

Appendix D-3: Marjory D. Fields,
*The Impact of Spouse Abuse on Children and
Its Relevance in Custody and Visitation Decisions in New York*

THE IMPACT OF SPOUSE ABUSE ON CHILDREN
AND ITS RELEVANCE IN CUSTODY
AND VISITATION DECISIONS
IN NEW YORK STATE

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To the memory of the Honorable Sybil Hart Kooper, late
Associate Justice of the Appellate Division, Second Department,
Supreme Court of the State of New York.

INTRODUCTION

New studies are continually being conducted to help us understand the complexities of family life. As the resources and information increase, so does the need for family law practitioners who understand the social and psychological implications of the legal problems they confront. This Article attempts to promote this understanding: it surveys the substantial body of scientific research relevant to the effects of wife abuse on children and it catalogues the way in which New York courts have dealt with this information.

Part I of this Article surveys the medical, psychological, and sociological literature regarding the effects of domestic violence on children. Part II examines the efficacy of programs for the treatment of domestic violence offenders. Part III discusses how New York State appellate and trial courts have viewed evidence of domestic violence--and scientific research attempting to explain it--in making child custody and visitation decisions. Based on this discussion, Part III of the Article also offers practice suggestions for family law practitioners.

I. PSYCHOLOGICAL AND SOCIOLOGICAL STUDIES

A. THE CORRELATION BETWEEN SPOUSE ABUSE AND CHILD ABUSE

Men who abuse their wives frequently abuse their children, especially as the children grow older.¹ Apparently, wife abusers cannot tolerate a child's independence and "they often become as possessive and intrusive into their child's life as into their wife's."² Lee Bowker, Michelle Arbitell, and Richard McFerron confirmed this pattern in an empirical study showing that men who beat their wives were also likely to beat their children.³ Of the 775 women in the survey who had children with their abusive husbands, 70% reported

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¹ Lenore E. Walker's research reveals that although some batterers nurture rather than abuse their younger children, they abuse rather than nurture their older children. LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 6 (1984).

² *Id.*

³ Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 158, 162 (Kersti Yllo & Michele Bograd eds., 1988). The authors conducted in-depth interviews with 146 women volunteers, focusing on premarital and marital history, violence, and personal

that their husbands also abused their children.⁴ Bowker, Arbitell, and McFerron believe the figure of 70% to be understated because the women who provided details of their own abuse were either reluctant to discuss child abuse or unaware that child abuse took place out of their presence.⁵ Finally, the categories of child abuse included in the interviews and questionnaires were limited to certain physical acts and excluded child sexual abuse, neglect, and psychological neglect.⁶

The researchers identified other factors associated with an increased likelihood of paternal child abuse. For example, likelihood of child abuse increased with the size of the family.⁷ In families with one child, abuse occurred 51% of the time; in families with four or more children, abuse occurred 92% of the time.⁸ Moreover, severity of child abuse increased in direct correlation with a husband's dominance over his wife, the frequency and severity of spouse abuse, and the frequency of marital rape.⁹ The authors concluded that the number of children, the length of the marriage, the frequency of wife beating, and the frequency of marital rape were more important than background characteristics of either spouse in predicting whether paternal child abuse occurred.¹⁰

Another researcher used in-depth interviews of women residing in shelters for battered women to study the correlation between wife abuse and child abuse.¹¹ Sociologist Jean Giles-Sims found that of the men and women who abused their children, the men did so an average of 19.9 times in the preceding year, while women were abusive an average of 4.4 times during the same period.¹² In follow-up interviews, Giles-Sims found that violence decreased only for those children whose mothers did not return to their violent husbands after leaving the shelters.¹³

In a more recent study, Evan Stark, a sociologist, and Anne Flitcraft, a physician, studied hospital records and

strategies and resources used to end or reduce violence. The results of this study appeared in *Woman's Day* magazine, along with an announcement that additional volunteers would be needed to continue the research. The authors included in their study the first 854 questionnaires they received in response to the advertisement. *Id.* at 161-62.

The authors acknowledged that their sample was nonrepresentative because the respondents were self-selected volunteers. The researchers neither observed the subjects nor consulted collateral sources. Nevertheless, they concluded that the results were valid because "[t]he battered wives contributed vignettes that leave little doubt in our minds regarding what occurred...." *Id.* at 162.

⁴ *Id.* Although the authors found that the child abuse in these families was less severe than the spouse abuse, the amount of violence in general is still overwhelming. *Id.*

⁵ *Id.* at 163.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 163.

⁹ *Id.* at 164.

¹⁰ *Id.*

¹¹ Jean Giles-Sims, *A Longitudinal Study of Battered Children of Battered Wives*, 34 FAM.REL. 205 (1985).

Giles-Sims interviewed 27 battered women who sought assistance at a battered women's shelter, 21 of whom were re-interviewed 6 months later. *Id.* at 206. The interviews focused on parent-child conflicts. *Id.* at 207.

¹² *Id.* at 208. The study focused on "kicking, biting, punching, hitting with an object, beating up, threatening with a knife or gun, and/or using a knife or gun." The study also found that of the 27 women who were interviewed initially, 55.6% of the women stated they used at least one of the abusive tactics and 63% of the women stated their husbands used at least one of the abusive tactics. *Id.* at 207.

Giles-Sims reported that a national survey of violence in American families published in 1978 showed that abusive parents abused their children an average of 10.5 times in the preceding year. The national sample did not separate abuse by gender; however, the data indicates that the men in the Giles-Sims sample used abusive tactics more frequently than the abusive parents in the national sample.

¹³ *Id.* at 209.

social work interviews of mothers whose children were suspected of being abused or neglected.¹⁴ Their research confirmed that fathers who abuse their wives are also a threat to their children.¹⁵ In about half of the cases studied, a man abused both the mother and the children.¹⁶

Another study found the correlation between spouse abuse and child abuse to be much higher than that reported by Stark and Flitcraft. Alan Rosenbaum and K. Daniel O'Leary conducted a study of ninety-two women, over half of whom were victims of spouse abuse.¹⁷ The study consisted of three groups: an abused sample of fifty-two women who were self-referred victims of physical marital violence and two comparison samples.¹⁸ The first comparison group consisted of twenty women randomly selected from a phone book who lived in the same socioeconomic areas as those in the abused sample.¹⁹ The second comparison group included twenty women who were not abused but who lived in discordant marriages.²⁰ All of the women were asked whether they or their spouses had witnessed their fathers abusing their mothers and whether either of them had been victims of child abuse.²¹ Rosenbaum and O'Leary concluded:

Almost 82% of the [abusive] husbands who witnessed parental spouse abuse were also victims of child abuse at the hands of one or both parents, strongly supporting the contention that children of spouse-abusing couples may be unusually vulnerable to abuse. If spouse abuse is occurring within a family, assessment for child abuse is clearly indicated.²²

Literature on child abuse and neglect portrays mothers as being primarily responsible for child mistreatment.²³ The psychological and sociological evidence is clear, however, that in a large proportion of child abuse cases the perpetrators are male. Moreover, the presence of spouse abuse is a strong indicator that the children may be suffering physical abuse by at least one parent, most likely the father. Lawyers should be aware of this correlation and present the relevant evidence to courts in custody and visitation proceedings. Similarly, judges presented with evidence of spouse abuse should determine the extent to which child abuse is occurring.

¹⁴ Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. HEALTH SERVS. 97 (1988). Stark and Flitcraft reviewed the medical records of mothers whose children's cases were referred to the child abuse and neglect review committee at Yale-New Haven Hospital between July 1977 and June 1978. The 116 mothers were classified as battered or non-battered based on the trauma history in their records and the social data in the committee reviews. *Id.* at 103.

¹⁵ *Id.* at 108. The authors found that battered wives whose children are abused generally do not have a background of violence or psychopathology. *Id.*

¹⁶ *Id.* at 106.

