

# Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence

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## I. INTRODUCTION

The emergence of joint custody as an option in divorce settlements has far outdistanced the empirical knowledge that supposedly informs it . . . [C]oncerns about the ways in which the legal system could exacerbate hostility and conflict between ex-spouses suggested that joint custody might offer divorcing parents a respectful alternative to the adversarial process. Despite these auspicious beginnings, rigorous research into the potentials and pitfalls of joint custody developed little beyond initial inquiries. This estrangement of joint custody from research left decision makers out on a limb, without a sufficient knowledge base, just as they were being faced with increasingly complex choices.<sup>1</sup>

For survivors of intimate partner violence, custody is, without question, one of the most important issues addressed by our legal system.<sup>2</sup> For battered women, the court's decision regarding their children is critical. As a result, legal scholars have examined, in depth, the value of sole custody awards in favor of battered women, as well as the dangers of joint custody.<sup>3</sup> To that end, this

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1. Marsha Kline Pruett & Christa Santangelo, *Joint Custody and Empirical Knowledge: The Estranged Bedfellows of Divorce*, in THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS 389 (Robert M. Galatzer-Levy & Louis Kraus eds., 1999).

2. Information based on the author's representation of hundreds of battered women seeking civil protective orders and custody of their children, since 1994.

3. See generally Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403 (2005) (asserting that joint custody is inappropriate where there has been domestic violence and that there should, at minimum, be a domestic violence exception to the presumption in favor of joint custody); Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM CT. REV. 500 (2008) [hereinafter *Custody Disputes*] (contemplating risk-assessment methods as they relate to parenting plans that best ensure the safety and protection of battered parents and their children); Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379 (2005); Peter G. Jaffe et al., *Parenting Arrangements After Domestic Violence: Safety as a Priority in Judging Children's Best Interest*, 6 J. CENTER FOR FAMILIES CHILD. & CTS. 81 (2005) [hereinafter *Parenting Arrangements*]; Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657 (2003); Tonia Ettinger, *Domestic Violence and Joint Custody: New York is Not Measuring*

Article considers, beyond the obvious risks of physical harm,<sup>4</sup> why joint legal custody is not a viable alternative to sole legal custody in cases involving intimate partner violence.<sup>5</sup> In addition, by de-constructing the fundamental aspects of co-parenting essential to an award of joint legal custody, this Article provides vital tools to judges tasked with custody determinations in cases involving domestic violence.

Today, many states acknowledge that intimate partner violence has some relevance to the court's ultimate custody determinations. In fact, the vast majority of jurisdictions in the United States list domestic violence as a statutorily required factor for consideration.<sup>6</sup> The weight afforded to evidence of domestic violence is, however, unclear.<sup>7</sup>

In an effort to provide added protections for battered parents and to clarify the weight to be given to evidence of intimate partner violence, twenty-six states have enacted legal presumptions against awarding custody to a batterer.<sup>8</sup> In

Up, 11 BUFF. WOMEN'S L.J. 89 (2002-2003) (arguing for a presumption against joint custody in cases involving intimate partner violence); Martha Albertson Fineman, *Domestic Violence, Custody, and Visitation*, 36 FAM. L.Q. 211 (2002); Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991); Arnold F. Blockman, *Survey of Illinois Law: Joint Custody Dilemmas and Views from the Bench*, 31 S. ILL. U. L.J. 941 (2007).

4. See Lisa Bolotin, Note, *When Parents Fight: Alaska's Presumption Against Awarding Custody to Perpetrators of Domestic Violence*, 25 ALASKA L. REV. 263, 268-72 (2008) (highlighting the obvious dangers of joint custody awards in custody cases involving domestic violence, such as physical harm to both victim and child, as well as the risk to a child's emotional development).

5. This Article considers custody determinations in the context of legal custody, not residence. The term "joint custody" is used herein to refer to joint legal custody, not joint physical custody. Joint legal custody requires some form of joint decision-making, co-parenting, and communication which presents challenges in cases involving intimate partner violence. Legal custody has been defined as "the authority and duty to make long-range decisions concerning the child's life, including education, discipline, medical care and other matters of major significance to the child's life." *Ysla v. Lopez*, 684 A.2d 775, 777-78 (D.C. 1996) (internal citations omitted); see also *Bell v. Bell*, 794 P.2d 97, 99 (Alaska 1990) (defining joint legal custody as "share[d] responsibility in the making of major decisions affecting the child's welfare") (internal citations omitted); *In re Marriage of Bolin*, 336 N.W.2d 441, 444 (Iowa 1983) ("[J]oint custody does not require alternating custodial companionship. Joint custody is not synonymous with what this court previously labeled 'divided custody.'"); *In re Marriage of Gensley*, 777 N.W.2d. 705, 714 (Iowa Ct. App. 2009) (providing that "'Legal Custody' carries with it certain rights and responsibilities, including but not limited to 'decision making affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction'" (internal citations omitted); *Nufrio v. Nufrio*, 775 A.2d 637, 639 (N.J. Super. Ct. App. Div. 2001) (defining joint legal custody as "the authority and responsibility for making 'major' decisions regarding the child's welfare"). "Physical custody," on the other hand, "comprises the residuum-physical control over the child and those decisions attendant to such immediate control." *Ysla*, 684 A.2d at 778. Although shared physical custody or ordering that the child reside with a batterer raises risks for victims and the children similar to those addressed in this Article, this Article focuses solely on legal, not physical custody.

6. See *Child Custody and Domestic Violence by State*, A.B.A. COMM'N ON DOMESTIC VIOLENCE (Feb. 2008), <http://www.abanet.org/domviol/docs/Custody.pdf> (highlighting that the vast majority of states – excluding Arizona, Louisiana, Maryland, Oklahoma, South Dakota, Texas, Washington, and West Virginia – consider domestic violence as a factor relevant to best interests).

7. See Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163, 195-97 (2009) (exposing the flaws inherent in the current application of the best interest standard to custody cases involving evidence of domestic violence).

8. A.B.A. COMM'N ON DOMESTIC VIOLENCE, *supra* note 6.

many instances, however, the victim faces a heavy burden in order to trigger that presumption. For example, some jurisdictions require that the victim prove she suffered physical injuries as a result of abuse, the act is recent, weapons were used in the commission of the act, the act was part of a continuing course of conduct, or that the batterer was convicted of an enumerated offense.<sup>9</sup> All of which are difficult to prove in domestic violence cases due to the nature of this type of abuse.

Research suggests that battered women are often reluctant to contact law enforcement or press charges.<sup>10</sup> As a result, many incidents of violence between intimate partners are never brought to the attention of law enforcement. Additionally, when a victim contacts the police, there is no guarantee that her abuser will be arrested, charged, or convicted for the crimes he has committed against her. Because these crimes are either never adjudicated or the batterer is charged with a lesser offense,<sup>11</sup> the criminal evidence often carries little weight during any subsequent child custody trial. If the presumption is not triggered, domestic violence becomes just one of many factors considered.<sup>12</sup> Furthermore, even if the presumption is triggered, it may be overcome.<sup>13</sup>

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9. In my prior Article I considered this problem in depth. See Harrington Conner, *supra* note 7, at 198. In the Article I provide the following analysis:

Although well-intentioned, some state laws are rendered meaningless based on that particular jurisdiction's definition of abuse or abuser. See DEL. CODE ANN. tit. 13, § 703A (2006) (defining a perpetrator of domestic violence as someone who has been convicted of a felony level offense, assault in the third degree, or various other significant criminal convictions, or has been found in criminal contempt of a family court protective order based on an assault or other physical abuse or threat of harm); see also N.D. CENT. CODE § 14-09-06.2(1)(j) (2006); R.I. GEN. LAWS § 15-5-16(g)(4) (2007) (focusing on physical harm, fear of harm, or sexual abuse). For example, in North Dakota, a presumption against awarding joint or sole custody to a perpetrator of domestic violence is only triggered if there is *credible evidence* that the batterer caused "serious bodily injury," used a dangerous weapon, or committed *recent* acts that rise to the level of a pattern of violence. N.D. CENT. CODE § 14-09-06.2(1)(j) (2006). All three of these possible protections have their own set of hurdles that detract from the law's intended use. The first factor, whether there was serious bodily injury, fails to focus on the conduct of the batterer and instead focuses on the outcome: the nature of the injury to the victim. *Id.* By failing to focus on the specific behavior of the batterer, acts that do not result in serious injury are irrelevant in the eyes of our legal system. In effect, the statute does not provide protections when the batterer acts in a clearly dangerous manner unless another section of the statute is triggered.

10. See ANDREW R. KLEIN, NAT'L INSTITUTE OF JUSTICE, SPECIAL REPORT: PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH 56 (2009), available at <http://www.ncjrs.gov/pdffiles1/nij/225722.pdf> (explaining that studies suggest that many victims of domestic violence do not contact law enforcement). Even if the victim does call the police, not all abusers are charged by law enforcement or prosecuted for the crimes they commit. *Id.* at 5 (maintaining that "not all cases reported to law enforcement are forwarded to prosecutors, and even fewer are prosecuted"). As a result, there is a large category of abusers who do not fall within the legal definition of a perpetrator of domestic violence. In addition, a victim may encounter resistance from a custody judge who is asked to consider an act of abuse that is remote in time. When an act of domestic violence is recent, even if there is no presumption in a particular case, the court may be more likely to provide sole custody to a victim parent. Cases in which the act or acts of domestic violence are remote in time present some of the greatest challenges to victims.

11. See *id.* ("[N]ot all incidents reported to law enforcement are forwarded to prosecutors, and even fewer are prosecuted").

12. See Harrington Conner, *supra* note 7, at 197-200.

13. The Louisiana Court of Appeals provides a useful explanation of presumptions generally, explaining that "the presumption only provides the judge with a first choice, which choice must be

Yet, an act of intimate partner violence rarely occurs in isolation. Experts suggest “victims do not generally report their initial intimate partner victimization but typically suffer multiple assaults or related victimizations before they contact authorities or apply for protection orders.”<sup>14</sup> One study found that 68 % of the victims seeking protection from their abusers had been physically abused in the past by the same batterer.<sup>15</sup>

Based on these findings, the report proposes that our courts “should not assume” that the case “before them represents isolated, unique behaviors on the part of the parties, particularly the abuser.”<sup>16</sup> Thus, any reliable evidence of intimate partner violence introduced at a custody trial is likely to be the tip of the iceberg.

Although there are a number of flaws with the current process of assessing domestic violence in custody cases, one of the greatest challenges lies with our legal system’s over-emphasis on the act of violence itself. There is little question that physical acts of violence must not be tolerated. Yet, emotional abuse, threats of harm and low level acts of physical violence can also have a devastating effect on a victim of intimate partner violence.

Clearly, past acts of physical violence indicate a risk of future physical harm to victims and their children.<sup>17</sup> A risk of harm that is highly relevant to the court’s ultimate custody determination. An over-emphasis on the dangerousness of particularized acts, however, has caused our system to be exclusive, rather than inclusive, in affording protections to victims of intimate partner violence. In essence, the court’s focus on a narrow group of individuals who are able to prove they are at risk of serious physical harm, thus affording them legal protections at the exclusion of the large number of other survivors, misses the broader problem. The vast majority of battered women seeking custody of their children, regardless of the nature of the intimate partner violence, suffer from many of the problems identified by the legislature as a basis for originally enacting statutory presumptions against an award of custody to an abuser. Unfortunately, our legal system’s narrow focus on physical acts of violence, specifically those that result in injury or a threat of serious bodily harm, causes courts to lose sight of critical information about how domestic violence generally influences parenting.

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rejected in the face of evidence which tends to disprove the conclusion. In such a case, it becomes necessary for the other party to reestablish the propriety of the presumption’s conclusion.” *Crockett v. Crockett*, 525 So.2d 304, 307 (La. Ct. App. 1988).

14. NAT’L INSTITUTE OF JUSTICE, *supra* note 10, at 6.

15. *Id.*

16. *See id.* at 7.

17. *See id.* at 19 (reporting a recidivism rate among abusers of approximately one-third.). Further, in instances where low rates of re-abuse have been found, “it appears the lower rate is a result of police behavior, not abuser behavior.” *Id.*; *see also* Sarah M. Buel, *Taking Domestic Violence Seriously: The Role of Lawyers, Judges and Probation Officers* 32 (2003) (unpublished manuscript), available at [http://childscryforhelp.com/DV/dv\\_seriously.pdf](http://childscryforhelp.com/DV/dv_seriously.pdf) (citing EDWARD W. GONDOLF, *BATTERER INTERVENTION SYSTEMS: ISSUES, OUTCOMES, AND RECOMMENDATIONS* 200 (2002)); AM. MED. ASS’N, *DIAGNOSTIC AND TREATMENT GUIDELINES ON DOMESTIC VIOLENCE* 6 (1992), available at <http://www.vahealth.org/Injury/projectradarva/documents/older/pdf/AMADiag&TreatGuide.pdf> (indicating that forty-seven percent of men who beat their wives do so at least three times per year).

While the risk of harm is an important reason to deny any abuser decision-making authority, it is only one part of the equation. Not only can evidence of domestic violence indicate a risk of physical harm to both victim and child, past acts of intimate partner violence have a profound effect on future parental decision-making, for both the victim and the abuser. Domestic violence alters the power dynamic between the parties, which in turn influences the way parents engage in parental decision-making. For example, a history of intimate partner violence may influence how one parent will communicate with the other, it may indicate a power imbalance in the relationship, or it may provide evidence of a pre-disposition on the part of one parent to intimidate and harass the other parent. Such information is highly relevant to assessing the parties' ability to make joint decisions in the future. Despite these facts, absent a presumption, abuse within an intimate relationship is often treated by our system as a short-term issue that becomes increasingly less relevant to the ultimate custody determination with the passage of time.

The rarity of equality in decision-making between an abuser and his victim renders joint decision-making unworkable. The occurrence of domestic violence within a relationship, regardless of how it is categorized,<sup>18</sup> suggests that the batterer is in a superior position of power. The propensity to abuse also provides important information about the character of the batterer. If he is an abuser, he is more likely to use power to dominate and intimidate the other parent. By ordering joint legal custody, thus requiring joint decision-making, the court places the victim in an impossible position—she is forced to negotiate with her batterer despite her lack of power within that relationship.

