent liberal contact with the child when considering the Article 6 custody and visitation petition. In reversing a lower court award of custody to one father the Appellate Division noted, “the Family Court gave inexplicably little weight to its own findings regarding the father’s domestic violence against the mother and his startling lack of judgment on several occasions with respect to the parties’ child.”[7] Even where proof of past harm is substantial, there is little acknowledgement of the potential for future harm — physical or emotional. Litigating a custody trial can be arduous and challenging. Attorneys for victims need to make arguments, write motions, introduce expert testimony, go to trial and appeal losses in order to educate the judiciary about the harm to children exposed to violence.

At the same time, attorneys for domestic violence victims should consider carefully whether even initiating a custody case is the best course of action. If the victim has de facto custody of her children and the abuser is not likely to disrupt the arrangement, it may not be necessary or a good idea to file for legal custody.

And, of course, be sure paternity has been legally established before seeking custody. If the child’s father lacks standing to pursue custody, your client is already the legal custodian of the child and need not endure the rigors of a custody proceeding (For further discussion of paternity proceedings, see the chapter in this volume on Child Support). Finally, consider whether initiating a family offense case may prompt the abuser to file a retaliatory petition for custody or visitation. A court proceeding could lock your client, and the children, in a time-consuming, costly, and exhausting court battle that drags on for years and forces her into contact with the very person she wants to escape.

The Legal Context

Because the legal standard for both custody and visitation in New York State is “the best interest of the child,” these issues are addressed together here. Courts have generated a large body of case law regarding weighing of factors, including domestic violence, in making best interest determinations, but there is little predictability of outcome. Factors include the child’s preference; the parent’s stability; primary caretaker status; parental fitness, including abandonment, neglect, substance or alcohol abuse, and mental illness; willful interference with visitation rights; nature of the parent-child relationship; religious beliefs; and the parties’ relative financial positions. Judicial understanding of domestic violence, as noted above, can also affect the outcome.

In 1996, the New York State Legislature attempted to create more consistency in judicial response to domestic violence victims and their children involved in custody and visitation disputes by requiring courts to consider proof of domestic violence. The statute states, in pertinent part, that where there are allegations of domestic violence in any action for custody or visitation, “and such allegations are proven by a preponderance of the evidence, the court *must* consider the effect of such domestic violence upon the best interest of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section” [emphasis added].[8]

The Legislature made these specific findings regarding domestic violence:

> [T]here has been a growing recognition across the country that domestic violence should be a weighty consideration in custody and visitation cases.… The legislature recognizes the wealth of research demonstrating the effects of domestic violence upon children, even when the children have not been physically abused themselves or witnessed the violence.
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> Studies indicate that children raised in a violent home experience shock, fear, and guilt and suffer anxiety, depression, low self-esteem, and developmental and socialization difficulties. Additionally, children raised by a violent parent face increased risk of abuse. A high correlation has been found between spouse abuse and child abuse.…
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> Domestic violence does not terminate upon separation or divorce. Studies demonstrate that domestic violence frequently escalates and intensifies upon the separation of the parties. Therefore. . . great consideration should be given to the corrosive impact of domestic violence and the increased danger to the family.[9]

Although the Legislature rejected the rebuttable presumption against awarding custody to a batterer that many other states adopted,[10] the law was meant to impose restrictions on visitation and custody for the parent found to have committed violence against the other parent. The legislative history plainly states that domestic violence "should be a weighty consideration."[11] Furthermore, since mandatory consideration of domestic violence is the only factor specifically codified as part of a best interest analysis, arguably it should be given more weight than factors identified in the decisional law. In 2009, the Domestic Relations Law (DRL) and Family Court Act (FCA) were further amended to require courts to include and state on the record how such findings, facts and circumstances of domestic violence factored into the custody decision.[12]

This legislative history is a persuasive body of material that can be used in several ways during litigation. First, it can be cited during oral argument when the court is determining temporary orders of custody and visitation. (The issuance of a temporary order is a critical juncture as temporary orders can last months and quickly turn into the "status quo.") The victim's attorney can also ask the court to take judicial notice of the findings at any point during a hearing, and they can be used in lieu of expert testimony on the effects of domestic violence on children. The legislative history provides material for cross-examination of experts; an expert's credibility could be seriously undermined if he or she is not familiar with the psycho-social research referenced in the legislative findings. Finally, they can be cited in any written motion, answer or summation.

Court decisions that have been reported since 1996 indicate that some judges deciding custody cases are giving considerable weight to domestic violence, often over the recommendation of an expert or position of the child's attorney.[13] In *E.R. v G.S.R.*, for example, the court declined to accept either the expert's recommendation, because he "skims over the many episodes of domestic violence," or the law guardian's, because she "discounted the history of domestic violence."[14] The Second Department has reversed and remanded cases when lower courts failed to consider the mother's allegations of domestic violence perpetrated against her by the father.[15]

Appellate courts ruling since the passage of the 1996 domestic violence custody law have consistently held that domestic violence witnessed by a child is a significant factor in determining custody and visitation.[16] Courts have considered acts of domestic violence in determining a parent's fitness for custody.[17] Domestic violence has been held to be a factor in relocation cases[18] and as a basis for ordering supervised visitation;[19] it also supports a finding of "extraordinary circumstances" in cases in which a non-biological party seeks custody.[20] Courts view violence committed by a parent against a new spouse as an important concern.[21] New York has adopted the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA)[22] elevating the importance of domestic violence in determining jurisdiction

over custody issues (For further discussion of UCCJEA, see Chapter 18 of this manual). Violence is also cited as a factor constituting changed circumstance in a modification proceeding.[23]

In 1998, the custody and visitation provisions of the DRL and FCA were further amended to prohibit courts from granting custody or visitation to any person convicted of murdering the child's parent.[24] Under this statute, the court is not permitted to order even temporary visitation pending the final determination of custody or visitation.[25] Exceptions include situations where a child of suitable age and maturity consents to such an order and where the person convicted of the murder can prove that it was causally related to self-defense against acts of domestic violence perpetrated by the deceased.[26]

Domestic violence is increasingly weighed by judges presiding over custody and visitation cases, but always in relation to the other "best interest" factors, sometimes in ways that are helpful to victims and other times in ways that are decidedly problematic. It is critical for attorneys representing victims of domestic violence to develop litigation strategies that ensure the court consider traditional "best interest" factors with awareness of the harm domestic violence brings to victims and their children. In the following section, those factors will be identified and suggestions provided for addressing them in the context of domestic violence custody litigation.

