Failure to Protect from Domestic Violence in Private Custody Contests

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Failure to Protect from Exposure to Domestic Violence in Private Custody Contests

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I. Introduction

Charlotte W. and Gary R. lived together for a short time after their son was born in 1997. In 2002, Charlotte moved to another town to live with her new boyfriend, David. In 2006, Charlotte called Gary and asked him to come and get her and their son because she was leaving David. Charlotte, Gary and their son moved in together, but Charlotte was arrested on outstanding traffic warrants within a month and was locked up. When she was released from jail, Charlotte went back to David, and she filed for custody. Pending trial, the court awarded her temporary custody.

At trial, Gary argued that Charlotte should not have custody because of domestic violence that had occurred between her and David in the presence of the child. Charlotte minimized the violence and denied that the child had been exposed to it. She also testified that when she and Gary were together, Gary had been convicted of assaulting her. The nine-year-old boy testified that he wanted to live with his mother, but Gary argued that Charlotte had continually denigrated him to the boy and interfered with their relationship.

These facts are from a recent New York case,1 which, like so many other custody disputes, involves domestic violence—violence between the parents when they were together and violence in the mother’s new home. The opinion does not discuss whether the father’s, Gary’s, home was also vio-

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lent. How should a judge decide what custody arrangement is in this child’s best interest? Does the judge even have enough facts to decide?

Today, statutes in all fifty states and the District of Columbia require courts to consider domestic violence committed by one parent against the other in resolving a custody or visitation dispute between parents. A significant number of states also have statutes or case law that require courts to consider the occurrence of violence in a child’s household or proposed household in resolving such disputes, regardless of who commits the violence or at whom it is directed. The latter type of law is aimed, not at a parent who commits domestic violence, but at a parent, often a victim, who fails to protect a child from being exposed to the violence.

In the case of Charlotte, Gary, and their son, the trial judge focused on the recent violence in Charlotte’s home, finding that “of necessity” it must have adversely affected the child. The judge minimized Gary’s earlier criminal conviction for assaulting Charlotte and concluded, therefore, that the child’s best interests required placing the boy with Gary, even though Charlotte had been his primary caretaker and the boy preferred to live with her. This article examines this case and others like it, as well as statutes that consider under what circumstances victims of domestic violence may lose custody because they have failed to protect children from being exposed to the violence.

The first section describes statutes from across the United States, enacted in the 1980s and 1990s, that require courts to consider violence between parents in determining what custody arrangement is in a child’s best interests. These statutes weight the custody decision against the parent who was violent on the theory that the parent presents a variety of dangers to the child, including the risk that the child will be harmed by being exposed to the violence. The second section discusses and analyzes cases and statutes that turn this claim of harm around and use it as a reason to deny custody to victims of domestic violence. By way of comparison, the third section looks at how claims of failure to protect from exposure to domestic violence are treated in the child welfare system. In the child welfare context, widely accepted reforms promote leaving children with their mothers who have been battered and offering services to these mothers to help them escape from the violence. These practices, which are endorsed by the “Greenbook” of the National Council of Juvenile and Family Court Judges, are based on the conclusion that preserving children’s relationships with their primary caretakers best serves the children’s interests. The

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2. 875 N.Y.S.2d at 282.
3. SUSAN SCHECHTER & JEFFREY L. EDLESON, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE AND CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE (1999) (called The GREENBOOK because of the color of its binding).
fourth section of the article argues that the lessons and techniques from the child welfare system can and should be brought to bear in private custody disputes involving claims of exposure to domestic violence. Transplanting these techniques to private custody contests is not simple, however, because child welfare agencies are not involved in private cases. Without their involvement, the facts may not be well-developed in the private cases, and battered mothers may not receive assistance in finding ways to leave their violent households. These problems are aggravated by the prevalence in private family law cases of parties who appear without an attorney to help them prepare and present their cases. The conclusion of the article recommends legislative and judicial changes that would move domestic relations courts toward a better approach to failure-to-protect claims in custody disputes.

II. The Emergence of Statutes Requiring Courts to Consider Violence Between Parents

At the end of the 1970s and the beginning of the 1980s, two principles structured courts’ determinations of which child custody arrangements were in the best interest of children—a preference for the primary caretaker in cases in which sole custody and visitation were awarded, and, in the alternative, a preference for joint custody. Both preferences are rooted in the highly influential argument of Goldstein, Freud, and Solnit that children’s emotional well-being should be the primary consideration in custody decisions.4

Goldstein, Freud, and Solnit believed that a child’s relationship with his or her “psychological parent” should be protected at almost all costs.5 However, determining who is a child’s psychological parent requires expert testimony and is, therefore, an expensive way to resolve custody cases.6 A related rule, the primary caretaker preference, does not require expert testimony and has, at least partly for that reason, become more widely accepted than the psychological parent preference. The primary


5. Id. at 99 (1973) (defining the least detrimental alternative as “that child placement . . . which maximizes, in accordance with the child’s sense of time . . . the child’s opportunity for being wanted . . . and for maintaining on a continuous, unconditional, and permanent basis a relationship with at least one adult who is or will become the child’s psychological parent.”).

6. For a dismissal of the psychological parent test in custody contests between parents because of doubts that experts would agree which parent would be less detrimental to the child, because of difficulty of evaluating psychological relationships to this degree of fineness, and because the test relies on predictions that cannot be made with confidence, see Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 LAW & CONTEMPPROBS. 226, 287 (1975).
caretaker analysis is supposed to identify the person most likely to be the best caregiver for the child because of his or her experience and assumed emotional bond with the child, as well as because it is consistent with the more general goal of promoting continuity and stability in the child’s life.\textsuperscript{7} Today, statutes or case law in all jurisdictions provide that placing a child with the primary caretaker is at least important for courts to consider in making the best interests decision.\textsuperscript{8}

The psychological parent preference was also challenged as being too simplistic in its approach to children’s bonds to adults, since many children have important relationships with a number of caregivers, particularly with both parents. This argument, as well as the emerging fathers’ rights movement, gave rise to the other major legal rule that structures the best interests analysis, the preference for joint custody.\textsuperscript{9} California enacted legislation endorsing joint custody in 1979, though other states already had statutes that authorized this arrangement.\textsuperscript{10} Nevertheless, California was a trendsetter, and within three years, more than thirty states had enacted legislation authorizing joint custody in some form.\textsuperscript{11}

The first laws requiring courts to consider domestic violence between a child’s parents were enacted against this backdrop of the primary caretaker and joint custody preferences. The most effective way to overcome a preference for joint custody or in favor of a primary caretaker is often to go negative—to show that the parent who benefits from the preference is unfit or, as more often is expressed today, that placing the child in that parent’s custody would be detrimental to the child.\textsuperscript{12} Laws providing that courts must consider evidence that one parent battered the other are particularly powerful tools for resisting requests for joint custody.

