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## **Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women**

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# ABUSE AND DISCRETION: EVALUATING JUDICIAL DISCRETION IN CUSTODY CASES INVOLVING VIOLENCE AGAINST WOMEN

DANA HARRINGTON CONNER \*

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\* Associate Professor of Law and Director of the Delaware Civil Law Clinic, Widener University School of Law. This Article is based, in part, on the author's fourteen years of experience representing countless battered women seeking civil protection orders and custody of their children. I would like to thank Justine Dunlap, Professor, Southern New England School of Law, for her willingness to read this Article in draft form and for her many thoughtful comments and suggestions that greatly improved this piece. I thank my colleagues at Widener University School of Law, in particular John Nivala, for providing feedback and guidance on this Article at *Works in Progress featuring Professors Britton, Epstein, Harrington Conner, Henderson, and Nichols* held by Widener University School of Law (Mar. 20, 2008) (on file with author). This Article is dedicated to the late Christine M. McDermott—teacher, mentor, colleague, and friend. On behalf of your former students, I thank you for teaching us to strive for the best—for ourselves, our clients, our profession, and our system of justice.

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*There is perhaps no other class of cases that give our courts such serious concern as those which deal with the awarding of the custody of children.<sup>1</sup>*

## I. INTRODUCTION

This Article is an exploration of the history and creation of the broad power of the custody trial judge, the unsatisfactory standards applied in custody cases involving violence against women,<sup>2</sup> and our system's inability to adequately review flawed decisions at the appellate level. This Article deconstructs both the process of judicial decision-making at the trial court level in custody cases involving batterers<sup>3</sup> and the standards applied to these cases at the appellate court stage. This Article also proposes a

1. *Culpepper v. Osteen*, 13 So. 2d 911, 911 (Fla. 1943).

2. The term "violence against women" will be used interchangeably throughout this Article with the phrases "domestic violence," "intimate partner violence," and what Dr. Evan Stark defines as "coercive control." See generally EVAN STARK, *COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE* (2007). The aforementioned terms associated with violence against women are used in their broadest context, including not only physical violence, but psychological, sexual, and emotional abuse. For many individuals "abuse" itself mistakenly implies physical violence, a notion that fails to capture the harms perpetrated by batterers. As a result, all terms used throughout this Article relating to violence or abuse against women are intended to signify not only physical violence but, more importantly, the control batterers exert against their victims as described by Dr. Evan Stark. Stark defines "coercive control" as follows:

coercive control entails a malevolent course of conduct that subordinates women to an alien will by violating their physical integrity (domestic violence), denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation), and appropriating or denying them access to the resources required for personhood and citizenship (control).

*Id.* at 15.

3. See Peter G. Jaffe et al., *Parenting Arrangements After Domestic Violence: Safety as a Priority in Judging Children's Best Interest*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 81, 84 (2005) (suggesting the term "batterer" is intended to capture those individuals "who demonstrate over time a pattern of abusive behaviors that are designed to control, dominate, humiliate, or terrorize their victims").

multi-level approach to resolving the domestic violence dilemma in a custody case.

History confirms that the custody trial judge enjoys immeasurable discretion to determine what is best for children. The judge's immense authority begins at the trial court level and permeates the appellate process. This expansive authority appears to be based in part on the significance of custody determinations, what is seen as the trial judge's special expertise in domestic relations law, and the misguided notion that the trial judge has a superior ability to assess issues of credibility unique to family law cases. As a result, our system's interpretation of the trial judge's level of discretion in custody matters appears to be synonymous with the ultimate power and authority to decide the matter beyond regulation.

This exercise of power and authority is without question life altering; it can provide great protection or cause terrible harm. Certainly, some legal issues call for broader judicial discretion than others. It may be true that custody matters generally call for a higher level of discretion because, as Carl E. Schneider maintains, they inherently require family law judges to assess issues that do not lend themselves to a rigid set of rules.<sup>4</sup>

There is little question that custody is an important legal matter calling for specialized treatment by our courts.<sup>5</sup> Custody determinations are among the most difficult and important decisions judges make in the lives of parents and children. Not only must judges balance the rights, interests, and wishes of parents, but, above all, they must ensure the safety and well-being of children.<sup>6</sup> Out of all the custody cases the trial judge faces, those involving domestic violence present some of the greatest challenges to both parental rights and child protection.

Interestingly, the safety and well-being of the child is directly related to the well-being of the parents.<sup>7</sup> In the area of domestic violence the issue of

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4. See Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2217-19 (1991). Schneider explains custody law as follows:

[custody law] regulates the complex behavior of millions of people . . . . Family law tries to regulate people in the most complex, most emotional, most mysterious, most individual, most personal, most idiosyncratic of realms. It is absurdly difficult to write rules of conduct for such an area that are clear, just, and effective . . . . To put the point rather differently, rules probably cannot wholly or perhaps even largely replace discretion in the law of child custody.

*Id.*

5. The term custody, as used throughout this article, includes visitation determinations.

6. See *Aragon v. Aragon*, 104 P.3d 756, 765 (Wyo. 2005) (citing *Leitner v. Lonabaugh*, 402 P.2d 713, 720 (Wyo. 1965)) (explaining that the trial judge is granted broad discretion in custody cases because the ultimate goal is a reasonable balance between the rights of the parents and the children's needs).

7. See *Casper v. Casper*, 254 N.W.2d 407, 409 (Neb. 1977) (observing that the

parent safety and stability is particularly significant.<sup>8</sup> The welfare of a child exposed to intimate partner violence is linked to the health, emotional stability, and safety of the abused parent.<sup>9</sup> Furthermore, research suggests that children exposed to batterers are at greater risk of both emotional and physical harm.<sup>10</sup>

Custody cases involving intimate partner violence require special analysis, given the risks associated with domestic violence. Thus, our concept of judicial discretion in custody cases involving domestic violence must be altered. Although the trial judge's authority may be expansive in nature, it must not be seen as beyond control. Unregulated authority is not only flawed in cases involving violence against women, it is dangerous.<sup>11</sup>

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well-being of the child partially depends on the stability of the home environment); *In re RJ v. DJ*, 508 N.Y.S.2d 838, 840 (N.Y. Fam. Ct. 1986) (maintaining that the child's wellbeing depends on the mother's stability).

8. See LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT* 103-04 (2002) (explaining that the long-term prospects of recovery for children exposed to domestic violence are "tied largely to 'the overall quality of life' in the custodial home" and a strong mother-child bond); see also Jennifer L. Woolard & Sarah L. Cook, *Common Goals, Competing Interests: Preventing Violence Against Spouses and Children*, 69 *UMKC L. REV.* 197, 203 (2000). Woolard and Cook explain that

[s]tudies of resilience in children exposed to community violence have identified several protective factors that might also help reduce the risk for negative developmental outcomes among children exposed to spouse assault. Across a variety of studies, the most consistent and important finding has been that a good relationship with a competent caring adult mitigates against the negative effects of violent exposure.

*Id.*; Dana Harrington Conner, *Do No Harm: An Analysis of the Legal and Social Consequences of Child Visitation Determinations for Incarcerated Perpetrators of Extreme Acts of Violence Against Women*, 17 *COLUM. J. GENDER & L.* 163, 221 (2008) (citing *In re RJ*, 508 N.Y.S.2d at 841) (suggesting that "the mother's ability to function [is] paramount to the healthy development of her child").

9. See Lois A. Weithorn, *Protecting Children From Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 *HASTINGS L. J.* 1, 135-36 (2001) (citing the OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, DEPARTMENT OF JUSTICE, *SAFE FROM THE START: TAKING ACTION ON CHILDREN EXPOSED TO VIOLENCE* (2000)) (suggesting that a positive relationship between the non-abusive parent and the child is a significant factor in the child's healing process for children exposed to violence in the home).

10. See FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 401 (2003) [hereinafter REPORT ON RACIAL & GENDER BIAS] (noting that 40% to 60% of batterers abuse children and pose psychological risks to the child); see also MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE, AND WHAT WE CAN DO ABOUT IT* 150-51 (1999) (explaining that research suggests "at least fifty percent of batterers who assault their wives also frequently physically injure their children"). Moreover, perpetrators of domestic violence pose risks to their children even if there is no direct evidence that the batterer has committed acts of violence against a child. See BANCROFT & SILVERMAN, *supra* note 8, at 30 (explaining that batterers are more likely to become angry with their children and more likely to respond with physical violence as a disciplinary measure).

11. This Article focuses on violence against women, particularly as a result of the frequency and severity of violence perpetrated by men against women.

Moreover, by proclaiming publicly that trial courts will be held accountable for failing to weigh domestic violence as an important factor in custody determinations, appellate courts send a strong message that violence against women is an important legal consideration.

This Article recommends a more liberal standard of review in custody cases involving intimate partner violence. The reasons that support a new standard of review are particular to the question presented on appeal. Therefore, this Article analyzes each distinct issue on appeal and provides support for a liberalized standard of review for most circumstances relating to custody cases involving violence against women. The primary reason for a different standard of review strikes at the heart of social policy. As a matter of public policy, the justice system has a vested interest in eradicating domestic violence, ending the intergenerational effects of violence against women, and protecting the welfare of “future member[s] of our society.”<sup>12</sup>

Many legal remedies involving violence against women demand new and specialized treatment by our courts; appellate review is but one aspect that cries out for a modified response. Attacking the issue at its heart, the trial court level, is the most direct way to resolve this problem. In fact, many states now provide judicial presumptions against awarding custody to perpetrators of domestic violence.<sup>13</sup> What the law allows and what happens in reality, however, are not one and the same.

Laws relating to custody cases involving violence against women fail to provide the protections envisioned by their authors and must, as a result, be modified to reflect the realities of our current system. The trial judge, therefore, must have a clear definition of what constitutes domestic violence and understand how domestic violence affects all family members and why this information is highly relevant to what is best for children. Moreover, the trial judge must be equipped with unambiguous recommendations regarding the weight to be given to evidence of intimate partner violence when making the ultimate custody determination.

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12. See *In re Badger*, 226 S.W. 936, 939 (Mo. 1920).

13. See *infra* Part V.

II. POWER AND AUTHORITY:<sup>14</sup> A HISTORICAL PERSPECTIVE

*He who has great power should use it lightly.*<sup>15</sup>

Early in our nation's history, appellate courts established a hands-off approach that defined the power and authority of the trial judge in custody matters for years. Although reviewing courts understood the importance of securing the welfare of minors,<sup>16</sup> they also saw family law cases as localized and tied to the social norms of a particular neighborhood.<sup>17</sup> They perceived their role as so far removed from domestic relations decision-making that they could not possibly question the findings and conclusions of the trial court.<sup>18</sup>

Appellate courts bestowed broad judicial discretion on trial courts, in part because they understood that domestic relations cases posed an extremely difficult task for trial judges.<sup>19</sup> The trial judge's role is made exceedingly difficult as a result of several factors found predominantly in

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14. Although the terms "power" and "authority" are often used in the context of domestic violence generally, they are used herein to emphasize the substitution of power players in the life of the battered litigant. The trial judge now replaces the perpetrator, who once held the "power of control" over the battered woman. See Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection and Domestic Violence*, 79 TEMP. L. REV. 877, 884 n.17 (2006) (citing Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183, 191 (1997)) (introducing the analogy between the trial judge and the perpetrator, considering the issue in the context of mandatory prosecution, and suggesting that forcing the decision to prosecute on the victim replaces the batterer's control with control by the prosecutor).

15. NEW WORLD ENCYCLOPEDIA, Lucius Annaeus Seneca, (Roman philosopher, C. 4 B.C.E. – 65 C.E.), <http://www.newworldencyclopedia.org/entry/Seneca> (last visited Apr. 28, 2009).

16. See *In re Badger*, 226 S.W. at 939 ("The welfare of the child, its life, health, and moral and intellectual being, are, in a proper exercise of the court's power, to be kept well in view in all controversies concerning its custody care, and control . . . . The welfare of the child should be looked to as a future member of society . . . ."); *Allison v. Bryan*, 109 P. 934, 939 (Okla. 1910) (explaining that "it is not the dry, technical right of the father, but the welfare of the child, which will form the substantial basis of judgment").

17. See *Travis v. Travis*, 138 S.W.2d 336, 338 (Ky. 1940) (explaining that "[t]he chancellor usually is in a better position to decide on matters of this sort than is this court, sitting at a distance from the immediate neighborhood").

18. See *id.* ("Our rule is that if there be no more than a doubt as to the chancellor's conclusions, we should affirm the judgment.").

19. See *Culpepper v. Osteen*, 13 So. 2d 911, 912 (Fla. 1943) (suggesting that the facts and importance of these cases require "delicate and difficult" decision-making on the part of the trial judge); *Travis*, 138 S.W.2d at 338 ("We also realize the extremely difficult task the chancellor has to perform in cases when such matters are presented . . . ."); *Aragon v. Aragon*, 104 P.3d 756, 765 (Wyo. 2005) (citing *Reavis v. Reavis*, 995 P.2d 428, 431 (Wyo. 1998)) (characterizing the decision of the trial judge in determining proper parental custody of a child as one of the most demanding tasks a judge will have to confront).

custody cases. Custody trials often involve *ore tenus* evidence,<sup>20</sup> conflicting testimony and, in many cases, either two relatively fit parents or equally unfit individuals. To say the least, these cases have been defined as “close calls” best left to the trial judge.<sup>21</sup>

Due to the great deference afforded to the custody trial judge,<sup>22</sup> these particular judges enjoy a position of authority over decision-making unseen in other types of cases.<sup>23</sup> As a result, family law cases are infrequently appealed<sup>24</sup> and have an extremely low reversal rate at the appellate court

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20. See BLACK’S LAW DICTIONARY 1133 (8th ed. 2004) (defining *ore tenus* as “[o]rally; by word of mouth”).

21. See *infra* Part II.F.

22. See *Leigh v. Aiken*, 311 So. 2d 444, 447 (Ala. Civ. App. 1975) (proclaiming broad judicial discretion for trial courts in custody cases); *Manary v. Rochelle*, No. CA 03-1001, 2005 WL 1463411, at \*1 (Ark. Ct. App. June 22, 2005) (“We know of no cases in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great a weight as those involving children.”); *Maynard v. Fayard*, 181 So. 2d 304, 308-09 (La. Ct. App. 1966) (confirming the broad judicial discretion of trial judges in custody cases); *Walker v. Walker*, 184 S.W.3d 629, 632 (Mo. Ct. S.D. 2006) (citing *In re Marriage of Pobst*, 957 S.W.2d 769, 771 (Mo. Ct. App. 1997)); *Purdun v. Purdun*, 163 S.W.3d 598, 600 (Mo. Ct. App. 2005) (maintaining that greater deference is afforded to trial court determinations in custody cases); *Loumiet v. Loumiet*, 103 S.W.3d 332, 342 (Mo. Ct. App. 2003) (explaining that the courts give even greater deference than usual to the trial court’s determinations in child custody cases).

23. See *Chandler v. Chandler*, No. CA07-923, 2008 WL 2192809, at \*2 (Ark. Ct. App. May 28, 2008) (explaining that the deference afforded to the trial judge with regard to factual findings “is even greater in cases involving child custody”); *Rodriguez v. Williams*, 911 So. 2d 170, 171 (Fla. Dist. Ct. App. 2005) (maintaining that courts are afforded broad judicial discretion in custody cases and confirming that “no appellate court may overturn a trial court’s custody decision unless there is no substantial competent evidence to support the decision”); *C.A.M.F. v. J.B.M.*, 972 So. 2d 656, 660 (Miss. Ct. App. 2007) (providing that the standard of review is limited in custody cases); *Royer v. Royer*, No. A-04-709, 2006 WL 786457, at \*1 (Neb. Ct. App. Mar. 28, 2006) (explaining that custody and visitation determinations are matters entrusted to the discretion of trial judges); *Foland v. Bradford (In re NRG)*, No. E2006-01732-COA-R3-CV, 2007 WL 1159475, at \*3 (Tenn. Ct. App. Apr. 19, 2007) (granting a presumption of correctness to trial courts in custody cases); *Klettke v. Klettke*, 294 P.2d 938, 940 (Wash. 1956) (observing that trial courts are vested with broad judicial discretion in cases involving the custody of a minor).

24. See Sanford N. Katz, *Prologue*, 33 FAM. L.Q. 435, 435-36 (1999) (noting that “[a]ppeals in family law cases were infrequent so that the trial judge was basically the final decision-maker”). There is evidence to suggest that victims of domestic violence, as a subclass, may be less likely to appeal trial court decisions generally given their lack of resources and the fact that they are often unrepresented. See Kin Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 215-16 (1992) (reporting that victims rarely appeal due to cost and the fact that many of them are intimidated by the judges who deny the orders); Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1, 10 (2005) (arguing that because victims are often unrepresented they infrequently appeal trial court decisions); Jennifer L. Vainik, Note, *Kiss, Kiss, Bang, Bang: How Current Approaches to Guns and Domestic Violence Fail to Save Women’s Lives*, 91 MINN. L. REV. 1113, 1142 (2007) (stating that victims rarely appeal, possibly because many of the victims are not even represented by counsel at protection hearings). Survivors are also disinclined to appeal as a result of their general frustration with the legal system.



level.<sup>25</sup>

Legal scholars Sylvia A. Law and Patricia Hennessey maintain that, by its very nature, the best interest standard vests a high degree of discretion in trial judges,<sup>26</sup> who are “effectively unreviewable on appeal.”<sup>27</sup> The best interest factors are open to interpretation and allow the trial judge the ability to weigh each factor in accordance with his or her own personal conscience. What one judge believes to be right or wrong under the circumstances is likely to be very different from what another judge or lawyer will find appropriate. Law and Hennessey suggest that this “unfettered discretion permits judges (usually older, white males) to incorporate their own personal history, experience and bias in adding content to the ‘best interest’ principles,”<sup>28</sup> and, because the factors involve the subjective observations of the trial court judge, the reviewing court has no objective way to find error, absent flagrant abuse.<sup>29</sup>

#### A. Special Expertise

One possible rationale for the broad authority of the custody judge and limited standard of review applied in such cases is articulated in *Cesare v. Cesare*, where the court suggested that family law judges possess special expertise in domestic matters.<sup>30</sup> *Cesare* provides that all civil cases heard

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25. *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1212 (1978) (presenting a study of 6,000 state supreme court cases to determine the variables affecting rates of reversal); Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHI.-KENT L. REV. 345, 351 (1993) (citing Jeff Atkinson, *Criteria for Deciding Child Custody in Trial and Appellate Courts*, 18 FAM. L.Q. 1, 39 (1984)) (“a study completed in the early 1980s found that trial-court decisions were reversed on appeal only eighteen percent of the time”); Steve N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect But Necessary Guidepost to Determine Child Custody*, 25 N. ILL. U. L. REV. 449, 480 (2005) (proposing that as a result of the broad discretion of the trial judge, few trial court decisions are overturned on appeal).

26. Law & Hennessey, *supra* note 25, at 350.

27. *Id.* at 351.

28. *Id.*

29. *Id.* Interestingly, it is this clearly expressed set of guidelines (the best interest standard) that some argue supports the notion that appellate courts could, and possibly should, exercise greater scrutiny. See, e.g., Mark P. Painter & Paula L. Walker, *Abuse of Discretion: What Should It Mean Under Ohio Law?* 29 OHIO N. U. L. REV. 209, 212 (2002) (claiming that appellate courts seldom realize that there are different “gradations of discretion” based on the particularities of the case that appellate courts can apply when reviewing a trial court’s decision).

30. See 713 A.2d 390, 399 (N.J. 1998) (stating that the trial court has special expertise because trial courts are experienced in hearing the cases and observing testimonies, thus it has a better perspective than an appellate court at evaluating the veracity of witnesses); see also *Sykes v. Warren*, 258 S.W.3d 788, 794 (Ark. Ct. App. 2007) (Gladwin, J., dissenting) (“We know of no cases in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great weight as those involving children.”); *Manary v. Rochelle*, No. CA 03-1001, 2005 WL 1463411, at \*1 (Ark. Ct. App. June 22, 2005) (claiming that special deference is given to trial

by these select judges are “unique to and aris[e] out of” a domestic or intimate relationship.<sup>31</sup> Thus, custody trial judges are assumed to have gained distinctive proficiency and knowledge in the area of family law given their experience with these cases on a daily basis. The trial judge is essentially a specialist in the field of domestic relations law, hence the appellate court, lacking familiarity, experience, knowledge, and understanding, cannot possibly question the judicial decision-making ability of the expert.<sup>32</sup>

This notion that the trial judge possesses the requisite skills and aptitude to properly decide the case may taint the review process. A belief that the custody judge is an expert could lead to appellate court bias in favor of affirming the trial court’s decision. In the area of intimate partner violence, in particular, this rationale is problematic because many custody judges lack expertise, and even proper training in the area of intimate partner violence.<sup>33</sup>

### *B. Superior Ability to Assess Credibility*

The custody judge has been characterized as possessing a superior “power of perception.”<sup>34</sup> The argument seems plausible: these judges are

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courts because of their superior position to judge and weigh the credibility of witnesses).

31. *Cesare*, 713 A.2d at 399.

32. Not all reviewing courts defer to the special knowledge and expertise of trial court judges in custody matters. In *Wilkins v. Ferguson*, the District of Columbia Court of Appeals was of the opinion that, although visitation matters are indeed within the sound discretion of the trial court and as such will be reviewed pursuant to an abuse of discretion standard, discretion “must be grounded ‘upon correct legal principles and must rest on a firm factual foundation.’” 928 A.2d 655, 666 (D.C. 2007). In rendering its opinion the reviewing court emphasized its faith in the trial court’s knowledge of the law in the domestic relations matters, nevertheless, it reversed the trial court’s order permitting unsupervised visitation because it was without evidence to support it. *Id.* at 670-71.

33. If expertise is relevant to the issue of authority, one could suggest that a trial judge’s individual experience should play a role in determining the level of knowledge mastered and consequent authority granted. Some judges have few years on the bench, while others have little experience with custody cases in particular. Should judges with little experience be afforded less authority? The answer to the question is not a simple one. Judges with vast experience do not necessarily make better decisions. In fact, the ability of an individual trial judge provides little utility to solving the conundrum. Moreover, a focus on the issue of expertise may be the problem, not the answer. Instead, the legal matters involved and the risks at issue should be the primary consideration for the expansion or reduction of judicial authority.

