THE GOOD, THE BAD, AND THE FUTURE OF *NICHOLSON V. SCOPPETTA:* AN ANALYSIS OF THE EFFECTS AND SUGGESTIONS FOR FURTHER IMPROVEMENTS

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I. INTRODUCTION

"Daddy I'm hiding in the closet. Why do you drink? Why do you hurt Mommy? I saw her crying. I saw her bleeding. Daddy I'm hiding under the covers. Why do you scream? Why do you hurt Mommy? I saw you. Through the crack in the door. Daddy I saw her with bruises. I saw her lying. Daddy. Please don't hurt my Mommy."[1]

In recent years the negative effects children experience as a result of exposure to domestic violence has been a widely discussed topic. But before suggesting these children be removed from their families, consider this mother's description of the condition of her children when they were returned to her after being removed to foster care:

> The children were in poor health . . . . [They] 'were not the same [children] I gave [to foster care].'
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> . . . [I] took them to the nearby hospital emergency room. . . . [A]ll were regurgitating and both of the youngest children had ear infections. . . . [T]he youngest child also [had] . . . a festering facial infection.[2]

Another mother described the following: "Destinee had a rash on her face, yellow puss running from her nose, and she appeared to have scratched herself. Her son had a swollen eye. . . . because the

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[1] Stop the Hurt, Kids Corner, http://www.stopthehurt.com/kidscorner.html (last visited Nov. 18, 2007).

[2] Nicholson v. Williams, 203 F. Supp. 2d 153, 176 (E.D.N.Y. 2002) (citation omitted).

foster mother had slapped his face."[3] Another mother described the following: "'[t]hey have been missing classes because their foster mother is unable to get them to school on time'[;] . . . 'the foster mother has refused to provide house keys to the children and they have been locked out of their foster home repeatedly.'"[4] Her daughter described the time in foster care as "'very uncomfortable;' the foster mother 'treated us like we were criminals' [and we] were locked in the house without access to the telephone when the foster mother would leave."[5] And consider one more mother's account:

> [Now,] [h]e's very attached to me. He screams [whenever] I even walk in the other room. He thinks that I am leaving. Every time the doorbell rings he gets hysterical. Especially when we go to my mother's house, he latches on to me. He won't leave my sight and he says I don't want to stay here. I want to go home with Mommy. I think he's very afraid to be away from me ever again.[6]

These disturbing accounts are far from rare; in fact, all of the preceding accounts came from just the plaintiffs in *Nicholson v. Williams*.[7]

This article will discuss the case *Nicholson v. Scoppetta*[8] from the perspective that it is almost always better to keep the mother[9] and her children together and remove the batterer instead. There was a great deal of scholarly writing[10] about this case immediately following the Court of Appeals decision, but this article, written over three years later, will examine how the Administration for Child Services (ACS)[11] and the lower courts have responded, and make

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[3] *Id.* at 172 (citations omitted).

[4] *Id.* at 180.

[5] *Id.* (citation omitted).

[6] *Id.* at 187.

[7] *Id.* at 172, 176, 180, 187.

[8] 820 N.E.2d 840 (N.Y. 2004).

[9] Due to the gendered nature of domestic violence and to comport with the terminology used in *Nicholson v. Williams*, this article will use the term "mother" when referring to a parent who has been a victim of domestic violence. *Nicholson*, 203 F. Supp. 2d at 164 ("The term 'mother' includes other legal or actual custodians of children; it usually is a female, but in relatively rare cases, the abused custodian will be a male.").

[10] *See, e.g.*, Amanda J. Jackson, Note, Nicholson v. Scoppetta*: Providing a Conceptual Framework for Non-Criminalization of Battered Mothers and Alternatives to Removal of Their Children from the Home*, 33 CAP. U. L. REV. 821, 821 (2005); Jill M. Zuccardy, Nicholson v. Williams*: The Case*, 82 DENV. U. L. REV. 655, 669 (2005); Heidi A. White, Note, *Refusing to Blame the Victim for the Aftermath of Domestic Violence: Nicholson v. Williams is a Step in the Right Direction*, 41 FAM. CT. REV. 527, 527 (2003).

[11] ACS is the New York City division of Child Protective Services (CPS) that was the subject of the *Nicholson* case. *Nicholson v. Scoppetta*, 820 N.E.2d at 842. For the sake of

suggestions for further improvement.

Section II will discuss background information on (1) child abuse; (2) the effects on children from exposure to domestic violence and removal to foster care; (3) ACS policy prior to *Nicholson v. Scoppetta*; and (4) New York case law prior to *Nicholson v. Scoppetta*. Section III will discuss the procedural history of *Nicholson v. Scoppetta* and how it changed New York law in the area of removals in neglect cases. Section IV will discuss the positive effects *Nicholson v. Scoppetta* has had, and the problems that still remain to be solved. Section V will suggest four methods of attacking these remaining problems: (1) malicious prosecution claims against ACS; (2) provision of additional services by ACS to victims of domestic violence and their children; (3) requiring courts to follow *Nicholson v. Scoppetta*'s instructions and weigh the harms of removal with the harms of remaining in the home, in each individual case; and (4) holding the batterer accountable. Section VI discusses how *Nicholson v. Scoppetta* has been cited and applied in other jurisdictions. Section VII contains a brief conclusion to the article.

II. BACKGROUND

A. History of Child Abuse

The first time that child abuse was brought to the forefront in American society was in 1874 when Mary Connolly was convicted of assault and battery against her ten-year-old foster daughter.[12] The Society for the Prevention of Cruelty to Animals was called upon to assist in this case because there were not yet any agencies that dealt with abuse directed toward children.[13] Following this trial, the New York Society for Prevention of Cruelty to Children was established and within forty years there were almost five hundred similar societies created.[14]

The Social Security Act of 1935, establishing the Aid to Dependent Children program, increased the federal government's involvement in social welfare and established the policy that it is

simplicity, this article will refer to all divisions throughout the state or any division other than ACS as simply CPS.

[12] Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 48–49 (2001).

[13] *Id.* at 49–50.

[14] *Id.* at 50.

better to provide financial aid to families in need than to remove children.[15] In 1962, the issue of child abuse was brought back to the forefront by physician C. Henry Kempe's article, *The Battered Child Syndrome*.[16] This article explained the physical manifestations of child abuse and told doctors they had a duty to report such abuse to the authorities.[17] One of the major responses to this article was the creation of mandated reporting statutes; by 1967 every state had enacted a statute mandating reporting of child abuse by certain professionals, and through statutory amendments, more professionals have become mandated reporters over the years.[18] The Child Abuse Prevention and Treatment Act of 1974 (CAPTA) required states to enact mandated reporting laws and create programs and procedures to investigate reports of child abuse in order to receive federal funds provided under CAPTA.[19] The Adoption and Safe Families Act (ASFA), passed in 1997, mandated a focus on the child's best interest[20] and signaled a change in policy, away from family preservation and towards "timely termination of parental rights and adoption."[21]

B. Effects on Children from Exposure to Domestic Violence and Removal to Foster Care

Throughout the 1900s there was also an increased awareness of domestic violence, and more recently, an awareness of the effects that exposure to domestic violence can have on children. In homes where domestic violence occurs, approximately eighty-seven percent of children are exposed to that violence, amounting to exposure of approximately 3.3 million children per year.[22] Children can be physically harmed as well as psychologically and emotionally harmed by exposure to domestic violence.[23] However, not all children are affected in the same way or to the same degree.[24]

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[15] *Id.* at 54.

[16] *Id.* at 55–56 (citing C. Henry Kempe et al., *The Battered Child Syndrome*, 181 J. AM. MED. ASS'N 17 (1962)).

[17] *Id.* at 56–57.

[18] *Id.* at 57.

[19] Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 373–74 (2005).

[20] Jackson, *supra* note 10, at 832.

[21] Weithorn, *supra* note 12, at 60.

[22] Philip C. Crosby, Comment, Custody of Vaughn*: Emphasizing the Importance of Domestic Violence in Child Custody Cases*, 77 B.U. L. REV. 483, 499 (1997).

[23] *See* Weithorn, *supra* note 12, at 85.

[24] *See id.*

Children in homes where domestic violence occurs can be at risk of physical injury in three ways: (1) due to the high correlation of domestic violence and child abuse, fifty to seventy percent; (2) by attempting to intervene to protect their abused parent; and (3) by inadvertently being caught in the cross-fire.[25]

A wide variety of emotional and psychological effects exhibited by children have been linked to exposure to domestic violence. These effects include depression, suicidal ideation, anxiety, fear, insomnia, low self-esteem, bed-wetting, post-traumatic stress disorder, hypervigilance, and desensitization to other forms of violence.[26] These children may also exhibit other behavior problems as they grow older, such as truancy and substance abuse.[27] Children may also develop social problems, such as aggression or withdrawal, and academic problems, such as trouble concentrating and lower standardized test scores, due to their exposure to domestic violence.[28] Additionally, exposure to domestic violence may create an "intergenerational cycle of violence" in which children enter into their own abusive relationships as adults.[29]

A variety of factors are believed to influence the emotional and psychological effects that exposure to domestic violence has on children: (1) nature, severity, and frequency of exposure; (2) nature of the child's involvement in incident; (3) whether the child has been multiply victimized; (4) the degree to which the adult victim of the violence is affected; (5) the child's relationship to the batterer; (6) the child's age and gender; and (7) "risk" factors such as poverty and parental substance abuse.[30]

Not all children, however, are harmed—one study found that "over 80% of children exposed" to domestic violence "retain[ed] their overall psychological integrity," and in those children that were affected, the effects tended to dissipate over time if the batterer was removed from the home.[31] The effects of exposure can also be

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[25] Janice A. Drye, *The Silent Victims of Domestic Violence: Children Forgotten by the Judicial System*, 34 GONZ. L. REV. 229, 230–31 (1999).