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\textsuperscript{7} James G. Dwyer, \textit{A Taxonomy of Children’s Existing Rights in State Decision Making About Their Relationships}, 11 WM. & MARY BILL RTS. J. 845, 918–19 (2003). Related to the primary caretaker rule is the ALI approximation rule—that custody should be allocated so that the amount of time the child spends with each parent approximates the amount each parent spent performing caretaking functions before the separation. \textit{AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION} (2000). The ALI proposal had been enacted in West Virginia. \textit{W.Va. CODE ANN. § 48-9-206(a)} (Michie 2002).

\textsuperscript{8} \textit{Id.} Dwyer criticizes the primary caretaker rule as an imperfect proxy that fails to take account of changes in the family accompanying divorce; he argues, therefore, that the rule does not further children’s welfare in a significant proportion of cases, but he does not cite data. \textit{Id.} at 924.


\textsuperscript{10} \textit{Carbone, supra} note 9, at 182.

\textsuperscript{11} \textit{JOINT CUSTODY AND SHARED PARENTING} 159, 209, and appendix A (Jay Folberg ed., 1984).

\textsuperscript{12} \textit{E.g.}, Harris v. Harris, 546 A2d 208, 214 (Vt. 1988) (holding that primary caretaker sta-
A. The Legal Effect of Violence Between a Child’s Parents

The first domestic violence/custody statutes provided that battering was among the factors that should inform a court’s determination of a child’s best interests. More recent statutes in many states go further, creating a presumption against awarding custody to the violent parent. As of early 2010, twenty-two states had enacted such presumptions, whereas the other twenty-eight states and the District of Columbia had only the former kind of statute. Other relatively recent statutory innovations provide that if both parents have engaged in violence, the parent who is less likely to
continue to be violent should receive custody\textsuperscript{15} or that the person who was not the primary aggressor should.\textsuperscript{16} In a number of states, friendly parent statutes, which favor the parent who is more likely to foster the child’s relationship with the other parent, do not apply in domestic violence cases.\textsuperscript{17} Similarly, several states provide that a parent’s absence or relocation should not be considered negatively if it was a response to the other parent’s violence.\textsuperscript{18}

\textbf{B. Statutory Refinements—the Triggering Level of Violence}

Most states’ statutes do not discuss specifically what level and frequency of violence triggers the consequences discussed above. The statutory approaches in states that do address these issues vary. At one extreme, the New Hampshire and Nevada statutes define abuse in terms of the state criminal codes, requiring that the allegedly violent person’s conduct fit into one of a list of crimes in the statute.\textsuperscript{19} At the other extreme,

\begin{itemize}
\item \textsuperscript{17} See, e.g., Al. Stat. § 25.24.150(c)(6) (2009); Iowan Code § 598.41(1)(b) (2009). In the absence of such provisions, some domestic violence advocates argue that courts not infrequently give custody or at least unsupervised visitation to batterers, particularly apparent in states with friendly parent statutes. See, e.g., Mary A. Kernic et al., Child Custody Determinations Among Couples with a History of Intimate Partner Violence, 8 Violence Against Women 991 (2005); Allison C. Morrill et al., Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother, 8 Violence Against Women 1076 (2005); 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 & Law 657 (2003).
\item \textsuperscript{19} N.H. Rev. Stat. Ann. § 173-B:1 (2009): Abuse’ means the commission or attempted commission of one or more of the following acts by a family or household member or current or former sexual or intimate partner and where such conduct constitutes a credible threat to the plaintiff’s safety:
\begin{itemize}
\item (a) Assault or reckless conduct as defined in RSA 631:1 through RSA 631:3.
\item (b) Criminal threatening as defined in RSA 631:4.
\item (c) Sexual assault as defined in RSA 632-A:2 through RSA 632-A:5.
\item (d) Interference with freedom as defined in RSA 633:1 through RSA 633:3-a.
\item (e) Destruction of property as defined in RSA 634:1 and RSA 634:2.
\item (f) Unauthorized entry as defined in RSA 635:1 and RSA 635:2.
\item (g) Harassment as defined in RSA 644:4.
\end{itemize}
\end{itemize}


Domestic violence occurs when a person commits one of the following acts against or upon his spouse, former spouse, any other person to whom he is related by blood or marriage, a person with whom he is or was actually residing, a person with whom he has had or is having a dating relationship, a person with whom he has a child in common, the minor child of any of those persons, his minor child or any person who has been appointed the custodian or legal guardian for his minor child:
the definition in some state codes is so broad that it could cover a single act of assault. For example, the Arizona statute provides that a person commits domestic violence if he or she “intentionally, knowingly or recklessly causes or attempts to cause sexual assault or serious physical injury, places a person in reasonable apprehension of imminent serious physical injury to any person, or engages in a pattern of behavior for which a court may issue an ex parte order to protect the other parent who is seeking child custody or to protect the child and the child’s siblings.”20 The California, Kentucky, and Massachusetts definitions are substantially similar.21 Some states define abuse both in general terms and by reference to

(a) A battery.
(b) An assault.
(c) Compelling the other by force or threat of force to perform an act from which he has the right to refrain or to refrain from an act which he has the right to perform.
(d) A sexual assault.
(e) A knowing, purposeful or reckless course of conduct intended to harass the other. Such conduct may include, but is not limited to:
(1) Stalking.
(2) Arson.
(3) Trespassing.
(4) Larceny.
(5) Destruction of private property.
(6) Carrying a concealed weapon without a permit.
(7) Injuring or killing an animal.
(f) A false imprisonment.
(g) Unlawful entry of the other’s residence, or forcible entry against the other’s will if there is a reasonably foreseeable risk of harm to the other from the entry.

a person has “perpetrated domestic violence” when he or she is found by the court to have intentionally or recklessly caused to cause bodily injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another, for which a court may issue an ex parte order pursuant to Section 6320 to protect the other person seeking custody of the child or to protect the child and the child’s siblings.

“Domestic violence and abuse” means physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple.

“Abuse” shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing bodily injury; or (b) placing another in reasonable fear of imminent bodily injury. “Serious incident of abuse” shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing serious bodily injury; (b) placing another in reasonable fear of imminent serious bodily injury; or (c) causing another to engage involuntarily in sexual relations by force, threat or duress.
the definitions of certain crimes.\textsuperscript{22}

Some states set out what kind of proof is admissible or even required to prove domestic violence, but again, provisions vary. In Arizona, the court must consider findings from other courts, police reports, medical reports, child protective service records, domestic violence shelter records, school records, and witness testimony.\textsuperscript{23} In California, a court may require independent corroboration that abuse occurred from records of such entities,\textsuperscript{24} and the statutes forbid a court from basing its findings “solely on conclusions reached by a child custody evaluator or on the recommendation of the Family Court Services staff.”\textsuperscript{25} In Iowa, for purposes of determining whether a “history of domestic abuse” exists, the court must consider whether proceedings to obtain a protective order have been initiated, whether an order has issued, and whether it has been violated.\textsuperscript{26} On the other hand, in Massachusetts, the issuance of an ex parte domestic violence restraining order is not admissible to show abuse.\textsuperscript{27}

\textit{C. Statutory Refinements—Proof of the Impact of Violence}

Most states’ statutes do not require proof that the child witnessed the violence or that the violence had an effect upon the child. Instead, the statutory consequences of a finding of abuse are triggered automatically; in fact, some statutes go as far as to say that whether the child witnessed the violence is irrelevant.\textsuperscript{28}

At least six state statutes, however, require the court to determine whether the violence had an adverse effect on the child. Massachusetts requires the court to make findings regarding the effects of domestic violence on the child.\textsuperscript{29} Statutes in Maine, Minnesota, and Connecticut also require the court to consider the effect of violence on the child.\textsuperscript{30} The


\textsuperscript{24} \textit{Cal. Fam. Code} § 3011(3) (West 2010).

