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Hon. Judith J. Gische

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Acting Supreme Court Justice presiding over the dedicated matrimonial part in Bronx County, New York. The author gratefully acknowledges the assistacne and good counsel of Eileen Kaspar, Esq. in connection with the preparation of this essay.

DOMESTIC VIOLENCE AS A FACTOR IN CUSTODY DETERMINATIONS IN NEW YORK STATE

*Hon. Judith J. Gische**

INTRODUCTION

In 1996, the New York State Legislature mandated that trial courts consider the effect of domestic violence in child custody and visitation disputes.[1] In 1998, the legislature amended the law to provide that, under most circumstances, a person convicted of murdering a child's parent shall be denied custody and visitation.[2]

The amendment was in response to a growing national trend to give greater attention to the serious effect domestic violence has on children. While the law now conveys the seriousness with which the legislature views domestic violence, many problems inherent in resolving custody and visitation disputes involving domestic violence still remain.

This essay examines the legislation and case law arising out of this issue, identifying remaining problems and judicial responses. Additional interventions will be suggested to assist in the appropriate resolution of these cases.

I. LEGISLATIVE HISTORY

In 1996, the state legislature amended section 240 of the New York Domestic Relations Law ("DRL") to provide that in connection with determining the "best interests" of the child in custody and/or visitation disputes, the court is mandated to consider as a factor, if raised, the issue of domestic violence.[3] Thus, section 240.1(a) of the DRL now provides in pertinent part:

> Where either party to an action concerning custody of a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of

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1. *See* 1996 N.Y. Laws, ch. 85, § 1 (codified at N.Y. DOM. REL. LAW § 240.1(a) (McKinney 1996)).

2. *See* N.Y. DOM. REL. LAW § 240.1-c(a) (McKinney 1998).

3. *See* 1996 N.Y. Laws 85, § 1.

> domestic violence against the party making the allegation or a family or household member of either party . . . and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interest of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section.[4]

In 1998, the legislature amended section 240.1-c of the DRL and added section 1085 of the Family Court Act ("FCA") to prohibit an award of custody or visitation to a person convicted of murdering the child's parent, except in very limited circumstances.[5] The 1998 amendment provides in pertinent part:

> no court shall make an order providing for visitation or custody to a person who has been convicted of murder in the first or second degree . . . of a parent, legal custodian or legal guardian of any child who is the subject of the proceeding . . . [n]otwithstanding paragraph (a) of this subdivision a court may order visitation or custody where: . . . such child is of a suitable age to signify assent and such child assents to such visitation or custody; or . . . if such child is not of suitable age to signify assent, the child's custodian or legal guardian assents to such order, or . . . the person who has been convicted of murder in the first or second degree . . . can prove . . . that . . . [h]e or she, or a family or household member of either party, was a victim of domestic violence by the victim of such murder; and . . . the domestic violence was causally related to the commission of such murder; and . . . the court finds that such visitation or custody is in the best interests of the child.[6]

Section 240 of the DRL sets forth the "best interest" standard for courts to employ in all custody and visitation disputes. Case law interpreting "best interests" has developed common law factors which, within the court's discretion, should be considered before a decision is made.[7] The 1996 amendment provides the only

4. N.Y. DOM. REL. LAW § 240.1(a) (McKinney 1999).

5. *See* 1998 N.Y. Laws 150, § 1.

6. N.Y. DOM. REL. LAW § 240.1-c(b).

7. *See, e.g.*, Fox v. Fox, 582 N.Y.S.2d 863, 864 (App. Div. 1992) (weighing factors such as 1) the quality of the home environment; 2) the ability of each parent to provide for the child's emotional needs and her financial status; 3) the ability of each parent to provide for the child; 4) the individual needs and expressed desires of the child; and 5) the need of the child to live with a sibling). *See also* Lynn W. v. Guy C., 519 N.Y.S.2d 400, 401 (App. Div. 1987); Gill v. Gill, 523 N.Y.S.2d 309, 310 (App. Div. 1987); Cornelius C. v. Linda C., 506 N.Y.S.2d 702, 704 (App. Div. 1986); Milton v. Dennis, 464 N.Y.S.2d 874, 875 (App. Div. 1983).

statutorily mandated factor, domestic violence, that the court must consider. The 1998 amendment is even stronger because it eliminates judicial discretion and mandates a result in custody and visitation cases involving a murder conviction of the petitioning parent.