Moral, Emotional and Intellectual Development

Courts have generally found that batterers are poor role models for children. The court in *Rohan v Rohan*[27] accorded significant weight to the father's history of violence against the mother, stating that the batterer's "reprehensible behavior demonstrate[d] his unfitness to be a parent."[28] His violent history, the court found, proved that he was "manifestly unsuited for the difficult task of providing [the child] with moral and intellectual guidance."[29] In *Spencer v Small*,[30] the Appellate Division, affirming an award of custody to the mother, found that the father's "failure to acknowledge the traumatic environment" he created for his children because of his volatile temper revealed "a character which is manifestly ill-suited to the difficult task of providing young children with moral and intellectual guidance."[31]

In *Farkas v Farkas*, a groundbreaking decision that preceded the 1996 legislation, the court recognized that children who witness domestic violence often emulate such behavior in their own relationships. The court reasoned that "a man who engages in physical and emotional subjugation of a woman is a dangerous role model from whom children must be shielded."[32] In *G.K. v L.K.*, the court noted, "plaintiff's view of the role of women is of extreme concern to this court and what he will teach his male children about women."[33]

In *Roberto A.M. v Esmeralda M.*, a modification case in which the father had custody of the two boys, the court acknowledged his "extensive involvement" in the children's lives, yet accorded great weight to the domestic violence he perpetrated against the mother and awarded her custody:

> [I]t is crystal clear to this court that he [the father] has not provided for the children's emotional development. On the contrary, he has repeatedly thwarted efforts to promote their emotional stability. The incidents of domestic violence against the mother which were witnessed by the children, the corporal punishment used by the father resulting in black and blue bruises, pulling the children out of therapy after only eight (8) session immediately upon the completion of the Family Court matter, failing to sign the counseling form provided by the school, failing to advise the paternal father that corporal punishment is prohibited by court order yet leaving the children in his care on a regular basis is simply not acceptable. Such decisions and actions by the father have clearly had on impact on these children.[34]

Significantly, the Supreme Court in *Roberto A.M.* held that "incidents of domestic violence override the positive qualities of the father's parenting," thereby according domestic violence the weight the Legislature intended.[35]

These judicial decisions are supported by a growing body of literature by social scientists and legal experts alike who have concluded that it is impossible for abusive parents to provide proper moral, emotional, and intellectual guidance to their children. The consensus is that violence is a learned behavior; it is "cyclical and self-perpetuating. Children who live in a climate of violence learn to use physical violence as an outlet for anger and are more likely to use violence to solve problems while children and later as adults."[36] Studies, like those cited in the legislative history of DRL § 240, suggest that girls who have been exposed to or who have experienced violence in their families may be at greater risk for violence in their own relationships.[37] More conclusively, it has been demonstrated that boys who are exposed to violence in their homes are at major risk of becoming batterers.[38]

Stability

Generally, courts have held that continuity of care and a stable home environment is in the child's best interest.[39] This factor can be problematic for battered mothers who have had to flee their abusers. The preference for maintaining a stable environment with custodial continuity is not absolute.[40] In *Rohan v Rohan*, the Appellate Division held that, given the father's history of domestic violence, the Family Court's reliance upon the factor of maintaining stability as the principle ground for granting physical custody to the father was misplaced.[41] The court concluded that, in light of the father's egregious acts of spousal abuse, his claim that the mother consented to his assumption of custody was "unworthy of belief."[42] The court also noted that the family court's award of custody had the undesirable effect of rewarding the father's abusive conduct.[43]

In *Rutz v Rutz*,[44] the Court exhibited a nuanced understanding of the dynamics of domestic violence. It held that the father had been the source of instability and had engaged in behaviors harmful to the children, both before the separation with his episodes of anger, degradation and domestic abuse towards the mother in the presence of the children, and also following the separation in having the children pray for the parents' reconciliation.

Children's Wishes

Although not controlling, the express wishes of the child should be accorded considerable weight when the child is of a sufficient age and maturity to articulate his or her needs and preferences to the court.[45] (*See* discussion of Attorneys for Children, below.) The wishes of the child, even a child of more than sufficient age and maturity, are not dispositive however, when those wishes appear to be the result of exposure to domestic violence.

In *Wissink v Wissink*,[46] the Appellate Division analyzed the weight to be accorded a child's wishes when there is domestic violence in the home. In that case, the law guardian supported the father as the custodial parent, despite ample evidence of his violence against the child's mother, because that was what his sixteen-year-old client said she wanted. The Appellate Division found that, given the findings of domestic violence, the law guardian had a duty to further examine the underlying reasons for the child's wishes.[47]

In any context (and particularly where domestic violence exists), assessment of the wishes of the child is complex and nuanced. In determining how much weight to accord a child's wishes concerning contact with a parent or living arrangements, a court must regard those statements in light of developmental limitations on decision-making. Research shows a wide range of development regarding

children's ability to decide, depending on their age, but most children do not have the capacity to make reasoned decisions. Children between six and ten years old are still developing abstract thinking and cannot reliably estimate time, space or distance. Courts give increasing weight to a child's wishes as they grow older, but even in adolescence children lack the emotional maturity to make reasoned decisions.

Despite perhaps having the intellectual maturity to make a decision, the adolescent brain is still developing, and adolescents are highly susceptible to outside influence. Maturity is multi-dimensional and assessing emotional maturity is difficult.[48] Adolescents' choices may reflect an emotional preoccupation with what is positive rather than a considered weighing of both positive and negative.[49] Relying on child development research, Justice Kagan held in declaring mandatory life imprisonment without parole for juveniles a violation of the Eighth Amendment, "mandatory life without parole precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity and *a failure to appreciate risks and consequences*"(emphasis added).[50]

Therefore, experts instruct, "children should be given voice, not choice."[51] It is important for lawyers for parents and children alike to remind the judge that it continues to be the court's responsibility to make a best interest determination, regardless of the child's age or maturity, and the child's wishes are but one factor in that determination. Children are not in the position to determine their own needs or best interest.

Prior Agreement

Prior agreement of the parties is another factor courts consider in deciding custody. It is not uncommon, however, for a victim of domestic violence to agree to a custodial arrangement that is not in the child's interest, or in her own, in an attempt to placate the abuser. In this situation, the victim's attorney must argue that she ought not be bound to any agreement that occurred without representation, or under duress, or that is not in the child's best interest. The parties cannot seek to enforce an agreement that does not comport with the child's best interest.[52]

Victims may also settle because of pressure from the court or their attorney. Sometimes they believe it is better for their children to settle. These flawed reasons can be uncovered and explained with persistent and direct questioning, as well as an explanation from the victim of what she was thinking at that time of settlement and why the terms are not in the longer-term interests of the children.

Primary Caretaker

Courts place considerable emphasis on the stability and continuity that the primary caretaker parent offers the children.[53] Since it is often the victim of domestic violence who is the primary caretaker of the children, if the court is reluctant to address the issue of domestic violence, it may help to rely on the primary caretaker factor. Whether or not your client was the primary caretaker, you should always elicit testimony about this issue. Testimony should focus on either your client's role as the primary caretaker or explain why she was prevented from performing this role.

Spousal Abuse and Parental Unfitness

In addition to being a factor in determining the best interest of the child, spousal abuse must also be considered in assessing parental fitness. In a 1986 report, the New York Task Force on Women in the Courts urged legislators to enact a law making domestic violence evidence of parental unfitness a basis for visitation termination or a supervised visitation requirement. Courts have repeatedly found spousal abuse indicative of parental unfitness.[54]

Friendly Parent

Whether the parent encourages the child's relationship with the other parent is often a weighty factor in custody determinations. Court decisions have held that it is inimical to the child's best interest to interfere with the visitation rights of the non-custodial parent.[55] The "friendly parent" factor is also applied to the non-custodial parent. For example, an attorney may try to use this factor to limit the child's visitation with a parent who disparages the custodial parent to the child.

