

Why Are New York State Courts Failing To Keep Our Children Safe?

By Nancy S. Erickson

Seasoned domestic violence expert, attorney, and author Nancy Erickson offers this masterful piece on the glaring deficiencies in the ways family courts in New York State decide child custody cases involving allegations of abuse. The author bases this article on the testimony she, along with a few other experts and stakeholders, provided to a subcommittee of the New York State legislature in 2019. As evidenced in Ms. Erickson’s testimony, which is laid out almost-verbatim in this report, after many decades of advocating, lobbying, and testifying by members of the battered women’s movement, the legal landscape faced by battered women and children in the Empire State has, at best, improved minimally; to this day, as the author eloquently argues, massive reforms continue to be urgently needed.

INTRODUCTION

On October 24, 2019, three New York State Assembly Standing Committees held a public hearing on “The Rights of Children in Court,” to “examine the Court’s role in custody, visitation and child support cases in New York. Five witnesses testified, and four of them encouraged reforms in the statutes governing custody and visitation cases.¹

The genesis of the hearings appears to have been lobbying by one of the witnesses—Jacqueline Franchetti. Franchetti’s 4-year-old daughter Kyra was murdered by Kyra’s father when a family court judge—on the recommendation of a custody evaluator—allowed Kyra’s father to have unsupervised visitation with Kyra, despite the fact that he had stalked, threatened,

¹ The four witnesses whose testimony concerned custody and visitation cases were: Robin M. Lynch, Ph.D., a licensed psychologist; Jacqueline Franchetti, whose child Kyra had been murdered by Kyra’s father; Nancy S. Erickson, former law professor, now consultant and attorney in private practice; and Meredith Lee Price, Esq., Senior Staff Attorney, Safe Horizons. Eileen Stack, Deputy Commissioner of Child Support Services, Office of Temporary and Disability Assistance, testified concerning child support.

and otherwise abused Jacqueline and had cursed Jacqueline regularly in front of Kyra.²

This article is an updated and expanded version of the author's testimony, with the questions asked of her by the Assembly members who presided over the hearing and her answers to those questions. The author made several recommendations for amendments to current New York State laws regarding custody cases, which are discussed here. Thankfully, some of these recommendations are actively being considering by the Legislature.

TESTIMONY

My name is Nancy Erickson. I am an attorney and former law professor. I thank you for the opportunity to present my views and the views of other experts on the important issue of ensuring the rights of children in custody and visitation cases.

First and foremost, every child has the right to be safe. Legislation in Australia, Sweden, and some states in the U.S. specifically prioritize child safety.³ So does a Resolution passed by the House of Representatives last year.⁴ Children are being denied their right to safety when courts fail to protect them from abuse or neglect, including exposure to domestic violence [DV]. Such exposure is a form of abuse in itself, as experts—including our own New York State Legislature⁵—have been telling us literally for decades. New York's custody laws must be amended to provide that a child's safety is the most important factor for courts to consider when deciding on custody and visitation.

But before I expand on that, let me say that it is time, at long last, to pass a bill to require judges to allow parents and their attorneys to have copies of their custody evaluations. That bill has been known for years as the Weinstein

² See Franchetti's website: <https://kyrafranchetti.org/>.

³ Hunter et al., (2018) *Introduction: Contact and Domestic Abuse, Special Issue*, 40 JOURNAL OF SOCIAL WELFARE & FAMILY LAW No. 4, 401-425.

⁴ H. Con. Res 72, 115th Congress, passed the House of Representatives on September 25, 2018. It has been summarized as follows:

H.Con.Res 72 expresses the sense of Congress that child safety is the first priority of custody and parenting adjudications, and courts should resolve safety risks and claims of family violence before assessing other best interest factors. In addition, it expresses that states should define required standards of expertise and experience for appointed fee-paid professionals who provide evidence to the court on abuse, trauma and behaviors of victims and perpetrators, specify requirements for the contents of such professional reports, and require courts to find that any appointed professionals meet those standards; and also that states should consider models under which court-appointed professionals are paid directly by the courts, with potential reimbursement by the parties after due consideration of the parties' financial circumstances.

⁵ The New York State Assembly Memorandum in Support of the Laws of 1996, ch. 85, states in part: "Studies indicate that children raised in a violent home experience shock, fear and guilt and suffer anxiety, depression, somatic symptoms, low self-esteem, and developmental and socialization difficulties. Additionally, children raised by a violent parent face increased risk of abuse." The Memo in Support contains a full-page list of studies that reveal the "Effects of Domestic Violence on Children."

Bill and now is known as the Weinstein - Biaggi bill.⁶ It may seem inconceivable to anyone that a judge would deny an attorney the right to see the charges against her/his client, but it is done every day in custody cases. I once had to drive from my law office in Brooklyn to the court in Suffolk County to read a 120-page custody evaluation under guard and take only whatever notes I could manage to scribble, because the judge did not permit attorneys to have copies of the custody evaluations in their cases. Thankfully, most courts in New York do allow attorneys to have copies, but all courts should. We are officers of the law, so we should be trusted with these documents, which we need to prepare our cases. And our clients should not have to be billed for time wasted when we have to sit and take notes in court rather than just read and analyze the custody evaluations in our offices.

Custody litigants also should be given copies of their custody evaluations. Throughout the state, litigants are usually denied copies of their custody evaluations—even in New York City, where at least all judges (to my knowledge) allow attorneys to have copies of custody evaluations. Consequently, even in the City, litigants and their attorneys have been prevented from being able to properly prepare for trial, because if a litigant does not have a copy, the litigant's ability to work with the attorney on the case is severely impeded.

Litigants who have attorneys are usually allowed to read the evaluation, but that must be in the attorney's office or otherwise in the presence of the attorney or someone standing in the attorney's place. The attorney must not permit the client to have a copy. That means the attorney must seat the client where she cannot use the copy machine and must confiscate the client's cellphone to prevent any copying of the document. Forcing the attorney to act as a guard over the client damages the attorney-client relationship. Most importantly, the client needs to read and reread the evaluation many times and alert the attorney to contents that might be misinterpretations by the custody evaluator or even actual falsehoods. No one should be shocked that a custody evaluator might be biased or even lie or accept bribes from a litigant. Custody evaluators have been found guilty of much worse things.⁷

Litigants who do not have attorneys, so that they are representing themselves "pro se," are usually restricted to reading the custody evaluation in the courthouse, which is very difficult for many reasons.

⁶ A1533; S6300.