34. *See* *Camp v. McNair*, 217 S.W.3d 155, 158-59 (Ark. Ct. App. 2005) (“We know of no cases in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great a weight as those involving children.”); *see also* *Dunn v. Dunn*, 972 So. 2d 810, 815 (Ala. Civ. App. 2007) (concluding that even though the appellate court may have found differently, the traditional deference given to trial courts in custody cases is great enough that a ruling will not be overturned unless a trial court explicitly exceeded its authority); *McCorvey v. McCorvey*, 916 So. 2d 357, 378 (La. Ct. App. 2005) (noting that trial judges are in the best position to

on the front lines, they see the action, observe witnesses testifying, and are able to gauge the climate in the courtroom. However, the notion that the trial judge generally, and the custody judge in particular, is somehow better at assessing witness credibility may be imprudent.<sup>35</sup>

What is it that leads us to believe that judges possess special expertise or ability to assess the credibility of witnesses? Judges are not psychologists or specially trained in human emotion. Admittedly, some protracted custody cases drag on for several years increasing the number of times that the trial judge interacts with a particular set of litigants, enhancing the judge's personal knowledge about the parties to the action.<sup>36</sup> In many

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observe the witnesses and assess credibility); *Shields v. Depew*, No. 273555, 2007 WL 1428808, at \*2 (Mich. Ct. App. May 15, 2007) (asserting that the trial court is in a superior position to assess the credibility of the witnesses); *Farnham v. Farnham* (*In re Farnham*), 675 N.Y.S.2d 244, 245 (App. Div. 1998) (quoting *Eschbach v. Eschbach*, 56 N.Y.2d 167, 171 (N.Y. 1982)) (affording great deference to the trial court's finding "because it is in the best position to evaluate the testimony, character and sincerity of all the parties involved in *this type of dispute*" (emphasis added)); *Jenkins v. Jenkins*, 348 P.2d 1108, 1111 (Or. 1960) ("[T]he judge who sees the witnesses and the parties and hears the testimony is in a better position than the appellate court, which has only the cold record before it, to weigh the evidence . . ."). Family law judges are not the only ones seen as credibility experts; it can be said that appellate courts in general view trial judges as better suited to assess the credibility of the witness. See Evan Tsen Lee, *Principled Decision Making and the Proper Role of the Federal Appellate Courts: The Mixed Question Conflict*, 64 S. CAL. L. REV. 235, 259-60 (1991) (describing that the trial judge is seen as the expert in fact finding).

It could not be gainsaid that district judges in general have a keener eye for the mien of an untruthful witness than do their appellate siblings. It may even be that district judges develop an especially acute knack for extracting the subtle inference from otherwise inscrutable declarations and deposition transcripts.

*Id.*; see also *Chandler v. Chandler*, No. CA07-923, 2008 WL 2192809, at \*2 (Ark. Ct. App. May 28, 2008) (maintaining that greater deference is afforded to the custody judge because "a heavier burden is placed on the circuit judge to utilize to the fullest extent his or her powers of perception in evaluating the witnesses, their testimony, and the best interest of the children"). Although an assessment of credibility may be more difficult and critically important for the custody trial judge, difficulty and significance do not necessarily lead to the conclusion that the custody judge is capable of doing a better job assessing witnesses, thus earning greater deference from the appellate court. In fact, the more intricate and consequential the responsibility, the greater the need for oversight by a reviewing court. See *infra* Part II.D.

35. See Chet K. W. Pagar, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373, 380 (2005) (explaining "[a]s early as 1872, [Sir James] Stephen believed that lie-detection ability was gained through experience. Accordingly, those with relevant experience, such as detectives, judges, and CIA, are more confident in their abilities. They are also more misguided.").

36. See *Maynard v. Fayard*, 181 So. 2d 304, 307 (La. Ct. App. 1966) ("[The judge] was certainly in a better position, having seen and heard the parties and observed their reactions when they appeared before him over a period of nearly two years, to appraise their suitability to be entrusted with the custody of the children than we are."). This argument assumes the same judge will hear the case throughout the life of the matter. In reality, given the overcrowded dockets and limited resources of our courts nationally, it is more likely that several hearing officers may preside over the various legal proceedings before the court. See REPORT ON RACIAL & GENDER BIAS, *supra* note 10, at 466 (documenting that "[a] fully-contested divorce, including related support and custody issues, can result in 15 different hearings before 15 different

cases, however, trial judges are marginally better off than those who review the record to make determinations about witness credibility.<sup>37</sup>

Legal scholars suggest that science disproves our longstanding notions about the use of demeanor evidence in detecting dishonesty;<sup>38</sup> and although it appears that much can be learned from the science of lie-detection, so far we may have it all wrong. According to the Honorable Rosemary Barkett:

[w]hile our notions of credibility choices might not have changed, the science that has supported those choices is continually evolving . . . . In most cases, people rely on their preconceived notions of an honest person and a liar—predictably mistaking nervousness for lying, self-confidence for honesty, or worse yet, a particular racial background with one of the two—often with disastrous results.<sup>39</sup>

An understanding of this research is critical in the area of domestic violence given the reality, which legal experts confirm, that battered women tend to exhibit what is often perceived as conduct consistent with

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individuals”).

37. In fact, some legal scholars argue that judges are actually worse off than others at lie-detection given their overconfidence. *See Pager, supra* note 35, at 381 (providing that “[d]espite their increased confidence, experts are no better than inexperienced civilians at distinguishing truth from falsehood, and some studies have found that experts, despite (or because of) their years of experience, perform even *worse* than laypersons”). *But see Peskind, supra* note 25, at 462 (suggesting that trial judges have a “unique opportunity to evaluate witnesses first hand”).

38. *See* Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1162 (1993) (citing Miron Zuckerman et al., *Verbal and Nonverbal Communication of Deception*, in 14 ADVANCES IN EXPERIMENTAL SOCICAL PSYCHOLOGY 1, 16 (1981)) (proclaiming that “empirical findings demonstrate that the behavioral cues used by jurors and other observers to perceive and measure deceptive discourse are ‘more strongly associated with judgments of deception than with actual deception.’”); *see also Pager, supra* note 35, at 380. Pager maintains that:

[t]here is now a large body of empirical literature on this subject, the findings of which converge on one near-unanimous conclusion: Our carefully considered evaluation of the truthfulness of a witness’s testimony is about as accurate as tossing a coin. Carefully controlled experiments report accuracy rates in the range of 55% for distinguishing true from false testimony, where a 50 % accuracy rate would be expected from chance alone.

*Id.* *But see* Samantha Mann et al., *Looking Through the Eyes of an Accurate Lie Detector*, 7 J. CREDIBILITY ASSESSMENT & WITNESS PSYCHOL. 1, 14 (2006) (extrapolating that although prior research indicated “no relationship between accuracy in deception detection and confidence . . . confidence scores for correct judgments were significantly higher” in their recent study “than those for incorrect judgments.”). This recent study is limited in use as it was directed by professional “lie catchers” such as police officers. *Id.*

39. *See* Rosemary Barkett, *Judicial Discretion and Judicious Deliberation*, 59 FLA. L. REV. 905, 924-25 (2007); *Pager, supra* note 35, at 383 (reporting that a nervous or agitated but honest witness increases the appearance of deception much more than a calm and collected liar); *see also* Linda C. Neilson, *Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases*, 42 FAM. CT. REV. 411, 420 (2004) (stating that “perceptions based on demeanor are often simply wrong”).

lying when, in fact, the behaviors arise out of fear or nervousness.<sup>40</sup> Chet Pager explains that “the high stakes of trial raises the general level of anxiety for truthful witnesses as well as for liars.”<sup>41</sup> Few stakes are higher than those in a child custody case between a battered woman and her abuser.<sup>42</sup>

Research shows that truthful, nervous witnesses may “give off more ‘cues’ that connote deception than do calm and collected liars.”<sup>43</sup> The battered litigant is the prime example of Pager’s high stakes, nervous witness who has much to fear from her abuser, his counsel, and our legal system as a whole.

In contrast, batterers tend to be self-confident and ultra-controlled in their outward appearance, and thus testify in a way that is traditionally perceived as truthful.<sup>44</sup> As a consequence, the appearances of both the

40. See Neilson, *supra* note 39, at 420. Neilson describes that:

[v]ictims may, as a result of damage caused by long-term victimization, seem confused, unreasonably fearful, or even aggressive . . . . By way of example, one of the women . . . who had been subjected to years of physical violence, on occasion life-threatening . . . presented herself to the court as seemingly aggressive [after advice from the prosecutor that she *must* stand up for herself], lending a degree of false credibility to her husband’s claim the abuse had been mutual. The pattern is not uncommon in domestic violence cases.

*Id.*; see also Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL’Y & L. 657, 691-92 (2003) (arguing that battered women tend to be disbelieved as a result of their in court demeanor).

[B]attered women, particularly those who have made it to court, are often angry or emotional. While this is a perfectly understandable reaction to domestic abuse and contests over custody, these demeanors do not enhance women’s credibility in the eyes of a judge or other evaluator. Moreover, many battered women in court are experiencing some stage of post-traumatic-stress-disorder (PTSD), which may distort their affects. In particular, PTSD can cause victims to over-react to ostensibly trivial issues, to display a strange lack of affect when discussing the violence, or to giggle inappropriately.

*Id.*

41. Pager, *supra* note 35, at 383.

42. Experience shows us that battered women have much to fear about our legal system. Take for example the case of Amy Castillo whose three young children were killed by their father during court ordered visitation. The court allowed visitation despite evidence of the father’s threat that the worst thing he could do to his wife was kill their children, as well as the father’s history of mental health problems. See Dan Morse & Katherine Shaver, *Deaths of 3 Children Test Md. Legal System: Judges Let Father Keep Visitation Rights*, WASH. POST, Apr. 6, 2008, at A01 (recounting the court’s denial of a protective order because the court believed both parents had credibility problems). Circuit Court Judge Joseph A. Dugan “called the case ‘very disturbing,’ saying both parents had credibility problems. He denied the protective order and allowed unsupervised visitation to continue but required Mark Castillo to provide proof that he was attending psychological counseling and appointed a lawyer to look out for the children’s interests.” *Id.*

43. Pager, *supra* note 35, at 383.

44. See Neilson, *supra* note 39, at 420 (analyzing how batterers “are highly skilled at presenting positive public images of self” and often perform better than their battered

batterer and the victim in court can be highly misleading to the trial judge.<sup>45</sup> It is critical that trial judges understand the contradictory nature of the demeanor of the party-witnesses in custody litigation involving domestic violence. Comprehensive training on demeanor evidence in the area of intimate partner violence and the unique characteristics of perpetrators and battered women should be an essential part of family court judicial training. Accordingly, counsel may wish to provide expert testimony to explain the behavior of the battered woman to counteract any misinterpretation about her behavior on the stand, as well as expert testimony regarding the abuser's self-control characteristics and predisposition to distort reality.<sup>46</sup> The use of experts to address demeanor, however, presents challenges for battered women. Survivors frequently have little financial means to afford counsel, let alone financing for experts at trial.

Demeanor evidence and credibility evidence, however, should not be

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partners on psychological testing); *see also* Meier, *supra* note 40, at 690 (confirming that custody judges tend to find perpetrators more credible than their battered counterparts).

While courts often find batterers to be sympathetic and convincing in their denials, these credibility assessments are often incorrect. Many who work in batterer's counseling attest that a common characteristic of batterers is their passionate and eloquent denial of the abuse and the impact of their own conduct on others . . . . Many batterers also exhibit a smooth and charming persona in public and when it is in their interest.

*Id.* *See generally* BANCROFT & SILVERMAN, *supra* note 8, at 23 (noting that it is a "prevalent misconception" that batterers "have poor impulse control"). Moreover, Bancroft and Silverman suggest that batterers are adept at manipulation, which extends to the public arena. *Id.* at 15-16 ("[O]ur clients are commonly able to lie persuasively, sounding sincere and providing an impressive level of detail . . .").

45. *See* Blumenthal, *supra* note 38, at 1165.

A trier of fact, when using demeanor as a gauge of a witness's credibility, places emphasis on cues that have been shown to be not only unhelpful but actually misleading. Thus, not only is the use of demeanor evidence unhelpful in the detection of deception, but given the cues on which the legal process focuses, in fact "diminishes rather than enhances the accuracy of credibility judgments."

*Id.*; *see also* Neilson, *supra* note 39, at 420 (suggesting that in intimate partner violence, "perceptions based on demeanor are often simply wrong").

46. *See* Pamela K. Sutherland and Delia J. Henderson, *Expert Psychiatrists and Comments on Witness Credibility*, TRIAL MAG., July 1998, available at [http://www.smith-lawfirm.com/Sutherland\\_article.html](http://www.smith-lawfirm.com/Sutherland_article.html).

Courts find this testimony constitutes impermissible "bolstering" of the witness by the expert. However, most jurisdictions allow expert testimony about psychiatric syndromes associated with abuse. Testimony about rape trauma syndrome, battered woman's syndrome, or child sex abuse accommodation syndrome is usually found admissible. The few courts that have balked at admitting this testimony have voiced concern that when linked with a specific witness's own characteristics, the psychiatric syndrome evidence "could be construed as impliedly supporting the truthfulness of [the witness]."

*Id.*

confused. The use of expert testimony to explain the characteristics of a class of individuals is quite different from the admissibility of such evidence to prove truth-telling on the part of a particular witness (the battered woman) or lie-detection in another (the batterer).<sup>47</sup> The evidence must be presented in a way that exposes the unreliability of our current philosophy about demeanor, not in an effort to prove or disprove the trustworthiness of the testimony of a particular witness.

### C. A Tendency to Doubt the Battered Woman

Complicating this problem further is the existence of gender bias in our courts. According to Jeanette F. Swent, judges and other key players in our legal system generally view women as less credible than men.<sup>48</sup> This is particularly problematic when the outcome of the case depends in large measure on credibility.<sup>49</sup> A custody case involving domestic violence (where the sole evidence of intimate partner violence may be the testimony of the victim) is a prime example of this problem. For the victim-litigant, who is seen as less credible simply by virtue of her gender, the most important evidence she must present to keep her children safe is disbelieved simply because she, a woman, is the sole source of the evidence.

Connected with the notion that the trial judge has a superior ability to assess witness credibility, special deference may also be afforded to the trial judge based on the myth that witnesses to domestic relations cases tend to exaggerate.<sup>50</sup> Interestingly, when exaggeration is at issue there is a good probability that the person suspected of offering the offending testimony is a woman.<sup>51</sup> The embellishment factor presents difficult

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47. See Sutherland & Henderson, *supra* note 46 (considering the use of expert testimony in an effort to bolster the witness's testimony).

48. See Jeannette F. Swent, *Gender Bias At the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 61-62 (1996) (reporting the results of a survey that show respondents find men more credible than women).

49. See *id.* ("In an adversarial system, where outcomes often depend on differences in credibility, gender bias can therefore cost a party the case.").

50. See *Barish v. Barish*, 180 N.W. 724, 725 (Iowa 1920) ("There is, as is quite usual in cases where the feeling that runs through suits of this kind prevails, a decided tendency to exaggerate. And that should be taken into consideration in weighing the testimony on this head."); *Linn v. Hobbs (In re Linn)*, 45 A.D.3d 1199, 1200 (N.Y. App. Div. 2007) (finding the mother's "testimony to be marked by a pattern of exaggeration and misrepresentation of important facts"); see also *Heck v. Reed*, 529 N.W.2d 155, 164 (N.D. 1995) (recognizing that the statute was in part designed to counteract the myth that "victims habitually lie or exaggerate the extent of violence").

51. See Marilyn Yarbrough with Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women As Liars*, 3 J. GENDER RACE & JUST. 625, 629-31 (2000).

The modern origins of the principal stereotype discussed . . . —women as

challenges when the case involves domestic violence because there may be an even greater likelihood that the fact finder will view the female victim as tending to exaggerate.<sup>52</sup>

The victim's story may seem to defy logic.<sup>53</sup> Without a great understanding of the dynamics of intimate partner violence, a judge may question the ability of an individual to tolerate such severe acts of violence for so long.<sup>54</sup> As a result, the judge may question the actual level of violence or the victim's motives if she remained in the abusive relationship for an extended period of time.<sup>55</sup> Studies suggest that judges tend to doubt

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liars—have been the subject of “scientific” as well as popular literature . . . . Men in this society have an ancient tradition of honor. A man's “word” sufficed as a promise to other men without a guarantee. A man's honor was considered different from a woman's honor . . . . A woman's honor . . . dealt with virginity, chastity and fidelity to her husband. Thus, honesty in women was not considered important . . . . Society regularly depicted women as whimsical, deceitful and untrustworthy . . . the female liar can be the woman of hyperbole. This depiction suggests that all women tend to exaggerate the circumstances surrounding harmless incidents. Something has happened to this woman, but it does not rise to the level she suggests. She is portrayed as having a gift for exaggerating pain, anxiety and suffering.

*Id.* Regrettably, the notion that women tend to exaggerate is so rooted in our social construct that it is seen by some as reliable evidence. See Robert W. Hinds & E. Ruth Bradshaw, *Gender Bias In Lawyers' Affidavits to the Family Court of Australia*, 43 FAM. CT. REV. 445, 452 (2005) (citing William G. Austin, *Assessing Credibility in Allegations of Marital Violence in the High-Conflict Child Custody Case*, 38 FAM. & CONCILIATION CTS. REV. 462, 467 (2000)) (suggesting that female lawyers tend to write longer statements, relating to domestic violence, based in part on the “female tendency to ‘exaggerate perceptions of events’ in order to bolster her case . . .”). Hinds and Bradshaw neglect to consider the possibility that female lawyers may simply do a better job extracting information from battered women and thus have more information upon which to base their pleadings.

52. See Woolard & Cook, *supra* note 8, at 211 (observing that some in our legal system believe that “women exaggerate or manipulate the issue of spouse assault and/or child maltreatment to gain an advantage in custody disputes”); see also Neilson, *supra* note 39, at 421 (arguing that “perpetrators tend to admit to less serious acts of violence to increase credibility and to create an impression that *women are exaggerating* or are being ‘vindictive’”) (emphasis added).

53. Information based on the author's representation of hundreds of battered women seeking civil protective orders and custody of their children since 1994. See also STARK, *supra* note 2, at 94 (suggesting that the type of violence male intimates perpetrate in particular creates a greater likelihood of the female victim becoming entrapped, creating a “problem profile found among no other class of assault victims,” and claiming that the outcome is that women are seen as tending to exaggerate or even present a falsehood because their “level of fear or danger . . . seems disproportionate to the proximate incident”).

54. Survivors have many valid reasons for staying given their bleak alternatives. See generally Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, COLO. LAW., Oct. 23, 1999 (providing a discussion of the reasons survivors stay).

55. What many fail to understand is that survivors of domestic violence do stay in the face of extreme acts of violence because it is often the safest option. See NEIL WEBSDALE, UNDERSTANDING DOMESTIC HOMICIDE 21 (1999) (surveying research that supports the proposition that the risk of lethal violence escalates for a battered woman after separation); see also Sharon L. Gold, Note, *Why are Victims of Domestic Violence Still Dying at the Hands of Their Abusers? Filling the Gap in State Domestic Violence*



the testimony of survivors of domestic violence and are more likely to question the female victim's credibility.<sup>56</sup> Complicating this issue further are the longstanding myths about domestic violence that tend to influence judicial decision-making.<sup>57</sup>

This tendency on the part of the fact finder to view victims, specifically women, as less credible and more likely to exaggerate is particularly dangerous in the area of domestic violence.<sup>58</sup> By refusing to believe the victim's account and concluding that domestic violence has not occurred, the trial judge will fail to properly apply important legal protections, leaving both the battered woman and her children at risk of future harm.

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*Gun Laws*, 91 KY. L.J. 935, 940 (2003) (conveying that the batterer is more likely to resort to more dangerous behavior after the victim leaves in an effort to regain power and control).

56. See REPORT ON RACIAL & GENDER BIAS, *supra* note 10, at 405 (examining various state task force studies of gender and racial bias). The Final Report provided the following account of judicial response to survivors of domestic violence:

the Gender Bias Task Force of Texas found that, "In too many instances, domestic violence is viewed as less serious than other criminal acts, the women's experiences are minimized, a victim's credibility is questioned, and . . . women suffering from abuse may even be blamed for causing the abuse." The Gender Bias Study of the Court System in Massachusetts . . . [noted], "The tendency to doubt the testimony of domestic violence victims and to 'blame' them for their predicament not only hampers the court's ability to provide victims with the protection they deserve, it also has a chilling effect on the victim's willingness to seek relief."

*Id.*

57. See Philip Trompeter, *Gender Bias Task Force: Comments on Family Law Issues*, 58 WASH. & LEE L. REV. 1089, 1090 (2001). Judge Trompeter explains:

What I found to be the most alarming result from the data that we collected was what many felt to be Virginia judges' lack of knowledge about the issues and dynamics of domestic abuse. The Task Force was aware that myths surround domestic violence and that these myths can effect judicial decision making. These myths include the ideas that domestic violence is a private family matter; that it is an unusual occurrence in the life of a couple; that abuse is only a momentary loss of temper; that domestic violence only occurs in poor, urban areas; that it never produces serious injuries; and that the victim can leave the relationship easily. We know that none of these myths are true. However, our data revealed that almost seven in ten service providers to family abuse victims, more than seven in ten female family law attorneys, and more than seven in ten female prosecutors believed that judges who handle family abuse cases in Virginia are almost never, rarely, or only sometimes knowledgeable about the dynamics of family abuse. It was a painful finding for me.

*Id.*

58. See REPORT ON RACIAL & GENDER BIAS, *supra* note 10, at 388 (explaining that the court's failure to understand domestic violence and thus accept the victim's allegations places her at risk).