Yet, our courts struggle to decide what relevance, if any, intimate partner violence has to legal custody determinations. According to Judith Greenberg:

Courts tend to miss the presence or importance of domestic violence for reasons very similar to those that account for its general invisibility in society. We can see this by looking under state statutes that create a presumption against awarding custody to a batterer. These cases are particularly interesting because they represent situations in which the victim has the strength to recognize the violence and to assert it as part of her case for why she should be given custody of the children. Despite this, the courts often do not acknowledge its importance or, if they do, they find reasons to dismiss its significance.<sup>19</sup>

As a result, judges continue to order joint legal custody in cases involving domestic violence, failing to see the long-term consequences of their orders. In an effort to expose the reasons why domestic violence is relevant to custody beyond the threat of physical harm and to ascertain the feasibility of joint legal custody in these cases, the key elements of joint decision-making must be uncovered and analyzed.

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18. Scientific experts, in an effort to assess risk and to assist the court in weighing domestic violence in custody cases, have attempted to create a typology for domestic violence. See *Custody Disputes*, *supra* note 3, at 501 (considering social science research on the following types of intimate partner violence: abusive-controlling violence relationships, conflict-instigated violence, violent resistance, separation-instigated violence).

19. See Greenberg, *supra* note 3, at 418.

## II. THE ESSENTIAL ELEMENTS FOR JOINT DECISION-MAKING

In every case the parties are entitled to an individualized determination of whether joint custody or sole custody serves the child's best interest.<sup>20</sup>

The vast majority of custody disputes resolved by trial judges are the least likely to be successful candidates for joint custody. The mere fact that the parties are unable to enter into an agreement without judicial intervention indicates that the parties may be less cooperative than parents who are willing to negotiate. One survey in particular suggests that many judges are well aware of this fact. The study indicates that responding judges "pointed out that the cases they hear generally represent the exception rather than the norm. Situations where joint custody was successful usually do not require judicial review or decision. What this data seems to confirm is that joint custody may not be the best arrangement in strongly disputed cases[.]"<sup>21</sup> Accordingly, judges must take care to thoroughly assess whether there is a likelihood of successful co-parenting before entering a custody award. This is particularly important in cases involving intimate partner violence.

Unfortunately, current standards fall short of providing useful guidance to judges assessing the probability that shared decision-making is feasible in a given case. This may result from our system's inability to realize that such an analysis is even necessary, likely based in part on the lack of information available about how domestic violence influences parental decision-making. This may also result from the long-standing belief on the part of our legal system that parents should simply be able to put aside their differences in order to do what is best for their children. In the face of intimate partner violence, however, the solution is much more complex.

Logically, what is required of a joint legal custodian is very different from what is required of a sole custodian. A joint legal custodian invariably has more contact with the other parent than his or her sole custodial counterpart. Research confirms that, although joint legal custody does not necessarily promote conflict, frequent contact among highly conflicted parents only "serves to sustain hostilities and predict ongoing aggression."<sup>22</sup> One must not ignore the role conflict plays in parental decision-making or the negative impact it has on children generally.<sup>23</sup> Conflict and domestic violence, however, are not one and the same, despite the connections made by the scientific community.<sup>24</sup> The

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20. See *Squires v. Squires*, 854 S.W.2d 765, 770 (Ky. 1993).

21. Thomas J. Reidy et al., *Child Custody Decisions: A Survey of Judges*, 23 FAM. L.Q. 75, 81-82 (1989-90).

22. Pruett & Santangelo, *supra* note 1, at 410 (explaining that "data confirm that, when parental conflict is high, frequent access actually predicts increased conflict and child symptomatology over time") (internal citations omitted).

23. Pruett & Santangelo, *supra* note 1, at 409 ("[T]he strongest empirical evidence that interparental conflict in shared parenting situations can adversely affect child adjustment emerges from two studies . . . . The data from this research suggest that these children . . . have both overcontrolled and undercontrolled profiles of disturbances characterized by such symptoms as depression, withdrawal, and diminished interest in communicating. Additionally, this group of children reported somatic complaints.").

24. See generally Janet R. Johnston & Linda E.G. Campbell, *Parent-Child Relationships in Domestic Violence Families Disputing Custody*, 31 FAM. CT. REV. 282 (1993); Janet R. Johnston & Linda E.G.

term “high conflict” as it is used in the area of family law suggests that both parents have acted equally in creating the hostility. In intimate partner violence cases the abusive parent often creates the “conflict.”

When judges assess domestic violence they tend to focus on its connection to the physical placement of children. What courts tend to overlook is the influence domestic violence has on decision-making, the key to the court’s legal custody award. Hence, the primary focus of this Article is how domestic violence influences parental decision-making and, in turn, how decision-making in intimate partner violence cases influences legal custody.

A court’s determination regarding child custody is multi-layered. Child custody decisions can be broken down into three categories: legal custody (decision-making), physical custody (where the child will reside), and visitation (parenting time); three discrete legal issues requiring judicial determination. The judge must consider who should make the major decisions in the child’s life, legal custody. The judge must further decide where the child should reside, physical custody. Finally, if the court orders primary residence to one parent, the court must also determine whether to grant the non-residential parent visitation. In an ideal world the custody judge will determine each legal issue separately and in the order presented above.

For the purpose of legal scholarship, these issues can be neatly divided into three distinct categories and addressed separately. For the custody judge, however, these issues are often intertwined. In fact, given the current state of assessing legal and physical custody, as well as visitation, it is easy for the trial judge to lose sight of the fact that these are three distinct issues.

Legal and physical custody are often evaluated under the same set of factors.<sup>25</sup> For example, Delaware judges determine both legal and physical custody by considering the following eight factors: (1) the wishes of the child’s parent or parents; (2) the wishes of the child; (3) the interaction and interrelationship between the child and the parents, as well as other family and household members; (4) the child’s adjustment to home, school and community; (5) the mental and physical health of all individuals; (6) the compliance by both parties with their rights and responsibilities to the child; (7) evidence of

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Campbell, *IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT* (1988); David B. Doolittle & Robin Deutsch, *Children and High-Conflict Divorce Theory, Research, and Intervention, in THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS*, *supra* note 1, at 425.

25. Although the vast majority of jurisdictions assess both legal and physical custody pursuant to the same standards, Colorado, for example, analyzes parenting time (physical custody) and decision-making responsibility (legal custody) pursuant to two separate standards. See COLO. REV. STAT. § 14-10-124 (1)(1.5)(a) (2010) for the factors Colorado considers for determining parenting time (including, but not limited to: the wishes of the parents; wishes of the child; interaction and interrelation of the child with his or her parents, siblings, and other persons who may significantly affect the child’s best interest; the child’s adjustment to home school and community, the mental and physical health of all individuals involved). See COLO. REV. STAT. § 14-10-124 (1)(1.5)(b) (2010) for the factors Colorado considers for determining decision-making responsibility (including, but not limited to: evidence of the ability of the parties to cooperate and make decisions jointly, evidence of child abuse, and evidence of spousal abuse). West Virginia maintains a similar statute. See W. VA. CODE ANN. § 48-9-207(a)(4) (LexisNexis 2009).

domestic violence; and (8) the criminal history of any party or household member.<sup>26</sup>

While all of the foregoing factors may provide good evidence as to with whom and where the child should reside (physical custody), a number of these factors provide little guidance as to whether a particular parent should be granted legal custody.

The court's legal custody assessment is two-fold. First, the court must determine whether each parent is capable of making proper child care decisions. An assessment of factors five through eight (the mental and physical health of the parents, their compliance with their rights and responsibilities to the child; evidence of domestic violence; and each parent's criminal history), provide the court with a good indication about each parent's capacity to make appropriate decisions on behalf of the child. The second assessment, whether these particular parents are capable of *jointly* making those decisions requires a different analysis.

Many of the current factors fail to provide the court with sufficient information to make a determination as to whether a particular set of parents will be able to engage in joint decision-making. For example, assessing a child's adjustment to her home, school and community, as well as her relationship with each parent provides the court with helpful information about the proper physical placement of the child (physical custody), but does little to suggest the parents have the aptitude to engage in cooperative decision-making (legal custody). Similarly, although the court may find a child's wishes, provided the child is of suitable age, persuasive as to the child's living arrangements, the court should certainly not ask a child to make suggestions about who should be vested with legal decision-making. Predicting whether legal custodians will be able to effectively joint- parent requires a consideration of many factors. A survey of family law judges suggests they believe the key to successful joint custody lies in the "maturity and stability of the parents, their willingness and commitment to cooperate, and their ability to communicate."<sup>27</sup> Likewise, it is apparent that successful co-parenting demands that both parents effectively communicate, cooperate, build trust, behave appropriately toward each other, and set and respect boundaries.<sup>28</sup> These five factors – communication,

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26. See DEL. CODE ANN. tit. 13, § 722 (2009). Some jurisdictions consider as few as five factors while others consider as many as sixteen factors. For example, the following jurisdictions list some or similar best interest factors for child custody as Delaware statute discussed *infra*: ARIZ. REV. STAT. ANN. § 25-403(A)(1)-(10) (2007); CONN. GEN. STAT. § 46b-56(c)(1)-(16) (West 2009); IDAHO CODE ANN. § 32-717(1)(a)-(g) (2006 & Supp. 2010); 750 ILL. COMP. STAT. ANN. 5/602(a)(1)-(10) (LexisNexis 2009 & Supp. 2010); IND. CODE ANN. § 31-17-2-8(1)-(8) (LexisNexis 2007); KAN. STAT. ANN. § 60-1610(a)(3)(B)(i)-(ix) (2005); KY. REV. STAT. ANN. § 403.270(2)(a)-(i) (West 2006); MO. ANN. STAT. § 452.375. 2(1)-(8) (West 2011); MONT. CODE ANN. § 40-4-212 (2010); N.D. CENT. CODE § 14-09-06.2(1)(a)-(m) (2009); OHIO REV. CODE ANN. § 3109.04(F)(1)(a)-(j) (West 2005 & Supp. 2009); TENN. CODE ANN. § 36-6-106(a)(1)-(10) (2010).

27. Reidy et al., *supra* note 21, at 82.

28. Susan Steinman, Dir., Jewish Family & Children's Servs., Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications, Bodenheimer Address at the King Hall School of Law (Feb. 24, 1983), in 16 U.C. Davis L. Rev. 739, 744 ("While the general requirement for joint custody parents is cooperation, there are four specific tasks of co-parenting after marital separation: decision making, communication, handling differences, and building new boundaries."). Steinman acknowledges that some elements of joint parenting have "the danger of

cooperation, trust building, parental behavior, and respecting boundaries – are the essential elements to joint decision-making. No one factor alone, however, can clearly predict the success of joint legal custody.

#### A. Effective Communication

... the single most important prerequisite. . . is effective communication.<sup>29</sup>

While there are a number of essential elements to successful joint or shared custody arraignments, the ability of the parents to effectively communicate is critical. In fact, the ability of the parents to communicate is frequently considered by our courts in assessing whether a particular set of individuals can joint parent.<sup>30</sup> It is logical to conclude that the parties must actually be able to speak with each other to effectively communicate for the purposes of joint parenting. Indeed, legal experts maintain that “the more parents are able to talk with each other and solve problems without tension, the better their children will be able to cope [.] . . .”<sup>31</sup>

Our courts, however, have not uniformly agreed on what constitutes effective communication. Some judges find that contact by way of written notes or a telephone message between the parties is sufficient to establish that the parents are able to communicate.<sup>32</sup> In effect, our system is suggesting that the simple transfer of information in any form is sufficient to prove that the parties are able to communicate for the purposes of joint legal custody. Defining communication as the exchange of information, however, neglects the complex nature of parental decision-making.

The simple transfer of information alone does not constitute shared decision-making. Accordingly, some judges recognize that successful joint parenting commands a greater level of interaction between the parties.<sup>33</sup> Judges

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arousing tension and stirring up residual anger.” *Id.* at 745. Further, she agrees that joint custody is less likely to work in certain relationships, including those with a history of domestic violence. *Id.* at 753.

29. *K.L.B. v. L.A.B.*, No. CN98-07272, 2004 WL 1146701, at \*2 (Del. Fam. Ct. Mar. 24, 2004) (addressing communication as it related to shared custody); *see also In re Marriage of Garvis*, 411 N.W.2d 703, 706 (Iowa Ct. App. 1987) (suggesting that the ability to communicate is critical to joint custody); *Taylor v. Taylor*, 508 A.2d 964, 971 (Md. 1986) (maintaining that the parents’ ability to communicate is one of the most important factors in determining whether the parents will be able to joint parent).

30. *Blaising v. Blaising*, No. 02A03-0612-CV-613, 2007 WL 1558594, at \*5 (Ind. Ct. App. May 31, 2007) (justifying an award of joint custody on the grounds that the parties were able to communicate); *Periquet-Febres v. Febres*, 659 N.E.2d 602, 605 (Ind. Ct. App. 1995) (explaining that joint custody is appropriate when the parties demonstrate an ability to communicate); *Walker v. Walker*, 539 N.E.2d 509, 513 (Ind. Ct. App. 1989) (affirming a joint custody award in light of the parents’ ability to communicate); *DeNillo v. DeNillo*, 535 A.2d 200, 202 (Pa. Super. Ct. 1987) (finding the parties able to communicate and cooperate for shared custody).

31. *Reidy et al.*, *supra* note 21, at 82-83.

32. *Ford v. Wright*, 611 S.E.2d 456, 460 (N.C. Ct. App. 2005) (“[T]he process of notes and telephone contact, although not the best way for parents to communicate generally, was the best way for parents to communicate in this case. Thus, we fail to find substantial evidence of unsuccessful communication by the parties as to the welfare of the child.”).

33. *See, e.g., M.W. v. S.W.*, No. 3942/02, 2007 WL 1228613, at \*17 (N.Y. Sup. Ct. Apr. 26, 2007) (suggesting that a change in custody was warranted based in part on the deterioration of the relationship to the point that communication could only be accomplished by e-mail); *see also*

often cite the inability of the parents to communicate as one of the most significant impediments to joint custody.<sup>34</sup> This lack of communication may in fact be a good indicator of a broader problem—an inability on the part of one or both parents “to cooperate in the rearing of” the child.<sup>35</sup> Without the ability to cooperate, it is unlikely that the parents will be able to jointly raise their child.<sup>36</sup>

In a select group of jurisdictions such as Iowa, communication is one of several factors considered by the court in making a custody determination,<sup>37</sup> given no more weight than any other best interest factor considered by the custody judge.<sup>38</sup>

Alternatively, when ordering an award of joint custody some jurisdictions specifically require a “positive finding” that the parties are able to communicate.<sup>39</sup> For example, Massachusetts requires a finding by the court that

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Nicotera v. Nicotera, 222 A.D.2d 892, 893 (N.Y. 1995) (suggesting that communication by certified mail fails to establish the effective level of communication necessary for joint parenting).

