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The Silent Victims: Children and Domestic Violence

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The Silent Victims: Children and Domestic Violence

Abstract
Few of us would fail to intercede if we happened upon a child being physically attacked. Most of us would shield even an unknown child from witnessing a traumatic event. If we knew that a child might come to harm, such as a toddler playing in traffic, most of us would escort that child to safety. On a personal level, we are committed to the well being of our children. As a society, however, we close our ears to the cries of the children growing up in violent homes. It is now time to give them voice. New research reveals that spousal abuse and child abuse often occur in the same families. Not surprisingly, children growing up in violent families are more likely to become violent teenagers and adults. If we fail to help these children, we acquiesce in training the next generation of abusers and criminals. More importantly, we leave our youngest and most vulnerable victims to cope unaided with their trauma and terror. Although the Minnesota Legislature has taken proper measures to address domestic abuse, further measures are needed to strengthen our civil legal framework. Part II of this article surveys recent social science research on family violence, including the dynamics of violent relationships and the consequent effect on children. Part III examines Minnesota’s current statutory framework regarding child custody, visitation, representation and child protection. Specific statutory and procedural changes are recommended in order to more fully protect children. The need for professional education and coordination of services is discussed in the context of preventing future violence.

Keywords
child witness, domestic violence, domestic abuse, family violence, child protection, child abuse, child neglect, impact of violence on children, guardian ad litem

Disciplines
Family Law
THE SILENT VICTIMS: CHILDREN AND DOMESTIC VIOLENCE

Nancy Ver Steegh†

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It is time the message that took so long to deliver to the adult victims of domestic violence, namely that the justice system does not hold them responsible for their victimization and that such victimization is a crime against the community, be given to the silent victims, the children of domestic violence.¹

I. INTRODUCTION

Few of us would fail to intercede if we happened upon a child being physically attacked. Most of us would shield even an unknown child from witnessing a traumatic event. If we knew that a child might come to harm, such as a toddler playing in traffic, most of us would escort that child to safety. On a personal level, we are committed to the well being of our children. As a society, however, we close our ears to the cries of the children growing up in violent homes. It is now time to give them voice.

New research reveals that spousal abuse and child abuse often occur in the same families.² Not surprisingly, children growing up in violent families are more likely to become violent teenagers and adults.³ If we fail to help these children, we acquiesce in training the next generation of abusers and criminals. More importantly, we leave our youngest and most vulnerable victims to cope unaided with their trauma and terror.⁴

Although the Minnesota Legislature has taken proper measures to address domestic abuse, further measures are needed to strengthen our civil legal framework. Part II of this article surveys recent social science research on family violence, including the dynamics of violent relationships and the consequent effect on children. Part III examines Minnesota's current statutory framework

¹ Pamela M. Macktaz, Domestic Violence: A View from the Bench, 6 Md. J. CONTEMPO. LEGAL ISSUES 37, 45 (1994-95) (proposing judicial system leadership committed to solving domestic abuse by attacking the root cause of the social problem).
³ See id. at § 1, ¶ 3.
⁴ See Maria Roy, CHILDREN IN THE CROSSFIRE 60-61 (1988); see also James Garbarino, LOST BOYS 159 (1999).
regarding child custody, visitation, representation and child protection. Specific statutory and procedural changes are recommended in order to more fully protect children. The need for professional education and coordination of services is discussed in the context of preventing future violence.

II. THE PROBLEM OF DOMESTIC VIOLENCE

Historically, a husband had the legal right to "physically chastise" his wife. This right stemmed from the belief that such matters "ought to be left to family government." By 1920, all states criminalized wife beating, but this did little to end the practice. Indeed, a deeply rooted ambivalence remains about intervening in private family matters. However, family violence that is ignored will not go away. Rather the violence escalates, sometimes to the point of homicide.

Domestic abuse is a pattern of coercive behavior that the abuser uses to control an intimate partner. It may involve physical abuse such as pushing, slapping, punching, choking, kicking, restraining, burning, cutting, shooting, sexual abuse and psychological abuse. The Minnesota Domestic Abuse Act defines domestic abuse as including physical harm, bodily injury, assault or fear of imminent physical harm. Terroristic threats and criminal sexual conduct also are included in the statutory definition.

A. The Statistics

The numbers tell a compelling story. Ongoing domestic vio-

7. See Asmus et al., supra note 5, at 116.
10. See Mary Ann Dutton, Expert Witness Testimony, in The Impact of Domestic Violence on Your Legal Practice, ABA Commission on Domestic Violence 8-1, 8-8 (Goelman et al. eds., 1996).
11. See id.
13. See id. § 518B.01, subd. 2(a)(1)-(2).
14. See id.
lence occurs in at least 25% of our homes. In the overwhelming majority of cases, 90-95%, the male is the abuser and the female is the victim. Battering is the single most common cause of injury to women—more common than car accidents, muggings and rape combined. In fact, a woman is more likely to be victimized by an intimate than a stranger. Forty percent of injured women visiting emergency rooms have been assaulted by their partners. Battering often begins or increases when a woman is pregnant. Fifty percent of abusive husbands beat their pregnant wives, which results in birth defects and low birth weight infants. Although battering cuts across all economic, racial and ethnic lines, some evidence indicates that domestic violence is more common in homes with incomes below the poverty line and among younger women.

15. See Asmus et al., supra note 5, at 120-21 (noting that authorities estimate 25-37% of all women are battered); see also Patricia Tjaden & Nancy Thoennes, Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey 2 (1998); Lenore Walker, The Battered Woman 21 (1979) (noting that most reports of domestic violence came from lower-class households but reports from middle- and upper-class households are increasing).

16. Cf. Sheila M. Murphy, Guardians Ad Litem: The Guardian Angels of Our Children in Domestic Violence Court, 30 Loy. U. Chi. L.J. 281, 289 (1999) (stating that women account for only 3-6% of domestic violence defendants in Illinois); see also Tjaden & Thoennes, supra note 15, at 8; Minnesota Supreme Court, Minnesota Task Force for Gender Fairness in the Courts 39 (1989); A.M. Keith, Domestic Violence and the Court System, 15 Hamline L. Rev. 105, 106 (1991) (reporting that 90% of domestic violence victims in Minnesota are women).


19. See Asmus et al., supra note 5, at 120.

20. See Cahn, supra note 17, at 1047; see also Erickson Mediation Institute, Domestic Abuse Manual on Domestic Violence Facts (1997); Walker, supra note 9, at 136.

21. See Davidson, supra note 18, at 1.

22. See Walker, supra note 15, at 21-22; see also H.R.J. Res. 602, 101st Cong. (1990); S.J. Res. 133, 101st Cong. (1989); Davidson, supra note 18, at 1; Cahn, supra note 17, at 1047.

In fact, approximately one third of girls under twenty-one years of age experience dating violence.24 Left unchecked, domestic violence can escalate into murder. A conservative estimate is that 41% percent of murdered women are murdered by their partners or husbands.25 Domestic violence situations account for 60% of night calls to police.26 Studies in Kansas City and Detroit show that in 80% of domestic violence homicides, the police previously had intervened as many as five times.27 A Justice Department study found that more than half of those accused in spousal homicides had been arrested previously.28

Women are not the only victims in such situations. Vulnerable and defenseless children are often initially exposed to beatings, stabbings and shootings when they witness them in their own homes.29 As many as 87% of children in violent homes directly witness the abuse of their mother.30 In addition to witnessing abuse, about one-half of the children growing up in homes with ongoing spouse abuse also are physically abused by the batterer.31 Men who batter more severely are more likely to also abuse their children.32

26. See ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE, supra note 25.
27. See Walker, supra note 15, at 27, 64 (concluding that homicide between a man and a woman is not a crime of passion but the end result of unchecked, long-standing violence).
28. See Amy Haddix, Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights, 84 CAL. L. REV. 757, 792 (1996); see also Simon, supra note 25, at 44.
29. See Garbarino, supra note 4, at 107.
30. See Haddix, supra note 28, at 760.
32. See Stacey, supra note 31, at 65; see also Schechter & Edleson, supra note 31, at 23.
B. The Cycle of Violence