The 1996 amendment was adopted in response to a growing national concern about the effect of domestic violence on children. In 1990, a joint resolution of Congress urged the states to adopt a legislative presumption that it is detrimental to a child when custody is awarded to an abusive spouse.[8] The Model Code on Domestic and Family Violence, developed by the National Council of Juvenile and Family Court Judges in 1994, and a report by the American Bar Association ("ABA") adopted this Congressional recommendation.[9]

New York was one of the last states to adopt the recommended legislation. Thus, before the New York amendment was adopted in 1996, thirty-eight states and the District of Columbia already had laws making domestic violence a relevant factor in custody and visitation determinations.[10] By 1997, the number of states grew to forty-four[11] and, according to the most recent information from the ABA, forty-six states currently require consideration of domestic violence before custody decisions are made.[12]

The New York statute, adopted six years after the original national proposal, differs from the congressional proposal in one major respect. New York expressly declined to adopt a presumption against awarding custody to a battering parent and, instead, only mandated that domestic violence be considered by courts as a factor in making such awards. Further, the statutory mandate only applies when allegations of violence are contained in a sworn pleading.[13] In this regard, the New York amendment reflects the

8. *See* H.R.J. Res. 172, 102d Cong. (1990).

9. *See* NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, MODEL CODE ON DOM. & FAM. VIOLENCE § 401 (1996).

10. *See id.*

11. *See* Lynne R. Kurtz, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345, 1348 (1997).

12. *See* American Bar Association, Family Law Section, *Tables Summarizing the Law in Fifty States, Chart 2: Custody Criteria* (visited Nov. 10, 1999) <http://www.abanet.org/family/familylaw/table2.html>.

13. Certainly the court still has the discretion to consider issues of domestic violence even when they are not raised in a sworn pleading notwithstanding that the statutory mandate does not apply. *See* Anthony S. v. Kimberly S., Nos. V-1276-97, V-1747-97, V-1277-97, V-1278-97, 1998 WL 425464, at *6-7 (N.Y. Fam. Ct. June 19, 1998).

tension between the strong public policy in favor of protecting children from the effects of a violent household and the concern that general, non-particularized claims of violence could be raised in order to gain an unfair advantage in a custody/visitation dispute.[14]

II. CASE LAW

Even before the statutory mandate was enacted, many courts had seriously considered the issue of domestic violence in connection with custody and visitation disputes.[15] Consideration of the issue, however, was not uniform.[16] Thus, the New York amendments ensure that the issue, if properly raised, must be considered.

Despite the fact that trial courts are statutorily obligated to consider domestic violence, courts still have an enormous amount of discretion in reaching a decision in a particular custody or visitation dispute. Where the existence of domestic violence is factually contested, the trial court must decide which of the parties is more credible. Moreover, the 1996 amendment does not: 1) define what constitutes "domestic violence"; 2) proscribe the weight accorded such finding of domestic violence; 3) determine what, if any, mitigating factors the court should consider before making a final award of custody or visitation; or 4) distinguish, in any way, between the effect of domestic violence in a custody proceeding as opposed to a visitation dispute.

A. Credibility Determinations on Issues of Domestic Violence

In cases where domestic violence is alleged, there are often factual disputes that require the court, as the trier of fact, to make credibility determinations. The importance of a correct credibility determination is paramount since a custody/visitation issue may turn on such determination. Appellate courts give the trial courts, who directly observe the demeanor of the witnesses, great deference in making credibility determinations.[17] Trial courts rely upon those things generally considered by any trier of fact in adjudicat-

14. *See* N.Y. DOM. REL. LAW §§ 240 Practice Commentary, 240.6 (McKinney 1996).

15. *See, e.g.*, Rohan v. Rohan, 623 N.Y.S.2d 390 (App. Div. 1995); Acevedo v. Acevedo, 606 N.Y.S.2d 307 (App. Div. 1994); Antoinette M. v. Paul Seth G., 608 N.Y.S.2d 703 (App. Div. 1994).

16. *See* Keating v. Keating, 538 N.Y.S.2d 286 (App. Div. 1989).

