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Cover Page Footnote

This Article was written by the "Failure to Protect" Working Group of Child Welfare Committee of New York City Inter-agency Task Force Against Domestic Violence, consisting of: Kim Ahearn, C.S.W., Social Worker, Domestic Violence Program, Barrier Free Living; Catherine Hodes, C.S.W., Social Worker Supervisor, Park Slope Safe Homes Project; Linda Holmes, Esq., NAPIL Fellow, Family Law Unit, South Brooklyn Legal Services; Lauren Shapiro, Esq., Director, Family Law Unit, South Brooklyn Legal Services; and Iris Witherspoon, Domestic Violence Program Coordinator, Lakeside Family & Children's Services.

CHARGING BATTERED MOTHERS WITH “FAILURE TO PROTECT”: STILL BLAMING THE VICTIM

*The “Failure to Protect” Working Group**

INTRODUCTION

Domestic violence harms children and families. In the past several years, efforts to recognize this harm have led to the passage of new state laws that allow for concurrent criminal and family court jurisdiction in domestic violence cases, mandate arrest in domestic violence situations and require courts to consider domestic violence as a factor in custody decisions.¹ Unfortunately, the heightened awareness of the harm domestic violence causes children has also resulted in a punitive policy towards battered women in the child welfare system. Increasingly in New York City, abuse and neglect proceedings are brought against battered mothers. Their children are removed from them, and the only allegation is based upon their children’s exposure to domestic violence. This approach has the result of discouraging battered mothers from seeking the services they need to escape domestic violence and often causes further harm to children and families.

Charging battered mothers with “failure to protect” implies that they are neglecting their children, because they did not prevent the violence. It places blame upon the mother, the primary target of the violence,² for the actions of the abuser. The mother is accused of exposing her children to violence when the exposure is caused

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1. See Family Protection and Domestic Violence Intervention Act of 1994, ch. 222, 1994 N.Y. Laws 786, amended ch. 224, 1994 N.Y. Laws 808. The chapters, which amend, *inter alia*, Family Court, Executive Law, Criminal Procedure Law and the Domestic Relations Law, were signed by Governor Cuomo on June 30, 1994.

2. See Howard Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L.Q. 357, 358 & n.8 (1995).

by its perpetrator. Ensuring full accountability of the batterer for his actions is one of the central recommendations of this article.

This Article intends to stimulate discussion among child protective workers and domestic violence advocates to work towards a policy and practice that does not punish battered mothers for the risks to their children's safety caused by the batterer. A policy that more effectively addresses the safety needs of both victims, the child and the battered mother is suggested. We recommend that the institutional players in this system — the Administration for Children's Services ("ACS"), the Legislature, the Judiciary and the Legal Aid Society's Juvenile Rights Division — create a structure that places culpability on the batterer and ensures safe and stable environments for children and non-abusive parents.

I. BATTERED MOTHERS FOUND LIABLE FOR "EXPOSING THEIR CHILDREN TO DOMESTIC VIOLENCE"

A. State Legislature Mandates Domestic Violence Factor in Custody and Visitation Cases

In 1996, the increased acknowledgment of the effects of domestic violence on children culminated in a dramatic change in the law. The New York State Legislature enacted a law requiring courts to consider domestic violence in deciding child custody and visitation cases. The law requires the "court to consider the effect of proven allegations of domestic violence upon the best interests of the child, together with such other factors and circumstances as the court deems relevant."³ Prior to the passage of this law, courts were not mandated to consider domestic violence and often did not unless a child had directly witnessed the violence.

The legislative history of the law emphasized the negative impact of exposure to domestic violence, even if the children did not witness it directly:

[s]tudies indicate that children raised in a violent home experience shock, fear, and guilt and suffer anxiety, depression, somatic symptoms, 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 and child abuse It is well documented that family violence is cyclical and self-perpetuating. Children who live in a climate of domestic violence learn to use physical violence as an outlet for anger and are more likely to

3. 1996 N.Y. Laws ch. 85 § 1; N.Y. DOM. REL. LAW § 240(1) (McKinney 1996).

use violence to solve problems while children and later adults Therefore, at the time the court must make judgments regarding the custody and visitation of children, great consideration should be given to the corrosive impact of domestic violence and the increase danger to the family upon dissolution and into the foreseeable future.⁴

Domestic violence advocates could never have foreseen that this law, intended to assist victims of domestic violence in disputed custody cases, would provide the underpinnings for finding battered mothers guilty of neglecting their children.

B. Statutory Definition of Neglect and Imminent Risk

The legal basis for finding battered mothers guilty of neglect is found in Article 10 of the Family Court Act (“FCA”). Domestic violence victims, whose children are removed because of the violence, are accused of failing to protect their children from danger and thus fall under the FCA’s definition of neglect. For a court to find neglect, the parent must have failed to exercise a minimum degree of care that resulted in physical, mental or emotional impairment or imminent danger of impairment to the child:

in supplying the child with food, clothing, shelter, education, medical, dental or optometrical or surgical care . . . ; or [] in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm or a substantial risk [of harm].⁵

In order for the court to find that a child was abused, the court must find that the parent (1) inflicted or allowed physical injury to be inflicted; (2) created or allowed to be created a substantial risk of physical injury; or (3) committed or allowed a sexual offense to be committed.⁶

To determine whether children should be removed from their parents, a more restrictive legal standard is applied by the court. In order to remove children, ACS must prove that removal is necessary to avoid “imminent risk” to the child’s life or health.⁷

4. 1996 N.Y. Laws ch. 85, at 121.

5. N.Y. FAM. CT. ACT § 1012(f)(i)(A)-(B) (McKinney 1998) [hereinafter FCA].

6. *See id.* § 1012(e)(i)-(iii).

7. *Id.* §§ 1022(a), 1027.