34. See, e.g., *In re Marriage of Quinlivan*, No. A1-3339, 2004 WL 717164, at \*3 (Cal. Ct. App. Mar. 30, 2004) (citing “the parents’ lack of communication and cooperation” as the basis for the court’s award of sole custody to the mother); *B.D.W. v. W.R.M.*, No. CN90-7063, 2006 WL 2389285, at \*5 (Del. Fam. Ct. Feb. 24, 2006) (ordering sole legal custody based in part on the parties’ lack of communication); *C.C. v. A.H.*, No. CN99-08092, 2003 WL 21434939, at \*6 (Del. Fam. Ct. Mar. 24, 2003); *Tompa v. Tompa*, 867 N.E.2d 158, 164 (Ind. Ct. App. 2007) (upholding the trial court’s modification of joint custody to sole custody based in part on the parties’ lack of communication); *In re Marriage of Gensley*, 777 N.W.2d. 705, 715 (Iowa Ct. App. 2009) (finding that “the overriding factor weighing against joint legal custody is the parties’ utter inability to communicate with each other, which is the result of their toxic relationship”); *Eilers v. Eilers*, 526 N.W.2d 566, 568-69 (Iowa Ct. App. 1994) (affirming the trial court’s award of sole custody based in part on the parties’ “severe lack of ability to communicate”); *Hollins v. Hollins*, 13 S.W.3d 669, 672 (Mo. Ct. App. 2000) (providing that joint custody is not proper if the parties are unable to communicate and cooperate); *M.W.*, 2007 WL 1228613, at \*17 (suggesting that a change in custody was warranted based in part on the deterioration of the relationship to the point that communication could only be accomplished by e-mail). But see *Naranjo v. Caguana*, No. FA074027792, 2008 WL 4379296, at \*4 (Conn. Super. Ct. Sept. 15, 2008) (awarding joint custody despite the fact that the parties had “little ability to communicate”); *Ysla v. Lopez*, 684 A.2d 775, 780 (D.C. 1996) (finding that an award of joint custody is presumed to be in the best interest of the child and thus the parents’ inability to communicate does not necessarily preclude an award of joint custody); *In re Marriage of Garvis*, 411 N.W.2d 703, 706 (Iowa Ct. App. 1987) (“a lack of ability to communicate must be something more than the usual acrimony which accompanies divorce”) (internal citations omitted); *Crockett v. Crockett*, 525 So.2d 304, 308 (La. Ct. App. 1988) (explaining that “joint custody cannot be built upon hatred, distrust, and a lack of communication”).

35. *In re Marriage of Petersen*, No. A06-1801, 2007 WL 1248192, at \*6-8 (Minn. Ct. App. May 1, 2007).

36. *Id.* at \*3 (citing statements made by the district court judge: “If you can’t get along and talk to each other how are you going to jointly raise a child together? It ain’t going to happen, period”); see also *infra* Part II.C.

37. See *Garvis*, 411 N.W.2d at 705-06 (stating that communication is one of seven factors the court must consider).

38. See IOWA CODE ANN. § 598.41(3)(c) (West 2001); N.H. REV. STAT. ANN. § 461-A:6(I)(i) (LexisNexis 2007); N.J. STAT. ANN. § 9:2-4(c) (West 2002); N.M. STAT. ANN. § 40-4-9.1(B)(8) (2010); VT. STAT. ANN. tit. 15, § 665(b)(8) (2002); WYO. STAT. ANN. § 20-2-201(a)(vi) (2009).

39. *Custody of Odette*, 810 N.E.2d 814, 816 (Mass. App. Ct. 2004); see also *DeNillo v. DeNillo*, 535 A.2d 200, 204 (Pa. Super Ct. 1987) (Noting that before shared custody may be awarded, the parents must demonstrate their ability to “communicate and cooperate in promoting the child’s best interest”).

the parties have the capacity to communicate.<sup>40</sup> By requiring that the judge make a positive finding, the focus is shifted from the negative to the positive. This approach is critical to cases involving intimate partner violence because it compels the court to confront, in a meaningful way, the batterer's persona. In a jurisdiction such as Massachusetts, the court will have to consider both the batterer's level of maturity and his capacity to communicate without harassing or intimidating the victim parent.

Most jurisdictions, such as Delaware, do not list communication as a factor, referring to it in case law on an ad hoc basis. The likelihood that the court will consider the parties' capacity to communicate in a jurisdiction such as Delaware is unpredictable. Moreover, even if it is considered, it is even less clear what weight, if any, this issue will be afforded.

For a variety of reasons, not all relationships are conducive to a joint parenting model.<sup>41</sup> In fact, joint custody is considered contrary to the best interest of the child when the parents' interactions are so acrimonious that there is a lack of effective communication.<sup>42</sup> Volatility within the relationship is also cited by courts as a bar to joint parenting. In denying a request for joint custody, one court in particular cited abusive language used by the husband while speaking with his wife as proof that he lacked the ability to communicate in a civilized manner with her, and thus lacked the capacity to joint parent.<sup>43</sup> If abusive language alone is sufficient proof that one parent will obstruct decision-making, it is reasonable to conclude that evidence of domestic violence, regardless of its nature, is an indicator of the same. Yet, hearing officers often overlook the extent to which intimate partner violence causes a breakdown in communication.<sup>44</sup>

40. *Odette*, 810 N.E.2d at 816 (“[T]he statute requires more than a finding that the parties have ‘not demonstrated an inability to communicate’ . . . To support an award of joint custody the statute requires a positive finding that they have such an ability.”).

41. It is not the intention of the Author to address the appropriateness of joint legal custody in the absence of intimate partner violence; such an analysis is well beyond the scope of this Article. There is, however, little consensus as to the feasibility of joint legal custody generally. See *Squires v. Squires*, 854 S.W.2d 765, 771 (Ky. 1993) (Leibson, J., dissenting) (arguing that “except for ‘those few, exceptionally mature adults who are able to set aside animosities in cooperating for the benefit of their children,’ joint custody is not a problem solver, but a pernicious problem causer”) (quoting J. Rainer Twiford, *Joint Custody: A Blind Leap of Faith?*, 4 BEHAV. SCI. & L. 157-68 (1986)). In fact, Judge Leibson relies on an number of sources to support his position that joint custody is not a panacea. E.g., Myra Sun, 1988 *Review of Family Law*, 22 CLEARINGHOUSE REV., 940, 944 (1989); Thomas W. Lowe, *Evaluating Parental Potential for Joint Custody*, 36 PRAC. LAW. 71 (1990); Dianne Post, *Arguments Against Joint Custody*, 4 BERKELEY WOMEN’S L.J. 316 (1990)).

42. See *M.W. v. S.W.*, No. 3942/02, 2007 WL 1228613, at \*17 (N.Y. Sup. Ct. Apr. 26, 2007) (citing *Yette v. Yette*, 834 N.Y.S.2d 547, 549 (N.Y. App. Div. 2007) (“When the parties’ interactions are so acrimonious that they cannot communicate effectively and amicably for the sake of their [child], joint custody is not in the best interest of the child.”) (internal citations omitted).

43. *Musante v. Musante*, No. 308886, 1994 WL 449115, at \*1 (Conn. Super. Ct. Aug. 12, 1994) (denying joint custody to the father where his “aberrant behavior . . . illustrated to the court in tapes submitted as exhibits . . . indicates that he lacks the ability to communicate in a civilized manner with his wife.”).

44. See, e.g., *In re Cariaso*, 2004 WL 360546, at \*1 (Iowa Ct. App. Feb. 27, 2004) (recognizing that the ability to communicate is “[e]ssential” to joint custody and noting that domestic violence is an additional reason why joint custody is inappropriate, but failing to establish any connection between the two).

Certainly, in some cases, the parents' inability to communicate is the result of an unwillingness to put aside their differences to do what is best for their children. In relationships involving intimate partner violence, however, there is an absence of communication between the parties. It is often not safe for a victim of domestic violence to speak freely with her abuser. The victim is silenced by the abuse and her abuser. She is not at liberty to express her opinion or make suggestions that will be reasonably considered. Joint decision-making requires joint participation—two voices, two minds, and two opinions merging to a resolution for the betterment of the child. For the batterer, however, there is only one voice, one opinion, and one correct resolution—his own.

For example, in the Alaska case *Farrell v. Farrell*, the court acknowledged that the fear batterers instill in their victims can negatively influence the good communication necessary for joint parenting.<sup>45</sup> The facts of the *Farrell* decision suggest there was a long history of domestic violence.<sup>46</sup> The reviewing court found that the lower court did not abuse its discretion by giving more weight to evidence that indicated an open dialogue was unlikely due to the history of domestic violence, despite other evidence that suggested communication between the parties had improved.<sup>47</sup> Most significant, the mother testified that her fear would impede her ability to speak her mind if "she felt really strongly about something."<sup>48</sup>

The *Farrell* case is a good illustration of how domestic violence can inhibit a parent's ability to fully participate in joint decision-making. Parents must be able to maintain an open dialogue and freely engage in discourse. When, however, a history of violence shuts down the exchange of ideas, joint legal custody is not a viable option. Accordingly, judges must not simply acknowledge the existence of domestic violence when making a custody determination; they must assess how its existence influences parental interaction.

Although some judges appreciate that domestic violence can have a negative influence on the communication necessary for joint parenting, others do not. Furthermore, even when the problem is identified, there is little guidance as to how this information should be used when assessing legal custody. For example, in 2003, the North Carolina trial court in *Ford v. Wright*<sup>49</sup> found that joint custody was no longer feasible because of a material change in circumstances.<sup>50</sup> The lower court based its determination in part on that fact that the parents were unable to communicate, as well as the conclusion that

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45. 819 P.2d 896, 899 (Alaska 1991).

46. *Farrell*, 819 P.2d at 900 (finding that there was "adequate support in the record for the superior court's decision to award Ruth sole custody. The court did not abuse its discretion by giving relatively less weight to the evidence suggesting improved communication between Ruth and Robert and more weight to the evidence indicating insufficient communication.").

47. *Id.* at 900 (finding that there was adequate support in the record for the superior court's decision to award Ruth sole custody. The court did not abuse its discretion by giving relatively less weight to the evidence suggesting improved communication between Ruth and Robert and more weight to the evidence indicating insufficient communication.).

48. *Id.*

49. 611 S.E.2d 456 (N.C. Ct. App. 2005).

50. *Id.* at 461 (citing *Shipman v. Shipman*, 586 S.E.2d 250, 255 (N.C. 2003)).

issues related to intimate partner violence remained unresolved.<sup>51</sup> In fact, two years earlier, the trial court found that the parents were having difficulty communicating due to domestic violence.<sup>52</sup> Despite finding that domestic violence shaped the parties inability to communicate, the trial court initially concluded that it was in the best interest of the children that the parents enjoy joint custody.<sup>53</sup>

Further breakdown in communication, however, resulted in a request by the mother for a protection from abuse order and a request to modify custody.<sup>54</sup> The trial court modified the custody order, granting the mother sole legal custody.<sup>55</sup> On appeal, the North Carolina Court of Appeals reversed the trial court's determination, maintaining that no change in circumstance had been established and that there was insufficient evidence to suggest that the parties were unable to communicate.<sup>56</sup>

In making its determination, the appellate court in *Ford v. Wright* relied on the testimony of the abusive parent who maintained that the parties had no problem communicating.<sup>57</sup> The reviewing court also highlighted the fact that the mother acknowledged that "although not ideal," the exchange of information via written notes and telephone calls was "the best way for the parties to communicate in this case," inferring that such a statement was proof that the parties could effectively joint parent.<sup>58</sup>

The reviewing court also found that the trial court's reliance on past acts of domestic violence was unfounded because the prior acts could not constitute a substantial change in circumstance, as they were previously addressed by the trial court.<sup>59</sup> Absent from the appellate court's analysis was any consideration of how the history of violence in this case negatively affected the parties' ability to communicate, which continued to deteriorate over time.<sup>60</sup> Arguably, this continuing breakdown in communication between the parties could, in fact, constitute good evidence of a substantial change in circumstances.

## B. Cooperation & Equality of Negotiating Power

[D]omestic violence at least impairs, if not destroys, the partner's autonomy, holds the mother . . . hostage (metaphorically), and allows the father to take

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51. *Id.* at 460.

52. *Id.* at 458.

53. *Id.* The reviewing court explained:

The trial court, in an order dated 29 March 2001, made a finding of fact which included incidents of domestic violence that had occurred between the parties, potential substance abuse problems on the part of the defendant, and difficulties between the parties in communication due to domestic violence. The trial court also found that both parties were "caring and concerned parents" and that it was in the best interest of the child that custody be shared jointly between the parties.

*Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 460-61.

57. *Id.* at 460.

58. *Id.*

59. *Id.* at 461.

60. *Id.* at 458.

power over the other individuals in the family . . . None of their interactions can accurately be viewed as occurring without his thumb on the scale, even if the last act of physical violence occurred years ago.<sup>61</sup>

Although critical to cooperative parenting, the ability of the parties to communicate is simply the threshold inquiry. It is evident that successful joint parenting requires much more. The likelihood that parents will be able to effectively communicate about important issues relating to the children appears to be dependent upon the parents' ability to act cooperatively. Additionally, cooperativeness itself appears to influence many other elements essential to joint decision-making.

In order to joint parent the parties must be able to reach agreement on important issues. For that reason, many courts list parental cooperation as essential to a successful joint legal custody arrangement.<sup>62</sup> One survey found that judges cited poor cooperation most often as the reason for the failure of a joint custody award.<sup>63</sup> As a result, some judges reserve joint custody for "those . . . relatively stable, amicable parents behaving in a mature civilized fashion."<sup>64</sup> Other hearing officers, however, believe that, as separation is typically based on disharmony between the parents, a lack of amicability alone should not act as a bar to joint parental involvement.<sup>65</sup>

Like communication, only a select number of jurisdictions list cooperation as a statutorily enumerated best interest factor for child custody.<sup>66</sup> Other

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61. Meier, *supra* note 3, at 695-96.