\textsuperscript{25} \textit{Cal. Fam. Code} § 3044(e) (West 2010).

\textsuperscript{26} \textit{Iowa Code} § 598.41(3)(c) (2009).


\textsuperscript{30} \textit{Me. Rev. Stat. Ann. tit. 19, § 1653(3)(L)(1)-(2)} (West 2009) (consider “the existence of domestic abuse between the parents, in the past or currently, and how that abuse affects the child emotionally and the safety of the child”); \textit{Minn. Stat. Ann.} § 257.025(a)(12) (West 2009) (consider “the effect on the child of the actions of an abuser, if related to domestic abuse [. . . ] that has occurred between the parents or the parties”); \textit{Conn. Gen. Stat.} § 46b-56(c)(14) (2009) (consider “the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child”).
emphasis in the New Hampshire and Kentucky statutes is somewhat different, requiring the trial court to look at the impact of the abuse on the child and on the relationship between the child and the abusing parent.\textsuperscript{31}

\textbf{D. Domestic Violence as a Danger to Children}

Advocates for laws requiring courts to consider domestic violence had to overcome the argument that domestic violence directed at an adult is irrelevant to a determination of the child’s best interests.\textsuperscript{32} They relied on empirical studies showing that men who abuse their mates harm or create risks of harm to children in the household, even if the children have not been abused themselves.

The first argument is that men who batter children’s mothers are also likely to abuse the children physically. Lenore Walker, who is usually credited with having identified the battered woman syndrome, wrote that fifty-three percent of men who abused their domestic partners also abused their children.\textsuperscript{33} Put a slightly different way, the estimates of the overlap between children who witness men battering the children’s mothers and children who are themselves battered by the men range from thirty to forty percent to sixty percent.\textsuperscript{34} In addition, evidence shows that children who witness parental violence have more aggressive, antisocial, and fearful behavior; more anxiety, aggression, depression, and temperamental problems; less empathy and self-esteem; and lower verbal, cognitive, and motor abilities. They may also carry violence and acceptance of violence into their adult relationships.\textsuperscript{35} This research has been widely accepted


\textsuperscript{32} In 1991, in most states the law was silent regarding the significance of domestic violence for custody or said that it was irrelevant. See Naomi R. Cahn, Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions, 44 Vand. L. Rev. 1041, 1042 (1991).

\textsuperscript{33} Lenore Walker, The Battered Woman Syndrome 59 (1984). She added that battered women are eight times more likely to abuse children than women who are not and that twenty-eight percent of women who were abused abuse their children. Id. at 59–60. See also Murray A. Straus, Richard J. Gelles, & Suzanne K. Steinmetz, Behind Closed Doors: Violence in the American Family 216–17 (1988) (Battered women are much more likely to use harsh physical punishment or to be abusive physically than other mothers are.).

\textsuperscript{34} Peter Jaffe, David A. Wolfe, & Susan K. Wilson, Children of Battered Women 22–23 (1990); Jeffrey L. Edleson, The Overlap Between Child Maltreatment and Woman Battering, 5 Violence Against Women 134 (1999).

and provides the justification for the statutes that require courts to take
domestic violence into account in making custody decisions.

The argument that the presence of domestic violence in a household
should be a reason to avoid placing a child in that household also expres-
es itself in a way much less favorable to victims of domestic violence. In
addition to the risks to children discussed above, some evidence shows
that mothers who are battered are less able to understand and respond to
their children’s needs, further aggravating the problems for the children.
As the next section discusses, litigants in private custody disputes are
using this evidence to support the argument that a parent with whom the
child would otherwise likely be placed should not have custody because
she is the victim of domestic violence, and some legislatures have begun
to include this circumstance as a factor for courts to consider in deciding
custody.

III. Failure to Protect in Private Custody Disputes

In custody contests between parents, failure to protect children from the
adverse effects of exposure to violence is often used to overcome a pre-
sumption or a preference that favors the child’s primary caretaker.
Evidence that a child has been exposed to violence in his or her household
may also be used to justify modifying the existing custody arrangement.
Similarly, evidence that the child lives in a violent household may be used
to overcome the constitutionally-based preference that children be placed
in the custody of their parents. The next section surveys cases that illus-
trate these points.

A. Parent Versus Parent Contests

In all jurisdictions, modification of an existing custody arrangement
requires proof of changed circumstances, and, in some states, the peti-
tioner must further prove that the existing arrangement is harmful to the
child, a rule that expresses a strong emphasis on the values of stability and
continuity in a child’s life. Even in a jurisdiction with such a stringent

Problems in Maritally Violent Families, 15 J. ABNORMAL CHILD PSYCHOLOGY 165 (1987);
Margaret Elbow, Children of Violent Marriages: The Forgotten Victims, 63 SOC. CASEWORK
465 (1982).

37. In other words, the evidence of failure to protect is used to rebut a presumption or over-
come a preference, just as evidence that a parent had committed violence is used to overcome
a custody rule favorable to that parent. See text accompanying supra note 12.


281 (1970). For applications of this provision, see In re Custody of Dallenger, 568 P.2d 169
(Mont. 1977); Laib v. Laib, 751 N.W.2d 228 (N.D. 2008). The ALI Principles of Family
rule, if the court is convinced that the child is being harmed by being in a household where there is violence, the motion to modify is likely to be successful. New York courts have been especially receptive to arguments to modify custody because of domestic violence in the child’s household, although they are not alone.

For example, in 2009, in *Wentland v. Rousseau*, a New York intermediate appellate court upheld a family court order awarding custody of a child born to an unmarried couple to the father, even though the child had lived with the mother for almost all of his nine years and expressed a preference for living with the mother, largely because the mother’s boyfriend was repeatedly abusive to her while living with her and the child. The court rejected the mother’s argument that the trial court’s analysis of the child’s interests was flawed because it failed to give enough weight to the father’s prior criminal conviction for assaulting her. At least seven other New York cases decided since 2004 authorize changes of custody based largely on proof that the custodial parent had been the victim of domestic violence at the hands of a new partner. On the other hand, in 2009, the New York appellate division ruled that a father’s petition to modify should be denied, despite an incident in which the mother’s boyfriend had broken down a door and attempted to strangle her while she was sleeping.