More often, however, the "friendly parent" factor is used against domestic violence victims who want to restrict the other parent's visitation because they are aware of that parent's propensity for violence. (See discussion below, *Parental Alienation*.) Several decisions, however, recognize that victims might indeed have meritorious and legitimate reasons for wishing to limit contact. For example, the court recognized in *Roberto A.M. v Esmeralda M*. that "the father's claim that the mother will not speak with him does have some merit, but notification itself does not have to be verbal. Given the history of violence and abusive behavior it would not be appropriate for the court to fault the mother for refusing to speak with the father."[56] In *R.L. v J.L.*, the court found that "the mother's reluctance to communicate with Father other than by text messages is not an attempt to alienate him from this child, rather it is the reasonable result of acts committed by Father against Mother including domestic violence, having her arrested, and his filing of numerous police reports against her."[57]

Addressing the tendency of abusers to use custody proceedings for manipulative purposes, the court in *Rutz v Rutz* noted:

> Research shows that … abusive ex-partners are likely to undermine the victim's parenting role… while the father claims to encourage the children to have a strong relationship with their mother and is seeking sole custody at the request of his children, he is doing so in order to resume a place of control in the life of the mother, by making himself a middle man to whom she must go to maintain her relationships with the children.[58]

Trial Practice

Joint Custody

Courts have long held that joint custody to parents with an antagonistic and embattled relationship is contrary to the child's best interest, and therefore improper.[59] Courts also recognize the power and control dynamic inherent in domestic violence and that an award of joint custody would only increase the abuser's opportunities to maintain control.[60] Nonetheless some courts pressure parties to agree to joint custody in an attempt to resolve the case quickly. Attorneys who represent domestic violence victims should cite the case law in response to any proposed settlement that includes joint custody. Citing case law is an easy way to protect your client from being blamed for not agreeing to such a "reasonable" disposition.

As an alternative to joint custody, courts have devised an alternative for "embattled" parents, referred to as "spheres of influence" or "zones of responsibility." In these cases each parent is awarded final decision-making in a specific area, such as religious, medical or educational decisions. Child-rearing, however, is rarely so easily divided; one area of decision-making is likely to color another. It is difficult to choose extra-curricular activities without knowledge or information regarding education and medical issues, and vice-versa.

At least one court has held "the existence of domestic violence is a factor that must be considered by the court with respect to decision-making determinations, and mitigates against an award of either

joint custody, 'zones of responsibility' or any other form of shared custody."[61] The mother sought sole legal custody and an order limiting the husband's parenting time to supervised visitation. The father sought joint custody or, in the alternative, joint legal custody with "spheres of (final) decision-making…." Applying *Braiman* and DRL § 240(1)(a), the Court found that the husband had violated his wife's and his child's physical and psychological boundaries, lacked insight, and exercised poor judgment in his relationships with them, and awarded sole custody to the mother.

In other cases, however, the courts have found that the domestic violence did not rise to a level that precluded split decision-making[62] or the violence had ended and therefore split decision-making was acceptable.[63]

Orders of Protection

An order of protection issued on consent in a family offense case is not sufficient to prove domestic violence in a custody case.[64] Attorneys who anticipate a contested custody or visitation case should resist succumbing to pressure from the judge or court attorney to accept a batterer's offer to consent to the order.

Instead, as long as your client has sufficient evidence to meet the burden of proof, and there are no other issues that might prevent testifying, especially issues that go to credibility such as mental illness or substance abuse, the attorney should probably request a fact-finding hearing on the family offense case. A judicial finding of domestic violence can be essential to limiting visits and winning custody, especially when the findings specify that the child was subjected to or witnessed the batterer's violence (though the legislative history of DRL § 240 specifically notes that witnessing the violence is not required in order to consider it).

In determining whether to file a family offense petition, attorneys need to consider whether the abuser will retaliate by seeking custody or visitation. Often the abuser files for custody or visitation within days of having been served with the family offense petition. If this happens, consider filing an answer to the petition to help the court understand the issues and facts favorable to your client early on in the case. If the abuser obtains a temporary order of custody, you will have to file an order to show cause to modify or a writ of habeas corpus for the return of the child. Temporary orders are often in place for up to a year or more if a custody case is pending. These motions are not only critical tools for achieving a speedy return of the child during the pendency of the case but also provide an important opportunity early on in the case to convey to the court the victim's experience of the violence, the impact on the children and other relevant facts and evidence before the trial.

Children as Witnesses

The impact of domestic violence on children has been the subject of much academic and legal discussion. Often, children are the primary or sole witnesses to incidents of violence in their homes. As a result, they may be a valuable resource for information, or potential witnesses at a hearing.

While a child's testimony may be important, most judges will not call the child as a witness and put him or her in the middle of a custody or visitation dispute. However, in developing your litigation strategy, try to understand the child's position, learn what the child witnessed and how the domestic violence affected him or her. Such knowledge may help you better understand the strengths and weaknesses of your case and assist in fashioning a settlement. If the child is not represented by counsel or the attorney for the child gives you permission to speak with the child, he or she can be interviewed like any other witness. Once the child has been assigned an attorney, however, it is unethical to communicate with him or her without their attorney's permission.[65]

If the child has information that is pertinent and unavailable elsewhere, consider requesting the appointment of an attorney for the child in order to articulate the child's wishes and provide information

to the court. The attorney will advocate for the child's position and can also assist the victim's case by offering additional witnesses to the court in the presentation of the child's case. The attorney for the child will also be able to cross examine witnesses for both the petitioner and respondent and may be able to elicit further information not obtained through the direct examination. If the batterer acts or speaks inappropriately during visitation or custodial periods, the attorney for the child can monitor via interviews with their client, report to the court and make the appropriate motions to protect the child from any harassment or badgering. Courts usually give more weight to these arguments if they come from the attorney for the child rather than parent's counsel. On the other hand, an attorney for the child may minimize or ignore allegations of domestic violence. (*See* discussion of *Attorneys for Children*.) Consider all possibilities before requesting the appointment of an attorney for the child.

If the child wishes your client to have custody or for a visitation arrangement your client believes is safe, and the child is a credible and reasonably articulate witness, move for the child to be interviewed by the judge in the judge's chambers, referred to as an "in camera" interview, or *Lincoln* hearing.[66] This type of testimony offers the court the child's perspective without the trauma to the child of having to confront the violent parent. It also spares the child cross-examination by the batterer's counsel.[67] Such a motion to the court should be supported by facts about the emotional harm the child would sustain should he or she be forced to testify in open court, and any other danger that might result from the child testifying. It is considered error to hold the in camera interview off the record and without the attorney for the child present.[68]

Other counsel will not be present during the interview but likely will be given an opportunity to give the court or attorney for the child a list of questions or issues to be posed to the child.

Another option for including the child's voice is to elicit it through your client. Section 1046(a) of the Family Court Act establishes that hearsay statements made by children pertaining to possible abuse or neglect are admissible as evidence in a proceeding under Article Ten if they are corroborated. Case law holds that such statements are also admissible in custody and visitation proceedings if corroborated.[69] Therefore, children's statements pertaining to domestic violence are admissible in custody and visitation cases, because domestic violence can constitute abuse or neglect. You may elicit from your client any of the child's reactions and statements regarding any incident of violence he or she observed or heard.

Attorneys for Children

Because of the great weight courts give to their positions, it is critical to understand the duties and role of attorneys for children (previously referred to as law guardians) in custody and visitation cases when domestic violence is an issue. The child's position can be the determinative factor in the disposition of the case.