[26] Nicholson v. Williams, 203 F. Supp. 2d 153, 197 (E.D.N.Y. 2002); Weithorn, *supra* note 12, at 86–87; Joy D. Osofsky, *Children Who Witness Domestic Violence: The Invisible Victims*, SOC. POL'Y REP., 1995, at 1, 3–4, *available at* http://www.srcd.org/documents/publications/SPR/spr9-3.pdf.

[27] Osofsky, *supra* note 26, at 4.

[28] *Nicholson v. Williams*, 203 F. Supp. 2d at 197; Weithorn, *supra* note 12, at 86.

[29] Osofsky, *supra* note 26, at 5.

[30] Weithorn, *supra* note 12, at 87–89.

[31] Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN'S RTS. L. REP. 107, 116 (2002).

mitigated by the presence of "protective" factors such as coping skills, support networks, presence of a strong parental figure, and appropriate social and legal intervention.[32] The child's well-being is strongly tied to the well-being of the non-abusive parent, and providing services to increase the safety and functioning of the non-abusive parent can also improve the well-being of the child.[33]

Conversely, removing the child from the non-abusive parent can have an extremely detrimental effect on the child. Children who have been exposed to domestic violence often view "their immediate universe as unpredictable and unsafe"[34] and removal may be more traumatic for them than for other children.[35] These children are at a heightened risk for separation anxiety disorder and may experience self-blame and anxiety about the safety of their parent.[36]

Children who are removed from their non-abusive parent are also at risk of harm in foster care.[37] Children placed in foster care, as compared to children in the general population, are at a seventy-five percent higher risk of child maltreatment,[38] twice as likely to die from abuse, and four times as likely to be sexually abused.[39] Children in foster care are also more likely to have health problems and receive inadequate medical care, to have problems in school, and to have behavior and emotional problems.[40] Children's lives are also further disrupted by removal because they are separated from

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32 Weithorn, *supra* note 12, at 88–89.

33 *Id.* at 135–36.

34 Stark, *supra* note 31, at 118.

35 Nicholson v. Williams, 203 F. Supp. 2d 153, 199 (E.D.N.Y. 2002).

36 *Id.*

37 *See, e.g.*, Doe v. New York City Dep't of Soc. Servs., 649 F.2d 134, 137 (2d Cir. 1981) ("[T]he record discloses a pattern of persistent cruelty to Anna at the hands of her foster father."); Thomas v. New York City, 814 F. Supp. 1139, 1144 (E.D.N.Y. 1993) ("While under the care of . . . defendants these eight infant plaintiffs were subjected to various forms of physical and emotional abuse.").

38 Zuccardy, *supra* note 10, at 667.

39 *Id.*; Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 137 (2001).

40 Sharon Vandivere, Rosemary Chalk & Kristin Anderson Moore, *Children in Foster Homes: How Are They Faring?*, CHILD TRENDS, Dec. 2003, at 1, 2–4, *available at* http://www.childtrends.org/Files//Child_Trends-2003_12_01_RB_FosterHomes.pdf. *But see* Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95, 107 (1999) ("[C]hildren who reside in foster care fare neither better nor worse than children who remain in homes in which maltreatment occur[s]."). It should be noted that Richard Gelles was an expert witness for ACS in *Nicholson v. Williams*, and despite the court's lengthy discussion of expert testimony, his testimony was not discussed by the court in reference to the effects of domestic violence on children or the effects of removal on children. *See Nicholson v. Williams*, 203 F. Supp. 2d at 197–99.

their siblings, community, friends, and school.[41] Also, for practical reasons, visitation may be difficult and the constraints of supervised visitation may inhibit normal interaction between parent and child.[42]

*C. Pre-*Nicholson *ACS Policy*

Despite the fact that not all children are negatively affected by exposure to domestic violence,[43] and despite the fact that removal from a non-abusive parent into the problematic foster care system can cause more harm than good,[44] prior to *Nicholson v. Williams* it was the stated policy of ACS to "resolv[e] any ambiguity regarding the safety of the child in favor of removing the child."[45] This policy, in conjunction with inadequate and outdated state domestic violence support training, resulted in ACS policies and procedures of inappropriately removing children from mothers simply because the mothers were victims of domestic violence.[46]

In New York, the State Central Registry for Child Abuse and Maltreatment (SCR) receives all reports of child abuse and neglect, and if reasonable cause is found to suspect abuse or neglect, SCR transmits a report to a local Child Protection Services (CPS) agency.[47] The CPS agency in New York City is now known as ACS.[48] In *Nicholson v. Williams*, the federal district court found that "ACS unnecessarily routinely prosecutes mothers for neglect and removes their children where the mothers have been the victims of significant domestic violence, and where the mothers themselves have done nothing wrong."[49] Despite the fact that these mothers were merely victims of domestic violence, ACS routinely charged both the mother and her batterer, or only the mother, with neglect based on allegations of "engaging in domestic violence."[50]

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[41] *See Nicholson v. Williams*, 203 F. Supp. 2d at 199.

[42] Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 462 (2003).

[43] *See* Weithorn, *supra* note 12, at 31 ("Clearly, not all children exposed to domestic violence are harmed in a manner justifying intrusive governmental intervention.").

[44] *See id.* at 136 ("[T]he child's relationship with the nonabusive parent plays a critical role in that child's psychological well-being.").

[45] *Nicholson v. Williams*, 203 F. Supp. 2d at 179.

[46] *See id.* at 216–17.

[47] Yuan v. Rivera, 48 F. Supp. 2d 335, 340 n.1 (S.D.N.Y. 1999).

[48] *Nicholson v. Williams*, 203 F. Supp. 2d at 166 ("The Administration for Children's Services (ACS) is responsible for investigating reports involving children in New York City.").

[49] *Id.* at 228.

[50] *See id.* at 209–10.

Also, one ACS employee testified that it was "common practice in domestic violence cases . . . to remove a child without seeking or obtaining judicial approval . . . because mothers will usually agree to attend whatever services ACS demands once their children have been in foster care for a few days."[51] Due to a lack of training on the dynamics of domestic violence, however, the services that ACS was demanding the mothers to take part in were often "unnecessary, fail[ed] to address the family's problem realistically, or actually increase[d] the danger."[52] The court further found that "ACS unnecessarily protracts the return of separated children to abused mothers even after the Family Court has ordered that they be reunited."[53]

*D. Pre-*Nicholson v. Scoppetta *New York Law*

The case law in New York State prior to *Nicholson v. Scoppetta* did little to discourage inappropriate removals by ACS in domestic violence situations. In a 1998 case, the Appellate Division, Second Department, found that allowing children to witness domestic violence was a permissible basis for a finding of neglect, and could also be used to establish derivative neglect[54] for other children who had not witnessed the violence.[55] In another 1998 case, the Appellate Division, First Department, held that expert testimony was not required to show that children were actually or imminently in danger of harm.[56] In a 1991 case, the Appellate Division, Third Department, went as far as to overturn a family court dismissal of a

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[51] *Id.* at 215.

[52] *Id.* at 212.

[53] *Id.* at 216.

[54] Derivative neglect can be established without direct evidence of neglect, when the neglect or abuse of another child by the same parent, "'demonstrate[s] a fundamental defect in [the parent's] understanding of the duties and obligations of parenthood.'" Dutchess County Dep't of Soc. Servs. v. Douglas E., Jr., 595 N.Y.S.2d 800, 802 (App. Div. 1993) (citing *In re* Lynelle W., 578 N.Y.S.2d 313, 313–14 (App. Div. 1991)). "Such flawed notions of parental responsibility are generally reliable indicators that a parent who has abused [or neglected] one child will place his or her other children at substantial risk of harm." *Id.* at 801–02.

[55] *In re* Deandre T., 676 N.Y.S.2d 666, 667 (App. Div. 1998). Ironically, the court cites the legislative history of the Family and Domestic Violence Intervention Act of 1994, an Act that was intended to protect victims of domestic violence, for proof that exposure to domestic violence is harmful to children and as support for charging mothers with neglect for allowing such exposure. *Id.* (citing *In re* Lonell J., Jr., 673 N.Y.S.2d 116, 118 (App. Div. 1st Dep't 1998)); *see also* The "Failure to Protect" Working Group, *Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 850–51 (2000).