Although family violence is experienced differently in every home in which it occurs, the dynamics are best understood through a discussion of Lenore Walker’s cycle of violence analysis.33 This theory posits three phases that families move through repeatedly and with increasing severity until the cycle is broken or the victim is killed.34

The first stage is the tension-building phase.35 Stressors accumulate within the family system from a variety of sources such as the work place, financial concerns, children, pregnancy, illness, fatigue, in-laws and problems within the relationship.36 As the tension increases, the woman may go to great lengths to placate the batterer in an attempt to prevent his anger from escalating.37 She may describe herself as “walking on eggshells” and suffers from psycho-physiological complaints as she anxiously awaits the violence that will follow.38

The second phase of the cycle involves the violent incident that may last a few minutes or go on for a day or more.39 Varying levels of physical and sexual assault may occur, including kicking, stomping, punching, choking into unconsciousness, pushing down stairs, twisting or breaking bones, burning, stabbing, shooting, forcing violent sexual acts and sometimes death.40 Though alcohol use does not cause the abuse, the abuser likely has been drinking.41

During the third phase of the cycle, the abuser becomes kind and contrite.42 This is sometimes referred to as the “honeymoon phase.” The batterer is sorry for his actions and seeks the victim’s

33. See Walker, supra note 15, at 55 (outlining the three phases as tension building, explosion or acute battering incident, and the calm, loving respite); see also Cahn, supra note 17, at 1050; Allison Morse, Social Science in the Courtroom: Expert Testimony and Battered Women, 21 HAMLIN L. REV. 287, 288-289 (1998) (stating that the cumulative effect of many studies and research designs done on battered women provides a strong basis for knowledge in the expert community, allowing experts to testify credibly on the topic).
34. See Walker, supra note 15, at 70.
35. See id. at 56; see also Cahn, supra note 17, at 1050.
36. See Walker, supra note 15, at 56.
37. See id. at 58.
38. See id. at 61 (stating that the anticipation of a battering causes severe psychological stress for the battered woman).
39. See id at 60.
40. See id. at 79; see also Dutton, supra note 10, at 8-8.
42. See id. at 65.
forgiveness by acting in a charming and loving manner.⁴³ Even if the victim is in the hospital, the batterer sends gifts, visits and assures the woman that the violence never will occur again.⁴⁴ The victim remembers better times in their relationship and believes that he is capable of changing.⁴⁵ She may agree to give him another chance.⁴⁶

C. Who is the Female Victim and Why Does She Stay?

An admittedly stereotypical profile of the domestic violence victim reveals that she has low self esteem, experiences guilt about the abuse (possibly as a way to minimize her terror and anger), has traditional and often rigid views about the roles of men and women, believes that she is responsible for the violence, is socially isolated and believes that no one can help her.⁴⁷ The abuse may have worn her down, and she may suffer from Post Traumatic Stress Disorder⁴⁸ and symptoms such as anxiety, depression and flashbacks.⁴⁹ Personality and symptomatic problems are not the cause of the abuse, rather they result from it.⁵⁰

Why does she stay? She may stay out of fear—the batterer often threatens to kill the victim and/or the children and himself if she leaves.⁵¹ In fact, the violence is likely to increase around this time, a phenomenon known as “separation assault.”⁵² Additionally, she may be economically dependent on the abuser and have no-

⁴³. See id.
⁴⁴. See id. at 66.
⁴⁵. See id.
⁴⁶. See Cahn, supra note 17, at 1050.
⁴⁷. See Walker supra note 15, at 31; see also Richard J. Gelles, Family Violence 96-97 (1979) (discussing why women who are victims of domestic violence stay with the abuser).
⁴⁸. See Neil S. Jacobson & John M. Gottman, When Men Batter Women 50 (1998); Morse, supra note 33, at 308; Simon, supra note 25, at 60.
⁴⁹. See Jacobson & Gottman, supra note 48, at 50; see also Richard J. Gelles & Murray A. Straus, Intimate Violence 137-38 (1988) (stating that the victim’s feeling of helplessness is the reason why she does not leave the abuser); Simon, supra note 25, at 60-61. See generally Morse, supra note 33 (arguing that courts should not ignore expert opinions of soft sciences).
⁵¹. See Kurtz, supra note 8, at 1360.
where to go with her children.\textsuperscript{53} For the benefit of her children, she may want to keep her family together.\textsuperscript{54} She may still love the batterer.\textsuperscript{55} She also may have grown up in a violent home and believe the violence is normal.\textsuperscript{56} As a result of the batterer’s controlling behavior and almost pathological jealousy, she may have become increasingly isolated from people and outside resources.\textsuperscript{57} She may be exhausted from the accumulated stress of her ordeal and see her situation as hopeless.\textsuperscript{58} Battering is more than the physical acts of abuse.\textsuperscript{59} “It is living with a constant sense of danger and expectation of violence. These together bring about terror that is slowly constructed and eventually fills the woman’s environment.”\textsuperscript{60}

D. Who is the Abuser and Why Does He Do It?

Batterers frequently have grown up in violent homes\textsuperscript{61} and tend to blame others (usually the victim) for their violent actions.\textsuperscript{62} They see themselves as victims.\textsuperscript{63} A batterer minimizes the harm that results from his violence and is likely to believe that no negative consequences should come to him.\textsuperscript{64} He subscribes to traditional family roles, including seeing himself as head of the family.\textsuperscript{65}

It was commonly believed that batterers were “specialists” in

\begin{enumerate}
\item See Gelles, supra note 47, at 97, 103; see also Lauer, supra note 52, at 480-81.
\item See Gelles, supra note 47, at 97.
\item See Morse, supra note 33, at 310.
\item See Gelles, supra note 47, at 96, 101; see also Simon, supra note 25, at 59 (explaining that women who experienced, or even witnessed abuse when they were children are more likely to be abused by their partners).
\item See Morse, supra note 33, at 311.
\item See Gelles & Straus, supra note 49, at 137-38. The author states that a battered woman who feels that life is completely hopeless is unlikely to attempt escaping from a violent home. See id. Instead, she remains in a state of hopelessness and helplessness. See id.
\item See Lauer, supra note 52, at 476.
\item See Simon, supra note 25, at 54 (suggesting that batterers have histories of childhood exposure to violence).
\item See id. at 53.
\item See id.
\item See id. at 52-53 (discussing general characteristics of batterers); see also Walker, supra note 15, at 36.
\item See Walker, supra note 15, at 36.
\end{enumerate}
that they were believed to be violent only in the home. Research, however, now shows that sizable proportions of batterers also are violent outside the home. Researchers now hypothesize that at least two different types of abusers exist. One group of batterers victimizes only family members and tends to be more dependent and fearful of abandonment. Another group of batterers is violent both in and out of the home. Their violence generally is more severe, they are more aggressive and they are likely to commit other crimes.

Men who batter often are pathologically jealous and will consequently limit their partner's contacts with friends, family and neighbors. This further isolates the victim. These men exhibit a dual personality sometimes referred to as Dr. Jekyll and Mr. Hyde. Though he may be brutal to his partner, an abuser often is quite capable of using his charm to manipulate others. "[M]any perpetrators of domestic violence are facile manipulators, presenting themselves as caring, cooperative parents casting the abused parent as a diminished, conflict-inciting, impulsive or over-protective parent. Furthermore, battered women may appear to be exhausted, hyper-vigilant, inarticulate, depressed, hopeless or angry."