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Dissolution relax the requirements somewhat, providing that “a court may modify a court-ordered parenting plan if it finds, on the basis of facts that were not known or have arisen since the entry of the prior order and were not anticipated therein, that a substantial change has occurred in the circumstances of the child or of one or both parents and that a modification is necessary to the child’s welfare.” ALI PRINCIPLES, supra note 7, § 2.15(1). The Principles also permit modifications if the parents agree, the modification reflects a de facto change already in place for at least six months, the change is necessary to accommodate an older child’s preferences, and other circumstances. Id. § 2.16.


41. See also Neail v. Deshane, 796 N.Y.S.2d 435 (App. Div. 2005) (initial custody award of child who has been living with mother for four years granted to father because mother exposes child to violent relationships with men); K.D. v. J.D., 791 N.Y.S.2d 870 (Fam. Ct. 2004) (unpublished opinion) (custody modified to father because mother is abused by boyfriend, even though she is the more capable and nurturing parent and the children are more bonded to her); Assini v. Assini, 783 N.Y.S.2d 51 (App. Div. 2004) (custody modified to father because mother’s boyfriend abuses her); Drew v. Gillin, 792 N.Y.S.2d 691 (App. Div. 2005) (custody modified from father because mother has been victim of domestic violence in child’s presence and he drinks too much, has been arrested for driving while intoxicated); Musgrove v. Bloom, 2005 WL 1414461 (App. Div. 2005) (custody modified to father because mother withholds child from him and is in a new violent relationship); Thomas v. Osborne, 857 N.Y.S.2d 323 (App. Div. 2008) (modifies joint custody order to sole custody for father on finding that mother violated court’s order of protection by allowing children to be exposed to two individuals with whom she was in relationships, one of whom had a history of domestic violence and child neglect); Battista v. Fasano, 838 N.Y.S.2d 178 (App. Div. 2007) (upholds transfer of custody to father based on finding that mother’s cohabiting fiancé had violent temper and was arrested after domestic dispute with her).
and the child was present. The court found that the mother had “responded appropriately” to the situation by ending the relationship, having the boyfriend arrested, and filing for a restraining order.

Courts in at least six other states have recently upheld modification orders or grants of initial custody to a parent, which resemble modifications, because the child has lived with the other parent for years in an informal arrangement, based on evidence of domestic violence in the original custodial parent’s home. These states are Alabama, Alaska, California, Kentucky, Michigan, Mississippi, Missouri, and Tennessee. The opinions in these cases for the most part do not require proof that the child suffered from exposure to the violence or that the child even witnessed it.

43. J.M. v. D.V., 877 So. 2d 623 (Ala. 2003) (initial award of custody of five-year-old child who has lived with mother since birth to father because mother’s husband is violent toward her).
44. Iverson v. Griffith, 2006 WL 2578692 (Alaska 2006) (upholding transfer of custody from mother to father based on finding that mother was violently assaulted by men she had entered into relationships with on several occasions. No evidence was submitted suggesting child was ever present to witness a specific assault. However, the court says that the serial nature of mother’s abusive relationships implies that the specific incidents alleged were likely not isolated and because that child can legally be exposed to domestic violence without ever actually witnessing it). Id. at *3–4.
46. McAninch v. Pittman, 2003 WL 1227159 (Ky. Ct. App. 2003) (not for publication) (modification of custody from to father affirmed because mother moved back in with abusive stepfather after juvenile court intervened on the basis of failure to protect, mother permitted only supervised visitation); compare Chapman v. Chapman, 2003 WL 21513513 (Ky. App. 2003) (not for publication) (modification of custody to father rejected, where mother was awarded custody when violent marriage to father broke up, child welfare authorities placed child with father because mother’s new relationship was violent, but returned child after mother broke off relationship at the insistence of the authorities and shortly thereafter father sought custody in domestic relations court).
48. Pruett v. Prinz, 979 So. 2d 745 (Miss. Ct. App. 2008) (custody transferred from mother to father partly because child exposed to incidents of domestic violence between mother and second husband); but see Weigand v. Houghton, 730 So. 2d 581 (Miss. 1999) (father’s request to modify custody order that granted primary physical custody to mother because of stepfather’s violence to mother denied because father is openly gay).
49. Davidson v. Fisher, 96 S.W.3d 160 (Mo. Ct. App. 2003) (initial custody award of child who has been living with mother for three years because mother has been involved with violent man and is not a “friendly parent”); see also Stangeland v. Stangeland, 33 S.W.3d 696 (Mo. Ct. App. 2000) (upholding grant of sole custody of child to father at divorce, in part because child was exposed to at least verbal arguments between mother and her new boyfriend while father had not exposed child to domestic violence either in his new household or while married to mother).
50. In re T.C.D., 261 S.W.3d 734 (Tenn. Ct. App. 2007) (custody modified to father because of the mother’s persistent interference with the latter’s visitation rights and because she expressed indifference toward his history of domestic violence and child abuse to the point that the child’s
B. Parent Versus Nonparent Cases

Appellate decisions from at least four states in recent years address grandparents’ requests for custody that were based on a claim that a child’s custodial parent was the victim of domestic violence and that the child’s exposure to the violence was detrimental to the child. In cases from West Virginia and Texas, paternal grandparents argued that they should have custody because of their own sons’ violence toward the children’s mothers. However, courts have generally not been receptive to this kind of claim in the absence of evidence of actual harm to the child.

In the Texas case, the state supreme court wrote, “A parent should not be denied custody of a child based on the fact that he or she has been battered. We hold that evidence that a parent is a victim of spousal abuse, by itself, is no evidence that awarding custody to that parent would significantly impair the child.” The court also observed, “As the abuser cannot take advantage of his acts of abuse in a custody battle with the abused, so the abuser’s parents also may not benefit from that abuse.” Similarly, in a 2005 case from Oregon, the intermediate appellate court reversed a grant of custody to a maternal grandmother who had raised the child for the last five years; the parents could not care for the child because they had alcohol and drug problems, and the father was violent. The appeals court concluded that the father was making some progress toward solving his problems, and that the evidence, therefore, did not support a finding that he could not provide adequate care for the child.

The only appellate case upholding a custody order favoring the grandparents came from Ohio; in Christopher A.L. v. Heather D.R. the court found that the evidence supported the grant of custody to the grandparents, rather than the father, because he was violent to his current wife, had never lived with the child, and drank to excess.

As this survey of cases demonstrates, even in the absence of express statutory authority, parties are arguing that violence in a child’s household that is not directed at the child still harms the child and that, therefore, the child should not live in the violent household, regardless of other facts that would support a finding in favor of placing the child there. Legislatures in a number of states have also begun to enact statues expressing this idea, as the next section discusses.

well-being was threatened); McEvoy v. Brewer, 2003 WL 22794521 (Tenn. Ct. App. 2003) (not for publication) (custody modified to father because mother’s new husband is violent to her).
52. Lewelling v. Lewelling, 796 S.W.2d 164 (Tex. 1990).
53. Id. at 167.
54. Id. at 168.
C. Statutory Provisions

Statutes in at least eight states can readily be interpreted to allow courts to count being the victim of domestic violence against a parent who seeks custody or visitation. In some states, statutes explicitly allow the court to consider any violence in the household in determining custody. For example, an Alaska statute provides: “In determining whether to award shared custody of a child the court shall consider . . . (8) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents.” In the same vein are statutes from Connecticut, Illinois, Michigan, and Pennsylvania.

