

The city of New York settled the class action lawsuit, *Nicholson v. Scopetta*, in December 2004, ending years of litigation that challenged the alleged practice of the City's Administration for Children's Services (ACS) of removing children from victims of domestic violence on the sole basis that the children were exposed to such violence.¹ This settlement follows closely on the heels of the recent ruling by the United States Court of Appeals for the Second Circuit (Court of Appeals) in which the Court of Appeals stated that the sole allegation that a child witnessed domestic violence against his or her parent is not sufficient to support a finding of neglect requiring removal, except in rare circumstances.²

The case came before the Court of Appeals as a result of a federal civil rights class action lawsuit filed on behalf of battered women and their children against ACS, the City and State of New York (city and state), and various city departments.³ The lawsuit alleged that the ACS's practice and policy of removing children from battered mothers "because, as victims, they engaged in domestic violence"⁴ violated the constitutional rights of both mothers and children to: preserve their family integrity; retain care, custody, and control of their children; and not be forcibly separated from their children unless found unfit. The suit alleged that ACS was holding battered women responsible for abuse committed by other individuals because it was "administratively easier to punish the mother by separating her from her children."⁵ On March 18, 2002, an injunction against ACS was granted ordering that all such policies and practices cease immediately.⁶

Because the lower court believed that some of the constitutional questions raised in the class action lawsuit could not be decided without guidance as to certain

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unresolved issues in New York's child protection laws, it requested that the Court of Appeals respond to three certified questions. Specifically, the Court of Appeals was asked to determine:

- whether the sole allegation that a child witnessed domestic violence against his or her parent is a form of neglect;
- whether emotional injury from witnessing domestic violence can rise to a level of "imminent danger" or "risk" to a child's life or health requiring removal; and
- whether a child's witnessing domestic violence is sufficient to demonstrate that removal is necessary or is in the child's best interest, or whether the child protection agency must offer additional, particularized evidence to justify removal.⁷

In answering these questions, the Court of Appeals found that "there can be no blanket presumption favoring removal when a child witnesses domestic violence."⁸ The Court placed the burden back on the trial court requiring judges to do more than find that a risk of serious harm to a child exists from exposure to domestic violence. It directed courts to pay particular attention to whether risks can be eradicated through means other than removal, such as by issuing a temporary protection order or providing services to the victim, and to balance the risk of harm to the child against the harm removal may cause.⁹

However, the Court clarified that in rare circumstances a child witnessing domestic violence against his or her parent, without more, may be a form of neglect. In discussing removal in these rare circumstances, the Court stated that a battered mother can be charged with neglect not because she is a victim or because her children witnessed abuse against her, but rather because the evidence establishes that the children were actually or imminently harmed because she failed to exercise even minimal care in overseeing her children.¹⁰

The Court of Appeals articulated a "minimum degree of care" standard that looks at how a reasonable and prudent mother who is a victim of domestic violence would act, or not act, under similar circumstances.¹¹ The

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significance of this lies in the fact that it instructs courts to take into account and to examine the victim's action in light of the domestic violence she is experiencing or has experienced.

Courts must consider risks to the victim and her children associated with:

- separating from her batterer;
- staying and suffering continued abuse;
- seeking assistance through the criminal, civil and social systems; and
- relocating.¹²

In addition, to examining the above risks, the Court of Appeals specifically instructed judges to consider the severity and frequency of the violence and the resources and options available to the victim and her children.¹³ In determining that only in rare circumstances is exposure to domestic violence neglect, the Court consistently emphasized throughout its opinion that removal determinations must be fact-specific and made on a case-by-case basis.¹⁴ Importantly, the Court recognized a "reasonable, prudent mother who is a victim of domestic violence" standard.

To ensure that ACS complies with the *Nicholson* decision, ACS, as part of the settlement agreement, is required to establish a dispute resolution procedure for disputes concerning the application of the principles of the law set forth in the Stipulation & Order of Settlement.¹⁵ Pending ACS' compliance with the decision, the plaintiffs' request for permanent injunction was suspended until September 1, 2005.

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Gail Parr

Twenty-year veteran of family law

Gail Parr is the founding treasurer of the National Center's Board and a family law attorney in private practice in Austin, TX. After law school, the Texas native's first job was at the Texas Department of Corrections (now the Texas Department of Criminal Justice), representing inmates. The work cemented Parr's feminist identity; she remembers it as an "anti-female, anti-feminist environment." Parr was even a plaintiff in a sex-discrimination suit against the Department.