62. Zimin v. Zimin, 837 P.2d 118, 123 (Alaska 1992) (explaining that "cooperation between parents is essential if joint custody is to be in the child's best interest") (internal citations omitted); *see also* Bell v. Bell, 794 P.2d 97, 99 (Alaska 1990) (providing that cooperation is essential to joint custody); McClain v. McClain, 716 P.2d 381, 386 (Alaska, 1986) (emphasizing that cooperation between parents is essential for joint custody to work); D.L.K. v. C.S., 1986 WL 9029, at \*2 (Del. Super. Ct. Aug. 5, 1986) (refusing to overturn a joint custody decision despite claims that the trial court did not properly weigh evidence of abuse when making the custody decision); Tompa v. Tompa, 867 N.E.2d 158, 164 (Ind. Ct. App. 2007) (upholding the trial court's modification of joint custody to sole custody based in part on the parties' lack of cooperation); Hollins v. Hollins, 13 S.W.3d 669, 672 (Mo. Ct. App. 2000) (highlighting, among other factors, the trial court's finding that father was "a control freak" and holding that "where the parties are unable to communicate or cooperate and cannot make shared decisions regarding the welfare of their child, joint custody is improper"); Kelly C. v. Jason C., No. V-13292-05/05A, 2006 WL 2770106, at \*3 (N.Y. Fam. Ct. Jul. 27, 2006) (explaining that a cooperative relationship is necessary for joint custody to succeed); Moore v. Moore, 209 P.3d 318, 322 (Okla. Civ. App. 2009).

63. *See* Reidy et al., *supra* note 21, at 80 (explaining that poor cooperation was cited 30.5% of the time by judges as the reason for the failure of joint custody).

64. D.Z. v. C.P., No. XX/07, 2007 WL 4823451, at \*4 (N.Y. Sup. Ct. Aug. 13, 2007); Nicotera v. Nicotera, 222 A.D.2d 892, 893 (N.Y. 1995) ("Joint custody is appropriate where both parties are fit and loving parents who desire to share in the upbringing of their children and have demonstrated a willingness and ability to put their differences aside and behave in a mature civilized fashion.") (internal quotation marks omitted).

65. *See* DeNillo v. De Nillo, 535 A.2d 200, 205 (Pa. Super. Ct. 1987) (Beck, J., dissenting) (explaining that "divorce is usually predicated on disharmony between the parties and that such disharmony may extend to childrearing. Disharmony alone is not a bar to shared custody if shared custody is in the best interest of the child. The law requires only that the parties be capable of a minimal degree of cooperation.").

66. ALA. CODE § 30-3-152(a)(2) (LexisNexis 1998); COLO. REV. STAT. § 14-10-124(1)(b)(I) (2010); ME. REV. STAT. ANN. tit. 19-A, § 1653(3)(I), (J) (Supp. 2010); MINN. STAT. ANN. § 518.17 2(a) (West Supp. 2011); NEV. REV. STAT. ANN. § 125.480(4)(e) (LexisNexis 2010); N.H. REV. STAT. ANN. § 461-

jurisdictions simply consider communication on an ad hoc basis. In most jurisdictions, however, the level and type of cooperation required for effective joint parenting is not clear. Some courts suggest that “a modicum of communication and cooperation”<sup>67</sup> is sufficient while others require a greater level of collaboration.<sup>68</sup> Clearly, a perfect relationship between the parties is not required for joint parenting.<sup>69</sup> Courts acknowledge that it would be unreasonable to expect that parents will agree on everything,<sup>70</sup> or even be friends,<sup>71</sup> in order for joint legal custody to work. In fact, some tension between separating parents is both expected and tolerated by our courts.<sup>72</sup> Judges do, however, insist that parents look beyond their differences and focus on the important issues relating to the upbringing of their children.<sup>73</sup>

The Oklahoma court in *Moore v. Moore* may have put it best when it declared:

“[j]oint custody is for parents who basically have the ability to communicate with each other even though they do not get along . . . [t]hey are mature enough to put their own differences aside and to be able to sit down and . . . discuss what’s best for the kids and to parent jointly . . . ”<sup>74</sup>

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A:6(I)(i) (LexisNexis 2007); N.J. STAT. ANN. § 9:2-4(c) (West 2002); N.M. STAT. ANN. § 40-4-9.1(B)(8) (2010); OHIO REV. CODE ANN. § 3109.04(F)(2)(a) (West 2005 & Supp. 2009); UTAH CODE ANN. § 30-3-10.2(2)(h) (LexisNexis 2007); VT. STAT. ANN. tit. 15, § 665(b)(8) (2002); W. VA. CODE ANN. § 48-9-207(a)(4) (LexisNexis 2009); WIS. STAT. ANN. § 767.41(5) 10 (West 2010).

67. *Memole v. Memole*, 63 A.D.3d 1324, 1328 (N.Y. Sup. Ct. 2009) (quoting *Blanchard v. Blanchard*, 304 A.D.2d 1048, 1049 (N.Y. 2003)); *see also D.Z.*, 2007 WL 4823451, at \*6 (explaining that “joint custody remains a viable alternative even where the parties ability to communicate is somewhat hindered[.]”).

68. *See supra* note 62 and accompanying text.

69. *In re Marriage of Garvis*, 411 N.W.2d 703, 706 (Iowa Ct. App. 1987) (“a lack of ability to communicate must be something more than the usual acrimony which accompanies a divorce”); *see also In re Marriage of Ertmann*, 376 N.W.2d 918, 920 (Iowa Ct. App. 1985); *In re Marriage of Fish*, 350 N.W.2d 226, 229 (Iowa Ct. App. 1984) (explaining that the parties do not have to be “in accord all the time,” but must be able to “communicate with each other regarding the child’s needs”).

70. *See DiCarlo v. Conway*, No. 04-P-1709, 2005 WL 3149130, at \*2 (Mass. App. Ct. Nov. 25, 2005) (explaining that “all parents do not always agree regarding the welfare of their child. These disparities do not rise to such a level that would prove that there is an inability for the parties to plan with one another. . .”).

71. *E.g.*, *Douglas E. v. Latanya D.*, No. CN89-10360, 1997 WL 297060, at \*4 (Del. Fam. Ct. Feb. 27, 1997) (acknowledging that there is no expectation that the parents like each other in order to communicate and cooperate); *In re Marriage of Bolin*, 336 N.W.2d 441, 447 (Iowa 1983) (maintaining that although “parents are not required to be friends” they should act civilly toward one another); *Rodgers v. Clark*, No. 06-0802, 2007 WL 108486, at \*3 (Iowa Ct. App. Jan. 18, 2007) (explaining that parents are not expected to be friends).

72. *See In re Marriage of Gensley*, 777 N.W.2d 705, 715 (Iowa Ct. App. 2009) (explaining that “tension between the parents is not alone sufficient to demonstrate” that parties are unable to cooperate) (internal citations omitted); *Squires v. Squires*, 854 S.W.2d 765, 768 (Ky. 1993) (maintaining that virtually every case of divorce has some conflict).

73. *See Rodgers*, 2007 WL 108486, at \*3 (maintaining that “adults must have the maturity to put their personal antagonisms aside and attempt to resolve the problems”); *Douglas E.*, 1997 WL 297060, at \*4 (suggesting that parents need to “move beyond their own differences, and concentrate on the needs” of the children).

74. 209 P.3d 318, 322 n.6 (Okla. Civ. App. 2009); *see also Ertmann*, 376 N.W.2d at 920 (citing *Bolin*, 336 N.W.2d at 447) (providing “[e]ven though the parents are not required to be friends, they owe it to the child to maintain an attitude of civility, act decently toward one another, and communicate

It is believed that, with the passage of time, conflict between the parents will dissipate and a reasonable level of cooperation will be achieved in the vast majority of cases.<sup>75</sup> As a result, some courts suggest that the parties' current level of cooperation is not the best predictor of their long-term ability to engage in joint decision-making. Instead, the court must "look beyond the present and assess the likelihood of future cooperation."<sup>76</sup> Admittedly, assessing the parties' ability to work together by focusing solely on their post-separation behavior is unsatisfactory. As expressed by the court in the Kentucky case *Squires v. Squires*, such a narrow focus is not only misleading, it could tend to eliminate joint custody as an option in all but a few select cases.<sup>77</sup>

Assessing the likelihood of future cooperation does, however, necessitate a consideration of past behaviors. Cooperation has been defined as a "willingness to rationally participate in decisions affecting the upbringing of the child."<sup>78</sup> The ability of both individuals to act "rationally" is crucial to successful cooperative parenting. Assessing whether an individual will rationally take part in future parenting decisions presents challenges, as it is not possible to make exact predictions about future human behavior. We can, however, assess the likelihood of reasonableness by examining general decision-making habits, as well as past conduct that is relevant to the decision-making process.

A parent's prior conduct can be a good predictor of his or her future cooperativeness. Evidence of pre-separation cooperative behavior is a strong indicator that the parties will be able to move beyond the conflict inherent in most separations to work together to achieve what is best for their children. Likewise, evidence of a parent's propensity to control the other parent or the decision-making process pre-separation tends to suggest that the controlling parent will be uncooperative in the future. For example, the Alabama court in *Lone Wolf v. Lone Wolf* found that the "parties could not cooperate to the extent necessary to make a joint custody arraignment work" due, in part, to a marriage that was strained from the very beginning.<sup>79</sup> The actions of the parties throughout the course of their marriage provided good evidence of their inability to act cooperatively in the future.

Emotional maturity is another factor that may indicate whether a specific parent possesses the capacity to cooperate. Interestingly, in determining what is best for children "the maturity of the parents," is infrequently enumerated by

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openly with each other.... adults must have the maturity to put their personal antagonisms aside and attempt to resolve the problems."); *Nicotera v. Nicotera*, 222 A.D.2d 892, 893 (N.Y. 1995) ("Joint custody is appropriate where both parties are fit and loving parents who desire to share in the upbringing of their children and have demonstrated a willingness and ability to put their differences aside and behave in a mature civilized fashion.") (internal quotation marks omitted).

75. See Reidy et al., *supra* note 21, at 82 ("Some [judges responding to a survey] suggested that joint custody might work after the passage of time if the initial anger and bitterness declined and the parents became more accustomed to cooperating with each other.").

76. *Squires*, 854 S.W.2d at 769.

77. *Id.* at 768-69 ("[D]ivorce, is attended by conflict in virtually every case. To require goodwill between the parties prior to an award of joint custody would have the effect of virtually writing it out of the law.").

78. *Id.* at 769.

79. 741 P.2d 1187, 1189 (Alaska 1987).

states as a statutory factor.<sup>80</sup> Nevertheless, one study in particular suggests that family law “judges attach great importance to each parent’s . . . overall maturity.”<sup>81</sup> Likewise, in *Squires*, the court declared that emotional maturity is a “dependable guide in predicting future behavior,” as it relates to cooperative parenting.<sup>82</sup> Not surprisingly, the level of emotional maturity among batterers tends to be very low; experts maintain that batterers consistently put their own needs above the needs of their family, often to the detriment of their children.<sup>83</sup>

The feasibility of cooperative parenting in custody cases involving domestic violence is doubtful for a number of reasons. First, unlike non-domestic violence cases where conflict between separating parents tends to dissipate over time, the conflict in cases involving battering often escalates at the time of separation<sup>84</sup> and is more likely to continue over time.<sup>85</sup>

Because the “overarching behavioral characteristic of the batterer is the imposition of” control over his partner,<sup>86</sup> a loss of control over the victim parent resulting from the separation may cause a batterer to become more controlling and hostile in other respects. This may arise in child custody, presumably because the child is the batterer’s only connection to the victim.

Cooperative parenting is greatly diminished in intimate partner violence cases based on this tendency of batterer to be ultra controlling.<sup>87</sup> To achieve

80. In fact, Utah may be one of the only jurisdictions to list “the maturity of the parents” as a best interest factor. See UTAH CODE ANN. § 30-3-10.2(2)(h) (LexisNexis 2007).

81. Reidy et al., *supra* note 21, at 75.

82. *Squires*, 854 S.W.2d at 769; see also *In re Marriage of Bolin*, 336 N.W.2d 441, 447 (Iowa 1983) (pointing out the need for maturity).

83. See LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT* 9 (2002) ([Batterers] perceive their needs as being of paramount importance in the family. They provide less emotional support and listen less well to their partners than do nonbattering men. They expect to be the center of attention, to have their needs be anticipated even when not expressed, and to have the needs of other family members postponed or abandoned. . . . Batterers are often preoccupied with their own needs and thus not available to their children yet may expect their children to be always available to them in ways that can interfere with a child’s freedom and development.”) (internal citations omitted).

84. See Linda C. Neilson, *Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases*, 42 FAM. CT. REV. 411, 419 (2004) (explaining that research confirms batterers use legal tactics, as well as visitation, “to continue to dominate and maintain contact and control following separation”);

*Parenting Arrangements*, *supra* note 3, at 82 (explaining the risks to battered women after separation); Sharon L. Gold, Note, *Why are Victims of Domestic Violence Still Dying at the Hands of Their Abusers? Filling the Gap in State Domestic Violence Gun Laws*, 91 KY. L.J. 935, 940 (2003). See generally NEIL WEBSDALE, *UNDERSTANDING DOMESTIC HOMICIDE* 20-21 (1999) (explaining that research supports a positive correlation between separation from an intimate relationship and “an increased risk of lethal violence” for the female partner); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5-7 (1991) (explaining the increased risks of violence after separation).

85. See NAT’L INSTITUTE OF JUSTICE, *supra* note 10, at 20 (explaining that there is a high likelihood that perpetrators of domestic violence will continue their abusive behavior, not only the short term but “over the subsequent decade at least.”).

86. BANCROFT & SILVERMAN, *supra* note 83, at 5.

87. See *id.* at 5-6. (“The overarching behavioral characteristic of the batterer is the imposition of a pattern of control over his partner....The controlling nature of the batterer has important implications for child rearing.... A study of restraining order affidavits found that one of the most

cooperation, parents must have relative equality in their power to negotiate. Inequality in the relationship leaves open the possibility of abuse of power. Without a balance of power between parents there is essentially no shared decision-making. This power imbalance between the parents effectively negates co-parenting, leaving in its place a sole decision-making privilege for the dominant parent. The perpetrator is able to seize the victim parent's decision-making authority, turning the court's joint legal custody award into sole legal custody in favor of the battering parent.

Although the potential for abuse of power in custody cases involving domestic violence has been acknowledged,<sup>88</sup> it is not clear how this fact influences the courts' ultimate custody determinations. In fact, beyond finding this behavior troubling, the connection between control and parental decision-making is often overlooked.<sup>89</sup>

For instance, *Naranjo v. Caguana* suggests that individual judges often fail to understand the magnitude of the problem.<sup>90</sup> In *Naranjo v. Caguana*, the Connecticut court acknowledged that giving the batterer final decision-making authority could result in abuse of that power.<sup>91</sup> By entering a joint custody award, however, the court in *Naranjo* failed to give proper weight to how one parent's abuse of power can negate the intended goal of joint legal custody – joint participation. Logically, an individual who is predisposed to abuse the court's award of sole decision-making authority is just as likely to exploit any authority he is given through a joint legal custody order.

