The fundamental responsibility of family court judges in custody cases is to determine the “best interests” of each child and to render decisions that will promote their well-being. Whether in the context of divorce or for couples who were never married, judges must decide whether the parents will be granted sole or joint legal custody, and whether and to what extent visitation will be authorized. The degree to which parents will be required to make important decisions together concerning their children following the dissolution of their relationship will be decided as a product of the court case. Doing so, particularly in the context of warring allegations, is not an easy task.

The pressures on state court judges are legion, and arguably more so for those hearing family cases. The often- oppressive volume of cases on any given day, coupled with the increasing lack of resources, adds stress to the magnitude of responsibility weighing on judges’ collective shoulders. Furthermore, being presented with competing perspectives of what has transpired and divergent proposals for post-separation custody and visitation orders, the task may not only seem, but be, overwhelming. Without a complete and accurate understanding of the relationship between the parties, their relationships with their children, and the dynamics of the family they have created, judges may unwittingly make decisions that will adversely affect the lives and safety of women, men, and children.

Conventional wisdom posits that divorce grows out
of conflict between adults that will, in most cases, mitigate following the legal dissolution of the relationship. Thus, even when conflict is intense, there has been an assumption, grounded in most states’ statutes, that joint custody and broad access of both parents to their children is in the children’s best interests. Recent scholarship has prompted some reconsideration of this assumption, incorporating the recognition that some couples remain intensely conflicted even several years after their separation or divorce, and generating some new recommendations—both procedural and substantive—to protect children from their parents’ ongoing struggles.

Increasingly, judges are asked to consider whether the conduct of a parent is the result of relationship conflict or whether, instead, there is evidence of abuse. We are coming to understand that abuse of one parent by another poses particular risks to both the abused parent and the children, not only during the time that the family is living together, but also after a separation. Again, the judge must be able to assess what the risks to the children are, and to enter orders that safeguard them from those risks, to the extent the law is able to do so. In addition, in this situation, the judge must assess the risks to the abused parent, and assure that child access arrangements do not endanger the non-abusive parent or provide ongoing opportunities for the abusive parent to perpetuate his or her control over the partner.

The premise of this article is that family court judges have traditionally been hindered in their response to abuse by the guiding literature’s conflation of “conflict” and “abuse,” and by the failure to distinguish between violence associated with conflict and violence associated with abuse. This confusion is compounded by our cultural decision to use “domestic violence” as a synonym for “abuse.” Analysts who approach these issues from the perspective of abuse are therefore tempted to see any signs of physical violence between partners as evidence that the relationship is abusive, whereas analysts approaching the same issues from the perspective of conflict are tempted to explain the violence as a symptom of the conflict between the partners.

If the risks associated with ongoing conflict and with abuse were the same, and the strategies for minimizing them the same, the distinction might be inconsequential. But in fact, while there is certainly an overlap in both risks and responsive strategies, there are also some important differences. They are elaborated in the following pages, but their most crucial implications can be summarized here:

- The physical safety of the non-abusive parent and the children after a separation must be a priority when the parents’ relationship has been abusive; this is not necessarily the case if the parents’ relationship has been highly, but mutually, conflictual.

- When both parents are immersed in ongoing conflict, the participation of each in the conflict does not provide a basis, in and of itself, for choosing one over the other as the primary physical or sole legal custodian; other factors will be determinative in that decision. When one parent has abused the other, there are strong arguments, and often statutory mandates, for giving sole legal and physical custody to the non-abusive parent. Further, the abused parent’s capacities may be currently diminished as a consequence of the abuse, making it crucial to look at evidence of past capacity and future potential for parenting once the abuse has been curtailed.

- Parents embroiled in conflict are likely to be equally vocal about their differences, and about one another’s perceived parenting deficiencies. In an abusive relationship, the abusive partner is likely to deny and minimize his or her abuse; and the abused partner may also have been, or still be, unwilling or afraid to disclose either the abuse, or other concerns about the partner’s parenting.

Given these differences, it is inappropriate to approach the abusive relationship with assumptions drawn from what we know about the “high-conflict” divorce, just as it would be inappropriate to do the reverse.

We seek here both to explore the distinction between “conflict” and “abuse,” and to develop a framework for judicial fact-finding and decision-making guided by that distinction. After examining the differences between conflict and abuse, the role of violence in both, and the particular issues raised by abuse for parents and children, we hope to offer ways for judges and others within the court system to determine whether a particular case involves conflict or abuse, and why and how to craft orders that are different when abuse is present. In so doing, we hope to provide judges with fresh analyti-
cal tools, and to assist them in becoming inquiring magistrates, willing to seek and able to distill information that will promote safety and well-being for children.

Consider this:

A couple has been married for three years. The husband files for divorce and seeks joint custody of the parties’ one child. He files an ex parte request for custody, since his wife has taken the child across the state line to live with her mother. The husband maintains that he wants a normal father-daughter relationship and believes that his wife is interfering with his “rights.” He states that he is better suited to care for the daughter, but that he will ensure liberal and frequent contact with the mother.

The wife responds that she left the marital home when the husband was out of town for the weekend with his friends, for fear that he would otherwise prevent her from leaving. She states that he has been controlling her every move throughout the relationship. She states that during her pregnancy he once punched and choked her; that on another occasion, in the presence of their daughter, he “body-slammed” her against his truck; and that on a third occasion he choked her in front of his friends at a party. He maintains that on these occasions he was drinking and out of control, but that the instances were isolated, not part of any larger pattern.

The wife claims that because of the husband’s controlling and abusive behavior, she is fearful of his having custody of their daughter. She wants custody, and the ability to control whether he may take the daughter out of state.

What is your decision as the trial judge? Is this a case of “conflict” or “abuse”? What difference, if any, does that distinction make to your disposition? What understandings of “conflict” and “abuse” inform the standards and practices of the other professionals upon whom you might rely for input? How can you help ensure that justice is sought and achieved in your courtroom? How can you most effectively and appropriately determine the “best interests” of the children whose futures will be charted by your decisions?