⁷ See, e.g., article by Armstrong & O'Hagan in the August 20, 2011 issue of the Seattle Times about Stuart Greenberg, Ph.D. Greenberg was a well known and highly respected psychologist who was appointed to do custody evaluations in hundreds of cases. He committed suicide after being arrested for putting a video camera in his office restroom and recording people in various states of undress. He had previously been charged by the state examining Board of Psychology for misconduct in several custody evaluation cases. He had pled guilty and was suspended from doing custody evaluations for three years. Because of an error in the official papers regarding the matter, he was able to get the suspension overturned and moved to another county where the records were not available for anyone to see. There he was able to conduct hundreds of other custody evaluations, to the detriment of children.

Finally, some judges prohibit litigants from even reading their custody evaluations. Instead, those judges only allow the attorneys to explain the contents to their clients the content.

This current situation is a blatant violation of Due Process, much less common sense. It is unconscionable that it has gone on so long without action by the Legislature. I understand the concern of some legislators, judges, and others that an angry litigant might want to put the custody evaluation on the internet or do something else with it as stupid as that, but the bill empowers the judge to throw such a miscreant in jail for contempt of court. Once a judge exercised that power and the news got out on Twitter, Facebook, the New York Times, and other media, it is highly probable that no other litigant would dare to do such a thing. Many other states do not hide the evaluations from the litigants, much less their attorneys, but the sky has not yet fallen in those states.⁸ Just pass the Weinstein-Biaggi bill, please!⁹

I (and some others) believe that the use of custody evaluations—at least as they are currently done—should be abandoned¹⁰ or, at the very least, limited to situations where they are really necessary.¹¹ There is no way to judge whether they even achieve their goal, which is to help judges to determine the best interests of children. Courts do not follow up—and perhaps cannot follow up—to see whether the recommendations of the custody evaluator turned

⁸ See, e.g., NJ Rule5:3-3(f) ,, which provides with regard to experts:

“(f) Submission of Report. Any finding or report by an expert appointed by the court *shall be submitted upon completion to both the court and the parties*. At the time of submission of the court’s experts’ reports, the reports of any other expert may be submitted by either party to the court and the other parties. The parties shall thereafter be permitted a reasonable opportunity to conduct discovery in regard thereto, including, but not limited to the right to take the deposition of the expert.” (emphasis added).

It should be noted that in New York in the First and Second Departments discovery is not permitted in custody cases, so New Jersey is also far ahead in that not only do the parties have a right to a copy of the report but they also have a right to depose the expert to discover flaws in the expert’s report.

⁹ See the many articles on the Weinstein bill—and the reasons why it is needed—by Tim Tippins in his New York Law Journal column, such as “*Forensic Reform: The Time is Now!*” NYLJ 3/1/17.

¹⁰ See, e.g., Tippins, Tim & Wittmann, Jeffrey (2005) *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAMILY COURT REVIEW (2) 193-222 and authorities cited therein.

¹¹ See, e.g., Fields, Marjory (2006), *Lawyer Skills Training for DV Representation: Tips from a Retired Judge*, 12 DOMESTIC VIOLENCE REPORT 1, 1-2 AND 11-12; Fields, Marjory, Getting Beyond “What Did She Do to Provoke Him?” 14 VIOLENCE AGAINST WOMEN (1) 93-99 (Judge Fields reports that she ordered custody evaluations only when there were allegations of mental illness and that she was never reversed on appeal for failing to order one; Erickson, Nancy, Testimony before the Matrimonial Commission 10/14/04; and Erickson, Nancy, Testimony before the NYS Bar Association Family Court Task Force 3/22/12. It should also be noted that the Notice of Public Hearing for the instant hearing states that it is “important that [custody, visitation, and child support] cases be completed in a timely manner.” Yet, in my experience, supported by the experience of former Judge Marjory Fields, *supra*, one of the most significant reasons why these cases are not completed in a timely manner is the use of custody evaluators.

out to be in the best interests of the child.¹² That is only discovered—if it is discovered at all—when the custody evaluations turn out to be terribly wrong, such as in the cases of Kyra Franchetti and other children who were murdered or raped by the parents to whom the courts awarded them.¹³

If the use of custody evaluations is not abandoned or very limited, at least the Weinstein-Biaggi bill and many others regarding custody evaluations need to be passed so that custody evaluations do not continue to violate litigants' constitutional rights.¹⁴

WHY ARE OUR COURTS FAILING TO KEEP OUR CHILDREN SAFE?

My main topic today is why our custody laws and courts are failing to keep our children safe when there are allegations of domestic abuse and/or child maltreatment and what we need to do about it.

It is important to get the views of both academics and practitioners on issues of this sort. I am a two-for-one insofar as that is concerned, having been a law professor for many years, having earned a Master's degree in forensic psychology in order to understand the psychobabble in custody evaluations,¹⁵ and having also represented or counseled hundreds of battered women (and two battered men) in custody cases in New York. From an academic point of view, the situation may look fairly good, but in practice it is extremely ugly.

STATUTORY AMENDMENTS THAT ARE URGENTLY NEEDED

Our laws need to be amended to create a presumption against custody or unsupervised visitation to abusers—either abusers of their intimate partners

¹² See, e.g., Kelly, R. & Ramsey, S. (2009). *Child Custody Evaluations: The Need for Systems-Level Outcome Assessments*. 47 FAMILY COURT REVIEW (2), 286-303.

¹³ See, e.g., Silberg, J. & Dallam, S (2019) *Abusers Gaining Custody In Family Courts: A Case Series Of Over Turned Decisions*, 16 J. CHILD CUSTODY (2) 140-169). Silberg and Dallam looked at cases where the trial court first disbelieved a protective parent's allegations of child abuse and put the child in the care of an abusive parent. Then, later, the harmful nature of the initial placement became apparent, so that the court realized that the initial allegations by the protective parent – the mother in all of the cases—were valid and removed the child from the abusive parent. See also Yeaman, R. (2010). *Urgent Need for Quality Control in Child Custody Psychological Evaluations*, Ch. 21 in Hannah, M. & Goldstein, B., eds, DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES.

¹⁴ E.g., another important issue is that statutes or court rules apparently are necessary in order to make it crystal clear that the Office of Professional Responsibility of the State Education Department has the power to obtain court-ordered custody evaluations and related court documents if a litigant or former litigant files a complaint against the custody evaluator. Currently, the OPD does not even investigate such complaints, as a general rule. See Tippins, Timothy, *Custody Evaluators: Where's the Oversight?*, NYLJ March 3, 2016; see also Sapien, Joaquin, *For New York Families in Custody Fights, a 'Black Hole' of Oversight*, PRO PUBLICA, March 7, 2017. The New York State Bar Association Committee on Children and the Law has been working on this problem since at least 2010, and it is hoped that the necessary statutes and court rules will be finalized sometime soon; however, I am not holding my breath.