C. *In re Lonell J.*: A Non-Abusive Battered Mother Is Neglectful

The central decision that changed the landscape of child welfare cases involving domestic violence was *In re Lonell J.*,⁸ decided in May 1998 by the Appellate Division, First Department. The court held that the definition of neglect under the FCA was sufficiently broad enough to encompass exposure to domestic violence. The court relied on the legislative findings of the Family and Domestic Violence Intervention Act of 1994 that showed exposure to domestic violence harmed children. The appellate court found that in the abusive relationship because the mother stayed; she had “failed to exercise a minimum degree of care.”⁹

Without explicitly saying so, the appellate court appeared to hold the mother “strictly” liable for the actions of her abuser.¹⁰ Although she had done nothing but suffer the abuse of her partner, her failure to leave him made her neglectful.¹¹ The decision refers to the battering as a pattern of domestic violence between the parents and fails to recognize the significant difference between the roles of batterer and victim.¹²

The *Lonell J.* court looked at the history of domestic violence without evaluating the reasons why the mother may have stayed in the home. Nor did the court, in assessing whether the mother endangered her children, consider the steps taken by the mother to protect her children from the batterer. In fact, the mother made repeated calls to the police, obtained an order of protection and made an attempt to leave by going to her mother’s house.

Lonell J. is significant because it is the first case in New York State to hold that a non-abusing mother may be neglectful for failing to protect her children from witnessing domestic violence. An

8. 673 N.Y.S.2d 116 (App. Div. 1998).

9. *Id.* at 116-17. For an in-depth analysis of *Lonell J.*, see A. Stone & R. Rialk, *Backlash Against the Abused Victim in Custody Disputes*, 4 DOMESTIC VIOLENCE REP. 17, 26-27 (1998).

10. See *Lonell J.*, 673 N.Y.S.2d at 118-19.

11. See *id.* at 118 (accepting “domestic violence in the child’s presence as neglect”).

12. See *id.* The reasoning of *Lonell J.* has been adopted by the Second Department in *In re Deandre T.*, 676 N.Y.S.2d 666 (App. Div. 1998), where evidence showed that the father’s violent abuse of the mother caused impairment to mental and emotional health of the child. It has also been reaffirmed by the First Department in *In re Athena M.V.*, 678 N.Y.S.2d 11, 12 (App. Div. 1998), finding that “evidence of acts of severe domestic violence between respondents in the presence of their children is sufficient to show ‘as a matter of common sense’ that the children were in imminent danger of harm.”

earlier case, *In re Glenn G.*,¹³ showed the direction that the New York State Family Courts were headed in their treatment of battered women.¹⁴ In *Glenn G.*, a non-abusing battered mother was found neglectful for failing to protect her children from sexual abuse by the father.¹⁵ In her defense, she offered evidence that she suffered from battered woman's syndrome.¹⁶ The family court judge found that although she did suffer from battered women's syndrome, she neglected her children *per se* since she was unable to prevent the abuse.¹⁷ The court concluded that the neglect statute was a strict liability statute, and the reasons for the mother's failure to remove herself and the children from the batterer had no bearing on her culpability.¹⁸ As in the *Lonell J.* case, the court failed to consider whether the mother had taken steps to protect her children. This shift in the law in defining neglect therefore makes it easier for child protective agencies, such as ACS, to remove children and sustain charges of neglect made against non-abusing mothers.

D. Strict Liability for Battered Mothers

After five years in Alcoholics Anonymous, Nola's boyfriend, the father of her two children, began drinking again. The more he drank, the more violent he became. He flew into jealous rages and accused her of sleeping with other men. He would repeatedly shove her, hit her and once threw her downstairs. Nola, too terrified to leave him, tried to protect her children by taking them away before his violent outbursts. She took the children to her mother's or sister's house when he began to drink. Nola sought family counseling and repeatedly called the police, but he was never arrested. ACS filed a neglect petition based solely on the history of domestic violence. The children were removed without any assessment of the actions she had taken to protect her children.

13. 587 N.Y.S. 2d 464 (Fam. Ct. 1992).

14. For a more in-depth discussion of *Glenn G.*, see JAMES G. NEWMAN & FLORENCE ROBERTS, NATIONAL CTR. ON WOMEN AND FAMILY LAW, BATTERED WOMEN, BATTERED CHILDREN: AN EXAMINATION OF THE LEGAL FRAMEWORK OF CHILD PROTECTIVE PRACTICE IN DOMESTIC VIOLENCE CASES IN NEW YORK, WITH RECOMMENDATIONS FOR BATTERED WOMEN'S ADVOCATES 43-60 (1996).

15. See *Glenn G.*, 587 N.Y.S. 2d at 470 (stating that "[t]he neglect [] statute imposes strict liability").

16. See *id.*

17. See *id.*

18. See *id.*

Nola's story illustrates the importance of assessing the actions a battered mother takes to protect her children from exposure to domestic violence. The unfortunate results of *Lonell J.* are that battered mothers are automatically held responsible for the actions of the batterer and that ACS and family court judges do not conduct individualized assessments. A battered mother often knows firsthand the batterer's patterns of behavior. Armed with this knowledge, mothers like Nola may use several tactics to anticipate violent incidents and to keep the children safe. A battered mother's attempts to protect her children, to seek services or to leave her batterer are rarely considered. There are still strong prejudices against women who do not leave their batterers, and the players in the child welfare system routinely blame the victims of domestic violence for the harm to the children. These efforts by a mother, however, should be considered in evaluating whether a mother has placed her children at risk.

The neglect statute authorizes the court to make a neglect finding where the parent fails to exercise a minimum degree of care and that failure results or will result in physical, emotional or psychological impairment to the child. In domestic violence cases, by ignoring the efforts that battered mothers take to protect their children and the individual facts of their cases, the "minimum degree of care" standard has been improperly transformed into a strict liability standard.