I. SORTING OUT THE CATEGORIES: A CONCEPTUAL FRAMEWORK

A. High Conflict Divorce

In 1992, Janet Johnston described high conflict divorce in these terms:

Ongoing high conflict is identified by multiple criteria, a combination of factors that tend to be, but are not always, associated with each other: intractable legal disputes, ongoing disagreement over day-to-day parenting practices, expressed hostility, verbal abuse, physical threats, and intermittent violence…. Those parents who met the multiple criteria of high conflict at the time of divorce were likely to remain conflicted over a 2- to 3-year period.¹

There is extensive research demonstrating that greater marital conflict, whether within a marriage or following separation and divorce, is associated with poorer adjustment in children, in the areas of personal, social, and academic development.² Interparental conflict leads to children’s increased distress, anger, and aggression.³ There are several channels for these processes to occur. Parents under the stress of conflict may be less available to their children in general. In addition, parents in conflict show less parental warmth, less empathy, and less capacity to set appropriate limits for children. Finally, children model the tactics and problem-solving strategies that they observe in their parents. At the same time, there is also consistent and significant evidence that, in general, reduced time with a non-custodial parent is also associated with poorer adjustment for the child of separation or divorce.⁴ The court is called upon to weigh these different sources of risk and damage to the development of the children whose conflicted parents appear before it.

The growing body of literature generated to assist legal and mental health professionals in resolving high-conflict custody disputes, which constitute between 10% and 20% of all divorces, increasingly coalesces around two different sets of recommendations. The first
High Conflict Divorce

set is designed to ration court-related services and resources, recognizing that “these families do not benefit from the basic services available to divorcing couples such as parent education programs, mediation, and divorce counseling;” and that they are likely, unless firmly discouraged, to perpetuate their conflict through repeat litigation. The second set of recommendations acknowledges that “cooperative parenting, frequent transitions, and joint custody are not … appropriate” in such cases. The focus has to be on protecting the children from the parental conflict, and, to that end, developing parenting plans that emphasize clarity over flexibility. “Parallel” rather than “cooperative” parenting may minimize the contact between the parents post separation, and thereby minimize the opportunities for renewed hostilities.

B. Violence: A Measure of Conflict or Abuse?

The description of high conflict divorce offered above on its face includes marital relationships in which there have been threats of, or actual incidents of, physical violence on the part of one or both of the partners. If we call this violence “domestic violence” because it occurs within a “domestic” relationship, then it would seem that divorces growing out of “domestic violence” are just a subset of the larger universe of high-conflict divorces. This is, in fact, the approach taken by many researchers and analysts of divorcing couples.

Our suggestion, however, is that this conflict-driven violence is different—in motivation and impact—from “domestic violence” used as a synonym for the physical and other strategies of control which characterize an abusive relationship. If it were possible to start afresh, it might be well to abandon the term “domestic violence” altogether. In the “high conflict” divorce context it is overinclusive, because it sweeps abusive relationships into the same category as conflictual ones. In the “abuse” context it is underinclusive, because physical violence is only one of the controlling strategies deployed by abusive partners. Unfortunately, broad cultural acceptance of the term “domestic violence” as a synonym for abuse makes it impossible to start over. In this article, therefore, we propose using “domestic violence” in this culturally specific sense, but using two different and distinct terms for the physical violence associated with conflict and the physical violence associated with abuse.

Following the lead of Desmond Ellis and Noreen Stuckless, we propose labeling these two distinct kinds of violence “control-initiated” and “domestic violence.” “Control-initiated” violence is specific to intimate relationships that are more accurately described as “abusive” rather than simply as “violent” or “conflictual.” In abusive relationships, as we describe further below, one partner uses a range of coercive behaviors to control the other’s activities, associations, and behavior. The threat or actual use of physical violence is just one kind of abusive behavior, and may well not be the dominant one. Additionally, when violence occurs in an abusive relationship, it is not necessarily triggered by conflict. Abused partners routinely report being woken out of sleep by their partners’ assaults, or assaulted by a partner who has just walked into the house. Furthermore, even when it seems that violence in an abusive relationship has been triggered by “conflict,” closer examination may reveal that the conflict arose only because the abused partner was resisting the other’s inappropriate control, or the abusive partner perceived a threat to his or her inappropriate control.

Murray Straus, a preeminent researcher of family violence, notes that his research “has been carried out from the perspective that defines violence exclusively as a physical assault,” and specifically differentiates between physical assaults and the set of coercive and controlling behaviors that add up to abuse. Consistent with this emphasis, the research instrument developed by Straus and others to measure the presence of physical violence in intimate relationships locates violence in the context of conflict, as a tactic of conflict resolution, rather than in the context of abuse, as a tactic of control. Called the Conflict Tactics Scale or CTS, the instrument invites participants to talk about the role of violence in their disputes, rather than in their relationships.

At one level, of course, it is always damaging for children to be exposed to violence between their parents; and we would always want to structure post-divorce relationships between parents so that children are not exposed to further violence. But our ability to assess the competing claims made by the parties, to understand the precise nature and level of the risks to which children may be exposed in the post-divorce context, and to craft interim and permanent custody and vis-
iation arrangements that meet children’s needs and
ensure their safety depends, as we elaborate below, on
being able to identify abuse as well as violence and con-
lict. We cannot manage the case effectively unless we
recognize whether it is conflict or abuse that has
shaped the family prior to the divorce, and is shaping
our experience of the case within the family law system.

**C. The Abusive Relationship**

One contemporary definition of abuse describes it as:

One intimate partner’s attempt to control, domi-
nate, and humiliate the other partner through a
variety of means, including physical, sexual, psy-
chological, financial, and spiritual abuse. Domestic
violence goes beyond individual acts of aggression to encompass an overall pattern of
behavior aimed at maintaining complete control. Researchers and practitioners alike recog-
nize that domestic violence typically escalates
in both frequency and severity over time.\(^{14}\)

Notice first that this definition uses “domestic vio-
lence,” not as a descriptor of any and every use of phys-
ical threat or assault between partners, but in the cul-
turally accepted way we have described, as a synonym
for “abuse,” which can take many non-physical as well as
physical forms. In another contemporary account, the
authors are explicit that “violence that is primarily
annoying (as opposed to intimidating) and that is not
accompanied by a pattern of coercion” does not qualify
as abuse.\(^{15}\) The areas in which the abusive partner seeks
to exercise control commonly include “arguments and
decision making, household responsibilities, emotional
caretaking and attention, sexual relations, finances, child
rearing, and outside social contacts.”\(^{16}\)