*D. Serious Business of the Court*

A custody case involving domestic violence presents risks not only to the mother and child but, if decided incorrectly, poses future risks to society as well. As a result, less deference should be given to the trial judge's determinations. Paradoxically, greater deference is afforded to the custody judge based, in part, on our system's recognition of the serious nature of these cases.<sup>59</sup>

Custody determinations are the most important decisions trial judges face. As a subclass, cases involving violence against women present the greatest challenges and risks. Children exposed to domestic violence are more likely to suffer harm than those who are not exposed.<sup>60</sup> Moreover, children of batterers are more likely to repeat the cycle of violence that their fathers inflicted or their mothers experienced than are children who grow up in homes free from intimate partner violence.<sup>61</sup>

In domestic violence cases the trial judge not only deserves a better guiding standard with which to make a decision, he or she requires closer scrutiny at the appellate court level. Accordingly, a more liberal standard of review is warranted when domestic violence is involved given the social

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59. See Anthony O. Bolson, Note, *Non-Parents: Overcoming the Law's Presumption of Parental Custody*; Meldrum v. Novotny II, *Extraordinary Circumstances and the Advent of "Timmy's Law,"* 48 S.D. L. REV. 484, 484 (2003) (suggesting these cases are "the most serious business [trial judges] are called upon to undertake"); see also Hall v. Donnelly, 149 So. 867, 868 (Ala. Ct. App. 1933) (maintaining that "this duty is indeed delicate and highly responsible. Impulses of the human heart are never more involved than in cases of this character where a decision must be rendered deciding which of the respective parties is to have possession of the little child very dear to them all."); Nutt v. Nutt, 214 S.W.2d 366, 371 (Ark. 1948) (McFaddin, J., dissenting); Culpepper v. Osteen, 13 So. 2d 911, 911-12 (Fla. 1943); *In re Austin S.*, No. M2005-01839-COA-R3-JV, 2006 WL 770455, at \*2 (Tenn. Ct. App. Mar. 24, 2006) (explaining that "custody and visitation decisions are among the most important decisions that courts make"). Disagreeing with the majority, which reversed the trial judge's determination, Judge McFaddin's dissent in *Nutt v. Nutt* provides the following dialog about the magnitude of child custody determinations.

These child custody cases are the most serious ones to be decided. They require, prayerful consideration. If a mistake be made in a case involving land or money, then the aggrieved party suffers only a financial loss; but if a mistake be made in a child custody case, then the entire life of the child may be ruined: "As the twig is bent, so the tree is inclined." On the cold printed page, that comes to this court, and without having seen the child or the parents . . .

*Nutt*, 214 S.W.2d at 371.

60. See *infra* Part III.

61. See Gina L. Kershaw, Comment, *The Child Witness as a Victim of Domestic Violence: Prosecuting the Batterer Under California's Child Abuse Statute*, 19 J. JUV. L. 196, 201 n.45 (1998) (citing Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1058 (1991)) (describing a study indicating that almost half of children from abusive families became abusive in their own relationships in early adulthood).

consequences stemming from the trial judge's determination. This reason more than any other supports the notion that the review process is the final safeguard to one of the most important and significant legal issues our family court judges are expected to undertake. Both the significance of the matter and the trial court's heavy case load, suggest the appellate process must play an important role in the safety of women and children.

#### *E. Prompt and Final Resolutions*

The passage of time during litigation can have negative implications for children's stability and security. A swift resolution of the matter is generally preferable to delay.<sup>62</sup> At times, however, judicial efficiency may cause additional harm to children because judges may fail to invest the time and attention necessary, not only to make the decision, but to evaluate it as well.<sup>63</sup>

A more liberal standard of review has two likely outcomes. One possible outcome is the appellate court affirms the trial judge's decision, upholding an order already in effect. This results in no change for a child who presumably continues to remain in the care or control of the appropriate parent or guardian. A second possible outcome is that the appellate court overturns the trial judge's custody determination. This second outcome likely will result in some delay of the matter as the case may be remanded for further consideration by the trial court. For the child who is placed incorrectly in the care or control of a batterer, however, delay in a final resolution of the case is preferable to continuing emotional trauma or physical harm to the child.

Our legal system has, to some extent, a mistaken belief that children under all circumstances fair better if their legal matters are resolved as quickly as possible. This may typically be true in cases involving two suitable parents. Nevertheless, if we consider the long-term risks to children as a result of flawed custody determinations, we ultimately must conclude that prompt adjudication of a matter is not necessarily beneficial if the outcome results in an award of custody to a battering parent.

Although children thrive on stability and continuity,<sup>64</sup> judges must

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62. Peskind, *supra* note 25, at 473-74 (lamenting that "[o]ne of the most detrimental results of custody litigation is the time it takes to adjudicate contested custody cases. While the experience is inherently painful for all participants, allowing the wound to fester over years of litigation is unconscionable. Courts need to actively manage contested custody litigation to provide closure for the family at the earliest practicable time.").

63. Barkett, *supra* note 39, at 921 (explaining that judges are "in the business of dispensing justice, not simply disposing of cases").

64. See *Bergan v. Bergan*, 356 N.E.2d 673, 676 (Ill. App. Ct. 1976) (expressing the importance of final judgments because they allow children to establish beneficial and stable environments at home, in school, and in the community).

understand that the welfare of the child may require the expenditure of time at both the trial and appellate court level, ultimately resulting in delay in some cases.<sup>65</sup> A bad decision is a bad decision; it cannot be made better simply by making it quickly. Delay is not necessarily harmful if doing justice requires a thoughtful and thorough analysis of the matter to ultimately reach the best result.

*F. Conflicting Testimony, Two Fit Parents & Close Cases*

It is not uncommon that the testimony of the parties will conflict in family law cases. Courts acknowledge that in the area of family law it is predictable for the parties to give completely different characterizations of their relationship and the events that transpired.<sup>66</sup> In such cases, appellate courts find that resolving the issue of conflicting testimony should fall squarely on the shoulders of the trial court judge.<sup>67</sup>

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65. *See id.* (proposing that although “much weight attaches to continuity, the welfare of a child may be better served by a modification of the custody order”).

66. *See, e.g.,* Stamm v. Stamm, No. 21A05-0607-CV-401, 2007 WL 1673799, at \*2 (Ind. Ct. App. June 12, 2007) (showing no surprise at conflicting testimony of the feuding spouses and in fact calling the occurrence predictable).

67. *See* Manary v. Rochelle, No. CA 03-1001, 2005 WL 1463411, at \*2 (Ark. Ct. App. June 22, 2005) (“[W]e defer to the trial court in matters of credibility”); Culpepper v. Osteen, 13 So. 2d 911, 911 (Fla. 1943) (maintaining that the trial judge’s decisions on conflicting testimony should not be disturbed); Kminek v. Kminek, 325 N.E.2d 741, 743 (Ill. App. Ct. 1975) (highlighting the presence of conflicting testimony at the trial court level); Coan v. Coan, 190 Ill. App. 633, 633 (1914) (explaining “[w]here the evidence is conflicting, findings of a chancellor have the force and effect of a verdict, and such verdict will not be disturbed or set aside unless palpably against the weight of the evidence”); Tritle v. Tritle, 956 So. 2d 369, 374 (Miss. Ct. App. 2007) (stating that the appellate court is not at liberty to substitute its own judgment for the trial court when it comes to evaluating conflicting testimony); Lampe v. Lampe, 28 S.W.2d 414, 415 (Mo. Ct. App. 1930) (“[W]hen, as here, the evidence sharply conflicts, justice requires that we defer largely to the findings of the trial judge who had the parties before him, and thus had the opportunity to observe their demeanor on the stand to aid him in reaching his conclusion as to the real facts in the case.”); Gedwell v. Gedwell, 170 S.W. 421, 422 (Mo. Ct. App. 1914) (admitting that great deference is given to the decisions of the trial court in divorce and custody cases); Ephraim H. v. Jon P., No. A-04-1488, 2005 WL 2347727, at \*2 (Neb. Ct. App. Sept. 27, 2005) (explaining “[w]here credible evidence is in conflict on a material issue of fact” great weight may be given to the ability of the trial judge to observe and assess the credibility of the witnesses); Klettke v. Klettke, 294 P.2d 938 (Wash. 1956) (observing that although the evidence was conflicting, the trial judge did not abuse his discretion by believing the testimony of one party over the other); Sorge v. Sorge, 191 P. 817, 817 (Wash. 1920) (affirming the trial court custody decision while highlighting that the evidence and testimony from the record below was “flatly contradictory throughout”). Although painfully aware that the testimony of the parties may be conflicting, not all jurisdictions maintain that the contradictory nature of the evidence in custody cases is relevant to an assessment of the trial court’s determination. Some jurisdictions will reweigh the evidence, even in the face of highly conflicting evidence, and reverse the trial court’s determination if the judge has erred. *See* Hager v. Hager, 219 S.W.2d 10, 12 (Ky. 1949) (observing that in equity cases, the reviewing court will reweigh the evidence).

Batterers have a distorted perception of themselves and their actions.<sup>68</sup> In addition, batterers tend to be master manipulators.<sup>69</sup> Accordingly, it is highly probable that the batterer will deny allegations of abuse thus proposing a story in direct conflict with that of the victim. At the appellate level an understanding of a perpetrator's propensity to distort reality is a critical step in any determination that the reviewing court is "left with a definite and firm conviction that a mistake has been made."<sup>70</sup>

By its very nature, a case involving intimate partner violence is not a close call. Yet when a judge is vested with the authority to make factual and legal determinations about allegations of abuse, a "close call" justification may be used as a validation for the trial judge's ultimate custody determination.<sup>71</sup> By concluding that the allegations do not rise to the level of abuse as defined by law<sup>72</sup> or that the act or acts of abuse simply did not occur,<sup>73</sup> the case becomes a closer call and the trial judge is back to a best interest analysis which carries with it a whole host of challenges.<sup>74</sup>

Additionally, a case involving domestic violence may appear, at least superficially, to be a closer call than it is in reality. In fact, because domestic violence is difficult to prove, a perpetrator of intimate partner violence may falsely allege abuse to divert the court's attention or counteract true allegations of abuse asserted by the battered parent.<sup>75</sup> Simply put, cross allegations of abuse may be one of the most destructive ways a perpetrator can effectively counterbalance the weight afforded to

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68. See Neilson, *supra* note 39, at 421.

Perpetrators who dominate and demean, who exert excessive power and control, commonly present themselves as victims. This is to be expected. We create our own projections of the world through our own action. Thus, those who victimize will, over time, come to interpret the behavior of others as if it were also victimization.

*Id.*; see also BANCROFT & SILVERMAN, *supra* note 8, at 114.

69. See BANCROFT & SILVERMAN, *supra* note 8, at 15-16 (explaining the batterer is so adept at manipulation that it "may be impossible to uncover accurate information" from him).

70. Parsley v. Parsley, 734 N.W.2d 813, 817 (S.D. 2007) (citing City of Deadwood v. Summit, Inc., 607 N.W.2d 22, 25 (S.D. 2000)).

71. The notion that many of these matters involve two fit parents or two equally unfit parents, depending on the allegations, is another reason espoused for affording great deference to trial courts in custody cases. See Jelsing v. Peterson, 729 N.W.2d 157, 163 (N.D. 2007) (reasoning that in "close cases," appellate courts must defer to the trial judge's enhanced ability to assess the credibility of the witnesses).

72. The first determination, that the allegations do not rise to the level of abuse as defined by law, is a mixed question of law and fact. See *infra* Part VI.C.

73. Determining that the acts did not occur is a pure question of fact. See *infra* Part VI.A. By a purely factual determination, the trial judge in effect avoids the remote possibility of reversal because such rulings are assessed pursuant to the abuse of discretion standard of review.

74. See *infra* Part V.

75. See *infra* Part VII.C.

bona fide allegations of domestic violence, thus placing the parties on equal footing in the mind of the custody trial judge.

Appellate courts, from a distance, may be in an excellent position to assess whether the trial court's findings of fact were reasonable given the weight of evidence in light of the nature and character of the witnesses providing that evidence. Regrettably, the current legal system customarily supports the notion that unless the "contradictory evidence is beyond belief," the appellate court will defer to the findings of the trial judge.<sup>76</sup> Those factual findings, as we will see, are highly complex when violence against women is involved.<sup>77</sup>

### G. *Ore Tenus* Evidence

Appellate courts are aware that trial judges rely on the oral testimony of witnesses as the primary source of evidence in custody cases. Reviewing courts have consistently held that when trial courts primarily consider *ore tenus* evidence, the standard of review is limited "because of the presumption of correctness afforded the trial court's judgment."<sup>78</sup> This justification presents unusual challenges for a survivor of domestic violence because in the vast majority of custody cases the battered parent must rely exclusively on oral testimony to prove allegations of abuse.

As we know, domestic violence occurs in private, resulting in little verifiable evidence. Victims are reluctant to contact law enforcement, seek medical treatment or inform others of the physical or emotional injuries they suffer at the hands of their batterers.<sup>79</sup> Unless law enforcement or another intervener is involved at the time of an abusive incident, it is unlikely that proof of the batterer's misconduct will be available at the time

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76. See *Lampe v. Lampe*, 28 S.W.2d 414, 415 (Mo. Ct. App. 1930).

77. See *infra* Part VI.A.

78. *Bishop v. Knight*, 949 So. 2d 160, 166 (Ala. Civ. App. 2006); see *Gedwell v. Gedwell*, 170 S.W. 421, 422 (Mo. Ct. App. 1914) (citing *Maget v. Maget*, 85 Mo. App. 6, 13 (1900); *Long v. Long*, 156 S.W. 487, 488 (Mo. Ct. App. 1913)) (explaining that in divorce cases great deference is given to the findings of the trial judge, in particular when the evidence is oral and conflicting); *Wyrick v. Wyrick*, 145 S.W. 144, 146 (Mo. Ct. App. 1912).

79. See Dorathy E. Roberts, *The Social and Moral Cost of Mass Incarceration In African American Communities*, 56 STAN. L. REV. 1271, 1287 (2004) (citing distrust of law enforcement as a reason for battered women of color's reluctance to contact the police); Marielsa Bernard, *Domestic Violence's Impact On Children*, MD. B.J., May-June 2003, at 17 (explaining that immigrant women fail to contact law enforcement for fear of losing their immigration status). Battered women are reluctant to contact law enforcement, seek medical treatment or assistance from others for many of the same reasons why they are unable to extract themselves from the abusive home. Threats of harm from their abusers, prior failures on the part of law enforcement to appropriately respond to calls for help, and the shame related to seeking assistance are just a few examples of why battered women are unable or reluctant to seek help. See generally Buel, *supra* note 54 (explaining the many obstacles to leaving an abusive relationship).

of the custody trial.<sup>80</sup> Law enforcement involvement, however, does not guarantee proper documentation of injuries, property damage, or other evidence. Hospital reports, although incredibly helpful when available, do not exist for clients who are unable or reluctant to seek medical treatment. In some cases, the only other witness to the batterer's behavior is a young child. Many battered mothers and their lawyers, however, are reluctant to subject children to the trauma of trial testimony, given the legal, social, and psychological risks.<sup>81</sup>

The trial judge must understand that domestic violence often occurs in private and that battered women must rely heavily on their own testimony to prove allegations of abuse. Moreover, evidence suggests that the credibility of the battered woman may be unfairly questioned because she is both a woman and a victim of domestic violence, not because she is disingenuous.<sup>82</sup> As a result, when domestic violence is at issue appellate courts must not follow the principle that trial court determinations should be affirmed simply because the trial court observed oral testimony.

### III. THE RISKS TO WOMEN AND CHILDREN

*The sense of safety in the world, or basic trust, is acquired in earliest life in the relationship with the first caretaker. Originating with life itself, this sense of trust sustains a person throughout the lifecycle. It forms the basis for all systems of relationship and faith.*<sup>83</sup>

Survivors of domestic violence fight an uphill battle when they seek to protect their children. They face a legal system burdened by high caseloads that are contemporaneously pressured to promptly resolve matters. Judges are also swayed by the myths that surround domestic violence and are influenced by gender, class, and racial bias.<sup>84</sup> If the trial judge makes a mistake, a survivor who has the wherewithal to seek review is at a great disadvantage against the victorious battering-parent because the appellate court presumes that the custody judge possesses special expertise.<sup>85</sup> Unlike the low risk in cases involving two relatively suitable parents, there are

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80. Based on the author's experience representing countless battered women seeking custody of their children.

81. See Neilson, *supra* note 39, at 423 (noting that "[c]hildren are not always reliable witnesses in partner-abuse cases. Some children have ambivalent feelings about the abuse and about the abusive parent, loving yet fearing them; others even side strongly with the abusive parent because, as a result of the abuse in the home, the abuser is viewed as powerful and competent.").

82. See *supra* Part II.C.

83. JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 51 (1992).

84. See *infra* Part IV.

85. See *supra* Part II.A.

grave risks for children placed in the care of a battering parent.

It is risky to separate the safety concerns for the battered mother and the welfare of her child; the two are linked.<sup>86</sup> Children exposed to batterers, in some cases, are in as much risk as their abused parent.<sup>87</sup> According to Evan Stark, “[d]omestic violence is the single most common context for child abuse and neglect.”<sup>88</sup> The numbers, however, are inconclusive, with the concurrence of intimate partner violence and child abuse “ranging from 6.5% to 82%.”<sup>89</sup>

Moreover, research suggests that children exposed to domestic violence are more likely to experience short-term negative consequences such as fear, depression, anxiety, sleep disturbance, eating disorders, physical illness, educational difficulties, and behavior problems as a result of their exposure to a batterer’s behavior.<sup>90</sup> Regrettably, these children are also

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86. Some may argue that the safety of the battered mother and the welfare of the child are two separate and distinct issues. The theory that the safety of mothers and minor children can be ensured while providing batterers the power of joint or sole decision-making and uncontrolled access to their children is misguided and dangerous. In fact, securing the safety and well-being of the mother ensures the protection, health, and welfare of children. See BANCROFT & SILVERMAN, *supra* note 8, at 42 (citing Gayla Margolin, *Effects of Domestic Violence on Children*, in VIOLENCE AGAINST CHILDREN IN THE FAMILY AND COMMUNITY 57 (Penelope K. Trickett & Cynthia J. Schellenbach eds., 1998)) (explaining that the resilience of children exposed to intimate partner violence depends on a positive relationship with their mother); JEAN HARRIS HENDRIKS ET AL., WHEN FATHER KILLS MOTHER: GUIDING CHILDREN THROUGH TRAUMA AND GRIEF 13 (1993) (explaining the positive correlation between security and successful stress management for children); SUSAN L. KEILITZ ET AL., NAT’L CTR FOR STATE COURTS, DOMESTIC VIOLENCE AND CHILD CUSTODY DISPUTES: A RESOURCE HANDBOOK FOR JUDGES AND COURT MANAGERS 47 (1997) (suggesting that custody and visitation orders should promote a stable home environment, as well as secure the safety of both the battered mother and the child); Weithorn, *supra* note 9, at 135-36 (healing for traumatized children depends in large measure the stability of the non-abusive parent).

87. See Neilson, *supra* note 39, at 412 (arguing that “[f]ailure to consider intimate-partner abuse in custody and access cases is serious, because witnessing abuse can be as harmful to children as child abuse itself. Moreover, abusive partners pose continuing risks both to children and to victims after separation or divorce. Patterns of hostility and conflict that developed during intact relationships tend to continue after separation); see also Jaffe et al., *supra* note 3, at 82 (explaining that there is “significant overlap between domestic violence and child maltreatment”).

88. STARK, *supra* note 2, at 42.

89. *Id.*

90. See John W. Fantuzzo & Wanda K. Mohr, *Prevalence and Effects of Child Exposure to Domestic Violence*, 9 FUTURE & CHILD. 21, 27 (1999). Research suggests that:

children exposed to domestic violence tended to be more aggressive and to exhibit behavior problems in their schools and communities ranging from temper tantrums to fights. Internalizing behavior problems included depression, suicidal behaviors, anxiety, fears, phobias, insomnia, tics, bed-wetting, and low self-esteem . . . . Children exposed to domestic violence demonstrated impaired ability to concentrate, difficulty in their schoolwork, and significantly lower scores on measures of verbal, motor, and cognitive skills.



more likely to suffer long-term negative health consequences as a result of exposure.<sup>91</sup> According to experts, childhood trauma is one of “the most significant predictors of adult ischemic heart disease, cancer, chronic lung disease, skeletal fractures, and liver disease”<sup>92</sup>—diseases that are often fatal.<sup>93</sup> Surprisingly, those who witness violence may be more likely to suffer greater long-term negative consequences as compared with those who suffer direct physical injury.<sup>94</sup>

Children do not have to suffer endlessly from the harmful effects of exposure to a perpetrator’s acts of domestic violence. In fact, evidence suggests that there is a positive correlation between restricting a batterer’s contact with his child and improved adjustment of the child post separation;<sup>95</sup> improved adjustment in the short-term may ward off the likelihood of long-term negative health consequences in adulthood.

Yet children are not the only family members at risk of harm as a result

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*Id.*; see HARRIS HENDRIKS ET AL., *supra* note 86, at 22 (observing that children exposed to domestic violence experience a range of psychologically negative outcomes such as “over-activity, aggression, rebelliousness and delinquency . . . depression, phobias, and obsessiveness . . . poor concentration . . . [and r]educed capacity to empathize, to communicate effectively or to assert themselves”); cf. Jaffe et al., *supra* note 3, at 85 (asserting that “[a]lthough exposure to domestic violence is harmful for most children, there is considerable variability in the outcomes of individual children”).

91. See William W. Harris et al., *In the Best Interests of Society*, J. CHILD PSYCHOL. & PSYCHIATRY 392, 394 (2007).

92. *Id.* (citing Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREV. MED. 245 (1998)).

93. *Id.*

94. See HARRIS HENDRIKS ET AL., *supra* note 86, at 26.

Post-traumatic stress symptoms were recorded in eighty percent of uninjured child witnesses of violence. Post-traumatic stress disorder is usually more severe and longer lasting if the stress is related to the actions of one person or group of people against another, and is more likely in uninjured witnesses than in injured abused children, whose perception and memories may focus more on their own pain and injury. In violent families the enduring threat of violence and uncertainty aggravates post-traumatic stress, or, at least, impedes recovery.

*Id.*

95. Neilson, *supra* note 39, at 412 (proposing that “the longer children went without seeing the abusive parent, the better the children’s adjustment”); see Jaffe et al., *supra* note 3, at 88.

[S]ome recent studies counter the prevailing notion of maintaining some form of access between a parent who is violent and the children. For example, a study on the effects of father visitation on preschool-aged children in families with a history of domestic violence found a complex pattern of results. The impact of father visitation depended somewhat on the severity of the violence that the father had perpetrated. . . . Another study . . . demonstrated the negative impact of violent fathers on children’s development . . . emerging evidence indicates the possible need to rethink the presumption of access in all cases.