57. These statutes are distinguishable from statutes that require courts to consider whether a parent seeking custody or someone in the parent’s household has committed a sex offense or child abuse. See, e.g., Colo. Rev. Stat. Ann. § 14-10-124(1.5)(a)(IX) (West 2009); 23 Pa. Cons. Stat. Ann. § 5302(b) and (b.1) (West 2009). See also Del. Code Ann. tit. 13, § 722(a)(8) (2009) (conviction of any criminal offense). Frequently this kind of statute includes a rebuttable presumption that living in a household of a convicted sex offender or child abuser is contrary to the child’s best interests. See, e.g., D.C. Code § 16-914(a)(2) (2009) (rebuttable presumption that joint custody is not in child’s best interests if parent was convicted of child abuse, child neglect, or parental kidnapping); Kans. Stat. Ann. § 60-1610(3)(B)(x) and (D) (West 2009); Neb. Rev. Stat. § 43-2933 (2009); Ohio Rev. Code Ann. § 3109.04(C) (West 2009). See also Nev. Rev. Stat. Ann. § 125C.220 (West 2009) (rebuttable presumption against awarding custody or visitation to parent who has been convicted of first-degree murder of the child’s other parent); N.Y. Dom. Rel. Law § 240(1-c) (McKinney 2009) (prohibits custody or visitation order in favor of person convicted of first or second-degree murder of child’s parent, legal custodian, legal guardian, sibling, half-sibling, or step-sibling unless child of suitable age assessing visits, child’s custodian assessors, or parent who was convicted of murder was a victim of domestic violence and homicide was causally connected to the violence); 23 Pa. Cons. Stat. Ann. § 5303(b.2) (West 2009) (prohibits awarding custody or visitation to parent who has been convicted of murdering the child’s other parent unless the child is of suitable age and assents to the visit).


59. Conn. Gen. Stat. § 46b-56(c) (2009) (“In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so may consider, but shall not be limited to, one or more of the following factors: . . . (14) the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child.”).

60. 750 Ill. Comp. Stat. § 5/602(a)(7) (2009) (“(a) The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including: . . . (7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person.”)

61. Mich. Comp. Laws § 722.23(k) (2009) (“Sec. 3. As used in this act, ‘best interests of the child’ means the sum total of the following factors to be considered, evaluated, and determined by the court: . . . (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.”). 

62. 23 Pa. Cons. Stat. Ann. § 5303(a)(3) (West 2009) (“Award of custody, partial custody or visitation . . . (3) The court shall consider each parent and adult household member’s present and past violent or abusive conduct which may include, but is not limited to, abusive conduct as defined under the act of October 7, 1976 (P.L.1090, No. 218), known as the Protection From Abuse Act.”).
A second kind of statute declares that witnessing domestic violence endangers children, which would support a court’s considering violence against a custodial parent as part of a general best-interests analysis. For example, a section of the California Family Code says, “The Legislature further finds and declares that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child.”63 Similarly, the Nebraska Code provides, “Given the potential profound effects on children from witnessing child abuse or neglect or domestic intimate partner abuse, as well as being directly abused, the courts shall recognize the duty and responsibility to keep the child or children safe when presented with a preponderance of the evidence of child abuse or neglect or domestic intimate partner abuse, including evidence of a child being used by the abuser to establish or maintain power and control over the victim . . .”64 Finally, a Hawaii statute provides, “The court may refer but shall not order an adult who is a victim of family violence to attend, either individually or with the perpetrator of the family violence, counseling relating to the victim’s status or behavior as a victim as a condition of receiving custody of a child or as a condition of visitation.”65

As this review has demonstrated, case law, statutes, or both in at least fifteen states allows courts in family law cases to consider domestic violence in a current or proposed custodial parent’s home as a reason to deny custody to that parent, even where that parent is herself the victim of the violence. Such claims have been made but rejected by appellate courts in at least three more states. These statutes and appellate opinions do not always provide much guidance about how much violence triggers an inquiry, whether proof of specific emotional harm to the child is required, how to resolve cases if the person raising the claim may have committed violent acts himself or herself, and other issues.

As courts resolve these questions, their work should be informed by information that has been developed in cases concerning failure to protect claims in the juvenile courts. For more than fifteen years, state child welfare agencies have been alleging that mothers who are victims of domestic violence are mistreating their children by allowing the children to be exposed to the violence. The next section describes how systemic responses to these claims have evolved over the years.

63. CAL. FAM. CODE § 3020 (West 2010). See also CAL. FAM. CODE § 3011 (West 2010), which provides that in determining a child’s best interests, the court shall consider any history of abuse by a parent or person seeking custody against any child, the other parent, or the perpetrator’s parent, spouse, custodian, or person whom he or she is dating. A number of other states’ statutes treat violence by a parent seeking custody as relevant, regardless of who the victim is. See, e.g., 750 ILL. COMP. STAT. § 5/602(a)(7) (2009).
64. NEB. REV. STAT. § 43-2921 (2009).
IV. Failure to Protect from Exposure to Domestic Violence in the Child Welfare System

By the early 1980s, juvenile courts were regularly holding that a parent who does not extricate her children from a household in which the children are being abused by another adult can be found neglectful, and, if the problem is not corrected, that her parental rights can be terminated.66 By the 1990s, courts were applying this theory to victims of domestic violence who “allowed” their children to be exposed to domestic violence by not leaving their batterers.67 Beginning in the late 1990s, states began to amend their juvenile codes to include exposing a child to domestic violence as an explicit basis for an adjudication of child abuse or neglect.68 This trend was controversial, however. Critics argued that the practice unfairly blamed victims of domestic violence for their own victimization, failed to hold batterers accountable, harmed children’s interests by removing them from their mothers unnecessarily, and deterred women who wanted to leave their batterers from seeking assistance.69

In 1999, the National Council of Juvenile and Family Court judges adopted a statement of best practices in child welfare cases involving domestic violence, familiarly called the Greenbook, that adopted the critics’ perspective.70 The Greenbook, in turn, was the foundation for groundbreaking litigation that challenged the way child welfare/domestic violence cases were routinely handled in New York City.

This litigation began as a class action in federal district court under 42 U.S.C. § 1983, brought by mothers and children, who alleged that as a matter of policy the New York City Administration for Children’s Services (ACS) routinely charged mothers with neglect in juvenile court solely on the basis that they were domestic violence victims and then removed their children to foster care, rather than offering them services on a voluntary basis.71 The plaintiffs argued that these practices were unnecessary to protect children and violated the mothers’ and children’s substantive and procedural due process rights.