Often, abusive relationships are characterized by
rules, and abuse is justified as punishment for infra-
tions of the rules. Within this context, conflict or dispute
is “manufactured” as a way of asserting control. Over
time, abused partners internalize the rules of the rela-
tionship and engage in self-censorship, while at the
same time continuing to assert autonomy, on occasion,
through acts of rebellion and resistance. In cases where
the parties appear to be in conflict about one partner’s
failure to meet the expectations of the other, it is impor-
tant to ascertain whether there is a persistent pattern in
the relationship of one partner setting those expecta-
tions unilaterally, and holding the other to account for
failing to meet them.\(^{17}\)

The physical abuse within an abusive relationship
should be understood to include not only assaults but
also threats of violence, whether those acts or threats are
directed toward the partner, other family members,
including children, family pets, or even other family pos-
sessions. It also includes acts that are deliberately endan-
gering, and therefore contain implicit threats. Dangerous
driving, for example, is often used by abusive partners as
a coercive strategy, or to signal displeasure. The pattern
of coercion commonly extends to the abuser’s sexual
relationship with his or her partner, who is often required
to have sex on demand and to engage in whatever sexual
al practices please him or her, no matter how painful or
degrading. Abused partners may not themselves define
this forced sex as rape or sexual assault, if they believe
that sexual availability is a marital obligation.\(^{18}\)

One very common form of emotional or psycho-
logical abuse is the systematic undermining of a
partner’s sense of self as an intelligent, competent, or
attractive person. Putdowns, ridicule, constant criticism,
and complaints are all standard fare. Another common
strategy is isolation. An abusive partner may prohibit
visits or calls to family or friends, may become verbally
or physically abusive if the abused partner seeks
company outside the relationship, may make scenes that
drive others away, or may embarrass his or her partner
into forgoing social connections. The abusive partner
may “check” frequently during the day to ascertain the
abused partner’s whereabouts and become irrationally
angry if he or she is not at home, the phone is busy, or
the partner returns late from a routine errand.\(^{19}\)

Some forms of isolation also promote economic
dependence, and thus facilitate financial abuse. Abusers
are often fierce in their determination not to allow their
partners to attend school or pursue employment. They
also commonly exert tight control over the family’s
finances, giving their partners only a minimum amount
to spend and monitoring every expenditure. In affluent
communities, robbing a partner of even the capacity of
lunching with friends or taking an exercise class is
another way of assuring social isolation. Refusing the
economic resources to meet the children’s needs for
clothing or sports equipment or school supplies not only creates stress and distress but potentially leaves the children feeling angry with the abused partner for not being able to advocate effectively for them.\textsuperscript{20}

The importance of understanding the range of behaviors that can contribute to a pattern of control in a relationship lies in recognizing that a collection of apparently trivial details about a partner’s behavior, unrelated to physical violence, may in fact provide important clues that the relationship is abusive. When, in addition, there are allegations of threats or incidents of physical violence, the presence of other controlling behaviors may lend credibility to those allegations, or suggest an interpretation of them different from the perpetrator’s claim that they were isolated instances, reflecting only an uncharacteristic loss of control. Even very occasional physical violence, or the threat of it, can alter the context of the relationship, investing what might otherwise seem unremarkable exchanges or events with menacing significance.

There are other salient features shared by many abusers. First, they tend to be highly entitled, expecting family life to focus on their needs, entertaining unreasonable expectations about the extent to which their partners or children will cater to them, and characterizing other family members as selfish or uncaring if they are less than completely responsive. Batterers often demonstrate disrespect or contempt for their partners, describing their opinions and behaviors with ridicule or sarcasm.\textsuperscript{21}

Second, abusive partners commonly experience themselves as victims in their intimate relationships, and so are able convincingly to describe those relationships in ways that shift responsibility for their behaviors to their partners. They are provoked beyond endurance. They are the reasonable ones, looking out for the best interests of everyone in the family; their partners are bewilderingly irrational, rigid, judgmental, or suspicious. If they have made mistakes, they are sorry for them, but feel that they should surely be given a second, and a third, and indeed multiple chances to redeem themselves.\textsuperscript{22}

Third, abusive partners are often extremely possessive. While the relationship continues, this possessiveness often asserts itself in the form of irrational jealousy and restrictions on the partner’s ability to spend time or forge or maintain connections with others. If the abused partner wishes to end the relationship, the abuser’s possessiveness takes the form of refusing to accept that outcome, and an escalation of tactics of control.\textsuperscript{23} This has significant and often frightening implications for the progress of a case involving abuse through the family court system.

Finally, abusive individuals can, and often do, present as charming, charismatic, likeable, reasonable, generous, and even flexible. Recent research commonly differentiates “anti-social” batterers, who are more likely to display aggressive and volatile behavior in all their relationships and more likely to have criminal records, from “family-only” batterers, whose coercive strategies are deployed only against their loved ones and who often appear to others as engaging and caring, deeply involved with their family, and active in their community.\textsuperscript{24} No judge could be faulted for coming away from an encounter with an abuser of this second type unable to believe the accusations made about the individual and his or her conduct. That is why it is so critical to look for independent verification of allegations of abuse rather than relying on one’s own instincts, which in this context can be all too fallible.

Adding to the difficulties of identifying, or verifying, abuse, is the fact that both the abusive and the abused partner have independent reasons to hide, deny, and minimize the abuse, sometimes for lengthy periods of time.\textsuperscript{25} The abused partner may break the silence upon realizing that there is no hope of “fixing” the relationship, that his or her life is at risk, that the children are also being abused or are at risk of physical or sexual abuse, or that the children are suffering emotionally from their exposure to the abuse or from their immersion in the abusive atmosphere of the household.\textsuperscript{20} One party’s argument in court that allegations of abuse lack credibility because they would surely have been made earlier if they were true may be nothing more than an exploitation of this earlier silence. Only a careful investigation will tell.

D. Why We Need to Know

If the risks to children of divorce were the same whether their parents’ relationship had been conflictual or abusive, and if the same interventions and dispositions could be relied on to minimize the children’s expo-
sure, post-separation, to physical and emotional harm, then there would be no need to distinguish between these two different types of “high conflict” divorce. Increasingly, however, research is yielding information about the specific consequences for children of witnessing one parent’s abuse of the other; about the parenting styles and behaviors of adults who abuse their partners; about how the dynamics of abusive relationships play out, post-separation; and about what that means both for the children’s continuing relationships with both parents and for the family court system. These topics are explored below. What we are learning underscores the importance, for judges, of understanding which type of relationship is at issue, and of tailoring interventions and dispositions to meet the particular challenges of protecting children from the risks associated with abuse.