¹⁵ See my testimony before the NYS Bar Association Family Court Task Force 3/22/12, note 5 *supra*.

or of their children. They must also be amended to eliminate the use of the “friendly parent” rule—or at least to exempt DV and child maltreatment cases from the application of that rule. Additionally, the theory of parental alienation needs to be eliminated root and branch from our jurisprudence. Many other statutory amendments are necessary,¹⁶ but I have time today only to address the amendments I believe are most urgently needed.

Presumption Against Custody or Unsupervised Visitation to a Perpetrator of DV

Domestic Relations Law Section 240 is our custody statute.¹⁷ All that it said prior to 1996 was that the court must determine what custody and visitation arrangements are in the best interests of the child.¹⁸ Unlike many states’ statutes, New York’s does not list factors to consider when determining the best interests of the child. New York courts have developed their own lists of factors,¹⁹ but those were never enacted by the Legislature, and some seem very inappropriate.²⁰

DRL 240 has been amended three times in hopes that those amendments would protect children against being placed in the custody of abusers or being in the care of abusers without supervision. Those amendments have failed to achieve that goal.

The 1996 Amendment

DRL 240 was amended in 1996 to add DV as a best interests factor to be considered by the court.²¹ In fact, DV is the *only* factor (aside from child abuse) specifically set forth in our custody statute.

¹⁶ See Saunders, Daniel, (2017), *State Laws Related to Family Judges’ and Custody Evaluators’ Recommendations in Cases of Intimate Partner Violence: Final Summary Overview*, NIJ Award # 2014-IJ-CX-0018, <https://www.ncjrs.gov/pdffiles1/nij/grants/250667.pdf>.

¹⁷ DRL Section 240 applies to divorce; Section 651(b) of the Family Court Act applies in Family Court custody cases and incorporates the language of DRL Section 240.

¹⁸ Actually, there was and still is some puzzling language in the statute, because it states that the court “shall enter orders for custody and support as, in the court’s discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child....” This is puzzling, because once the court has determined the best interests of the child, what more would the court have to consider regarding “the circumstances of the case and the respective parties”?

¹⁹ See, e.g., *Eschbach v. Eschbach*, 56 NY2d 167(1982).

²⁰ E.g., the financial ability of each parent is often listed in cases as a factor. However, it should not be a factor, because once custody is determined, the non-custodial parent is required to pay child support. Therefore, the less monied parent should not be disadvantaged when custody is determined simply because of having a lower income or fewer assets. Additionally, using financial ability as a factor has the foreseeable sex discriminatory impact of disadvantaging mothers and advantaging fathers in custody cases, because fathers usually earn more and have more assets than mothers.

²¹ L. 1996, ch. 85; DRL 240(a-1)(2).

The legislative history of the statute indicates that the Legislature viewed DV as a “weighty” consideration²² when a court determines the best interests of the child. The statute states:

Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party..., and such allegations are proven by a preponderance of the evidence, *the court must consider the effect of such domestic violence upon the best interests of the child*, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section....(emphasis added).

The fact that the statute specifically mentions domestic violence demonstrates how important the Legislature considers DV to be. However, the 1996 amendment leaves a lot of wiggle room for a judge to ignore or get around it. This amendment has not prevented courts from giving unsupervised visitation or even custody to abusers.²³ A judge could decide (1) that the allegations did not make out a claim of domestic violence²⁴; (2) that the allegations were not credible (based on the myth that women lie²⁵); (3) that the proven DV was not serious enough or was too long in the past or that there were not enough incidents of DV (although none of these “reasons” are in the statute); (4) that the DV has not had any effect on the best interests of the child (e.g., because the children were not present while the abuse was taking place—although the Memo in Support makes it clear that DV affects children even if they are not present while it is taking place); or (5) that some “other facts and circumstances” negate the importance of the DV, such as claims by the alleged abuser that the maker of the allegations of DV has been guilty of so-called “parental alienation”²⁶ or of being “unfriendly”²⁷ to the alleged abuser.

²² L. 1996, ch. 85, Section 1. See also Memo in Support, note 2 *supra*.

²³ See, e.g., *Wissink v. Wissink*, 301 A.D. 36 (2d Dept 2002), where the trial court awarded custody to the abusive father even though the father had actually involved the child to assist him to abuse the mother. The Appellate Division reversed the trial court decision, but most litigants cannot afford to appeal a bad decision – the trial courts must obey the Legislature’s mandates.

²⁴ Judges who do not understand DV often think it means only physical abuse – sometimes they think it means only very serious physical abuse. Some judges understand DV, so they define it much more broadly, as they should. See, e.g., *J.D. v. N.D.*, 10 Misc.2d 877 (Fam. Ct. N.Y. Co. 1996).

²⁵ Unfortunately, some judges and other members of the legal profession still seem to believe that women are not as credible as men. See NEW YORK STATE COMMISSION ON WOMEN IN THE COURTS, 2020 GENDER SURVEY, at pages 28-30.

²⁶ See discussion of “parental alienation” below.

²⁷ See discussion of the “friendly parent” doctrine below.

Children of divorced or divorcing parents²⁸ have paid the price. They have been neglected, abused, and even killed by abusive parents—usually, but not always, their fathers.²⁹

The 1996 amendment should be replaced with a presumption against custody to an abusive parent. Such presumptions are the law in at least half of our states³⁰ and are favored by experts.³¹ Congress³², a committee of the American Psychological Association,³³ and the National Council of Juvenile and Family Court Judges,³⁴ among others, all recommended this type of law before the turn of this century, but we in New York—the best state in this Nation in so many other ways—still have not gotten around to it. We are backward in regard to domestic violence laws and protection of children.

The usual lobbying groups and individuals will oppose a presumption against custody to an abusive parent, of course, and they will lobby for a presumption of joint legal custody and a presumption of 50/50 shared parenting time, even when mothers are breastfeeding.³⁵ But don't let them bully you!

²⁸ And never-married parents who are involved in custody cases.

²⁹ See the series of four excellent articles by investigative reporter Chris Bragg in the Albany Times Union: *Children died despite warnings in New York Family Courts* (May 23, 2020); *After Children Die, Questions of Standards and Biases* (May 30, 2020); *Before Children Died, Investigations Skirted State Rules* (June 7, 2020); and *Grieving Parents Look to Albany for Reform* (June 13, 2020). Most of these articles, and others, can be found on Jacqueline Franchetti's website, <https://kyrafranchetti.org>.

³⁰ Saunders, D. (2017), *State Laws Related to Family Judges' and Custody Evaluators' Recommendations in Cases of Intimate Partner Violence: Final Summary Overview*, NIJ Award # 2014-IJ-CX-0018, <https://www.ncjrs.gov/pdffiles1/nij/grants/250667.pdf>.