Great controversy surrounds the effectiveness of treatment programs for batterers. Because an abuser's completion of an ineffective treatment program may give women and children a false

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66. See Simon, supra note 25, at 55.
67. See id.
68. See LEGAL RESPONSES TO WIFE ASSAULT 18 (N. Zoe Hilton ed., 1993).
69. See id. at 18-22; JACOBSON & GOTTMAN, supra note 48, at 36-39.
70. See Fields, supra note 50, at 237.
71. See JACOBSON & GOTTMAN, supra note 48, at 36-38; see also LEGAL RESPONSES TO WIFE ASSAULT, supra note 68, at 18-22 (explaining that this type of batterer does not differ from other violent criminals).
72. See Cahn, supra note 17, at 1053; see also WALKER, supra note 9, at 52 (listing isolation of the abused woman as one of the seven factors that occur in adulthood during the battering relationship); Morse, supra note 33, at 311.
73. See Morse, supra note 33, at 311 (“Part of the dynamics of a battering relationship is the husband isolating the victim from the outside world.”).
75. See id.
76. Barbara J. Hart & Meredith Höfford, The Best Interest of the Child: Child Custody, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, ABA COMMISSION ON DOMESTIC VIOLENCE 5-3 (Goelman et al. eds., 1997).
77. See e.g., Fields, supra note 50, at 235-44 (discussing the ineffectiveness of treatment programs for domestic abusers); see also Simon, supra note 25, at 48 (stating that outcome evaluations of hundreds of domestic violence offender treatment programs have yielded mixed and unpromising results).
sense of security, it has been suggested that programs be further evaluated and even regulated.\textsuperscript{78}

In addition to treatment, court orders can be effective in stopping the violence when the batterer’s desired behavior is defined in detail and consequences of not following the order are clearly outlined.\textsuperscript{79} This step especially is necessary when children are involved because they frequently become pawns in the batterer’s effort to continue to control and victimize his partner.\textsuperscript{80}

E. The Effect of Domestic Violence On Children

Children are more than the tag-along victims of domestic violence.

Reports by battered mothers indicate that 87 percent of the children witness the abuse. Events can be witnessed in many ways. Children may hear their mother’s screams or crying, the batterer’s threats, glass breaking, or wood splintering. They may see the aftermath of abuse in the form of torn clothes, their mother’s injuries, broken furniture, or wounded animals. Children who witness abuse suffer extreme emotional trauma and react with shock, fear, and guilt.

Children’s lives are frequently disrupted by moves to escape domestic violence. They may lose considerable school time; flee their homes without taking books, money, or clothing; and live in the family car when shelters are unavailable.\textsuperscript{81}

Experts agree that children who see their mothers abused, listen to the abuse as it happens and/or view the resulting black eyes, broken bones, and bleeding suffer behavioral, emotional and developmental consequences.\textsuperscript{82} These consequences may include ag-

\textsuperscript{78} See generally Fields, supra note 50, at 235-41. See also NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 508 (1994) (explaining the requirements needed for states to adopt treatment programs).

\textsuperscript{79} See Simon, supra note 25, at 49 (explaining that batterers are best deterred if they believe penalties for repeat behavior are certain and severe).

\textsuperscript{80} See Murphy, supra note 16, at 287.

\textsuperscript{81} K.J. WILSON, WHEN VIOLENCE BEGINS AT HOME 30-31 (1997).

\textsuperscript{82} See Murphy, supra note 16, at 283-84; see also JEFFREY L. EDELSON, PROBLEMS ASSOCIATED WITH CHILDREN’S WITNESSING OF DOMESTIC VIOLENCE 12 (1999); Kurtz, supra note 8, at 1351-52.
gression, anxiety, depression and trauma-related symptoms.\textsuperscript{83} Symptoms intensify when the child not only witnesses abuse but is also abused by the batterer.\textsuperscript{84}

As previously stated, men who batter their wives are more likely to also abuse their children.\textsuperscript{85} This occurs in approximately 50\% of domestic violence cases.\textsuperscript{86} There also may be a connection between battering and incest.\textsuperscript{87} As spouse abuse becomes more intense, the likelihood of concurrent child abuse increases.\textsuperscript{88} In fact, "domestic violence may be the \textit{single major precursor} to child abuse and neglect fatalities."\textsuperscript{89}

This concurrent child abuse may commence while the child still is in the womb.\textsuperscript{90} As previously noted, battering often takes place during pregnancy and constitutes prenatal child abuse.\textsuperscript{91} After birth, the infants and toddlers may be most severely traumatized by witnessing or experiencing violence.\textsuperscript{92} One of the most significant tasks of an infant during the first year of life is attaching to an adult care-giver.\textsuperscript{93} This process is severely disrupted in a violent home and these babies exhibit poor health, sleeplessness, decreased responsiveness and increased screaming.\textsuperscript{94} Preschoolers may show regressive behavior and cling to their mothers.\textsuperscript{95}

\begin{itemize}
\item\textsuperscript{83} See Edleson, \textit{supra} note 82, at 12-13.
\item\textsuperscript{85} See Fields, \textit{supra} note 50, at 222; see also Carter, \textit{supra} note 2, at § 1, ¶ 2.
\item\textsuperscript{86} See Carter, \textit{supra} note 2, at § 1, ¶ 2; Kurtz, \textit{supra} note 8, at 1352; see also \textit{Legal Responses to Wife Assault}, \textit{supra} note 68, at 15; Roy, \textit{supra} note 4, at 24; Fields, \textit{supra} note 50, at 3; Haddix, \textit{supra} note 28, at 44.
\item\textsuperscript{87} See Walker, \textit{supra} note 9, at 152 (drawing a parallel between abuse and incest as crimes committed by men who want power and control).
\item\textsuperscript{88} See Simon, \textit{supra} note 25, at 45.
\item\textsuperscript{89} Carter, \textit{supra} note 2, at § 1, ¶ 4 (emphasis added).
\item\textsuperscript{90} See Gelles & Straus, \textit{supra} note 49, at 111.
\item\textsuperscript{91} See id. at 115.
\item\textsuperscript{92} See Garbarino, \textit{supra} note 4, at 159 (stating that when faced with traumatic experiences, children under ten are three times more likely to develop Post Traumatic Stress Disorder than are adults or teenagers); Edelson, \textit{supra} note 82, at 3; Murphy, \textit{supra} note 16, at 285 (stating that preschoolers and young children may suffer from school phobias and insomnia).
\item\textsuperscript{93} See Garbarino \textit{supra} note 4, at 58-39.
\item\textsuperscript{94} See Haddix, \textit{supra} note 28, at 789; see also Wilson, \textit{supra} note 81, at 33.
\item\textsuperscript{95} See Haddix, \textit{supra} note 28, at 789 (stating that researchers believe these symptoms appear because of the violence which disrupts the attachment of the child to their mother); see also Wilson, \textit{supra} note 81, at 34 (stating these children may suffer severe separation anxiety, exhibit fear of being left alone and retreat to
\end{itemize}
Older children who witness domestic violence also exhibit behavioral problems, including depression, anxiety and violence towards peers.96 Cognitive functioning may be impaired and long term trauma-related symptoms are common.97 Girls tend to react by becoming more passive and depressed while boys become more hostile and aggressive.98 In fact, a link between domestic violence and youth violence has received increased recognition.99 Children from violent homes are more likely to run away, use drugs and alcohol, attempt suicide, and exhibit assaultive behavior.100 Exposure to multiple forms of violence (such as domestic violence and child abuse) may as much as double the risk of youth violence.101

By and large, lost boys are traumatized boys. They do many things in a failing attempt to cope with their trauma, but rarely do they have the resources or knowledge to cope effectively and in a socially acceptable way. They take drugs. They engage in violence. They steal. They gorge themselves on sex. They join gangs and cults. And, when no one is watching or listening to them, they suck their thumbs and cry themselves to sleep.102

Another sad truth is that boys who see their mothers abused are twice as likely to become batterers themselves.103 Unfortunately, this pattern extends beyond the home. In 1990, the Minnesota Department of Corrections found that 90% of incarcerated men were raised in homes where their fathers battered their mothers.104 Other studies have found similar results.105

earlier stages of functioning).
96. See Carter, supra note 2, ¶ 1, ¶ 8.
97. See EDELSION, supra note 82, at 13.
98. See id; see also Kurtz, supra note 8, at 1552 (stating that 70% of abusive husbands were exposed to domestic violence as children).
99. See Carter, supra note 2, at ¶ 1, ¶ 9; see also EDELSION, supra note 82, at 4.
100. See ROY, supra note 4, at 103-04; see also GELLES & STRAUS, supra note 49, at 128-29.
101. See Carter, supra note 2, at ¶ 1, ¶ 9.
102. GARBARINO, supra note 4, at 158.
103. See Carter, supra note 2, at ¶ 1, ¶ 10; see also LEGAL RESPONSES TO WIFE ASSAULT, supra note 68, at 11 (stating that persons who are both witnesses to, and targets of, domestic violence are five times more likely to become abusers themselves); ROY, supra note 4, at 14; Murphy, supra note 16, at 286.
104. See Asmus et al., supra note 5, at 121.
105. See ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE, supra note 25; see also ROY, supra note 4, at vi; Fields, supra note 50, at 231-32.
The good news is that many children from violent homes escape the generational cycle of abuse to become loving spouses and model citizens. Many children benefit from education and support while some require intensive therapy. At a minimum, children should receive information about domestic violence, help in understanding that they did not cause the violence, help with safety planning, a chance to grieve and the opportunity to learn non-violent methods of conflict resolution.