*Id.*

of flawed custody orders. An award of sole legal custody provides a parent with the authority to make important decisions. That authority includes determinations about residence, medical treatment, education, religious affiliation, extracurricular activities, and daily routines. For a battering parent, authority equals power, the power to control one of the most important aspects of the battered mother's existence: her children. Bestowing decision-making authority regarding the welfare of children to a batterer is not only imprudent because a perpetrator of domestic violence is likely to make poor decisions about the well-being of his children;<sup>96</sup> he is also more likely to use it as a vehicle to control his former partner.<sup>97</sup>

Joint legal custody, on the other hand, grants an equally dangerous power to a batterer; the authority to contact and the power to communicate. Contact and communication between the perpetrator and battered woman creates an increased risk of both physical and emotional harm. It is well established that a battered woman is at greater risk of harm after separation from her abuser.<sup>98</sup> Moreover, a battered woman with children may be at a greater risk of harm than her motherless counterpart.<sup>99</sup> Forced contact will only increase her risk of future violence. At a minimum, stress is likely to result when a victim is required to have regular and continuing contact with

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96. See Neilson, *supra* note 39, at 413.

Post-separation parenting problems documented by researchers who have studied custody and access decisions in intimate-partner abuse cases include the following: continuing exposure of children to conflict and abuse directed at the nonabusing parent; exposing children to additional patterns of intimate partner abuse as new relationships are formed; teaching children intimate-partner abuse techniques; exposing children to criminal and addictive lifestyles; endangering children's safety; interfering with victim and child therapy; neglecting children's needs and interests, undermining the authority, health and welfare of the custodial parent; involving children as allies in parental conflicts; and redirecting abuse at the children.

*Id.*

97. *Id.* (explaining that research confirms batterers use legal tactics, as well as visitation "to continue to dominate and maintain contact and control following separation").

98. See Jaffe et al., *supra* note 3, at 82 (indicating that high rates of abuse continue after separation); Sharon L. Gold, Note, *Why are Victims of Domestic Violence Still Dying at the Hands of Their Abusers? Filling the Gap in State Domestic Violence Gun Laws*, 91 KY. L.J. 935, 940 (2003) (articulating that due to the abuser's need to control, the partner is at greatest risk when deciding to leave); see also WEBSDALE, *supra* note 55, at 21 (asserting that research supports a positive correlation between separation from an intimate relationship and "an increased risk of lethal violence" for the female partner); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5-7 (1991) (explaining the increased risks of violence post separation due to the phenomenon of "separation assault").

99. Research suggests that battered women with children may be at a greater risk of violence. See Carolyn N. Ko, Note, *Civil Restraining Order for Domestic Violence: A Question of "Efficacy"*, 11 S. CAL. INTERDISC. L.J. 361, 374 (2002) (explaining that "study results indicated that women with children were more likely to experience post-restraining order violence than women without children").

her assailant, which is likely to interfere with parenting.<sup>100</sup>

#### IV. A GENDERED ISSUE

*[T]he primary harm abusive men inflict is political, not physical, and reflects the deprivation of rights and resources that are critical to personhood and citizenship.*<sup>101</sup>

There is little question that the domestic violence dilemma in custody cases is a complicated, gendered issue.<sup>102</sup> The devaluation of domestic violence results partly from the fact that intimate partner violence is largely a female problem. Despite arguments to the contrary, research indicates that the vast majority of battered individuals are women.<sup>103</sup> Not only are

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100. See Harrington Conner, *supra* note 8, at 221 (taking into consideration the stress continued contact with the batterer has on a survivor of domestic violence).

101. STARK, *supra* note 2, at 5.

102. For a consideration of the link between gender bias and domestic violence in the judicial system, see Blake D. Morant, *Introductory Essay: The Relevance of Gender Bias Studies*, 58 WASH. & LEE L. REV. 1073, 1083 (2001).

Perhaps the most polemic portion of the Virginia study included the examination of gender bias in matters of domestic relations and domestic violence. Judge Philip Trompeter highlights the most exemplary findings of bias within certain aspects of domestic relations matters such as divorce, child support, and child custody. Judge Trompeter's Comment further describes the manifestation of bias as it relates to the judiciary's handling of domestic violence matters. His Comment portrays the subtle nature of gender bias, its more obvious manifestations as it relates to child custody, and the difficult pathology of domestic violence . . . . Judge Coleman particularly highlights some women's disparate treatment, which is perceived by women, but not by male members of the judiciary.

*Id.* See also Trompeter, *supra* note 57, at 1089-90 (explaining that the Virginia task force on gender bias in the courts found that "respondents perceived gender bias to play the most significant role in family law cases" and that the "most alarming result from the data" was the "judges' lack of knowledge about the issues and dynamics of domestic abuse"); *cf.* Meier, *supra* note 40, at 675.

It can generally be assumed that judges and forensic evaluators who react negatively to battered mothers' claims in custody/visitation contests do not (with some notable exceptions) consciously do so out of sexism. Rather, they often rely on apparently gender-neutral rationales, which undercut the likelihood that a battered mother is truly seeking to protect her children.

*Id.* But see generally Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender In the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582 (1996) (contemplating domestic violence gender discourse and suggesting that such analysis fails to properly consider intimate partner violence between same-sex couples).

103. See REPORT ON RACIAL & GENDER BIAS, *supra* note 10, at 388 (explaining that "gender is at the core of many domestic violence issues. Women are traditionally the recipients of violence at the hands of their intimate partners."). The report also provides statistics that more than ninety-five percent of protective orders are filed by women. *Id.* at 386; see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 1 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/>

women abused at an alarming rate,<sup>104</sup> legal scholars suggest the act of intimate partner violence is itself gender motivated.<sup>105</sup> For battered women, the gender issue is multi-layered and interconnected. Women are objectified, abused, humiliated, and degraded as a result of one primary factor: their status as females. Domestic violence, it follows, is devalued as a legal and social ill predominantly because it is perpetrated chiefly against women, because they are women. Thus, to end violence against women, Dr. Evan Stark maintains we must first eradicate sexual discrimination.<sup>106</sup>

As a result, the problems identified in this Article do not stem exclusively from the law as it is written. Most states, in fact, require the trial judge to consider domestic violence as part of the best interest determination,<sup>107</sup> or presume by statute that a batterer should not have joint or sole custody of the child at issue.<sup>108</sup> The problems grow out of how the law is applied in a system guided and burdened by an extensive history of gender bias and inequality.<sup>109</sup> This history confirms the devaluation of

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fvs02.pdf (reporting that “[t]he majority (73%) of family violence victims were female. Females were 84% of spouse abuse victims and 86% of victims of abuse at the hands of a boyfriend or girlfriend.”); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ-149259, VIOLENCE BETWEEN INTIMATES 2 (1994) (providing that ninety to ninety-five percent of all victims of domestic violence are women); Meier, *supra* note 40, at 683 (explaining domestic violence “is perpetrated most often by males against females”); Neilson, *supra* note 39, at 415.

Most research studies and statistical reports indicate that rates of violence against women in intimate relationships are higher than rates of violence against men, particularly once factors such as seriousness, pattern, frequency, and injury are considered. Statistics from police forces and data from hospital records, court files, and service providers consistently and overwhelmingly document women as the targets of intimate-partner violence.

*Id.*; *cf.* STARK, *supra* note 2, at 91-92 (considering the question of whether abuse is gender-neutral).

104. According to the National Institute on Justice, approximately 1.3 million women are abused annually by an intimate. See Nat’l Inst. on Justice, U.S. Dep’t of Justice, How Widespread Is Intimate Partner Violence? <http://www.ojp.usdoj.gov/nij/topics/crime/intimate-partner-violence/extent.htm> (last visited Apr. 28, 2009).

105. See Julie Goldscheid, *Advancing Equality in Domestic Violence Law Reform*, 11 AM. U. J. GENDER SOC. POL’Y & L. 417, 424 (2003) (acknowledging that many instances of domestic violence may be gender motivated).

106. See STARK, *supra* note 2, at 14 (“[A]buse of women in personal life is inextricably bound up with their standing in the larger society and therefore that women’s entrapment in their personal lives can be significantly reduced only if sexual discrimination is addressed simultaneously.”).

107. See AMERICAN BAR ASSOCIATION COMM’N ON DOMESTIC VIOLENCE, CHILD CUSTODY AND DOMESTIC VIOLENCE BY STATE (2008), available at <http://www.abanet.org/domviol/docs/Custody.pdf> [hereinafter ABA COMMISSION] (displaying all states that consider domestic violence as a best interest factor with the exception of Arizona, Louisiana, Maryland, Oklahoma, South Dakota, Texas, Washington, and West Virginia).

108. See *id.* (illustrating that approximately half of the states have a rebuttable presumption against granting joint or sole custody to the batterer).

109. Case law demonstrates that mothers generally were held to a higher standard than fathers and were afforded lesser rights in the area of custody than their male

women and mothers in the eyes, ears, and minds of our legal decision-makers.<sup>110</sup>

Defining gender bias in the justice system may help solve this problem. Jeannette F. Swent, in her national study of gender bias task forces, suggested the following definition: gender bias occurs when “‘preconceived notions’ (or ‘stereotypes,’ ‘myths’ or ‘misconception’) based on gender . . . limit or even eclipse the possibility of individualized appraisal of a person or situation.”<sup>111</sup>

Swent maintains that women generally receive “unfavorable outcomes” because of their gender and that battered women in particular are frequent victims of gender bias.<sup>112</sup> According to Swent, gender bias task forces work throughout this country exposing the truth “that all reaches of the justice system, from police through prosecutors and judges, trivialize domestic violence.”<sup>113</sup> The trial judge, in Swent’s opinion, turns out to be the battered woman’s worst enemy.<sup>114</sup> She explains that judicial bias takes

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counterparts. *See Paine v. Paine*, 23 Tenn. (4 Hum.) 523 (1843).

That the father is entitled upon the principles of the common law to the exclusive custody of his children is not and cannot be controverted; and that if he have it, a court of common law will not deprive him of it but for an abuse of his trust affecting their persons either by improper violence, or improper restraint, and which would justify the issuance of a writ of *habeas corpus* for their protection.

*Id.* at 534; *see also* Swent, *supra* note 48, at 34 (providing that in “all states, and regardless of the research approach, the task forces [on gender bias] found overwhelming evidence that state court systems are seriously compromised by gender bias, and most frequently and dramatically, the victims are women”).

110. *See* Swent, *supra* note 48, at 60 (confirming that mothers are held to “higher standards of behavior than fathers in determining custody and that the standards often unfairly include assumptions about appropriate behavior that are stereotypically based on gender.”). For a period of time in our nation’s history, women were afforded a small measure of protection related to their young children, provided they acted in accordance with prevailing notions of acceptable behavior and purity. For a historical analysis of how parental gender influenced custody determinations by our courts, *see* Peskind, *supra* note 25, at 452-55 (explaining that early in our history English law mandated that fathers automatically receive custody of their children; this occurred until a maternal preference for young children was widely accepted by way of the tender years doctrine). With regard to battering, history confirms that mothers are even held accountable for the violence of others, namely men, when it occurs in the presence of their children. *See* STARK, *supra* note 2, at 43.

111. Swent, *supra* note 48, at 35 (basing the definition on the work of Lynn Hecht Schafran and Norma J. Wikler). Schafran and Wikler, a lawyer and a sociologist respectively, joined together through the National Judicial Education Program “to work at a national level on setting the course for judicial education regarding gender bias” by using state data. *Id.* at 7-8.

112. *Id.* at 55; *see* Neilson, *supra* note 39, at 414-15 (comparing how battered women are not only victims of gender bias by the Canadian justice system, the data shows that they are victims of gender bias in legal systems generally, noting that “most [legal systems] have concluded that gender bias . . . when it exists, is against women, particularly women who are the victims of abuse”).

113. *See* Swent, *supra* note 48, at 55.

114. *Id.* at 58 (“Some of the most visceral testimony before the task forces

many forms, such as mitigating the true impact of the violence, disbelieving it altogether, concluding it was mutual or justified despite evidence to the contrary, or choosing to disregard it as relevant to child custody.<sup>115</sup> Judicial gender bias extends well beyond mere distraction, acting as the driving force for legal determinations made in a particular case.<sup>116</sup> Consequently, it is nearly impossible for the battered female litigant to receive a fair trial in the face of judicial gender bias.

Battered women are also at risk of class bias.<sup>117</sup> This problem is complicated by the fact that class bias is directly related to and often caused by the battered woman's gender and predicament. Battered women frequently find themselves without adequate financial resources as a direct result of a perpetrator's control over both the battered woman's autonomy and her ability to gain meaningful employment.<sup>118</sup> As a result of her gender and status as a victim, she is unlikely to have adequate financial resources. In turn, her inadequate financial resources increase the likelihood that she will not have legal representation.<sup>119</sup> Therefore, her gender and poverty increase her risk of both judicial gender and class bias.<sup>120</sup> Since it is unlikely that she will have representation, she lacks an

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concerned how judges treat victims of domestic violence in court. The victim who arrives in court after overcoming all of the difficulties . . . too often finds her toughest adversary on the judicial bench.”).

115. *See id.* (listing ways that judges distort the power imbalance that exists between the victim and the aggressor, including presuming “the victim provoked or deserved the violence,” and issuing mutual protective orders, thereby improperly suggesting aggression on the part of the victim).

116. *See id.* For example, by improperly concluding that the violence is of no consequence, justified, or mutual, the court successfully avoids application of proper legal presumptions or improperly weighs the domestic violence factor in determining legal custody. *Id.*

117. Bias continues to be a problem today. In a 2003 report by the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, the committee acknowledged that it “received numerous complaints about reportedly biased conduct directed toward women, minorities and indigent witnesses and litigants appearing before the family court system . . . judges were impatient with female litigants whom they viewed as emotional, and frequently interrupted witnesses and other parties who were female.” *See* REPORT ON RACIAL & GENDER BIAS, *supra* note 10, at 477.

118. *See Swent, supra* note 48, at 59 (revealing how class bias extends beyond the economic limitations imposed by the aggressor to the economic limitations imposed on the victim by the judicial setting, where female victims are unlikely to receive an equitable share of property or money that could fund legal services). “Thus the economically dependent woman facing divorce will probably be underrepresented by both her lawyer and experts, while her husband will probably not be subject to such dire financial constraints.” *Id.*

119. *See id.* at 80 (explaining that many gender bias task forces reported that “poor women's problems with access to justice are acute and are compounded by gender bias”).

120. *See id.* (regarding gender in particular, Jeannette Swent, in her national study of gender bias task forces, suggests that “in the case of gender bias, the victims are almost always women”).

important safeguard against judicial bias. Due to her lack of representation, the battered woman is less likely to be in a position to effectively navigate the legal system and more vulnerable to legal, emotional, and physical attack.

For battered women of color, the effect of judicial bias is often devastating given the multiple forms of oppression they face and the nature of racial bias.<sup>121</sup> Yet, the impact of the subjugation of women of color is complex. According to Kimberle Crenshaw, “race cannot be separated from gender in Black women’s lives. Race in many ways both shapes the kinds of gender subordination Black women experience and limits the opportunities to successfully challenge it.”<sup>122</sup> Like the female litigant who cannot change her gender, the battered woman of color cannot guard against race bias because she cannot change the color of her skin. In addition, this bias is virtually impossible to prove because it occurs in silence.

As we have seen, when a woman raises allegations of domestic violence at a custody trial, her motivation and honesty are questioned.<sup>123</sup> Trial court judges tend to discount or disregard the violence during the custody phase, despite what the law allows.<sup>124</sup> Judicial doubt may be based, in part, on the myths that women generally tend to exaggerate<sup>125</sup> and that domestic violence is rare. In some ways, the justice system is truly blind to the battered woman, the reality of intimate partner violence, the welfare of her

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121. The author cannot properly articulate the plight of a battered woman of color. She faces, without question, an impossible legal, social and personal crusade against a system which often fails to see, hear, or respond to her in any meaningful way. See Yarbrough & Bennett, *supra* note 51, at 628 (describing the “piling on” that happens to women of color given race stereotyping, as well as the tendency of our legal system to disbelieve women generally).

122. Kimberle Crenshaw, *Gender, Race and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1467, 1468 (1992).

123. See REPORT ON RACIAL & GENDER BIAS, *supra* note 10, at 475 (report evidence suggests that when domestic violence is raised by battered women during the custody phase, judges may consider the women’s actions tactical not protective in nature); see also Meier, *supra* note 40, at 686 (confirming the court’s skepticism of battered mothers who raise allegations of domestic violence at the custody stage).

[I]t is highly unusual for a battered woman in private litigation to be recognized by a court to be sincerely advocating for her children’s safety. Rather, her very status as a litigant, a mother, and battered, seems to ensure that she will be viewed as, at best, merely self-interested, and at worst, not credible.

*Id.*

124. See REPORT ON RACIAL & GENDER BIAS, *supra* note 10, at 475 (suggesting that some trial judges fail to give domestic violence the deliberation required in custody matters); see also Swent, *supra* note 48, at 58 (explaining that “[e]ven judges who are aware of a violent domestic violence history may not consider this when deciding child custody, child support and visitation arrangements”).

125. See *supra* Part II.C.

children, and her basic need for safety. Yet in other ways, justice is not blind; it sees clearly the battered woman's gender, class, and race. Justice takes it in, assesses it, and finds her to be less believable, less deserving, and less relevant than her abusive male counterpart.

#### V. ASSESSING CUSTODY AT THE TRIAL COURT LEVEL

*Sometimes what we need to do is give ourselves credit not for intelligence—but for ignorance.*<sup>126</sup>

This section analyzes the application of the best interest standard, as well as legal presumptions applied by trial court judges in custody cases involving intimate partner violence. It is clear from this examination that the current tools used to assess custody at the trial court level create unpredictability in cases of domestic violence and fail to meet the needs of battered women and their children.

The best interest standard has been hotly debated among legal scholars. Some suggest it is the only viable option available for the custody trial judge,<sup>127</sup> while others categorically reject its utility.<sup>128</sup> Given the imprecise rules associated with the best interest standard, Steven N. Peskind asserts it has caused the custody case to become “a combination beauty contest and circus sideshow with both parents attempting to woo the judge with their respective strengths and the concurrent weaknesses of their spouse.”<sup>129</sup> The best interest standard has been modified by many jurisdictions in an effort to respond to the negative criticism associated with its use and

126. Larry V. Starcher, *The Importance of Appellate Review*, W. VA. LAW., May 1999, at 8.

127. See Peskind, *supra* note 25, at 451 (suggesting that “despite its many profound flaws, there simply is no better way to resolve contested issues affecting children”). See generally Schneider, *supra* note 4. But see Peskind, *supra* note 25, at 456 (acknowledging that “critics have questioned the standard, claiming that it ironically is harming those children it is designed to benefit”). In particular, Peskind explains that the American Law Institute has three chief objections to the best interest standard:

The standard is indeterminate and unpredictable;  
The standard is impossible to adjudicate; and  
The standard is unjust.

*Id.* (citing AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 2 (2002)).

128. See Kimberly B. Cheney, *Joint Custody: The Parents' Best Interest Are in the Child's Best Interest*, VT. B.J., Dec. 27, 2001, at 33 (citing JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 54 (1973)) (“[T]he best interest standard ‘in context and as construed . . . has come to mean something less than what is in the child’s best interests.’”); see also Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child’s Best Interests*, 35 WILLAMETTE L. REV. 467, 470 (1999) (suggesting that because broad judicial discretion is built into the best interest standard, the standard is highly unpredictable).

129. Peskind, *supra* note 25, at 459.



application.<sup>130</sup> The unpredictability of this standard has led many to suggest alternative formulas to better meet the needs of children and parents alike.

The primary caretaker presumption is one formula that has been suggested as an alternative to the best interest standard.<sup>131</sup> The presumption is favorable because, in theory, it ensures placement of the children with the parent who would, but for the break-up of the relationship, provide for the daily needs of the children.<sup>132</sup> Katherine Bartlett suggests, however, that the primary caretaker approach is an ill fit for our society because parents tend to share the childrearing responsibilities.<sup>133</sup> As a result, without an identifiable “primary caretaker” the approach is inapplicable.<sup>134</sup> In addition, Bartlett maintains that the presumption is problematic because it “is an either/or, winner-take-all approach that fails to account for the wide variations in circumstances in which a caretaker may have been providing primary care.”<sup>135</sup>

In addition to its problems generally, the primary caretaker standard is likely to present unnecessary challenges to the battered woman because it, like the best interest standard, shifts the focus away from the batterer and onto the battered woman by concentrating on her suitability as a parent. In cases of intimate partner violence, the focus must remain on the batterer and his bad acts. Instead, the primary caretaker presumption requires that

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130. See Bartlett, *supra* note 128, at 472-73. Bartlett explains:

[t]he first—and by far the most common—way legislators have attempted to make the best-interests test more specific and predictable is to detail a “laundry list” of factors that courts must consider in applying the best-interests test . . . . [S]tatutes mention the child’s physical, emotional, mental, religious, and social needs and the capability and desire of each parent to meet these needs, the child’s preferences, and the stability of each home environment . . . . When the factors do not all point in a single direction—that is, when guidelines are needed most—they leave the decisionmaker to decide which factors matter most, with no useful guidance from the rule itself.

*Id.*

131. See *id.* at 473 (explaining that once the court identifies “the parent who has spent the greatest amount of time caring for the child,” that parent is awarded custody of the child unless he or she is unfit); see also Peskind, *supra* note 25, at 468 (“While originally many scholars embraced the concept of a primary caretaker presumption to avoid the uncertainty of the best interest standard, nationally, only West Virginia and later Minnesota have adopted the presumption as law.”).

132. See Bartlett, *supra* note 128, at 474 (“The [primary caretaker presumption] is defended on the grounds that the parent who has been taking primary care of the child has the better parenting skills and the stronger emotional connection with the child.”).

133. *Id.* at 475.

134. *Id.*

135. *Id.*; see Hogue v. Hogue, 574 N.W.2d 579, 583 (N.D. 1998) (confirming that there simply is not always a clear primary care taker in all cases, and referencing Marcia O’Kelly, *Blessing the Tie that Binds: Preferences for the Primary Caretaker as Custodian*, 63 N.D. L. REV. 481, 484 n.10 (1987)).

the judge focus on the amount of time each parent spends caring for the child, as well as the types of parental tasks conducted by the mother and the father. Because batterers are highly controlled and controlling individuals, they present a completely different picture of themselves to the outside world.<sup>136</sup> They may appear to outsiders as highly involved with the care and control of their children,<sup>137</sup> despite their general lack of involvement or harmful behavior behind closed doors.<sup>138</sup> Consequently, abusive fathers may be better able to manipulate a system that employs a primary caretaker standard given the false perception extended family members, friends, and neighbors have about the batterer's parental involvement.