¹⁷ Alan Rosenbaum & K. Daniel O'Leary, *Children: The Unintended Victims of Marital Violence*, 51 AM. J. ORTHOPSYCHIATRY 692 (1981).

¹⁸ *Id.* at 694.

¹⁹ *Id.*

²⁰ *Id.* The women "were [all] involved in marital therapy, either at the State University of New York at Stony Brook or one of the Suffolk County mental health centers." *Id.*

²¹ *Id.* at 695-96.

²² *Id.* at 698-99.

²³ Judith Martin, *Maternal and Paternal Abuse of Children*, in THE DARK SIDE OF FAMILIES 293, 293 (David Finkelhor et al. eds., 1983). Martin points out that "study of male abusive parents has been neglected." *Id.* She concludes that "[m]ore information is needed concerning virtually every quality of paternal abuse." *Id.* at 299.

B. EMOTIONAL AND PSYCHOLOGICAL HARM TO CHILDREN CAUSED BY DOMESTIC VIOLENCE

By focusing on parental rights rather than on the best interests of the child, courts frequently fail to limit child visitation by a parent who has abused the other parent. The substantial body of research showing the impact of domestic violence on children, however, suggests that judges should take spouse abuse into account in making custody and visitation decisions. Children suffer emotional and psychological harm not only when they are victims of abuse, but also when they witness the abuse of one parent by another and when they live in a violent home without witnessing abuse. This section reviews the studies analyzing this harm.

Numerous studies demonstrate a connection between a child's exposure to abuse in the home and that child's later development of emotional and psychological problems. A 1975 study of fifty families seen in a general medical practice in England concluded that "children who observed their parents in violent conflict reacted with antisocial behavior and psychiatric problems," and are in danger of physical harm.²⁴ Between February 1977 and March 1979, Beatrice Porter and K. Daniel O'Leary conducted a study of sixty-four children at the Psychological Center of the State University of New York at Stony Brook.²⁵ Using standardized measures of child behavior problems, their research showed "a significant relationship between marital discord and behavior problems in boys...."²⁶

In another study, Alan Rosenbaum and K. Daniel O'Leary examined fifty-three children treated in a mental health clinic.²⁷ Using "two appropriate comparison groups" and the standardized measures of child behavior problems, they showed that 70% of the children whose mothers had been victims of spouse abuse had "Conduct Disorder" scores "above the mean for a normative sample, while 34% of the children from satisfactory marriages had scores that exceeded the normative mean."²⁸ The investigators concluded that, " although not all children of spouse-abusing couples will develop either conduct or personality problems, such children appear to have some increased vulnerability to these difficulties."²⁹

Elaine Hilberman, a psychiatrist, and Kit Munson, a psychiatric nurse, studied sixty battered women referred to them by a medical clinic for psychiatric evaluation.³⁰ In twenty of the families the children were physically or sexually abused, or both.³¹ The study demonstrated that "whether the children were themselves battered or were onlookers to parental violence, they were deeply affected by the climate of violence in which they lived."³² Reviewing the medical charts of the children, Hilberman and Munson found that "evidence of somatic, psychological, and behavioral dysfunction was documented for a third of the 209 children, and was suspected for many more."³³ These problems started when the children were very young and continued through adolescence, during which boys showed aggressive behavior and girls showed increasing somatic symptoms and passivity.³⁴

Peter Jaffe, David Wolfe, Susan Wilson and Lydia Zak published a study showing that boys who were exposed to violence between their parents and boys who were abused themselves had far greater behavioral

²⁴ Montague B. Levine, *Interparental Violence and Its Effects on the Children: A Study of 50 Families in General Practice*, 15 MED.SCI. & L. 172, 175 (1975).

²⁵ Beatrice Porter & K. Daniel O'Leary, *Marital Discord and Childhood Behavior Problems*, 8 J.ABNORMAL CHILD PSYCHOL. 287 (1980).

²⁶ *Id.* at 292-93.

²⁷ Rosenbaum & O'Leary, *supra* note 17, at 694-95.

²⁸ *Id.* at 698.

²⁹ *Id.*

³⁰ Elaine Hilberman & Kit Munson, *Sixty Battered Women*, 2 VICTIMOLOGY 460 (1978).

³¹ *Id.* at 463.

³² *Id.* These children "were witnesses to drunken rages, savage assaults, strangling, shooting, stabbing, and rape." *Id.*

³³ *Id.*

³⁴ *Id.*

problems than a comparison group of boys from the same community who had no known exposure to family violence.³⁵ The results also showed that 90% of the boys who were abused and 75% of the boys whose parents were abused, but only 13% of the boys with no known history of family violence, had behavior problem scores significantly above the normal for the Child Behavior Checklist.³⁶

Using the same Child Behavior Checklist, Liane Davis and Bonnie Carlson looked at sixty-six boys and girls, ages four to eleven, residing with their mothers in shelters for battered women.³⁷ These children were dislocated from their homes and witnessed violence against their mothers.³⁸ Half of the children had been abused themselves.³⁹ Davis and Carlson obtained the same results as Jaffe, Wolfe, Wilson and Zak: both witnessing violence in the home and being a victim of family violence result in significantly more behavioral problems for children than the children in the established norm.⁴⁰

These results are also supported by a study using another child behavior assessment instrument. Michael Hershorn and Alan Rosenbaum selected two groups of women referred for marital therapy at community mental health clinics.⁴¹ One group consisted of victims of marital violence; the second consisted of women with nonviolent but discordant marriages.⁴² A control group from the same community was selected from the telephone book and screened for satisfactory marriages with no history of marital violence.⁴³ The study employed the Behavior Problems Checklist,⁴⁴ on which the women reported their children's behavior. The results were clear: children who lived in families with marital discord and marital violence had significantly more behavioral and emotional problems than children from families in which their parents had satisfactory marriages with no violence.⁴⁵

Studies show that violence by one parent against another harms children even if they do not witness it.⁴⁶ A chaotic environment in which the mother is injured and anxious, and the father is volatile and enraged disrupts the routine and nurture children need. Children raised in these environments display stress symptoms, suffer developmental delays and somatic disorders, exhibit antisocial behavior, and have poor coping mechanisms.⁴⁷ They become frightened and distressed when they see the resulting bruises and abrasions.⁴⁸ Furthermore, children may model their parents' violent behavior.⁴⁹

Not surprisingly, children who exhibit the most severe problems are those who are both witnesses and victims

³⁵ Peter G. Jaffe et al., *Similarities in Behavioral and Social Maladjustment Among Child Victims and Witnesses to Family Violence*, 56 J.ORTHOPSYCHIATRY 142, 144-45 (1986).

³⁶ *Id.* at 145. The Child Behavior Checklist is "a well-normed instrument designed to be completed by parents, which provides individual profiles on the behavioral problems and social competencies of children aged 4 through 16." Liane V. Davis & Bonnie E. Carlson, *Observation of Spouse Abuse, What Happens to the Children?*, 2 J.INTERPERSONAL VIOLENCE 278, 282 (1987).

³⁷ Davis & Carlson, *supra* note 36, at 281.

³⁸ *Id.*

³⁹ *Id.* at 283.

⁴⁰ *Id.* at 283-87.

⁴¹ Michael Hershorn & Alan Rosenbaum, *Children of Marital Violence: A Closer Look at the Unintended Victims*, 55 AM.J.ORTHOPSYCHIATRY 260, 262 (1985).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 264-65.

⁴⁶ See, e.g., PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN 39-44 (Developmental Clinical Psychology and Psychiatry Vol. 21, 1990); Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND.L.REV. 1041, 1055-58 (1991).

⁴⁷ JAFFE ET AL., *supra* note 46, at 67-69.

⁴⁸ *Id.* at 69.