Domestic violence courts in Dade County, Florida, and Honolulu, Hawaii, have special programs for helping children. These programs include counseling and group education. The key is to identify children at risk and provide timely and appropriate help.

III. MINNESOTA’S CIVIL LEGAL RESPONSE

“Like their battered mothers, children are often doubly victimized: first by cruel and abusive fathers, then by the state, whose legal and child-care bureaucracies too rarely take into account the truths of the human heart and psyche . . .”

The Minnesota Task Force for Gender Fairness in the Courts found that Minnesota has a progressive statutory scheme for handling domestic violence cases. However, the Task Force further adduced that the legal system is not equipped to handle the caseload generated by the high incidence of domestic violence. Unfortunately, our children are the most likely to fall through the cracks of an over-stressed system.

106. See Wilson, supra note 81, at 213 (stating that one of the challenges is providing meaningful services during the generally limited time battered women seek shelter protection, sometimes only for a night or two).
107. See Davidson, supra note 18, at 6.
108. See id. at 6-7.
109. See id.
110. Walker, supra note 9, at 139-40.
111. See Minnesota Task Force for Gender Fairness in the Courts, supra note 16, at 37.
112. See id.
A. Child Custody

1. Current Minnesota Statutes

a. The Best Interests Standard

The majority of state child custody statutes now use a "best interest of the child" standard for awarding custody. As applied, this standard sometimes fails to adequately protect children in violent homes.

Historically, fault-based divorce and custody decisions focused on parental morality and scrutinized parental character and behavior. Spousal abuse was viewed as a form of cruelty, and abusers generally were not given custody. However, as no-fault divorce laws became popular in the 1970s, courts became less concerned with the relationship between the spouses. Even violence between parents was not always seen as relevant to the parent-child relationship and, in a few extreme cases, fathers who killed their wives later were awarded custody.

As the research presented in Part II makes clear, domestic violence harms children whether they witness or hear the attack, view the aftermath, and/or are physically abused themselves. A batterer's disregard of the effect of his violence upon his children clearly is relevant to his ability to parent and evidence of abuse always should be admitted in custody cases.

Legislatures have increasingly recognized this nexus between domestic violence and custody. In 1990, fewer than sixteen states addressed the issue but by 1995, forty-three states and the District of Columbia enacted some provision regarding domestic violence and custody.

113. See Kurtz, supra note 8, at 1348.
114. See id. at 1347; see also Cahn, supra note 17, at 1062-68 n.119.
115. See Kurtz, supra note 8, at 1363-64.
116. See Cahn, supra note 17, at 1074-75.
Minnesota was no exception to this trend. The Minnesota legislature added domestic violence as a factor to consider along with twelve other factors in determining the best interests of the child. Specifically, Minnesota Statute section 518.17, subdivision 1 provides:

(a) "The best interests of the child" means all relevant factors to be considered and evaluated by the court including:

(1) the wishes of the child’s parent or parents as to custody;

(2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;

(3) the child’s primary caretaker;

(4) the intimacy of the relationship between each parent and the child;

(5) the interaction and interrelationship of the child with a parent or parents, siblings and any other person who may significantly affect the child’s best interests;

(6) the child’s adjustment to home, school, and community;

(7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

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(8) the permanence, as a family unit, of the existing or proposed custodial home;

(9) the mental and physical health of all individuals involved; except that a disability, as defined in section 363.01, of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interest of the child;

(10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child’s culture and religion or creed, if any;

(11) the child’s cultural background;

(12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and

(13) except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.

The court may not use one factor to the exclusion of all others. The primary caretaker factor may not be used as a presumption in determining the best interests of the child. The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child.

(b) The court shall not consider conduct of a proposed custodian that does not affect the custodian’s relationship to the child.\(^{119}\)

While an important first step, inclusion of domestic violence as a single factor among many does not go far enough to protect children. Judges who are not aware of the detrimental effects of witnessing domestic violence or its aftermath may discount its importance.\(^ {120}\) Under the statute, courts are free to give little weight to

\(^{119}\) Minn. Stat. § 518.17, subd. 1(a)–(b) (emphasis added).

\(^{120}\) See Jack M. Dalgleish, Jr., Annotation, Construction and Effect of Statutes Mandatory Consideration of, or Creating Presumptions Regarding Domestic Violence in Awarding Custody of Children, 51 A.L.R. 5TH 241 (1997).
domestic violence because no particular factor outweighs another. In fact, judges specifically are prohibited from using "one factor to the exclusion of all others." As will be discussed below, ongoing violence by a proposed custodial parent is sufficiently serious to warrant exclusion of the other best interest factors.

Minnesota courts also are directed not to consider parental conduct that does not affect his or her relationship to the child. An uninformed judge might believe that violence overheard or witnessed by a child would not affect his or her relationship with the abusive parent. This section leaves such a judge the latitude to ignore the violence.

Like many other states, Minnesota enacted a "friendly parent" provision giving custodial preference to the parent most willing to co-parent. Specifically, the Minnesota statute directs courts to consider the "disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child." As noted above, continuing contact can be dangerous in the context of domestic violence. Since such laws punish domestic violence victims for their seeming lack of cooperation, the American Bar Association's Center on Children and the Law has encouraged state legislatures to amend these provisions. Minnesota has been a leader in this regard by legislatively excepting cases from the friendly parent provision after a finding of domestic violence.

b. Custody and the Domestic Abuse Act

The Minnesota Domestic Abuse Act uses a different custody standard than the best interests factors discussed previously. The Act authorizes courts to award temporary custody based upon the safety of the victim and the children:

(a) Upon notice and hearing, the court may provide relief as follows:

121. See Cahn, supra note 17, at 1065-66, 1083-84.
122. MINN. STAT. § 518.17, subd. 1.
123. See id.
124. See id.; see also Cahn, supra note 17, at 1069-70.
125. See MINN. STAT. § 518.17, subd. 1(a)(13).
126. Id.; see also DAVIDSON, supra note 18, at 15; Cahn, supra note 17, at 1064.
127. See DAVIDSON, supra note 18, at 15.
128. See MINN. STAT. § 518.17, subd. 1(a)(13).
129. See id. § 518B.01 (1998).
130. See id. § 518B.01, subd. 6.
(4) award temporary custody or establish temporary visitation with regard to minor children of the parties on a basis which gives primary consideration to the safety of the victim and the children. Except for cases in which custody is contested, findings under section 257.025, 518.17, or 518.175 are not required . . . .