Historically, there have been two approaches taken by attorneys who represent children — the strict advocacy approach and the substituted judgment approach. Strict advocacy is when the lawyer advocates for the child's wishes, regardless of whether the lawyer considers those wishes to be in the child's best interest. Substituted judgment is when the lawyer substitutes his or her own judgment for the child's. Determining which approach is more appropriate formerly depended on factors such as the age and maturity of the child, the facts of the case and the predilection of the individual attorney. Since 2007, however, when Chief Judge Kaye created Rule 7.2 of the Rules of the Chief Judge, the default approach is strict advocacy. The rule states in part:

> [I]f the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and

> may recommend to the child a course of action that in the attorney's view would best promote the child's interests.

The rule stems from and is supported by the Statewide Law Guardian Advisory Committee (LGAC), established by the Office of Court Administration in 1996, which endorsed the strict advocacy approach except in cases in which the law guardian fears that the child's position would place the child in harm's way. It also supports the notion that, even when the attorney is substituting his or her own judgment, the child's wishes ought to be made known to the court.[70]

In 1994, the New York State Bar Association (NYSBA) also set forth standards and commentary for law guardians in custody and visitation cases, which recognize two critical dimensions of law guardian representation. The first is the inherent conflict that may emerge between the child's stated wishes and what the law guardian believes to be in the child's best interest. The second is that the appearance of neutrality gives the law guardian's position great weight.

NYSBA posited that it is the lawyers' responsibility to "avoid actions or positions based on preconceived notions about sexual, racial or class roles or stereotypes and seek to protect the child's interests without trying to impose the attorney's own value system or sociological theories on the child or family."[71] This statement holds particular significance in domestic violence cases. The dynamics of domestic violence and its impact on children have been recognized and codified by the legislature and case law; it is not a sociological theory that attorneys can choose to discount as contrary to their own beliefs. Attorneys for children, like many people, may have preconceived notions or stereotypes about domestic violence that should be overcome. The NYSBA standards thus establish that law guardians must investigate facts, participate fully in the proceedings, and take a position.[72] Referring to these standards, you may ask that an attorney for the child be appointed on any concurrent family offense case so that he or she can participate in those proceedings in order to understand the history and severity of domestic violence and its impact on the child.

Courts have also addressed the role of the attorney for the child. In *Koppenhoefer v Koppenhoefer*, the Appellate Division held that the failure of the attorney for the child to take an active role in the proceeding was grounds for vacatur.[73] Conversely, once appointed, courts "cannot thereafter relegate the [Attorney for the Child] to a meaningless role."[74]

In *Wissink v Wissink*,[75] the attorney for the child supported the father as the custodial parent because that was what his client said she wanted. This position appears to comply with the strict advocacy approach mandated by the Chief Judge's Rules. However, the attorney for the child ignored the history of domestic violence perpetrated by the father against the mother and did not understand the dynamics. The Appellate Division made clear that it was the responsibility of the attorney for the child to understand the dynamics of domestic violence, to apply that understanding to the adolescent girl's denigration of her abused mother and her stated desire to reside with her abusive father, and to advise the court accordingly.

Lawyers for domestic violence victims have reported that attorneys for children assigned to represent their client's children have too often disregarded the domestic violence in spite of the statutory mandate and have viewed their clients' allegations as suspect, even in the face of strong evidence supporting the victim's account. When the law guardian's bias is clear, it may be necessary to move to recuse him or her. Such an effort may be an uphill battle, however. In *Eli v Eli*,[76] the court denied a motion for the recusal of the law guardian based on bias, holding that disqualification will only be granted upon a showing of one or more of the following: (1) the law guardian's violation of the Code of Professional Responsibility; (2) a violation of the Rules of Judicial Conduct; (3) a dereliction of the law guardian's duties to the children or the court; or (4) the law guardian is unqualified pursuant to the standards imposed by law, the judiciary, or court administrators.

Other times attorneys for children give undue weight to the rule that they should strictly advocate for even their young client's wishes without examining the possibility of outright or subtle manipulation by the abuser. They may not understand the dynamics of power and control and its impact on children, thus taking their wishes at face value. Many do not heed the case law requiring them to examine why a child may wish to live with an abusive parent.[77]

Attorneys representing children often request an interview with each parent as part of their investigation. Like any other lawyer wishing to speak with a party who is represented by counsel, the attorney for the child must first have the consent of that party's attorney. Together with your client, you need to decide whether to agree to this interview and whether you need to be present. Your decision will depend heavily on your client's ability to tell her story coherently and the extent to which you believe the child's attorney understands the dynamics of domestic violence. As explained above, many attorneys for children view allegations of domestic violence as suspect while prioritizing the child's relationship with the non-custodial parent even when that parent is an abuser. When deciding whether to permit the attorney for the child to interview your client, balance the danger of appearing to be hiding something against the likelihood of your client enlightening the attorney about her history with the abuser and their child. Generally, it is best to permit your client to meet with the attorney for the child. If you are concerned that she will not be a good advocate for herself or that the attorney does not understand domestic violence, attend the interview with her.

Either way, you must prepare your client for her interview. The victim must understand that the purpose of the interview is to help the child's attorney decide what position to take, whether they need to substitute judgment, and that any information shared with the attorney can be reported to the judge.

Domestic violence victims often mistakenly assume that just because the attorney for child represents the child, he or she will support the child's best interest, and that position would be consistent with the victim's. What the attorney for the child views as the child's best interest, however, may differ from what the victim perceives as the child's best interest. Moreover, the child's attorney needs a basis to substitute her own judgment for the child's if the attorney believes the child's position is not consistent with his or her best interest.

In many cases the history or severity of domestic violence may warrant the child's attorney to substitute judgment. Together with your client, decide which facts should be highlighted for the child's attorney. Go through her history with her so she can tell her story coherently, highlighting the most significant aspects, such as the impact the violence had on the children and safety considerations. Help her understand that her answers should be child-centered rather than self-centered. Tell her to bring police or hospital records with her to corroborate the violence, but remind her that the most important information is her own account of it. Warn her that overemphasizing the domestic violence can backfire by making it appear that she is obsessed with the negative aspects of her relationship with the other parent or hostile to him. Work with your client on her affect and demeanor so that she can describe the domestic violence she endured without appearing to be overly emotional, angry, or exaggerating. She must tell the child's attorney that she understands the importance of the relationship between the other parent and the child, but simply wants the child to be safe.

Forensics

Along with the position taken by the attorney for the child, the conclusions of forensic reports, also known as psychological evaluations or mental health studies, are likely to profoundly influence the outcome of the custody or visitation case. Although judges are encouraged by the Appellate Division to be independent,[78] they are also encouraged to order, and accord significant weight to, forensic reports.[79] Courts tend to rely heavily on experts.

Case law precedent requires forensic evaluators to address domestic violence, although it is not uncommon for evaluators to minimize its impact on the child. In *Wissink v Wissink*,[80] the Appellate Division reversed an order of custody to the father and held that "the fact of domestic violence should have been considered more than superficially, particularly in this case where Andrea [the child] expressed her unequivocal preference for the abuser while denying the very existence of the domestic violence that the Court found she witnessed."[81] The court found that the forensic evaluation failed to adequately address the reasons the teenager expressed a desire to live with her abusive father and directed the lower court to order a comprehensive psychological evaluation.