[56] *In re Lonell J., Jr.*, 673 N.Y.S.2d at 117–18.

neglect charge against a mother because, in the Appellate Division's opinion, the children's problems appeared to be "at least partially due to" exposure to domestic violence.[57] As the dissenting opinion pointed out, this decision clearly ignored the statutory causation requirement that the harm be "'clearly attributable'" to the failure of the parent to provide a "minimum degree of care."[58]

In a 1992 King's County Family Court case, where expert testimony was introduced regarding the Battered Women's Syndrome (BWS), the court dismissed the abuse charges but held that strict liability applied to neglect charges filed on the basis that children had witnessed domestic violence.[59] The court's assertion that BWS "seriously impairs the will and the judgment of the [mother]" may have helped this mother escape abuse charges,[60] but this characterization of a domestic violence victim could obviously be detrimental to other mothers who are victims of domestic violence and fighting to retain or regain custody of their children. Women often face the problem of needing to "emphasiz[e] their victimization so that family court judges will seriously consider the domestic violence" while also proving that they are fit to be the "primary caretaker and the stable element in the children's lives."[61] The survivor theory suggests that battered women should be viewed "not [as] helpless victims, but instead, [as] active survivors who are thwarted in their attempts to end the violence by community passivity and economic barriers."[62] For these reasons, the possible detriment caused by introducing BWS evidence into a neglect proceeding should be carefully considered.

The state of the law in this area did not immediately start to improve after *Nicholson v. Williams* began. In 2002, after the preliminary injunction in *Nicholson* had been granted, the Appellate Division, Second Department, in *In re Carlos M.*,[63] overturned the dismissal of a neglect petition, holding that evidence of acts of severe violence in the presence of children was enough to show imminent danger to the child and neglect by the parent.[64]

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[57] *In re* Theresa "CC", 576 N.Y.S.2d 937, 938 (App. Div. 3d Dep't 1991).
[58] *Id.* at 939 (Casey, J., dissenting); *see* N.Y. FAM. CT. ACT § 1012(h) (McKinney 2008).
[59] *In re* Glenn G., 587 N.Y.S.2d 464, 469–70 (Fam. Ct. King's County 1992).
[60] *Id.* at 470.
[61] Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1247 (2001) (quoting Drye, *supra* note 25, at 240).
[62] *Id.* at 1248.
[63] 741 N.Y.S.2d 82 (App. Div. 2d Dep't 2002).
[64] *Id.* at 83–84.

III. *NICHOLSON V. WILLIAMS*: THE CASE

Nicholson v. Williams began as the combination of three separate suits filed in the United States District Court for the Eastern District of New York, each alleging due process violations by ACS, the State of New York, and various officials.[65] In 2001, the complaints were joined and class certification was granted.[66] After a twenty-four day trial, including forty-four witnesses and two hundred and twelve documents, Judge Weinstein granted a preliminary injunction.[67] The preliminary injunction, among other things, required ACS to cease charging domestic violence victims with neglect and to cease removing their children without court orders, required ACS to provide mothers with assistance in obtaining shelter and orders of protection, required ACS to train its employees on the principles of *In re Nicholson*, and created the Nicholson Review Committee (NRC) to assure compliance with the injunction.[68] In 2003, the United States Court of Appeals for the Second Circuit upheld the preliminary injunction, but before reaching the constitutional issues in the cases, certified three questions to the New York State Court of Appeals.[69] The New York State Court of Appeals accepted certification and provided a lengthy opinion interpreting the various pertinent sections of the Family Court Act.[70]

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[65] Nicholson v. Williams, 203 F. Supp. 2d 153, 164–65 (E.D.N.Y. 2002). The suits were instituted under 42 U.S.C. § 1983 (2000) which provides a civil rights cause of action against any party that acts under color of law to deprive a United States citizen of "any rights, privileges, or immunities secured by the Constitution and laws."

[66] *In re* Nicholson, 181 F. Supp. 2d 182, 183 (E.D.N.Y. 2002).

[67] *Nicholson v. Williams*, 203 F. Supp. 2d at 165 (citing *In re Nicholson*, 181 F. Supp. 2d at 182).

[68] *In re Nicholson*, 181 F. Supp. 2d at 190–93.

[69] Nicholson v. Scoppetta, 344 F.3d 154, 176–77 (2d Cir. 2003). The three certified questions were:

(1) "Does the definition of a 'neglected child' under N.Y. Family Ct. Act § 1012(f), (h) include instances in which the sole allegation of neglect is that the parent or other person legally responsible for the child's care allows the child to witness domestic abuse against the caretaker?";

(2) "Can the injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a parent or other caretaker constitute 'danger' or 'risk' to the child's 'life or health,' as those terms are defined in the N.Y. Family Ct. Act §§ 1022, 1024, 1026–1028?"; and

(3) "Does the fact that the child witnessed such abuse suffice to demonstrate that 'removal is necessary,' N.Y. Family Ct. Act §§ 1022, 1024, 1027, or that 'removal was in the child's best interests,' N.Y. Family Ct. Act §§ 1028, 1052(b)(i)(A), or must the child protective agency offer additional, particularized evidence to justify removal?" *Id.* at 176–77.

[70] Nicholson v. Scoppetta, 820 N.E.2d 840, 844–55 (N.Y. 2004).

The Court of Appeals held that simply showing that a child was exposed to domestic violence is insufficient to show neglect—"[p]lainly, more is required."[71] The "more" that is required of the petitioner is a showing, by a preponderance of the evidence, that (1) the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) the actual or threatened impairment is clearly attributable to the mother's failure to exercise a minimum degree of care toward the child.[72] The use of the word "imminent" requires that the harm is "near or impending, not merely possible."[73] The minimum degree of care required is an objective baseline standard that all parents must meet.[74] When determining if a domestic violence victim has exercised a minimum degree of care, however, the court must specifically consider the risks attendant to leaving, the risks attendant to staying, the risks attendant to seeking assistance through government channels, the risks attendant to criminal prosecution of the batterer, the risks attendant to relocating, the severity and frequency of the violence, and the resources available to the woman.[75] Requiring these factors to be considered and rejecting a presumption of neglect in domestic violence cases were huge steps in the right direction. The court declined to find, however, that a domestic violence victim could never be neglectful, but stated that the finding of neglect would be due to her failure to exercise a minimum degree of care, not because she was a victim of domestic violence or because her children were exposed to it.[76]

The court also found that there could be no blanket presumption in favor of removal because not every child is harmed by exposure to domestic violence and removal may do more harm than good.[77] Each case is fact specific and the petitioner must provide "particularized evidence" to prove that removal is in the best

[71] *Id.* at 844.

[72] *Id.* at 845.

[73] *Id.*

[74] *Id.* at 846.

[75] *Id.* at 846–47.

[76] *Id.* at 847. The court provides two examples of when a mother who is a domestic violence victim might be found neglectful: (1) if she is aware that her children are afraid of the batterer but repeatedly allows him to return without awareness of the impact on the children, *see In re* James "MM" v. June "OO", 740 N.Y.S.2d 730, 732 (App. Div. 2002); and (2) if there is severe, continued violence that repeatedly requires official intervention and causes the children fear and distress, *see In re* Theresa "CC", 576 N.Y.S.2d 937, 938 (App. Div. 1991). *Nicholson v. Scoppetta*, 820 N.E.2d at 847.

[77] *Nicholson v. Scoppetta*, 820 N.E.2d at 849, 852.

interests of the child.[78] The "safer course" cannot be used to hide a lack of evidence or an impermissible presumption of removal in cases of domestic violence.[79] The court must weigh the imminent risk to the child in remaining in the home with the harm that removal might cause.[80] Also, the court must consider whether the imminent risk could be mitigated or eliminated by issuing a temporary order of protection or providing services to the mother and child.[81] The court states a clear preference for removing the batterer, not the child—"'[w]here one parent is abusive but the child may safely reside at home with the other parent, the abuser should be removed'" to spare the child "'the trauma of removal and placement in foster care.'"[82]

The court also discussed the different methods available to remove children and when it would be appropriate to use each.[83] In a situation where removal is necessary, the best option is the temporarily removal of the child with the consent of the parent.[84] If the parent is unwilling to consent and there is not an imminent risk to the child's life or health, a petition must be filed requesting removal and the court must weigh the risks of the child remaining in the home with the risks of removal.[85] However, if there is an imminent risk to the child's life or health and insufficient time to file a petition and hold a preliminary hearing, the CPS agency can seek a preliminary order of removal from family court before a petition is filed.[86] When such an application is made by CPS, it will be heard by the court on that same day.[87] The court expresses a

[78] *Id.* at 852, 854.

[79] *Id.* at 853.

[80] *Id.* at 852.

[81] *Id.*; *see* N.Y. FAM. CT. ACT § 1029 (McKinney 2008).

[82] *Nicholson v. Scoppetta*, 820 N.E.2d at 852 (quoting *Memorandum of the Assembly Rules Committee*, Bill Jacket, 1989 N.Y. Sess. Laws 3221 (McKinney **1989**), *reprinted in* 1989 NEW YORK STATE LEGISLATIVE ANNUAL 316). The court also cites approvingly to *In re Naomi R.*, 745 N.Y.S.2d 485 (App. Div. 2002), for the proposition that the court should "maintain[] the integrity of the family unit and instead remove the abuser." *Id.* at 852.