69. Id. at 26–28 (collecting sources). See also Elaine Chiu, Confronting the Agency in Battered Mothers, 74 S. CAL. L. REV. 1223 (2001).
70. SCHECHTER & EDLESON, GREENBOOK, supra note 3.
To support their argument that the practices were not necessary to protect children, the plaintiffs presented the testimony of Dr. Jeffrey Edleson, one of two principal authors of the Greenbook. He testified that at least half the children in three studies who witnessed domestic violence had few or no problems compared with children in a control group and that there was “a great deal of variability in children’s experiences and the impact of those experiences.”72 Another of plaintiffs’ experts, Dr. Evan Stark, testified that children “rarely experience long-term effects from witnessing domestic violence.”73 Relying on empirical studies, Stark testified that more than 80 percent and sometimes more than 90 percent of children exposed to very severe domestic violence “tested psychologically normal, were self-confident, had positive images of themselves, and were emotionally well off.”74

The federal trial judge found that the plaintiffs’ factual claims were true75 and that the ACS practices violated procedural and substantive due process.76 The judge relied on the expert testimony and cited the Greenbook extensively.77 The principles from the Greenbook that he highlighted included:

1. Mothers should not be accused of neglect for being victims of domestic violence. . . . When [child protective services] files a petition, it should allege and be able to support the contention that the child has suffered harm and that the mother can not adequately protect the child with assistance from [protective services].78

2. Batterers should be held accountable.79

3. Children should be protected by offering battered mothers appropriate services and protection. . . . [Case plans] should focus on, among other things, “securing safe housing—in the adult and child victims” own residence whenever possible or with her family or friends, in subsidized housing, in shelter, or in transitional or permanent housing [and] providing voluntary advocacy services for battered women within the child protection system.80

4. Separation of battered mothers and children should be the alternative of last resort.81

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73. *Id.* at 198.
74. *Id.*
75. *Id.* at 228–29.
78. *Id.*
79. *Id.* at 201.
80. *Id.* at 202.
81. *Id.* at 203. Dr. Stark recommended that a child should be removed to foster care only if the mother has been offered an appropriate array of services, efforts to prosecute the batterer have been pursued aggressively, and “[t]here is a demonstrable safety risk to the child that outweighs the risks associated with foster placement.” *Id.* at 204.
The state appealed, and the Second Circuit held that the evidence supported the trial court’s findings. However, the court ruled that before reaching the constitutional issues, the federal courts should clarify whether the actions of the child welfare agency were, in fact, authorized by state law. It, therefore, certified questions about state law to the New York Court of Appeals, which responded that under state law proof that a mother did not protect a child from witnessing domestic violence was alone insufficient to prove child neglect. In light of this opinion, the Second Circuit remanded the case to the district court for reconsideration. The city then settled with the plaintiffs, agreeing not to put children in foster care solely on the basis that their mothers had been abused.

While efforts to implement the Greenbook recommendations have not been entirely successful, its approach toward parents who are victims of domestic violence is widely regarded as authoritative in the child protection realm, and its fundamental premises are taken seriously. For purposes of this article, the most important are that the impact on children of being exposed to domestic violence varies tremendously, that routinely separating children from their battered mothers harms many children and is not justified in many cases, and that services should be offered to battered mothers to enable them to retain custody of their children if possible to do so safely. The next section examines how these insights should affect private custody disputes in which allegations of failure to protect from exposure to violence are raised.

V. Lessons from the Child Protection System for Private Custody Disputes

Some differences between private custody contests and child welfare proceedings support the conclusion that domestic relations courts do not need to be as reluctant to change custody in response to claims that a child as been exposed to domestic violence as juvenile courts are in child welfare cases. On the other hand, often the concerns about whether a child’s best interests are served by removing a child from the custody of

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83. Id. at 154.
86. Leslie Kaufmann, City Settles Suit Over Separating Abused Mothers from Children, N.Y. TIMES (Dec. 18, 2004).
87. Over five to seven years during the early 2000s, federal agencies provided funds to six communities to implement the Greenbook recommendations, and then the sites were studied to assess the effectiveness and impact of efforts. THE GREENBOOK EVALUATION TEAM, THE GREENBOOK INITIATIVE FINAL EVALUATION REPORT (2008), available at http://www.thegreenbook.info/documents/FinalReport_Combined.pdf.
a parent who has been the victim of domestic violence are as salient in a private custody dispute as in child welfare case, and domestic relations courts are structurally less well-equipped to resolve these concerns than juvenile courts are. For these reasons, and because children’s interests are the most important consideration in these cases, I argue that domestic relations courts should be hesitant to change custody based only on claims that a child is being exposed to domestic violence, just as juvenile courts should be.

A. Arguments Supporting the View That Custody Should Readily Be Changed in Response to Allegations of Failure to Protect from Exposure to Domestic Violence

In a custody contest between two parents, the parents are on equal footing for constitutional purposes, and a court order changing custody from one to the other does not automatically present a substantive due process issue. In contrast, in custody disputes between parents and nonparents and in child welfare cases, constitutional protection for parental rights requires that the nonparent or the state carry a heavy burden to justify a court order taking custody away from the parent.

In a private custody dispute involving a parent and a third party, due process requires a legal preference for the parent. In Troxel v. Granville, the Supreme Court held that a Washington state visitation statute had been applied so as to violate parents’ constitutional rights to custody. The statute allowed a court to order that nonparents be allowed to visit a child over the parents’ objection if the court found visitation to be in the child’s best interests. Writing for a plurality, Justice O’Connor characterized the statute as “breathtakingly broad” and said that it “effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent’s children to state-court review. . . . [The statute] contains no requirement that a court accord the

88. Even though grandparents’ and other relatives’ claims to custody or visitation are subordinate to parents’ rights, the law gives those claims special protection in a variety of ways. In child welfare cases, federal law requires that states “consider [ ] giving preference to an adult relative over a non-related caregiver when determining a placement for a child,” 42 U.S.C. § 671(a)(18), and all fifty states had enacted statutes that particularly recognized and protected grandparents’ visitation rights by the time the Supreme Court decided Troxel in 2000. Troxel, 530 U.S. 57, fn*. The great majority of states continue to make special provisions for grandparents’ claims to visit their grandchildren. Michael K. Goldberg, A Survey of the Fifty States’ Grandparent Visitation Statutes, 10 MARQ. ELDER’S ADVISOR 245 (2009). See also Daniel R. Victor & Keri L. Middleditch, Grandparent Visitation: A Survey of History, Jurisprudence, and Legislative Trends Across the United States in the Past Decade, 22 J. AM. ACAD. MATRIM. LAW. 391 (2009).

89. 530 U.S. 57 (2000).
parent’s decision any presumption of validity or any weight whatsoever. . . . Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge’s determination of the child’s best interests. . . .”

The opinion further criticized the trial court order because the judge did not find that the children’s mother was unfit and seemed to have put the burden of proof on the mother to prove that visitation would harm the children before it could be denied.