_Baker v. Baker_132 clarified the standard. The Minnesota Supreme Court affirmed that the “safety of the victim and child” standard, rather than the “best interests of the child” standard, would apply in granting _ex parte_ and temporary orders for protection.133 The court reasoned that in this emergency context it was unrealistic to develop the full factual record desired prior to making a best interests finding.134 This finding is in contrast to temporary custody orders entered under section 518.131, where the court uses the best interests factors and the analysis as set forth in Minnesota Statute section 518.17.135

The initial focus on safety satisfies a paramount concern. Our first task is to stop the violence. Failure to inquire, however, further results in lost opportunity to understand the child’s needs and connect him or her to immediate services. The Domestic Abuse Act gives the court power to order counseling and other social services when minor children are involved.136 The custody determination would be an opportune time to do so. The extent of the court’s findings at this early stage in the proceedings becomes even more significant if custody later is contested. According to Minnesota Statute section 518.01B subdivision 17, courts in subsequent custody proceedings must consider a finding that domestic abuse occurred.137 Thus, it is imperative that a finding of domestic abuse be made at the earliest proceedings.

As noted above, judicial resources are stressed both by the number of cases and their emergency nature.138 Perhaps more re-

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131. _Id._
132. 494 N.W.2d 282 (Minn. 1992).
133. See id. at 290.
134. See id.
135. See Minn. Stat. § 518.131, subd. 7.
136. See id. § 518B.01, subd. 6(a)(6).
137. See id. § 518.01, subd. 17.
138. See Minnesota Task Force for Gender Fairness in the Courts, _supra_ note 16, at 53 (emphasizing the lack of commitment of prosecutorial resources
sources need to be added and focused at this crucial stage of a domestic violence proceeding.

c. Joint Custody

The inherent power imbalance in battering relationships makes joint custody of children inappropriate. Joint custody requires continued contact and shared decision making between the parents. A 1990 Congressional Resolution warned states against such awards because joint custody guarantees an abuser continued access and control over the battered spouse through the children. In addition, such an arrangement continues a “dangerous psychological environment” for the children.

Some states consider abuse a factor in awarding joint custody. Minnesota has gone a step further. Minnesota Statute section 518.17, subdivision 2, provides that “the court shall use a rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic abuse, as defined in section 518B.01, has occurred between the parents.” However, the legislature was silent with respect to the level of proof necessary to rebut this presumption. As a result, this section has been criticized for leaving too much discretion to courts in deciding whether the presumption has been adequately rebutted.

2. Recommended Statutory Changes Regarding Custody

State legislatures and the American Bar Association have actively encouraged states to go beyond using domestic violence as a

resulting in premature dismissal of domestic abuse cases).

139. See Davidson, supra note 18, at 32, App. B; see also Kurtz, supra note 8, at 1347-48 (discussing the negative aspects of statutes that provide for joint custody); Murphy, supra note 16, at 290.

140. See H.R.J. Res. 172, 101st Cong. (1990) (expressing the sense of Congress that in child custody cases, evidence of spousal abuse should create a statutory presumption that it is detrimental to the child to be placed in the custody of an abusive parent).

141. Id.

142. See Cahn, supra note 17, at 1064-65.

143. See Minn. Stat. § 518.17, subd. 2 (1998).

144. Id. § 518.17, subd. 2(d).

145. See Kurtz, supra note 8, at 1371 (“Minnesota . . . formulated a rebuttable presumption against awarding an abuser joint custody . . . . Minnesota failed to list the factors legislators intended would rebut the presumption. These codes leave the court too much discretion to decide when the presumption has been rebutted.”)
single factor in making a “best interests” custody determination. Congressional Resolution 172 provides that “evidence of spousal abuse should create a statutory presumption that it is detrimental to the child to be placed in the custody of an abusive parent.” Similarly, the ABA recommends that “[w]here there is proof of [domestic violence], batterers should be presumed by law to be unfit custodians for their children.”

The National Council of Juvenile and Family Court Judges drafted a Model Code on Domestic and Family Violence (Model Code). Section 401 provides:

In every proceeding where there is at issue a dispute as to the custody of a child, a determination by a court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.

The need for such a presumption stems from several conclusions. First, domestic violence is harmful to children even if a child is not physically harmed. Second, the abuser will continue to try to control his partner through the children. Third, courts may not be aware of the dynamics of the relationship and the effects upon the child.

Presumptions adopted by states differ in scope and intent. The Texas statute perhaps is the most far reaching in that it provides for an irrebuttable presumption of unfitness “if credible evi-

146. See Hart & Hofford, supra note 76, at 5-1; see also Kurtz, supra note 8, at 1366-69.


148. DAVIDSON, supra note 18, at 13.

149. See MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE, supra note 78, at §§ 401-03.

150. See Cahn, supra note 17, at 1055 (explaining that children suffer enormously from witnessing violence between their parents even if they are not physically harmed).

151. See DAVIDSON, supra note 18, at 13 (“[A]busers are highly likely to use children in their care, or attempt to gain custody of their children, as a means of controlling their former spouse or partner.”).

152. See Cahn, supra note 17, at 1077 (“Of course, in many cases, evidence of domestic violence is simply not considered relevant.”); see also DAVIDSON, supra note 18, at 13 (stating that state legislatures should promote judicial efforts to consider domestic violence when deciding child custody cases).
vidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child.\textsuperscript{153} This statute has been criticized for going too far and not giving the batterer the chance to reform.\textsuperscript{154}

The Louisiana statute is the most instructive as it considers a number of issues that arise in this context:

There is created a presumption that no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of children. The court may find a history of perpetrating family violence if the court finds that one incident of family violence has resulted in serious bodily injury or the court finds more than one incident of family violence. The presumption shall be overcome only by a preponderance of the evidence that the perpetrating parent has successfully completed a treatment program as defined in R.S. 9:362, is not abusing alcohol and the illegal use of drugs scheduled in R.S. 40:964, and that the best interest of the child or children requires that parent's participation as a custodial parent because of the other parent's absence, mental illness, or substance abuse, or such other circumstances which affect the best interest of the child or children. The fact that the abused parent suffers from the effects of the abuse shall not be grounds for denying that parent custody.\textsuperscript{155}

A presumption is created that no parent with a history of perpetrating family violence can be awarded sole or joint custody. The statute recognizes that a batterer likely is an unfit parent.\textsuperscript{156} The statute is triggered by a court finding of family violence, defined as one incident resulting in serious bodily injury or more than one incident of family violence.\textsuperscript{157} Other states require different initial findings, such as credible evidence of domestic violence, evidence

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\textsuperscript{153} TEX. FAM. CODE ANN. § 153.004(b) (West 1996).
\textsuperscript{154} See Haddix, supra note 28, at 808 ("Although there is strong statistical evidence that a batterer will continue to jeopardize his children's welfare in the future, the ultimate determination of unfitness in each case should be made by the trial court, not by legislative mandate.").
\textsuperscript{155} LA. REV. STAT. ANN. § 9:364A (West 2000).
\textsuperscript{156} See id.
\textsuperscript{157} See LA. REV. STAT. ANN. § 9:362 (definitions section).
\end{flushleft}
of a crime or clear and convincing evidence of such incidents.\textsuperscript{158}

In Louisiana, the presumption can be overcome by a preponderance of the evidence showing completion of a treatment program, no alcohol and drug use, and circumstances affecting the best interests of the child.\textsuperscript{159} The statute addresses the possibility of both parents having a history of violence.\textsuperscript{160} There is no “friendly parent” provision.\textsuperscript{161}

Various concerns have been raised about the use of domestic violence custody presumptions. First, there is a fear of unfounded allegations of abuse.\textsuperscript{162} This concern can be mitigated by requiring a specific factual finding in order to trigger the presumption. Remedial statutes also are in effect, including Minnesota Statute section 609.507, making false reporting of child abuse a misdemeanor, and Minnesota Statute section 518.17, subdivision 1a, requiring the court to consider false reporting when determining the child’s best interests.\textsuperscript{163} Second, some believe that custody decisions should be left to the discretion of judges.\textsuperscript{164} However, not all judges are aware of the dynamics of domestic abuse and its toll on children.\textsuperscript{165} Third, advocates for battered women are concerned that such a presumption would be used against victims who defend themselves from attack.\textsuperscript{166} This is best remedied by using a clear threshold to trigger the presumption.\textsuperscript{167} The Louisiana statute provides that “the fact that the abused parent suffers from the effects of the abuse” cannot be used as grounds to deny custody to the abused


\textsuperscript{160} See id. § 9:364B.