Further, the ability to compromise is fundamental to cooperative parenting.<sup>92</sup> Yet, batterers tend to believe that their views are superior to those of other individuals. Experts maintain that batterers in particular "believe themselves to be superior to their victims [and] . . . tend to see their partners as inferior to them in intelligence, competence, logical reasoning, and even sensitivity and therefore treat their partners' opinions with disrespect and

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common reasons that mothers gave for why they needed the order was the batterer's 'punishment, coercion, and retaliation against the women's actions concerning children.'").

88. See *Naranjo v. Caguana*, No. FA074027792, 2008 WL 4379296, at \*4 (Conn. Super. Ct. Sept. 15, 2008). *But cf.* Meier, *supra* note 3, at 695-96; Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But is it Enough?*, 1996 U. ILL. L. REV. 533, 540-41 (1996) (concluding that battered women are unable to effectively negotiate with their batterers given National Institute of Justice (NIJ)'s findings that suggest "'the balance of power in victim-abuser relationship is so weighted that the possibility of victim coercion during mediation is virtually unavoidable.'").

89. See *Kelly C. v. Jason C.*, No. V-13292-05/05A, 2006 WL 2770106, at \*3 (N.Y. Fam. Ct. July 27, 2006). The trial judge found that father engaged "in controlling and other negative behaviors toward Mother . . . which [he found] troubling." *Id.* Yet, the court ultimately granted the mother sole custody based on the conclusion that the parents did not have the "cooperative and amicable relationship necessary for joint-custody." *Id.* at \*4. The court's findings suggest, however, that the father was uncooperative not the mother. Thus, it was the father, not the parties' relationship, was responsible for the lack of cooperation.)

90. No. FA074027792, 2008 WL 4379296, at \*4 (Conn. Super. Ct. Sept. 15, 2008).

91. *Id.* at \*4 (explaining that "the court is unwilling to give this authority to the father due to the court's concern that he may somehow abuse that power as well as making it difficult for the mother to participate in the children's upbringing").

92. *Bell v. Bell*, 794 P.2d 97, 100 (Alaska 1990) (the court considered both cooperation and compromise in assessing the possibility of joint legal custody).

impatience."<sup>93</sup> This tendency on the part of the batterer to view himself or herself as the better decision-maker can be disastrous for abused parents tasked with cooperative parenting.

In addition, cooperation may be an elusive goal given the explosive nature of the battering parent. Research indicates that the effectiveness of both arrests and protective orders is diminished in cases in which the batterer and the victim have children in common.<sup>94</sup> Such findings suggest that intimate partner violence cases involving children tend to be more volatile. This in turn indicates that there may be a decreased likelihood of successful cooperative parenting in custody cases involving intimate partner violence.

Although some courts simply use cooperativeness as an assessment tool in making custody determinations, others take a more active approach to the issue of parental collaboration by fashioning orders that attempt to fix the problem. Although creativity in drafting orders may be beneficial under some circumstances, care must be taken to avoid placing the victim parent at risk. For example, despite evidence of domestic violence, one Delaware judge ordered the parents into joint counseling in an effort to teach them the skills necessary to joint parent.<sup>95</sup> Ordering a victim to participate in counseling sessions with her batterer ignores immense research that suggests that joint counseling places victims at risk.<sup>96</sup>

Still, case law supports the notion that even in extreme cases of failure to cooperate, the child's best interest should always be the paramount consideration,<sup>97</sup> overriding the needs and wishes of the parents. Yet, some judges may unintentionally compromise the welfare of the child in an effort to

93. See BANCROFT & SILVERMAN, *supra* note 83, at 10.

94. See NAT'L INSTITUTE OF JUSTICE, *supra* note 10, at 58 (providing that "over a period of two years before and after order issuance, physical abuse dropped from 68 percent to 23 percent after the orders were obtained, if victims maintained the order. If the abusers were also arrested at the time of the order issuance, the physical abuse diminished further; if they had children, it diminished less.").

95. See C.B. v. M.R.-B, No. CS97-03499, 2002 WL 31453495, at \*17 (Del. Fam. Ct. Apr. 5, 2002).

96. See Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 33 (2002) (explaining the recognition by the American legal system that joint counseling in custody cases may not provide adequate protections to victims); Evan Stark, *Building a Domestic Violence Case*, 33 PLI/NY 139, 171-72 (1998) ("Couples counseling is the least effective milieu within which to work out differences in couples with a history of domestic violence . . . the dependency previously enforced through threats and violence in the relationship creates a significant hindrance to couples work, even where there is a reasonable assurance that no further violence may occur. The risk of future abuse that may be inflicted on herself and/or her children if the batterer is not appeased or placated renders the battered woman unequal in any joint problem solving exercise and intensifies what is at stake for her in any custody dispute."); see also Wanless, *supra* note 88, at 540 (uncovering the dangers of joint counseling given its failure to recognize that domestic violence is a crime and the assumption that the problem is shared, stemming from "defects in the parties' relationship").

97. See Douglas E. v. Latanya D., No. CN89-10360, 1997 WL 297060, at \*4 (Del. Fam. Ct. Feb. 27, 1997) (mandating that the needs of the children, not the parents, be "paramount"); *In re Marriage of Garvis*, 411 N.W.2d 703, 705 (Iowa Ct. App. 1987) (explaining that the "paramount consideration" is the children); *Newhouse v. Chavez*, 772 P.2d 353, 356 (N.M. Ct. App. 1988); *DeNillo v. DeNillo*, 535 A.2d 200, 202 (Pa. Super. Ct. 1987).

accommodate the wishes of the parents.<sup>98</sup> Parental requests that conflict with what is best for the child should not be given preferential consideration. On the other hand, if the interests of a parent serve the welfare of the child, judges must give those interests great weight. One such example is meeting the needs of the abused parent which research suggests is beneficial to the healthy development of the child.<sup>99</sup>

Battered parents may, however, be reluctant to seek sole custody fearing that such a request could backfire. This fear may be well founded in some jurisdictions given judicial decisions that find one parent's opposition to joint custody as evidence of a lack of the cooperativeness necessary for joint parenting.<sup>100</sup> In such cases, the court, misinterpreting the motives of a battered parent who seeks sole custody, may grant sole custody to the other parent based in part on the belief that that parent will be more cooperative.

In fact, some jurisdictions are legally mandated to take into consideration the "friendly parent" factor,<sup>101</sup> the likelihood that a parent will foster a relationship between the child and the other parent, when making custody determinations. The friendly parent doctrine could be used against a battered parent simply because she seeks sole custody,<sup>102</sup> especially considering that only a small minority of the thirty-two states that have friendly parent provisions

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98. *Crockett v. Crockett*, 525 So.2d 304, 308 (La. Ct. App. 1988) (providing "that the court look only to the child's best interest and not to whatever interests the parents may have"); *Squires v. Squires*, 854 S.W.2d 765, 771 (Ky. 1993) (Leibson, J., dissenting) (maintaining that the child's best interest is "not just another thing to be considered along with the sensibilities of the parents in awarding custody. It is the most important thing. It is the only thing.").

99. See Harrington Conner, *supra* note 7, at 166 n.8; see also BANCROFT & SILVERMAN, *supra* note 83, at 104 (the long-term prospects of recovery for children exposed to domestic violence are "tied largely to 'the overall quality of life' in the custodial home" and a strong mother-child bond); Jennifer L. Woolard & Sarah L. Cook, *Common Goals, Competing Interests: Preventing Violence Against Spouses and Children*, 69 UMKC L. REV. 197, 203 (2000) ("Studies of resilience in children exposed to community violence have identified several protective factors that might also help reduce the risk for negative developmental outcomes among children exposed to spouse assault. Across a variety of studies, the most consistent and important finding has been that a good relationship with a competent caring adult mitigates against the negative effects of violence exposure."); Dana Harrington Conner, *Do No Harm: An Analysis of the Legal and Social Consequences of Child Visitation Determinations for Incarcerated Perpetrators of Extreme Acts of Violence Against Women*, 17 COLUM. J. GENDER & L. 163, 220 (2008) (suggesting that "the mother's ability to function [is] paramount to the healthy development of her child") (citing *R.J. v. D.J.*, 508 N.Y.S.2d 838, 841 (N.Y. Fam. Ct. 1986)).

100. See *In re Marriage of Wolter*, 382 N.W.2d 896, 899 (Minn. Ct. App. 1986) (explaining that "[t]his court has generally recognized that one parent's opposition to joint custody undermines the cooperation necessary for joint custodial decisions.").

101. For a consideration of the friendly parent concept see Margaret K. Dore, *The "Friendly Parent" Concept: A Flawed Factor for Child Custody*, 6 LOY. J. PUB. INT. L. 41, 41-42 (2004) ([T]he friendly parent doctrine . . . is codified in child custody statutes requiring a court to consider as a factor for custody, which parent is more likely to allow 'frequent and continuing contact' with the child and the other parent, or which parent is more likely to promote the child's contact or relationship with the other parent.").

102. *But see id.* at 43 (maintaining that there is "a small but growing movement to reject the friendly parent concept or limit its application as a factor for custody.... the State of Alaska amended its child custody statute to prevent consideration of its friendly parent factor if a parent is able to prove that the other parent committed sexual assault or domestic violence. Oregon and Vermont have similar 'domestic violence exceptions.'").

have an exception for victims of domestic violence.<sup>103</sup> In the remaining states that maintain a friendly parent provision, a battered parent may be justified in fearing that her request for sole legal custody will be seen as “unfriendly” or uncooperative.<sup>104</sup> As a result, her legal request for sole custody may not only fail, but also result in the victim’s greatest fear – a sole custody award in favor of her abuser.

What our system fails to understand is that battering has very little to do with the actions of the victim parent and everything to do with the behavior of the batterer. As such, there is much to suggest that abused parents request sole custody as a protective measure in direct response to the behavior of their abusers: abusers who often present a risk to the children, are poor role models, make risky decisions, and lack the ability to engage in shared decision-making.

### C. Trust

Reasonableness of a petitioner’s fear should be measured with reference to her history with respondent.<sup>105</sup>

A relationship based on trust may be the key to cooperative parenting. Yet this factor rarely comes into play when our courts consider whether two parents will be able to engage in cooperative parenting. Nevertheless, trust is precisely what the Connecticut court in *Slavick v. Slavick* relied upon when determining that the parties were unable to engage in joint parenting.<sup>106</sup> The court opined that trust between parents is essential to effective communication which, in turn, is necessary for joint parenting.<sup>107</sup> It was the lack of trust between the parties that the court specifically cited as the reason why they could not engage in joint decision-making.<sup>108</sup> The court provided examples of the parties’ behavior that likely led to the court’s conclusion that trust was lacking in the relationship. Specifically, the mother physically abused father and was unable to control her temper. In addition, the father engaged in various acts which constituted an invasion of mother’s privacy. The forgoing actions formed the basis for the court’s determination that trust was not possible in this parental relationship.<sup>109</sup>

Despite the fact that both parties engaged in behavior that led to the breakdown in trust, the father was granted sole custody. Given the court’s ultimate determination, it is reasonable to conclude that more weight may have

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103. *Id.*; see also A.B.A. COMM’N ON DOMESTIC VIOLENCE, *supra* note 6.

104. See *Ertmann v. Ertmann*, 376 N.W.2d 918, 920 (Iowa Ct. App. 1985) (Although not involving domestic violence, this case supports the notion that courts will view parents who oppose joint custody as uncooperative.).

105. *Parrish v. Parrish*, 765 N.E.2d 359, 364 (Ohio 2002) (Lundberg Stratton, J., dissenting) (citing *Eichenberger v. Eichenberger*, 613 N.E.2d 678 (Ohio Ct. App. 1992)).

106. No. FA 980331705S, 2000 WL 1196424, at \*6 (Conn. Super. Ct. July 28, 2000) (The court “specifically” found “that joint custody is not in the best interest of [the children] because there is not the essential trust necessary to facilitate any level of communication necessary for joint custody to be feasible or work in any way.”).

107. *Id.*; see also *Nicotera v. Nicotera*, 635 N.Y.S.2d 739, 741 (N.Y. App. Div. 1995) (referring to the expert’s opinion that without trust between the parties, “the cooperation and communication necessary for joint custody” is not viable).

108. *Slavick*, 2000 WL 1196424, at \*7.

109. *Id.* at \*7-8.

been given to mother's acts of domestic violence than father's invasion of mother's privacy. As such, *Slavick* supports the proposition that domestic violence is extremely detrimental to the trusting relationship essential for shared parenting.

In fact, manipulation is the hallmark of the abusive relationship. Survivors of intimate partner violence can quickly learn that there is very little they can trust when it comes to their former abusive partner. Deception is at the core of the abuser's repeated cycle of violence that holds the battered parent captive during the abusive relationship. Perpetrators of intimate partner violence are master manipulators who trick their victims into believing that they will change. Experts suggest that batterers successfully repeat the cycle of violence because they are able to "reengage [the victim] over and over again in a way that can be baffling to outsiders who do not understand the deep combined effects of trauma, intimidation, and manipulation which can form strong 'trauma bonds.'"<sup>110</sup>

The act of intimate partner violence itself is the ultimate violation of trust. For the victim parent, abuse perpetrated by someone they care about deeply destroys their faith in that individual. As a result, when the battered parent finally breaks free, she leaves the relationship knowing that her perpetrator is not to be trusted. Yet once the court enters a joint custody order, the abused parent is expected to trust that the battering parent will act in the best interest of the child, despite the batterer's past behavior.

#### D. How the Parties Behave Toward Each Other

Past behavior seems a good indicator of what future behavior might be.<sup>111</sup>

In determining whether cooperative parenting is possible, courts must consider the way the parties treat each other.<sup>112</sup> A parent who is unable to control his or her anger toward the other parent is unlikely to have the capacity to successfully engage in joint decision-making. Additionally, requiring a cooperative parent to continually engage in high-stress decision-making with a hostile parent is not only unjust—it is risky. Analyzing parental behavior is important not only because it is a good indicator of future actions, but also because it may suggest to the judge future risks to the health and safety of both mothers and children.

As we have seen, batterers tend to be ultra controlling of the abused parent when it comes to decision-making related to child rearing. According to Lundy Bancroft and Jay G. Silverman, batterers engage in "[h]arsh and frequent

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110. BANCROFT & SILVERMAN, *supra* note 83, at 15 ("[B]atterers employ a wide range of behavioral tactics, foremost among which is often a pattern of manipulateness. Immediately following abusive incidents, a batterer may strive to manipulate his partner's perceptions of his actions or to create confusion about the causes or meaning of the incidents, which has been described as a form of mind control. Over the longer term, his manipulateness may take a different form: Periods of abuse are usually interspersed with times of relative calm, during which the batterer may be loving or friendly, with shows of generosity or flexibility, in an attempt to regain his partner's trust and to create the hope that he has changed.") (internal citations omitted).