II. BATTERED MOTHERS FACE REMOVAL OF THEIR CHILDREN AND COURT INTERVENTION

A. Trend Toward Removal Without Offering Appropriate Services

Service providers for victims of domestic violence report an increase in child protective involvement in domestic violence cases over the last several years. The removal of children from domestic violence victims is consistent with ACS's current practice of removing children rather than providing services to prevent foster care placement.¹⁹ Although these trends preceded the recent "failure to protect" case law, such case law has the potential to prompt removal in more domestic violence cases. Additionally, as the public

19. This is part of an overall trend in increased child protective removals. According to the Mayors' Management Reports for 1997 and 1998, there has been a 40% increase in the number of new children entering foster care, but no increase in the number of allegations of abuse and neglect. See *Children Go to Foster Care Needlessly, Suit Charges*, N.Y. TIMES, Jan. 30, 1999, at B3.

becomes more educated about the harmful effects of domestic violence on children, it is likely that there will be more reports to the State Central Registry in domestic violence cases and therefore more opportunities for removal.²⁰

When there is a report of neglect or abuse, ACS has responsibility to investigate the report to determine whether it is "indicated." If indicated, then ACS must determine whether the children are in imminent risk and should be removed from the home. In cases of domestic violence, deciding whether a report should be indicated against the victim and when the mother's inaction place the children at risk is complicated by the fact that there are no guiding standards. Since workers are not trained in how to assess domestic violence cases and what interventions are appropriate, ACS's response to domestic violence cases is inconsistent and depends on the particular worker or supervisor assigned to the case.

Children are too often removed before an effort is made to provide appropriate services to the mother. Although the law clearly requires ACS to offer services before removing children from their home,²¹ children are frequently removed in domestic violence cases without ACS first developing a safety plan for the mother and children and without offering preventive services for the family. ACS's failure to offer services and prevent removal is due to the lack of connections with domestic violence service providers, the insufficient number of preventive services programs and the bias on the part of ACS workers that battered mothers are unlikely to leave their batterers.

In some cases, ACS or the court requires mothers to obtain services, such as seeking shelter or an order of protection, which may not be safe or available options in a particular case. For example, many women are advised to go to a battered women's shelter, yet after the children are removed, it is almost impossible for a woman to leave her batterer to go to a domestic violence shelter. Without the children, they now have a much harder time accessing domestic

20. *See, e.g.*, Settlement Agreement at 10, *Marisol A. v. Giuliani* (S.D.N.Y. 1998) (No. 95 CV 10533). The recent settlement between the plaintiffs, a class of children in foster care or at risk of foster care placement, and the State's Office of Children and Family Services provides that the State Central Registry must accept reports in domestic violence cases even when no physical harm to children is claimed.

21. Prior to entering an order directing the temporary removal of a child, the court must determine whether reasonable efforts were made to prevent or eliminate the need for removal. *See* FCA §§ 1022, 1027 (McKinney 1998).

violence shelters.²² Domestic violence victims are often referred to preventive programs that are not familiar with crucial interventions for battered women and their children, such as making detailed personal safety plans. In some cases, ACS files a petition stating that the mother failed to accept offered services even though the services were inappropriate or she did not have sufficient time to access them.

When ACS files neglect petitions against the mother, ACS charges that the batterer and victim are equally culpable for the harm to the children. As in Nola's case,²³ ACS often files petitions where the only allegation against the battered mother is that the parents have "engaged in acts of domestic violence." These petitions do not describe how the mother failed to "exercise a minimum degree of care" as the statute requires and reflect ACS's policy of equally treating the batterer and victim at fault for exposing the children to domestic violence.

B. Instant Response Protocol

Another disturbing development is ACS's recent plan to increase the role of law enforcement in child protective cases. ACS's Instant Response Protocol, initially designed to ensure a coordinated response in cases of serious sexual and physical abuse, now includes cases of domestic violence.²⁴ According to a draft protocol explaining the expansion, both ACS and the police department would cross-refer cases of domestic violence where such intervention would be necessary.²⁵ This is a positive step to the extent that this collaboration will lead to holding the batterer accountable for his actions.

We have strong concerns, however, about the possible increased rate of arrest of battered mothers and removal of their children from them as a result of the increased role of law enforcement in child welfare cases involving domestic violence. We are also concerned that battered mothers will be less likely to seek domestic violence intervention if there is an increased risk that they will suffer arrest and the loss of their children to foster care. The Instant Response Protocol could lead to these outcomes if there is not

22. Most domestic violence shelters prioritize families with children because there are so few available beds.

23. See *supra* Part I.D.

24. See *Draft ACS/NYPD Domestic Violence Coordinated Response Pilot Interim Protocol*, Mar. 1999 (on file with authors). According to the protocol, the project will be implemented on a pilot basis in Manhattan North. See *id.*

25. See *id.*

clear guidance about the role of law enforcement and child protective workers in these cases and adequate training of child welfare workers about how to work with law enforcement. The current protocol does not define any criteria for when ACS should refer a case to the police or when the police should refer a case to ACS. Without a clear standard for when arrest or removal of children is appropriate, both police and child protective workers may err on the side of removing children rather than the batterer.

III. REMOVAL FURTHER HARMS CHILDREN AND DISCOURAGES WOMEN FROM SEEKING SERVICES

Removing children from the non-abusive mother's care often has severe and long-lasting effects on the family. Children who have witnessed abuse are already victimized by the feelings of helplessness from watching their mother suffer at the hands of the abuser. The children are struggling with anger, grief, anxiety and feelings of being responsible for the abuse and by removing them, they are victims again by their increased fear of abandonment.²⁶ Keeping the mother and children together as a family while addressing emotional and safety issues can reduce rather than intensify the trauma of the domestic violence to the mother and child.

Removing children from non-abusive battered mothers will discourage other battered mothers from seeking help. In Massachusetts, for example, the Department of Social Services found that its practice of identifying domestic violence as an indicator of child abuse without any corresponding training or clinical support resulted in both an increase in child abuse reports and a decrease in battered women seeking services.²⁷ When a mother mentions domestic violence to a mandated reporter, that reporter has an obligation to determine whether to file a report with the Central Registry. This policy of removing children from battered mothers can be interpreted to mean that any time a battered mother goes to a social worker, talks to her children's teacher, goes to her doctor or calls the police to report domestic violence, she may be placing the custody of her children in jeopardy.

The chilling effect of charging battered mothers with failing to protect their children is that they will be even more reluctant to reach out to law enforcement, social services and the courts for the

26. See AMERICAN PSYCHOLOGICAL ASS'N PRESIDENTIAL TASK FORCE ON VIOLENCE IN THE FAMILY, *VIOLENCE AND THE FAMILY* 102 (1996) [hereinafter APA].