II. ABUSIVE RELATIONSHIPS IN THE FAMILY COURT SYSTEM: THE RISKS TO CHILDREN

The impact on and risks to children of living in a household in which one parent abuses the other, even when the children are not themselves abused physically or sexually, went virtually unrecognized in the research community until 1975.\(^{27}\) Even now, the subject has been under study for only a scant quarter-century, while attention to the question of how those risks evolve when parents separate is even more recent, and far from complete.\(^{28}\) Quite simply, there has been insufficient time for this new learning to have had a uniform impact on the education, understanding, and practice of professionals, even those specializing in family dynamics or the children of divorce. The integration of this new knowledge into the practice of mental health professionals is as incomplete, and as urgent, as its integration into the practice of family court practitioners and judges.

As our understanding increases, it becomes clear that some risks are the same in nature, if not in degree, for both those children whose parents are locked in conflict, and those children one of whose parents is abusing the other. Violence, for example, is surely traumatic to children whether it is the product of conflict or abuse.\(^{29}\) When warring parents exploit their children as weapons in their ongoing battles with one another, the children suffer, just as they do when one parent unilaterally uses children as a means of exerting continuing control over his or her partner.\(^{30}\) When the court system becomes the ongoing battleground, whether for a couple in intractable conflict or an abusive partner seeking to disrupt and control the lives of other family members, the instability, as well as the diversion of parental resources, takes its toll on children.\(^{31}\)

In some important ways, however, the risks to children are different when one parent abuses the other. Even more important, the choices available to courts seeking to protect children from those risks are different. In this section, we catalog the risks to children of an abusive parent, not asserting that those risks are always unique to the context of abuse, but emphasizing where and how they may be different in degree or in kind. We also highlight some particular considerations for courts as a foundation for the specific recommendations in the next section of the article.

A. The Risks to Children

Children Witnessing Violence

The new research documents a significant array of problems—physical, developmental, emotional, and behavioral—associated with witnessing violence. These problems include “acting out” behaviors such as aggression and destructiveness, oppositional behavior, cruelty toward animals or drug and alcohol use; internalizing problems such as depression and suicidal tendencies, low self-esteem, self-blame, passivity and withdrawal; somatic problems such as headaches, bedwetting, insomnia and ulcers; symptoms such as flashbacks, nightmares, anxiety and hyper-vigilance, sleep disturbances, numbing of affect, attention deficit disorder or obsessive-compulsive disorder; deficits in social and problem-solving skills, low empathy and acceptance and perpetration of violence in relationships; and school problems such as poor academic performance, poor conduct, and truancy.\(^{32}\) It seems that younger children are more likely to exhibit somatic complaints and experience greater distress, while older children are more likely to experience one or more specific externalizing or internalizing problems. Many of the adverse consequences of exposure to violence are symptoms commonly associated, for adults as well as children, with the diagnosis of post-traumatic stress disorder.\(^{33}\) Newer and
even more troubling research now indicates that some of the symptoms may result from irreversible changes in the structure and function of the brain in children exposed to violence at an early stage of development. However, there is yet an additional issue for children growing up in a violent household. That issue is the extent to which these children internalize a set of assumptions about the acceptability of violence, its role in the maintenance and regulation of social relationships, and even more specifically its connection to love and commitment in intimate relationships. Where the violence in their family is inflicted by a man on a woman, those messages may also contain, and communicate, gender-linked assumptions about the comparative power, entitlement, and worth of men and women.

The catalog of potential consequences for children of witnessing domestic violence in and of itself belies the proposition that the behavior of a parent toward his or her partner is irrelevant to our assessment of his or her parenting. The parent who exposes a child to his or her violence toward a partner has injured that child. The damage may be irreversible, or reversible only with extensive treatment. The child is being set up to use or suffer violence in his or her own relationships, interrupted in his or her appropriate development, handicapped in performing to expected levels at school, and sabotaged in making and sustaining relationships with peers or other adults. He or she may also struggle with physical, somatic, and emotional illnesses that have their own impact on his or her ability to lead a normal life.

Some of the studies have also suggested or identified variables that may mitigate the impact of partner violence on children who witness it. The impact on the child may depend on whether the child was the direct target of verbal or physical abuse in addition to witnessing the abuse of a parent. Other relevant variables include a child’s temperament, his or her ability to escape self-blame, his or her development of talents and interests, the strength of his or her peer relationship, and the opportunity to develop close relationships with trustworthy adults, within or outside the family. A final set of critical variables includes the severity and frequency of the violence towards the abused parent, the level of stress experienced by the abused parent, and the capacity of that parent to continue to provide appropriate parenting. These variables begin to suggest how violence related to conflict may impact a child differently from violence related to abuse and control.

**Increased Risk of Physical and Sexual Abuse**

First and foremost, the research consistently demonstrates that children of a parent who has abused a partner are at significantly increased risk for physical and sexual abuse at the hands of that parent. The most persuasive research is that of Murray Straus, whose study involved more than 600 subjects and used a high threshold of physical abusiveness (whether the man “frequently” assaulted the children). Straus reported that 49% of batterers physically abuse children, whereas only 7% of non-battering men do. The most frequently and severely violent batterers had 10 times the rate of child physical abuse associated with non-battering men. Several smaller-scale studies support these findings and suggest other predictive factors, including high husband dominance, the frequency of marital rape, the number of children in the family, and the batterer’s abuse of alcohol.

Are children who are exposed to the abuse of one parent by another also at increased risk for sexual assault? One recent review of the research suggests both that this is the case, and that this issue requires more careful examination than it has yet received. As Lundy Bancroft and Margaret Miller report:

> Multiple studies demonstrate that the mothers of incest victims are likely to be battered by the perpetrator. Other studies indicate that daughters of batterers have unusually high rates of incest victimization. These two sets of studies taken together suggest that exposure to battering is among the strongest indicators of risk of incest victimization.

They also conclude that subtler forms of boundary violation by batterers may occur in an even larger percentage of cases. An important consideration for the court in cases involving abuse is that abusive parents will have both increased opportunity, and perhaps increased motivation, to abuse their children if they have unsupervised access to them after separation. Their former partners
will not be present to curb or even inhibit their behavior, and they may use their children to meet emotional and sexual needs that are no longer being met by their former partners, or to punish their former partners for leaving.