A New York City study supports the notion that some evaluators minimize domestic violence, and that in fact it is the evaluator's knowledge of domestic violence, especially risk factors for continuing abuse, that predict the court outcome in regard to the safety of the parenting plan. In other words, the experts' knowledge of domestic violence is a better indicator of a safe outcome than the duration or severity of the violence.[82]

Section 722C of the County Law permits use of experts paid by the City. Most experts are chosen from lists provided by the 18-B panel, and choices are generally made by reputation in the community. Social science research, case law and anecdotal evidence all suggest that it is crucial to investigate any expert being considered for appointment, not just by getting a copy of the curriculum vitae or resume, but by speaking with the expert and specifically asking what his or her experience has been with domestic violence. For additional information, speak to other advocates and practitioners to see if they have had experience with the expert.

Prepare your client for her interview with the forensic evaluator much in the same way that you prepared her for the interview with the attorney for the child. This preparation is of critical importance to the outcome of the case. Work with your client so that she is able to recount clearly and without an angry or overwrought affect the history of the domestic violence and to demonstrate her commitment to her emotional and physical safety and that of the child. At the same time, unless the batterer was abusing the child or involved in activities that posed a direct threat to the physical safety of the child, she must also communicate her awareness of and support for the child's relationship with that parent.

Explain to your client that although the expert is a doctor, he or she is not the client's therapist — this is not the time to explore her feelings or unburden herself of her conflicts — and that her discussions with the expert are not confidential. A good expert will observe each parent interact with the children separately; prepare your client for this possibility.

You may wish to contact the expert directly and offer to provide court documents, such as an Administration for Children's Services report or an Investigation and Report ["I&R"] from Probation. You can offer to provide the expert with literature about domestic violence.[83] Since many experts do not know about the law mandating consideration of domestic violence in custody and visitation cases, consider providing them with a copy of the statute that contains the legislative history section replete with social science research on the impact of domestic violence on children, even where they are not the direct targets of the violence. Remember to send your adversary and the child's attorney a copy of any written communication you have had with the expert. Many courts however now require attorneys to sign a document limiting access to the report and the forensic.

If the forensic report ignores or minimizes the domestic violence, is hostile to your client, and/or makes inappropriate recommendations, you will need to prepare to cross-examine the expert. There is a host of psycho-social literature on the impact of domestic violence on children which you may use as material for this task. Introduce this literature into evidence by asking the court to take judicial notice of the legislative history, and then ask the expert whether domestic violence was considered in his or her recommendation and what weight it was given in light of its established negative impact on children. When cross-examining an expert who performed personality tests, be aware that domestic

violence victims tend to score higher on the "paranoia scale" of the Minnesota Multiphasic Personality Inventory (MMPI) than others because the scale measures not only paranoia but fear in general.[84] When domestic violence victims have been administered such tests, attorneys frequently find that the experts misinterpret the data or fail to understand how experience as a domestic violence victim can skew the results.

You must obtain impeachment material for your cross-examination of the expert.[85] One of the richest sources of such material is likely to be the expert's own notes. Although lower courts have denied pre-trial disclosure of the notes of forensic experts,[86] there is no appellate ruling on the issue of obtaining such data and there are strong arguments to be made in favor of such disclosure.[87]

Some courts have held that special circumstances need to exist in order to obtain notes and raw data.[88] One trial court, engaging in comprehensive analysis of the due process issue, held that special circumstances are not necessary:

> This Court fails to understand how a party can show bias on the part of the evaluator or a deficiency in the report without the careful review of the raw data and notes of the forensic evaluator. Otherwise, the litigator is limited to cross examination of the forensic evaluator and a forensic report without knowing which questions to ask and without being able to properly establish to the Court … any deficiencies in the report or bias on the part of the evaluator. The Court is tasked with applying a certain amount of weight to the conclusions in a forensic report, and it is the parties' job to bring any deficiencies in the report to the Court's attention and same cannot be properly completed, or attempted, without the raw data and notes available during trial preparation.[89]

The American Psychological Association (APA) has established fourteen guidelines for forensic evaluators in custody cases, which can be very valuable in cross-examination. The guidelines require that the expert gain specialized competence, engage in culturally informed, nondiscriminatory evaluation practices, use multiple methods of data gathering and maintain written records, and determine the scope of the evaluation based on the nature of the referral question.[90] Many experts in domestic violence custody cases do not use multiple methods of gathering data, such as interviewing collaterals. Experts in domestic violence cases often do not limit the scope of their evaluation to the assigned task but instead attempt to mediate. Thanks to the recommendations of the Matrimonial Commission, courts now issue more specific orders delineating the role the forensic should take; this somewhat ameliorates the problem of overreach by the evaluator.[91] The guidelines also require the expert to "gain specialized competence" in conducting child custody evaluations. This includes an understanding of applicable law, child development, substance abuse, and domestic violence.

If the attorney concludes that cross-examination will not be sufficient to undermine the expert's recommendation, an additional expert may be retained by the client. However, if the judge will not permit the expert to examine the child a second time, this may not be particularly helpful. A motion for funds to retain an additional expert may be made pursuant to Section 722C of the County Law.

Parental Alienation

The issue of parental alienation often arises in domestic violence cases.

Frequently, the abuser or his attorney will accuse the victim of communicating messages to the child that alienate him or her from the abuser. The victim's efforts to protect herself and her children may be misinterpreted by courts, lawyers, and experts as parental alienation. Psychological theory[92] does not support this interpretation, and the attorney for the victim should vigorously challenge it via oral argument or preliminary motion. A majority of courts that have considered the issue have declined to recognize the purported syndrome as a valid psychological phenomenon. Unfortunately, despite

vigorous effort by advocates and experts to educate about this fictional syndrome, litigants continue to assert "parental alienation" as grounds for seeking change in custody.[93]

Visitation

The initial temporary order for visitation will likely determine the course of visitation throughout the case. Visitation is easily expanded, but courts rarely cut back on previously approved contact. Therefore, the schedule of visits between the abusive parent and the child should start slowly, expanding gradually, if all goes well, from supervised visits, to several hours of unsupervised visits, to full days, and then to overnight and weekend visits.

Often in cases involving allegations of domestic violence, the visitation is initially supervised. This arrangement protects the child and the custodial parent. There are many possibilities for supervised visitation: supervision by staff or volunteers at an agency providing this service, or by friends or relatives of one or both parents. The decision about which kind of supervised visitation is best requires an exploration of a variety of factors. For example, would a report to the court be helpful? If so, supervised visitation at a reputable agency,[94] where trained staff supervise the visits, is preferable. Such agencies supervise visits either free of charge or for a small fee; visits are usually held once a week for one hour; and supervisors usually provide a written report to the court. If the batterer has abused the child or poses an ongoing danger to the victim, visitation should be supervised by professionals at an agency. Be sure that the agency will protect your client's safety by ensuring that she does not encounter her abuser when she brings the child and leaves with him or her.