According to Professor Bartlett, the American Law Institute (ALI) provides an alternative to the primary caretaker presumption.<sup>139</sup> The ALI proposes that the hearing officer award parenting time in "rough proportion to the share of responsibility the parent assumed before the divorce or the circumstances giving rise to the custody action," unless the parents enter into an alternate agreement.<sup>140</sup> In addition, Bartlett points out that the ALI's default rule has some clearly identified exceptions, one of which is domestic violence.<sup>141</sup> Moreover, the domestic violence exception to the ALI default rule bars the batterer's access to the child unless the battered woman and her child are properly protected.<sup>142</sup> The ALI's domestic violence exception is similar to the presumptions enacted in a number of states restricting a batterer from obtaining joint or sole custody of a minor child.<sup>143</sup> Although the ALI's abuse exception and the presumptions in existence today are a good start, they are not without problems.

Notwithstanding this debate, the best interest standard is the predominant formula applied nationally. Yet the standard is a poor solution for judges tasked with making a custody determination when battering is at issue.<sup>144</sup>

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136. See BANCROFT & SILVERMAN, *supra* note 8, at 15 (maintaining that "[b]atterers' manipulateness often extends to the public arena as well. The great majority of batterers project a public image that is in sharp contrast to the private reality of their behavior and attitudes.").

137. See *id.* at 32 (finding that "the batterer tends to take an interest in his children when it is convenient for him or when an opportunity arises for public recognition for his fathering").

138. See *id.* (explaining "[b]atterers tend to be underinvolved and neglectful parents").

139. See Bartlett, *supra* note 128, at 478.

140. *Id.*

141. *Id.*

142. *Id.* at 479.

143. *Id.* at 477 (analyzing how some states that utilize the joint custody presumption usually "follow rules that counteract its effects," such as presuming that joint custody is preferable unless clear and convincing evidence shows otherwise, or requiring a domiciliary or primary parent designation).

144. This Article presumes that the power to make important decisions about the

In spite of the unsuitability of this tool as a measure for determining the welfare of children in the face of intimate partner violence, some states consider abuse to be just another best interest factor for consideration.<sup>145</sup> By applying a best interest standard in a case involving domestic violence, a court fails to appreciate that battering, by its very nature, is unmistakable evidence that the abusive parent's actions are contrary to what is best for the child.<sup>146</sup>

Moreover, balancing evidence of domestic violence with other best interest factors is unproductive. For example, weighing the parents' "wishes"<sup>147</sup> against evidence that a parent has committed an act of intimate partner violence is without a doubt a useless task. Batterers by definition are poor decision-makers,<sup>148</sup> negative role models for their children,<sup>149</sup> more likely to place their children at risk both emotionally and physically,<sup>150</sup> and, if vested with power, more likely to present a risk of physical or emotional harm to the battered parent.<sup>151</sup>

Jennifer L. Woolard and Sarah L. Cook point out that many best interest

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well-being of the children should not be placed in the hands of batterers. Many legal scholars have considered this issue at length. *See, e.g.,* Meier, *supra* note 40, at 707 (suggesting the best interest standard "is both amorphous—a vacuum to be filled by the decision-maker's personal values—and prospective . . .").

145. *See* GA. CODE ANN. tit. 19, § 19-9-1 (2008); ILL. COMP. STAT. ANN. CH. 750, 5/601 (West 2007); KAN. STAT. ANN. § 60-1610(A)(3)(B)(vii) (2007); KY. REV. STAT. ANN. § 403.270(2)(f), (i) & (3) (West 2007); MONT. CODE ANN. § 40-4-212(1)(f) (2008); N.C. GEN. STAT. § 50-13.2(a) (2008); NEB. REV. STAT. § 42-364(2)(d) (2007); N.J. STAT. ANN. § 9:2-4(c) (2007); N.Y. DOM. REL. LAW § 240 (Gould 2007); 23 PA. CONS. STAT. ANN. § 5303 (West 2007); R.I. GEN. LAWS § 15-5-16 (2008); S.C. CODE ANN. § 20-7-1520 (2007); UTAH CODE ANN. § 30-3-10.2 (2008); VA. CODE ANN. § 20-124.3(9) (2008); VT. STAT. ANN. tit. 15, § 665(b)(9) (2007); WYO. STAT. ANN. § 20-2-201(c) (2008); ABA COMMISSION, *supra* note 107.

146. *See* Cahn, *supra* note 61, at 1090 (advocating that states consider abuse evidence in the best interest analysis, since abuse "traumatizes and terrorizes" children, "teaches them that violence is acceptable," and abuse by a parent is indicative that the parent may not adequately care for the child).

147. *See* DEL. CODE ANN. tit. 13, § 722(a)(1) (2008) (stating that the parent's wishes is one of eight best interest factors to be weighed by family court judges in Delaware).

148. *See* Neilson, *supra* note 39, at 413 (discussing research that suggests batterers make poor parental decisions).

149. *See* Jaffe et al., *supra* note 3, at 82 (asserting that batterers represent poor role models for their children).

Children's socialization with respect to relationships and conflict resolution is negatively affected by exposure to a perpetrator of domestic violence. For example, when children witness one parent inflicting abuse upon the other or using threats of violence to maintain control within a relationship, their own expectations about relationships may come to parallel these observations.

*Id.*

150. *See* Meier, *supra* note 40, at 679 (maintaining that the batterer's access to children places both children and mothers at risk).

151. *See id.* at 685 (explaining that it is "well-established that many batterers seek custody primarily as an extension of their power and control over and abuse of the mother").

factors concentrate predominantly on the ability of a parent to provide “stability and security” for the child.<sup>152</sup> Consequently, they assert that the battered woman is at a distinct disadvantage when viewed through the lens of the best interest standard.<sup>153</sup> As a direct result of her status as a victim of domestic violence, they maintain, the battered woman is less likely to have adequate financial resources and stable housing, and more likely to remove the children from their current educational environment, home, and community.<sup>154</sup>

In addition, legal scholars suggest the best interest standard requires that the judge make predictions about the future;<sup>155</sup> a future that depends in large measure on their own judicial determinations about placement, custody, and visitation. If past acts are good indicators of future behavior, the forecast is stormy for children who are placed in the hands of battering parents. Logic suggests that delegating the power of important decision-making to batterers is not best for children.<sup>156</sup> As a result, a number of states now apply a presumption that a perpetrator of intimate partner violence shall not receive joint or sole custody of any children involved.<sup>157</sup> In such jurisdictions, when the presumption is triggered it must be applied regardless of the applicable best interest standard. What the law allows and the system delivers, however, are not necessarily in harmony.<sup>158</sup>

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152. Woolard & Cook, *supra* note 8, at 212.

153. *Id.*

154. *See id.*

In effect, help-seeking behaviors and coping strategies may be held against women in custody disputes. For example, women who have moved or are residing in temporary shelter may be viewed as disrupting their children’s education or lacking stable housing. Women may have acquiesced to partners who demanded that they remain at home to avoid further violence, and thus may not be able to gain sufficient employment.

*Id.*; *see also* Heck v. Reed, 529 N.W.2d 155, 163 n.5 (N.D. 1995) (pointing out, on appeal, that it was “impermissible [for the trial court] to deny a parent custody because ‘the abused parent suffers from the effects of the abuse,’” and specifically, “it [was] clear error” for the trial court to weigh the mother’s unstable living arrangements against her when they resulted from father’s acts of domestic violence).

155. *See* Peskind, *supra* note 25, at 460 (citing Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 250 (1975)).

156. *See* Cahn, *supra* note 61, at 1083-84 (illuminating the paradoxical problem that courts focus on the “parental behavior that affects the child” and trends toward no-fault divorce, rather than examining “the pervasiveness of domestic violence . . . [by peering] behind the marital curtain into the domestic violence morass”).

157. *See* ABA COMMISSION, *supra* note 107; *see also* Meier, *supra* note 40, at 662 (stating that approximately seventeen jurisdictions have adopted such presumptions).

158. *See* Meier, *supra* note 40, at 662 (conveying that batterers are gaining custody in those states that have adopted a presumption against an award of custody to a perpetrator of domestic violence).

Although well-intentioned, some state laws are rendered meaningless based on that particular jurisdiction's definition of abuse or abuser.<sup>159</sup> For example, in North Dakota, a presumption against awarding joint or sole custody to a perpetrator of domestic violence is only triggered if there is *credible evidence* that the batterer caused "serious bodily injury," used a dangerous weapon, or committed *recent* acts that rise to the level of a pattern of violence.<sup>160</sup> All three of these possible protections have their own set of hurdles that detract from the law's intended use. The first factor, whether there was serious bodily injury, fails to focus on the conduct of the batterer and instead focuses on the outcome: the nature of the injury to the victim.<sup>161</sup> By failing to focus on the specific behavior of the batterer, acts that do not result in serious injury are irrelevant in the eyes of our legal system. In effect, the statute does not provide protections when the batterer acts in a clearly dangerous manner unless another section of the statute is triggered.

The second category, use of a dangerous weapon, indicates that battering the other parent (unless frequent and recent) is not harmful to children unless accompanied by the threat of deadly force.<sup>162</sup> The third category, a recent pattern of domestic violence, suggests that acts of violence that fail to result in "serious physical harm" or are not accompanied by the use of a dangerous weapon are not per se harmful to the welfare of children unless the violence occurs regularly and recently.<sup>163</sup> The notion that remote acts

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159. See DEL. CODE ANN. tit. 13, § 703A (2006) (defining a perpetrator of domestic violence as someone who has been convicted of a felony level offense, assault in the third degree, or various other significant criminal convictions, or has been found in criminal contempt of a family court protective order based on an assault or other physical abuse or threat of harm); see also N.D. CENT. CODE § 14-09-06.2(1)(j) (2006); R.I. GEN. LAWS § 15-5-16(g)(4) (2007) (focusing on physical harm, fear of harm, or sexual abuse).

160. N.D. CENT. CODE § 14-09-06.2(1)(j).

161. *Id.*

162. *Id.*

163. Remote acts of violence are relevant and useful to the trial court's consideration of child custody. It is important to understand that the danger associated with intimate partner violence does not necessarily disappear with time, particularly when the perpetrator fails to seek treatment. The trauma experienced by both the children and the parent are long-lasting. Laws that limit the admission of remote acts of violence add yet another layer to the unattainable requirements survivors must overcome in order to show the batterer has acted in a manner inconsistent with the welfare of the child. Moreover, such laws fail to take into account the nature of the act committed and instead place arbitrary time limits on the relevance of certain kinds of evidence. *But see Kraft v. Kraft*, 554 N.W.2d 657, 658-60 (N.D. 1996) (finding that the trial court mistakenly weighted violence against the victim by her former spouse and current fiancé according to the proximity of the incidents to the trial, rather than applying a rebuttable presumption against the former spouse). Prior to his incarceration for drug charges, Joel Kraft threatened Nancy Kraft with a knife, "beat the shit out of her," and tried to choke and kill her. *Id.* Joel Kraft served his prison term and, in 1995, moved for a transfer of custody claiming mother's paramour had committed acts of domestic violence. *Id.* at 658. Mother denied father's allegations and maintained that father was

of violence are not harmful to children ignores the reality that witnessing intimate partner violence has been linked to a greater likelihood of long-term negative effects to the health and safety of children.<sup>164</sup> Moreover, requiring proof of multiple acts of abuse is problematic for survivors who often struggle to prove even one act of violence, given the rarity with which evidence is available in the aftermath of intimate partner violence. In addition, when the presumption is not triggered, evidence of domestic violence is simply viewed as just another factor and given no more or no less weight than any other best interest factor to be considered.<sup>165</sup>

Some states add an additional hurdle by mandating that a presumption is triggered only upon the conviction of the batterer.<sup>166</sup> Delaware, for example, requires that the abuser's act must fall within one of the enumerated offenses defined by law to trigger a presumption that the batterer should not be granted joint or sole custody of a child.<sup>167</sup> The Delaware statute requires that the abuser must be "convicted" of a felony level offense against the other parent, the child at issue or any minor child or adult living in the home, or a specified misdemeanor offense against the above-mentioned classes of individuals.<sup>168</sup> The conviction requirement is not unique to Delaware.<sup>169</sup>

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disqualified from obtaining custody because of his prior acts of violence against her. *Id.* at 659. The trial court found that there was insufficient evidence of domestic violence because the acts of violence were isolated and occurred five years prior to the proceeding. *Id.* at 660. The Supreme Court of North Dakota found father's violence relevant given the nature of the acts, and declared that it was "firmly convinced that [the] finding [of the trial court] was mistaken." *Id.* Restrictions on the admission of remote evidence of violence are not unique to North Dakota. Other states also limit the court's consideration of domestic violence to recent acts of abuse. *See* TEX. FAM. CODE ANN. § 153.004(a) (2006) (limiting evidence of past acts of violence to a "two-year period preceding the filing of the suit or during the pendency of the suit").

164. *See, e.g.,* Harris et al., *supra* note 91, at 394.

165. *See* Reeves v. Chapulis, 591 N.W.2d 791, 795 (N.D. 1999) (explaining that "evidence of domestic violence which clearly does not trigger the presumption, however, certainly remains one of the best interest factors to be considered," and further, citing Huesers v. Huesers, 560 N.W.2d 219, 221 (N.D. 1997), that "domestic violence predominates [once the presumption is triggered]").

166. *See* DEL. CODE ANN. tit. 13, § 703A (2006).

167. *Id.*

168. *Id.* Thus, a civil protection order alone is insufficient to trigger the presumption. The seven offenses listed include: any felony level offense; assault in the third degree; reckless endangering in the second degree; reckless burning or exploding; unlawful imprisonment in the second degree; unlawful sexual contact in the third degree; and criminal contempt of a civil protection from abuse order based on physical abuse, a threat of abuse, or other action which places the victim in immediate risk or fear of bodily harm.

169. *See* S.D. CODIFIED LAWS § 25-4-45.5 (2008) (providing that "[t]he conviction . . . creates a rebuttable presumption that awarding custody to the abusive parent is not in the best interest of the minor").

In a perfect world, perpetrators of domestic violence are arrested and charged for the crimes they commit against their intimate partners, but this vision is not a reality. A batterer arrested and charged with assault in the third degree, for example, is likely to plead guilty to offensive touching, a crime which fails to trigger a presumption in Delaware.<sup>170</sup> Moreover, in some cases, law enforcement personnel are reluctant to arrest, fail to file the appropriate charges, or dismiss the matter altogether.<sup>171</sup> In many other cases, the police are never contacted.<sup>172</sup> In effect, our laws provide the illusion of protection for women and children, but also build obstacles that few victims have any hope of overcoming.<sup>173</sup>

In other states, such as Pennsylvania, domestic violence is just one of many factors a trial judge considers.<sup>174</sup> If a court convicts a parent of certain enumerated offenses, such as assault or endangering the welfare of the child, then it must determine that the abusive parent does not pose a danger to the child before entering a custody or visitation order.<sup>175</sup> The Pennsylvania law, however, fails to provide guidance as to how domestic violence should be weighed against any other factors the court should consider.<sup>176</sup>

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170. Cf. Swent, *supra* note 48, at 58 (explaining “[o]ne task force that considered imposition of criminal sentences concluded that batterers who are convicted and sentenced for their violence (mostly men) are sentenced leniently”).

171. See STARK, *supra* note 2, at 61 (maintaining “few of these [domestic violence] cases are prosecuted, and almost no offenders go to jail”); Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 *FORDHAM L. REV.* 1285, 1294 (2000) (indicating the police bias against arrest in intimate partner violence cases); Jane Gordon, *When Police Are Caught in the Middle*, *N.Y. TIMES*, Jan. 23, 2005, at A14 (confirming the use of a “cooling off period” by police officers in cases of domestic violence). See generally Dennis P. Saccuzzo, *How Should the Police Respond to Domestic Violence: A Therapeutic Jurisprudence Analysis of Mandatory Arrest*, 39 *SANTA CLARA L. REV.* 765 (1999) (providing a historical consideration of law enforcement’s response to domestic violence).

172. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1257 (1991) (identifying and explaining a legitimate and pervasive reluctance on the part of women of color to contact law enforcement); Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, *U. ILL. L. REV.* 533, 549 (1996) (suggesting survivors of domestic violence may be reluctant to contact the police given the real possibility of poverty in light of mandatory arrest policies). See generally Buel, *supra* note 54.

173. See *infra* Part VII (discussing the limits of existing custody laws).

174. 23 PA. CONS. STAT. ANN. § 5303(a)(3) (West 2007) (“The court shall consider each parent and adult household member’s present and past violent or abusive conduct . . .”).

175. 23 PA. CONS. STAT. ANN. § 5303(b) (West 2007).

176. Some states do provide limited guidance regarding the weight to be given to evidence of domestic violence. See S.C. CODE ANN. § 20-7-1530(A) (2006) (providing that “the court must give weight to evidence of domestic violence,” including “evidence of which party was the primary aggressor”).

As we have seen, our legal system often places insurmountable requirements on the battered mother; it is a system that tends to doubt the frequency and severity of the violence that occurs in intimate relationships. This system expects the battered woman to present evidence of abuse despite the fact that intimate partner violence typically occurs in private, resulting in little, if any, evidence of that violence. If the battered mother is able (against all odds) to overcome these requirements and judicial bias, it is still improbable that a connection between intimate partner violence and the welfare of the child will be achieved.<sup>177</sup>

In the jurisdictions that maintain a presumption against awarding custody to a batterer, the terms abuse and batterer must be redefined. Moreover, a conviction must not be a prerequisite for triggering a presumption against awarding custody to an abuser. Although evidence may provide additional proof, lack of evidence should not act as an absolute bar to the protections critical to the health and safety of women and children. Instead, testimony should be taken and additional evidence, when available, should be considered but not required.<sup>178</sup>

If the presumption is not triggered in a particular case or if the state does not maintain a presumption against awarding custody to a batterer, the trial judge making the custody determination must give great weight and due consideration to acts of domestic violence. Peskind suggests that the trial judge must formulate thoughtful and reasoned written findings.<sup>179</sup> Such findings must reflect the following: a careful analysis of all allegations of abuse; a proper consideration of the impact that domestic violence had and

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177. See Meier, *supra* note 40, at 667-68 (citations omitted). Meier explains:

Despite the widespread acceptance of the growing body of evidence that adult domestic violence is detrimental to children, both courts and lawyers commonly separate the issue of domestic violence from custody/visitation, and even sometimes excuse it in a divorce context. More notably, sympathy and concern to an adult battering victim can be transformed into an attitude of disdain and outright hostility when the battered woman seeks to limit the abuser's access to his child. This disjunction can even occur within a single case, heard by a single judge . . . . [T]his judicial attitude all too often inures to the profound detriment of the children involved.

*Id.*

178. See Cahn, *supra* note 61, at 1091 (listing examples of domestic violence evidence, such as witness's testimonial evidence of the violence or the result of the violence, police testimony, protection orders, etc.).

179. Peskind, *supra* note 25, at 480.

[W]ritten and detailed findings force a trial judge to confront his own biases and predispositions. The court must wrestle with the evidence in order to prepare a cogent opinion supported by the evidence. This not only will assist the trial court in refining its opinion, but it will also allow both the appellate court as well as a chief judge in a circuit to monitor the reasoning process of a judge charged with the awesome responsibility for children.

*Id.*



continues to have on the children at issue; the influence the batterer's violent behavior will likely have on his future decision-making; and the potential risks to both the mother and her minor children which may result from the court's ultimate custody determination.<sup>180</sup>

## VI. APPELLATE REVIEW

*If I'm wrong, they can fix it upstairs.*<sup>181</sup>

The standard of review in a custody case depends in large measure on the issues raised on appeal. Customarily, three standards of review are applied by appellate courts in custody decisions.<sup>182</sup> First, the clear legal error standard is often applied to the trial court's interpretation and application of the law.<sup>183</sup> Second, the clearly erroneous standard is typically applied to a trial judge's finding of fact.<sup>184</sup> Third, the abuse of discretion standard is primarily applied to the discretionary decisions made by the trial judge.<sup>185</sup> The particular standard of review applied dictates the deference afforded to the trial judge<sup>186</sup> and defines the trial court's power.<sup>187</sup>

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180. A proper analysis of the potential risks should include risk of psychological and physical harm to children, risk of physical harm to the mother, potential manipulation by the batterer as a result of possible joint custody arrangements and future damage to the relationship between the battered-parent and the child. *See, e.g., Harris et al., supra* note 91, at 392 (summarizing that violence impacts childhood development, including psychological and social effects such as anxiety and depression, post-traumatic disorders, and learning disorders).

181. Starcher, *supra* note 126, at 9.

182. *See Pears v. Ramsey*, No. 271820, 2007 WL 1342562, at \*1 (Mich. Ct. App. May 8, 2007), *appeal denied by* 739 N.W.2d 84 (Mich. 2007) ("We apply three standards of review in custody cases."); *Tucker v. Deveroux*, No. 266472, 2006 WL 1008671, at \*1 (Mich. Ct. App. Apr. 18, 2006); *Walker v. Walker*, 184 S.W.3d 629, 632 (Mo. Ct. App. 2006) ("Appellate courts will affirm the trial court's judgment in custody modification cases if it is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law.").

183. *Pears*, 2007 WL 1342562, at \*1.

184. *See Strosnider v. Gwinn*, No. 2007-CA-002280-ME, 2008 WL 3551189, at \*3 (Ky. Ct. App. Aug. 15, 2008) (explaining that "the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence") (quoting *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003); *see also Kurhajetz v. Fenice*, No. A07-0865, 2008 WL 570821, at \*2 (Minn. App. Mar. 4, 2008); *Laib v. Laib*, 751 N.W.2d 228, 232 (N.D. 2008); *Stewart v. Stewart*, 550 S.E.2d 86, 89 (W. Va. 2001). *See, e.g., Pears*, 2007 WL 1342562, at \*1.

185. *Pears*, 2007 WL 1342562, at \*1.

186. *See Norman H. Jackson, Utah Standards of Appellate Review*, UTAH B.J., Oct. 7, 1994, 9, at 11 (declaring that the standards of review establish "the power of the lens through which appellate judges examine each issue").