[83] *See id.* at 849–55.

[84] *See id.* at 849; *see* N.Y. FAM. CT. ACT § 1021 (McKinney 2008). In cases where temporary removal is in the best interest of the child, collaborative and respectful safety planning by CPS and the mother can help the mother to see removal "as an intermediate step towards reunification and family survival" and can make the separation much less traumatic for the child. Stark, *supra* note 31, at 125; *see also* Nicholson v. Williams, 203 F. Supp. 2d 153, 204 (E.D.N.Y. 2002).

[85] *Nicholson v. Scoppetta*, 820 N.E.2d at 849–50; *see* N.Y. FAM. CT. ACT § 1027 (McKinney 2008).

[86] *Nicholson v. Scoppetta*, 820 N.E.2d at 852; *see* N.Y. FAM. CT. ACT § 1022 (McKinney 2008).

[87] *See* N.Y. FAM. CT. ACT § 1022(c)(ii) (McKinney 2008).

strong preference for this method of removal rather than emergency removals without court orders, which had been the predominant method of removal used by CPS prior to *Nicholson v. Scoppetta*.[88] The very purpose of the provision allowing for a preliminary ex parte order before a petition is filed was "to avoid a premature removal of a child from his home by establishing a procedure for an early judicial determination of urgent need."[89] To remove a child without a prior court order, the danger to the child's life or safety must be so urgent and immediate that there is insufficient time to obtain even an ex parte order.[90] With regard to the danger of emotional injury, the court said the following:

> While we cannot say, for all future time, that the possibility can *never* exist, in the case of emotional injury—or, even more remotely, the risk of emotional injury—caused by witnessing domestic violence, it must be a rare circumstance in which the time would be so fleeting and the danger so great that emergency removal would be warranted.[91]

While the court clarified and modified the interpretation of much of the law regarding neglect petitions and removal in the context of domestic violence, it adhered to the previous interpretation that expert testimony would be permitted, but not required in order to show neglect.[92]

This long, complicated case finally came to an end on December 17, 2004 when the parties entered into a stipulation and order of settlement after the case was transferred back to federal court.[93] The stipulation and order (1) terminated the preliminary injunction due to the fact that "ACS ha[d] substantially complied with the terms," (2) required ACS to establish a mechanism for complaints that the requirements of *Nicholson* were not being complied with, (3) awarded attorney's fees to plaintiffs, and (4) did not foreclose the possibility of future actions for violations of the law occurring thereafter.[94]

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[88] *Nicholson v. Scoppetta*, 820 N.E.2d at 853–54; *see* N.Y. FAM. CT. ACT § 1024 (McKinney 2008); Nicholson v. Williams, 203 F. Supp. 2d 153, 214–15 (E.D.N.Y. 2002).

[89] *Nicholson v. Scoppetta*, 820 N.E.2d at 853 (quoting N.Y. FAM. CT. ACT § 322, Committee Comments (McKinney 1963)).

[90] *Id.*; *see* N.Y. FAM. CT. ACT § 1024 (McKinney 2008).

[91] *Nicholson v. Scoppetta*, 820 N.E.2d at 854.

[92] *Id.* at 855; *see* N.Y. FAM. CT. ACT § 1024 (McKinney 2008).

[93] Stipulation and Order of Settlement, Nicholson v. Williams, No. 00-CV-5155 (E.D.N.Y. Dec. 17, 2004), *available at* http://www.lanskub.com/news/orderofsettlement12.17.04.pdf.

[94] *Id.* at 2–3. The State was required to pay the plaintiffs' attorneys fees' pursuant to 42

IV. THE AFTERMATH

A. Positive Effects

Nicholson v. Williams has had wide-ranging positive effects on both the policies and practices of ACS and on New York's lower courts. One of the most obvious, but also most important, benefits has been that ACS has been removing fewer children and charging fewer victims of domestic violence with neglect solely because of the exposure of their children to domestic violence.[95] This reduction is evidenced by the records of the Nicholson Review Committee (NRC), which was established by the preliminary injunction to assure compliance with the principles of *Nicholson v. Williams*: the NRC received thirteen complaints during the first year after the injunction and only two complaints the second year.[96]

Following the precedent of *Nicholson v. Scoppetta*, the lower courts have made improvements in their decisions involving neglect petitions filed against victims of domestic violence. In *In re Eryck N.*,[97] the children were exposed to domestic violence, and the mother had secured an order of protection and moved, with her children, to a shelter, but she subsequently returned home to facilitate visitation due to a court ordered modification of the order of protection.[98] The Appellate Division, Third Department, overturned the family court's grant of summary judgment on the neglect petition, citing *Nicholson v. Scoppetta*, which was decided during the pendency of the appeal.[99] Similarly, in *In re Casey N.*,[100] the Appellate Division, Second Department, overturned the family court's finding of neglect against the mother due to the family

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U.S.C. § 1988(b) (2000). The fees were expected to amount to over two million dollars. Tom Perrotta, *City, Agency Settle Suit Over Children of Battered Mothers*, N.Y.L.J., Dec. 20, 2004, at 1. The city settled the suits of the three named plaintiffs for six hundred thousand dollars, and the total settlement for the twenty plaintiffs that settled was over three and a half million dollars. *Id.*; William Glaberson, *City to Settle Over Removal of Children*, N.Y. TIMES, Sept. 15, 2002, at 35.

[95] Letter from Nicholson Review Committee to Judge Jack B. Weinstein (Dec. 17, 2004), at 4, 11, *available at* http://www.lanskub.com/news/ (follow "nicholsonrc.doc" hyperlink) [hereinafter NRC Letter] (stating that "the number of children removed due to domestic violence and the number of neglect petitions filed against mothers solely because they were victims of domestic violence appear[s] to [have] decline[d] significantly").

[96] *Id.* at 1, 5.

[97] 791 N.Y.S.2d 857 (App. Div. 3d Dep't 2005).

[98] *Id.* at 857.

[99] *Id.* at 858. Despite the court's remand for a factual hearing, it appears that it was ordered that the children be kept in the custody of CPS in the interim. *Id.*

[100] 844 N.Y.S.2d 92 (App. Div. 2d Dep't 2007).

court's failure to determine the nature and extent of the domestic violence to which the children were exposed and whether the children suffered actual or imminent emotional or mental impairment as a result of such exposure.[101] While it is encouraging to see that the appellate courts are overturning erroneous findings of neglect based on exposure to domestic violence, it also displays that CPS is still filing petitions on these grounds and some family courts are still granting the petitions.

Also as a result of *Nicholson v. Williams*, CPS is more frequently charging batterers with neglect for exposing children to domestic violence.[102] Carolyn Kubitschek, one of the plaintiffs' attorneys in *Nicholson v. Williams*, noted that since *Nicholson v. Williams,* "'A.C.S. has been charging batterers with neglect and using family court to keep an eye on [them].'"[103] In *In re Michael WW.*,[104] the Appellate Division, Third Department, upheld the family court's finding that a single incident of domestic violence in the presence of children, that upset and frightened them, was sufficient to find that the batterer had neglected the subject children.[105] The court also rejected the batterer's attempt to use *Nicholson v. Scoppetta* to escape neglect charges and the court further stated that *Nicholson v. Scoppetta* stood for the proposition that the *victim* of domestic violence was not neglectful solely for exposing children to domestic violence.[106]

The Appellate Division, Third Department, has also cited *Nicholson v. Scoppetta* for the proposition that once children are removed from their parents and put in foster care, CPS has a duty to use "reasonable efforts to reunite" parent and child, even after a

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[101] *Id.* at 94. The family court originally granted an adjournment in contemplation of dismissal (ACD) when the mother admitted that her children had been exposed to domestic violence. *Id.* at 93. While this outcome was preferable to a finding of neglect, the petition should have been dismissed if CPS failed to meet its burden of proving neglect. Granting an ACD allowed CPS to restore the case to the calendar for what appears to be simply further exposure to domestic violence. *Id.* at 94.

[102] *See* NRC Letter, *supra* note 95, at 11.

[103] Leslie Kaufman, *Abused Mothers Keep Children In a Test of Rights and Safety*, N.Y. TIMES, Nov. 28, 2003, at A1.

[104] 798 N.Y.S.2d 222 (App. Div. 3d Dep't 2005).

[105] *Id.* at 224. *Compare In re* Sadjah S., 804 N.Y.S.2d 68, 69 (App. Div. 1st Dep't 2005) (finding batterer neglectful for taunting mother with child and being verbally abusive and menacing in the presence of the child), *with In re* Ravern H., 789 N.Y.S.2d 563, 565 (App. Div. 4th Dep't 2005) (granting batterer ACD on neglect charges after physically abusing mother while child was in her arms), *and In re* Imani B., 811 N.Y.S.2d 447, 449 (App. Div. 2d Dep't 2006) (dismissing neglect petition against batterer after excluding evidence of physical abuse as hearsay and finding remaining evidence of loud verbal disputes insufficient).