111. Fineman, *supra* note 3, at 220.

112. See *Slavick*, 2000 WL 1196424, at \*7.

criticism of the mother's parenting, often audible to the children."<sup>113</sup> They provide, as an example of the underlying basis for both protection and child custody for battered parents, one victim's account that "the batterer's 'punishment, coercion, and retaliation against [her] actions concerning children,' . . . including specific reference to the batterer's anger at [her] questioning of his authority over the children."<sup>114</sup>

This ultra controlling behavior toward the abused parent regarding the rearing of children may suggest a number of things. First, simply engaging in discussions related to child rearing may inflame batterers. Second, children are, in many cases, the only continuing connection perpetrators of intimate partner violence have to their former victims. Third, batterers understand that the power to control child rearing decisions results in a power to control the other parent. Fourth, child rearing with an intimidating and argumentative parent can result in negative implications for both the victim parent and the children.

Courts recognize that parental conflict is harmful to children.<sup>115</sup> The conflict created by the batterer has a negative effect on the children in a variety of ways. Beyond the obvious physical dangers posed by batterers,<sup>116</sup> children also undergo stress related to their exposure to the arguments and the unpredictability of the hostile decision making process caused by the batterer. Stress is significant for several reasons. At the outset, stress can cause short-term problems for children such as anxiety, depression, sleep disturbances, eating disorders and relationship problems. What our system fails to understand are the long-term implications of stress on children. In fact, experts maintain that stress in childhood can result in significant long-term negative health risks. In particular, Vincent J. Felitti has "discovered a strong correlation between high levels of exposure to negative childhood experiences and diminished adult health status."<sup>117</sup> Felitti explains: "[t]he higher the level of exposure to negative childhood experiences, the more likely the possibility of health risk factors, such as increased smoking, obesity, depressed mood, suicide attempts, alcoholism, drug use, and history of sexually transmitted disease."<sup>118</sup>

Joint legal custody demands a greater level of contact than sole legal custody, which in turn provides greater opportunities for conflict between parents. In turn, these repeated conflict opportunities result in the greater potential for childhood stress.

113. BANCROFT & SILVERMAN, *supra* note 83, at 6.

114. *Id.* at 6.

115. See *Slavick*, 2000 WL 1196424, at \*7 (maintaining that a reduction in parental conflict would be beneficial for the child); *Joseph J.F. v. Sheila D.R.*, No. 1581-85, 1997 WL 296995, at \*2 (Del. Fam. Ct. Jan. 28, 1997) (citing the child's threat to end his life is just one example of "the adverse impact the hostile conduct" between the parents is having on the children).

116. See *Bolotin*, *supra* note 4, at 268-69 (explaining that not only do perpetrators of domestic violence pose a risk of physical harm to their ex-partners, they are also more likely to abuse their children).

117. Harrington Conner, *supra* note 99, at 229-30 (citing Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTATIVE MED. 249-51 (1998)).

118. *Id.* (citing Felitti et al., *supra* note 117, at 249-50).

As a result, not only do the children suffer initially from the stress created by the battering parent who behaves in a caustic fashion, there is also a risk that these children will suffer significant health problems in adulthood.

#### E. Setting and Respecting Boundaries

Judges must confront the possibility that the very judicial system in which they make family decisions can become weapons of further abuse.<sup>119</sup>

In a cooperative parenting arrangement, not only must boundaries be set but the parties must have the capacity to respect those boundaries. Given the limited number of custody decisions that consider parental behavior as it relates to boundaries, it is difficult to predict what weight judges will afford to this particular factor. In *Slavick* the court found that the father engaged in behaviors such as documenting the mother's time with the children, taping her conversations, and joining a club she attended, all demonstrating that he had problems maintaining boundaries.<sup>120</sup> Despite these findings, however, the court ultimately awarded father sole custody based on the lack of trust in the relationship.

The *Slavick* opinion suggests that, when assessing trust, the court must consider how the parties "treated" each other, emphasizing physical abuse and the inability to control one's anger (which are strong indicators of an inability to respect boundaries).<sup>121</sup> It would appear that when both parties are unable to respect boundaries and one of those individuals has also committed acts of domestic violence, the evidence of domestic violence is much more relevant to the court's ultimate custody determination.

The act of intimate partner violence itself can be viewed as an invasion of the victim parent's privacy. An act of intimate partner violence strikes at the heart of the batterer's inability to maintain appropriate boundaries and respect the victim parent's privacy. Experts maintain that batterers see the victim parent "as an owned object,"<sup>122</sup> not as an individual entitled to personal autonomy. This possessiveness is what places the victim at the greatest risk after the relationship ends, as the batterer is unwilling to give up his control over the victim.<sup>123</sup> Beyond the potential risk of physical danger is the likelihood that the batterer will attempt to exert control over the abused parent: control over her person, her actions and her decisions. It is this ultimate invasion of her privacy that continues long after the abusive relationship is over. This inability to maintain boundaries tends to suggest that batterers will make poor joint legal custodians because they are unwilling to cooperate with and respect the victim parent.

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119. Fineman, *supra* note 3, at 214.

120. 2000 WL 1196424, at \*7-8.

121. *Id.* at \*7.

122. BANCROFT & SILVERMAN, *supra* note 83, at 11.

123. *Id.* at 12 ("A batterer's possessiveness sometimes exhibits itself starkly when a relationship terminates, commonly leading to violence against the woman for her attempts to leave . . . . Nearly 90% of intimate partner homicides by men have been shown to involve a documented history of domestic violence, and a majority of these killings take place during or following separation . . . .").

Although the existence of domestic violence in a particular custody case may signal the need for an in depth inquiry into the ability of those select parents to communicate effectively, cooperate, build trust, and maintain the boundaries necessary for successful joint-parenting, our courts do not necessarily recognize the value of this analysis.

### III. EVIDENCE OF DOMESTIC VIOLENCE & THE ESSENTIAL ELEMENTS

Advanced societies take intra-family violence seriously.<sup>124</sup>

Given the complex nature of custody determinations, without a clear set of guidelines for assessing legal custody (independent of physical custody and visitation assessments) allegations of domestic violence will not be given proper consideration.

Undoubtedly, intimate partner violence has some influence on the parental decision making process. As we have seen, joint decision making necessitates equality of negotiating power, open lines of communication, parental maturity, respect, and some level of trust between the parties—elements which are often lacking in relationships marked by intimate partner violence. Yet our courts have been less than uniform in addressing domestic violence as it relates to the essentials of the decision making process. Although the importance of communication and cooperation are cited on occasion by judges when assessing the likelihood of successful joint legal custody, it is less predictable how individual judges will consider parental communication and cooperation in cases involving domestic violence.

Unfortunately, the importance of legal custody determinations in domestic violence cases may escape many well intended judges. In the face of domestic violence, for good reason, some judges focus on the physical placement of the children to the exclusion of other important legal determinations. Yet, by neglecting to make a decision about legal custody, our courts send a strong message—as a legal system we do not view acts of intimate partner violence as significant to the process of parental decision making.

For example, given the serious nature of the father's acts of domestic violence against the mother, the Indiana trial court in *Fortner v. Fortner*<sup>125</sup> awarded physical custody of the children to their mother.<sup>126</sup> Specifically, the father in *Fortner v. Fortner* grabbed the mother "by the neck, choked her, and shoved her against a wall."<sup>127</sup> Subsequent to these physical acts of violence the mother received a protective order and moved back into the residence with her children only to find that the father had vandalized the home, "including urinating in [mother's] coffeemaker."<sup>128</sup> Relying on these acts of violence, as well as other factors, the trial court found that the mother was the proper parent to have the care and physical custody of the children. Yet, the trial court neglected to enter an order addressing legal custody of the children. The

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124. *Felton v. Felton*, 679 N.E.2d 672, 680 (Ohio 1997).

125. No. 67A05-1001-DR-36, 2010 WL 311831 (Ind. Ct. App. Aug. 9, 2010).

126. *Id.* at \*2 (Ind. Ct. App. Aug. 9, 2010).

127. *Id.* at \*1.

128. *Id.*

reviewing court in *Fortner v. Fortner* ultimately remanded the case for clarification on the issue of legal custody.<sup>129</sup>

As a result of the trial court's failure to make a legal custody determination, a resolution of which parent should make the decisions regarding the child is left for another day. Pending the trial court's clarification of legal custody the parents are left guessing who is authorized to make decisions about the welfare of the children and what contact is permitted or required. In an abusive situation this outcome is a recipe for disaster.

When our courts do consider issues of legal custody, some judges in particular have demonstrated a tremendous understanding of the importance of intimate partner violence to the ultimate legal custody determination. The District of Columbia Court of Appeals, for example, announced in *Wilkins v. Ferguson* that there is no limit on the amount of time an act of domestic violence shall follow a perpetrator.<sup>130</sup> In this watershed opinion the court professed the legislative mandate that a history of domestic violence is always relevant to both custody and visitation.<sup>131</sup> Regrettably, this case appears to be the exception, not the rule.

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129. *Id.* at \*7.

130. 928 A.2d 655, 669 (D.C. 2007); *See also* Gietzen v. Gabel, 718 N.W.2d 552, 556 (N.D. 2006) (confirming the presumption against awarding custody to a batterer applies to remote acts of domestic violence); *C.f.* Rodrigo M. v. Benjamin Z., No. B157937, 2003 WL 1301975, at \*5 (Cal. Ct. App. Mar. 19, 2003) (holding that a six year old incident of domestic violence wherein the father held a gun to the mother's head was not too remote for consideration in a child dependency proceeding). Obviously such a serious act of abuse should be given significant weight despite the age of the violence. Although beyond the scope of this Article, the court's error in using the evidence of intimate partner violence against the victim and the choice to hold her accountable for the behavior of her perpetrator demands condemnation.

131. *Wilkins*, 928 A.2d at 668. This case involved abuse of both the mother and the child. The record revealed an award of divorce and findings of compelling evidence that the father had committed substantial physical and psychological abuse, which had a "profound impact" on the mother. *Id.* at 658. Nevertheless, the trial court ordered joint custody, primary residence to the mother, and liberal visitation to the father. *Id.* Approximately six months later, however, the court entered a temporary order suspending all visitation between father and child in response to evidence that the father had inappropriately touched the child. *Id.* The following year, upon the mother's request for modification of visitation, the trial court entered a supervised visitation order, based in part on a report from the child's therapist recommending limited and monitored contact until the father underwent treatment. *Id.* at 659. However, the trial court ordered that the father receive unsupervised overnight visitation commencing in January, 2004. *Id.* In April 2004, the mother obtained a temporary protective order suspending the father's visitation. *Id.* at 660. In response, the father filed a motion claiming that the allegations the mother asserted in support of her protection order were false and sought a contempt finding against the mother for violation of the visitation order. *Id.* at 661. In October, 2004, the father underwent a psychological evaluation which suggested, among other findings, that the father displayed narcissistic characteristics, including a high view of his own self worth, a tendency to be self-indulgent, indifference to others, devaluation of others, diminished ability to parent independently. *Id.* The report recommended psychotherapy and other treatment. *Id.* These characteristics are representative of batterers. *See generally* BANCROFT & SILVERMAN, *supra* note 83. In June, 2005, the mother filed a motion to modify the trial court's custody determination suspending visitation until the father successfully completed therapy and requested future visitation be supervised. *Wilkins*, 928 A.2d at 661. Four days of trial took place over the course of six months. *Id.* at 662. The father argued that "an intrafamily offense should not follow a person for an unlimited period of time." *Id.* at 669.

Given the wide variety of judicial responses to evidence of domestic violence, an assessment of how such allegations are treated in custody cases currently is complex. For example, some courts simply fail to make any findings as to the allegations of domestic violence. As a result, the trial judge never considers how domestic violence influences the ultimate custody determination. Other judges consider the allegations of domestic violence but find that the acts simply did not occur. In yet other cases, the trial judge may make a finding that domestic violence occurred but ultimately determines that such evidence carries very little weight to the court's ultimate custody determination.

A court's failure to make any finding as to allegations of domestic violence is fairly straightforward. The Arizona case of *Salas v. Hernandez* provides an excellent example of how the issue manifests itself in what many would view as a clear case of intimate partner violence.<sup>132</sup> Approximately one year prior to the trial court's custody determination the father was convicted of misdemeanor assault against the mother.<sup>133</sup> In fact, father had a history of physical violence against mother and had threatened to kill her in the past.<sup>134</sup> Yet, the trial court made no findings regarding the evidence of domestic violence and ultimately granted sole custody of the children to the father.<sup>135</sup> In remanding the case for additional findings relating to domestic violence, as well as child abuse, the reviewing court explained that domestic violence is of "primary importance" in determining the safety and well-being of both the child and their abused parent.<sup>136</sup> In fact, according to Arizona law, the court is not permitted to award joint custody, let alone sole custody to an abuser, if it makes a finding of either a history of domestic violence or the existence of significant acts of violence.<sup>137</sup> *Salas v. Hernandez* is an important example of first of many layers of analysis the trial judge must engage in when allegations of domestic violence are raised in a child custody case.

Simply put, the court must first acknowledge that someone has made an allegation of domestic violence. Second, the court must make a finding that either abuse has or has not occurred. Third, if the court finds that domestic violence has occurred, the court must next assess whether those acts are relevant to three separate and distinct legal determinations: (1) parental decision-making (legal custody); (2) where the child will reside (physical custody); and (3) contact between the child and his or her parents (visitation or parenting time). Although the focus of this Article is on the first issue, legal custody, it is important to point out that it is critical that the trial judge address all three legal considerations. It is the first issue, legal custody that demands a consideration of the essential elements of joint custody set forth in Part II of this Article.

Because domestic violence often takes place behind closed doors, with little documented evidence of its occurrence, it is rather easy for a trial judge to disregard the validity of an allegation of intimate partner violence. In a civil

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132. See generally *Salas v. Hernandez*, 2010 WL 2773374 (Ariz. Ct. App. July 13, 2010).

133. *Id.*

134. *Id.*

135. *Id.* at \*2

136. *Id.* at \*3.

137. *Id.*

custody case the standard of proof is by a preponderance of the evidence. Yet, an analysis of judicial decisions involving intimate partner violence may suggest that a higher standard is applied, possibly unknowingly, by some trial judges. For example in *Consalvi v. Cawood*, despite evidence of a history of violence against another family member and experts opinions that the father engaged in inappropriate and violent abuse toward the mother and the children, the Kentucky trial court discounted the allegations of domestic violence.<sup>138</sup> It is unclear from the reviewing court's opinion, what, if any, standard was applied by the trial court in determining whether domestic violence had occurred. In fact, even if the court had engaged in judicial deliberation and properly concluded that it was more likely than not that the father had not committed acts of domestic violence against both the mother and the children, evidence of the father's acts of violence against maternal grandmother remain relevant to the court's evaluation of father's ability to engage in joint decision making.