⁴⁹ *Id.* at 56-60.

of abuse. In a study conducted by psychologist Honore Hughes, children and their mothers were asked to provide information concerning the children's feelings of anxiety, depression, and self-esteem.⁵⁰ Children living with their mothers in a shelter for battered women were divided by age groups and subdivided into two categories: those who had witnessed their mothers being beaten and those who had both witnessed such abuse and were abused themselves.⁵¹ A comparison group was recruited through the media, and screened to exclude marital violence and child abuse.⁵² Women in the comparison group were living with male partners and were matched demographically with the shelter mothers.⁵³

Children who had both witnessed the abuse of their mothers and who were abused themselves had the most behavioral and emotional problems.⁵⁴ Children who witnessed the abuse of their mothers had fewer problems.⁵⁵ Children in the comparison group had the fewest problems.⁵⁶ Mothers' reports were consistent with those of the children.⁵⁷

The harm suffered by children who witness abuse manifests itself in numerous ways, ranging from physical symptoms to behavioral problems. Sociologist Mildred Daley Pagelow surveyed and interviewed 350 battered women between 1976 and 1980.⁵⁸ Pagelow's study included 306 mothers who had a total of 735 children.⁵⁹ She found that young children who witnessed violence in their homes showed insecurity through "clinging, crying, nervousness, or demanding to know where their mothers are and what they are doing at all times. Some seem to be susceptible to minor infections, colds, sore throats, bed wetting, insomnia or fitful sleep, and frantic play activities, others passively avoid group activities and games."⁶⁰ These symptoms cleared up soon after they arrived at a battered women's shelter. "The safety, security, supportive and nonviolent atmosphere of shelters seems to be the most effective 'medicine' for the vast majority of the young victims of violence."⁶¹ Pagelow also found that the children suffered pain, terror, and guilt because of the violence they observed.⁶²

Agnes Wohl and Bobbie Kaufman analyzed drawings by children living in a shelter for battered women and concluded that the children suffered from serious emotional disturbances, experiencing feelings of helplessness, powerlessness, fragmentation, depression, anger, and anxiety.⁶³ "The youngsters are frightened, sometimes terrified, often confused, and insecure. Their sense of self is poorly defined and their self-esteem is pitifully low."⁶⁴

Jane Pfouts, Janice Schopler, and Carl Henley studied a sample of 141 children who were not in shelters for battered women, but were from families in which child or spouse abuse was confirmed by child protective

⁵⁰ Honore M. Hughes, *Psychological and Behavioral Correlates of Family Violence in Child Witnesses and Victims*, 58 AM.J.ORTHOPSYCHIATRY 77, 80 (1988).

⁵¹ *Id.* at 79.

⁵² *Id.*

⁵³ *Id.* "Criteria for inclusion consisted of a) total family income less than \$15,000 a year, b) educational level of the mother roughly high school graduate or below, c) at least one child between the ages of 4 and 12 years living at home, and d) the mother was living with a male partner." *Id.*

⁵⁴ *Id.* at 82 Table 2.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 87-88. This increased the reliability of the results. *Id.*

⁵⁸ Mildred Daley Pagelow, *Children in Violent Families: Direct and Indirect Victims, in YOUNG CHILDREN AND THEIR FAMILIES* 47, 54 (Shirley Hill & B.J. Barnes eds. 1982).

⁵⁹ *Id.*

⁶⁰ *Id.* at 59.

⁶¹ *Id.*

⁶² *Id.* at 60.

⁶³ AGNES WOHL & BOBBIE KAUFMAN, *SILENT SCREAMS AND HIDDEN CRIES: AN INTERPRETATION OF ARTWORK BY CHILDREN FROM VIOLENT HOMES* (1985).

⁶⁴ *Id.* at 135.

service workers.⁶⁵ Of twenty-five children who had witnessed their mothers being abused by their fathers, 40% suffered anxiety and 48% suffered depression.⁶⁶ "Fifty-three percent acted out with parents, and 60 percent acted out in their interactions with siblings."⁶⁷ The authors concluded:

Children who saw abuse directed toward their mothers appear to suffer somewhat more emotional turmoil and, in addition, had a tendency to model the violent behavior of their parents. This sketch of child witnesses within violent families is especially disturbing because the social workers who reported the information often understated the bystander's case. Because the importance of protecting those who are abused overshadows all other considerations, social workers usually had less contact with and less information about the children who witnessed the violence.⁶⁸

The tendency of child witnesses to model violent behavior is well established. In one important study, sociologist Joan McCord kept track of 253 men who participated in a delinquency prevention program in "deteriorated urban areas of eastern Massachusetts" between 1939 and 1945.⁶⁹ Between 1976 and 1980, 130 of the men participating in the earlier study were interviewed.⁷⁰ McCord divided the men into three groups based on the way their families behaved.⁷¹ "Aggressive families" were characterized by open parental conflict or physical aggression by one parent--yelling, throwing objects, or injuring someone.⁷² "Punitive families" were those in which neither parent was generally aggressive and there was little parental conflict, but at least one of the parents used corporal punishment on the subject of the current study.⁷³ In "nonaggressive families," neither parent was aggressive, parental conflict was scarce, and corporal punishment was not present.⁷⁴ McCord summarized her findings as follows:

The study showed, as have many others, a tendency for aggressive families to produce criminals.

Generalized parental aggressiveness seemed more criminogenic than aggression in the form of punitive discipline.... [M]en reared in a generally aggressive atmosphere were more likely than those reared by punitive parents to be convicted for Index crimes [as juveniles as well as adults].⁷⁵

These results are consistent with those of other studies discussed here. Men raised in violent homes exhibit antisocial and aggressive behavior.

⁶⁵ Jane H. Pfouts et al., *Forgotten Victims of Family Violence*, SOCIAL WORK, July, 1982, at 367, 368.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Joan McCord, *Parental Behavior in the Cycle of Aggression*, 51 PSYCHIATRY 14, 16 (1988).

⁷⁰ *Id.* at 18. The interviewers were male and had no background information about the men. *Id.* The interviewers questioned the men about their treatment records, families, jobs, education, health, behavior, and attitudes. *Id.* Criminal records were searched for all of the men. *Id.* at 18-19.

⁷¹ *Id.* Counselors collected the underlying data by visiting the men's homes twice a month and filing reports describing family behavior.

⁷² *Id.* at 16-17.

⁷³ *Id.* at 17.

⁷⁴ *Id.*

⁷⁵ *Id.* at 20-21. "Index" crimes are reported by the Federal Bureau of Investigation and include larceny, auto theft, burglary, assault, attempted rape, rape, kidnapping, attempted murder, or murder. *Id.* at 18; see FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1991 (1992).

Joan McCord used the same data base to assess the long-term effects of abuse and neglect in childhood.⁷⁶ When McCord looked at these men forty years later, she found that "close to half (45%) of the abused or neglected boys had been convicted for serious crimes, became alcoholics or mentally ill, or had died when unusually young."⁷⁷ Moreover, the study suggests that child abuse and neglect tend to produce juvenile delinquency. The effects of abuse and neglect seem to be greatest among those who have aggressive parents and were aggressive themselves.⁷⁸

Some children who are exposed to violence in their homes experience delayed development. In a major study of 435 battered women, Lenore Walker found that 87% of the women reported that their children were aware of the violence in their homes.⁷⁹ Walker cites a study that showed pre-school children suffered the most disruption from the violence and showed obvious developmental delays from living in violent homes.⁸⁰ Walker concluded that "children who grow up in violent homes show its effects in their overall socialization process as well as in mental health symptoms."⁸¹ Walker reported in an earlier book describing battered women and their families that instead of expressing anger or acknowledging tension, children aware of family violence stare, transfixed, reacting in terror whenever they hear screaming or loud noises.⁸² When they are older, these children report feelings of guilt because they did not attempt to intervene.⁸³ Indeed, they often believe they are the cause of the violence.⁸⁴