[106] *In re Michael WW.*, 798 N.Y.S.2d at 224.

finding of neglect.[107] The Court of Appeals has found that diligent efforts at reunification must include services to help the parent "so as to render the parent capable of caring for the child."[108] These services may "includ[e] assistance with housing, employment, counseling, medical care and psychiatric treatment."[109] This is important because it shows the courts are aware that providing services to the mother, that will enable her to provide and care for her children, will ultimately benefit her children as well.

Nicholson v. Williams has also led to increased training of child welfare workers. The preliminary injunction in *In re Nicholson* specifically required that a training program be implemented that informed all ACS employees of the requirements of the injunction and required that a supervisory program be implemented to ensure that the requirements were carried out in practice.[110] Also as a result of the case, legislation was passed in New York State that required domestic violence training for all child welfare workers.[111] This training is imperative because injunctions and policy changes are useless if the front-line employees are not aware of the changes and are not taught how to implement them.

B. Remaining Problems

Despite the benefits that have flowed from *Nicholson v. Scoppetta* and *Nicholson v. Williams*, there are still some problems remaining in the realm of social services and children who are exposed to domestic violence. One main problem is that the courts are failing to consider, or at least to articulate their consideration of, the "clearly attributable" causation requirement and the "risk" factors necessary to determine whether a domestic violence victim has provided a minimum degree of care to her children. In *In re Paul U.*,[112] the mother obtained an order of protection in favor of herself and her child but subsequently returned the child to her batterer because she was financially unable to care for the child.[113] The

[107] *In re* Donna KK., 819 N.Y.S.2d 582, 583 (App. Div. 3d Dep't 2006).

[108] *In re* Marino S., Jr., 795 N.E.2d 21, 24–25 (N.Y. 2003).

[109] *Id.* at 25.

[110] *In re* Nicholson, 181 F. Supp. 2d 182, 192 (E.D.N.Y. 2002).

[111] Zuccardy, *supra* note 10, at 669–70; *see* N.Y. SOC. SERV. LAW § 17(g) (McKinney 2003 & Supp. 2008).

[112] 785 N.Y.S.2d 767 (App. Div. 2004).

[113] *Id.* at 768. It is interesting to note that the problem arose because the mother was financially unable to care for her child, but there is no mention of any services offered or provided to the mother to help her obtain housing or financial assistance. *See id.*

court upheld a finding of neglect against the mother because she failed to exercise a minimum degree of care.[114] The court, however, mentions only the objective aspect of the test and fails to analyze, or at least articulate, the factors specific to domestic violence victims.[115]

The language in the Second Department's decision in *In re Xavier J.*[116] is also troubling. In overturning the family court's decision to return the child to the mother, the Second Department stated that "the safer course is not to return the child to the mother's custody."[117] In *Nicholson v. Scoppetta*,[118] the New York Court of Appeals specifically stated that "[t]he term 'safer course' should not be used to mask a dearth of evidence or as a watered-down, impermissible presumption."[119] The petition in *In re Xavier J.* alleged that the mother derivatively neglected her child, "based upon past abuse and neglect cases involving the child's older siblings, one of whom died from being shaken by the mother, as well as the continuing risk posed by the father's drug abuse and violent behavior toward the mother."[120] While these are admittedly serious concerns, the court ignored evidence the family court had found persuasive—that the mother had undergone therapy, that she had acted appropriately during supervised visitation with the older children, and that the risk posed by the father had been mitigated by issuance of an order of protection—and reverted to the "safer course" language, that was so commonly used in pre-*Nicholson v. Scoppetta* neglect cases to remove a child from its mother.[121]

In *In re Rebecca KK.*,[122] the petition for termination of parental rights was based on the mother's "admission to various allegations, including that she was the repeated victim of domestic violence."[123] The petition was dismissed for defective notice, but the court

[114] *Id.* at 769.

[115] *Id.*; *see also In re Angelique L.*, 840 N.Y.S.2d 811 (App. Div. 2007). In *In re Angelique L.*, the court does not specifically analyze the "risk" factors applicable to domestic violence victims but does at least explain that the finding of a failure to exercise a minimum degree of care is due to "the mother's effort to minimize the effects of the domestic violence incident, her total lack of awareness of the impact of the violence on the children, and her reluctance to have the companion leave the home." 840 N.Y.S.2d at 815.

[116] 849 N.Y.S.2d 648 (App. Div. 2d Dep't 2008).

[117] *Id.* at 649.

[118] 820 N.E.2d 840 (N.Y. 2004).

[119] *Id.* at 853 (citations omitted).

[120] *In re Xavier J.*, 849 N.Y.S.2d at 649.

[121] *Id.*; *see, e.g.*, *In re* Kimberly H., 673 N.Y.S.2d 96, 98 (App. Div. 1998).

[122] 796 N.Y.S.2d 720 (App. Div. 2005).

[123] *Id.* at 720.

specifically states that it can be refiled with proper notice.[124] Although the other "various allegations" that the mother admitted may have been sufficient for a finding of permanent neglect, it is problematic that the court only states that the mother was a victim of domestic violence and does not even mention whether the children were exposed to the violence, let alone whether they were harmed by it.[125] It is important for the trial and appellate courts not only to consider the factors discussed in *Nicholson v. Scoppetta*, but also to articulate their considerations. Failure to mention the causation requirement or the risk factors applicable to domestic violence victims may seemingly condone filing of petitions that do not consider these issues. The more detailed the decisions, the more guidance that family courts and CPS employees can gain from the decisions.

Another remaining problem may be the filing of neglect petitions by CPS alleging pretextual reasons to hide the primary purpose of removing children from homes where they are exposed to domestic violence. This practice was exposed in *Nicholson v. Williams*, where the District Court Judge found that some petitions alleged "neglect unrelated to domestic violence, but caseworkers either have no evidence at all supporting the unrelated allegations or the caseworkers do not consider the unrelated allegations to merit a finding of neglect."[126] In 2004 the NRC received a complaint that prompted them to report that they were still concerned that "ACS was using pretextual allegations to conceal the fact that the prosecution of a mother for neglect . . . is due primarily to domestic violence or the refusal of services related to domestic violence."[127]

There also have been cases subsequent to *Nicholson v. Scoppetta* that suggest this practice may still be occurring to some extent and the courts may be acquiescing to it. In *In re Alan FF.*,[128] the Appellate Division, Third Department, overturned a dismissal of a neglect petition that alleged that the children had been exposed to

[124] *Id.* at 721.

[125] *Id.* at 720; *see also In re* Christopher B., 809 N.Y.S.2d 202, 202 (App. Div. 2006) (finding that the mother neglected children because they were exposed to domestic violence and her batterer used drugs in their presence, but the court fails to mention whether the children were harmed by this exposure).

[126] Nicholson v. Williams, 203 F. Supp. 2d 153, 213 (E.D.N.Y. 2002). As an example, in *Nicholson v. Williams*, the neglect petition filed against plaintiff Norris alleged that she "'engaged in domestic violence'" and that "both parents used drugs." *Id.* at 186. However, there was absolutely nothing in the record to support the allegations of drug use. *Id.*

[127] NRC Letter, *supra* note 95, at 8.

[128] 811 N.Y.S.2d 158 (App. Div. 3d Dep't 2006).

domestic violence and the mother had acquiesced in unsupervised visits by the father, a convicted sex offender.[129] However, the year before, in *In re Krista L.*,[130] the Third Department had overturned findings of neglect based upon the father's status as a convicted sex offender and the father's failure to investigate his daughter's claim that her grandfather had tried to "'French'" kiss her.[131] From this comparison, it appears that the mother in *In re Alan FF.* was truly found neglectful because she allowed her children to be exposed to domestic violence. Also, in *Velez v. Reynolds*,[132] the court noted that a finding of neglect by the family court based on educational neglect and alcohol and drug abuse still did not preclude the conclusion that the sole reason the mother was being prosecuted was the fact that she allowed her children to be exposed to domestic violence.[133]

A similar problem involves the failure of CPS and the courts to realize that domestic violence is a pervasive force in a mother's life and can affect many other aspects of her life. In *In re Aiden L.*,[134] CPS alleged that the mother had neglected her child "by allowing him to be exposed to an incident involving domestic violence and by compelling the child to live in a residence that was in such a deplorable condition."[135] The condition of the mother's home was less than ideal, but the court gave no weight to the mother's testimony that the state of the home was due to her batterer ransacking it just before the CPS worker arrived.[136] The court also failed to consider that unclean living conditions may exist in situations where domestic violence occurs because the mother's focus is centered on keeping herself and her children safe, and not on the cleanliness of her home.[137] If ACS and the courts looked at

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[129] *Id.* at 159–60.

[130] 798 N.Y.S.2d 592 (App. Div. 3d Dep't 2005).

[131] *Id.* at 595.

[132] 325 F. Supp. 2d 293 (S.D.N.Y. 2004).