³¹ See Saunders, D., "Testimony Before the State of Maryland Workgroup to Study Child Custody Court Proceedings Involving Child Abuse or Domestic Violence Allegations," October 1, 2019, p. 2-3, http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnChdAbuseDomViol/Testimony_by_Daniel_Saunders.pdf. Professor Joan Meier, an expert on domestic abuse, recommends the language in the District of Columbia Code that creates a presumption against custody or visitation to an abusive parent. See Code of the District of Columbia Section 16-1005 (c-1).

³² See H.R. Cong. Res. 172, 101st Congress (1990).

³³ See APA PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY, *THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN* (1994).

³⁴ NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *FAMILY VIOLENCE: A MODEL STATE CODE* Sections 401-406(1994).

³⁵ A large number of the opponents to a presumption against custody or unsupervised visitation to a perpetrator of DV are what are sometimes called "fathers' rights" proponents. The fathers' rights movement arose along with and probably in reaction to the women's movement that started in the sixties and seventies. See Dinner, D. *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79 (2016) and https://en.wikipedia.org/wiki/Fathers%27_rights_movement. The fathers' rights organizations sometimes use the terms "men," "fathers," or "fatherhood" in their names, such as the Father's Rights Association of New York State <https://www.fathersrightsny.com/>, and sometimes use neutral terms such as "families" or "children" to hide their real purposes, such as Families Civil Liberties Union <https://www.fclu.org/>, National Parents Organization <https://nationalparentsorganization.org/> (formerly called Fathers and Families); and Children's Rights Council (CRC) <https://www.crckids.org/about-us/>. They typically lobby for a presumption of joint custody. Obviously, joint custody with an abuser would just allow the abuse to continue. Additionally, a presumption

A statutory presumption against custody or unsupervised visitation to an abuser is not a guarantee that an abuser will not be granted custody or unsupervised visitation, especially if custody evaluators and judges continue to apply the “friendly parent” doctrine in cases involving abuse and continue to give credence to the unscientific and dangerous concept of “parental alienation,” both of which I will discuss later. However, in states that have enacted it, such a presumption has gone far to make sure that the safety of children (and their abused parents—almost always mothers) is protected.³⁶

The 2008 Amendment to the New York Custody Statute

New York DRL section 240 was again amended in 2008.³⁷ The 2008 amendment provides that the court must “state on the record how such findings [of domestic violence], facts, and circumstances factored into the direction [of custody or visitation].”³⁸

This was an attempt to eliminate the possibility that a judge might grant custody or unsupervised visitation to an abuser without thoroughly considering her or his reasons for doing so and without expressing them so that the litigants and their attorneys could understand the basis of the decision. Reasons for a decision in favor of an abuser would also assist litigants who wished to appeal, because they would be able to better gauge their probability of success on appeal. Like the 1996 amendment, however, the 2008 amendment might also be relatively easy for judges to circumvent.³⁹

The 2009 Amendment to the New York Custody Statute

of joint custody contains an assumption that all parents who split up can work together relatively amiably for the benefit of the children. That assumption collides not only with common sense but also our Court of Appeals ruling in *Braiman v. Braiman*, 44 N.Y.2d 584 (1978), in which the Court stated that “children need a home base” and elaborated by stating:

In the rare case, joint custody may approximate the former family relationships more closely than other custodial arrangements. It may not, however, be indiscriminately substituted for an award of sole custody to one parent. Divorce dissolves the family as well as the marriage, a reality that may not be ignored. In this case the gross conflict between the parents is so embittered and so involved with emotion and litigation that between them joint custody is perhaps a Solomonic approach, that is, one to be threatened but never enforced.

³⁶ Saunders, D. (2017), *State Laws Related to Family Judges’ and Custody Evaluators’ Recommendations in Cases of Intimate Partner Violence: Final Summary Overview*, NIJ Award # 2014-IJ-CX-0018, <https://www.ncjrs.gov/pdffiles1/nij/grants/250667.pdf>.

³⁷ L. 2008 c. 538, eff. 9/4/2008.

³⁸ D.R.L. Section 240 1(a).

³⁹ The required statement of the court could be extremely vague regarding “how such findings, facts, and circumstances factored into” the custody or visitation decision, so that appeal could be almost impossible. Further, even if the judge totally failed to explain her or his decision, an appellate court might consider it “harmless error.” Thus, the 2008 amendment might not have much “teeth.”

The 2009 amendment⁴⁰ provides that if a parent makes a good faith allegation that the other parent abused or neglected the child or that the child has been adversely affected by DV against the child's parent, then the court is prohibited from depriving the accuser of custody or visitation solely because the allegations could not be proven. The intent of the legislation was to remove the double bind that many DV victims and protective parents find themselves in—if they report the abuse but cannot prove it, they may have custody or visitation taken from them, but if they fail to report it, they may be charged by Child Protective Services with “failure to protect, despite the *Nicholson* case.”⁴¹

Unfortunately, again, the amendment has not accomplished its goal, for at least four reasons. First, it includes the word “solely,” which gives the court an “out” if there is even arguably any other conceivable reason for denying custody or visitation to the parent alleging abuse. Second, a court could “find” that the parent did not act in “good faith.” Third, New York has adopted—through caselaw, not statute—the so-called “friendly parent” rule, the use of which generally harms children and their protective parents. Therefore, if that rule is not eliminated, an exception to it needs to be enacted for cases involving DV.⁴² Fourth, the unscientific and invidious theory of “parental alienation,”⁴³ along with all of its proponents’

⁴⁰ L. 2009 c. 476 Section 2, eff. 12/16/09. If the 1996 statute had worked, so that abusers were no longer being given custody or unsupervised visitation and custody was no longer being taken away from protective parents because they made allegations of abuse or neglect against the other parent but could not prove them to the court's satisfaction, the 2008 and 2009 amendments would not have been viewed as so urgent. Decisions that were against children's best interests or even dangerous to children were still being made all over the country. See Meier, J., Dickson, J., O'Sullivan, C., Rosen, L. & Hayes, J. (2019), *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations, Final Report to the National Institute of Justice, USDOJ* (2019). See also Silberg, J. & Dallam, S (2019) *Abusers Gaining Custody in Family Courts: A Case Series Of Overturned Decisions*, 16 J. CHILD CUSTODY (2) 140-169), discussed in note ____supra.

⁴¹ See Tippins, T., *Legislature Addresses Abuse Allegations in Custody Disputes*, NYLJ March 17, 2009. On failure to protect, see Erickson, N., *Battered Mothers of Battered Children*, 1A CURRENT PERSPECTIVES IN PSYCHOLOGICAL, LEGAL & ETHICAL ISSUES 195 (1991) and the discussion of the famous case of *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002) in Breger, M., Kennedy, Zuccardy, J. and Elkins, L., 2 NEW YORK LAW OF DOMESTIC VIOLENCE Sections 4:29 through 4:38 (2013). The City of New York appealed to the Second Circuit, which certified questions of state law to the New York Court of Appeals, *Nicholson v. Scopetta*, 344 F.2d 154 (2d Cir. 2003), certified question accepted, 1 N.Y.3d 538, 775 N.Y.S.2d 233 (2003), and certified question answered, 3 N.Y.3d 357 (2004).