Similarly, in a child welfare case, the state seeks to limit the parent’s constitutionally protected right to raise a child. Juvenile court abuse-and-neglect statutes allow states to intrude on parental authority to protect children, but they may not do so simply because a judge thinks that what the State offers is better than what the parents have to give. Explaining a preference for leaving children at home, even after they have been found to be abused or neglected, the Connecticut Supreme Court, in In re Juvenile Appeal (83-CD) said:

. . . [Courts and state agencies must keep in mind the constitutional limitations imposed on a state which undertakes any form of coercive intervention in family affairs. The United States Supreme Court has frequently emphasized the constitutional importance of family integrity. “The rights to conceive and to raise one’s children have been deemed ‘essential,’ ‘basic civil rights of man,’ and ‘[r]ights far more precious . . . than property rights.’ . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.” It must be stressed, however, that the right to family integrity is not a right of the parents alone, but “encompasses the reciprocal rights of both parents and children. It is the interest of the parent in the ‘companionship, care, custody and management of his or her children,’ and of the children in not being dislocated from the ‘emotional attachments that derive from the intimacy of daily association,’ with the parent.” This right to family integrity includes “the most essential and basic aspect of familial privacy—the right of the family to remain together without the coercive interference of the awesome power of the state.” . .

Studies indicate that the best interests of the child are usually served by keeping the child in the home with his or her parents. “Virtually all experts, from many different professional disciplines, agree that children need and benefit from continuous, stable home environments.” The love and attention not only

90. Id. at 67.
91. The foundational cases on constitutional protection for parental rights are Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925).
94. 455 A.2d 1313 (Conn. 1983).
of parents, but also of siblings, which is available in the home environment, cannot be provided by the state. Unfortunately, an order of temporary custody often results in the children of one family being separated and scattered to different foster homes with little opportunity to see each other. Even where the parent-child relationship is “marginal,” it is usually in the best interests of the child to remain at home and still benefit from a family environment.95

While the Supreme Court has never decided a case regarding the substantive grounds for juvenile court intervention, it has held in two termination-of-parental-rights cases, Lassiter v. Department of Social Services96 and Santosky v. Kramer,97 that due process protects a parent’s right to custody of his or her children, a right that it called “extremely important,“98 “vital,”99 “fundamental,”100 “commanding,”101 and “far more precious than any property right.”102

The constitutional distinction between parent-versus-parent custody disputes and contests between parents and third parties, including the state, supports the argument that the child welfare system’s reluctance to remove children from the custody of mothers who are battered should not carry over to disputes between a child’s parents. However, just as routinely placing children in foster care to protect them from exposure to domestic violence is not always best for the children, routinely transferring custody from a battered parent to the other parent will not always serve children’s interests either. Further, a domestic relations court handling a custody dispute between parents may not be in as good a position to evaluate a claim about violence in the child’s home as a juvenile court is. The next section explores these points further.

95. 455 A.2d at 1318-1319. Several federal circuit courts have also held that procedural due process prohibits removing a child from a parent’s custody without a prior hearing on abuse or neglect allegations unless this step is immediately necessary to protect the child’s safety. Gomes v. Wood, 451 F.3d 1122, 1130 (10th Cir. 2006); Doe v. Kearney, 329 F.3d 1286, 1295 (11th Cir. 2003); Hatch v. Dep’t for Children, Youth, & Their Families, 274 F.3d 12, 20 (1st Cir. 2001); Brokaw v. Mercer County, 235 F.3d 1000, 1019 (7th Cir. 2000); Wallis v. Spencer, 202 F.3d 1126, 1138 (9th Cir. 2000); Tenenbaum v. Williams, 193 F.3d 581, 594 (2d Cir. 1999); Croft v. Westmoreland County Children & Youth Servs., 103 F.3d 1123, 1126 (3d Cir. 1997); Manzano v. S.D. Dep’t of Soc. Servs., 60 F.3d 505, 511 (8th Cir. 1995).

96. 452 U.S. 18 (1981). Lassiter held that parents are constitutionally entitled to court-appointed counsel in termination cases that are sufficiently complex that the parent cannot be expected to represent himself or herself adequately.

97. 455 U.S. 745 (1982). The Court held that the state must prove allegations in support of a petition to terminate parental rights by clear and convincing evidence, rather than by a preponderance.

98. Lassiter, 452 U.S. at 31.

99. Santosky, 455 U.S. at 753.

100. Id.

101. Id. at 758.

102. Id. at 759.
B. Determining Children’s Best Interests in Private Custody Cases
When Failure to Protect Is Alleged

Even though a child’s parents have equal rights in custody proceedings for constitutional purposes, they do not necessarily have equally strong relationships with the child. For example, a child taken from a parent with whom the child has lived for years and placed with the other parent with whom he or she has never lived may suffer emotionally in much the way that a child placed in foster care would. Indeed, as discussed above, the primary caretaker preference and rules making it difficult to modify custody are justified as protecting the child’s relationship with the parent who is (relatively) closer to the child. Of course, if the child has been harmed or is seriously endangered in his or her current household, a change of custody may be the only way to protect the child. However, for a variety of reasons, a domestic relations court hearing a dispute between the parents may be less able to evaluate the seriousness of the harm to the child and whether removal is necessary than a juvenile court is.

1. LIMITS ON ACCURATE FACTFINDING

As noted above, child abuse and neglect cases in juvenile court are brought typically by the State, in particular by the state child welfare agency. Before an agency files such a case, social workers employed by the agency will have investigated the allegations of abuse or neglect that brought the family to their attention. State laws typically provide that reports may be made to the child welfare agency or to the police, that the agency and the police share information, and that police may investigate a report if need be. If the agency decides to file a petition alleging child maltreatment, the court can order the agency to undertake further investigation, including psychological evaluations of the parent and child and drug and alcohol testing, at agency expense. In contrast, in a private custody dispute, the court has only the information that the parties bring before it, and the judge cannot order the police or any public agency to undertake supplementary investigation.

The lack-of-information problem is likely to be worse if a party does not have an attorney to help gather information, assess its probative value, and enter it into evidence. In many jurisdictions around the country, at

103. See text accompanying supra notes 4–8 and note 37.
105. Id.
least one party is unrepresented by an attorney in seventy percent of more of family law cases. A report published in 2004 found that in California, at least one of the parties was not represented in seventy percent of the divorce petitions filed, and by the time of judgment the percentage increased to eighty.\footnote{107} A 2006 Utah study found that forty percent of petitioners and eighty-one percent of respondents in divorce cases were not represented.\footnote{108} In 2004, one party appeared pro se in almost seventy percent of the domestic relations cases in New Hampshire.\footnote{109} In the family court of Philadelphia (Pa.) County in 2006, eighty-five to ninety percent of litigants did not have lawyers.\footnote{110} A compendium of data collected from around the country during the 1990s found at least one of the parties had no lawyer in thirty-five to almost ninety percent of the family law cases.\footnote{111} In comparison, the limited available data, which are from California, show that a party was unrepresented in less than one percent of juvenile court dependency cases.\footnote{112} In studies that collected data about the gender of the unrepresented parties in the family law cases, the majority were women.\footnote{113}

In domestic relations cases where a respondent lacks the resources to develop facts to prove or disprove allegations that a child has been exposed to or harmed by domestic violence, to show how severe the violence was and how safe the petitioner’s home is, and to measure the likely impact on the child of a change in custody, the court’s ability to make a wise decision that will actually serve the child’s interests is seriously undermined.