[133] *Id.* at 308 n.8. To support this assertion the court referenced plaintiff's expert's statement that it was "'unlikely that ACS would have prosecuted Ms. Velez for neglect' based only on alleged educational neglect and drug and alcohol abuse." *Id.* It should be noted, however, that this plaintiff lost the jury trial on her 42 U.S.C. § 1983 claim against ACS. Velez v. Bell, No. 02 Civ. 8315(JGK), 2006 WL 1738076, at *1 (S.D.N.Y. June 22, 2006).

[134] 850 N.Y.S.2d 671 (App. Div. 2008).

[135] *Id.* at 672.

[136] *Id.* at 672–73.

[137] *See id.*; 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, 696–97 (2003) ("[T]oo often evaluators and courts . . . overlook the fact that many of mothers' 'character' flaws are the product of the battering. . . . Neglect of children, failure to keep the house or children clean, and other 'un-motherly' behaviors may be predictable occurrence circumstances when the mother is living in constant fear of violence,

the problem from this angle, perhaps they could begin to focus on helping the mother and children, rather than punishing the mother for the side effects of being a victim of domestic violence.

Another case that displays troubling action taken by ACS is *Doe ex rel. Doe v. Mattingly*.[138] The mother, a victim of domestic violence, had custody of her child and had never been the subject of a neglect or abuse petition.[139] ACS conducted unauthorized supervision of the mother and child, including inspecting their residence "down to the level of inspecting the refrigerator," and having ACS workers perform strip searches of the young child.[140] ACS defended their actions by stating they "'believed'" the supervision had been ordered by the court.[141] However, no such order had ever been given.[142] In further support of its actions, ACS presented a declaration that claimed that the father had struck out at the mother while she was holding the baby and actually struck the baby.[143] Counsel for ACS eventually admitted this was a false allegation, but the Declaration was never amended, leaving the "mistaken impression that [the child] had been subjected to violence by his father, while in the arms of his mother."[144] These suspicious and possibly deceptive actions by ACS are extremely troubling because ACS plays such an important role in providing family court with the information from which it makes its custody decisions.[145]

V. SUGGESTIONS

A. Malicious Prosecution Claims

One possible avenue that a domestic violence victim can explore when CPS files petitions with pretextual allegations or conducts itself as it did in *Doe* is to file a state law malicious prosecution

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and is operating to survive rather than to further a healthy day-to-day existence.").

[138] No. 06-CV-5761, 2006 WL 3498564 (E.D.N.Y. Nov. 6, 2006).

[139] *Id.* at *1.

[140] *Id.* at *2.

[141] *Id.* at *1.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *See* Nicholson v. Williams, 203 F. Supp. 2d 153, 222 (E.D.N.Y. 2002) ("Family [c]ourt judges usually must rely almost entirely on ACS's representations, and grant any requests by ACS until the parents have a chance to present a meaningful response to the charges, which usually occurs several weeks into the process. This dependence by the [f]amily [c]ourt on ACS highlights ACS's responsibility to present fair and accurate charges and information to the court when it decides to file a petition.").

claim against CPS.[146] The tort of malicious prosecution is intended to "protect[] the personal interest of freedom from unjustifiable litigation."[147] The elements of malicious prosecution under New York law are as follows: (1) "commencement or continuation of a criminal proceeding by the defendant against the plaintiff," (2) "termination of the proceeding in favor of the accused," (3) "absence of probable cause for the criminal proceeding," and (4) "actual malice."[148] The element of termination of the proceeding in the accused's favor requires a finding equivalent to innocence and, therefore, an ACD cannot provide the basis for a malicious prosecution claim,[149] but a termination due to the plaintiff's assertion of a constitutional right might.[150] Due to the clear

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[146] A federal claim under 42 U.S.C. § 1983 for malicious prosecution has been attempted by victims of domestic violence who had their children improperly removed with varying outcomes. *See, e.g.*, Garcia v. Scoppetta, 289 F. Supp. 2d 343, 349, 353 (E.D.N.Y. 2003) (applying qualified immunity because the law was not clearly established prior to *Nicholson*); Fulton v. Robinson, 289 F.3d 188, 196–99 (2d Cir. 2002) (affirming dismissal of malicious prosecution claim because petitioner could not show the criminal prosecution was "commenced or continued with malice and without probable cause"); Yuan v. Rivera, 48 F. Supp. 2d 335, 348–51 (S.D.N.Y. 1999) (plaintiff's claim survived summary judgment); Taylor v. Evans, 72 F. Supp. 2d 298, 315 (S.D.N.Y. 1999) (dismissed because abuse of process did not rise to level of "conscience shocking"). In 1991 the Second Circuit held that a cause of action for civil malicious prosecution must be based on misuse of the legal process that was "'conscience-shocking'" or "so egregious as to work a deprivation of a constitutional dimension." Easton v. Sundram, 947, F.2d 1011, 1018 (2d Cir. 1991). The next year, the Second Circuit held that § 1983 liability could be based on malicious prosecution but not malicious abuse of process. Spear v. Town of W. Hartford, 954 F.2d 63, 68 (2d Cir. 1992). The Supreme Court then issued a plurality opinion in 1994 that has been interpreted to require a violation of Fourth Amendment rights as a prerequisite to § 1983 liability for malicious prosecution. *See* Albright v. Oliver, 510 U.S. 266, 273–74 (1994); *Fulton*, 289 F.3d at 195. Subsequent to *Albright*, the Southern District continued to allow malicious prosecution claims based on neglect petitions. *See Taylor*, 72 F. Supp. 2d at 314–15; *Yuan*, 48 F. Supp. 2d at 348–49. Subsequent to *Fulton*'s affirmance of *Albright*, however, the Southern District seems to have adopted the same rationale. *See* Washington v. County of Rockland, 211 F. Supp. 2d 507, 512–13 (S.D.N.Y. 2002). The Eastern District appears to be the only court that has left the door open to neglect petitions providing the basis for a malicious prosecution claim under § 1983. *See Garcia*, 289 F. Supp. 2d at 348–49. Even if the action is allowed, however, the defendant may be entitled to qualified immunity. *See* Kaminsky v. Rosenblum, 929 F.2d 922, 924–25 (2d Cir. 1991). The one avenue that may still be available, although apparently untested, is to assert the violation of the child's Fourth Amendment rights in conjunction with a malicious prosecution charge under 42 U.S.C. § 1983. *See generally* Nicholson v. Williams, 203 F. Supp. 2d 153, 246–47 (E.D.N.Y. 2002); Tenenbaum v. Williams, 193 F.3d 581, 601–04 (2d Cir. 1999).

[147] Broughton v. State, 335 N.E.2d 310, 314 (N.Y. 1975).

[148] *Id.*; *Fulton*, 289 F.3d at 195. While malicious prosecution claims were originally limited to criminal proceedings, Article 10 neglect and abuse proceedings can now provide the basis for a malicious prosecution claim. *See* Parkhurst v. Westchester County Dep't of Soc. Servs., 644 N.Y.S.2d 768, 768 (App. Div. 1996) (claim dismissed on other grounds).

[149] *Parkhurst*, 644 N.Y.S.2d at 768.

[150] *Fulton*, 289 F.3d at 196. This is important because if a mother asserts her

explanation by the court in *Nicholson v. Scoppetta* that solely exposing a child to domestic violence is not neglectful, absence of probable cause for a neglect petition can be inferred when CPS alleges solely that the mother has exposed her children to domestic violence.[151] Similarly, an inference of the absence of probable cause can be made when other pretextual allegations are made by CPS without reasonable belief that those behaviors constitute neglect.[152] To establish malice, the "plaintiff need not prove actual spite or hatred" but only that the proceedings were commenced "due to a wrong or improper motive, something other than a desire to see the ends of justice served."[153] Establishing a lack of probable cause will generally create an inference of malice.[154]

A state law claim of malicious prosecution is subject to a one year statute of limitations from the time that the cause of action accrues—when the petition is dismissed and the proceeding thereby terminates in plaintiff's favor.[155] However, in New York State the plaintiff must also serve a notice of claim to the defendant, CPS, within ninety days from the date the cause of action accrues.[156]

One hurdle is that social service workers are entitled to immunity for removing a child if their actions are taken in good faith, and there is generally a presumption that social workers act in good faith.[157] However, this presumption does not extend to "willful misconduct or gross negligence."[158] Filing a petition for removal without probable cause could rise to the level of "willful misconduct or gross negligence."[159] CPS employees might also claim common law immunity as a government official performing duties that require the exercise of discretion.[160] While the CPS employee would probably be correct in asserting that removing a child is a

constitutional right to due process in the context of an unwarranted removal and the case is terminated for that reason, she can still pursue a claim of malicious prosecution against CPS. *See id.*

[151] *See* Nicholson v. Scoppetta, 820 N.E.2d 840, 845–47 (N.Y. 2004).

[152] *See* Yuan v. Rivera, 48 F. Supp. 2d 335, 350 (S.D.N.Y. 1999) (stating that "an inference can be drawn that they lacked probable cause to file neglect charges" if the "defendants lacked a reasonable belief that [the] behavior constituted neglect").

[153] *Id.* at 350.