⁴² Saunders, D. (2017), *State Laws Related to Family Judges' and Custody Evaluators' Recommendations in Cases of Intimate Partner Violence: Final Summary Overview*, NIJ Award # 2014-IJ-CX-0018, <https://www.ncjrs.gov/pdffiles1/nij/grants/250667.pdf>.

⁴³ On so-called “parental alienation,” see, e.g., Meier, J. (2013, September), *Parental Alienation Syndrome and Parental Alienation*. Harrisburg, PA: VAWnet, a project of the National Resource Center on Domestic Violence, available at <https://vawnet.org/material/parental-alienation-syndrome-and-parental-alienation-research-review>; Meier, J., Dickson, S., O'Sullivan, C., Rosen, L., & Hayes, J., *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations* (2019), which was funded by Department of Justice funds, Award No.: NIJ-2014-MU-CX-0859 and can be downloaded free of charge from the Social Science Research Network: <https://ssrn.com/abstract-3448062>; Davis, M., O'Sullivan, C., Susser, K. & Fields,

theories about how to “cure” it,⁴⁴ have crept into our caselaw and need to be rejected.

New York State Needs an Exception to the Use of the So-Called “Friendly Parent” Custody Factor in Cases Involving Domestic Violence

In New York we have a “friendly parent” factor in our custody law, but it was developed by the courts without the imprimatur of the Legislature. In many other states, it is one factor in the state’s statutory list of custody factors.⁴⁵ The friendly parent rule was expressed in one of the first New York cases in which it appeared, *Entwistle v. Entwistle*, 61 A.D.2d 380, 384-385 (2d Dept. 1978), as follows:

“[R]espondent’s very act of preventing the two children of tender age from seeing and being with their father is an act so inconsistent with the best interests of the children as to, per se, raise a strong probability that [Respondent] is unfit to act as custodial parent.”

This prohibition against keeping the other parent away from the child then developed further into the “friendly parent” rule—a parent not only may not keep the child away from the other parent but also has an affirmative obligation to encourage the relationship between the child and the other parent. This was expressed in *Tori v. Tori*, 67 A.D.3d. 1021 (2d Dept. 2009), as follows:

“The evidence presented at the hearing established, inter alia, that the mother was more willing than the father to assure meaningful contact between the child and the other parent (see *Matter of Lovitch v Lovitch*, 64 AD3d at 710; *Matter of Honeywell v Honeywell*, 39 AD3d 857 [2007]; *Young v Young*, 212 AD2d at 122-123).”

M., *Custody Evaluations When there Are Allegations of Domestic Violence: Practices, Beliefs, and Recommendations of Professional Evaluators* ((2011), Final Report to the National Institute of Justice. [Http://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf); Erickson, N., *Fighting False Allegations of Parental Alienation Raised as Defenses to Valid Claims of Abuse*, In M. Hannah & B. Goldstein (eds). DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES (pp. 20-1 to 20-38) (2010); Kingston, N.J.: Civic Research Institute, updated and expanded as Erickson, N. *Fighting False Allegations of Parental Alienation Raised as Defenses to Valid Claims of Abuse*, 6 FAM. & INTIMATE PARTNER VIOLENCE Q.35 (2013).

⁴⁴ E.g., “parentectomies” (cutting off all contact with the parent preferred by the child), “reunification therapy,” “reunification” programs and “reunification camps.” These have not been shown to be beneficial and might in fact be detrimental to children. Dallam, S. & Silberg, J., *Recommended Treatments For “Parental Alienation Syndrome” (PAS) May Cause Children Foreseeable and Lasting Psychological Harm*, 13 J. CHILD CUSTODY (2-3) 134-43 (1016).

⁴⁵ At least 31 states have statutes requiring courts in custody or visitation cases to consider how “friendly” each parent is to the other. Gonzalez, A. & Reichmann, L., *Representing Children in Civil Cases Involving Domestic Violence*, 39 FAMILY L. Q. (1) 197-220 (2005).

The court in *Tori* makes it seem as though the obligation is mutual, but in fact, it is usually viewed by courts as one-sided. The friendly parent rule says to the custodial parent, not the non-custodial parent: “You must make sure that the other parent has meaningful contact with the child, or you will lose custody.” This puts no obligation on the non-custodial parent to exert himself to have meaningful contact with the child. The obligation rests solely on the custodial parent.

It is highly probable that the friendly parent rule came into existence because custodial parents are most often the mothers, not the fathers. As a highly-respected Australian political analyst has stated regarding the related concept of parental alienation:

“Due to PA’s dominance of family court proceedings, a ‘good mother’ is now not one who is loving, caring, and responsible towards her children, but instead a mother who actively encourages contact with a father, whether he is violent or not.”⁴⁶

A court would never expect a “good father” to actively encourage unsupervised contact with a violent mother. Men are forgiven for being violent. Women are not. In fact, a stereotypical view of women is that they are peaceful and diplomatic and can and should civilize men (who are stereotyped as wild and prone to aggressive behavior) and make them settle down into being good husbands and fathers.

Research by the prominent domestic violence researcher Daniel Saunders of the University of Michigan, funded by the U.S. Department of Justice, has found that the effect of the friendly parent rule is that in states with a friendly parent rule, as opposed to states without such a rule, “an outcome favoring the abuser was significantly higher...even with the presence of laws presuming the abuser should not have custody...”⁴⁷ That is an astounding discovery—that the friendly parent rule in a state often trumps a statutory presumption against custody to or unsupervised visitation with an abuser!

Fortunately, Saunders reports that “at least eight states thus far have DV exemptions to their “friendly parent” best interests factor.”⁴⁸ More should enact such exemptions. Saunders found that when there are laws that exempt DV cases from friendly parent standards, “judges tend to favor victim-supportive outcomes, such as awarding sole custody to victims.”⁴⁹ We need victim-supportive outcomes in New York, and we can accomplish it by passing such a law exempting DV cases from friendly parent standards.

⁴⁶ Wyeth, Grant, (2020) How the Family Court’s Purpose to Protect Children Became Inverted, <https://medium.com/equality-includes-you/how-the-family-courts-purpose-to-protect-children-became-inverted-d300871553d0>.

⁴⁷ Saunders, D. (2017), *State Laws Related to Family Judges’ and Custody Evaluators’ Recommendations in Cases of Intimate Partner Violence: Final Summary Overview*, NIJ Award # 2014-IJ-CX-0018, <https://www.ncjrs.gov/pdffiles1/nij/grants/250667.pdf>.