27. See NATIONAL COUNCIL OF JUV. & FAM. CT. JUDGES, *FAMILY VIOLENCE: EMERGING PROGRAMS FOR BATTERED MOTHERS AND THEIR CHILDREN* 15 (1998).

help they need. Knowing that they may be investigated by child protective services, charged with neglect or lose their children to foster care, battered mothers, isolated and afraid, are more likely to remain in an abusive home so that they can remain with their children. Efforts to keep a mother and her children together while addressing emotional and safety issues will encourage mothers to come forward to seek needed services.

IV. SAFE OPTIONS AND SERVICES ARE NOT ALWAYS AVAILABLE

The many institutional players in the child welfare system lack an understanding of the realities and the difficult decisions that battered women face. The assumption of ACS caseworkers, law guardians, attorneys and family court judges is that safe options and services are available and that the battered woman should have left the relationship when the domestic violence began. There is little understanding of the fact that leaving itself is dangerous and there is a lack of social support, resources and safe options for women and children attempting to flee. Battered mothers' attempts to protect themselves and their children are routinely minimized and dismissed. In Susan Schechter's *Women and Male Violence*, she explains:

Battered women are not passive, rather, they engage in step-like, logical behavior as they attempt to stop the violence or leave. Not all of them are successful because the major variable, the violent man, is outside their realm of control. Staying, especially given the lack of resources and social supports for leaving, should never be read as accepting violence.²⁸

A. Physical Danger

Leaving the abuser or trying to restrain his behavior often increases danger to the survivor mother and children.²⁹ In fact, the most dangerous time for a woman and her children is *after* they have left the batterer. Studies reveal that it is during and after separation that the batterer is most likely to stalk, harass and even kill the mother. Battered women are well aware of the dangers of leaving due to the batterer's continual threats. If she takes these threats seriously, and statistics show that she should, then she may

28. SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE* 233 (1982).

29. See N.Y. COMM'N ON DOM. VIOLENCE FATALITIES, REPORT TO THE GOVERNOR 14 (1997) [hereinafter REPORT TO THE GOVERNOR].

conclude that it is safer for her and her children in the short term to stay in the relationship.

B. Lack of Shelter Space and Permanent Housing

A woman and her children, who are able to safely leave their batterer, face the possibility of homelessness and dislocation, which can be especially difficult for children who may have to leave their classmates and friends. In New York City, the Victim Services Agency ("VSA") received 34,175 requests for domestic violence shelter during a twelve-month period in 1997-98, as well as an average of 38.2 unduplicated requests for shelter every day. During that period, the average daily availability of shelter was 10.6 spaces, meeting only one quarter of the need.³⁰

The reality is that there are few safe, affordable housing options for women fleeing abuse.

C. Lack of Financial or Other Support

Domestic violence cuts across class lines. After leaving an abusive relationship, many battered women have difficulty supporting themselves and their children.³¹ Battered women frequently report that batterers interfere with their education, training or work. As a result, abused women are heavily represented in the welfare population, at approximately fifty percent of total recipients. Welfare, however, is becoming increasingly difficult to obtain, and a woman may wait for months to find out if she is eligible. When there is a source of financial support beyond the abusive spouse, a greater percentage of battered women are likely to end the relationship.³²

Women can also be forced to rely upon their batterers for other necessary supports. For example, a battered immigrant woman may also be prevented from leaving an abusive relationship if she is isolated from family and friends, unable to speak English, fearful of accessing the police or unaware of her legal rights. Sometimes

30. See Victim Services Data, Sept. 17, 1998 (on file with Victim Services Agency, New York, NY).

31. One researcher, studying why battered married women returned to their husbands, found that the answer often lay in their financial dependence on their spouses. Eighty-four percent of wives in shelters who reported that their husbands were their only source of financial support planned eventually to return to their batterers. See B.E. AGUIRRE, NAT'L ASS'N OF SOCIAL WORKERS, WHY DO THEY RETURN? ABUSED WIVES IN SHELTER 350-53 (1985).

32. See Cheribeth Tan et al., *The Role of Social Support in the Lives of Women Exiting Domestic Violence Shelters*, J. INTERPERSONAL VIOLENCE 437, 447-49 (1995) (discussing the strong relationship between social support and the ability to recover from domestic violence).

the batterer is the only means of achieving legal immigration status in the United States.³³ These factors, combined with a lack of educational and employment options, present tremendous obstacles to a woman's safety.

D. Criminal Justice System May Not Offer Protection

Cynthia has been physically abused by her boyfriend for the last six months. He has threatened to kill her and take her child. When she called the police, they referred her to family court and did not arrest the batterer. She fled the apartment, and the batterer contacted her and told her that he was destroying everything in her apartment. She was scared to return that night, but when she did so the next day, she found her apartment ransacked. He had ripped up all her clothing, torn up the furniture, destroyed all the appliances and wrote derogatory statements about her in permanent marker all over the apartment. She decided to press charges, but the prosecutor told her that there was insufficient evidence for felony charges and the batterer would do no jail time. Cynthia decided to flee the state.

Battered women who seek protection from the batterer often find limited recourse in the criminal justice system. Despite the passage of laws requiring police to arrest perpetrators of domestic violence and to identify the primary aggressor in a domestic dispute, police response to domestic violence too often results in no arrests or dual arrests of both partners. When the batterer has left the scene before the police arrive, there is rarely any further investigation even if the police find that a crime has been committed. When the batterer is arrested, most domestic violence cases are charged as misdemeanors. Unless the crime is egregious, most batterers spend little time in jail.³⁴ Many batterers are released on bail after the arrest, and the arrest often provokes more violence. In addition, the victim may be faced with pressures from the batterer's family, or even her own, to drop the charges.