The time between the occurrence of an act of intimate partner violence and the date of the custody trial also plays a critical role in how evidence of domestic violence is weighed by the court. Some opinions suggest that judges may be more likely to disregard remote acts of abuse regardless of the nature of the violence,<sup>139</sup> while others tend to overemphasize the freshness of violence when determining whether intimate partner violence is relevant to the ultimate custody determination.<sup>140</sup>

The Supreme Court of New York in *Hugh L. v. Fhara L.*, in changing custody from mother to father, highlighted the passage of time since the original acts of abuse and the date of the custody hearing,<sup>141</sup> the lack of recurrence of

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138. *Consalvi v. Cawood*, 63 S.W.3d 195, 196-97 (Ky. Ct. App. 2001).

139. See, e.g., *A.H. v. R.M.*, 793 So.2d 799, 800 (Ala. Civ. App. 2001) (affirming trial court's custody award to the father and confirming that a twenty-one year old conviction for assaulting the mother of his children was too remote to trigger a presumption that custody should not be awarded to the father, despite the father's recent acts of whipping the children with a belt); *In re Marriage of Gensley*, 777 N.W.2d 705, 715 (Iowa Ct. App. 2009) (finding no history of abuse because a three year old act of abuse was too remote); *Harvey v. Harvey*, No. 258938, 2005 WL 1399652, at \*6 (Mich. Ct. App. June 14, 2005) (although the record was silent as to the nature of the acts perpetrated, the reviewing court deferred to the trial court's findings that evidence of domestic violence favored neither party because it was remote in time); *Hugh L. v. Fhara L.*, 840 N.Y.S.2d 352, 356 (App. Div. 2007); *Tulintseff v. Jacobsen*, 615 N.W.2d 129, 134 (N.D. 2000) (finding incidents of domestic violence beyond three years old "were too remote to constitute a pattern of domestic violence," despite evidence that the father dragged the mother by her hair down the street, pulled her by her feet off the bed, and threw an item at her); *Holtz v. Holtz*, 595 N.W.2d 1, 29 (N.D. 1999) (concurring with the trial court's finding that incidents of domestic violence were too remote in time to be given much weight in its custody determination, despite evidence that the father hit the mother, raped her, and slashed her tires). It is also not uncommon for courts to disregard acts of abuse that are remote in time when assessing requests for civil protective orders. See *H.E.S. v J.C.S.*, 815 A.2d 405, 410 (N.J. 2003) (explaining that the trial court declined to consider many allegation of past acts of domestic violence because, among other factors, they were too remote); *Parrish v. Parrish*, 767 N.E.2d 1182, 1187 (Ohio Ct. App. 2000) (finding evidence of domestic violence too remote in time to support petitioner's request for protection).

140. See *P.F. v. N.C.*, 953 A.2d 1107, 1115 (D.C. 2008). Despite finding that domestic violence is a factor to be afforded significant weight in custody cases, the District of Columbia Court of Appeals over-emphasized how recent the abuse was relative to the custody trial.

141. 840 N.Y.S.2d 352, 356 (App. Div. 2007) (the acts of violence occurred nine years prior to the Court's custody determination).

domestic violence,<sup>142</sup> and the fact that there was no evidence of child abuse in making its ultimate custody determination.<sup>143</sup> The remote act of violence at issue related to an incident during which the father, by his own admission, placed a belt around the mother's neck. The father, however, denied the mother's claims that he tightened the belt around her neck and bit her hand.<sup>144</sup> The court acknowledged that the father had a "bad temper," but gave the abuse little weight.<sup>145</sup>

Some courts simply ignore this issue altogether, recognizing the history of domestic violence and yet failing to give it any consideration in its ultimate custody determination,<sup>146</sup> while other judges find a way of diminishing the relevance of intimate partner violence based on the belief that, absent abuse to the child, domestic violence has little relevance to the court's custody determination. For example, the Kentucky court in *S.M. v. P.C.* affirmed an award of sole custody to the father based on the inability of the parents to cooperate, despite evidence that the mother had a protective order against father.<sup>147</sup> The trial court in *S.M. v. P.C.* determined that the domestic violence was irrelevant to its custody determination because, in the court's opinion, "it did not affect the child or his relationship with his parents."<sup>148</sup> What the court failed to consider is that the domestic violence itself may have been the root cause of the parties' inability to "agree on anything,"<sup>149</sup> thus necessitating an award of sole legal custody.

Similarly, in *Douglas E. v. Latanya D.*, the Delaware court ordered that the parties retain joint legal custody despite allegations of domestic violence and a long history of conflict between the parties.<sup>150</sup> In fact, the court acknowledged that the problems and disagreements between the parties were so acrimonious that the exchange of the children for visitation could not be aided by the presence of a third party.<sup>151</sup> In response to the difficulties related to both decision making and visitation exchange, in what appeared to be a complete

142. *Id.* Perpetrators do not need to commit new acts of violence to exert control over their victims.

143. *Id.* In fact, a psychologist, Dr. Joe Scropo, testified that the father's temper and parenting style "put him at increased risk for disciplining [the child] in potentially physically abusive ways." *Id.* at 355.

There is a strong correlation between intimate partner violence and child abuse. See Peter G. Jaffe et al., *Parenting Arrangements After Domestic Violence: Safety as a Priority in Judging Children's Best Interest*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 81, 82 (2005) (explaining that there is "significant overlap between domestic violence and child maltreatment").

144. *Id.* at 353.

145. *Id.*

146. See *Naranjo v. Caguana*, No. FA074027792, 2008 WL 4379296, at \*3 (Conn. Super. Ct. Sept. 15, 2008). In *Naranjo*, the mother testified about the father's history of domestic violence, which included the father kicking her in the face, pulling her hair, and choking her when she was pregnant with their son. *Id.* These acts occurred many years prior to the custody trial. *Id.* The court, however, did not address the age of the prior allegations, simply finding that no evidence was admitted to substantiate them. See *id.*

147. No. 2009-CA-001111-ME, 2009 WL 5125080, at \*1 (Ky. Ct. App. Dec. 30, 2009).

148. *Id.*

149. *Id.* at \*2.

150. No. CN89-10360, 1997 WL 297060, at \*1 (Del. Fam. Ct. Feb. 27, 1997).

151. *Id.*

refusal to acknowledge any role domestic violence may have played in causing these problems, the court commanded that the parties would just have to work together.<sup>152</sup>

The court determined that there was “no evidence of domestic violence” in the case, solely relying on mother’s voluntary dismissal of a civil protection from abuse petition she filed against father without considering her allegations of abuse.<sup>153</sup> The dismissal was voluntary, in a jurisdiction that dismisses voluntary requests without prejudice, thus enabling the victim to raise the allegations in future legal proceedings.<sup>154</sup> Yet the court gave no indication that any evidence regarding those allegations was permitted or considered at the custody trial. Interestingly, the court acknowledged that the mother filed a criminal charge against the father “at one time during their marriage,” yet the trial judge did not address the underlying facts of the criminal matter, discuss any specific charges, or make any findings as to whether that particular act constituted domestic violence.<sup>155</sup>

Even in cases in which the court specifically acknowledges that an award of joint legal custody could be used “as a disguised attempt to harass” the other parent, judges do not necessarily connect the history of domestic violence with the destructive behavior of the abusive parent.<sup>156</sup> In the New Jersey case *Nufrio v. Nufrio*, the reviewing court affirmed the trial court’s finding that joint legal custody would not be in the best interest of the child, stressing that the parent’s amenability or inability to cooperate with the other parent are factors to be considered in awarding joint legal custody.<sup>157</sup> The reviewing court acknowledged the parties “bitter and acrimonious” history, as well as several domestic violence charges, yet provided no information about the underlying facts of the charges.<sup>158</sup> The court’s opinion described the father as “pathological in his testimony,” one who “does nothing that is not for his own benefit,” and has no idea how difficult he makes things for others.<sup>159</sup> Interestingly, the court made no connections between the father’s pathological behavior, the court’s perception that the father would use the power of joint legal custody to harass the mother, and the history of violence within that relationship.

*Buttle v. Buttle* illustrates the challenges judges face when addressing domestic violence as it relates to the multiple layers of child custody determinations.<sup>160</sup> In *Buttle v. Buttle* the Wyoming trial court granted the mother what it referred to as “primary physical custody for decision making

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152. *Id.*

153. *Id.* at \*5.

154. This information is based on the author’s sixteen years of experience representing victims seeking protection from abuse in petitions before the Delaware Family Court.

155. *Douglas E.*, 1997 WL 297060, at \*5.

156. See *Nufrio v. Nufrio*, 775 A.2d 637, 642 (N.J. Super. Ct. App. Div. 2001).

157. *Id.* at 638.

158. *Id.* at 640.

159. *Id.* at 638.

160. 196 P.3d 174 (Wy. 2008). See *infra* Part II for a consideration of the multiple layers of judicial custody determinations. The three distinct legal issues are: (1) legal custody, (2) physical custody, and (3) visitation.

purposes.”<sup>161</sup> Although never clearly defined by the trial court, the order could be viewed as a combination of both legal and physical custody. One could logically conclude that such a ruling grants mother sole physical and legal custody (residence and primary decision making power). Yet, it appears that the court did not intend to grant the mother sole legal custody given its recommendation that “Mother and Father discuss where the child should attend school when he reached school age and if they could not resolve the issue then the court would resolve it.”<sup>162</sup> The court’s order more closely resembles joint legal custody given the collective decision making required for education decisions (an important child rearing determination). The court also ordered that the parents should equally share the physical parenting of the child,<sup>163</sup> granting each parent equal time with the child. In response, the mother appealed arguing that the trial court abused its discretion in ordering shared custody and failed to consider her allegations of domestic violence as being contrary to the best interest of the child.<sup>164</sup>

In an effort to address the mother’s claims, the reviewing court in *Buttle v. Buttle* first considered the evidence of spousal abuse. According to the record, the mother testified that “[o]n one occasion, Father threw her down on the ground, held her by the hair and choked her. Another time, she locked herself in the bedroom when they were fighting and he kicked the door open. . . threw her to the ground and kicked her.”<sup>165</sup> The mother also claimed that the father called her names and damaged property.<sup>166</sup> The father admitted that their “fights ‘got rough at times,’” that he held her down one time, pushed her another, and called her names such as “fat cow” or “pig” in the presence of the child.<sup>167</sup> The father denied, however, kicking and choking her.<sup>168</sup> The trial court maintained that it was aware of the impact the father’s behavior had on the mother. It is less clear that the court actually understood how intimate partner violence restricts the abused parent’s right to freely engage in joint decision-making.

First, the trial judge in *Buttle v. Buttle* gave the father credit for admitting “some of the horrible things that” the mother claimed.<sup>169</sup> The court never give the mother credit for her strength given the abuse she endured, only that the court was aware of her “belief” she needed to get away.<sup>170</sup> The judge found that because the majority of the violence occurred prior to the birth of the child that “it would be inappropriate . . . to make a finding that domestic violence occurred” or to decide custody on such a finding.<sup>171</sup> In an attempt to excuse the behavior, the judge explained that “sometimes people know of no other way

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161. *Buttle*, 196 P.3d at 175.

162. *Id.* at 178.

163. *Id.*

164. *Id.* at 176.

165. *Id.* at 178.

166. *Id.*

167. *Id.* at 178-79.

168. *Id.* at 178.

169. *Id.* at 179.

170. *Id.*

171. *Id.*

than to react either by silence or removal or by violence and striking out.”<sup>172</sup> To add insult to injury, the court found the parties to be equally at fault for the divorce, explaining that based on the judge’s thirty years of experience he found it rare for a marriage to breakdown as the result of one partner’s conduct alone.<sup>173</sup>

The reviewing court in *Buttle v. Buttle* found that the district court did not abuse its discretion in declining to base its custody determination on evidence of abuse.<sup>174</sup> The appeals court maintained that domestic violence is one of many factors that the trial judge must consider. Interestingly, how the parties interact and how they communicate with each other were among the other factors for consideration, neither of which appear to have been given much weight by the either the trial court or appeals court, as they relate to legal custody.

Yet, the reviewing court was also tasked with determining whether the trial court abused its discretion when it ordered shared physical custody. Curiously, the appellate court found that the trial court had abused its discretion on this issue based, in part, on the parties’ inability to communicate and work together to promote the child’s best interest.<sup>175</sup> In finding that the trial court abused its discretion as to the physical custody determination, the reviewing court relied on the same acts of domestic violence which it inferred the trial judge need not rely on for its legal custody determination. This outcome is curious given the court’s own reasoning that suggests both legal and physical custody determinations demand an evaluation of the ability of the parents to communicate and cooperate.

#### IV. CO-PARENTING ASSUMPTIONS

The whole specter of family violence threatens the fundamental myth of separate spheres, which casts families as special, supportive places in which family members relate to each other with unselfish and altruistic impulses. Violent families are supposed to be the exceptions: pathological entities. Literature and statistics on domestic violence undermines this belief, suggesting that the possibility of spousal violence might initially be a consideration in most custody and visitation cases. It may not be a norm, but it is certainly not an exception either.<sup>176</sup>

Joint legal custody is based on a co-parenting model. A co-parenting model, in turn, assumes that involving both parents in important child rearing decisions is naturally best for the child, that both parents will make good decisions regarding the welfare of their child, and that both parents have an unconditional right to make these important decisions. This Article will explore these co-parenting assumptions and uncover why it is unsound to apply them to custody cases involving intimate partner violence.

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172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 183.

176. Fineman, *supra* note 3, at 214.

### A. In the Best Interest of the Child

The 'best interest of the child' is not just another thing to be considered along with the sensibilities of the parents in awarding custody. It is not just the most important thing. It is the only thing.<sup>177</sup>

Assumptions about what is best for children can result in negative consequences for both children and parents alike. In fact, when it comes to making determinations about what is best for children, much depends on the individual facts of the specific case.<sup>178</sup> Experts suggest that in cases involving conflict, including domestic violence, children may actually suffer from a joint custody arrangement.<sup>179</sup> Dr. Evan Stark explains that much of the research supporting the joint custody model comes from studies of "highly cooperative" parents.<sup>180</sup> If we analyze joint custody from the victim-batterer perspective the outcomes are very different. In fact, Stark suggests that leading researchers who have studied custody cases involving domestic violence find that the joint custody model is not only poorly suited for battered parents, but potentially harmful for the children.<sup>181</sup>

There is a wide range of reasons why the joint custody model is ill-suited for application to battering relationships. Joint custody orders place battered parents at risk of physical harm as a result of continuing contact with their abusers. The risk of harm can arise in several ways in the joint custody arrangement, even when protections are put in place. Forced contact creates opportunities for an abusive partner to threaten or harass the victim. Even e-mail and texting open lines of communication that could facilitate abuse.