\textsuperscript{161} See id.

\textsuperscript{162} See Comment, Developments in the Law—Legal Responses to Domestic Violence, 106 Har. L. Rev. 1498, 1618 (1993); see also Kurtz, supra note 8, at 1372.

\textsuperscript{163} See Minn. Stat. § 609.507 (1998); § 518.17 subd. 1(a) (1998).

\textsuperscript{164} See Kurtz, supra note 8, at 1373.

\textsuperscript{165} See id. at 1359-60.

\textsuperscript{166} See id. at 1374.

\textsuperscript{167} See id.
parent. Finally, some have questioned the constitutionality of a rebuttable presumption, alleging due process violations. Since the private and government interests involved will be balanced against the risk of error, the key to avoiding such a challenge lies in requiring an appropriate level of proof to rebut the presumption.

Despite the issues to be resolved, a rebuttable presumption against custody for abusers likely would better protect women and children. As previously noted, Minnesota already has a rebuttable presumption against awards of joint custody to perpetrators of domestic violence. In addition, those convicted of certain crimes against family members currently must prove, by clear and convincing evidence, that custody or visitation is in the best interests of the child.

Minnesota childhood victims of domestic violence would be more comprehensively protected by replacing Minnesota Statute section 518.17, subdivision 1(12) and subdivision 2(d) and 518B.01, subdivision 6(4) with language similar to the Louisiana statute.

B. Visitation

1. The Current Statutory Framework

Children who witness their fathers beating their mothers are at greater risk of being beaten themselves than children who do not witness such events. Yet, in divorce cases, even when the children have testified about their father’s abuse, they are expected to be shuttled back and forth between parents for visits. Only their fragile survival skills can keep them safe.

Visitation orders often require children to spend time with an abusive parent. Not only is this frightening for the child, but it gives the batterer the continued opportunity to control and threaten

169. See Kurtz, supra note 8, at 1373.
170. See Haddix, supra note 28, at 809-10.
171. See MINN. STAT. § 518.179, subd. 1(3) (1998).
172. See MINN. STAT. § 681.52, subd. 1(2) (1998).
174. WALKER, supra note 9, at 146.
family members. Children of domestic violence are best protected by restricting and supervising visitation. In a dissolution proceeding, a court has the option to restrict or deny visitation for an endangered child.

If the court finds, after a hearing, that visitation is likely to endanger the child's physical or emotional health or impair the child's emotional development, the court shall restrict visitation by the non custodial parent as to time, place, duration, or supervision and may deny visitation entirely, as the circumstances warrant.

Since the statute does not specifically recognize that domestic violence constitutes endangerment, this analysis is left entirely to the judge's discretion. Additionally, if the custodial parent requests supervised visitation, the court must consider whether an Order for Protection exists.

If a custodial parent requests supervised visitation under subdivision 1 or 5 and an order for protection under chapter 518B or a similar law of another state is in effect against the non-custodial parent to protect the custodial parent or the child, the judge or judicial officer must consider the order for protection in making a decision regarding visitation.

Unfortunately, only a parental request triggers this section. Even then, the court need only "consider" the order for protection. No direction is given about restricting or supervising visitation because of violence.

In a proceeding under the Domestic Abuse Act, the court can order restricted visitation upon finding that the safety of the victim or the children will be jeopardized.

If the court finds that the safety of the victim or the children will be jeopardized by unsupervised or unrestricted

175. See Hart & Hofford, supra note 76, at 5-1.
176. See MINN. STAT. § 518.175, subd. 1 (1998).
177. Id. § 518.175, subd. 1(a).
178. Id.
179. See id.
180. See MINN. STAT. § 518B.01, subd. 6(a)(4) (1998).
visitation, the court shall condition or restrict visitation as to time, place, duration, or supervision, or deny visitation entirely, as needed to guard the safety of the victim and the children.\textsuperscript{181}

It is difficult to imagine a situation involving ongoing domestic violence where unrestricted visitation would not jeopardize the safety of the victim and children. However, the imposition of restrictions remains discretionary.

Despite the statutory authorization to do so, the Gender Fairness Task Force found that many judges hesitated to restrict visitation, allowing unsupervised visitation despite domestic violence and even requiring visitation at the victim’s home.\textsuperscript{182} Thus, some children certainly have not been adequately protected.

2. Recommended Statutory Changes Regarding Visitation

Two statutory approaches have been suggested to resolve visitation issues. The National Council of Juvenile and Family Court Judges has proposed that all visitation orders for families of domestic violence incorporate specific conditions designed to protect the children:

1. A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made.

2. In a visitation order, a court may:
   (a) Order an exchange of a child to occur in a protected setting.
   (b) Order visitation supervised by another person or agency.
   (c) Order the perpetrator of domestic or family violence to attend and complete, to the satisfaction of the court, a program of intervention for perpetrators or other designated counseling as a condition of the visitation.
   (d) Order the perpetrator of domestic or family violence to abstain from possession or consumption of alcohol or controlled substances during visitation and for 24 hours

\textsuperscript{181} Id. § 518.175, subd. 6(a)(4).
\textsuperscript{182} See MINNESOTA TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, \textit{supra} note 16, at 44.
preceding the visitation.  
(e) Order the perpetrator of domestic or family violence to pay a fee to defray the costs of supervised visitation.  
(f) Prohibit overnight visitation. 
(g) Require a bond from the perpetrator of domestic or family violence for the return and safety of the child. 
(h) Impose any other condition that is deemed necessary to provide for the safety of the child, the victim of domestic or family violence, or other family or household member.

3. Whether or not visitation is allowed, the court may order the address of the child and the victim to be kept confidential.

4. The court may refer but shall not order an adult who is a victim of domestic or family violence to attend counseling relating to the victim’s status or behavior as a victim, individually or with the perpetrator of domestic or family violence as a condition of receiving custody of a child or as a condition of visitation.

5. If a court allows a family or household member to supervise visitation, the court shall establish conditions to be followed during visitation.  

This section allows for visitation only if the victim and children can be made safe and gives specific guidance to courts in fashioning detailed orders that anticipate problem areas.  

The state of Louisiana took a stronger approach by creating a rebuttable presumption that abusers have supervised visitation:

If the court finds that a parent has a history of perpetrating family violence, the court shall allow only supervised child visitation with that parent, conditioned upon that parent’s participation in and completion of a treatment program. Unsupervised visitation shall be allowed only if it is shown by a preponderance of the evidence that the violent parent has completed a treatment program, is not

183. Model Code on Domestic and Family Violence, supra note 78, at § 405 (emphasis added); see also Davidson, supra note 18, at 14 (encouraging courts to exercise their authority to create highly structured visitation orders where proof of domestic violence exists). 
184. See id.
abusing alcohol and psychoactive drugs, and poses no danger to the child, and that such visitation is in the child's best interest.\textsuperscript{185}

A batterer must complete a treatment program prior to exercising even supervised visitation.\textsuperscript{186} The statute clearly sets forth the standard of proof required before a court may award unsupervised visitation.\textsuperscript{187} Thus, while abusers do not automatically receive visitation, they are given the opportunity to establish a healthy relationship with their children if and when that becomes appropriate.

Minnesota children would be better protected by amending Minnesota Statute section 518.175 and Minnesota Statute section 518B.01, subdivision 6, to create a rebuttable presumption of supervised visitation as set forth in the Louisiana statute.

C. \textit{Representation for Adult and Childhood Victims}

1. \textit{Representation for Battered Women}

The Minnesota Domestic Abuse Act\textsuperscript{188} requires the court to provide simplified forms and clerical assistance to victims of domestic violence seeking an Order of Protection.\textsuperscript{189} In addition, a woman can seek the assistance of a domestic violence advocate.\textsuperscript{190} In many cases this assistance will be sufficient. However, if issues such as custody and visitation become contested and/or the abuser has an attorney, the victim may be at a distinct disadvantage unless she can retain her own counsel.\textsuperscript{191} If the parties file for divorce, her dilemma may deepen.