B. Emotional Abuse and Its Impact on Child Development

Abusing a child’s parent is in itself, of course, psychologically abusive to the children. It seems, however, that the parent who abuses his or her partner is also likely to engage in other forms of direct psychological abuse of the children.\textsuperscript{43} Sometimes the maltreatment is a direct outcome of the abusive parent’s relational style. Battered women report, for example, far more chronic and harsh criticism of children by their partners than do non-battered women.\textsuperscript{44} A poignant summary is provided by two seasoned clinicians:

Recurring themes have included ruining events of major importance to the children, such as birthday parties and Christmas celebrations; cruel verbal put-downs, including references to issues that the batterer knows are the areas of greatest emotional pain; repeated rejection; overt favoritism between children; and public humiliation \textemdash Our clients tend in many ways to replicate their abusive style with the partner in their relationships with the children.\textsuperscript{45}

To the extent this emotional abuse affects children’s capacity to feel cherished and successful, to take pleasure in their own pursuits and talents, and to develop positive relationships with peers and other adults, it will rob them of the ability to “buffer” the impact of the violence to which they are exposed.

Sometimes, on the other hand, maltreatment of children is intended primarily to control, hurt, or intimidate a partner—the children are casualties of the abusive parent’s willingness to inflict collateral damage en route to that goal.\textsuperscript{46} The children may be robbed of appropriate opportunities for social interaction or educational or cultural enrichment as part of the abuser’s strategy of family isolation. They may be enlisted to take the abusive partner’s side in arguments, or to monitor and report on the other parent’s behavior, without consideration of the costs to them of experiencing such a conflict of loyalties. They may be threatened with physical harm, or abduction, or the intervention of child protective services, to discipline or to punish the other parent. They may be actually abused, physically or emotionally, endangered, or kidnapped, again to instill fear into or punish their abused parent.\textsuperscript{47}

Whether these behaviors are disruptive of children’s relationships with their non-abusive parent, disruptive of their security, routines and activities, or directly emotionally damaging or preoccupying, they again limit children’s capacity to defend against the trauma of exposure to violence. Evidence that a parent has been willing to use children in these ways is especially troubling in the context of divorce and contested access, because so many opportunities will arise to continue, and escalate, this exploitation after the separation.

Undermining the Abused Parent’s Capacity to Parent

Another critical aspect of parenting by an abusive partner is that partner’s consistent undermining of the abused parent’s relationships with the children. That undermining may start very early, with a male abuser’s refusal to let his partner prioritize the needs of their unborn child over his needs for physical and sexual caretaking. When the child is born, the abusive parent may continue to assert his or her needs over the needs of a crying infant, or a child who is frightened or hurt, particularly when the parent is the source of the fear or injury, and the comfort provided by the other parent implies a criticism of his or her conduct.\textsuperscript{48} As the children grow older, the forms of undermining may include unrelenting criticism of the abused parent’s parenting, retaliation when the abused parent disagrees with or ignores parenting instructions, and forbidding the children contact with the abused parent when the abusive parent is angry with him or her. Efforts to isolate the abused parent may interfere with that parent’s ability to care for the children, share activities with them or facilitate their social life. These very common behaviors can significantly impact children’s healthy attachments to the abused parent,\textsuperscript{49} and that parent’s availability to help them cope with the fallout of abuse.

Compounding the direct undermining of an abused parent’s ability to meet the children’s needs is the fact
that the parent’s own experience of abuse is likely to cause physical and emotional depletion, and to that extent less availability to the children. To the extent this parent is depressed and anxious, suffering from sleep disturbances and emotional numbing, he or she is unlikely to be engaged and energetic as a parent, or to be able to keep track of all the details of the children’s lives. The abused parent may be impatient or withdrawn, or if confidence in his or her parenting ability has been undermined, may be timid with the children leaving them feeling insecure in their relationships with him or her.50 If the abused parent’s attention is focused on protecting himself or herself from the abusive partner it cannot be focused on the children, and they may feel abandoned. To the extent they, too, are targets of the abusive parent’s criticism or assault, and are not protected, the abused parent may be a safer target of their anger than is the abuser.51

A distinct aspect of the undermining behavior of abusive partners is the erosion of the abused parent’s authority. The parent who abuses his or her partner is obviously communicating that that partner is not worthy of respect. When the abuse is accompanied by name-calling and blaming, the children are being invited to conclude that the abused parent has brought the abuse on himself or herself. When there are no consequences for such behavior, it is as if that assessment is endorsed by society at large.52 Batterers often reinforce this role-modeling with behaviors that are explicitly undermining—overruling the other parent’s decisions, telling the children their mother or father is incompetent or deficient in judgment, or ridiculing the parent in front of them. The abusive parent may actually encourage a child to defy the other parent, or make himself or herself especially available and sympathetic when a child is in conflict with the other parent.53

The extent to which an abusive parent may continue or escalate a strategy of undermining the other parent after a separation, and then use evidence of the partner’s ineffective parenting to argue for modifying access arrangements, is an important consideration for the court in shaping its orders.

C. Guiding Considerations for Courts

The dynamics of abusive relationships, the ways in which they affect children, and the ways in which they present within the family court system, create particular difficulties for judges and others whose task it is to assess the best interests of children after a separation or divorce. We highlight a few of those difficulties here, as a basis for the concrete recommendations that follow. Some of the difficulties relate to assessment. Neither the children nor the parents can be relied upon to provide an accurate account of the family’s functioning, and a superficial investigation may produce an equally flawed understanding. Others relate to the risk that the judicial process itself will be co-opted to serve as a vehicle for further abuse. A final category relates to the specific dangers to which family members may be exposed if an incomplete investigation or an imperfect appreciation of risk leads to inappropriate judicial determinations.

Children’s Feelings Toward a Parent Who Abuses the Other

The blunt truth is that no matter how abusive a parent may be, either toward a partner or the child, and no matter how ambivalent a child’s feelings may be about that parent’s behavior, children still love their parents, cling to the hope that a damaged or abusive relationship can become a reciprocally loving one, and will usually fight to maintain connection in order to keep that hope alive.