As discussed *infra*, joint custody places the victim in a risky position because she is forced to negotiate with her abuser. If the victim negotiates with her abuser, she risks the possibility that she will enrage him, which in turn may place her in danger.

In addition, joint custody places battered parents at risk for increased stress. Forced negotiation with an individual who is predisposed to violence can be frightening, intimidating and exhausting. A battered parent must choose her words carefully before speaking, given the batterer's propensity to react in anger. Not only can the act of negotiation be frightening for a battered parent, it is often futile, as research suggests that batterers are predisposed to act in an uncooperative manner,<sup>182</sup> effectively blocking consensus. As a result, our legal

177. *Squires v. Squires*, 854 S.W.2d 765, 771 (Ky. 1993) (Leibson, J., dissenting).

178. *Wilcox*, 298 N.W.2d at 670.

179. See Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L. Q. 381, 398 (2008) (explaining that "[c]ourts can only go so far in making parents communicate about their children . . . If the parents are in conflict, children often suffer more in joint custody arrangements."); Stark, *supra* note 96, at 169 (explaining that joint custody is not best for children because it places primary caregivers "at continued risk, thus failing to establish the secure boundaries children require").

180. Stark, *supra* note 96, at 169.

181. *Id.* at 170.

182. *Id.* at 170 ("One of the hallmarks of domestic violence perpetrators is their inability to cooperate; mutual decision-making is often impossible for them, since their coping style relies heavily on blaming, denying and acting-out.").

system expects that victim to achieve the unattainable – reach an agreement with someone who is unwilling to cooperate.

Battered women experience high levels of stress associated with their victimization generally. Many factors cause increased stress for these women: they struggle financially, battle homelessness, experience compromised health related to poverty, suffer from depression and experience additional stressors related to the problems their children experience related to the violence.<sup>183</sup> Over and above all of these other stressors, battered mothers must endure the stress associated with continuing contact with an uncompromising batterer. This high level of tension in turn compromises the emotional and health status of the victim and, in turn, her children.

In fact, some courts have acknowledged that co-parenting is not best in all cases, and that an award of sole custody is, in fact, necessary to ensure stability for some children.<sup>184</sup> Sole legal custody, unlike legal joint custody, reduces the occurrence of conflict between the parents, conflict that is extremely damaging to battered mothers and their children.<sup>185</sup>

#### B. Parents will Make Decisions in Accordance with what is Best for their Children: Batterers & Decision-Making

. . . a batterer's parenting cannot be assessed separately from his entire pattern of abusive behaviors, all of which have implications for his children.<sup>186</sup>

A grant of joint legal custody assumes that both parents will make good choices about the welfare of their children. Such an assumption, however, is ill advised in cases involving batterers. A parent who makes poor decisions with regard to his own life is also likely to make poor decisions about his children. To state the obvious, logic suggests that vesting decision-making authority in someone who has a history of battering is risky, as individuals who commit acts of intimate partner violence are proven to be poor decision makers.

Batterers often engage in other risky behavior, including abuse of drugs and alcohol, criminal behavior and abuse of children. They fail to comply with court orders and have a general disregard for the law. According to a report by the National Institute of Justice, perpetrators of intimate partner violence engage in criminal activity well beyond acts of violence against their domestic partners.<sup>187</sup> "Most studies agree that the majority of domestic violence perpetrators . . . have a prior criminal history for a variety of nonviolent and violent offenses against males as well as females."<sup>188</sup> In fact, the authors of the

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183. See Felitti et al., *supra* note 117, at 249-51 (noting that stress-related illnesses due to exposure to parental conflict have been shown to cause long-term health risks for children).

184. See *In re Marriage of Gensley*, 777 N.W.2d 705, 716 (Iowa Ct. App. 2009) (maintaining that "[w]ith an award of sole legal custody, one parent will make the decisions, which will ensure the decisions are made and result in a more stable atmosphere for the children to carry on with their daily lives.").

185. *Id.* (explaining that the parents' "'extreme difficulty communicating' and . . . 'intense hostility' . . . negatively impact[ed] the children.").

186. BANCROFT & SILVERMAN, *supra* note 83, at 2.

187. See NAT'L INSTITUTE OF JUSTICE, *supra* note 10, at 16.

188. *Id.*

report assert that there is a “large overlap between domestic violence and general criminality.”<sup>189</sup> In addition, the prevalence of drug and alcohol abuse among batterers is high.<sup>190</sup> Not only do batterers tend to make poor role models, they also place themselves and their children at risk as a result of their dangerous behavior.

In fact, researchers maintain that “[s]eemingly unrelated nonviolent offenses such as drunk driving or drug possession, which suggest substance abuse by the abuser, should be considered as risk markers for continued abuse.”<sup>191</sup> Not only are batterers more likely to use children as weapons without regard for their safety, they are also apt to place their general needs above those of their children.<sup>192</sup> This self-centeredness is a good indicator that batterer’s decision-making is not in keeping with the best interests of their children.

And yet, when the court grants an abusive parent joint legal custody, it makes the following declaration: we trust the batterer’s judgment, we find his criminal behavior to be irrelevant to the court’s custody determination, we find the batterer to be an appropriate role model for his children and we believe he is capable of cooperative parenting with his victim.

### C. Parents Have the Right to Joint Legal Custody: Flaws in the Rights Based Argument

Children are ‘precious’ but not as their parents’ ‘possession’ . . .<sup>193</sup>

Although many argue that the reason behind these assumptions regarding child custody determinations is what is best for children, there is no denying the simple truth—at the end of the day many judges are influenced by the belief that both parents, short of serious physical or sexual abuse to the child, have a right to decide how their children will be raised. The court’s determination as it relates to legal custody, however, does not give rise to a constitutional debate about parental rights. The primary consideration for the court in a legal custody dispute between parents is who should be vested with the authority to make the important decisions about this child. Accordingly, the court must decide whether the parents possess the maturity, wisdom, and flexibility to make appropriate choices for their children. In essence, the family law judge’s task is to determine whether one or both parents have good judgment—a judgment about judgment.

Legal custody primarily involves major decision making about the child’s life, including choices about religion, residence, “choice of school, course of study, extent of travel away from home, choice of camp, major medical

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189. *Id.*

190. *Id.* at 17 (explaining that a Memphis study “found that 92 percent of [batterers] used drugs or alcohol on the day of the assault, and nearly half were described by families as daily substance abusers,” while other studies found more modest, yet still significant, occurrences of intoxication and drug use in 24.1 percent of cases in Seattle and 45 percent of cases in North Carolina). It is important to note that this report acknowledged that, as many experts agree, substance abuse is neither a cause of nor excuse for domestic violence.

191. *Id.* at 24.

192. See BANCROFT & SILVERMAN, *supra* note 83, at 72-75.

193. *Squires v. Squires*, 854 S.W.2d 765, 771 (Ky. 1993) (Leibson, J., dissenting).

treatment, lessons, psychotherapy, psychoanalysis or like treatment, part or full-time employment, purchase or operation of a motor vehicle, especially hazardous sports or activities, contraception and sex education, and decisions relating to actual or potential litigation involving the children . . ."<sup>194</sup> Except in rare cases,<sup>195</sup> these decisions are made less frequently than daily children rearing decisions.

Daily decisions, which are usually not made jointly even when the parents do have joint legal custody, are typically made by the custodial parent. Daily decisions may include food choices, studying habits for a school test, the time at which to put the child to bed on any given evening, whether to administer medication for a slight fever, whether to take the child to a physician's office in light of a child's minor illness, the granting of permission for a school field trip, play dates and other similar day to day determinations. Although daily decisions do not typically necessitate input of a joint legal custodian, when that joint custodian craves control, as batterers often do, the non-residential batterer may use his legal custodial power to exert control over the most ordinary decisions. Further, if he is not consulted about these commonplace issues a batterer may intimidate the victim, threaten her with legal action, or file with the court in an attempt to harass her through the legal process.

Clearly, legal custody determinations and daily decision-making require parents to exercise both maturity and flexibility. Parents must have the wisdom to make sound decisions related to both important, as well as minor, decisions that affect the lives of their children. Parents must be flexible, able to change their course of action to best suit the needs of their children, an attribute uncommon in batterers.

## V. A BALANCED APPROACH

' . . .the dance of justice'<sup>196</sup>

Custody cases involving intimate partner violence call for new methods of evaluation as well as added protections for both abused parents and their children. Protection in the form of a sole legal custody award must, however, be balanced with the desire the other parent has to information and involvement (provided this can be accomplished without risk to the child) in the care, custody, and control of the child. Managing the conflicting interests of the parents, while promoting the best interest of the child, is complicated. While many custody cases involving domestic violence are not properly suited for cooperative parenting, children may benefit from the limited involvement of both parents. At a minimum, the batterer could have access to information about the health, welfare and education of their child. Yet, the simple exchange of information can place abused parents at risk both emotionally and physically; risks that can translate to harm to both mothers and children.

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194. See *Douglas E. v. Latanya D.*, No. CN89-10360, 1997 WL 297060, at \*6 (Del. Fam. Ct. Feb. 27, 1997) (listing examples of major decisions related to legal custody).

195. A rare case may involve a child with a medical condition, which requires major medical decision-making on a frequent basis.

196. EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 397 (2007).

Requiring the parent with legal custody to communicate with an abusive parent is not a practical solution to the abusers desire for information about the child. The extreme alternative, requiring that the abusive parent obtain the information from the child's school, coaches, health care providers and other adults involved in the child's life may not be ideal either. Vested with such authority, the batterer may make frequent and unnecessary requests for information. Perpetrators may harass or intimidate providers, which will, in turn, lead to a strained relationship between the battered parent and the third party provider. In extreme cases the batterer's behavior may lead to a refusal on the part of the third party to treat, coach, or have a relationship with the child.

One solution to this problem may be fairly easy to employ. As a result of the parents' absolute inability to communicate, a court in Connecticut ordered that the mother provide the father with information through *Our Family Wizard*, a web based information manager designed specifically for separated parents with children in common.<sup>197</sup> Although not strictly designed for domestic violence cases *Our Family Wizard* allows the sharing of information between divorced or separated parents. This site provides a multitude of resources for parents, enabling them to post confidential medical and school records, information about the children's activities, send and receive messages, track expenses, as well as coordinate parenting time and visitation schedules. A family calendar is available to parents and children from any remote location.<sup>198</sup>

*Our Family Wizard* emphasizes that the documentation of evidence is an added benefit to the abused parent should the abusive parent engage in harassing behavior,<sup>199</sup> not ideal for an abused parent. Newly created sites, however, could employ better protections given the high probability of harassing or abusive behavior in cases involving domestic violence. Similar web based resources could be created to enable abused parents to place information related to the child at issue on a secure website accessible to the battering parent. In turn, the battering parent could obtain current information about the child

197. *Pierce v. Meltzer*, No. FA054008183S, 2009 WL 2603081, at \*9 (Conn. Super. Ct. Jul. 22, 2009); see OUR FAM. WIZARD, <http://www.ourfamilywizard.com> (last visited Apr. 5, 2011).

198. See *Long Distance Parenting*, OUR FAM. WIZARD, <http://ourfamilywizard.com/ofw/index.cfm/solutions/long-distance-parenting> (last visited Mar. 24, 2011) ("One of the most important things to children in a long distance parenting relationship is consistent and regular contact. The OurFamilyWizard website can make this much easier for both parents and children. By having the entire family working from a shared set of information and calendars online, the long distance gap can become much shorter. The website provides the parent who is living a long distance away the ability to have regular input and feedback on activities and other information related to the child.")

199. See *Restraining Orders, Orders for Protection, No Contact Orders*, OUR FAM. WIZARD, <http://www.ourfamilywizard.com/ofw/index.cfm/solutions/restraining-orders-orders-for-protection-no-contact-orders> (last visited Mar. 27, 2011) ("The OurFamilyWizard website can be a great tool to help in situations where there are orders for protection, restraining orders or even no contact orders. The website provides a safe and secure location to share information and schedules. Once you are on the website, there will be no need for more harassing phone calls or lengthy emails . . . The OurFamilyWizard website will document all of the communication so if the abuse begins again, it will be documented for return trips to court. The website also can provide structure for sharing information, so the need to send lengthy emails is greatly diminished. As parents have better more productive interactions, a bad relationship can become workable for the benefit of the child.")

without the ability to respond or post information, reducing the risk of conflict created by direct or indirect contact between the parents.

## VI. CONCLUSION

When parties have decided to divorce and lead separate lives, 'the court's objective is not to reconstruct a family that is no more, but to provide the framework for a new family that can best serve the children.'<sup>200</sup>

It is evident that no one factor should act as the sole determinate for custody. Evidence of intimate partner violence is, however, highly relevant to the court's ultimate custody determination. Research indicates it is risky to require a victim of domestic violence to joint parent with her abuser. First and foremost, there is a risk of harm to the abused parent who is forced to have the contact necessary to make joint decisions with the abusive parent. In addition, communication is made difficult, if not impossible, when one parent harasses, abuses, and intimidates the other parent. Not only are batterers poor decision makers, they also tend to use the power of joint parenting to exert control over the other parent.

Giving weight to how the history of domestic violence in the relationship influences parental decision making is crucial to ensuring the best for children in the long-term. An award of sole legal custody to a survivor of intimate partner violence is the ultimate safeguard to both women and their children. It ensures that the perpetrator will have limited access to and control over the battered parent: a reduction in contact that decreases the likelihood of the stress associated with the conflict caused by battering parents. This reduction in stress to the abused parent in turn diminishes the possibility of increased health problems, which are linked to chronic stress, for both mothers and their children.

Hence, even if we are unwilling to accept the plethora of information that suggests sole legal custody is a necessary safeguard for victims and their children—it is risky to conclude that joint legal custody is a reasonable option. To make such a conclusion is to find that victims can communicate freely with their abusers, that victims have equal power to negotiate, that abusers will act cooperatively and that the history of domestic violence has no influence over the process of collaboration.

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200. *Buttle v. Buttle*, 196 P.3d 174, 184 (Wyo. 2008) (quoting *Resor v. Resor*, 987 P.2d 146, 152 (Wyo. 1999)).