In 1985, Parr took a job as Staff Attorney for the Family Violence Project, a joint project of the Austin Center for Battered Women (now SafePlace) and Legal Aid Society of Central Texas. She recalls, "I knew this was the perfect job for me and I convinced the interviewers of it, too! It put everything together — criminal law, civil law and my degree in social work." Parr worked at the Family Violence Project for over six years to resolve communication issues between advocates and lawyers, and, she remembers, "I was hooked!"

Parr went on to be the Assistant Director for Public Policy for the Texas Council



on Family Violence from 1991–1993, and she served as their Board treasurer for many years as well. In 1995, she began her private-sector legal work.

Twenty years after getting her start in anti-violence work, what keeps her going? It's still a perfect combination of my interests; it is the perfect merging. [Later], I realized I didn't need to use my social work skills, because I didn't have any because I was a lawyer! But being aware of those issues helped. I was also a growing feminist, and this work fit into empowerment of women, too — helping women through the legal system and helping families — I couldn't imagine anything better."

In her practice, Parr handles family law cases and some of her clients are victims of family violence, but not all. She is continually intrigued by the way in which lawyers can have a positive impact on family dynamics. "Lawyers can influence the judge," Parr notes, "but we can also affect how a family comes through the process. We have to be conscious of our obligation to not make things worse! These are not corporations, but [rather], people whose lives are entwined with children, usually forever. Do no more harm than is necessary to represent your client's interests, and that is a fine line."

For more information on Parr, visit www.ncdsv.org. Click on About NCDsv, and then on Board of Directors.

LIBRARY CORNER

By Nancy Flanakin,
National Center Librarian

Upholding Battered Mothers' Rights in Child Protection Actions

Nicholson v. Williams (federal district court decision):
<http://news.findlaw.com/hdocs/docs/nyc/nchlswllms030102drft.pdf>

Nicholson v. Scopetta (state court decision):
www.nycourts.gov/courts/appeals/decisions/oct04/113opn04.pdf

Communities Addressing Child Protection Issues in Domestic Violence Situations

"Accountability and Connection with Abusive Men: A New Child Protection Response to Increasing Family Safety," by Fernando Mederos with the Massachusetts Department of Social Services Domestic Violence Unit
<http://endabuse.org/programs/children/files/AccountabilityConnection.pdf>

"Family Team Conferences in Domestic Violence Cases: Guidelines for Practice," by Lucy Salcido Carter and Family Violence Prevention Fund, et al.
http://endabuse.org/programs/children/files/ftm_rev02.pdf

Greenbook Initiative
www.thegreenbook.info

Jury Verdict for Damages Against Employer

Gantt v. Security USA (4th U.S. Circuit Court Decision)
<http://pacer.ca4.uscourts.gov/opinion/pdf/031033.P.pdf>

"Workplace Violence: Supreme Court Lets Stand Ruling Finding No Constitutional Breach in Assault of Guard," BNA Daily Labor Report, October 5, 2004
www.ncdsv.org/images/WorkplaceViolenceSupremeCourtLetsStand.pdf

What Employers Can Do to Prevent Violence in the Workplace

"Combating Workplace Violence," International Association of Chiefs of Police
www.theiacp.org/documents/pdfs/Publications/combatingworkplaceviolence%2Epdf

Workplace Policies and Programs, Family Violence Prevention Fund
<http://endabuse.org/programs/display.php3?DocID=75>

For more resources, visit www.ncdsv.org. Click on Resources, then on Publications and then on Child Protection/Welfare and Workplace Issues.

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1. Leslie Kaufman, "City Settles Suit over Separating Abused Mothers from Children," *New York Times*, Dec. 18, 2004, at 1B.
2. *Nicholson v. Scopetta*, No. 113 slip op. 07617 (2nd Cir. Oct. 26, 2004).
3. *Nicholson v. Williams*, 2003 F. Supp.2d 153, (E.D.N.Y. 2002).
4. *Nicholson*, note 2.
5. *Nicholson*, note 3, at 209.
6. *Id.*
7. *Nicholson*, note 2.
8. *Id.* At 23, 29 (In reaching this determination, the Court of Appeals reviewed the legislative intent of the New York statute that ACS relied upon to re-

move children from battered mothers and concluded it was never intended to create a presumption of removal based upon exposure to domestic violence.)

9. *Nicholson v. Scopetta*, No. 113 slip op. 07617 (2nd Cir. Oct. 26, 2004).
10. *Nicholson v. Williams*, 2003 F. Supp.2d 153, (E. D. N. Y. 2002).
11. *Nicholson*, note 2.
12. *Nicholson*, note 3, at 209.
13. *Id.*
14. *Nicholson*, note 2.
15. *Nicholson v. Williams*, 00 CV 2229 (JBW) (CLP) (Dec. 17, 2004).