2. Lack of Restorative Services

As discussed above, experts advise and juvenile courts require child welfare agencies to offer battered mothers services and protection to help them escape from violent situations and live safely with their children.\footnote{114} If a mother refuses these services or, if even with services she is unable to create a safe home for the children, a court can and likely will order the children removed, of course. Even then, though, the agency will have a continuing obligation to arrange visitation between the mother and children and to continue to offer appropriate services to the mother to try to help her solve the problems and regain custody. These obligations are consistent with child welfare agencies’ general duty under federal and state law to make reasonable efforts to prevent the need to remove children from their homes of their admittedly abusive or neglectful parents and, if children are removed, to make reasonable efforts to reunite the family.\footnote{115}

In a domestic relations case, no one has a duty to offer such assistance to a mother who lives in a violent household. If the mother cannot pull herself out of the situation alone, she may not only lose custody but may be allowed only supervised visitation away from her household. It is, therefore, all the more critical that the court’s decision about whether to change custody be well-founded, since as a practical matter, if the battered mother loses custody, she may never regain it.\footnote{116}

VI. Steps Toward a Better Approach to Failure to Protect Cases

Custody fights in which a parent or third party claims that the child would be exposed to domestic violence in an opponent’s household present very tricky problems for domestic relations judges, and statutes and case law in many states do not provide much guidance about how the problems should be solved. Ideally, legislatures will enact statutes that provide this guidance. The first part of this section suggests some legislative provisions that would be helpful. The second part makes recommendations about what courts can do in the absence of such legislation.

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\footnote{114} See text accompanying supra notes 77–81.
\footnote{115} 42 U.S.C. § 671(a)(15) provides that for a state to be eligible to receive federal funds for its foster care system, its law must include the reasonable efforts requirements.
\footnote{116} I have argued elsewhere that if a juvenile court places children with fathers with whom they had not been living after a finding that their mothers had neglected them, the court should nevertheless order the agency to make reunification efforts unless it finds that this would be contrary to the child’s best interests. Leslie Joan Harris, Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions, 9 J.L. & FAM. STUD. 281, 304–07 (2007).
A. Proposed Legislative Solutions

At least three states—Alaska, Louisiana, and North Dakota—have statutes that protect domestic violence victims against claims that they should lose custody for that reason alone, and all states should consider enacting such provisions. The Alaska statute provides a good model; it says, “The fact that an abused parent suffers from the effects of the abuse does not constitute a basis for denying custody to the abused parent unless the court finds that the effects of the domestic violence are so severe that they render the parent unable to safely parent the child.”

Custody statutes should include exposure to domestic violence as a factor for courts to consider in determining a child’s best interests, provided that there is evidence that the child has been harmed or is at significant risk of emotional harm from the exposure, in light of the great variation in children’s responses to exposure to domestic violence. The statute should also provide that even if harm or a risk of harm is shown, before the parent in the violent household is denied custody, the court should balance that risk against any risk of harm in the alternate placement. This analysis could include evidence about what the parent in whose household the child is living has done and is doing to eliminate the violence in the home, whether the proposed alternative household is safe, and the extent of harm to the child from disrupting his or her existing living situation, where that would occur.

Finally, considering the real likelihood that the parties in some private custody disputes will not present sufficient evidence to allow a judge to make these findings, statutes should allow domestic relations judges to refer cases to the state child welfare agency for investigation when a judge finds the allegations and evidence are sufficient to raise substantial questions about a child’s safety. The statute should provide that the agency must make an expedited investigation and report its findings to the domestic relations court judge. That judge should have discretion to either resolve the case on the merits or to refer the case to juvenile court, which has more investigative resources and services to offer parents to help them resolve problems that make their homes unsafe for their children.

118. N.D. Cent. Code § 14-09-06.2(1)(j) (2009), provides in part: “The fact that the abused parent suffers from the effects of the abuse may not be grounds for denying that parent residential responsibility.”
120. See text accompanying supra notes 72–74.
B. Recommendations for Judges in the Absence of Statutory Solutions

Because most states’ custody statutes ultimately grant the judge authority to make a decision in the child’s best interests, judges can implement many of the changes discussed above even without explicit statutory authority. Before denying custody to a parent who has allegedly exposed the child to domestic violence, a court can insist that the violence be proven by credible evidence and that the evidence show that the violence has caused or presents a substantial risk of causing harm to the child. The court should also consider evidence about the proposed alternative home to determine whether the child would be safe there.

The more difficult problem is how to handle cases in which the parties do not present enough evidence for courts to make these necessary findings. One solution is to make the custody order that would be entered if there were no allegation of exposure to domestic violence, on the theory that the party making that claim has not presented sufficient evidence. While this resolution may be satisfactory in some cases, in others the judge may be too concerned about the possible danger to the child to follow this route. In such a situation, it would be tempting to resolve the case against the parent in whose household the violence has allegedly occurred, but this outcome might well be harmful to the child in the long run. The best approach may be for the judge to continue the case and make a child abuse report to the child welfare agency, providing evidence about the alleged violence in the home and hoping that the agency will act expeditiously.

Invoking the aid of the child welfare agency and the juvenile court are central to both my proposed legislative and judicial responses to cases involving allegations that a child is being harmed or is at risk of harm because of exposure to domestic violence. If it were possible to obtain this assistance in this kind of case, domestic relations courts would also likely want to refer other cases in which other harms or risks of harms to children are alleged and the parties’ evidence leaves important questions unanswered. In this era of tight budgets, the agencies and the juvenile courts might well resist these referrals, which would add to their already too-large caseloads. Indeed, there is evidence that in some places actors in the child welfare system are trying to do just the opposite, that is, channel cases that would ordinarily go through juvenile court into family law courts.121 However, although the problems of child welfare agencies and

121. See, e.g., a report in April 2010 about the Illinois Department of Children and Family Services pressuring relatives of abused and neglected children into filing for guardianship in probate court, relieving the agency from having to initiate cases in juvenile court. The agency said that it has done this only when the cases are simple and can safely be handled outside the “overburdened” state system. However, the reporters concluded that some of the cases were
juvenile courts with too much work and too few resources are very real, the solution to their problems should not come at the expense of children who allegedly are suffering from a kind of harm that the child welfare system is well-equipped to handle. Denying the resources of the system to children on the basis that they are already the subject of a private custody dispute ignores the reality that the private litigants may not be in a position to present the evidence and provide the resources that a judge needs to protect the children.

inappropriate for resolution in the probate court, in part because the families need services that were only available through the juvenile court, including stipends for foster parents and Medicaid coverage for the children. Ofelia Casillas & Dahleen Glanton, Is DCFS Diverting Cases to Save Costs? Child-Custody Cases Steered to Probate Court, Putting More of the Financial Burden on Families, CHICAGO TRIB. (Apr. 5, 2010).