At least one study found that victims proceeding \textit{pro se} were less likely to obtain orders for protection and those orders granted were less likely to contain provisions concerning custody, support

\textsuperscript{185} \textsc{La. Rev. Stat. Ann.} § 9:364, subd. c (West 2000); \textit{see} Davidson, \textit{supra} note 18, at 13 ("A few states create a rebuttable presumption that custody or visitation should not be granted to a parent who has a history of inflicting domestic violence.").\textsuperscript{186} \textit{See} \textsc{La. Rev. Stat. Ann.} § 9:364 subd. c.

\textsuperscript{187} \textit{See id.}\textsuperscript{188} \textsc{Minn. Stat.} § 518B.01 (1998).

\textsuperscript{189} \textit{See} \textsc{Minn. Stat.} § 518B.01, subd. 4(e).

\textsuperscript{190} \textit{See id.}\textsuperscript{191} \textit{See Family Violence Project of the National Council of Juvenile and Family Court Judges, supra} note 117, at 222-23 (recognizing the complexity of cases involving family violence).
and restricted visitation.\(^{192}\) Contested custody hearings may involve the use of experts and child witnesses, knowledge of the effects of domestic violence and the rules of evidence.\(^{193}\) Additionally, at this time in her life, the victim of domestic violence is at her most vulnerable. The abuser likely is threatening to harm her and to harm or take her children.\(^{194}\) She may need access to representation to protect herself and her children. The cost of providing such representation is high but the cost of not providing representation also is very high. In some instances, it may be appropriate for the abuser to pay the woman’s legal fees. Law school clinical programs also might provide some assistance. Ultimately, more resources may need to be directed to Legal Services programs and to support *pro bono* efforts.

2. Representation for Children

As silent victims of domestic violence, children need adults to ascertain children’s needs and desires and to speak for them. Traditionally, the role of the guardian *ad litem*\(^{195}\) has been to focus exclusively upon the particular needs of the child who has witnessed or been the subject of violence.\(^{196}\) The guardian *ad litem* investigates, reports and advocates for the child’s best interests,\(^{197}\) whereas an attorney for the child performs the traditional duties and obligations of representation, including acting as a zealous advocate of

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192. *See* Davidson, *supra* note 18, at 9 (referring to conclusions of a 1990 study performed by the National Institute of Justice).

193. *See* Family Violence Project of the National Council of Juvenile and Family Court Judges, *supra* note 117, at 223 (noting that custody and visitation cases increasingly require complex hearings with the use of child and expert testimony, evaluations of parental fitness, and more thorough consideration of the child’s best interest where family violence is involved).

194. *See* Kurtz, *supra* note 8, at 1348 n.21 (stating that 75% of women who are separated or divorced are in greater danger when a custody proceeding is pending or has recently been decided) (citations omitted).

195. *See* Minn. Stat. § 518.165, subd. 2 (1998) (stating “the guardian *ad litem* shall represent the interests of the child and advise the court with respect to custody, support, and visitation.”)


197. *See* Minn. Stat. § 518.165, subsds. 1, 2 (1998); *see also* Minn. Stat § 260C.163, subd. 5 (Supp. 1999) (directing district courts to appoint guardians *ad litem* to protect the child’s interests in certain situations); *Guardian Ad Litem R. 909.02;* Jones, *supra* note 196, at 444 (explaining the generally agreed upon role of guardians *ad litem*).
the child’s preferences.\textsuperscript{198} Depending upon the facts of the case, appointment of a guardian \textit{ad litem} either is permissive or required under Minnesota law.\textsuperscript{199} In juvenile court “child in need of protection or services” (CHIPS) proceedings, a guardian \textit{ad litem} is required.\textsuperscript{200} Appointing counsel for the child is discretionary, though if appointed, counsel is prohibited from simultaneously acting as the guardian \textit{ad litem}.\textsuperscript{201} By contrast, in family court a guardian \textit{ad litem} may be appointed if custody and visitation issues arise. A guardian is required if the court “has reason to believe that the minor child is a victim of domestic child abuse or neglect, as those terms are defined in sections 260.015 and 622.556 . . . .”\textsuperscript{202} Thus, courts routinely can appoint guardians \textit{ad litem} and/or attorneys to speak on behalf of children experiencing domestic violence.

The effectiveness of either type of representation depends upon that person’s knowledge of the impact of domestic violence on children and his or her familiarity with available services. Because of the complex nature of the situations and level of expertise required, paid professionals are optimal representatives. Children from violent homes especially need such a protective angel.

\textbf{D. Child Protection and Domestic Violence}

Child abuse and domestic violence have been treated as separate legal issues and most states have separate court systems to address them. However, as discussed in Part II, the line between the two issues is blurred. We now know that children in homes where spousal abuse occurs are more likely to be physically abused\textsuperscript{203} and that some children who witness domestic violence are psychologi-

\textsuperscript{198} See Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, 29 Fam. L.Q. 375, 376 (1995) (recommending the proposed standard for a child’s attorney to recognize the child as “separate individual” to whom the attorney owes traditional duties found in an attorney-client relationship).

\textsuperscript{199} See Minn. Stat. § 260C.163, subd. 5 (1998 & Supp. 1999) (setting forth where courts shall and may appoint guardians \textit{ad litem}).

\textsuperscript{200} See id. (requiring courts to appoint guardians \textit{ad litem} “in every proceeding alleging a child’s need for protection or services . . . ”).

\textsuperscript{201} See id. § 260C.163, subd. 3(c) (“Counsel for the child should not also act as the child’s guardian \textit{ad litem}.”).

\textsuperscript{202} Minn. Stat. § 518.165, subd. 2 (1998) (explaining further that a guardian \textit{ad litem} need not be appointed if the matter is already before the court on a juvenile dependency and neglect petition—presumably because a guardian \textit{ad litem} would have been appointed).

\textsuperscript{203} See Davidson, \textit{supra} note 18, at 357–8.
cally and emotionally harmed. Other children are injured trying to stop the violence. Are these events best addressed as domestic violence or as child abuse?

The child protection system and domestic violence movement have different histories and different philosophies. They seek different outcomes and use different terminology. Child protection workers usually focus exclusively on the child's safety. This focus has meant that a battered woman may be charged with "failure to protect" her children if she stays in an abusive home. In fact, a recent Hennepin County study reveals that three quarters of the "failure to protect" cases involved domestic violence. However, if a woman leaves the batterer and is unable to provide for her children, she may be accused of neglect. Under either scenario her children might be taken from her despite the ultimate child protection goal to strengthen and reunify the family.

In contrast, battered women's advocates focus intervention on the mother. Their goal is to keep her safe so that she can protect her children. They see the batterer as the root of the problem, and want him removed from the family system and held account-

204. See Murphy, supra note 16, at 284 (stating that observing domestic violence is as harmful for children as experiencing direct physical abuse); see also Davidson, supra note 18, at 1 (explaining that children are harmed in more than one way—cognitively, psychologically and socially—by observing or hearing the domestic terrorism of brutality against a parent at home).

205. See Davidson, supra note 18, at 2 (stating that some children are caught in the middle of domestic violence and become accidental victims of serious injury—either through violence aimed at someone else or while trying to protect a parent).


207. See id. (citing barriers the child welfare organizations and battered women's programs face in cooperating with each other).

208. See Davidson, supra note 18, at 18 (stating that laws and child protective service agency policies should provide that services be made available to the victimized parent).