Children exposed to parental spouse abuse exhibit negative effects which persist into their young adult years. Barbara Forsstrom-Cohen and Alan Rosenbaum, trying to develop a theory concerning the effects on children of violence by one parent against the other, interviewed college students to determine the long-term behavioral and emotional effects of viewing parental spouse abuse.⁸⁵ They divided the college students into three groups: students who had witnessed any physical violence by one parent against the other; students who reported marital discord but no violence by one parent against the other; and students "who characterized their parents' marriages as satisfactory and nonviolent."⁸⁶ All three groups were screened to exclude those who were victims of child abuse.⁸⁷ Forsstrom-Cohen & Rosenbaum conclude

that exposure to parental marital violence negatively affects the witnessing children, that these effects persist into young adulthood, and that males and females are differentially affected. Exposure to marital violence was associated with increased levels of anxiety for both males and females; however, only females showed elevated levels of depression and aggression.⁸⁸

The researchers believed they were testing long-term rather than concurrent effects of witnessing violence

⁷⁶ Joan McCord, *A Forty Year Perspective on Effects of Child Abuse and Neglect*, 7 CHILD ABUSE & NEGLECT 265 (1983).

⁷⁷ *Id.* at 270.

⁷⁸ *Id.*

⁷⁹ WALKER, *supra* note 1, at 59. This study was funded by the National Institute of Mental Health. *Id.* at xiii, 1-4.

⁸⁰ *Id.* at 63.

⁸¹ *Id.* at 64.

⁸² LENORE E. WALKER, *THE BATTERED WOMAN* 150 (1979).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Barbara Forsstrom-Cohen & Alan Rosenbaum, *The Effects of Parental Marital Violence on Young Adults: An Exploratory Investigation*, 47 J.MARRIAGE & FAM. 467, 468 (1985).

⁸⁶ *Id.*

⁸⁷ *Id.* at 469.

⁸⁸ *Id.* at 470. Students from nonviolent but discordant homes also suffered from heightened anxiety. *Id.* Thus, the researchers concluded that "marital discord rather than the exposure to violence may have accounted for" increased anxiety. *Id.*

because the men in the study reported an average of four years and the women in the study reported an average of seven years since they last witnessed parental violence.⁸⁹ That the women reported witnessing violence less recently than the men did not lessen the lasting impact on women, as they "showed the most negative effects."⁹⁰

Given the abundance of studies demonstrating the risk of harm facing children who are forced to remain in violent households, courts have a sound basis to protect them. Mildred Daley Pagelow concludes:

That the state should act "in the best interests of the children" is a widely accepted legal dictum. Ironically, the focus often shifts from the rights of children to nonviolent lives, to a focus on parental (paternal) rights when abused mothers attempt to separate from their abusers or to terminate their violent marriages in the hope of building violence free lives for themselves and their children.⁹¹

Certainly, there is a "a flood of reports" showing that children are aware of violence in their homes and that domestic violence is harmful both directly and indirectly.⁹² Nevertheless, it is the practitioner's burden to move beyond allegations of domestic violence and present evidence of the danger.

II. EFFICACY OF BATTERERS TREATMENT PROGRAMS

Many published studies indicate that educational or treatment programs for domestic violence offenders do not succeed in stopping the violence. Nevertheless, judges routinely accept a violent person's agreement to attend one of these programs as the equivalent of a ceasing of violent behavior, as proof of remorse, and as acceptance of responsibility for the violence. This section argues that, in basing their decisions on these unjustified assumptions, judges grant custody and order unsupervised visitation in situations in which violent men continue to pose a risk of harm to children and their mothers.

Most early empirical studies of wife abusers were simplistic, and cited monocausal explanations for violence: abuse in childhood, substance abuse, socioeconomic factors, personality disorders, or mental illness.⁹³ These studies offered little aid in developing an appropriate response to cases of wife abuse.⁹⁴ They ignored the context in which battering occurs, the perceptions and experiences of people in these situations, the family environment and dynamics of those involved, the victim's continuous terror, and the community's tolerance for family violence.⁹⁵

Any useful theory of woman battering must incorporate social and familial contexts as well as the perspectives of spouses.⁹⁶ According to Jeffrey Edleson, Zvi Eisikovits, and Edna Guttmann, an understanding of battering and the men who batter begins with the recognition that "the most damaging and unbearable aspect of being a battered woman seems to be life in an environment where terror reigns."⁹⁷ Moreover, the authors argue that "

⁸⁹ *Id.* at 471.

⁹⁰ *Id.*

⁹¹ Mildred Daley Pagelow, *Adult Victims of Domestic Violence, Battered Women*, 7 J.INTERPERSONAL VIOLENCE 87, 107 (1992) [hereinafter *Adult Victims*]; see also Mildred Daley Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 MEDIATION Q. 347 (1990).

⁹² *Adult Victims*, *supra* note 91, at 106.

⁹³ See, e.g., Jeffrey L. Edleson et al., *Men Who Batter Women*, 6 J.FAM.ISSUES 229, 241 (1985) (stating that the studies were "oriented toward the search for linear relationships among isolated variables and simple, monocausal explanations").

⁹⁴ See *id.* at 240-41.

⁹⁵ *Id.* at 241-44.

⁹⁶ *Id.* at 231 (arguing for a more comprehensive contextual study of woman battering).

⁹⁷ *Id.* See also WALKER, *supra* note 82 (study based on in-depth interviews with battered women); MILDRED

battering is not just overt physical and verbal behavior of a man toward a woman. It is living with a constant sense of danger and expectation of violence. These together bring about terror that is slowly constructed and eventually fills the woman's environment."⁹⁸

A common misperception is that women in abusive relationships should be studied because they possess characteristics that caused them to be abused.⁹⁹ In a recent study evaluating potential "risk markers" of husband to wife violence, Gerald Hotaling and David Sugarman describe their search for attributes of women that make them susceptible to battering as "futile."¹⁰⁰ They stated: "There is little current evidence that women with particular personality characteristics contribute to their own victimization."¹⁰¹

Hotaling and Sugarman found no consistent evidence that any behaviors, attitudes, demographic characteristics, or personality traits of battered women are helpful in predicting which women will be victimized by husband or male partner violence.¹⁰² Personality and symptomatic problems in women are not the cause of abuse; they are the result.¹⁰³ Low self-esteem, high anxiety, psychosomatic illness, and alcohol and prescription drug abuse all develop in response to chronic victimization.¹⁰⁴ As Hotaling and Sugarman observe, "the most influential victim precipitant is being female."¹⁰⁵

Hotaling and Sugarman's study supports the theory that "[t]he victimization of women may be better understood as the outcome of male behavior."¹⁰⁶ Noting that a great majority of men who batter their wives either witnessed or experienced violence during childhood, and that spouse abusers also exhibit a broad pattern of violence against other family members and strangers, Hotaling and Sugarman conclude that the characteristics associated with male abusers offer greater utility for assessing the risk of husband to wife violence.¹⁰⁷ Understanding the cause of wife abuse requires a close examination of the male abuser.

Few studies of the characteristics of male batterers exist. The best available information regarding the likelihood of violence continuing once it has begun is from research on aggressive behavior.¹⁰⁸ Studies on aggressiveness often conclude that "once a characteristic style of aggressive responding develops, it seems to

DALEY PAGELOW, *WOMAN-BATTERING: VICTIMS AND THEIR EXPERIENCES* (1981) (study based on in-depth interviews with 350 battered women); R. EMERSON DOBASH & RUSSELL P. DOBASH, *VIOLENCE AGAINST WIVES* (1979) (study based on in-depth interviews with 109 battered wives and a review of 12,000 criminal court cases in Glasgow, Scotland).

⁹⁸ Edleson et al., *supra* note 93, at 231-32.