187. *Id.*

Application of the proper standard of review, however, is anything but straightforward when a custody case involves domestic violence. In these cases, the issues will likely involve mixed questions of law and fact, as well as discretionary rulings based on factual findings. A comprehensive analysis of appellate review in the domestic violence custody case must consider the level of scrutiny applied by the appellate court and the reasons for affording deference.

A great deal of debate focuses on the purpose of appellate courts generally. Some maintain that the role of the appellate court is the creation and clarification of law,<sup>188</sup> while others suggest a greater responsibility: justice.<sup>189</sup> Without question, leading scholars argue that it is not “a denial of justice” to restrict an individual’s second bite at the apple.<sup>190</sup> Such reasoning, however, assumes that the litigant received a just trial in the first case.

Justice is an elusive goal for battered women. Battered women suffer extreme mistreatment from their batterers, our justice system, and society: they are stripped of their autonomy in addition to being physically and emotionally abused and accused of failing to protect themselves and their children.<sup>191</sup> When they do seek help, their stories are doubted by the very people employed to help.<sup>192</sup> Moreover, as Joan Meier suggests, an award of custody to a batterer is incompatible with any notion of justice given the social consequences of such a legal determination, as well as the destructive message it sends to the children at issue.<sup>193</sup>

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188. See Lee, *supra* note 34, at 248 (analyzing Judge Posner’s argument “that the only legitimate function of appellate courts is to oversee the development of doctrine”); see also *Works in Progress*, *supra* note \* (comments by Professors Steve Henderson and Jules Epstein) (on file with author).

189. See Lee, *supra* note 34, at 248 (explaining that appellate courts should generally ensure justice, yet not necessarily in individual cases).

190. *Id.* at 249 (citing Professor Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 780-81 (1957)).

191. See Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 588 (2004). According to Dunlap:

failure-to-protect charges cast the abused mother as a bad mother, much as the batterer castigates her for untold and untrue inadequacies . . . . The charge revictimizes the mother by removing her children and premising their return on her conformity with governmental edict. Failure-to-protect charges functionally divest a mother, living in the midst of domestic violence, of her choices. The Nicholson case highlights these unreasonable and at times cruel agency behaviors. The trial judge found that, once removed, some children were intentionally kept from their mothers because the agency had the power to do so. (Internal citations omitted).

*Id.*

192. Included in the group of providers are police, physicians, social workers, prosecutors, their own lawyers and the hearing officers who sit in judgment of them.

193. Specific to the predominant standard used in custody cases generally and

The appellate court must balance efficiency with justice to ensure a proper functioning of our legal system. Appellate court review of individual cases not only affects the current parties involved, but also guides our trial judges in future cases.<sup>194</sup> While the trial court maintains a case-specific focus, the appellate court's view is broad.<sup>195</sup> Accordingly, the reviewing court must strike a delicate balance between the appropriate use of appellate court resources while responding creatively to vital social matters.

While it would be impossible for appellate courts to seek to ensure justice in every individual case,<sup>196</sup> domestic violence matters demand specialized oversight, a protection essential to the safety needs of women and children. Although appellate court decisions in all cases have a lasting effect on society generally, these decisions also have a direct impact on the lives of the children at issue—children who often have no role in the litigation. Moreover, granting custody or visitation rights to an abuser presents continuing risks to the battered litigant and her children long after

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domestic violence specifically, Joan S. Meier suggests that there is a “clash between ‘justice’ principles and ‘best interests’ principles” in her article about judicial resistance to intimate partner violence. See Meier, *supra* note 40, at 697. Meier suggests three reasons why a best interests balancing, which favors an abusive father, fails to serve justice:

First, a child whose mother has been abused has already suffered a loss of full ‘mothering’ by virtue of the abuse . . . . Second, an award of custody to an abuser is a powerful lesson to the child that violence and abuse wins, that power and control are their own law, and that the courts and society see (essentially) nothing wrong with what the father has done to the mother . . . . Finally, and perhaps most importantly, . . . men who batter women usually make bad parents.

*Id.* at 697-98 (internal citations omitted).

194. See MYRON MOSKOVITZ, WINNING AN APPEAL 5 (Matthew Bender ed., LexisNexis 2007) (1985). Moskowitz explains the difference between trial and appellate courts as follows:

First, the appellate court has more time: time to read the record and the lawyer's briefs, and even time to do independent research . . . . Second, the appellate court has a much greater interest in properly arriving at *and explaining* its notion of a “correct” decision than a trial court judge does. The appellate court will publish many or all of its decisions, which serve as precedent throughout the jurisdiction (and sometimes beyond it) . . . . The appellate court judge has a responsibility (and an audience) well beyond your case, client, and self . . . .

*Id.*

195. *Id.*

196. See Lee, *supra* note 34, at 248 (questioning the utility of appellate courts to “take upon themselves the additional responsibility of seeing that justice is done in particular cases”). Lee also considers the balance between individual justice and the conservation of resources and promotion of “societal wealth.” *Id.* at 251-52. What is not considered is the security, safety, and stability of society generally, which ensures the greater good and should win over the alternative—wealth.

the decision is made.<sup>197</sup> In an effort to address appellate review as it relates to the domestic violence custody case and to unearth a workable solution, various appellate questions must be considered.

#### *A. Findings of Fact*

Findings of fact typically are reviewed pursuant to a clearly erroneous standard.<sup>198</sup> The definition of clearly erroneous varies slightly depending on the jurisdiction or appellate court judge applying the standard. Some hold that “a trial court’s findings of fact are clearly erroneous if they are so lacking in support as to be against the clear weight of the evidence,”<sup>199</sup> while others maintain that findings “should be affirmed unless the evidence clearly preponderates in the opposite direction.”<sup>200</sup> Although these definitions differ to some extent, they suggest one similar theme: appellate court criteria for reviewing a trial court’s finding of fact are exceedingly deferential.<sup>201</sup>

Factual findings are based not on the law but on subjective determinations about what, who, how, and why.<sup>202</sup> Thus, the general rule precluding a reviewing court from substituting its judgment with that of the trial judge is practical.<sup>203</sup> There must, however, be exceptions to any general rule. Personal values can be the driving force behind the factual

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197. See *supra* Part III.

198. See *Elton H. v. Naomi R.*, 119 P.3d 969, 974 (Alaska 2005); *Seelye v. Perkins*, 127 P.3d 1035, 1036 (Mont. 2006) (applying a clearly erroneous standard of review to findings of fact); *Parsley v. Parsley*, 734 N.W.2d 813, 817 (S.D. 2007); see also *Jackson*, *supra* note 186, at 14 (explaining findings of fact are reviewed pursuant to a clearly erroneous standard); Amy E. Sloan, *Appellate Fruit Salad and Other Concepts: A Short Course in Appellate Process*, 35 U. BALT. L. REV. 42, 63 (2005) (explaining questions of fact are reviewed by a clearly erroneous standard).

199. *Jackson*, *supra* note 186, at 14.

200. *Roodovets v. Royce*, 2007 WL 1828896, at \*7 (Mich. Ct. App. June 26, 2007). Still others suggest findings of fact are found to be clearly erroneous when the reviewing court is left with the firm impression that a mistake has been made. See *Elton H.*, 119 P.3d at 974; see also *Chandler v. Chandler*, No. CA07-923, 2008 WL 2192809, at \*2 (Ark. Ct. App. May 28, 2008); *Rubenstein v. Rubenstein*, 945 A.2d 1043, 1049 (Conn. App. Ct., 2008) (citing *Rivnak v. Rivnak*, 913 A.2d 1096 (Conn. App. Ct. 2007)); *Parsley*, 734 N.W.2d at 817 (explaining that clear error occurs when after reviewing all the evidence, the appellate court is “left with a definite and firm conviction that a mistake has been made” (quoting *City of Deadwood v. Summit, Inc.*, 607 N.W.2d 22, 25 (S.D. 2000))).

201. *Jackson*, *supra* note 186, at 14.

202. See Jay E. Rosenblum, *The Appropriate Standard of Review for a Finding of Bad Faith*, 60 GEO. WASH. L. REV. 1546, 1569 (1992) (denoting that “[p]ure factual findings relate to what occurred in time and place: things, events, actions, conditions, and other narrative findings”). Factual inferences are treated in a similar manner to pure facts, thereby granting the judge discretion in factual determinations. *Id.* at 1570.

203. See *McCorvey v. McCorvey*, 916 So. 2d 357, 362 (La. Ct. App. 2005) (explaining that trial court findings of fact should not be disturbed even if the reviewing court believes its inferences are more reasonable).

determinations of the trial judge, determinations based in whole or in part upon conclusions guided by the individual biases of the trial court judge. Nowhere is this more true than in the area of intimate partner violence where personal values play a pivotal role in the decision-making process.<sup>204</sup>

Legal scholars suggest that deference is afforded to the factual findings of the trial judge due, in part, to the fact that physical presence in the courtroom enhances the trial judge's superior ability to evaluate the veracity of the witnesses.<sup>205</sup> As such, appellate courts are inclined to yield to the trial court's factual findings whenever possible.<sup>206</sup> As we have discussed, however, this may be a misguided policy in the area of intimate partner violence.<sup>207</sup>

Purely factual questions have been defined as "entailing the empirical, such as things, events, actions, or conditions happening, existing, or taking place, as well as the subjective, such as a state of mind."<sup>208</sup> In a custody case involving domestic violence, an example of a judge's factual determination related to the violence may entail assessing whether one parent hit, struck, punched, or beat the other parent—what many might view at first blush as a simple factual determination.

Acts of domestic violence, however, rarely occur in isolation.<sup>209</sup> Domestic violence by definition does not involve a one time act of assault or battery. Instead, intimate partner violence involves complex interactions

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204. See generally *supra* Part IV.

205. See *Parsley*, 734 N.W.2d at 817 (noting that deference is afforded to the trial judge's firsthand perceptions of the witnesses); see also Harvey J. Sepler, *Appellate Standards of Review*, 73 FLA. B.J. 48, 48 (1999) (observing that trial courts are in a better position than reviewing courts to make factual determinations given their superior ability to assess characteristics of evidence they admit).

206. See *Baker v. Baker*, No. CA 05-284, 2006 WL 401645, at \*2 (Ark. Ct. App. Feb. 22, 2006) (providing "we know of no cases in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great a weight as those involving children"); see also *McCorvey*, 916 So. 2d at 362 (explaining that trial judges are in a better position to evaluate live witnesses); *Tritle v. Tritle*, 956 So. 2d 369, 373 (Miss. Ct. App. 2007); *Walker v. Walker*, 184 S.W.3d 629, 633 (Mo. Ct. App. 2006) (maintaining that trial judges are in the best position to assess the credibility of witnesses); *Cesare v. Cesare*, 713 A.2d 390, 411-12 (N.J. 1998); Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 38 (1994) (explaining the standard "prevents needless review of fact-findings on appeal"); Lee, *supra* note 34, at 259-61 (noting that appellate courts generally defer to the factual findings of trial court judges because they believe they are better able to assess the credibility of the witnesses).

207. See *supra* Part II.B.

208. Jackson, *supra* note 186, at 12 (quoting *State v. Pena*, 869 P.2d 932, 935 (Utah 1994)).

209. STARK, *supra* note 2, at 12 (stating that "[t]he most important anomalous evidence indicates that violence in abusive relationships is ongoing rather than episodic, that its effects are cumulative rather than incident-specific, and that the harms it causes are more readily explained by these factors than by its severity").

of controlling and sometimes physically abusive behaviors.<sup>210</sup> Some actions are easily defined as abusive, such as physical acts of violence. Dr. Evan Stark explains that we understand that a punch or a kick is abusive,<sup>211</sup> but other forms of violence against women are much more difficult to understand. Not only are they difficult to detect, they are also foreign to our conception of how human beings treat each other in relationships.<sup>212</sup> As a result, the actions of the batterer do not present simple questions of fact, instead they spin an intricate web of factual and legal issues so intertwined that it is difficult for even trained experts to untangle them.<sup>213</sup>

A variation on this problem occurs when findings are not made at all. Instead of making true findings of fact, some trial courts simply restate the testimony of the witnesses in an effort to support their decision. In *Stamm v. Stamm*, the appellate court maintained that by restating the testimony of the witness the trial court failed to make a finding of fact.<sup>214</sup> In the appellate court's view, such restatements should be treated as "surplusage."<sup>215</sup> Trial courts are expected to do much more. In fact, the court of appeals in *Stamm v. Stamm* explained that "findings of fact are a mechanism by which the trial court completes its function of weighing the

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210. *Id.* at 15. The complex nature of male violence against women may be best understood through Dr. Evan Stark's definition of "coercive control":

Coercive control entails a malevolent course of conduct that subordinates women to an alien will by violating their physical integrity (domestic violence), denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation), and appropriating or denying them access to the resources required for personhood and citizenship (control).

*Id.*

211. *Id.* Dr. Evan Stark explains that although many people understand acts of physical violence more readily male dominated intimate partner violence, which he defines as "coercive control," is much more complex:

Violence is easy to understand. But the deprivations that come packaged in coercive control are no more a part of my personal life than they are of most men's. This is true both literally, because many of the regulations involved in coercive control target behaviors that are identified with the female role, and figuratively, because it is hard for me to conceive of a situation outside of prison, a mental institution, or a POW camp where another adult would control or even care to control my everyday routines.

*Id.*

212. *Id.*

213. For an example of the domestic violence and the mixed question see *infra* Part V.C.

214. *Stamm v. Stamm*, No. 21A05-0607-CV-401, 2007 WL 1673799, at \*6 (Ind. Ct. App. June 12, 2007).

215. *Id.* ("When the trial court enters purported findings that merely restate testimony, this court will not 'cloak the trial court recitation in the garb of true factual determinations and specific findings as to those determinations and specific findings as to those facts.'" (quoting *In re Adoption of T.J.F.*, 798 N.E.2d 867, 874 (Ind. Ct. App. 2003))).

evidence and judging the witnesses' credibility."<sup>216</sup> The appellate court suggested that in order to make a "finding of fact" the trial court must adopt the witnesses' testimony, not simply restate it.<sup>217</sup> The trial court's job is to analyze the evidence presented, weigh it, and determine whether the evidence is relevant to the court's ultimate determination and why. Problems also arise when the trial court simply ignores the testimony of particular witnesses. The Michigan Court of Appeals in *Pears v. Ramsey* reversed a trial court's change of custody, in part, based on the fact that the court ignored some testimony.<sup>218</sup>

Given the nature of trial courts, West Virginia Supreme Court Justice Larry Starcher explained that appellate courts are crucial to a trial judge's ability to do her or his job well.<sup>219</sup> Starcher believes that the trial judge will be more confident in making a decision knowing that the responsibility is shared.<sup>220</sup> If this is true, a deferential standard of review will not catch many of the critical errors made by custody judges who have large case loads and little time to spend on individual matters.

Admittedly, mistakes are likely to occur; judges are human. Some argue that the appellate process is not an instrument for catching the factual mistakes of trial judges in individual cases,<sup>221</sup> not even when justice will be served.<sup>222</sup> They posit that the service of justice is simply not what appellate courts do or how appellate court judges should spend their time.<sup>223</sup> This line of reasoning may be suitable for the majority of the cases that come before appellate courts. When the mistake is made in a custody case involving two relatively fit parents who are able to provide a loving and

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216. *Id.*

217. *Id.*; see also Jackson, *supra* note 186, at 15 (providing that trial court "findings must contain enough detail to reveal the trial court's reasoning process").

218. No. 271820, 2007 WL 1342562, at \*1 (Mich. Ct. App. May 8, 2007), *appeal denied by* 739 N.W.2d 84 (Mich. 2007); see Weeks v. Doucette, No. 269666, 2007 WL 1342577, at \*1 (Mich. Ct. App. May 8, 2007).

219. See Starcher, *supra* note 126, at 8 (portraying the plight of the custody judge: "[a]s a trial judge, you rule, you make a decision, you sign an order—and then you move on—to the next question, the next motion, the next witness, the next case").

220. *Id.* ("[W]hen a trial judge knows that there will be a reflective and detached review of the trial judge's shoot-from-the-hip, on-the-spot, disputed calls—then that trial judge can function far more expeditiously, robustly, confidently, and sustainably. Why? Because then the responsibility isn't all on the trial judge's shoulders.")

221. See Lee, *supra* note 34, at 248 (analyzing Judge Posner's endorsement of deferential review, Lee explains: "[h]e makes a considerably bolder and more profound declaration about the proper role of appellate courts. He assumes that the *only* legitimate function of appellate courts is to oversee the development of doctrine and that appellate courts are not directly concerned with ensuring that the correct result is reached as between litigants at bar.")

222. *Id.* at 248-49 (suggesting that although appellate review is a mechanism for justice overall, it is not necessarily the proper tool for ensuring justice in individual cases).

223. See *supra* note 188 and accompanying text.

safe environment, there is a low probability of harm resulting to the children at issue or any other far-reaching negative consequences from that fact-finding error. But when a mistake is made in a case involving domestic violence, the harm is disastrous for the children, the battered parent, and society as a whole.<sup>224</sup> In addition, since a case involving domestic violence presents a greater risk of judicial gender, class, and racial bias, added protections should be afforded at every level of our legal process, even with regard to the factual-findings of the trial judge.

### *B. Questions of Law*

The standard of review on a question of law is significantly different from review of a judge's factual determination or other discretionary ruling. Questions of law are typically reviewed for clear legal error.<sup>225</sup> Clear legal error occurs when a trial court "incorrectly chooses, interprets, or applies the law."<sup>226</sup> Typically, an appellate court is not required to defer to the trial court's ruling because it reviews questions of law de novo.<sup>227</sup>

Randall Warner suggests that reviewing courts are granted this "ultimate authority" over questions of law because appellate court judges are specifically selected for their "knowledge and understanding of the law," they are in the business of deciding legal questions on a daily basis, and their perspective is much broader than the trial judge, given the array of cases they consider.<sup>228</sup> Warner also notes that the appellate court has "greater opportunity to research, analyze, discuss, and debate important legal issues."<sup>229</sup> The luxury of time and the opportunity for reflection are critical advantages of the appellate court.<sup>230</sup> This notion of reserving appellate court time and attention for important legal issues is at the heart

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224. See Morse & Shaver, *supra* note 42. Mark Castillo's case file included examples of warning signs, including threats to his wife and his children, suicidal claims, and the purchase of poison and other harmful materials, but the judge allowed visitation rights because the standard for denial was not met. *Id.* Mark Castillo drowned each of his three children within a year of the hearing. *Id.*

225. Bradford v. Bradford, No. 274065, 2007 WL 1864225, at \*1 (Mich. Ct. App. June 28, 2007).

226. Roodovets v. Royce, No. 275461, 2007 WL 1828896, at \*7 (Mich. Ct. App. June 26, 2007).

227. See Donna Wickham Furth, *Seeking Appellate Review: Practice Pointers for Custody Cases*, 26 FAM. ADVOC. 48, 51 (2004); see also Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 105 (2005) (explaining that appellate courts review questions of law "without deference, or 'de novo'" and have "the ultimate authority over these issue for a number of reasons").

228. Warner, *supra* note 227, at 105; see Sepler, *supra* note 205, at 49 (explaining that unlike other questions on review, trial courts are "not in a superior position to evaluate questions" of law).

229. Warner, *supra* note 227, at 105.

230. Randall Warner acknowledges that trial judges "make lots of decisions each day, often without time for extended reflection . . . ." *Id.*



of our domestic violence inquiry.

Although reviewing a trial court's failure to properly apply a question of law appears to be straightforward, application of the clear legal error standard of review is not without problems. In *C.W.L. v. R.A.*, the Mississippi Court of Appeals considered a trial judge's determination that a pattern of family violence did not occur.<sup>231</sup> The high court refused to find the trial judge's determination manifestly wrong because the trial judge was in the best position to assess the credibility of the witnesses as to whether there was a pattern of family violence.<sup>232</sup> Whether the trial court was in the best position to assess the credibility of the witnesses, however, was not the fundamental issue. The trial court assessed the case and determined that acts of violence occurred, thus resolving the factual questions.<sup>233</sup> The reviewing court should have addressed whether the trial court properly determined that the acts of violence did or did not constitute a pattern of family violence as a question of law or arguably a mixed question of law and fact (not a purely factual question calling for credibility assessments as the appellate court concluded). The waters, as we shall see, are murky when the question on appeal in a custody case involves an analysis of the law as it relates to domestic violence.

### *C. Mixed Questions of Law and Fact*<sup>234</sup>

The mixed question may be one of the most often ignored and yet appropriate issues for appeal in a custody case involving intimate partner violence. The standard of review applied to mixed questions varies; some appellate courts review these questions *de novo* giving no deference to the trial court's determination while others apply a deferential standard.<sup>235</sup> One

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231. *C.W.L. v. R.A.*, 919 So. 2d 267, 272 (Miss. Ct. App. 2005) (revealing evidence that showed that there was not only yelling and screaming but on a few occasions slapping and "perhaps one incident of choking"). In the trial court's view, the evidence did not support the conclusion that the acts of abuse reached the level of a pattern of significant behavior because there were no "serious or even moderate injuries" sustained. *Id.*

232. *Id.*

233. *See id.* (minimizing the level of violence presented by *both* parties as "general yelling and screaming which, on a few occasions, resulted in slapping and perhaps one incident of choking" and finding that there was no pattern of violence).

234. *See Lee, supra* note 34, at 238 (defining a mixed question of law and fact as "one that requires the decision maker to apply law to facts . . . that is, [to] ascertain the legal significance of relevant historical fact as liquidated" (internal citations omitted)).

235. *See id.*

The question is whether the "clearly erroneous" standard applies to the review of district court findings of *mixed* questions of law and fact in both civil and criminal cases in federal court. The circuits are in disarray on this question, with conflicts not only between circuits but within them. The circuits fall into four categories: those whose general rule is to review mixed questions under the "clearly erroneous" standard; those whose general rule is to review mixed

possible factor that may influence a reviewing court when deciding the proper standard to apply is “whether legal aspects predominate or are subordinate to factual aspects.”<sup>236</sup> Determining whether the primary issue is one of law or fact is highly complex, like the mixed question itself.