E. Family Court May Not Offer Sufficient Protection

Battered women are routinely told to obtain further orders of protection in family court to prevent the batterer from threatening, harassing and abusing them. In reality, obtaining an order of pro-

33. See Ginger Thompson, *Afraid of Husbands, and the Law*, N.Y. TIMES, Apr. 18, 1999, at 37, 41.

34. See *id.*

tection does not guarantee a woman's safety. Pursuing an order of protection may actually anger the batterer and provoke more violence. In one study, nearly half of the victims who obtained orders of protection were re-abused within two years.³⁵ Knowing that an order of protection will not necessarily provide safety, some women decide not to seek one.

Legally, such orders can also exclude a batterer from the home and require him to pay child support, thereby allowing the mother and children to remain safe in their home with some means of support. Exclusion orders and temporary child support orders, however, are difficult to obtain, because unrepresented petitioners often do not know to ask for this relief. In addition, judges are reluctant to grant exclusion orders except in the most egregious cases.

Seeking orders of protection in New York City's Family Court is even more challenging, because the family court is overwhelmed and has little resources. Litigants face long waits, delays and adjournments. Battered women are thus further discouraged from obtaining orders of protection. One study found that petitioners in Brooklyn coming to the initial intake parts received just over four minutes to be heard on their first court appearance.³⁶

F. Batterer May Seek Unsupervised Visitation or Custody

Genna ended her relationship with her boyfriend when he began to act violently towards her, but she allowed him to watch their two-year old while she was at school. He continued to harass her whenever they exchanged the child. ACS began investigating both parents based on allegations of domestic violence. Genna got an order of protection and ceased contacting the father. He has now filed for custody of their child and has been granted unsupervised visitation.

Sarah was charged with failure to protect her children because of their exposure to domestic violence. One of the ways her batterer had tried to exercise control over her was by constantly threatening to kidnap their children. On one occasion, he hid their daughter at his mother's house after an argument. Sarah had to call the police to get her daughter back.

35. See *DO ARRESTS AND RESTRAINING ORDERS WORK?* 199, 212, 223, 240 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

36. See *THE FUND FOR MODERN COURTS, THE GOOD, THE BAD, AND THE UGLY OF THE NEW YORK CITY FAMILY COURT* 9 (1997).

Leaving the batterer often results in the batterer escalating his coercive control by filing for custody or visitation with the children. Battered mothers frequently worry about the possibility that the batterer will kidnap their children, because he has threatened to do so in the past. More than fifty percent of child abductions result from situations involving domestic violence, and most of these abductions are perpetrated by fathers and their agents.³⁷ Fathers who batter mothers are more than twice as likely to seek sole custody of their children than non-violent fathers.³⁸ Batterers may file custody proceedings against mothers or false reports to ACS as methods of continuing to harass and control their partners.³⁹ For battered mothers, one of the most difficult issues is how to negotiate custody and visitation issues with the abuser.

V. MODELS AROUND THE COUNTRY AND STATE HAVE SUCCESSFULLY INTEGRATED DOMESTIC VIOLENCE AND CHILD PROTECTIVE SERVICES

There are numerous models around the country and the state that ACS should follow in creating a comprehensive approach to domestic violence and child protection. The most notable of these is in Massachusetts, where a national model for collaboration between child protective services and domestic violence service providers has been established. In 1993, the Massachusetts Department of Social Services ("MDSS") created a specialized Domestic Violence Unit ("DVU") as part of its child protective services.⁴⁰ The principle of the DVU was that the safety of the battered mother cannot be separated from the best interests of the child. The DVU focuses on working with battered mothers to develop safety plans for the mothers and their children.⁴¹

The DVU provides two kinds of services: consultation and support to caseworkers on abuse and neglect cases where there is domestic violence, and provision of direct services to battered mothers. Eleven domestic violence specialists spend three days a week in the local MDSS offices to ensure their availability to

37. See APA, *supra* note 26, at 101.

38. See *id.* at 40.

39. See NOW LEGAL DEFENSE AND EDUC. FUND, *THE ABCS OF CHILD CUSTODY WHEN DOMESTIC VIOLENCE IS AN ISSUE* (1998).

40. FAMILY VIOLENCE DEP'T, NATIONAL COUNCIL OF JUVENILE & FAM. CT. JUDGES, *FAMILY VIOLENCE: EMERGING PROGRAMS FOR BATTERED MOTHERS AND THEIR CHILDREN* 15 (1998).

41. See *id.* at 16.

caseworkers.⁴² In five MDSS offices, there are interagency teams comprised of MDSS staff, police officers, battered women's advocates, batterer's intervention providers, court personnel, hospital staff, and supervised visitation providers who meet to discuss difficult cases and design effective case planning. This coordinated effort can help a family to avoid inconsistent services and case planning.⁴³

The specialist is also available as a liaison with the domestic violence community to discuss cases or issues that may arise. The protocol for caseworkers requires accurate identification of the perpetrator on investigation documents.⁴⁴ This program has resulted in a decrease in unnecessary out-of-home placements and has helped caseworkers to identify domestic violence in their caseloads.⁴⁵

Another program aimed at protecting battered mothers and their children operates in Jacksonville, Florida as part of a community-based approach in protecting children. The Domestic Violence and Child Protection Collaboration includes the city's Department of Children and Families ("DCF"), a local domestic violence program called Hubbard House, an area shelter, local schools and neighborhood tenant associations.⁴⁶

DCF Child Protective Service ("CPS") workers, trained in conjunction with the staff at Hubbard House, are required to routinely screen for domestic violence and to intervene with the dual goals of protecting the children and the battered spouse and of holding the perpetrator responsible. Specific CPS workers are identified as domestic violence consultants and are paired with a Hubbard House staff member in order to serve as additional resources to other CPS workers.⁴⁷ In addition, a "special condition" voluntary foster care placement program has been implemented. The program allows battered mothers to place their children for up to three months to avoid charges of abuse or neglect. During that three month period the mothers work with an advocate from Hubbard House to establish a safety plan for herself and her children.⁴⁸

42. *See id.*

43. *See id.* at 17.

44. *See id.* at 16.

45. *See id.*

46. *See id.* at 21.

47. *See id.* at 22.