⁹⁹ Gerald T. Hotaling & David B. Sugarman, *An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge*, 1 *VIOLENCE & VICTIMS* 101, 111 (1986).

¹⁰⁰ *Id.* at 120.

¹⁰¹ *Id.* at 111.

¹⁰² *Id.* at 106-11. Hotaling and Sugarman found one factor consistently associated with being a victim of spouse abuse: witnessing violence in the wife's family of origin. *Id.* at 106.

¹⁰³ *Id.* at 118.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 118. *Cf.* DIANA E.H. RUSSELL, *RAPE IN MARRIAGE* 169-89 (1982) (concluding that focusing on characteristics in women is inappropriate).

¹⁰⁷ *Id.* at 119-20. Hotaling and Sugarman's research further reveals that there is no clear causal connection between psychopathology and wife beating. *Id.* at 118. Although they found studies showing that batterers have many similarities to men with borderline and antisocial personality disorders, Hotaling and Sugarman could not find "direct evidence" that wife batterers have clinical character disorders to a greater extent than typical men who do not beat their wives. *Id.*

¹⁰⁸ *See* Edleson et al., *supra* note 93, at 232-41 (surveying and criticizing some studies on aggressive behavior).

persist."¹⁰⁹ Once established, aggressive behavior remains remarkably stable across time, situations, and even generations within a family.¹¹⁰ This research is relevant because few studies of group programs for wife batterers address the deeply entrenched nature of aggressive behavior or the extent to which threats continue after physical abuse stops.¹¹¹ In the context of formerly physically violent relationships, threats are sufficient to maintain an atmosphere of terror.

The results of the aggressiveness studies coupled with studies of men who completed treatment programs indicate that treatment programs for wife batterers are not successful in eliminating abuse.¹¹² Thus, courts and helping professionals have misplaced their reliance on these programs. The results of a study conducted by Adele Harrell are telling:

Contrary to expectations that treatment would reduce violence, a significantly smaller proportion of offenders in treatment programs abstained from physical aggression: the prevalence of cessation from physical aggression was 57 percent for the treated offenders, compared to 88 percent of those not ordered to treatment.¹¹³

"Threats stopped in about half (47%) of the cases, regardless of whether the offender attended treatment,"¹¹⁴ but psychological abuse occurred at least once in all cases across the treatment period, with treated cases averaging only slightly fewer incidents of psychological abuse than non-treated cases (2.6 and 2.7 incidents per month, respectively).¹¹⁵ Other studies support Harrell's finding that threats continue after treatment.¹¹⁶

Harrell also found that the victims of men who submitted to treatment programs called the police for assistance more often, both during the treatment program and in the year that followed than did the victims of men not ordered to undergo treatment.¹¹⁷ Harrell believes this increase may be explained by a "greater willingness on the part of victims of treated offenders to seek assistance from police when subsequent incidents occurred. The court-required treatment of offenders may have convinced the victim that the police and courts were willing to act on her behalf."¹¹⁸ These victims had proof that treatment had not worked to stop their assailants' violence. Furthermore, decreased violence by the treated men is not enough; any continued violence is sufficient to determine program failure for this group.¹¹⁹

¹⁰⁹ L. Rowell Huesmann et al., *Stability of Aggression Over Time and Generations*, 20 DEVELOPMENTAL PSYCH. 1120, 1131 (1984) (22 year study of 600 subjects concluding that a child who is among the most aggressive of his peers at age eight is likely to be among the most aggressive of that group at age 30).

¹¹⁰ *Id.* at 1133.

¹¹¹ Jeffrey L. Edleson & Roger J. Grusznski, *Treating Men Who Batter: Four Years of Outcome Data from the Domestic Abuse Project*, 12 J.SOC.SERVICE RES. 3, 16-21 (1988).

¹¹² *Id.* at 21-22 (suggesting that treatment programs may not be successful in permanently eliminating domestic violence).

¹¹³ ADELE HARRELL, EVALUATION OF COURT-ORDERED TREATMENT FOR DOMESTIC VIOLENCE OFFENDERS 65 (1991) (Project Report, The Urban Institute, Washington, D.C.) (comparing 81 men who completed one of three group treatment programs after being ordered to do so by a court with 112 men who had been to court but were not ordered to enter treatment).

¹¹⁴ *Id.* at Summary, 5.

¹¹⁵ *Id.*

¹¹⁶ See Edleson & Grusznski, *supra* note 111, at 21; L. KEVIN HAMBERGER & JAMES E. HASTINGS, SKILLS TRAINING FOR TREATMENT OF SPOUSE ABUSERS: AN OUTCOME STUDY, 128 (1988) (finding evidence of continued psychological abuse after treatment program).

¹¹⁷ HARRELL, *supra* note 113, at Summary, 5.

¹¹⁸ *Id.*

¹¹⁹ See Edleson & Grusznski, *supra* note 111, at 20 (refusing to ask in follow-up interviews whether the amount of violence decreased after a husband's treatment because the authors believed that any violence after treatment was unacceptable).

Harrell was not able to identify those offenders particularly likely to benefit from treatment: "Factors previously related to spouse assault such as the offenders' history of violence, childhood exposure to violence, criminal history, alcohol or drug involvement, employment status, and marital status were not consistently related to treatment effectiveness in reducing the prevalence and frequency of violence."¹²⁰

Another indication that reliance on treatment programs is unjustified is that participation in these programs improves neither victim safety (as measured by injuries to victims) nor victim perception of safety.¹²¹ This lack of actual or perceived improvement in safety is foreseeable given the failure of the treated offenders to alter their normative beliefs about the use of violence against wives, as measured in post-treatment tests.¹²² Harrell concludes that

There was no discernable deterrent effect of treatment participation, despite its educational value in conveying an understanding of the consequences of violence. This outcome suggests that offenders were well aware that the risk of facing consequences for future violence from the courts and police, as well as from acquaintances, was relatively low.¹²³

As discussed above, evidence that treatment programs are unsuccessful abounds. Studies lauding offender treatment programs¹²⁴ are flawed for several reasons. Judges tend to order treatment for offenders who are "more likely to be married to the victim, less likely to have a prior criminal record, and less likely to be unemployed," because of expressed judicial views that "batterer treatment is more appropriate for first-time offenders, those with stable ties to the community, and those likely to continue in a relationship with the victim-offenders thought most likely to benefit from treatment."¹²⁵ These factors distort reports of treatment effects in a positive direction.¹²⁶ Those who are ordered to undergo treatment have support and thus a greater incentive to cease battering than those not-so ordered.

Moreover, most of these studies fail to consider the absence of violence in the follow-up period, the periodic nature of wife beating, the impact of arrest or court action, or the effect of separation from the former partner. The reported success of these programs must be questioned because the follow-up periods were often too short to account for those who are violent a few times each year or those who are temporarily without partners.¹²⁷ Short evaluation periods do not take into account the fact that violence varies over time and in different situations. Longer follow-up periods of two to five years may be necessary to correct for these variables.¹²⁸

Arguably, treatment programs designed to stop wife beating per se are misdirected because the prevalence of physical violence toward women in most societies may lead to the conclusion that it is "normal" behavior. David Levinson analyzed anthropological studies of ninety societies to test the cross-cultural validity of the

¹²⁰ HARRELL, *supra* note 113, at Summary, 7.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See, e.g.*, Edleson & Grusznski, *supra* note 111, at 21-22 (study indicating that treatment has some success in eliminating violence).

¹²⁵ HARRELL, *supra* note 113, at Summary, 3.

¹²⁶ *Id.* at Summary, 9. *See also* Huey-tyh Chen et al., *Evaluating the Effectiveness of a Court Sponsored Abuser Treatment Program*, 4 J.FAM.VIOLENCE 309, 321 (1989) (finding that empirical evidence indicates that the success of court-sponsored abuser treatment programs is far from clear).