[154] *Id.*

[155] *See* N.Y. C.P.L.R. § 215 (McKinney 2008); *Yuan*, 48 F. Supp. 2d at 357–58.

[156] *See* N.Y. GEN. MUN. LAW § 50-e (McKinney 2008).

[157] *See* N.Y. SOC. SERV. LAW § 419 (McKinney 2003); N.Y. FAM. CT. ACT § 1024(c) (McKinney 1998).

[158] *See* N.Y. SOC. SERV. LAW § 419 (McKinney 2003).

[159] *See Yuan*, 48 F. Supp. 2d at 358.

[160] *Id.*

discretionary function, the privilege does not extend to actions taken "in bad faith or without a reasonable basis."[161]

Despite the obstacles, initiating a claim of malicious prosecution against individual CPS employees could be a critical tool in preventing future unwarranted removals and neglect petitions. A successful claim would result in potential personal monetary liability for the employee and would act as a deterrent to that employee and others. Also, it is important to discourage CPS employees from ever carrying out unwarranted removals and filing unwarranted petitions because even if the family court judge dismisses the petition or returns the child to the mother, both mother and child have already been traumatized by the ordeal.[162]

B. Provision of Services

CPS needs to consider the best interests of the mother as integral to the best interests of the child because the child's well-being is inextricably intertwined with that of the mother.[163] Studies have shown that interventions targeting the mother's functioning and safety can also improve the child's well-being.[164] CPS tends to lack the training and ability to effectively provide services to victims of domestic violence and, therefore, to promote the best interest of the family; CPS and domestic violence service providers need to cooperate and coordinate and overcome their "philosophical difference[] and history of mistrust."[165] However, the first step is for CPS to follow the mandates of *Nicholson* and stop removing children and filing neglect petitions based on domestic violence. Women will continue to be hesitant to ever call CPS for assistance if they fear it could lead to the removal of their children; many women would rather suffer the abuse in their home than risk losing their children.[166]

Once CPS becomes involved, it is crucial that appropriate services are provided. Generic services such as parenting classes may be unnecessary and services such as couples counseling may actually

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[161] *Id.*
[162] *See* Stark, *supra* note 31, at 118.
[163] Weithorn, *supra* note 12, at 135.
[164] *Id.*
[165] *Id.* at 35; *see also* 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, 578 (2004).
[166] Weithorn, *supra* note 12, at 125–26.

be dangerous for the mother and child.[167] The service plan needs to be a collaborative effort between CPS and the mother to ensure her safety and the safety of her children.[168] Services that may be beneficial include housing or shelter assistance, employment referrals, and financial assistance such as food stamps.[169]

Another critical service that should be considered is assistance in obtaining an order of protection against the batterer.[170] Obtaining an order of protection removes the batterer from the home and allows the children to remain in familiar surroundings with their mother—a situation where hopefully they can begin to heal from the trauma caused by the batterer.[171] The case law with respect to orders of protection is encouraging. In *In re David Edward D.*,[172] a non-domestic violence case, the court denied a continuation of removal because CPS had not shown that the imminent risk could not be "eliminated by issuing an order of protection."[173] In another non-domestic violence case the court held that if the parent with the order of protection allowed the other parent access to the children, the parent with the order of protection would not be neglectful as long as the parent's behavior was reasonable under the circumstances.[174] This is an important holding because it could protect domestic violence victims whose batterers coerce them into allowing contact with the children.

C. Weighing Harms in Each Individual Case

Nicholson v. Scoppetta requires that courts weigh the imminent risk of harm of remaining in the home with the risks of removal based on the facts of each individual case.[175] Before balancing these risks, however, the court must consider whether the imminent risk of remaining in the home could be mitigated or eliminated by providing services to the mother and child, such as an order of

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[167] *See* Nicholson v. Williams, 203 F. Supp. 2d 153, 202 (E.D.N.Y. 2002).

[168] *See id.* at 202–04.

[169] *See id.* at 211.

[170] *See* N.Y. FAM. CT. ACT § 1029 (McKinney 2007); *Nicholson v. Williams*, 203 F. Supp. 2d at 203.

[171] *See Nicholson v. Williams*, 203 F. Supp. 2d at 202–04; Dunlap, *supra* note 165, at 614–15. While orders of protection do not guarantee safety, they serve as a deterrent because the batterer is subject to criminal prosecution if he violates the order. The "Failure to Protect" Working Group, *supra* note 55, at 865.

[172] 828 N.Y.S.2d 438 (App. Div. 2006).

[173] *Id.* at 440.

[174] *In re* Israel S., 764 N.Y.S.2d 96, 97–98 (App. Div. 2003).

[175] Nicholson v. Scoppetta, 820 N.E.2d 840, 852 (N.Y. 2004).

protection.[176] This element is crucial given the physical, emotional, and psychological harm that children face when they are removed from their non-abusive parent into foster care, and given the positive effects that can result from remaining with their non-abusive parent as they heal together.[177] This balancing is required by *Nicholson v. Scoppetta* but apparently is not being considered, or at least articulated, in the lower court decisions. Clearly articulating this balancing in court decisions would be extremely beneficial,[178] as it would provide guidance to CPS employees who tend to be "crisis-driven in their approach," and "may systematically underestimate the possibility of a bad outcome for a child who ends up separated from both parents."[179] Comprehensive risk assessments will undoubtedly cause greater expenditures of time and money at the beginning of the proceeding; but, if removal can be avoided, costs of foster care and additional court proceedings may be avoided, not to mention the value of sparing the mother and child from the harm of unwarranted removals.[180]

While risk assessments have not been articulated in domestic violence cases since *Nicholson*, they have been considered in non-domestic violence cases with positive outcomes. In *In re David Edward D.*,[181] the court denied an application for continued removal because CPS had failed to demonstrate that the imminent risk of remaining in the home could not be eliminated by issuing an order of protection.[182] In *In re Alexander B.*,[183] the Appellate Division, Second Department, reversed a family court decision removing the children because a factual analysis of the risks of harm had not been conducted.[184] The court then analyzed the particular risks to the subject children, including the children's previous negative experiences in foster care and the children's relationship to their

[176] *Id.*

[177] *See supra* Part II.B.

[178] *See* Chill, *supra* note 42, at 464 (advocating weighing the risks of non-removal against those of removal and requiring decision makers to issue written explanation of which risk is greater).

[179] Peter Margulies, *Lawyering for Children: Confidentiality Meets Context*, 81 ST. JOHN'S L. REV. 601, 618–19 (2007).

[180] *See* Theo Liebmann, *What's Missing From Foster Care Reform? The Need For Comprehensive, Realistic, and Compassionate Removal Standards*, 28 HAMLINE J. PUB. L. & POL'Y 141, 167–68 (2006).

[181] 828 N.Y.S.2d 438 (App. Div. 2006).

[182] *Id.* at 439–40.

[183] 814 N.Y.S.2d 651 (App. Div. 2006).

[184] *Id.* at 652–53.

mother.[185] This type of analysis should be undertaken in every case, and especially in domestic violence cases, because the mother typically does not present a risk of harm, and if the batterer is removed from the home by an order of protection, the child will likely be able to remain with the mother and avoid the harms of removal.

D. Batterer Accountability

It is imperative that CPS's response to situations where children are exposed to domestic violence holds batterers accountable for their actions.[186] Two ways of holding the batterer accountable are instituting a policy of always charging the batterer with neglect in cases of domestic violence[187] and a policy of always referring the batterer to the District Attorney's office for criminal prosecution.[188] CPS has the authority to refer cases for criminal prosecution[189] and should consistently exercise this authority in order to send a message to batterers that their conduct is criminal and will not be tolerated.[190] Once referred to the District Attorney's office, the batterers should be charged with any crimes they have committed against the mother and also for endangering the welfare of a child.[191] Also, courts have found that the perpetrator of domestic violence in the presence of children can be found neglectful.[192] CPS

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[185] *Id.* at 653.

[186] *See* Nicholson v. Williams, 203 F. Supp. 2d 153, 201 (E.D.N.Y. 2002).

[187] Neglect charges can be filed against any "person legally responsible for [the child's] care." *See* N.Y. FAM. CT. ACT § 1012(f) (McKinney 2008). A person legally responsible is defined as "the child's custodian, guardian, any other person responsible for the child's care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child." N.Y. FAM. CT. ACT § 1012(g) (McKinney 2008). This somewhat broad definition might allow for charging a mother's abusive boyfriend with neglect of her child, even if he does not live with the mother and her child.

[188] *See* Carla M. Da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 S. CAL. REV. L. & WOMEN'S STUD. 251, 266 (1994) (noting that enforced criminal and civil penalties would constitute an attack on domestic abuse).

[189] *See* N.Y. SOC. SERV. LAW § 424(11) (McKinney 2008).

[190] Sheila M. Murphy, *Guardians Ad Litem: The Guardian Angels of Our Children in Domestic Violence Court*, 30 LOY. U. CHI. L.J. 281, 296—97 (1999) (discussing benefits of holding batterers criminally responsible for domestic violence in the presence of children).