48. *See id.* Similar innovative programs around the country include the Family Violence Outreach Program in Greater New Haven, Connecticut, the Domestic Vio-

Closer to home, the Orange County Department of Social Services in New York State forged a collaboration with the Orange Safe Homes Project. Based on the Massachusetts model, the guiding principle of their alliance is that:

The primary focus of MDSS intervention in domestic violence cases is the ongoing assessment of the risk posed to children by the presence of domestic violence. The preferred way to protect children in most domestic violence cases is to join with mothers in safety planning and to hold offenders accountable.⁴⁹

The protocol developed by the two groups emphasizes that certain alternatives must be considered before removing children. These options include: safety planning with the mother and children, preventive services, MDSS-initiated Order of Protection for the children to vacate the father from home, placement in a domestic violence shelter and assistance in obtaining an Order of Protection.⁵⁰

In fact, the New York State Office of Children and Family Services ("OCFS") recently issued an informational letter recommending collaborative efforts similar to those achieved by Orange County.⁵¹ In 1996 and 1997, OCFS funded two demonstration projects to improve the provision of services to families impacted by both domestic violence and child protective services Orange County and Warren/Washington Counties.⁵² Representatives from each discipline met to design and implement a protocol for handling these cases.⁵³ A domestic violence worker was stationed at local social services districts and would accompany child protective workers on investigative home visits.⁵⁴ During these visits, the domestic violence worker spoke with the mother about her options and assisted the protective worker in developing a safety plan.⁵⁵ There were numerous benefits to this collaboration. First, by identifying domestic violence before the crisis stage, children could

lence Collaboration Project of Michigan and the Integration Project in Montgomery County, Ohio. *See id.* at 27-39.

49. ORANGE COUNTY DEPT. OF SOC. SERV., ORANGE COUNTY SAFE HOMES PROJECT, INC., DOMESTIC VIOLENCE PROTOCOL.

50. *See id.*

51. Informational Letter from New York State Office of Children and Family Services to Commissioners of Social Services and Directors of Domestic Violence Programs, *Collaborative Efforts for Assisting Families Experiencing Both Domestic Violence and Child Abuse/Maltreatment* (Nov. 25, 1998) (on file with authors).

52. *See id.* at 2.

53. *See id.*

54. *See id.*

55. *See id.*

more frequently remain in their home. Second, domestic violence workers were seen as less threatening, and women viewed child protective services as more of a resource. Third, protective workers learned “to better understand why a victim is unable to leave and/or why leaving can be more dangerous than staying, and . . . [that by helping the battered mother] with the domestic violence issues, abuse and maltreatment of the child and the likelihood of re-incidence can be reduced.”⁵⁶ OCFS found that by stationing a domestic violence advocate at the child protective office, even on a part-time basis, was likely to offer the greatest benefits.⁵⁷

VI. RECOMMENDATIONS

A. Accountability for Domestic Violence Should Be Shifted to the Batterer

Where the battered mother is named in the petition, ACS and the court should consider options that would prevent removal and place accountability on the batterer. Where “imminent risk” would be eliminated, ACS should request and the family court should issue an order of protection excluding the batterer from the home.⁵⁸ Although no order of protection can guarantee safety, this practice would at the very least communicate a message of accountability to the batterer, and if the order is violated, the threat of incarceration may reduce the risk of violence. Further, ACS should consider referring the case to law enforcement officials or the District Attorney’s office for criminal prosecution of the batterer.

If the children are removed in limited circumstances, the batterer, not the mother, should be prevented from having unsupervised contact with the children until he has completed a batterer’s intervention program and has demonstrated to the court his ability to refrain from using violence.

Finally, family court judges should consider dismissing neglect petitions filed against battered mothers under section 1051(c) of the FCA. Under this section, a Judge may dismiss a petition, even after a finding of neglect, where its aid is not required on the rec-

56. *Id.*

57. *See id.* at 5.

58. Family court may only enter an order directing the temporary removal of a child after the court considers “whether imminent risk to the child would be eliminated by the issuance of a temporary order of protection, . . . directing the removal of a person or persons from the child’s residence.” FCA § 1022(a)(iii) (McKinney 1998).

ord before it.⁵⁹ Where the efforts of ACS and the mother since the filing of the petition have resulted in protecting the child from the batterer, the court's aid may no longer be required. Moreover, by dismissing the petition against the mother, the court sends the message that the batterer, not the victim, will be held accountable for the harm to the children.

B. Enact Legislation to Address Failure to Protect Issues

The New York State Legislature should address the way in which current child welfare law separates battered mothers and their children. One option is to legislate a "battered woman defense." In 1994, New York State Assemblyman Roger Green introduced a proposal that called for amending the definition of neglect to provide a defense that the parent had "a reasonable expectation, apprehension or fear that acting to stop or prevent such abuse would result in substantial bodily harm to parent or other person legally responsible for the care of the or to the child."⁶⁰ The proposed amendment would also have allowed the parent to introduce expert testimony to show that the "inability to protect the child was due to a reasonable expectation, apprehension or fear that preventing or stopping the alleged abuse or neglect would result in physical injury to the subject child or respondent."⁶¹

Another legislative recommendation calls for an amendment to the neglect statute to insure that appropriate services are provided in those cases where a court found abuse or neglect based on domestic violence.⁶² This legislative proposal would require a judge at the "dispositional" hearing: 1) to inquire and enter findings as to whether the respondent had been offered or had received domestic violence-specific services, and the results of the offer or receipt of services; and 2) to determine whether issuance of an order of protection would eliminate the need for placement, or would expedite the return of the child. Where placement or extension of placement is ordered, the child protective agency should be required to present its reunification plan to the court and to specifically enumerate the services it intends to provide along with a time-frame for providing services. Even without a legislative enactment,

59. See N.Y. JUD. LAW § 1051 (McKinney 1999).

60. A. 11870, 208th Sess. (N.Y. 1994). The proposal of June 7, 1994 was intended to amend the definition of an abused or neglected child and evidence of abuse in child protective proceedings. On February 11, 1999, these definitions were amended but not in accordance with this proposal. See FCA § 1012, at 39-40 (1999).