Not all mixed questions are straightforward. Edward Walters and Darrel Papillion attempt to unravel the mixed question through the Louisiana Supreme Court’s analysis in *Reed v. Wal-Mart Stores, Inc.*<sup>237</sup> The mixed question in *Reed* called for a determination of whether something created an unreasonable risk of harm.<sup>238</sup> The *Reed* court explained that because the issue of whether something creates an unreasonable risk of harm is not a fixed legal concept, the trial court in each case must determine whether “the social value of the hazard outweighs, and thus justifies, its potential harm to others . . . .”<sup>239</sup> Such questions, in the court’s view, were better assessed under a manifest error standard of review.<sup>240</sup> Domestic violence, unlike a potentially hazardous condition, possesses no social value. There are no competing social issues for the trial judge to weigh if an act of violence takes place. There is only one overarching public concern: protection. Thus, in custody cases involving domestic violence the legal and factual issues should be separated and addressed individually. This task, however, proves difficult.

Determining whether an act of abuse occurred requires the trial judge to assess both law and facts as well as the evidence and the credibility of the witnesses.<sup>241</sup> Determining whether the batterer hit, intimidated, or followed

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questions under a de novo standard; those whose general rule is to review mixed questions under a variable standard that attempts to characterize each question as essentially one of law or fact; and those where no discernable pattern has emerged.

*Id.*; see also Jeffrey P. Bauman, *Standards of Review and Scope of Review in Pennsylvania—Primer and Proposal*, 39 DUQ. L. REV. 513, 547 (2001) (explaining the standards applied to mixed questions are “in a state of flux”).

236. Bauman, *supra* note 235, at 547; see Sepler, *supra* note 205, at 54 (establishing that the standard for mixed questions of law and fact depends on what part of the ruling is under review, noting that “the clearest way to approach mixed law-fact questions is to allow free review of legal conclusions and legal effects, while deferring to determinations of underlying facts and even factual inferences” (quoting STEVEN ALAN CHILDRESS & MARTHA A. DAVIS, *FEDERAL STANDARDS OF REVIEW* 2, 133 (2d ed. 1992))). Moreover, according to Edward Walters and Darrel Papillion, mixed questions contain “both legal and factual elements.” Edward Walters & Darrel J. Papillion, *Appellate Review of Mixed Questions of Law and Fact: Due Deference to the Fact Finder*, 60 LA. L. REV. 541, 542 (2000).

237. Walters & Papillion, *supra* note 236, at 545 (citing *Reed v. Wal-Mart Stores*, 708 So. 2d 362 (La. 1998)).

238. *Id.*

239. *Id.*

240. *Id.*

241. In some cases, an assessment of whether an act occurred may have been decided already at the civil protection hearing or the criminal trial. In such cases, the

the victim are examples of the types of questions of fact at issue. After such findings of fact are made, “the application of those facts to the final legal determination”<sup>242</sup>—whether the act or acts are domestic or family violence as defined by a particular jurisdiction—is a mixed question of law and fact. As Evan Tsen Lee explains, a mixed question generally entails the trial judge’s application of the law to the facts.<sup>243</sup> When defining what constitutes domestic violence, the trial judge must determine whether the acts—the findings of fact taken as a whole—constitute a pattern of behavior that amounts to family violence as defined by law.<sup>244</sup>

This second level of analysis can be problematic in a custody case because it is often based, in part, on the trial judge’s credibility assessments and factual findings. If the trial judge regards the victim’s testimony as incredible or an exaggeration of the level of violence,<sup>245</sup> he or she is likely to conclude that the acts fail to rise to the level of family violence. Such a conclusion involves a combination of credibility assessments, factual findings, and conclusions of law. Unlike other legal matters, the mixture of legal and factual determinations in the domestic violence assessment may be so intertwined that it is virtually impossible to ascertain whether the predominant question is one of law or fact.

In addition, the infiltration of gender, race, or class biases<sup>246</sup> in cases involving violence against women, and the significant social consequences of custody cases involving domestic violence, in particular, demand a de novo review of mixed questions.<sup>247</sup> Vesting reviewing courts with the authority to freely assess whether the trial judge properly applied the law to the facts of the particular case makes a great deal of sense given the function of appellate courts and the far-reaching risks that these particular

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trial judge does not have to consider factual questions and is able to move directly to an analysis of the law.

242. Walters & Papillion, *supra* note 236, at 543 (citing *Green v. City of Thibodaux*, 671 So. 2d 399 (La. Ct. App. 1995)).

243. Lee, *supra* note 34, at 238.

244. This issue is complicated by the fact that many jurisdictions define domestic violence, family violence, or a perpetrator of domestic violence in varied ways.

245. See *supra* Part II.C.

246. See REPORT ON RACIAL & GENDER BIAS, *supra* note 10, at 405 (confirming gender bias against battered women specifically); Morant, *supra* note 102, at 1083; Trompeter, *supra* note 57, at 1089-90.

247. Although determining what legal standard to apply to mixed questions may appear perplexing, some courts provide a clear answer. See Walters & Papillion, *supra* note 236, at 542 (providing that “[b]ecause a mixed question contains both legal and factual elements, appellate courts are often at a loss regarding the appropriate standard to apply on review. Courts have difficulty because the legal elements in mixed questions seem to call for de novo review, while the factual elements seem to require application of the manifest error standard.”). Moreover, *Green v. City of Thibodaux*, suggests that trial courts are “in no better position than the appellate court to *apply* the facts, as opposed to *finding* the facts,” 671 So. 2d at 403.

cases present.

#### *D. Discretionary Rulings*

Even absent trial court findings of fact that are clearly erroneous or are an incorrect application of the law, a litigant may still argue that the trial court abused its discretion when it made its custody determination. Abuse of discretion arguments are, however, always an uphill battle. There are some “substantive areas [of the law] traditionally left to trial court discretion.”<sup>248</sup> Custody is one such area.<sup>249</sup> In few other substantive areas of the law does the trial judge command more power and authority.<sup>250</sup>

In fact, the reviewing court is likely to focus on the ultimate custody decision, a determination afforded great deference,<sup>251</sup> instead of individual factual findings. It follows then that those jurisdictions that conclude the ultimate custody decision is a discretionary ruling, review the case pursuant to an abuse of discretion standard.<sup>252</sup>

Special status flows to the custody judge because appellate courts confirm that custody determinations command greater deference. It follows that with unique status comes special treatment for this elite group of hearing officers;<sup>253</sup> treatment that affords the custody judge great power over one of the most important decisions affecting parents and children.

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248. Sepler, *supra* note 205, at 50.

249. *Id.* (citing *Kuvin v. Kuvin*, 442 So. 2d 203 (Fla. 1983)). Not all jurisdictions deem custody determinations to be discretionary; instead such jurisdictions view the custody determination as a finding of fact and review it pursuant to a clearly erroneous standard. *See Reeves v. Chepulis*, 591 N.W.2d 791, 794 (N.D. 1999) (noting that a “trial court’s custody determination is a finding of fact unless it is clearly erroneous”).

250. *See supra* Part II; *see also* note 19 and accompanying text.

251. *See Foster v. Foster*, 149 S.W.3d 575, 579 (Mo. Ct. App. 2004) (acknowledging that “[w]e give greater deference to the trial court’s determination in child custody proceedings than in any other type of case” (quoting *Wallace v. Chapman*, 64 S.W.3d 853, 858 (Mo. Ct. App. 2002))).

252. *See Bradford v. Bradford*, No. 274065, 2007 WL 1864225, at \*1, 4 (Mich. Ct. App. June 28, 2007) (“Discretionary rulings, such as custody decisions, are [often] reviewed for an abuse of discretion.”); *see also Leder v. Leder*, No. 275237, 2007 WL 1828895, at \*3 (Mich. Ct. App. June 28, 2007), *vacated on reconsideration by* No. 275237, 2007 WL 2892583 (Mich. Ct. App. Oct. 4, 2007); *Lundquist v. Lundquist*, No. 271023, 2007 WL 1864255, at \*1 (Mich. Ct. App. June 28, 2007) (involving allegations of domestic violence where the Michigan Court of Appeals maintained that the trial court’s decision to give little credence to mother’s abuse allegations was not against the great weight of the evidence because mother’s evidence of domestic violence was “scant and mostly subjective.” The appellate court failed to provide sufficient details of the acts of domestic violence thus making it difficult for the reader to properly assess the trial court’s findings.); *Seelye v. Perkins*, 127 P.3d 1035, 1036-37 (Mont. 2006) (“If no clear error is apparent, the district court’s decision will be upheld unless it abused its discretion”). There are, however, a select group of states that review custody determinations *de novo*. *See Atkinson, supra* note 25, at 41.

253. *See Sepler, supra* note 205, at 50 (determining that “a presumption exists as to the correctness” of discretionary decisions).

In support of a limited standard of review, some appellate courts maintain that there may “be more than one reasonable and principled outcome” in a custody matter.<sup>254</sup> As a result, abuse of discretion only occurs where the decision of the trial court falls outside that range of reasonable outcomes.<sup>255</sup>

It is also likely that many of the issues previously considered influence the power and authority of the custody trial judge and the deference accordingly afforded.<sup>256</sup> Some considerations that play a critical role in guaranteeing the custody judge’s decision-making power include the perception that these cases are important,<sup>257</sup> the idea that the custody trial judge possesses special expertise,<sup>258</sup> the illusion that the trial judge has a heightened ability to assess the credibility of the witnesses,<sup>259</sup> the perception that these matters cry out for a prompt and final resolution,<sup>260</sup> the myth that litigants and witnesses particular to custody actions tend to exaggerate,<sup>261</sup> the reality of judicial gender bias,<sup>262</sup> and the belief that these cases are “close calls” best left to trial judges.<sup>263</sup> Because the level of deference reviewing courts afford trial court decisions depends in large measure on the level of discretion exercised by trial judges, the term “*judicial discretion*” in and of itself calls for close analysis.

### 1. *Judicial Discretion*

*[V]ariances come from the hearts of the judges rather than the facts of the case.*<sup>264</sup>

In order to make a determination of what constitutes abuse of discretion, one must first define judicial discretion. It has been defined as “a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or

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254. *Roodovets v. Royce*, No. 275461, 2007 WL 1828896, at \*7 (Mich. Ct. App. June 26, 2007).

255. *See id.*; *see also* *Morrill v. Morrill*, 77 A. 1, 5 (Conn. 1910) (articulating that “[a] mere difference of opinion or judgment cannot justify our intervention”).

256. *See supra* Part II.

257. *See supra* Part II.D.

258. *See supra* Part II.A.

259. *See supra* Part II.B.

260. *See supra* Part II.E.

261. *See supra* Part II.C.

262. *See supra* Part IV.

263. *See supra* Part II.F.

264. Atkinson, *supra* note 25, at 3.

capriciously.”<sup>265</sup> Similarly, judicial discretion has been described as “impartial reasoning, guided and controlled in its exercise by fixed legal principles, requiring the court, in consideration of the facts and circumstances, to decide as its reason and conscience dictate, and it requires that the court be discreet, just, circumspect and impartial, and that it exercise cautious judgment.”<sup>266</sup> If these definitions of judicial discretion are accurate, is abuse of discretion the opposite of just and impartial decision-making? Neither the question nor the answer is that simple.<sup>267</sup>

Judicial discretion can be loosely described as the legal authority to choose;<sup>268</sup> judicial choice within the bounds of justice and the limits of the law. Defining the limits of judicial choice prove difficult. The appropriate and reasonable choice for a fact finder under the circumstances is subjective in nature. Determinations made by judges, although based on the facts and the law, are influenced by the decision-maker’s personal opinions, perspective, and quite possibly bias.<sup>269</sup> Showing that a hearing officer abused his or her authority to choose, however, is not an easy task. It is not sufficient to simply prove that the judge failed to exercise sound decision-making.

## 2. Defining Abuse of Discretion

*[T]he abuse of discretion standard “means everything and nothing at the same time.”*<sup>270</sup>

Wendell Hall explains that the test to determine whether the trial court abused its discretion is not whether the appellate court would decide the case differently,<sup>271</sup> rather “whether the trial court acted without reference to

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265. *Byerly v. Madsen*, 704 P.2d 1236, 1238-39 (Wash. Ct. App. 1985) (quoting *Washington ex rel. Carroll v. Junker*, 482 P.2d 775, 784 (Wash. 1971)); see *Lopez v. Lopez*, 116 P.3d 1098, 1100 (Wyo. 2005); *Aragon v. Aragon*, 104 P.3d 756, 759 (Wyo. 2005).

266. *Texas Co. v. Globe Oil & Refining Co.*, 114 F. Supp. 144, 147 (N.D. Ill. 1953) (quoting *Dixie Cup v. Paper Container Mfg.*, 174 F.2d 834, 836 (N.D. Ill. 1949)).

267. See *infra* Part VI.D.2.

268. *Zocraras v. Castro*, 465 F.3d 479, 483 (11th Cir. 2006) (citing *Betty K Agencies, Ltd. v. M/V Monada*, 432 F.3d 1333, 1337 (11th Cir. 2005)) (defining discretion as a range of choices available to the trial court). See generally *Ass’n of Flight Attendants-CWA, AFL-CIO v. Mesaba Aviation, Inc.*, 350 B.R. 435 (D. Minn. 2006).

269. Proving that personal experience or bias inappropriately influenced the hearing officer’s decision in a particular case is exceedingly difficult.

270. W. Wendell Hall, *Standards of Appellate Review in Civil Cases*, 21 ST. MARY’S L.J. 865, 869 (1990) (citing *Landon v. Jean-Paul Budinger, Inc.*, 724 S.W.2d 931, 935 (Tex. App. 1987)).

271. *Id.* at 934; see PAUL MARK SANDLER & ANDREW D. LEVY, *APPELLATE PRACTICE FOR THE MARYLAND LAWYER: STATE AND FEDERAL* 235 (2001). Sandler explains:

any guiding rules and principles, or in other words, acts in an arbitrary or unreasonable manner.”<sup>272</sup> In essence, the decision must be manifestly wrong or clearly erroneous before a reviewing court will reverse the trial court’s decision.<sup>273</sup> This stringent standard is likely the result of what scholars describe as judicial disinclination to perpetuate litigation.<sup>274</sup>

Many courts struggle to define this obscure standard. One court explained that “[a]buse of discretion implies that the court’s attitude was unreasonable, arbitrary, or unconscionable.”<sup>275</sup> Others maintain that the trial judge abuses his or her discretion when the reasons of the court unfairly deprive a litigant of an important right and a just result.<sup>276</sup> One court provides that abuse of discretion is established in a custody case when the trial judge fails to consider statutorily mandated factors, assigns disproportionate weight to a particular factor while ignoring others, or chooses to consider improper factors.<sup>277</sup> As some legal scholars suggest, however, “[t]o be overturned on abuse of discretion, a decision ‘must be eye-popping, neck-snapping, jaw-dropping egregious error.’”<sup>278</sup>

In the alternative, one appellate court defines abuse of discretion broadly, suggesting a trial court decision that deprives a litigant of a “just result” is in fact abuse of discretion.<sup>279</sup> Although such reasoning supports

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An appellate court is likely to defer to the decision below if the appellant’s argument, when stripped to its essentials, is little more than that the case could have been decided differently. Conversely, an appellate court is likely to reverse if there is support for the appellant’s argument that the process was unfair or that it produced a fundamentally unfair result.

*Id.*

272. See *Goodman v. Goodman*, 360 P.2d 877, 880 (Kan. 1960) (explaining that abuse of discretion “implies not merely an error in judgment, but perversity of will, passion, or moral delinquency when such abuse is exercised to an end or purpose not justified by, and clearly against, reason and evidence”); Hall, *supra* note 270, at 934.

273. See *Kminek v. Kminek*, 325 N.E.2d 741, 747 (Ill. App. Ct. 1975) (“The determinations of the trial judge with respect to custody matters would not be disturbed on review unless it appears that a manifest injustice has been done.”); *Harper v. Harper*, 926 So. 2d 253, 255 (Miss. Ct. App. 2006) (articulating that appellate courts must affirm factual findings in custody cases “when they are supported by substantial evidence”).

274. SANDLER & LEVY, *supra* note 271.

275. *C.D. v. D.L.*, No. CA2006-09-037, 2007 WL 1531417, at \*3 (Ohio. Ct. App. May 29, 2007).

276. See *Wells v. Singleton*, No. 2002-CA-002513-MR, 2004 WL 869320, at \*3 (Ky. Ct. App. Apr. 23, 2004) (defining abuse of discretion as a decision which is unreasonable or unfair); *Ephraim H. v. Jon P.*, No. A-04-1488, 2005 WL 2347727, at \*2 (Neb. Ct. App. Sept. 27, 2005); *Strelko v. Larson*, No. A-04-448, 2005 WL 780386, at \*2 (Neb. Ct. App. Apr. 5, 2005).

277. *Elton H. v. Naomi R.*, 119 P.3d 969, 974 (Alaska 2005).

278. Painter & Walker, *supra* note 29, at 219 (quoting Roger Badeker, *Wide as a Church Door, Deep as a Well: A Survey of Judicial Discretion*, 61 J. KAN. B. ASS’N 33, 33 (1992)).

279. *Royer v. Royer*, No. A-04-709, 2006 WL 786457, at \*1 (Neb. Ct. App. Mar. 28, 2006).

the notion that justice and fairness underlie the abuse of discretion standard,<sup>280</sup> it is difficult to find an example of the theory in use in this area of the law.

Discretion, according to Justice Stanley Feldman, is necessary when a decision is based on an assessment of conflicting factual considerations which vary from case to case.<sup>281</sup> This is true of many custody decisions. When the issue, on the other hand, is based on “law or logic,” Justice Feldman maintains that the court of appeals must exercise a rigorous review of the trial court’s decision.<sup>282</sup> The latter should apply to custody cases involving domestic violence because determining the occurrence of family violence requires both an application of the law and use of logical decision-making. Moreover, reliance on the former standard results in unpredictability for battered mothers given the difficulty in defining and, more importantly, identifying abuse of discretion in these cases.

What we do know is that there are some judicial actions that are highly likely to result in reversible error in custody cases. One such act is a refusal by a judge to allow the testimony of a tendered witness.<sup>283</sup> Judicial refusal may present itself in a unique way in the area of domestic violence because the sole competent or willing witness to the acts of violence is often the battered litigant. Instead of an outright denial of testimony, a judge may refuse to allow the battered litigant the ability to fully explain the allegations of abuse, restrict the number of allegations she may discuss, or place limits on testimony related to remote acts of abuse.

Reversible error, in the words of the Wyoming Supreme Court, may also be found when the trial court fails to consider a “material factor deserving significant weight.”<sup>284</sup> Successfully arguing that domestic violence is a “material factor” presents challenges. Some jurisdictions suggest that evidence of domestic violence carries more weight than other best interest factors;<sup>285</sup> in other jurisdictions the weight given to evidence of domestic

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280. *Royer*, 2006 WL 786457, at \*1.

281. *Painter & Walker*, *supra* note 29, at 221 (citing *State v. Chapple*, 660 P.2d 1208, 1224 n.18 (Ariz. 1983)).

282. *Id.*

283. *Kminek v. Kminek*, 325 N.E.2d 741, 746 (Ill. App. Ct. 1975) (citing *Gerst v. Gerst*, 110 N.E.2d 470, 471 (Ill. App. Ct. 1953)).

284. *CAA v. ZWA*, 85 P.3d 432, 435 (Wyo. 2004).

285. *See P.F. v. N.C.*, 953 A.2d 1107, 1112 (D.C. 2008) (declaring evidence of domestic violence is “considered a significant factor”); *see also Huesers v. Huesers*, 560 N.W.2d 219, 221 (N.D. 1997) (citing *Ryan v. Flemming*, 533 N.W.2d 920, 923 (N.D. 1995) (explaining that when determining the best interest of a child, “in the hierarchy of factors to be considered, domestic violence predominates when there is credible evidence of it”); *Heck v. Reed*, 529 N.W.2d 155, 162 (N.D. 1995) (finding that the legislature intended that domestic violence committed by a parent weigh heavily against that parent’s claim for child custody and that under the governing statute “it takes compelling or exceptional circumstances . . . to award custody to a perpetrator of



violence is unclear. Although it may be easier to argue that evidence of domestic violence is a material factor in a jurisdiction that maintains a presumption against awarding custody to a perpetrator of domestic violence,<sup>286</sup> the justifications for affording great weight to these particular harms exist apart from any codified presumption.<sup>287</sup>

#### VII. NEW STANDARDS FOR CUSTODY CASES INVOLVING DOMESTIC VIOLENCE

*That which is not just is not law.*<sup>288</sup>

Early on, our courts understood that custody decisions are interconnected with society and “humanity generally.”<sup>289</sup> Often times, however, this important truth is lost in the process. If the primary goal of a custody determination is safety,<sup>290</sup> everything else must flow from that basic assumption. Child safety demands a standard of review broad enough to secure the protection of both children and their primary caretaker, as well as uphold the interests of society generally. There is, however, little consistency among, or even within, the jurisdictions from the trial court level through appellate review when a custody case involves evidence of domestic violence.<sup>291</sup>

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domestic violence, and certainly something more than the customary weighing and reciting of factors”).

286. *See Heck*, 529 N.W.2d at 162 (“The use of the word ‘require’ is a clear legislative signal that the presumption against awarding custody to a domestic violence perpetrator is not overcome merely by balancing the other factors slightly in the perpetrator’s favor.”).

287. *See id.* at 164 (suggesting evidence of domestic violence is of great importance in custody determinations because, among other reasons, “children are seriously and detrimentally affected by exposure to a parent who uses violence to exert control over family members”). The court in *Heck* relied on recognition by the United States Congress that domestic violence is harmful to children exposed to an abusive parent, emphasizing that “Congress made a legislative finding that ‘even children who do not directly witness spousal abuse are affected by the climate of violence in their homes and experience shock, fear, guilt, long-lasting impairment of self-esteem, and impairment of developmental and socialization skills.’” *Id.*

288. WILLIAM LLOYD GARRISON, THOUGHTS ON AFRICAN COLONIZATION 72 (1832) (quoting Algernon Sidney).

289. *Johnston v. Lowery*, 25 S.W.2d 436, 437 (Ark. 1930).

290. Jaffe et al., *supra* note 3, at 87 (addressing the issue of “safety first” as it relates to child custody).

291. *See Atkinson*, *supra* note 25, at 3 (“When judges apply their own life experiences to cases before them, the result is lack of uniformity in decisions. Cases with very similar facts may be decided opposite ways by courts in different states and even courts within the same state.”).