[191] *See* N.Y. PENAL LAW § 260.10(1) (McKinney 2008). The Court of Appeals has held that acts of violence by one parent against the other in the presence of the child can be grounds for a conviction of endangering the welfare of a child. People v. Johnson, 740 N.E.2d 1075, 1077 (N.Y. 2000).

[192] *See supra* Part IV.A.

should take advantage of this and institute a policy of always charging the perpetrator of domestic violence with neglect. In addition to batterer accountability, these policy suggestions would provide domestic violence victims with records of the abuse that might prove helpful in future family court proceedings involving the batterer.

VI. TREATMENT IN OTHER JURISDICTIONS

The New York State Court of Appeals issued its decision only four years ago,[193] and already it has been cited by several other states in various contexts.[194] "Because the federal court heard the case, many think *Nicholson* will influence practices far beyond New York."[195] A Legal Aid attorney in New York City stated that "'*Nicholson* is a landmark and will set precedent through the country.'"[196]

McEvoy v. Brewer,[197] a case decided by the Court of Appeals of Tennessee in 2003, seems somewhat contradictory to the spirit of *Nicholson v. Williams*. In this case, the court cites *Nicholson v. Williams* for the proposition that exposure "to domestic violence can have an immediate and long-term effect on a child."[198] *McEvoy* involves a custody dispute between divorced parents.[199] The mother remarried to an abusive husband, and the biological father filed for a custody modification based on the child's new home situation.[200] The court acknowledged that the child has "so far been spared [her stepfather's] abuse" but finds that the mother's "marriage to an abuser provides an ample basis for the . . . conclusion that a material change in circumstances had occurred."[201] The court then goes on to grant custody of the child to the biological father.[202] While this case is a custody dispute between two private parties and not a neglect proceeding, the citation to *Nicholson v. Williams* to establish that being a victim of domestic violence makes you a less

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[193] Nicholson v. Scoppetta, 820 N.E.2d 840, 840 (N.Y. 2004).

[194] *See infra* footnotes 197–218 and accompanying text.

[195] Leslie Kaufman, *Abuse Victims and the City Settle Lawsuit*, N.Y. TIMES, Dec. 18, 2004, at B1.

[196] *Id.* (quoting Barrie Goldstein, Legal Aid).

[197] No. M2001-02054-COA-R3-CV, 2003 WL 22794521 (Tenn. Ct. App. Nov. 25, 2003).

[198] *Id.* at *4.

[199] *Id.* at *1.

[200] *Id.* at *1–2.

[201] *Id.* at *4.

[202] *Id.* at *5.

fit parent is troubling.[203]

In *In re S.H.*,[204] a case decided in 2007 by the Court of Appeals of Washington, *Nicholson v. Williams* was cited by a domestic violence victim to establish that exposure to domestic violence does not always have negative effects on children.[205] The court noted that she had not raised this issue at trial and, therefore, it was not preserved for appellate review, but explained that even if it had been raised, there had been evidence produced at trial that exposure to domestic violence does have a negative effect on children.[206] The court did, however, go on to describe testimony that showed the specific effects that domestic violence had on the subject children.[207] Thus, even though the court did not allow *Nicholson v. Williams* to be used to support the mother's case, the specific detrimental effects to the children caused by domestic violence may have led to the same ultimate determination of neglect in New York under the principles of *Nicholson v. Scoppetta*.[208]

Similarly, in a 2007 California Court of Appeals case, *In re Jason J.*,[209] *Nicholson v. Scoppetta* was cited by a domestic violence victim in a neglect proceeding in support of her position that due to the severity of the violence, and the other circumstances of her case, she had not failed to exercise a minimum degree of care to protect her child, and therefore, was not neglectful.[210] The court discusses *Nicholson v. Scoppetta* and states that it is sympathetic to the mother's argument and might agree that "exposure to a single incident of domestic violence [should not be] the *sole* reason for a dependency proceeding."[211] The court finds, however, that the mother's prior drug use and her awareness of the physical abuse of her child by her batterer are sufficient to establish her failure to

[203] *See id.* at *4–5.

[204] No. 24781-3-III, 2007 WL 2340792 (Wash. Ct. App. Aug. 16, 2007).

[205] *Id.* at *10.

[206] *Id.*

[207] *Id.*

[208] *Compare id.* (explaining the impact of domestic violence on children may include emotional, psychological, and "discipline-type problems"), *with In re* Angelique L., 840 N.Y.S.2d 811, 814–15 (App. Div. 2007) (finding under a *Nicholson v. Scoppetta* analysis that a mother neglected the subject children by failing to exercise minimal care in preventing exposure of the children to "the incidents of domestic violence").

[209] No. D050869, 2007 WL 2965558 (Cal. Ct. App. Oct. 12, 2007).

[210] *Id.* at *3; *see also* Nicholson v. Scoppetta, 820 N.E.2d 840, 846 (N.Y. 2004) ("Whether a particular mother . . . has actually failed to exercise a minimum degree of care is necessarily dependent on facts such as the severity and frequency of the violence, and the resources and option available to her.").

[211] *In re Jason J.*, No. D050869, 2007 WL 2965558 at *3 (emphasis added).

protect her children.[212] It appears that California might not allow neglect proceedings based on a single event of domestic violence, but would consider a proceeding based on a long history of domestic violence or a single incident in conjunction with other factors.[213]

Florida law requires that when future behavior is the basis of a neglect petition, it must be shown that the "'future behavior will adversely affect the child and can be clearly and certainly predicted.'"[214] In a dissenting opinion, a Florida Appellate Judge cited approvingly to *Nicholson v. Scoppetta*'s definition of imminence as "near or impending, not merely possible" when clarifying the "clearly and certainly predicted" requirement.[215]

Ohio's Domestic Violence Law contains a "Question and Answer" section where *In re Nicholson* is discussed in reference to the constitutionality of removals.[216] The discussion focuses, however, more on the New York State Court of Appeals decision interpreting New York law than on the constitutional issues discussed in the federal court decisions.[217]

Lastly, a federal case in Georgia cited to *Nicholson v. Williams* for the correct standard to be applied in determining whether an injunction should be granted due to systematic ineffective representation.[218]

The *Nicholson* decisions have already been cited by at least six other states in the past three years and these controversial and groundbreaking decisions will most likely continue to be referenced as this complex area of law is further explored and developed.

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[212] *Id.*

[213] *See id.*

[214] J.C. v. Florida Dep't of Children & Family Servs., 937 So. 2d 184, 191 (Fla. Dist. Ct. App. 2006) (Shepherd, J., dissenting) (quoting *In re* P.S. v. Dep't of Children & Family Servs., 825 So. 2d 530, 531 (Fla. Dist. Ct. App. 2002)) (emphasis omitted); *see also* J.O. v. Dep't of Children & Family Servs., 970 So. 2d 395, 399 (Fla. Dist. Ct. App. 2007) (Gersten, C.J., and Ramirez, J., concurring, Shepherd, JJ., concurring dubitante) (quoting *In re P.S.*, 825 So. 2d at 531).

[215] *J.C.*, 937 So. 2d at 191 (Shepherd, J., dissenting) (quoting *Nicholson v. Scoppetta*, 820 N.E.2d at 845); *see also J.O.*, 970 So. 2d at 399 (Gersten, C.J., and Ramirez, J., concurring, Shepherd, JJ., concurring dubitante) (quoting *Nicholson v. Scoppetta*, 820 N.E.2d at 845).

[216] *See* RONALD B. ADRINE & ALEXANDRIA M. RUDEN, OHIO DOMESTIC VIOLENCE LAW § 15:24 (2007).

[217] *See id.*

[218] Kenny A. v. Perdue, 356 F. Supp. 2d 1353, 1362 (N.D. Ga. 2005). *Nicholson v. Williams* dealt in great detail with issues of effectiveness and wages for court appointed attorneys in family court proceedings, but those issues are outside the scope of this article. *See* Nicholson v. Williams, 203 F. Supp. 2d 153, 253–57 (E.D.N.Y. 2002).

VII. CONCLUSION

The *Nicholson* litigation was groundbreaking and has had many positive effects in the areas of social welfare and domestic violence. There are still some remaining problems, but there are also some solutions to those problems. The use of malicious prosecution charges against CPS employees that wrongfully remove children and file neglect petitions can deter other employees from ignoring the mandates of *Nicholson v. Scoppetta*. Through more coordinated, comprehensive provision of services to domestic violence victims and their children, CPS can help to prevent the need for removal. Through close attention to the mandates of *Nicholson v. Scoppetta* by lower courts, and articulation of their considerations in their decisions, valuable guidance can be provided to CPS employees. And through policies focused on batterer accountability, such as referrals for criminal prosecution and charging the batterer with neglect, a message can be sent that domestic violence in the presence of children will not be tolerated. If all of this is done, hopefully there will be more stories like this: "So the boy . . . stayed with his mother, and they have left the father. Today, the mother regularly dresses her son in his favorite hockey jersey, waits with him for the school bus in the morning and is living out another day . . . ."[219]

[219] Kaufman, *supra* note 103, at A1.