Is supervision necessary for the long term? Agencies that specialize in supervising visits typically will supervise for a limited period of time, such as during the pendency of the court case. If long-term supervision is what is needed, supervision by a mutually agreed upon friend or family member, if available, may be an alternative, if safety considerations have been addressed. If visitation is unsupervised, the exchange should be conducted at a safe place, either a police precinct or a public location, such as a popular fast food restaurant or a library. Some judges and lawyers believe that an exchange at the police precinct is harmful to a child. If the visitation exchange should take place at a police precinct in order to protect your client's safety, cite the literature and case law demonstrating that exposure to domestic violence is harmful to children and point out that it would be far more damaging to the child to be exposed to domestic violence than to be exposed to the police. Practically speaking there is a dearth of supervised visitation programs. This reality can lead to consideration of family members of the abuser who might otherwise have been considered not reliable.[95]

Although theoretical support exists for the proposition that visitation ought to be supervised when there has been a finding of domestic violence,[96] obtaining a final order for supervised visits is difficult and usually requires evidence that the batterer engaged in conduct that placed the child at the risk of significant harm or continues to be violent to your client. Obtaining an order suspending visits between the batterer and the child is even more challenging, usually requiring such wrongdoing as sexual abuse of the child, repeated physical violence directed at the child, and severe substance abuse or mental health issues. Importantly, in *Matter of Laura A.K. v Timothy M*. and *Lightbourne v Lightbourne*,[97] the Appellate Divisions held that supervised visitation is not a deprivation of meaningful access. Expert testimony will likely be needed to obtain an order of permanently supervised or suspended visits.

Modification of Custody/Visitation Orders

Batterers often continue their abuse through incessant litigation.[98] If your client is harassed by her abuser filing new petitions for custody or visitation after the case has been decided, argue that modification of the custody or visitation order requires a showing of change of circumstances. In *David W. v Julia W*.,[99] the court held that to "automatically grant a hearing to a non-custodial parent

would simply facilitate a disgruntled party in harassing his or her spouse compelling the latter to expend considerable time, money, and emotional anguish in resisting the loss of custody."

Conclusion

Although the New York State Legislature and appellate courts require factfinders to give significant weight to domestic violence in custody and visitation matters, litigating these cases continues to pose challenges to lawyers representing victims. In spite of powerful legal precedent and the social science research that supports it, victims and advocates still encounter lawyers, judges, and experts who downplay the significance of domestic violence, fail to understand its impact, and stereotype or blame victims. Attorneys for domestic violence victims can overcome these challenges by educating themselves about new developments in domestic violence law and social science literature, understanding how domestic violence implicates the traditional "best interest" factors in custody law, developing strategies to bring information about domestic violence and the law to the key decision makers, and helping their clients negotiate a court system that too often is confusing and insensitive to victims. While effective representation of domestic violence victims in custody and visitation cases requires knowledge, sensitivity, and hard work, such litigation can be uniquely rewarding. Just as the threatened loss of her child often instills the greatest fear in the battered mother, preventing such a loss may constitute the greatest gift.* L 1996, ch 85 at 273-74.

Notes

1. *Report* of the American Psychological Association Presidential Task Force on Violence and the Family (1996) at 100 (*hereinafter APA Report*).
2. Evan Stark, *Building a Domestic Violence Case, in Lawyer's Manual on Domestic Violence: Representing the Victim*, eds. Anne M. Lopatto & James C. Neely (Appellate Division, 1st Dep't 1995).
3. L1996, ch 85.
4. Diana Baumrind, *Child Care Practices Anteceding Three Patterns of Preschool Behavior*, 75:1 Genetic Psychology Monographs 43-88 (1967).
5. Lundy Bancroft & Jay Silverman, *The Batterer as Parent* (SAGE 2002); Evan Stark, *Coercive Control* (Oxford Univ Press 2007).
6. See Joan Meier, *Domestic Violence, Child Protection and Child Custody: Understanding Judicial Resistance and Imagining the Solutions*, Am Univ J of Social Policy, Gender and the Law (2003).
7. *See Matter of Rodriguez v Guerra*, 28 AD3d 775, 777 (2d Dep't 2006).
8. L 1996, ch 85.
9. L 1996, ch 85 at 273-74 (emphasis added).
10. Lynne R. Kurtz, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 Alb L Rev 1345, 1350 (1997); *see also* Katherine M. Reihing, *Protecting Victims of Domestic Violence and Their Children After Divorce: The American Law Institute's Model*, 37 Fam & Conciliation Cts Rev 393, 395 (1999); see e.g. Ala Code 1975 § 30-3-131; Ariz Rev Stat Ann § 25-403 (West Supp 1999); Ark Code Ann § 9-13-101(c) (Michie 1997); Colo Rev Stat Ann § 14-10-124 (1.5) (West 1999); Del Code Ann Tit 13, § 705A (Supp 1998); Fla Stat Ann § 61.13(2)(b)(2) (West Supp 1999); Haw Rev Stat Ann § 571-46(9) (Michie Supp 1998); Idaho Code § 32-717B(5); La Rev Stat Ann § 9:364 (West Supp. 1999); Minn Stat Ann § 518.17(2)(d) (West Supp 1999); Nev Rev Stat § 125.480(5) (2008); NJ Rev Stat Ann § 458:17 (1993); NM Cent Code § 14-09-06.2(1)(j) (1997); Okla Stat Ann Tit 10 § 21.1(D) (West 1995); Tex Fam Code Ann § 153.004 (West 1996); Wash Rev Code Ann § 26.09.191 (2)(a)(iii) (West 1997); Wis Stat Ann § 767.24(2)(b)(2)(c) (West 1993); Wyo Stat Ann § 20-2-113(a) (Michie 1999).
11. L 1996, ch 85.