In the case of a child who has witnessed one parent’s abuse of the other, whether or not the child has also been a direct target of abuse, these feelings are yet more complicated. One dynamic goes by the label “traumatic bonding” or “The Stockholm Syndrome.” A child does not necessarily have a distant or overtly fearful relationship with a parent whose behavior has been traumatizing. Abuse can generate strong, if unhealthy, bonds between the perpetrator and the victim, particularly if the abuse has been punctuated by periods of kindness, so that the abusive parent is also the one who has provided relief from the distress the abuse has caused. A typical response by victims in this scenario is “to feel thankful for the kindness, to be eager to forgive, and to form a belief that the abuser actually cares deeply about him or her.”54 For children especially, it is a hard-wired neurological response to turn to an attachment figure—a parent—when frightened. When the person the child turns to is also the source of the threat, the normal process is disrupted, and the attachment, counter-
intuitively, can be intensified rather than diminished.\textsuperscript{55}

Alternatively, children who witness one parent’s abuse by the other may decide that forging a bond with the abusive parent is one way to increase their own safety. The cognitive dissonance produced by “siding” with the abuser is relieved if they can also take on the batterer’s distorted view of his or her own superiority as a parent, and adopt a negative view of the other parent.\textsuperscript{56} Finally, abusive parents who enlist their children as emotional caretakers encourage an unhealthy role reversal, in which the children feel it is their responsibility to rescue the abusive parent from his or her distress that the marital relationship is ending—a responsibility they can fulfill only by being with that parent.\textsuperscript{57}

**The Appearance of Good, and Bad, Parenting**

Abusive partners often use the same authoritarian style in their relationships with their children as they do with their partners: expecting their dictates to be obeyed without question; proving incapable of accepting feedback from family members; or being inflexible in responding to the evolving needs of children. Some studies have reported that batterers are more often angry with their children, using spanking more than non-battering parents, and reacting to conflict with more “power-assertive” responses.\textsuperscript{58} It would be a mistake to assume, however, that all abusive partners are authoritarian parents, or that authoritarianism is the only characteristic of their parenting. Other researchers report that “batterers tend to swing unpredictably between authoritarian and permissive parenting … or between authoritarian parenting and showing no interest in their children at all.”\textsuperscript{59}

Another important characteristic of abusive partners, however, is that they are frequently able to persuade others that they are good parents—to talk the talk even if they do not consistently walk the walk—and to perform well under observation. Furthermore, when a child is observed with the parent who is allegedly abusive, the child may seize the opportunity for a loving and conflict-free interaction, and give every indication that the relationship is a close and healthy one. This, after all, may be the child’s dearest wish. Alternatively, the child may be intimidated into complying with the abusive parent’s agenda to portray the relationship as loving, knowing that the price for noncompliance will be high. An irony observed repeatedly by advocates who work with abused women is that children often behave better when they visit their abusive fathers than when they return to their mothers, where they feel safe to express the feelings that were too dangerous to acknowledge in the stressful context of the visit. In these situations, observers can easily draw erroneous conclusions about which parent is better equipped to “manage” the children.\textsuperscript{60}

As capable as abusive partners are of portraying themselves as caring and effective parents, they are just as capable of portraying their partners as abusive, neglectful, and ineffective parents. And, at the point at which the court is assessing the parenting capacity of both parents, the abused parent may indeed be struggling to parent—either because of the impact of abuse on his or her own functioning, or because of the abusive partner’s undermining of his or her parenting. An assessment that makes no effort to distinguish between the abused parent’s underlying personality and capabilities and his or her current condition risks rewarding the abuser for the damage inflicted by giving him or her an inappropriate level of access to the children and, through them, ongoing access to the abused parent.

**The Family Court System: Abuse through Process**

Unfortunately, the legal process surrounding separation and divorce offers multiple opportunities for the abusive partner to harass, frighten, and control the partner who is seeking to leave, and to inflict further damage on children already affected, both directly and indirectly, by the abusive family environment in which they have been living. Some of these opportunities can be avoided if the process is carefully managed. Others can only be minimized.

As with high conflict relationships, parent education, mediation, and conciliation processes are unlikely to be beneficial in cases involving abuse. But whereas the conflictual couple may simply absorb resources that could be more effectively directed elsewhere, an abusive partner may be able to use these processes to intimidate and harass the abused partner, who may be singularly ill-equipped to advocate for his or her own interests. This partner may also feel, or be, physically unsafe engaging in these processes, knowing that the abuser will have physical access to him or her,
and, unless the process is exceedingly carefully managed, recurring opportunities to abuse or threaten or stalk.\textsuperscript{61} The same dangers may be present in the context of court-ordered investigations or evaluations, which may be indispensible, but must be scrupulously managed to minimize the risks they pose.\textsuperscript{62}

Frequent requests for modification of custody and visitation orders, or failure to pay child support, are ways for an abuser to force the former partner to return to court, exhausting both economic and personal resources in efforts to protect the new arrangements that have created the possibility for the non-abusive parent and children to live free from the wearing impact of abuse.\textsuperscript{63} Finally, a particularly potent weapon for the abusive partner is the opportunity to resist a request to relocate out of state by the former spouse, so that the abused partner is unable to escape post-separation efforts to make him or her pay for such perceived abandonment.\textsuperscript{64}

**Endorsing Abuse through Court Order**

While most courts today would not consciously grant sole legal or physical custody to a parent who has abused his or her partner, that may be the consequence of an incomplete investigation or an erroneous interpretation of the evidence presented. In this scenario, the abusive partner has succeeded in enlisting the court in guaranteeing ongoing control of the former spouse—if the abused parent wishes to have any access to the children, that parent will continue to be exposed to the abuser, and access will be on the abuser’s terms.

In some situations, courts the granting of shared legal custody as an opportunity to reassure a parent who is not chosen as the primary physical custodian that he or she still has a central role to play in the child’s life. In the context of an abusive relationship, however, shared legal custody is yet another opportunity for an abusive partner to persist in an ongoing campaign for control over the family whose life has been disrupted by abuse.\textsuperscript{65}

Every shared access arrangement, unless the transfer of children from one parent to the other is scrupulously handled to prevent not just contact between the parents, but contact between the abusive parent and anyone who may themselves be intimidated or enlisted in communicating threats to the other parent, provides new opportunities for abuse. Every unsupervised contact between the abusive parent and the children presents the potential for the children to be exposed afresh to physical danger or emotional harm. Even behavior that may look as “innocent” as seeking frequent changes in the visitation schedule or picking up or dropping off the children early or late, in this context, contains a powerful message about the abuser’s ability to continue to disrupt his or her partner’s life, and the necessity that it be arranged around the abuser’s needs. The abuser then enlists the children in communicating this message, to the detriment not only of their need for consistency, but potentially of their relationship with the non-abusive parent.\textsuperscript{66}

This is not to argue that children should lose all contact with an abusive parent once the parents separate. For the most part, children want and should be able to sustain their relationships with that parent, provided they can do so without undue risk. But for this very reason, the court’s capacity to identify abuse, acknowledge the risks it poses, and respond thoroughly and sensitively to each situation, is critical to the well-being of these children. In the next section, we attempt to translate these aspirations into concrete recommendations for family courts to follow.