17. *See* Chamberlain v. Chamberlain, 687 N.Y.S.2d 485, 486 (App. Div. 1999); Hollister v. Hollister, 678 N.Y.S.2d 820, 821 (App. Div. 1998); *In re* Millard v. Clapper, 679 N.Y.S.2d 434, 435 (App. Div. 1998); Perez v. Perez, 659 N.Y.S.2d 642 (App. Div. 1997).

ing the credibility of parties' testimony, such as objective corroborating documentation,[18] previously issued orders of protections or adjudications of abuse,[19] medical records,[20] photographs[21] and non-party witness testimony.[22]

Trial courts also may seek forensic evaluations from mental health experts to assist in determining whether the alleged violence occurred and whether the children of the particular dispute have been affected. While forensic input may be analyzed, only the court can assess credibility and the best interests of children. Thus, the court is duty-bound to critically evaluate any forensic recommendation and not just blindly accept it.[23]

B. The Definition of Domestic Violence

The 1996 amendment does not define domestic violence. It would be reasonable, however, for courts to conclude that domestic violence includes the commission of those acts enumerated in section 812(1) of the FCA[24] as family offenses that justify the grant of an order of protection. In at least one reported decision, the trial court broadly defined domestic violence to include psychological violence and not just overt acts leading to physical injury.[25] The court's definition in that case drew upon the current mental health

18. *See In re* Hugo F. v. Jeannine F., 671 N.Y.S.2d 259 (App. Div. 1998) (relying upon the "documented and undisputed" history of domestic violence in finding unsupervised visitation inappropriate).

19. *See* Peters v. Blue, 661 N.Y.S.2d 722 (Fam. Ct. 1997) (observing prior assault convictions in finding that domestic violence existed). *See also* Irwin v. Schmidt, 653 N.Y.S.2d 627 (App. Div. 1997); Joseph v. Joseph, 646 N.Y.S.2d 167 (App. Div. 1996) (considering prior orders of protection and police intervention in finding domestic violence).

20. *See Joseph*, 646 N.Y.S.2d at 167 (admitting evidence of medical records).

21. *See* Spencer v. Small, 693 N.Y.S.2d 727, 728 (App. Div. 1999) (admitting photographs of petitioner's injuries into evidence).

22. *See* Anthony S. v. Kimberly S., Nos. V-1276-97, V-1747-97, V-1277-97, V-1278-97, 1998 WL 425464, at *1 (N.Y. Fam. Ct. June 19, 1998)

23. *See* Aldrich v. Aldrich, 693 N.Y.S.2d 282 (App. Div. 1999) (finding no error where the trial court did not follow psychologist's recommendation or consider respondent's alleged acts of domestic violence); *In re* E.R. v. G.S.R., 648 N.Y.S.2d 257, 261 (Fam. Ct. 1996) (rejecting the court-ordered physician's clinical evaluation and recommendation.).

24. N.Y. FAM. CT. ACT § 812(1) (McKinney 1998) (listing offenses of disorderly conduct, harassment in the first and second degree, aggravated harassment in the second degree, menacing in the second and third degree and attempted assault between spouses, former spouses, parent and child or members of the same family or household).

25. *See* J.D. v. N.D., 652 N.Y.S.2d 468 (Fam. Ct. 1996).

paradigm that refers to domestic violence as a pattern of behaviors designed to exercise control over the victim.[26]

C. The Weight to Be Given a Finding of Domestic Violence

Once the trial court finds, by a preponderance of the evidence, that there is domestic violence, the court must go on to consider what effect, if any, the finding will have on its custody or visitation determination. Courts often look at domestic violence in the factual context of an entire case, considering the common law factors of "best interests" as well. Courts may also consider mitigating factors, such as the parties' successful efforts at domestic violence counseling.[27] Thus, domestic violence, while a significant consideration in custody and visitation disputes, is not necessarily dispositive of the outcome of the case.

While not dispositive, however, a finding that a parent is a batterer will weigh heavily against an award of custody to that parent. On the other hand, the same finding will not usually result in the court denying visitation. In order to deny visitation, the court must find that contact will have a detrimental effect on the child.[28] It is not enough for the court to conclude that no visitation is in the child's best interest.[29] In many cases where domestic violence is proven, the court will control the nature, duration and conditions of visitation, without denying visitation altogether. Courts rely heavily upon supervised visitation and/or referrals to counseling programs as appropriate safeguards even where the visiting parent is an abuser.[30]

D. The "Accused But Not Yet Convicted" Murderer Problem

The 1998 amendment is distinctive from the 1996 amendment in that it directs a custody result, with limited exceptions, in cases where the party seeking custody has been convicted of murdering the child's parent. The 1998 amendment still leaves open to court

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26. *See id.* at 471.