61. *Id.*

62. Newman & Roberts, *supra* note 14, at 65-67.

courts on their own initiative should make these inquiries and findings.

More recently, in the context of amending the state's child welfare law to bring it in conformity with the federal Adoption and Safe Families Act ("ASFA"),⁶³ the Victim Services Agency proposed changes to address the need for domestic-violence specific services to prevent or eliminate the need for foster care in domestic violence cases. The legislature should consider these recommendations in the current legislative session.

We commend the New York State Legislature for including in the state's ASFA implementation statute a requirement that the Office of Children and Family Services study the extent to which victims of domestic violence have their children removed due to the conduct of the perpetrator of the violence and that a report of its findings be submitted by October 31, 2000.⁶⁴ We hope that in conjunction with the study, the judiciary and Children and Family Services Committees of the New York State Senate and Assembly will consider amending the neglect statute to ensure that local social service districts hold batterers accountable for their actions, and that victims of domestic violence and their children are provided services rather than for punishment of the perpetrator's conduct.

Although recommendations for amending the neglect statute have been made in the past, now more than ever before, such changes are needed. In New York City, the number of children placed in foster care has increased dramatically, and federal mandates require that states move more quickly to terminate parental rights. In this environment, the interrelationship of domestic violence and child welfare must be addressed immediately and directly.

C. ACS Should Build on Prior Successes by Developing a Comprehensive Domestic Violence Program

Since 1988, the Child Welfare Committee of the Inter-agency Task Force Against Domestic Violence has worked with successive city and child welfare administrations to address domestic violence

63. The stated purpose of the Adoption and Safe Families Act ("ASFA") is to achieve timely permanence for children in foster care. The ASFA requires states to file petitions to terminate parental rights after a child is in foster care for 15 months and allows states to suspend reasonable efforts to reunite families in certain cases. See 42 U.S.C.A. § 670 (1997).

64. See 1999 N.Y. Laws ch. 7, § 56.

and child protection issues in a meaningful way. Most recently, in January 1997, the Committee met with ACS Commissioner Nicholas Scoppetta to present recommendations for a comprehensive and coordinated ACS response to child protective cases where domestic violence is a factor. The reason for the Committee's concern at the time was that the Commissioner's December 1996 Reform Plan did not make any mention of domestic violence.⁶⁵ The lack of attention to domestic violence in the Reform Plan was startling since studies show the strong relationship between domestic violence and child maltreatment,⁶⁶ and the City's own Child Fatality Review Panel Reports show the high correlation between child deaths and woman abuse.⁶⁷

This Article calls upon ACS to expand its collaboration with domestic violence advocates and to develop a comprehensive domestic violence program and timetable for implementation of the program. The current ACS administration must commit the attention, energy and resources needed to address this complex problem as other states and counties have done. This section describes the efforts ACS has undertaken thus far and makes suggestions for how to build upon these efforts.

1. *Domestic Violence Coordinator*

In January 1997, ACS created a domestic violence coordinator position to oversee the domestic violence work of the agency. While it is significant that there is a domestic violence coordinator, the position has not been given the resources or the authority to significantly expand programming, coordinate efforts or institute protocols. The coordinator does not work on domestic violence full time since she is also deputy director of ACS's Office of Inter-agency Affairs and does not report directly to the Commissioner's office. Without such authority, little change will be accomplished.

65. ADMINISTRATION OF CHILDREN'S SERVS., PROTECTING THE CHILDREN OF NEW YORK: A PLAN OF ACTION FOR THE ADMINISTRATION FOR CHILDREN'S SERVICES (1996).

66. Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 162 (Kersti Yllo & Michelle Bogard eds., 1988) (noting that child abuse is present in 70% of the homes where there is partner violence).

67. The Child Fatality Review Panel indicates that during the previous three years in 46.1% of the cases where a child had died, the mother was also abused. See Report of Child Fatality Review Panel (1993) (on file with authors).

2. Pilot Projects to Assess Domestic Violence

In 1993, the City made its first attempt to address the interrelationship between domestic violence and child welfare by creating the "Zone C" pilot project in the Manhattan Field Office.⁶⁸ The pilot lasted six months. During this period, child protective case workers assessed every case alleging abuse or neglect that came into Zone C for domestic violence. A domestic violence protocol was developed for this purpose by the then Child Welfare Administration in consultation with the Child Welfare Committee and the Urban Justice Center. In April 1995, the Columbia School of Social Work prepared a written report evaluating the Zone C program.⁶⁹ The report concluded that although workers and supervisors were initially resistant to the protocol, it was effectively implemented during the pilot test period.⁷⁰ The report found that domestic violence was uncovered in more cases using the protocol than would have otherwise been discovered and that although there were identifiable obstacles to delivery, these families were referred to appropriate services.⁷¹ The report established the need for ongoing training of staff on the dynamics and causes of domestic violence.⁷²

In 1998, ACS planned to replicate the initial Zone C pilot project. Building upon the Massachusetts model, a domestic violence specialist was hired for Zone A, the North Manhattan Field Office. The specialist reports to the Director of the Field Office, not the domestic violence coordinator. The specialist is responsible for coordinating with child protective workers on those child protective cases where domestic violence is identified. She will also be involved in training the child protective workers in the office along with the Urban Justice Center. If a child is removed from his or her parent, however, the case is transferred within ninety days to the Office of Contract Agency Case Management ("OCACM") and the case planning is then done by the foster care agency. The

68. RANDY MAGEN ET AL., CENTER FOR THE STUDY OF SOC. WORK PRACTICE, COLUMBIA UNIV. SCH. OF SOC. WORK, CHILD ABUSE AND WOMAN ABUSE IN THE CHILD PROTECTIVE SERVICE SYSTEM: THE ZONE C STUDY 3 (1995). Each borough has a child protective "field office," which is responsible for investigating allegations of child abuse or neglect. The office determines whether the report is indicated and, if so, whether the children should be removed. Field offices are then divided by zone, and each zone covers a different geographic area. Zone C covers East 57th Street, South to the bottom of Manhattan and north to West 110th Street. *See id.*

69. *See id.* at 2.