⁴⁸ *Id.*

⁴⁹ *Id.*

New York State Needs Judicial or Legislative Repudiation of the Unscientific and Dangerous “Parental Alienation” Belief System

The unscientific belief system of “parental alienation,” which, again, was never enacted by the Legislature, has been applied by many courts without an understanding that it is junk science and that it is often used by abusive parents to get custody or unsupervised visitation with their children.⁵⁰

I am using the term “belief system” rather than “theory” to describe the ideas of parental alienation advocates because, as Jean Mercer—a researcher who has studied parental alienation in depth—points out, a theory must involve more than a single observed factor. The parental alienation belief system rarely involves observation of more than one factor, which is that the child is avoiding contact with a parent.⁵¹

Some New York courts use the terms “parental alienation syndrome,” “parental alienation” or just “alienation” in their decisions. Others use both friendly parent language and parental alienation interchangeably. Others use both as though they are two totally different concepts,⁵² while in fact they are very similar in many ways. Pro-parental alienation organizations and individuals have also used substitute terms for parental alienation that sound very innocuous, such as “gatekeeping”⁵³ and “resist-refuse dynamics.”⁵⁴

The Legislature must repudiate the use of unscientific theories and belief systems such as parental alienation, and the courts must reject them. To be accepted as “expert” opinion that can be admitted into evidence, an opinion must pass the relevant legal standards, which parental alienation does not.⁵⁵

⁵⁰ See, e.g., Meier, J., Dickson, S., O’Sullivan, C., Rosen, L., & Hayes, J., *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations* (2019), available free of charge at <https://ssrn.com/abstract=3448062>; Erickson, N. *Fighting False Allegations of Parental Alienation Raised as Defenses to Valid Claims of Abuse*, 6 FAM. & INTIMATE PARTNER VIOLENCE Q.35 (2013).

⁵¹ Mercer uses the term “the PA belief system” and discusses its lack of scientific basis in *Rejecting the Idea of Rejection as a Measure of Parental Alienation: Comment on Bernet, Gregory and Rohner* (2020), which will soon appear in the *Journal of Family Trauma, Child Custody and Child Development* (in press, 2020).

⁵² Davis et al. (2011), note 30 *supra*, found that custody evaluators used “alienation” and “parental alienation” in two different ways—when they believed a parent had turned a child against the other parent and also when they believed the child was reluctant to be with a parent because the parent was abusive. Yet the mere use of the term by the evaluator prejudiced the court against the protective parent.

⁵³ E.g., Franklin, R., *Maternal Gatekeeping and Nebraska Courts*, National Parents’ Organization website, June 8, 2019.

⁵⁴ This phrase is one that recently is being used by the Association of Family and Conciliation Courts (AFCC). It should be noted that the AFCC is not an association of courts or judges, as the name implies. It is simply an organization made up of professionals and non-professionals of all sorts.

⁵⁵ See Bow, J., Gould, J., & Flens, J. (2009), *Examining Parental Alienation in Child Custody Cases: A survey of Mental Health and Legal Professionals*, 37 AM. J. FAMILY THERAPY 127-145 (Findings from an internet survey of mental health and legal professionals revealed that they did not view PAS as meeting admissibility standards). In *J.F. v. D.F.*, 61 Misc.3d 1226 (Fam. Ct., Monroe Co. 2018), Justice Dollinger held that the testimony by the parental alienation “experts” for the father was the “apex of foolishness,” among other interesting appellations. See Tippins, T., *A Passel of Poppycock: Expert Witness Roles and Limitations*, NYLJ 3/15/19.

Parental alienation has not been accepted by any respected, authoritative, professional organization. Parental alienation advocates lobbied hard to get the American Psychiatric Association to include their proposed Parental Alienation Disorder (PAD) in the fifth edition (2013) of the APA's Diagnostic and Statistical Manual of Mental Disorders (DSM-5), but their attempts were unsuccessful.⁵⁶ The American Psychological Association (APA) likewise does not support parental alienation.⁵⁷ An important publication by the National Council of Juvenile and Family Court Judges (NCJFCJ) supports the view that testimony on parental alienation syndrome and parental alienation is unscientific and inadmissible into evidence.⁵⁸ It has also been rejected by the American Professional Society on the Abuse of Children (APSAC), but pro-parental alienation individuals and organizations still make false claims concerning APSAC's position on parental alienation.⁵⁹

IMPLEMENTATION

Many experts throughout not only English-speaking countries but also many countries in Europe and elsewhere have researched these issues and virtually all have come to the same conclusions about what courts and legislatures need to do to prevent children from being placed in the custody of abusers or being forced into unsupervised contact with abusers.⁶⁰ One of those conclusions is that presumptions against custody or unsupervised contact with perpetrators of DV must be enacted.⁶¹ New York and some other jurisdictions have not enacted such a presumption, but even in states that have enacted it, the presumption has not always been properly implemented.

Even the best custody laws, if they are not implemented properly, can result in custody decisions that are not in the best interests of children. This has been documented in many countries throughout the world—it is not a problem unique to the United States.⁶²

⁵⁶ Some parental alienation advocates are now claiming that the DSM-5 includes “concepts describing parental alienation.” <http://kwbrow2.wordpress.com/category/parental-alienation-syndrome>. However, the American Psychiatric Association has not approved of any reference to parental alienation in its publications.

⁵⁷ American Psychological Association, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* 40 (1996).

⁵⁸ Dalton, C., Drozd, L. & Wong, F. (2006 revised ed.) *Navigating Custody and Visitation In Cases With Domestic Violence: A Judge's Guide*, National Council of Juvenile and Family Court Judges.

⁵⁹ <https://www.apsac.org/single-post/2019/08/16/apsac-announces-revisions-to-its-definitions-of-psychological-maltreatment-and-adds-a-cau#:~:text=APSAC%20has%20been%20advised%20that,a%20type%20of%20psychological%20maltreatment>.

⁶⁰ Hunter et al., (2018) *Introduction: Contact and Domestic Abuse, Special Issue*, 40 JOURNAL OF SOCIAL WELFARE & FAMILY LAW No. 4, 401-425.

⁶¹ New Zealand now has such a law. *Id.* And we have discussed, above at text accompanying note __, that at least half of U.S. states have such a presumption.

⁶² *Id.*

Experts throughout the world on DV in custody cases have noted that there are several reasons why, even when the laws are protective of victims of DV and their children, the courts often end up judicially nullifying the laws.