### *A. Defining Domestic Violence*

Clear instruction from our high courts and new legislation defining what constitutes abuse is imperative. In light of the realities of our current system and the truth that intimate partner violence extends far beyond behavior proscribed by criminal law, domestic violence must be defined broadly. Otherwise, the use of domestic violence evidence will continue to cause unpredictability and frustrate sound judicial decision-making in custody cases.

Some jurisdictions define domestic violence narrowly thus diminishing the possibility of triggering a presumption against awarding legal custody to the perpetrator. For example, North Dakota law defines domestic violence as “physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault . . . on the complaining family or household members.”<sup>292</sup> This definition fails to take into consideration acts of intimidation or subjugation abusers often exert to achieve control over the victim’s behavior.<sup>293</sup>

For example, in accordance with the North Dakota law, the court in *Lawrence v. Delkamp* found that threats by the perpetrator did not create a fear of imminent physical harm.<sup>294</sup> In particular, the perpetrator in *Lawrence* threatened to “beat the crap out” of his ex-girlfriend if she pursued child support,<sup>295</sup> to “eliminate” their child in a boating accident,<sup>296</sup> and to withhold the child after visitation unless the father was allowed to claim the child on his tax return.<sup>297</sup> Clearly, these threats were made in an effort to control another individual’s behavior. This kind of intimidation is not only very dangerous, it is also highly relevant to a custody case because it shows a predisposition to use threats of harm to control or restrict the other parent from exercising a legal right or interest.<sup>298</sup> This behavior also indicates a propensity on the part of the battering parent to place his interests—in this case a desire to avoid child support obligations or to receive tax benefits—above the interests of his child.

By comparing clinical and legal definitions of domestic violence, some scholars suggests that our legal definition of domestic violence may fail to

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292. *Lawrence v. Delkamp*, 620 N.W.2d 151, 153-54 (N.D. 2000).

293. *Id.* at 154.

294. *Id.* (reversing the trial court’s finding of domestic violence).

295. *Id.*

296. *Id.*

297. *Id.*

298. It is precisely this type of coercion that can be used by the battering-parent to direct future decision-making related to the care and control of the child.

provide an accurate characterization of what constitutes abuse between intimate partners.<sup>299</sup> Peter Jaffe accurately describes our criminal and civil response to domestic violence as “incident-based, which means that one incident can trigger a finding of domestic violence.”<sup>300</sup> Unfortunately, reliance on an “incident-based” definition of domestic violence also means that without a clearly defined act of abuse, victims of intimate partner violence are often without legal recourse. Jaffe explains that the clinical definition of domestic violence, in the alternative, takes into consideration “the context of the behaviors—their intent, the impact on the victim, the degree to which the behaviors interfere with parenting and child well-being.”<sup>301</sup> Thus, the clinical model focuses on how domestic violence plays a role in the relationship as opposed to a snapshot of what just occurred, as well as what, if any, influence the abuse has on the child.<sup>302</sup>

This “incident-based” model likely grows out of the traditions of our criminal justice system; a system with vastly different goals and consequences from that of our civil system. It is true that an “incident-based” model works well in the criminal context where the primary goal is to determine guilt or innocence—what happened and who did it are primary considerations, and why it was done is secondary for the purpose of motive only. In the civil/custody context, however, the principal goal is to determine what is best for the child. Although who did it and what happened are significant, why it was done becomes an important consideration for determining what the best outcome is for the child. As such, the characterization of domestic violence must be broad in the custody context. It must provide the court with an understanding of the role domestic violence plays in the family relationship, its effect on individual family members, and how it will or will not continue to influence individual actions in the future. Additionally, the court must take

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299. Jaffe et al., *supra* note 3, at 83.

Although historically the term *domestic violence* was reserved for a pattern of abuse and violence that included a significant power differential in the relationship, it is sometimes used more indiscriminately to refer to any episode of violence. Without minimizing the impact of any assault, a single incident of mutual pushing during an emotional period of separation is notably different from a longstanding pattern of terror, humiliation, and abuse. In this respect, a clinical assessment of domestic violence may yield very different results than a legal one. The civil and criminal justice system is by definition incident-based, which means that one incident can trigger a finding of domestic violence. Conversely, numerous subthreshold behaviors (in the legal sense) would not meet the legal standard but might clearly be part of a larger pattern of domestic violence.

*Id.*

300. *Id.*

301. *Id.*

302. *Id.*

into consideration the power dynamic potentially created by its own order for custody or visitation. The ability to use intimidation to control the behavior of the other parent is highly relevant to the free exercise of parenting one's child. Thus, the law must include conduct that is employed for the specific purpose of controlling the behavior of another individual.

The court must also look beyond the specific act or acts of abuse. The answers to how and why the abuse occurred may provide critical information about batterer behavior and how it impacts parental decision-making. Looking broadly at the relationship and the behaviors of the parties over the course of their relationship will provide the court with an understanding of both the history of domestic violence and the power dynamic in the relationship. Both aspects influence how each parent will deliberate, negotiate, and communicate for custody decisions they make in the future.

### *B. Properly Weighing the Evidence*

The particular acts of domestic violence deemed relevant and the weight trial judges are required to give those acts is not always clear. A comprehensive study by the Pennsylvania Supreme Court Committee on racial and gender bias in the judicial system documents the extent of this problem.<sup>303</sup> According to the report some suggest that it is unusual for judges to even consider domestic violence at the custody stage, let alone act on it.<sup>304</sup>

A select group of custody decisions, however, afford greater weight to domestic violence evidence, once established.<sup>305</sup> These decisions command that evidence of domestic violence predominate all other considerations to be weighed by the custody judge. In particular, the Court of Appeals for the District of Columbia in *P.F. v. N.C.* insisted that "it would be patently illogical" to presume that law makers intended that

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303. REPORT ON RACIAL & GENDER BIAS, *supra* note 10, at 401.

304. *See Helbling v. Helbling*, 523 N.W.2d 650, 650-52 (N.D. 1995) (representing a failure on the part of the trial court to recognize the significance of domestic violence by placing primary physical custody of the child with her father despite "extensive evidence of domestic violence," such as testimony from the mother to numerous acts of violence by the father including: whipping; grabbing her by the hair and dragging her down the steps; kicking her; throwing her against a linen closet; throwing her against a gun cabinet; stating he knew how to use a gun; and observations by another witness to injuries on the mother); *see* REPORT ON RACIAL & GENDER BIAS, *supra* note 10, at 401.

305. *See P.F. v. N.C.*, 953 A.2d 1107, 1112 (D.C. 2008); *Zimmerman v. Zimmerman*, 569 N.W.2d 277, 279 (N.D. 1997) ("domestic violence predominates when there is credible evidence of it."); *Huesers v. Huesers*, 560 N.W.2d 219, 221 (N.D. 1997); *Ryan v. Flemming*, 533 N.W.2d 920, 923 (N.D. 1995) (explaining "in the hierarchy of factors to be considered, domestic violence predominates when there is credible evidence of it"); *Heck v. Reed*, 529 N.W.2d 155, 162 (N.D. 1995) (providing "domestic violence committed by a parent weigh heavily against that parent's claim for child custody").

domestic violence be considered a “neutral factor and that both parents—the abuser and the victim—should be presumed to be equally suitable candidates for sole custody.”<sup>306</sup> In the words of the *guardian ad litem* in *P.F. v. N.C.*—simply put—“some factors are clearly more important than others.”<sup>307</sup> Nevertheless, even jurisdictions that afford great weight to evidence of domestic violence maintain a high threshold before either the presumption against awarding custody to the batterer or the presumption in favor of affording greater weight to evidence of domestic violence are triggered;<sup>308</sup> thus restricting protection to acts that fall within the definition of abuse as defined by the particular jurisdiction.<sup>309</sup>

There are many public policy reasons why change is necessary in this particular area. The legal system and society as a whole must understand why domestic violence is relevant to custody determinations in order to appreciate the weight that must be afforded to evidence of abuse.<sup>310</sup>

Obviously, the harm caused by domestic violence in general, and the batterer’s behavior in particular, should play an important role in custody determinations involving children exposed to the violent behavior of a battering parent.<sup>311</sup> There is a clear link between securing custody of

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306. *P.F.*, 953 A.2d at 1115.

307. *Id.* at 1118.

308. *See supra* Part VII.A.

309. *Id.*

310. *See P.F.*, 953 A.2d at 1113-14 (identifying the risks to children exposed to domestic violence); *Carmille A. v. David A.*, 615 N.Y.S.2d 584, 589 n.2 (N.Y. Fam. Ct. 1994).

[T]here are few more prevalent or more serious problems confronting the families and households of New York than domestic violence. It is a crime which destroys the household as a place of safety, sanctuary, freedom and nurturing . . . . The corrosive effect of domestic violence is far reaching. The batterer’s violence injures children both directly and indirectly. Abuse of a parent is detrimental to children whether or not they are physically abused themselves.

*Id.*; *see also Heck*, 529 N.W.2d at 163-64 (explaining “[t]he United States Congress recognized this inherent harm to children whose parents perpetrate domestic violence on their partners”); *Cahn, supra* note 61, at 1044 (advising that the use of domestic violence as a factor in child custody cases “reflects increased public awareness of the impact of battering on children”).

311. *See Leigh Goodmark, From Property to Personhood: What the Legal System Should do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 244 (1999) (maintaining that children witness intimate partner violence in many ways).

Witnessing includes not only what a child sees during an actual violent event, but also what the child hears during the event, what the child experiences as part of the event, and what the child sees during the aftermath of the event . . . . They hear their mothers screaming or crying or begging . . . seeing a parent’s battered and bloodied face, watching as a parent is interviewed or apprehended by the police, moving with a parent to a shelter to escape further violence. All of these forms of witnessing can have the same detrimental impact on children as actually watching an event take place. In some cases, the impact may be

children and maintaining safety for the battered woman.<sup>312</sup> Batterers use custody as a means of maintaining control over their victim,<sup>313</sup> as well as placing both mother and child at risk of physical and emotional harm.

The trial judge should carefully weigh domestic violence, whether or not it triggers a presumption. Furthermore, the custody court should clearly articulate the significance of the domestic violence, both on the record and in the court's written findings. By doing so, the court will provide a clear record for the reviewing body if the matter is appealed, as well as be reflective in its decision-making.

### *C. Broadening the Standard of Review*

Although a majority of states provide a limited standard of review, a minority of states allow broad discretion for appellate court review of custody cases generally.<sup>314</sup> Legal scholar Jeff Atkinson contends that the magnitude of a custody decision, which traditionally justifies applying a limited standard of review, actually supports applying a de novo standard of review in certain circumstances.<sup>315</sup> Atkinson limits a de novo review to those decisions that suggest bias on the part of the trial judge or lack of detailed analysis.<sup>316</sup> Expanding on Atkinson's theory, cases involving domestic violence fall well within the category of high risk for judicial bias.<sup>317</sup> Moreover, compared with custody cases generally, domestic violence custody cases present a far greater risk of harmful outcomes. The higher the risks, the greater the need for closer scrutiny at the appellate court level.

An example of the risks of applying a narrow standard of review can be found in *Stamm v. Stamm*.<sup>318</sup> The Indiana Court of Appeals in *Stamm*

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more damaging . . . .

*Id.*

312. REPORT ON RACIAL & GENDER BIAS, *supra* note 10, at 401 (explaining that securing custody provides protection and promotes autonomy).

313. See BANCROFT & SILVERMAN, *supra* note 8, at 75-76 (describing how batterers use the children as a "weapon" after separation).

314. See, e.g., *Morgan v. Weiser*, 923 A.2d 1183, 1186 (Pa. Super. Ct. 2007) (defining the standard of review in custody matters as the "broadest type"); *J.F. v. D.B.*, 897 A.2d 1261, 1273 (Pa. Super. Ct. 2006) (providing the standard of review in a custody case is broad); see also Atkinson, *supra* note 25, at 41.

315. Atkinson, *supra* note 25, at 41 (explaining that "[t]he de novo standard of review is preferable to the 'abuse' standard. On a subject as fundamentally important as the custody and welfare of children, each case on appeal should receive close scrutiny. A careful review is especially important since a custody determination may be influenced by the biases of the trial judge."). *But see id.* (maintaining that "[w]hen the trial judge makes specific findings, such as on credibility of witnesses, those findings should be given great weight").

316. *Id.*

317. See *supra* Part IV.

318. No. 21A05-0607-CV-401, 2007 WL 1673799, at \*1 (Ind. Ct. App. June 12,

considered, among other issues, whether the trial court abused its discretion in ordering joint legal custody and shared parenting time.<sup>319</sup> During the course of the trial, evidence presented was described by the court of appeals as “substantial evidence of [the father’s] detrimental effect on his children.”<sup>320</sup> The evidence presented suggested that the father became more controlling and increasingly bullied the mother over the course of their relationship,<sup>321</sup> a relationship described as physically hostile.<sup>322</sup> Specifically, the father called the mother obscene and disparaging names in the presence of the children, withheld the children from her for five weeks after she obtained a protective order,<sup>323</sup> became upset after the mother requested he sign separation papers, and choked her.<sup>324</sup> The evidence suggests that the father was abusive and failed to act in the best interest of his children. Professionals involved with the children testified that the father operated with “rigid distortions of reality” and was “incapable of containing his emotions,” which “he allowed to spill negatively onto the children.”<sup>325</sup> They also testified that he was a problem at the children’s school as a result of his inappropriate comments about their mother and attempts to influence and control the school counselor.<sup>326</sup>

The trial court appears to have relied primarily upon the fact that the children expressed a desire to remain with their father and that they were well adjusted to their home, school, and community.<sup>327</sup> Interestingly, the children made a request to Dr. Bart Ferraro, custody evaluator, to live with their father. Dr. Ferraro, however, ultimately recommended that the mother be granted sole custody, and the father be awarded supervised visitation based, in part, on his emotionally abusive manner with the children.<sup>328</sup> The trial court did not follow Dr. Ferraro’s recommendations because, in the court’s words, they were “not supported by the evidence in this case.”<sup>329</sup> The court also took issue with Dr. Ferraro’s request that the

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2007).

319. *Id.* at \*1.

320. *Id.* at \*7.

321. *Id.* at \*2 (“Wendy Stamm [mother] was required to buy all groceries, children’s diapers, formula, clothing, household goods and gasoline for her vehicle from a sum of \$400.00 from the mid-1990’s until Wendy Stamm became employed full-time in mid-2004.”).

322. *Id.* (explaining that on one occasion the father threw the mother’s items out of an automobile in the children’s presence).

323. *Id.* at \*2-3.

324. *Id.* at \*1.

325. *Id.* at \*3.

326. *Id.* at \*4.

327. *Id.*

328. *Id.* at \*3.

329. *Id.* at \*4.

court interview the children.<sup>330</sup> It is possible that Dr. Ferraro may have wanted the court to interview the children to ensure that they were not coached, or at the very least to confirm their wishes.<sup>331</sup>

The appellate court, reviewing the trial court's decision, explained that "[e]ven though the evidence introduced in this case would clearly be sufficient to support an order requiring that [the father's] parenting time be more limited and supervised, 'we will not substitute our judgment for that of the trial court.'"<sup>332</sup> As a result, the court of appeals found that it was "compelled" to affirm the order of the trial court.<sup>333</sup> The reviewing court explained that "[d]eterminations regarding child custody fall within the trial court's sound discretion,"<sup>334</sup> which the appellate court must affirm unless the trial court abused its discretion.<sup>335</sup>

The appeals court undertook a two-tiered standard of review:<sup>336</sup> first, the court considered whether the evidence supported the findings, and second, whether the findings supported the judgment.<sup>337</sup> The court of appeals explained that as part of the review process it would not reweigh the evidence or judge the credibility of the witnesses.<sup>338</sup> Instead, it would only consider the evidence favorable to the judgment,<sup>339</sup> a very high standard indeed. Such a standard deprives the appellate court of the ability to assess whether the trial court acted "in an arbitrary or unreasonable manner"<sup>340</sup> with regard to the domestic violence factor. Essentially, the reviewing court is unable to evaluate the determination that domestic or family violence did or did not occur, though it is a mixed question of law and fact, not a purely factual determination.

As in *Stamm*, this problem is made exceedingly difficult when a trial court fails to make findings of fact related to the allegations of abuse.<sup>341</sup> By

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330. *Id.* ("The Court takes particular exception to Ferraro's concern over the Court speaking with the children regarding their wishes in this case, when it is the Court that is given the ultimate legal responsibility of deciding the issue of custody and the legislature has directed the Court to consider the wishes of the children.").

331. *Id.* at \*3 (suggesting an example of such coaching occurred when Shelia Marshall testified that her father tried to convince her that her mother had abandoned the children, which the father convinced the children to say, and when challenged, the father admitted the mother had not abandoned the children).

332. *Id.* at \*8.

333. *Id.*

334. *Id.* at \*5.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. Hall, *supra* note 270, at 934.

341. *Stamm*, 2007 WL 1673799, at \*6 ("Before addressing the merits, we note that many of the 'findings of fact' issued by the trial court in this case are not true findings,



failing to make such findings the trial court ignores a critical factor that in turn precludes the appellate court from properly assessing the second tier, which requires an analysis of whether the findings support the judgment.

Often a reviewing court fails to appreciate the complex nature of intimate partner violence and the particular characteristics of a true batterer. In *Gibbs v. Hall*, the Michigan Court of Appeals found that the trial court did not err in failing to weigh the domestic violence factor against the father despite the fact that the father admitted he struck the child.<sup>342</sup> The reviewing court rejected the mother's legal argument that the trial court erred on two grounds: (1) the trial court did consider the physical act of violence against the child, which presumably was all that was required;<sup>343</sup> and (2) the reviewing court maintained that evidence of the mother's behavior, although non-physical, would also constitute domestic violence.<sup>344</sup> There are two lessons to be learned from this type of judicial minimizing of domestic violence.<sup>345</sup> First, all acts of bad behavior on the part of parents are not equal. Second, although it is easy to minimize intimate partner violence by comparing parental behavior (despite the dissimilarity of the acts), a full assessment of the individual behavior of each parent respectively and a determination of whether those actions constitute family violence as defined by law provide the best result for children.

The Supreme Court of North Dakota provides one possible framework for addressing the dilemma of cross allegations of domestic violence in custody cases.<sup>346</sup> The court suggests a balancing of the relative acts of both parents in an effort to determine who has inflicted "greater" abuse.<sup>347</sup>

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as they merely restate the testimony of the witnesses.").

342. No. 258538, 2005 WL 857366, at \*5 (Mich. Ct. App. Apr. 14, 2005).

343. *Id.*

344. *Id.*

345. See *C.W.L. v. R.A.*, 919 So. 2d 267, 272 (Miss. Ct. App. 2005) (providing an example when a court minimized domestic violence by finding no pattern of such activity despite evidence of a slap by the mother in self defense and choking by the father in response). Compare *Heck v. Reed*, 529 N.W.2d 155, 167 (N.D. 1995) (Sandstrom, J., concurring) (minimizing the violence against mother by highlighting a letter written by mother apologizing for hitting the father), with *id.* at 158 (majority opinion) (contrasting the concurrence, the majority opinion reveals the following dangerous depiction of violence perpetrated by the father against mother: "pulled hair and hitting on her birthday and punching in the face and, '[Shane] has hit me more than once' . . . . And there has [sic] been dismissals on a couple abuse charges.").

346. *Huesers v. Huesers*, 560 N.W.2d 219, 222 (N.D. 1997).

347. *Id.*

[I]f domestic violence has been committed by both parents, the trial court [must] measure the amount and extent of domestic violence inflicted by both parents. If the amount and extent of domestic violence inflicted by one parent is significantly greater than that inflicted by the other, the statutory presumption against awarding custody to the perpetrator will apply only to the

Perhaps by looking deeper into the nature of the violence and the motivation of the actor, the court will discover which allegations are abusive in nature and which are defensive, as well as who is the true survivor of violence.

#### VIII. CONCLUSION

The law must embrace those who most require its assistance in whatever form we can negotiate. It must engage us where we live, or become irrelevant, because it is through our respect, our compliance, and our love for its righteousness that the law lives.<sup>348</sup>

If we consider matters related to child custody and domestic violence as Jaffe and other scholars suggest—in terms of “safety first”<sup>349</sup>—child protection becomes our paramount goal. As we have seen, the protection of the child is inextricably linked to the health and safety of the battered parent.<sup>350</sup>

The historical reasons for the special standard of review afforded to a trial judge’s discretionary ruling in custody cases actually support *de novo* review when a case involves evidence of domestic violence. The significance of trial court determinations in these cases demands an approach contrary to a narrow standard on review because the risks inherent in child custody determinations, those involving domestic violence in particular, cry out for a high level of scrutiny. To defer to the authority of trial judges in these cases is a failure on the part of our legal system to grasp the magnitude of the problem. Thus, balancing judicial discretion is necessary.

The extraordinary level of authority afforded to trial court judges is greatly outweighed by public policy considerations,<sup>351</sup> primarily the protection of women and children. In effect, we must alter our concept of the trial court’s role in custody cases involving domestic violence. No longer can the court be seen as the “gatekeeper,”<sup>352</sup> rather it must be the

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parent who has inflicted the greater domestic violence . . . .  
*Id.* (quoting *Krank v. Krank*, 529 N.W.2d 844, 850 (N.D. 1995)).

348. STARK, *supra* note 2, at 400.

349. Jaffe et al., *supra* note 3, at 87.

350. See *supra* Part I, note 9, and accompanying text.

351. In addition to physical harm, children exposed to violence against women are at risk of many problems. Even high conflict and emotional abuse in the form of negative gender stereotypes place young female children at risk. See *McCorvey v. McCorvey*, 916 So. 2d 357, 376 (La. Ct. App. 2005) (suggesting statements that value one gender over another such as “men are more powerful than women and that men should rule the world” influence a young girl’s ability to make choices, as well as her adequacy and self-esteem).

352. *Cesare v. Cesare*, 713 A.2d 390, 416 (N.J. 1998).

protector of our most vulnerable citizens. If we see our role as a system of justice, as it relates to child custody, as protector, at every legal level, we succeed.

Although appellate review is a critical part of the legal process, we cannot forget that it often fails to resolve the underlying problem. Unless our trial judges listen to and heed the message our appellate courts send on review, we merely place a band-aid on a bullet wound. As a result, we must provide the trial judge with a clear definition of abuse and an understanding of the weight to be accorded to evidence of domestic violence. Clarity will improve not only the legal process at both the trial and appellate level; it will also send an important message to all—domestic violence will not be tolerated.