**III. PROTECTING CHILDREN FROM ABUSE: RECOMMENDATIONS**

These recommendations address three key areas of concern for courts seeking to protect the best interests of children as their parents separate or divorce:

- determining whether the parental relationship is conflictual or abusive;
- preventing a parent who has been abusive towards his or her partner from using the separation or divorce proceeding as one more means of controlling and abusing the other parent;
- crafting custody and visitation orders that will secure the ongoing safety and well-being of both the abused parent and the children.

Some of the recommendations are at the level of policy—suggestions for those in a position to develop and propose or enforce system-wide guidelines or standards for judges, lawyers, guardians \textit{ad litem}, custody
investigators and evaluators, family service officers, and others working within the family court system. Others are at the level of individual practice—recommendations for judges and others who are faced with difficult cases, right now, every day.

One recommendation that cuts across every area of concern is that court-based personnel be offered high-quality training in each area of concern. Ideally, that training would be required not only for judges but also for those, whether lawyers, mental health professionals or family service officers, who investigate or evaluate child access issues. At a minimum, training should be available, and judges and practitioners should be encouraged to attend and supported in attending.67 It is not enough to offer basic training in the dynamics of abusive relationships—sometimes called, somewhat pejoratively, “DV 101.” This training by itself will not provide a basis for distinguishing the conflictual from the abusive relationship. Nor will it provide a sufficient grounding in either the dangers associated with an abuser’s exploitation of the judicial process, or the dangers associated with access arrangements insufficiently attentive to the potential for ongoing abuse.

A. Knowing the Difference Between Conflict and Abuse

The dangers of conflating conflict and abuse, and of looking at a case involving abuse with assumptions drawn from cases involving conflict, can be demonstrated by setting side by side the starkly different “features” of the two kinds of relationships. The features of the high conflict relationship are drawn from the work of Janet Johnston, Linda Campbell, and Judith Wallerstein.68 The features of the abusive relationship are drawn from the preceding discussion and the sources that informed that discussion.

Imagine being the judge in the hypothetical case described earlier in this article. If you assumed, simply because the parties were contesting custody, that they were probably personality-disordered, channeling their unresolved feelings about their own relationship into the fight over their child, each making exaggerated negative claims about the other, and pressuring their daughter to take sides, you would hear their testimony entirely differently than if you were open to the possibility that the father might indeed have been abusive, the mother’s claims about his behavior accurate, and her flight with their child a good faith response to that behavior. As the judge, it would be crucial to resist making assumptions about the case, or about the source of the conflict over custody, until you were in possession of sufficient data to determine whether the case was driven by conflict or had its foundation in abuse.

How might you, as the judge, try to maximize your chances of uncovering the truth about the parents’ relationship? One aspect of this task will involve the use of critical judgment on the part of all those in a position to ask relevant questions and draw informed conclusions. From the bench, you may be asking those questions yourself of the parties or of the experts called in, whether by the court or by the parties, to provide their own assessments. The experts will be asking their own questions and drawing their own conclusions, although to the extent they are court-appointed, you have significant power to guide their inquiry.

Some recommendations for determining whether the parental relationship is conflictual or abusive include:

- Recognizing that a party who has been abused may have difficulty disclosing the abuse and working to create as safe as possible an environment for that disclosure.
- Recognizing that a party who has abused his or her partner is likely to deny or minimize that abuse, and may subjectively believe himself or herself to be the victim in the relationship, making it critical to seek independent verification of both partners’ claims about their relationship.
- Recognizing that the behavior or statements of a child, in the presence of a parent alleged to have abused the other parent may not be an accurate reflection of the child’s experiences with or feelings toward either parent.
- Since the parties are likely to present very different versions of reality, going beyond questioning, interviewing, and/or evaluating the parties and the child/ren, to conduct a thorough investigation. This would include accessing all relevant records (including those pertaining to criminal and protective order proceedings, medical records for both the parent alleging abuse and the children, and school or child-care records for the children).
## HIGH CONFLICT

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>a.</strong></td>
<td>The likelihood of personality disorders in both partners, stemming from unresolved childhood issues.</td>
</tr>
<tr>
<td><strong>b.</strong></td>
<td>The partners’ unresolved feelings regarding their failed relationship, which are channeled into fighting over the children.</td>
</tr>
<tr>
<td><strong>c.</strong></td>
<td>Mistrust of each parent for the other, based on the distorted and exaggerated negative view of each held by the other.</td>
</tr>
<tr>
<td><strong>d.</strong></td>
<td>Cycles of reaction and counter-reaction, which further erode the possibility of trust.</td>
</tr>
<tr>
<td><strong>e.</strong></td>
<td>Pressure on the children to &quot;take sides,&quot; leading children, on occasion, to relieve the pressure by pleasing one parent since they cannot please both.</td>
</tr>
</tbody>
</table>

## ABUSE

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>a.</strong></td>
<td>One partner exhibits attitudes and behaviors designed to exert inappropriate control in the relationship, while the other may display symptoms of physical and/or emotional injury from exposure to abuse.</td>
</tr>
<tr>
<td><strong>b.</strong></td>
<td>The abusive partner’s unresolved feelings regarding his or her partner’s desire to separate from the relationship prompt the abusive partner to fight for custody or generous access to the children as a way of maintaining access to the partner, punishing him or her for leaving, or using the children to meet physical or emotional needs.</td>
</tr>
<tr>
<td><strong>c.</strong></td>
<td>Mistrust of the abusive partner by the spouse, solidly grounded in past experience and a well-informed assessment of the abuser’s current intentions and likely future behavior, along with unfounded allegations about the abused parent made by the abusive parent, based on his or her distorted and exaggerated negative view of the abused parent.</td>
</tr>
<tr>
<td><strong>d.</strong></td>
<td>Repeated instances of manipulation and control, which further erode the abused partner’s capacity to trust the abuser.</td>
</tr>
<tr>
<td><strong>e.</strong></td>
<td>Children fearful of exposure to the abusive partner’s dangerous, neglectful, or inappropriate behavior, yet often desirous of maintaining a connection to him or her, and sometimes distrustful of the abused parent’s capacity to meet their physical, social, and emotional needs.</td>
</tr>
</tbody>
</table>

It would also involve interviewing third parties who may have knowledge of the abuse and its impact on family members, while recognizing that they may be fearful about disclosing their knowledge of abuse.