209. See id. at 17.


211. See Davidson, supra note 18, at 17.


213. See Schechter & Edelson, supra note 31, at 3.

214. See id. (citing data from shelters and projects that indicates keeping battered mothers safe also keeps abused children safe).
They recognize, however, that some women require a long time to leave their abuser and that some battered women have difficulty caring for their children in the midst of ongoing abuse.\textsuperscript{216} 

As noted above, substantial disagreement exists as to about which system is more appropriate for handling these cases. Recent legislative enactments point to a blending of the two approaches.\textsuperscript{217} For example, Minnesota recently expanded its child neglect reporting statute to include children who witness domestic violence:

(c) "Neglect" means:

(8) that the parent or other person responsible for the care of the child:

(i) engages in violent behavior that demonstrates a disregard for the well-being of the child as indicated by action that could reasonably result in serious physical, mental, or threatened injury, or emotional damage to the child;

(ii) engages in repeated domestic assault that would constitute a violation of section 609.2242, subdivision 2 or 4;

(iii) intentionally inflicts or attempts to inflict bodily harm against a family or household member, as defined in section 518B.01, subdivision 2, that is within sight or sound of the child; or

(iv) subjects the child to ongoing domestic violence by the abuser in the home environment that is likely to have a detrimental effect on the well-being of the child.\textsuperscript{218}

Reporting is required when clergy, medical, educational and law enforcement professionals become aware of children witnessing abuse and/or living in homes where serious domestic violence occurs on a regular basis.\textsuperscript{219} While most of the statute deals with the abuser's behavior, the battered woman also may be reported if she fails to take reasonable steps to protect her children from the vio-

\textsuperscript{215} See id.

\textsuperscript{216} See id. at 4.


\textsuperscript{218} Minn. Stat. § 626.556, subd. 2(c)(8) (1998 & Supp. 1999).

\textsuperscript{219} See id. § 626.556, subd. 3.
lence. This change in reporting requirements resulted in a 50% increase in child neglect reports in Hennepin County and larger increases in outlying counties.

Despite expanded of reporting requirements, the legal definitions of children in need of protection or services for emotional maltreatment were not expanded to specifically include child witnesses of domestic violence. Instead, the legislature authorized an "alternative response" to reports made under Minnesota Statute section 626.556. Under Minnesota Statute section 626.5551, local welfare agencies can make a risk assessment and offer community-based services to families on a voluntary basis. Thus, in less serious cases, a family can receive early assistance without a formal investigation and finding of maltreatment.

Another example of the blending of the child protection and domestic abuse systems occurs in more serious cases involving concurrent child abuse. Instead of placing the child in foster care, the abuser can be removed from the home and prosecuted for contributing to the need for protective services. Minnesota Statute section 260C.148 allows the local welfare agency to seek a court order excluding a parent from the home when that parent commits domestic child abuse. However, the definition of domestic child abuse includes the abused minor but does not encompass child witnesses to domestic violence.

220. See Laws Related to Domestic Violence Involving Children, supra note 217, at 4 (stating that public policy requires intervention when an adult caretaker fails to protect children from detrimental exposure to violence).
221. See Ruben Rosario, Battered Moms Not Only Ones with Scars/ Kids Who Watch Abuse Shellshocked, Damaged, PIONEER PRESS (St. Paul), Dec. 6, 1999, at 1B.
224. See id.
226. See e.g., Model Code on Domestic and Family Violence, supra note 78, at § 402. The Code underscores the priority of protecting the abused child and the non-perpetrating parent. See id.
227. See MINN. STAT. § 260C.425 (1998 & Supp. 1999) ("Any person who ... contributes to the need for protection or services is guilty of a gross misdemeanor."); see also id. § 260C.335 (1998 & Supp. 1999) (granting the juvenile court civil jurisdiction to conduct a hearing on the matter and to order appropriate actions).
228. See id. § 260C.148 (1998 & Supp. 1999) ("The local welfare agency may bring an emergency petition on behalf of minor family or household members seeking relief from acts of domestic child abuse.").
229. See id. § 260C.007, subd. 21 (1998 & Supp. 1999) (defining "domestic
The National Council of Juvenile and Family Court Judges urged all states to adopt the broader language of the Model Code. For example:

Duties of children's protective services

1. The state administrator of children's protective services shall develop written procedures for screening each referral for abuse or neglect of a child to assess whether abuse of another family or household member is also occurring. The assessment must include but is not limited to:
   (a) Inquiry concerning the criminal record of the parents, and the alleged abusive or neglectful person and the alleged perpetrator of domestic or family violence, if not a parent of the child; and
   (b) Inquiry concerning the existence of orders for protection issued to either parent.

2. If it is determined in an investigation of abuse or neglect of a child:
   (a) That the child or another family or household member is in danger of domestic or family violence and that removal of one of the parties is necessary to prevent the abuse or neglect of the child, the administrator shall seek the removal of the alleged perpetrator of domestic or family violence whenever possible.
   (b) That a parent of the child is a victim of domestic family violence, services must be offered to the victimized parent and the provision of such services must not be contingent upon a finding that either parent is at fault or has failed to protect the child.

Under this legislative framework, the perpetrator could be removed from the home before physical harm to the child. This protects the children and the woman who may have difficulty separating from the abuser. Having the child protection agency initiate

child abuse" as "any physical injury to a minor family or household member inflicted by an adult family member other than by accidental means . . . or subjection of a minor family or household member by any adult family or household member to any act which constitutes a violation of sections 609.321 [to] 609.346".

230. See Model Code on Domestic and Family Violence, supra note 78, at v-vi.
231. See id. § 409 (emphasis added) (underscoring the premise that protection of the abused child and the non-perpetrating parent should be the guiding policy of the child protective service agencies).
the abuser's removal could help shield the woman from retaliation and threats. This is analogous to the use of mandatory arrest in domestic violence cases—the abuser is prosecuted by the state rather than at the woman's behest. Adoption of Model Code section 409 would expand the range of options available to protect children in Minnesota.

Domestic violence advocates and child protection workers are working together on behalf of abused families. Both groups can work together to identify families enmeshed in domestic violence, provide them with supportive and empowering options and, possibly, stop the violence. Other collaborative ventures on the table include cross-disciplinary training and establishing structures for ongoing cooperation. The National Council of Juvenile and Family Court Judges issued policy and practice guidelines to assist in these efforts. The guidelines center around: 1) keeping children with the nonviolent parent; 2) establishing community services; and 3) designing a more diverse range of interventions better tailored to the unique needs of individual families.

Minnesota has taken important first steps to coordinate child protection and domestic violence services. However, continued monitoring, evaluation and tailoring are necessary to ensure effective efforts.

E. Continued Professional Training

We can improve our response to children "caught in the crossfire" of domestic violence by continuing to train and update all of the professionals involved including judges, lawyers, court personnel, custody evaluators, mediators, guardians ad litem, caseworkers, psychologists, police, teachers, clergy and physicians. In the past,
these groups trained separately. However, since successful intervention in domestic violence cases requires a coordinated response, cross-disciplinary training also makes sense. Professionals from the various groups benefit from a more complete understanding of others' perspectives, consequently enhancing continuity of services to families.

If we are serious about working together to stop the violence, we must share an understanding of its nature, extent and causes, the practices that promote safety and the resources available.

IV. CONCLUSION

Domestic violence is widespread and ongoing with tragic repercussions for our children and society. While Minnesota has taken an enlightened approach to this issue, the state can do more. Specifically, lawmakers can strengthen our civil legal framework by legislating a rebuttable presumption denying batterers custody or unsupervised visitation. We can provide sufficient resources to: 1) establish educational and counseling services for children; 2) connect children to these opportunities at the earliest possible stage in legal proceedings; 3) provide women and children with representation; 4) find new and innovative ways to coordinate child protection and domestic violence services (including enacting section 409 of the Model Code); and 5) provide ongoing quality training for all professionals involved.

Some say that these measures would be too expensive. Consider, however, the true cost of failing to adequately confront a problem that diminishes the safety, health and welfare of our communities. Consider social costs such as medical expenses, homelessness, lost productivity and teen violence. Consider the pain and horror children experience every day in our state. What price do we put on a child's suffering?

As Winston Churchill said, "There is no finer investment for any community than putting milk into babies." Let's protect our future by protecting our children.

235. See Edelson & Beeman, supra note 233.
236. See generally Beeman et al., supra note 232 (setting forth currently available programs and needed developments and changes).
237. See Model Code on Domestic and Family Violence, supra note 78, at § 409.