First, many countries have what attorneys and child experts call a “pro-contact” culture⁶³—a cultural belief that contact between a child and a parent is essential. Even if a father is abusive, the pro-contact culture makes it extremely difficult for the courts to deny or restrict an abuser from getting visitation or even custody.⁶⁴ Yet, research shows that extensive contact with the non-custodial parent is not essential for children; what is essential is a secure home and one good parent or parent figure, and a good parent’s stability can be compromised by ongoing harassment by an abusive ex-partner.

Second, sex bias against women—including the myth that women often lie, and especially the myth that women commonly make false allegations of abuse in custody cases⁶⁵—often cause judges to rule that no DV occurred or it was exaggerated by the alleged victim. And all that a judge has to say in a decision in order to make that decision appeal-proof is that the disfavored parent is not credible. This is because on appeal, the appellate court usually gives great deference to the fact that the trial judge saw and heard the testimony; therefore, the trial judge is assumed to be in the best situation to assess credibility.⁶⁶ Consequently, a judge’s assumption that women are not credible could make the difference in a case between a child and its mother being protected against an abuser or not.

⁶³ Hunter et al., (2018) *Introduction: Contact and Domestic Abuse, Special Issue*, 40 JOURNAL OF SOCIAL WELFARE & FAMILY LAW No. 4, 401-425, note ___ supra.

⁶⁴ See Rosen, L.N. & O’Sullivan, C.S. (July 2005). *Outcomes of Child Custody and Visitation Petitions When Fathers Are Restrained by Protection Orders*, 11 VIOLENCE AGAINST WOMEN 1054-1075. Their study showed that fathers restrained by orders of protection were more likely to secure visitation orders (64%) than not and that such fathers obtained visitation at about the same rate as fathers who were not restrained by orders of protection. Rosen and O’Sullivan studied New York cases decided prior to the enactment of the 1996 amendment to DRL 240. However, as shown by the acknowledged need to enact further legislation – namely, the amendments to Section 240 in 2008 and 2009—the problem of abusers getting custody or unsupervised visitation did not disappear after 1996. And now that the 2008 and 2009 amendments have been in place for over a decade, attorneys who represent domestic violence survivors still report that it is extremely difficult to protect survivors and their children against abusers being awarded custody or unsupervised visitation.

⁶⁵ See discussions of the myth that women lie in Epstein, D. & Goodman, L., *Discounting Credibility: Doubting the Testimony and Dismissing the Experiences of Domestic Violence Survivors and Other Women*, 67 U. PA. L. REV. 399 (2019); Saunders, D., Faller, K. & Tolman, R., *Child Custody Evaluators’ Beliefs About Domestic Abuse Allegation: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation Recommendations*, Final Technical Report Submitted to the National Institute of Justice, U.S.S.D.O.J. (2011); Dallam, S. & Silberg, J. *Myths That Place Children at Risk During Custody Disputes*, 9 SEXUAL ASSAULT REPORTS No. 3, 33-34, & 42-47 (2006).

⁶⁶ See, e.g., *Matter of Brittni K.*, 297 AD2d 236, 238 (1st Dept 2002).

Third, there is a general failure to believe children, at least partly because many custody evaluators and judges believe that it is very easy to manipulate children and get them to lie.⁶⁷

Fourth, and perhaps most important, there must be the political will. I trust that the New York State Legislature will have the political will after these hearings.

QUESTIONS FROM MEMBERS OF THE ASSEMBLY

During my discussion of presumptions against custody or unsupervised visitation to abusers,⁶⁸ Assembly Member Hevesi asked whether such presumptions applied when a parent had been convicted of a domestic violence offense.⁶⁹

I responded that presumptions against custody or unsupervised visitation to abusers are worded differently in different states, so that all the relevant statutes must be consulted. Some states may require a criminal conviction, but in others a decision in a family court may raise the presumption.⁷⁰

Assembly Member Hevesi indicated that the legislature would look at the statutes from the different states. However, he stated, “But I’ve got to be honest, right off the bat that gives me pause. There are people who have histories that they’ve made mistakes, and that should not be determinative that they should never have access to their kids. This is a very dangerous.....”

I interrupted to assure Assembly Member Hevesi that the presumption is only a presumption. As an attorney, he would understand that this means it is a rebuttable presumption.

Assembly Member Hevesi stated in response that “the best interests of the child that everybody has mentioned here should be the predominant thought here.” I agreed.

Assembly Member Hevesi continued, “But there’s other considerations that make me cautious about it [a presumption against custody or unsupervised visitation to abusers]. I just want to throw that out there.”

⁶⁷ There is a huge area of research which looks at (1) whether children lie about being abused without being manipulated by anyone to lie and (2) whether someone who wanted a child to lie about abuse would be able to somehow persuade, “brainwash,” or otherwise manipulate a child into lying about abuse. Studies show that it is extremely rare for children not to tell the truth about abuse. Children who report that they have been abused are almost always reporting honestly and not as a result of being manipulated by someone else to falsely report. See “How Often Do Children’s Reports of Abuse Turn Out to Be False?”, on the website of The Leadership Council on Child Abuse and Interpersonal Violence, <http://www.leadershipcouncil.org/1/res/csa-acc.html>. For example, in one study, investigators reviewed case notes of all child sexual abuse reports to the Denver Department of Social Services over 12 months. Of the 551 cases reviewed, there were only 14 (2.5%) instances of erroneous concerns about abuse emanating from children. These consisted of three cases of allegations made in collusion with a parent, three cases where an innocent event was misinterpreted as sexual abuse and eight cases (1.5%) of false allegations by the child of having been sexually abused. Oates, R., Jones, D. Denson, D., Sirotnak, N., Gary, N., Krugman, R., *Erroneous Concerns about Child Sexual Abuse*. 24 CHILD ABUSE & NEGLECT 149-57 (2000).

⁶⁸ Text accompanying notes 25-28 *supra*.

⁶⁹ Transcript of the proceedings at pages 81-82.

⁷⁰ Transcript of the Proceedings at page 82.

At the end of my testimony, Assembly Member Dinowitz noted that I had “mentioned something about the usual lobbying groups” in my testimony, and he indicated he was curious about what I was referring to.⁷¹

I answered, “[T]hey give themselves all different names, but it’s basically what some of us call the fathers’ rights lobbies or the fathers’ supremacy lobbyists. That’s who I’m talking about.”⁷²

Assembly Member Dinowitz asked whether any other members of the Assembly had questions. Assembly Member Hevesi indicated that he did. He commented:

“Thank you, professor. So just trying to put myself in this circumstance, so say I have a daughter, hypothetically my wife abuses my daughter.... The idea that I as the other parent have to be friendly to that parent is absurd.... So the friendly parent doctrine, as you call it, makes sense up to a point, but there have to be exceptions.... Like the case of abuse, the case of abduction, the case of stalking, whatever, so I understand that you mentioned that there should be exceptions, there can be exceptions in other states, but you mentioned domestic violence specifically. Is there anything else that we should consider going on a list of exceptions to the friendly parent [doctrine]? ”

I responded that child abuse should be on that list.