¹²⁷ *See, e.g.*, Richard M. Tolman & Larry W. Bennett, *A Review of Quantitative Research on Men Who Batter*, 5 J.INTERPERSONAL VIOLENCE 87, 110-12 (1990) (noting that follow-up periods in studies often are insufficient to reveal recidivism); *cf.* Edleson & Grusznski, *supra* note 111, at 22 (arguing that any reports of threats or actual violence after treatment are unacceptable and that success of a treatment program should not depend on a statistical decrease in violence, since even sporadic violence is intolerable).

¹²⁸ Daniel G. Saunders, *Issues in Conducting Treatment Research with Men Who Batter*, in COPING WITH FAMILY VIOLENCE 145, 147 (Gerald T. Hotaling et al. eds., 1988).

most common theories of family violence and to identify the correlates of wife beating.¹²⁹ He discovered that wife beating occurs with considerable frequency in 84% of those societies.¹³⁰ He found that, " while no family member is entirely immune from family violence, adult women are most likely to be the victims while adult men are most likely to be the perpetrators and least likely to be the victims."¹³¹ He also found that "w omen are more likely than any other category of family members to suffer severe and debilitating injuries," usually at the hands of their husbands.¹³² Some inferred that because wife beating is so common, it must be considered normal behavior.¹³³ Why should there be a treatment program to help men cease a "normal" behavior?

Unless treatment programs address these issues and incorporate victim notification and protection into their practice, treatment programs will continue to increase the risks to battered women by creating false expectations of change and safety. These expectations can cause women to remain with or return to live with dangerous men. Children of wife batterers face similar risks. Until treatment programs improve, however, practitioners, judges, and other professionals must acknowledge that wife batterers pose a significant risk to their families even after participating in a treatment program.

III. NEW YORK CASES AND PRACTICE SUGGESTIONS

Historically, courts have not given due weight to evidence of domestic violence when making child custody and visitation decisions.¹³⁴ Nevertheless it is the family law practitioner who must present compelling evidence explaining the dangers of domestic violence and its relevance to the case before the court. This Part offers suggestions for family lawyers to help them ensure that courts have the evidence concerning the effects of domestic violence when making decisions regarding child custody and visitation.

The Family Violence Project of the National Council of Juvenile and Family Court Judges proclaims that "[f]amily violence is a significant factor which must be considered when deciding custody and visitation matters."¹³⁵ The Project urges that supervised visitation programs should be available to everyone, not only because violence by one parent against another leads to a long-lasting emotional impact on children, but also because those who do not take responsibility for their violent behavior are likely to commit future violence.¹³⁶ Restriction or curtailment of visitation would protect children from continued exposure to violence against their mother's or against their father's subsequent companions or spouses as well as from direct victimization.¹³⁷

Prior to 1985, there were four reported New York appellate decisions concerning the relationship between custody, visitation, and domestic violence. Since 1985, the New York appellate and trial courts have rendered thirteen decisions holding that violence by one parent against the other is relevant to the issues of custody and visitation. Although this increase shows a trend to give greater weight to evidence of domestic violence in

¹²⁹ DAVID LEVINSON, FAMILY VIOLENCE IN CROSS-CULTURAL PERSPECTIVE (Frontiers of Anthropology Vol. 1, 1989).

¹³⁰ *Id.* at 82.

¹³¹ *Id.* at 81.

¹³² *Id.*

¹³³ *Cf.* R. EMERSON DOBASH & RUSSELL P. DOBASH, WOMEN, VIOLENCE & SOCIAL CHANGE 4 (1992) (quoting one woman as saying, "I hid what was happening to me from everyone.... I thought I should ... accept my lot as being part of marriage....").

¹³⁴ In recent years, three legal commentators have criticized courts for failing to regard spouse abuse as dispositive (or even relevant) to custody and visitation determinations. See Ilona M. Besseney, *Visitation in the Domestic Violence Context: Problems and Recommendations*, 14 VT.L.REV. 57, 71- 73 (1989); Cahn, *supra* note 46; Linda R. Keenan, *Domestic Violence and Custody Litigation: The Need for Statutory Reform*, 13 HOFSTRA L.REV. 407, 408 (1985).

¹³⁵ *Family Violence: Improving Court Practices*, JUV. & FAM.CT.J., 1990/Vol. 41 No. 4, at 19.

¹³⁶ *Id.* at 20.

¹³⁷ *Id.*

custody and visitation cases, lawyers must present evidence on these issues to courts.

To ensure that the courts consider the effects of domestic violence, family lawyers should provide ample evidence of any violence and its impact on the child involved. In addition to presenting physical evidence and eye witness testimony, lawyers should also use expert testimony concerning the effects of the violence on the specific child. Attorneys should also seek the appointment of law guardians to appear before the court on the children's behalf. Although some courts remain blind to issues of domestic violence in custody and visitation cases, a thorough presentation of the evidence will make it difficult for a court to ignore the issue, and will at least provide an adequate record for appeal.

A. EVIDENCE OF DOMESTIC VIOLENCE

Well-documented evidence of domestic violence is essential. Parties asserting a history of domestic violence bear a great burden of proof, and the pressures on women who bear this burden must be recognized.¹³⁸ For example battered women cannot concede that fathers are good parents and at the same time expect the court to order supervised visits only. Nevertheless, battered women frequently do so concede because they fear retaliation if they take a strong stand,¹³⁹ or because they hope to escape a bad situation expeditiously. [FN140] Similarly, much evidence never comes before the court because an abused woman may be humiliated and reluctant to recount the severity of the abuse she has suffered.¹⁴⁰

To paint a picture of the atmosphere of terror and chaos in which women and children afflicted by domestic violence live, evidence of the violence and resulting physical and emotional injuries must be presented in fullest possible detail.¹⁴¹ Descriptions of how a woman feels during and after the beating are a necessary part of this portrait. Details of children's immediate and continuing reactions to the violence are also essential.

*Blake v. Blake*¹⁴² highlights the importance of presenting evidence¹⁴² of physical violence. The judge in the first trial focused on the mother's failure to provide evidence to corroborate her testimony that the father had beaten her. He stated:

I have no proof that there was ever a mark on this Petitioner [the mother], and I would have to say that there would appear to be many people who would have been willing to come in and testify to any marks, had there been any, so I have to make the inference that there were no marks, and that leads me to the conclusion that the burden of proof has not been sustained as to a family offense.¹⁴³

The mother testified on her own behalf, but her attorney did not call any witnesses from the battered women's shelter where the mother had been living, nor did he present the mother's hospital records. The judge consequently was unwilling to find that abuse had occurred, ignoring even the father's admission that he hit the

¹³⁸ Cahn, *supra* note 46, at 1088 (arguing that "[t]here is no widespread recognition of the incidence of violence or of the pressures facing individual women who, intimidated by the batterer and the legal system, may keep evidence of violence out of the courtroom.").

¹³⁹ Lenore E. Walker & Glenace E. Edwall, *Domestic Violence and Determination of Visitation and Custody in Divorce*, in DOMESTIC VIOLENCE ON TRIAL 127, 132 (Daniel J. Sonkin ed., 1987).

¹⁴⁰ Naomi H. Archer, *Battered Women and the Legal System*, 13 L. & PSYCHOL.REV. 145, 160 (1989)

¹⁴¹ See *Desmond v. Desmond*, 509 N.Y.S.2d 979, 984 (Fam.Ct.1986).

¹⁴² For a discussion of this terror and stress, see JAFFE ET AL., *supra* note 46, at 65 (discussing the "extremely elevated" stress in women in shelters, such as "somatic complaints, anxiety and insomnia, and depression")

¹⁴³ No. V-100-84 (Fam.Ct. May 2, 1984) [hereinafter *Blake I*], *rev'd and remanded*, 483 N.Y.S.2d 879 (App.Div.1984) [hereinafter *Blake II*], *on remand*, No. V-100-84 (Fam.Ct. Apr. 18, 1985) [hereinafter *Blake III*].

mother in the eye.¹⁴⁴ This admission alone could have provided a sufficient basis for the court to grant the mother an order of protection.