12. Domestic Relations Law § 240; L 2009, ch 476.
13. *See E.R. v G.S.R.*, 170 Misc 2d 659 (Fam Ct, Westchester County, 1996); *see also* J.D. v N.D., 170 Misc 2d 877 (Fam Ct, Westchester County, 1996); *Roberto A.M. v Esmeralda M.*, 28 Misc 3d 1239(A) (Sup Ct, Kings County 2010).
14. *E.R. v G.S.R., supra* at 666-67.
15. *Clarke v Boertlein*, 82 AD3d 976 (2d Dep't 2011); *Wissink v Wissink*, 13 AD3d 46 (2d Dep't 2004); *Samala v Samala*, 309 AD2d 798 (2d Dep't 2003); *Finkbeiner v Finkbeiner*, 270 AD2d 417 (2d Dep't 2000). In particular, the court gave inexplicably little weight to its own findings regarding the father's domestic violence against the mother and his startling lack of judgment on several occasions with respect to the parties' child (*see Matter of Rodriguez v Guerra, supra* 28 AD3d at 777).
16. *See* Lee Elkins and Jane Fosbinder, *New York Law of Domestic Violence* 591 (Thomson/West 2005).
17. *See Farkas v Farkas*, NYLJ July 13, 1992, at 31 Col1 (Sup Ct, NY County); *Rohan v Rohan*, 213 AD2d 804 (3d Dep't 1995).
18. *See, e.g. Mitchell v Mitchell*, 209 AD2d 845 (3 Dep't 1994); *Olmo v Olmo*, 140 AD2d 677 (2d Dep't 1988).
19. *See, e.g. Anonymous G. v Anonymous G.*, 132 AD2d 459 (1st Dep't 1987).
20. *See, e.g. Peters v Blue*, NYLJ, June 23, 1997 at 29 (Fam Ct, NY County); *Pratt v Wood*, 210 AD2d 741 (3rd Dep't 1994).
21. *See Neail v Deshane*, 19 AD3d 758 (3rd Dep't 2005); *see also Kaplan v Chamberlain*, NYLJ, Sept. 17, 1993 at 27 (Fam Ct, NY County); *T.I. v P.S.*, June 5, 1995 at 31 (Fam Ct, NY County).
22. Uniform Child Custody Jurisdiction and Enforcement Act § 207; Domestic Relations Law § 76.
23. *Roberto A.M. v Esmeralda M., supra* 28 Misc 3d at 1239(A) ("It is apparent to this court that the children have experienced escalating violence in the home. These findings lead this court to believe that there is a sufficient change in circumstances that were not foreseen and it is in the best interests of the children that a modification of the custody and access schedule be granted."); *Garcia v Scruggs*, 44 AD3d 660, 661 (2d Dep't 2007) ("the allegations in the modification petition that the father continued to have no involvement in the child's life, … and the existence of a temporary order of protection based upon an allegation of domestic violence, were sufficient to warrant a hearing to determine whether a modification of the joint custody award was in the best interests of the child.")
24. *See* L 1999, ch 378.
25. *Id.*
26. *Id.*
27. 213 AD2d 804 (3d Dep't 1995).
28. *Id.*
29. *Id.; see also Costigan v Renner*, 76 AD3d 1039 (2d Dep't 2010).
30. 263 AD2d 783 (3d Dep't 1999).
31. *Spencer, supra,* 263 AD3d at 785.
32. *Farkas v Farkas*, NYLJ, July 13, 1992 at 31, col 1 (Sup Ct, NY County).
33. *G.K. v L.K.,* 20 Misc 3d 1138(A) (Sup Ct, Kings County 2008).
34. *Roberto A.M. v Esmeralda M., supra.*
35. *Id.*,emph added; *see also W.Y. v. I.V.*, 26 Misc 3d 1227(A) (Fam Ct, Richmond County 2010) (fact that Father was able to engage in these acts of violence then deny responsibility for them…indicates to this Court "a character that is manifestly unsuited" for long term parenting of Christopher, despite that the children lived with the Father for several years).
36. L 1996, ch 85.
37. Marjory D. Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State*, 240 Cornell J L and Pub Pol 221 (1994).
38. APA Report, *supra* at 37.

39. *Moorehead v Moorehead*, 197 AD2d 517, 519 (2d Dep't 1993) (court found that the parties were "equally able to care for their children" and therefore, stability was of central importance; court also considered the young ages of the children who were 1.5 and 2 years old.)
40. In *Moorehead*, the court found that a long-term custody arrangement may be disrupted if it would serve the best interest of the child. *Id.* at 519-520. *See also Roberto A.M. v Esmeralda M., supra* (despite residing with the father the court awarded custody to mother because father undermined the children's emotional stability).
41. 213 AD2d at 806; *see also Supangkat v Torres*, 101 AD3d 889, 890 (2d Dep't 2012) (the lower court gave undue weight to the mother's temporary housing situation).
42. *Id.*
43. *Id.; see also Labow v Labow*, 86 AD2d 336 (1st Dep't 1983). In reversing a trial court's transfer of custody from the mother to the father, the court cited the trial court's failure to consider the father's manipulative yet apparently successful technique of bringing about a change in custody by failing to comply with court orders and the impact that this technique would have on the child's thinking. "It hardly seems to be in the best interests of a child for him to learn the efficacy of such a technique and to observe it practiced by his father and approved by the court."
44. 45 Misc 3d 1210(A) (Fam Ct, NY County 2014).
45. *Koppenhoefer v Koppenhoefer*, 159 AD2d 133 (2d Dep't 1990).
46. 310 AD2d 36 (2d Dep't 2002).
47. *See also W.Y. v I.V., supra; G.K. v L.K.*, 20 Misc 3d at 1138(A), *supra* ("This court must view the oldest child's wishes to live with plaintiff in the context of what he has been told and his immersion by plaintiff and plaintiff's family in a family dispute designed to denigrate and humiliate defendant, and isolate her from her children").
48. *See generally,* Benjamin D. Garber, *Developmental Psychology for Family Law Professionals* (Springer 2009)
49. *See* Barbara Jo Fidler, Catherine Grace Hannibal & Hon. Jane Pearl, *"Interviewing Children in Family Law Disputes,"* presentation co-sponsored by FamilyKind and the New York Chapter of the Association Of Family and Conciliation Courts (AFCC-NY) (March 20, 2015).
50. *Miller v Alabama*, 567 US —, 132 S Ct 2455 (2012).
51. *See* Barbara Jo Fidler, Nicholas Bala, & Michael A. Saini, *Children Who Resist Postseparation Parental Contact: A Differential Approach for Legal and Mental Health Professionals* (Oxford Univ Press 2013).
52. *Eschbach v Eschbach*, 56 NY2d 167 (1982); *Roberto A.M. v Esmeralda M., supra.*
53. *Hall v Keats*, 184 AD2d 825, 827 (3d Dep't 1992); *Diane L. v Richard L.*, 151 AD2d 760, 761 (2d Dep't 1989); *Moon v Moon*, 120 AD2d 839, 839 (3d Dep't 1986).
54. *See Farkas v Farkas, supra; Rohan v Rohan, supra,* at 806; *Acevedo v Acevedo*, 200 AD2d 567 (2d Dep't 1994).
55. *Entwhistle v Entwhistle*, 61 AD2d 380 (2d Dep't 1978); *Bliss v Ach II*, 56 NY2d 995 (1982).
56. *Roberto A.M. v Esmeralda M., supra.*
57. *R.L. v J.L.,* 34 Misc 3d 1236(A) (IDV Sup Ct, NY County 2012).
58. *Rutz v Rutz,* 45 Misc 3d 1210(A) (Fam Ct, NY County 2014).
59. *Braiman v Braiman*, 44 NY2d 584, 589-92 (1978); *Forsyth v White*, 266 AD2d 743 (3d Dep't 1999).
60. *Rutz v Rutz, supra* 45 Misc 3d at 1210(A); *G.K. v L.K., supra.*
61. *C. B. v J. U., 5* Misc 3d 1004(A) (Sup Ct, NY County 2004).
62. *C.C.W. v J.S.W.,* 15 Misc 3d 1140(A) (Sup Ct, Monroe Cty 2006).
63. *Matter of Gerald H. v Qui Yinh H.,* 30 Misc 3d 1238 (Fam Ct, Queens County 2011).
64. Domestic Relations Law § 240, which references the Family Court Act, requires that a finding of domestic violence be based on a preponderance of the evidence in order for the judge to have to consider the

domestic violence in determining the best interest of the child. An order entered on consent does not meet this standard.