Assembly Member Hevesi continued, stating:

“Because ... if I’m putting myself in that particular circumstance, if my partner,

my wife abuses my kid, the idea that a court is going to use [against me] my lack of friendliness against her is absurd because trust me, I’m going to be unfriendly is the kind way to put it.... I’m protective and furious.... So I get that. I will tell you though we’ve got to be careful in all of these contexts because the pro-contact culture, I’m a believer in the pro-contact culture.”

I responded, “Absolutely. If the other parent is safe, even if they’re not the greatest parent in the world, it’s wonderful that they can have a good relationship.”

Assembly Member Hevesi then expressed a need for meaningful standards, stating:

“[T]here are times when it’s logical for a parent, for the protection of their child, ... to be unfriendly or ... to want to alienate the [other] parent from the child.... So the problem for this ... is what’s the standard? Because there’s going to have to be multiple standards, we’ve got to do

⁷¹ Transcript of the Proceedings at page 92.

⁷² Id. See note 30 *supra*.

our best try to come up with—run through the circumstances of what we’ve seen, apply a standard, and then recognize that even if we have a new standard we’re going to miss.... I have wanted to make sure that the things we’re missing are fewer and further in between. But ... I appreciate your testimony because some of the doctrines that we’re holding to, if they’re being used in cases of abuse, neglect, domestic violence.... that’s absolutely absurd.”

I added:

“And ... parental alienation ... has taken over.... Child Protective Services people in many areas, and I’ve noticed that particularly in Nassau and Suffolk and Westchester, just believe this parental alienation garbage.... And they have actually assisted courts to take children away from protective parents and give them to abusers, saying that ... the mother’s claiming abuse, but that’s just parental alienation.”

Assembly Member Jaffee then asked whether in schools there is an awareness of abuse. I mentioned that there is an organization in New York City called Day One that interacts with schools on abuse issues.⁷³

Assembly Member Hevesi then asked, “[Y]ou mentioned earlier in your testimony that use of custody evaluations should be abandoned. That’s the first we’ve heard of it here.... Why? ... Can you get into that?”

I responded:

“Because they’re totally unscientific.... I have actually personally trained custody evaluators and judges in the past, but it’s extremely—well, I’ve got a lot of citations I could give you on that, and I will. But [custody evaluations] are relied upon.... [T]he most scary thing is that they are relied upon by the judges to the extent that you’ve been told.... [I]t’s pretty automatic.... [i]t’s so difficult because it’s such a long conversation. I studied psychology [for four years] to [understand] all of this.”

Assembly Member Hevesi responded:

“I appreciate that. Let me ask you specifically. So the threshold question for us is, and some of the other witnesses mentioned that they wanted us to take a real in-depth look at these evaluations, these evaluators, who they are, how [they] get paid, what are their biases, and ... should we ever do that or are you advocating that we scrap the entire system? And then....if the answer to that is yes,....[t]hen what are we left with? Judges....”

⁷³ Day One specializes in combatting abuse in relationships between teenagers, so it often works with schools. See <https://www.dayoneny.org/>.

I agreed:

“Left with judges, unfortunately having to do what they’re supposed to do, which is to have trials. And I ... certainly sympathize with them. Their problem is that they don’t have enough time and resources to do these trials. We need more judges. We need more courtrooms. We are penny pinching with some of the most important people in our state.”

Assembly Member Hevesi:

“Okay. No argument there, but just trying to play out the unintended consequences....[F]or me I’ll have to think about the question, do we look to reform the evaluation process and the 50,000 pieces to that that we have to consider or do we just look to scrap it and then, ...if that’s the case, you need to arm some judges, you’re going to need to train some judges. There’s a whole pile of consequences either way....”

I agreed:

“Now, I’ve thought about a possible partial suggestion to make along those lines....[O]ne thing that the custody evaluators are supposed to do is collect a whole lot of information for the judges.... [T]hen often they make recommendations. Even the American Psychological Association has not come down on whether [making recommendations is] good or not.... I think it’s totally wrong to make recommendations.⁷⁴ So if you are going to have custody evaluations, don’t have them make recommendations. But my suggestion would be perhaps we just should have people who collect information for the judge.”

Hevesi: “So it’s not a custody evaluation, it’s a custody investigator who.... will in a non-opinionated way present it to the judge and let the judge make the call?”

I agreed: “A very non-opinionated [way], right.”

Hevesi: [B]y doing that, you eliminate [a] whole series of biases right off the bat because you take an evaluator out of the mix.”

I agreed:

Right. And another thing you could do is, the judges could ask the parties ... tell me what you agree happened in this case. Do you agree about when [you] got married or when [you] started living together, do you agree about when [you] had kids. And take it from the easy questions to ... what happened on such-and-such a day. What do you

⁷⁴ See Tippins, T. & Wittmann, J. (2005) *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAMILY COURT REVIEW (2) 193-222 and authorities cited therein.

agree happened? I always ask my clients, make me a chronology.... [T]hat really is a good basis for my starting to help them, and I think it would help the judges.”⁷⁵

Hevesi: “Thank you very much.”

I responded: “You’re very welcome.”

And I truly was very pleased that the Assembly members were listening so carefully to what I and other witnesses related in our testimony.

AUTHOR’S CONCLUSION

Some statutory amendments are crucial to the safety of children and their protective parents:

1. A presumption against custody or unsupervised visitation to abusers;
2. Elimination of the use of the “friendly parent” rule, or at least an exemption of abuse cases from the application of that rule;
3. Elimination of the unscientific theory of “parental alienation” in custody and visitation cases.

There is urgent need to pass these amendments and then to implement them swiftly and decisively. It has been only four years since little Kyra was murdered by her father, but in that short time period, at least four other New York children have been killed after courts ignored the pleas of their parents—in some cases, the pleas of the custodial mothers,⁷⁶ and in other cases the pleas of the non-custodial mother or father.⁷⁷ Not one other child should suffer such a fate.

⁷⁵ Among other things, the chronology often reveals certain patterns, such as that the abuse has been escalating.

⁷⁶ Investigative reporter Chris Bragg of the Albany Times Union discusses the cases of Jovani Lirugo and Gabriella Steinbrecher in *Children died despite warnings in New York Family Courts* (May 23, 2020).

⁷⁷ Reporter Bragg discusses the cases of Davonte Paul and Thomas Valva in *Children died despite warnings in New York Family Courts* (May 23, 2020). In all four cases, the child was killed by a father, stepfather, or boyfriend of the mother. In two cases, the killer also committed or attempted suicide.



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