Regarding the custody issue, the first trial court also ignored the maternal grandmother's testimony that she had sufficient space for the mother and two children in the large home owned by the maternal grandparents.¹⁴⁵ The first trial court held that the mother "has no proper facilities" for the children, for the judge had "walked past" the shelter for battered women and did not believe it to be an adequate place to raise a child.¹⁴⁶ He further stated, "I have no testimony as to the adequacy of those facilities, and I am sure they wouldn't compare with a home."¹⁴⁷ The father testified that he lived with the children in a mobile home.¹⁴⁸ The court accepted this as better than the shelter and awarded joint custody, with physical custody to the father.¹⁴⁹

The Appellate Division, Fourth Department, reversed this award of joint custody primarily because the Family Court failed to "conduct a full and complete hearing."¹⁵⁰ Pending a new hearing, the Appellate Division granted sole custody to the mother and "liberal visitation privileges" to the father.¹⁵¹ It characterized the award of joint custody as inappropriate because "the parties here have demonstrated great antagonism toward each other."¹⁵²

Before another judge at the second custody trial, the mother testified, presented a witness from the battered women's shelter, and introduced her medical and mental health records into evidence.¹⁵³ There were also reports from the Jefferson County Department of Social Services child protective unit and a law guardian.¹⁵⁴ The second trial court found that "the respondent's abusive nature would quickly have a permanent effect upon the children."¹⁵⁵

The transcripts of the *Blake* trials demonstrate the need to "make a record" or provide "objective" evidence such as medical records, medical testimony, and third-party observation of the injuries. Even though the first trial record should have been sufficient, additional evidence was needed to overcome that court's bias against women and its reluctance to limit the fathers' contact with their children. Had the record been better at the first trial, the Appellate Division would have had a basis on which to enter its own custody decision, without ordering a second trial.

The first *Blake* trial decision illustrates the credibility problem women face when testifying about domestic violence. The first trial judge rejected the mother's testimony regarding domestic violence and ignored the father's admission that he hit the mother in the eye. This indicates that it is often necessary to inundate certain trial judges with evidence.

Appellate Division judges have recently rebuked trial courts for failing to give proper consideration to evidence of abuse. In *A.F. v. N.F.*,¹⁵⁶ the Appellate Division, Second Department, reversed the Family Court's award of custody to a father and its finding of contempt against the mother for violation of a prior visitation order for the father. The Appellate Division granted sole custody to the mother, vacated the contempt order,

¹⁴⁴ *Blake I*, Transcript at 78.

¹⁴⁵ *Id.*

¹⁴⁶ *Blake II*, 483 N.Y.S.2d at 880.

¹⁴⁷ *Blake I*, Transcript at 83.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 53.

¹⁵⁰ *Id.* at 82.

¹⁵¹ *Blake II*, 483 N.Y.S.2d at 880.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Blake III*, slip op. at 5, 7.

¹⁵⁵ *Id.* at 7.

¹⁵⁶ *Id.* at 6.

and remitted the case for a hearing to determine a visitation schedule for the father.¹⁵⁷ The Appellate Division noted that, prior to the Family Court custody proceeding, the mother had been granted an order of protection against the father.¹⁵⁸ The Appellate Division criticized the Family Court for failing to consider the mother's evidence of violence by the father. The appellate court stated: "While the evidence that the father has acted violently towards the mother does not automatically warrant denial of custody, this type of behavior, especially where it occurs in the presence of the child, does relate to the parties' respective abilities to assume the role of primary custodian."¹⁵⁹

In *Keating v. Keating*,¹⁶⁰ the Appellate Division, Second Department, reversed the trial court's change of custody from the mother to the father. The Appellate Division found that the decision was contrary to all of the evidence presented to the trial court.¹⁶¹ One specific example it cited was the trial court's failure to consider the father's assaults on the mother, stating: "Also of significance in balancing the parties' respective abilities to assume the role of primary custodian is the plaintiff's testimony that the defendant on numerous occasions had physically assaulted her."¹⁶² Although the father admitted striking the mother "in the face on at least one occasion in the presence of the parties' daughter,"¹⁶³ and the daughter told the trial judge "that she had seen her father hit her mother many times and had noticed bruises on her body," the trial court failed to consider that this behavior could affect "the children's emotional well-being and the defendant's father's fitness to assume the role of custodial parent."¹⁶⁴ This rebuke of the trial court for ignoring domestic violence indicates the progression of New York appellate decisions from paying mild to close attention to the issue.

In addition to providing evidence of abuse, legal counsel should present other proof that the parent is dangerous and uncontrollable when making a case for denial of visitation or for supervised visitation. If the parent has violated orders of protection or visitation repeatedly, was arrested more than once, or was found in contempt of court in the past, these records should be introduced into evidence. Expert testimony should be used to establish that arrest and short-term incarceration cause many wife batterers to cease their violence, and that those who are not so deterred are more dangerous.¹⁶⁵

Expert opinion evidence may also include research findings from the scholarly studies discussed above. Expert opinion evidence may be used to indicate that domestic violence is primarily male behavior against wives, that it is difficult to isolate the causes or predict which men will be abusive as there is no "profile" of a "wife beater" or typical personality of those who are violent toward their wives, or that spouse abuse is not the result of mental illness. Furthermore, expert opinion evidence may show that existing treatment programs have not proven effective, and, therefore, a promise to attend them cannot be equated with an assurance of safety for the woman or child.

B. EVIDENCE OF NEGATIVE EFFECT ON THE CHILD

Providing evidence of a father's violent behavior toward a mother is not always sufficient. Some courts require a plaintiff to show that the abusive conduct had a negative effect on the child. Thus, at the beginning of the case, the family law practitioner should request the court to appoint a law guardian to represent the child. A law guardian may help provide protection for the child by countering the tendency of battered women when they testify to minimize the violence committed against them. The law guardian can present the child's wishes

¹⁵⁷ 549 N.Y.S.2d 511 (App.Div.1989).

¹⁵⁸ *Id.* at 512-13.

¹⁵⁹ *Id.* at 513.

¹⁶⁰ *Id.* at 514.

¹⁶¹ 538 N.Y.S.2d 286 (App.Div.), *mot. for leave to appeal dismissed*, 74 N.Y.2d 791 (1989).

¹⁶² *Id.* at 288-91.

¹⁶³ *Id.* at 290.

¹⁶⁴ *Id.* at 291.

¹⁶⁵ *Id.*

to the court. Finally, the law guardian will have greater credibility with the court when presenting evidence of the impact of the violence on the child, and the child's fears of the violent father.