65. *Cooperman v Cooperman*, NYSBA Opinion 656, DR 7-104(a)(1) of Professional Responsibility.
66. *See Lincoln v Lincoln*, 24 NY2d 270 (1969).
67. *Id.*
68. Family Court Act § 664(b); CPLR Rule 4019; *see Fleishman v Walters*, 40 AD2d 622 (4th Dep't 1973); *Matter of Buhrmeister v McFarland*, 235 AD2d 846 (3d Dep't 1997); *Matter of Kathleen OO*, 232 AD2d 784 (3d Dep't 1996); *Matter of Sellen v Wright*, 229 AD2d 680 (3d Dep't 1990).
69. *LeFavour v Koch*, 124 AD2d 903 (3d Dep't 1986) (custody); *Albert G. v Denise B.*, 181 AD2d 732 (2d Dep't 1992) (termination of visitation).
70. The Statewide Law Guardian Advisory Committee, Law Guardian Program Administrative Handbook, at 2-3.
71. NYSBA Standards; *see also* Appellate Division First Department, Office of Attorneys for Children Administrative Handbook (Jan. 2015) at www.courts.state.ny.us/courts/AD1/Committees&Programs/CounselChildren&Parents%28LG%29/index.shtml
72. *Matter of Brown v Simon*, 123 AD3d 1120 (2d Dep't 2014). *See also* Nancy Erickson, *The Role of the Law Guardian in a Custody Case Involving Domestic Violence*, 27 Fordham Urb L J 817 (2000), for a thorough review of the standards and how the consideration of domestic violence expands the role of the law guardian.
73. *Koeppenhoefer v Koeppenhoefer*, 159 AD2d 113 (2d Dep't 1990).
74. *Figueroa v Lopez*, 48 AD3d 906, 907 (3d Dep't 2008) (internal citations omitted).
75. *Wissink, supra*, 301 AD2d at 36; *see also W.Y. v I.V.*, 26 Misc 3d 1227(A) (Fam Ct, Richmond County 2010)(court declines to follow recommendation that custody be granted to father. *See Berstell v Berstell*, 272 AD2d 566 (2d Dep't 2000) (forensic evaluation consisted of two sixty-minute interviews of each party and a one hour parent-child observation; time spent was simply not sufficient to allow analysis necessary to fully understand the impact of domestic violence in this case); *Xiomara M. v Robert M., Jr.,* 102 AD3d 581, 582 (1st Dep't 2013) (the court reasonably rejected the recommendation of its appointed forensic psychologist; see *Matter of Kozlowski v Mangialino*, 36 AD3d 916 [2nd Dep't 2007])(expert did not sufficiently weigh impact of domestic violence on petitioner's emotional and psychic state; expert disproportionately blamed petitioner for problems in the parties' relationship while ignoring her explanations, and relied too heavily on reports of the paternal grandparents, who had themselves made false reports of abuse and neglect against petitioner).
76. *Eli v Eli,* NYLJ, Nov. 12, 1998 at col 30 (Sup Ct, Suffolk County); *see also Stien v Stien*, 130 Misc 2d 609 (Fam Ct, Westchester County 1985).
77. *See Matter of Brown v Simon*, 123 AD3d 1120 (2d Dep't 2014); *Carballeira v. Shumway*, 273 AD2d 753 (3d Dep't 2000).
78. *Wissink, supra.*
79. *See Alanna M. v Duncan M.,* 204 AD2d 409 (2d Dep't 1994).
80. *Wissink, supra.*
81. *Id.*
82. Michael S. Davis, Chris S. O'Sullivan, Hon. Marjory D. Fields, Kim Susser, *Custody Evaluations When There Are Allegations of Domestic Violence: Practices, Beliefs and Recommendations of Professional Evaluators* (Report submitted to National Institute of Justice, 2009).
83. Some of the relevant literature includes: APA *Report, supra;* American Bar Association Commission on Domestic Violence, *The Impact of Domestic Violence on Your Legal Practice*, 1996, ch 5; *The Impact of Spousal Abuse on Children*, Marjory D. Fields, 3 Cornell J Law and Public Policy, No. 2 1994; Ann Jones, *Next Time, She'll Be Dead: Battering and How to Stop It* (Beacon Press 2000); Lundy Bancroft and Jay Silverman, *The Batterer as Parent* (SAGE 2011).

84. Lynne Bravo Rosewater, *Clinical and Courtroom Application of Battered Women's Personality Assessments,* Domestic Violence on Trial: Psychological And Legal Dimensions of Family Violence, ed Daniel Jay Sonkin, (1987).
85. CPLR 3120; *see also Kessler v Kessler,* 10 NY2d 445 (1962).
86. *Ochs v Ochs,* 193 Misc 2d 502 (Sup Ct, Westchester County 2002); *Feuerman v Feuerman*, 112 Misc 2d 96 (Sup Ct, NY County, 1982); *Nicholson v Nicholson*, 4 AD3d 347 (2d Dep't 2004).
87. Tippins, *Custody Evaluations, Part 4: Full Disclosure Critical,* NYLJ, Jan. 15, 2004 at 3.
88. *C.P. v A.P.,* 32 Misc 3d 1210(A) (Sup Ct, NY County 2011).
89. *J.F.D. v J.D.*, 45 Misc 3d 1212(A) (Sup Ct, Nassau County 2014).
90. 65:9 *American Psychologist* 863 (2010).
91. Matrimonial Commission Report to the Chief Judge of the State of New York, February 2006 at 46, available at www.nycourts.gov/ip/matrimonial-commission/.
92. The American Psychological Association determined that "although there are no data to support the phenomenon called parental alienation syndrome, the term is still used by some evaluators and courts to discount children's fears in hostile and psychologically abusive situations. Psychological evaluators not trained in domestic violence may contribute to this process by ignoring or minimizing the violence and by giving pathological labels to women's responses to chronic victimization. Terms such as 'parental alienation' may be used to blame the women for the children's reasonable fear of or anger toward their violent father." *Report on Violence and the Family* at 40, 100.
93. Proffered expert testimony on parental alienation syndrome has failed to persuade most New York courts. *See People v Fortin*, 184 Misc 2d 10 (Cty Ct, Nassau County 2000); *People v Loomis* 172 Misc 2d 265 (Crim Ct, NY County 1997). That court also noted that in Florida such testimony was not generally accepted under the *Frye* rule; *see also Darla N. v Christine N.*, 289 AD2d 1012 (4th Dep't 2001); but see *Zafran v Zafran*, 28 AD3d 753 (2d Dep't 2006); P.M. v S.M., 17 Misc 3d 1122(A) (Sup Ct, Nassau County 2007); *Matter of F.S.-P. v A.H.R.*, 17 Misc 3d 390 (Fam Ct, Nassau County 2007); *J.F. v L.F.,*181 Misc 2d 722 (Fam Ct, NY County 1999) (finding natural parental right to visitation with children that exceeds any property right).
94. www.svnetwork.net/standards.asp.
95. Samantha Moore, Kathryn Ford, *What Courts Should Know When Working With Supervised Visitation Programs*, Center for Court Innovation (2006) www.courtinnovation.org/sites/default/files/Supervised%20 Visitation.pdf.
96. Some states, though, have a presumption that the abusive parent have only supervised visits unless the presumption is rebutted by showing fitness to have unsupervised visits, for example by completing a batterer's education program.
97. 204 AD2d 325 (2d Dep't 1994); 179 AD2d 562 (1st Dep't 1992).
98. Susan L. Miller and Nicole L. Smolter, *Paper Abuse: When All Else Fails Batterers Use Procedural Stalking*, 17 Violence Against Women 637 (originally published online 28 April 2011).
99. 158 AD2d 1 (1st Dep't 1990).