70. *See id.*

71. *See id.* at 7.

72. *See id.* at 9-10.

rest of the pilot project is on hold, like investigating domestic violence in each new case, but the Urban Justice Center is providing assistance to the domestic violence specialist.

3. *Training*

In 1996, the Columbia School of Social Work received one-time funding to train new child protective supervisors in domestic violence. This training has never been replicated. Domestic violence training for all caseworkers should begin at the Satterwhite Academy and continue periodically throughout their tenure. The curriculum for such training should be developed in conjunction with the domestic violence coordinator and the domestic violence advocacy community.

4. *Foster Care Agencies*

In developing a comprehensive domestic violence program, ACS must not forget the need to address domestic violence issues with foster care agencies. Such agencies monitor a large percentage of the children removed from their homes due to domestic violence.⁷³ Once children are removed from their home, case planning is usually transferred within ninety days to the foster care agency. The agencies must be equipped to deal with domestic violence issues so that mothers can be provided the services they need to be reunified with their children as quickly as possible. ACS has done little to ensure that foster care agencies are meeting their responsibilities to assess, evaluate and develop a plan for services in domestic violence cases. Only one foster care agency, Lakeside Family and Children's Services, has a domestic violence services coordinator. ACS should study this program and encourage its replication when awarding new contracts to foster care agencies. ACS must also ensure that foster care workers receive training about domestic violence issues and have a domestic violence screening and assessment tool in place, as preventive services agencies do, for parents with children in foster care.

5. *Preventive Services*

Although this Article is concerned primarily with the policy of removing children from battered mothers, the availability of preventive services for domestic violence victims is also a necessary component of a comprehensive domestic violence program that en-

73. See City of New York, Fiscal 1998 Mayor's Management Report 117-20 (1999).

sure children are removed as a last resort. ACS has made some strides in the provisions of preventive services for domestic violence victims.⁷⁴ The first preventive efforts took place in conjunction with the Zone C pilot project. Ruth Messinger, then Manhattan Borough President, helped fund four preventive agencies to increase domestic violence services for families identified by Zone C workers. In 1994, a preventive pilot project was started in Staten Island. The Urban Justice Center and ACS (then the Child Welfare Administration) developed a questionnaire for preventive workers to assess preventive cases for domestic violence within the first thirty days. This project, now called the Family Violence Prevention Project ("FVPP"), has grown to include twenty-seven programs out of a total of 120 preventive programs and is being expanded to fifty programs in the next year. All twenty-seven of these programs use a questionnaire that now includes an assessment tool called WEB (Women's Experience of Battering). Each of the twenty-seven groups has a domestic violence specialist who meets with an advocate at the Urban Justice Center for consultation once a month. The Urban Justice Center also provides year long training and supervision for the FVPP workers who will run twenty-six week long groups for abusive fathers of families who are clients of preventive service agencies. Three groups are running in Manhattan, Queens and Staten Island. The female partners of these men are in support groups. The family's case workers and facilitators of both male and female groups keep in close contact with one another. APIP (Abusive Partner Intervention Program) is primarily funded by the Urban Justice Center along with some funding from the preventive agencies themselves.

Specifically, we recommend that ACS take the following actions:

- Develop a comprehensive domestic violence plan for all parts of the child welfare system with a clear and specific timetable for implementation.
- Establish a domestic violence office to coordinate preventive and protective domestic violence services for the agency and create and implement a domestic violence program that focuses on safety planning for domestic violence victims.
- Hire two domestic violence specialists for each field office.
- Mandate on-going training on domestic violence issues including safety planning for all ACS staff, including protective workers, ACS OCACM case managers, child evaluation spe-

74. Much of this work has been in coordination with and at the behest of the Urban Justice Center's Family Violence Project.

cialists and foster care case planners and supervisors, including training on underserved populations, such as disabled and immigrant battered women.

- Improve assessment tools and protocol for assessing risk to children in domestic violence cases.
- Form an ongoing working group on domestic violence that meets regularly with a range of domestic violence advocates to ensure community input into the development of a comprehensive plan and a coordinated response to domestic violence.
- Continue and expand domestic violence assessment and services at preventive agencies, and require on-going training for preventive staff. Each agency should have a full-time domestic violence coordinator.
- Require foster care agencies to demonstrate how they are addressing and screening for domestic violence, and require development of linkages to domestic violence providers/advocates.
- Foster care agencies should be able to demonstrate how they will achieve early reunification with non-abusing mothers in domestic violence cases.
- Provide preventive services to families affected by domestic violence in the context of safety planning.

CONCLUSION

In the past decade, the domestic violence community has been instrumental in defining and articulating the impact of domestic violence on children. These same advocates now find themselves assisting battered mothers who are losing their children to foster care and who are being charged with abuse or neglect for failing to protect their children from witnessing domestic violence. Mothers are punished and children are traumatized by the separation while the perpetrator of the violence generally experiences few consequences. This Article calls for a multi-disciplinary approach to domestic violence. This approach must focus on protecting children by holding batterers accountable and keeping the non-abusing mother and children together and on short and long term safety options and support.

Issues of fairness are not all that is at stake here. The current policy of removing children from their mothers will have a negative impact on domestic violence survivors and may have a chilling effect on the mother's willingness to seek assistance. As the removals of children increase, battered mothers are learning that child

protective services involvement may be a detrimental consequence of seeking help from the police, courts, hospitals or social workers.

The needs of battered mothers and their children are different but linked. We cannot address the best interests of the children without addressing the safety of battered mothers. The community, the courts and the child welfare field must enter into a partnership with battered mothers to assist them in addressing the harm done to children who have experienced the violence. We must continue to work toward holding batterers fully accountable for the violence they perpetrate.

It took until 1996, almost twenty years of education and advocacy, for the state legislature and judges to recognize the harmful effects of domestic violence. Now, child welfare and court systems have been quick to hold mothers accountable for the harm. Society has recognized and accepted the harm, but it is incumbent upon us to develop meaningful ways to assist battered mothers and not a system for separating them from their children.