A law guardian might have provided the necessary correlation between spouse abuse and its effect on the child in *Janousek v. Janousek*,¹⁶⁶ wherein the Appellate Division, Second Department, remitted the matter for a hearing to "determine the terms and conditions of defendant's visitation and whether such visitation should be supervised."¹⁶⁷ The appellate court held that the trial court had "overreacted to defendant's conduct" during the court hearing by sua sponte modifying the divorce judgment to deny defendant father all visitation with the child.¹⁶⁸ The court stated that the appropriate action would have been to cite the defendant for contempt.¹⁶⁹

The appellate court based the remittitur on the custodial parent's testimony that the defendant had "continually harassed" her.¹⁷⁰ She testified that "defendant made threats of violence against her and her parents, that defendant assaulted her mother causing bruises on her mother's arm and that he had threatened to kidnap the child."¹⁷¹ The court stated: "It is well-settled that a noncustodial parent should have reasonable rights of visitation, and that the denial of such rights is such a drastic remedy that an order doing so should be based on substantial evidence that visitation would be detrimental to the welfare of the child."¹⁷²

The appellate court noted that the testimony of "plaintiff [mother] indicated that defendant was very hostile to plaintiff and her parents."¹⁷³ The testimony "further indicated that defendant at times acted in an obnoxious and immature manner and that he had a quick temper."¹⁷⁴ In spite of this summary of the testimony, the appellate court held that "an individual's personal characteristics cannot be relied on to deny visitation, unless there is a specific finding that the individual's conduct would be detrimental to the child's welfare."¹⁷⁵

In this case, the appellate court found that "no correlation was made between defendant's behavior toward plaintiff and her parents and his behavior toward the child."¹⁷⁶ The plaintiff herself stated that she "would have no problem with defendant's visitations if he would adhere to the schedule provided in the judgment of divorce."¹⁷⁷ The court placed great weight on this concession. No evidence was presented concerning the impact on the child of the father's conduct toward the mother and the grandparents. Without such evidence, trial and appellate courts do not have a sufficient basis on which to limit or deny visitation because of the strong preference for maintaining contact with the non-custodial parent.

Two recent trial court custody decisions demonstrate the need to present much direct and expert testimony to establish that domestic violence occurred and to show the harm or risk of harm to the children from the violent spouse. In *Antoinette M.*,¹⁷⁸ maternal grandparents seeking custody of their grandchild presented extensive evidence of violence by the father against the mother prior to the murder of the mother. At the time of the custody trial the father was a suspect in the mother's death. Psychiatrists and psychologists called by the maternal grandparents testified that the father suffered from a personality disorder and from poor self control. They opined that the father posed a risk to the child, and the court awarded custody to the maternal

¹⁶⁶ See *Symposium on Domestic Violence*, 83 J.CRIM.L. & CRIMINOLOGY 1 (1992).

¹⁶⁷ 485 N.Y.S.2d 305 (App.Div.1985).

¹⁶⁸ *Id.* at 308.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 307.

¹⁷² *Id.* at 307-08.

¹⁷³ *Id.* at 308 (citations omitted).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

grandparents.¹⁷⁹

In *Sklar v. Sklar*,¹⁸⁰ the defendant mother testified that the father threatened her, pushed her, called her names on numerous occasions, and choked her on one occasion. The mother in *Sklar*, in contrast to the grandparents in *Antoinette M.*, presented no other evidence on this issue. The court ordered that the mother leave Indiana--where she had moved with the two children in order to live with the maternal grandparents and return to Brooklyn.¹⁸¹ The court, however, never rejected the allegations of domestic violence as not being credible. Furthermore, the court made no reference to domestic violence when it listed the factors to be considered in custody determinations in the "Conclusions of Law."¹⁸²

From the court's review of the facts in *Sklar*¹⁸³, the mother failed to present any evidence that the father's violence harmed the children. Instead, she presented only her own testimony regarding the physical and emotional abuse she suffered. The outcome of this case shows that in addition to corroborating fact and expert opinion evidence, a party should provide the court with a trial brief describing the appellate cases. This approach shows the trial court that domestic violence is relevant to child custody and visitation as a matter of fact and as a matter of law.

These decisions turn on the strength of the evidence. Contrasting *Sklar* with *Serrano v. Serrano*¹⁸⁴ (both of which were decided by the same trial judge) makes this clear. In *Serrano*, the mother presented evidence of eighteen separate incidents of assault to show the seriousness of the violence of the father against her in the presence of the child.¹⁸⁵ Based on this evidence and expert testimony regarding the effect of the violence on the child, the court denied the father any visitation.¹⁸⁶

In *Farkas v. Farkas*,¹⁸⁷ a 1992 decision awarding custody to the mother, a New York trial court recognized the full extent to which a father's violent behavior could affect a child. The court determined that the evidence presented was sufficient to allow it to find that the father had repeatedly beaten and harassed the mother and presented perjured testimony regarding the violence toward the mother. Thus, the court limited the father's contact with the child to letters and tapes censored by the mother.¹⁸⁸ The court stated that this procedure was the only way to ensure that the father "will not attempt to pry" the mother's address from the child.¹⁸⁹ In addition, the court determined that the mother's

ability to function effectively as a custodial parent is of critical importance to [the child]. It would not be in the best interests of the child to impose upon [the mother] a visitation schedule that she would reasonably find stressful, difficult or dangerous to her physical well-being.¹⁹⁰

The court held that the violence against the mother endangered the child's emotional well-being, the child would witness the abuse of his mother by his father, and the father would provide a negative role model.¹⁹¹ The court stated that "a man who engages in the physical and emotional subjugation of a woman is a dangerous role

¹⁷⁹ N.Y.L.J., Mar. 4, 1993, at 35 (Sup.Ct.Queens County).

¹⁸⁰ *Id.*

¹⁸¹ N.Y.L.J., Dec. 17, 1992, at 27 (Sup.Ct.Kings County).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ N.Y.L.J., Jan. 21, 1986, at 17-18 (Sup.Ct.Kings County).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 18.

¹⁸⁷ N.Y.L.J., July 13, 1992, at 31 (Sup.Ct.New York County).

¹⁸⁸ *Id.* at 32.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

model from whom children must be shielded."¹⁹² This court's stance reflects a well-presented case which demonstrated the risk of harm to the child from continued domestic violence.

C. ADDITIONAL PRACTICE SUGGESTIONS

The foregoing notwithstanding, one should avoid presenting cumulative evidence on one's direct case.¹⁹³ Corroborating fact witnesses may be saved for the rebuttal case. Case law must be submitted at the beginning of the trial in a memorandum of law or trial brief. Judges respect well- presented evidence and a clear and persuasive argument in favor of a party's position.

In addition, counsel whenever possible should familiarize themselves with the judges deciding their cases. Counsel should be aware of the judges' reactions during the direct and defense presentation of the case and guide themselves accordingly. By providing the necessary evidence in a manner which is pleasing to the judge, practitioners will increase the likelihood that their cases will receive thoughtful consideration and positive results.

CONCLUSION

The cases reviewed show that New York courts will consider evidence of domestic violence in making custody and visitation decisions. The evidentiary burden to be met is a heavy one when one seeks to obtain custody of a child or to place limitations on child visitation by a parent who abuses the child's other parent. The attorney must come forward with substantial evidence to demonstrate the harsh reality of serious, repeated abuse. She must present photographs, medical records, and eyewitness testimony describing the acts of violence.

While New York appellate and trial courts will consider all the evidence and act to protect children and battered parents in making custody and visitation orders, legal issues cannot be overlooked. New York law includes a strong preference for the protection of a parent's visitation rights, even if that parent has a history of violence. This high hurdle is sometimes raised when female litigants' testimony is given diminished weight because of subtle biases regarding women's credibility that creep into the adjudication process.

A demonstrable impact on the child is an essential element in the court's determination of the best interests of the child. Eyewitness and expert testimony are needed unless the child is old enough to make his or her wishes known and has good reasons for them. An attorney or law guardian for the child should advocate the child's position and protect the child's interests. The careful lawyer must not trust or assume that the judge will make the seemingly obvious connection between spouse abuse and harm to the child; instead, she must marshal all of her evidence to present a convincing case.

¹⁹² *Id.*

¹⁹³ WILLIAM P. RICHARDSON, RICHARDSON ON EVIDENCE § 147 (10th ed. 1973); *Berry v. Jewish Bd. of Family & Children's Servs.*, 570 N.Y.S.2d 586, 588 (App.Div.1991) (holding that the trial court has discretion to exclude evidence as cumulative); *People v. Levy*, 589 N.Y.S.2d 1, 2 (App.Div.1992) (holding that trial court properly exercised its discretion in denying admission of evidence as cumulative); *Reome v. Cortland Memorial Hosp.*, 543 N.Y.S.2d 552, 554 (App.Div.1989).