27. *See In re* Millard v. Clapper, 679 N.Y.S.2d 434, 435 (App. Div. 1998); Hilliard v. Peroni, 666 N.Y.S.2d 92 (App. Div. 1997).

28. *See* Susan G.B. v. Yehiel B.-H., 627 N.Y.S.2d 384, 385 (App. Div. 1995); Paul G. v. Donna G., 572 N.Y.S.2d 364, 365 (App. Div. 1991).

29. *See* John R. v. Marlene C., 683 N.Y.S.2d 724, 727 (Fam. Ct. 1998) ("Denial of visitation is a drastic remedy that should be invoked only when there is substantial evidence that visitation would be detrimental to the child.").

30. *See In re* Hugo F. v. Jeannie F., 671 N.Y.S.2d 259 (App. Div. 1998) (finding unsupervised visitation inappropriate where there is a history of domestic violence); *In re* N Children, N.Y. L.J., Nov. 19, 1996, at 26 (App. Div. Nov. 19, 1996) (directing therapy before increased access).

discretion the question of where the child should reside after arrest, but prior to conviction.[31]

In general, before a court can consider the custody or visitation petition of a non-parent, "extraordinary circumstances" must be established. The courts are divided over whether this threshold is met when one parent is accused of murdering the other.[32] Even when such extraordinary circumstances are present, the court must still determine where it would be in the child's "best interest" to live. Custody cases necessarily require a prediction of future behavior based upon past history. The problem with making accurate predictions for a child's future well-being is exacerbated in these murder cases, due to the allegations and potential for harm present.

CONCLUSION

Both the 1996 and 1998 amendments to the DRL focus attention on the serious, long-lasting, detrimental effect that domestic violence can have on children living in the household. They each recognize that children are psychologically damaged by such behaviors regardless of whether the child, or some other household member, is the actual victim. The amendments, however, provide little guidance for the courts and leave many unanswered questions. Clearly, additional resources and legislation would alleviate some of these problems.

Victim advocates must recognize that courts' need objective, tangible, corroborating evidence in custody and visitation cases. Advocates should help their clients prove claims in court by helping them gather the evidence they need, including medical records, photographs and police reports. In fact, early intervention with victims should include evidence collection in the event that there is a court case.

Absent a legislative mandate, courts will continue to exercise their discretion in weighing domestic violence against other factors in custody and visitation cases. Although the statute mandates courts to consider domestic violence, it is clear that the presence of violence alone will not be outcome determinative. The legislature must define "domestic violence" in order for the courts to give this factor proper consideration. If the legislature continues to give the trial court unfettered discretion regarding the weight to be given a

31. *See* Myrna Felder, *Murderers and Custody*, N.Y. L.J., Aug. 9, 1999, at 3.

32. *See* Ratliff v. Glanda, 693 N.Y.S.2d 319 (App. Div. 1999); O'Guin v. Pikul, N.Y. L.J., May 16, 1991, at 24 (App. Div. May 16, 1991).

finding of domestic violence, a more inclusive statutory definition would be in order. In the event that the legislature decides to adopt a legislative presumption in accordance with the congressional recommendation, then a more limited statutory definition would be appropriate.

Many times, the court will direct a final order of supervised visitation where it finds that there has been domestic violence in the home. Where supervision by a family member or other adult may be unavailable, unreliable and/or inadequate, the courts should look to an outside agency to provide such services. Currently, however, these programs in the New York City area are oversubscribed. Also, program hours may not always be convenient to working parents or school age children. Resources for creating new programs or expanding the existing programs are needed so that the court can, with confidence, order supervised visitation as a feasible safeguard on visitation with a potentially abusive parent.

It is evident that, where a parent has been convicted of the other parent's murder, the surviving parent should never be awarded custody. However, until the accused is adjudicated, the court is faced with the uncertainty of awarding temporary custody to a parent who may indeed be guilty of murder. The legislature should consider an amendment that permits a third party to seek custody of the child without having to prove extraordinary circumstances. In this manner the court can apply the "best interest" standard to determine custody rather than having to first make a threshold determination.

The statutory amendments are an important first step in addressing the complex issues of domestic violence in child custody/visitation disputes. In the meantime, those in the court system need to be vigilant in understanding how the laws work and what resources and improvements are necessary to ensure that children are in safe home environments.