- Appreciating that particular behaviors or incidents that may seem trivial in isolation take on a different weight and significance when understood as part of a larger and longer pattern of manipulative, controlling, coercive, or threatening conduct.
Insisting that any claim of parental alienation be thoroughly investigated—to determine whether children who express anxiety or fear about a parent, or share negative assessments of a parent with a guardian ad litem or custody evaluator—are in fact responding to their own real concerns, rather than the fabricated or exaggerated concerns of the other parent.

Building into one’s assessment of the case the knowledge that the children of a parent who has abused a partner are at greater than average risk for physical or sexual abuse. This knowledge should not, of course, lead a decision maker to a premature conclusion that a child has been abused. It should, on the other hand, support the decision maker in making a thorough inquiry into any such allegations, and in resisting a premature conclusion that the allegations are being made in bad faith or are based on a distorted perception of reality.

Prohibiting the use of the Sex Abuse Legitimacy Scale developed by Dr. Richard A. Gardner, which is weighted toward discrediting legitimate claims of abuse, and lacks the requisite “degree of recognition and acceptability among the spectrum of scientific or medical experts.”

In cases in which there is a plausible claim that one parent has been abused by the other, but also legitimate concerns about the abused parent’s current parenting capacity, looking to evidence of both past capacity and potential for effective parenting. Evidence of successful functioning in other areas of the abused parent’s life or at earlier times in his or her life will be relevant here, including, for example, evidence about that parent’s child-rearing in an earlier marriage or performance in jobs held before the current relationship.

As the judge in any individual case in which abuse is alleged or suspected, tailoring the appointment of any custody investigator or evaluator to ensure that the investigation is thorough, properly focused on areas of concern, and free of any prejudicial assumptions that will constrain the collection, interpretation, or presentation of relevant information.

Another aspect of the task involves making the best use of inevitably limited investigatory resources—not just by focusing each individual investigation, but by determining which case warrants investigation and who is qualified to conduct it.

Recommendations regarding the use of investigative resources include:

- Developing criteria to identify those cases needing increased investigatory resources in order to differentiate abuse from conflict. Because families have frequently neither sought nor received abuse-related interventions prior to a separation or divorce, it is not appropriate to require the existence of a protective order or police involvement as the trigger for an enhanced investigation. Even using “credible allegations” of abuse as the trigger requires a preliminary determination with respect to exactly those matters needing fuller investigation. Ideally, whenever one party alleges a pattern of abusive behavior or one or more serious incidents of abuse, and the other contests that allegation, there should be further investigation, so that the allegations are not left at the level of “he said-she said” and interpreted as evidence of conflict rather than abuse.

- Developing a list of qualified personnel to perform investigations in alleged or suspected abuse cases. Where all the personnel available to the court to conduct custody investigations or evaluations have received specialized training in the areas of particular concern in cases involving abuse, there may be no need to maintain a separate list. However, if not all such personnel have received training, then a specialized list should be maintained and appointments made from that list. If the parties are involved in the selection of a court-appointed investigator, still no appointment should be given to someone not specifically trained to recognize and respond to the concerns raised by abuse.

- Where no list of qualified or specialized personnel exists, making sure on a case-by-case basis that any appointed guardian ad litem, custody investigator, or custody evaluator has the relevant expertise to assess allegations of abuse. That expertise should include familiarity with the dynamics of abusive relationships and the impact on adults and children of living with an abusive family member, and the ability to conduct a thorough investigation, including accessing all relevant records.
Where other resources are not available, and court rules allow, using personnel employed within the family court—in a family service office or court clinic—to gather information from official records, other documents, and third parties to corroborate the parents' differing versions of reality.

B. Maximizing Safety and Limiting Abuse During the Proceedings

It is difficult, and frightening, for those who work within the family court system to acknowledge the reality that participating in family court proceedings can be dangerous—for the parties, for their lawyers, for other helping professionals involved in the cases, and for judges. Yet, every now and again a participant is killed or injured in a courthouse or on its steps; and the protective denial we use to shield ourselves from that reality is shattered. If fear, injury, and death can visit even the courthouse, how much more likely it is that they can visit the lives and homes of the participants, far from the protections the courthouse offers. And how much more likely it is that they will visit in cases in which one parent has already demonstrated a readiness to use threats and violence to maintain control over the family whose cohesion is threatened by the proceedings. The courts, therefore, have a large responsibility to ensure not only that courthouses, courtrooms, and court proceedings are attentive to the physical safety of adults and children, but that the safety of the participants remains a priority in every aspect of the litigation, inside and outside of the courthouse. Securing the physical safety of the parties will at the same time increase the reliability of the information available to the court in making its difficult and crucial decisions about custody and visitation.

Recommendations for safety during the divorce process include:

- Providing at least one waiting area in the courthouse that is supervised by security personnel, training court security officers to intervene as needed to separate parties in the courtroom or elsewhere in the courthouse, and developing security protocols to manage the order and timing of parties leaving the courthouse.
- Recognizing that mediation is rarely appropriate for families experiencing violence and almost never when there has been a pattern of abuse and intimidation. The premise of mediation is that it is a negotiation between equals, which is not the case when one partner has been controlling the other, often for many years. It may be unsafe for the parents to meet together, not only because of what can happen in the office, but more importantly because of the risk of violence in the hallways or parking lot.
- On the other hand, since some partners desire to reach a mediated settlement even though they have been abused, it is also important to develop both a protocol for identifying those cases (and distinguishing them from the more common situation in which an abused partner is being intimidated into participating), and specialized procedures for mediation in the context of abuse, conducted by specially qualified professionals.
- Making sure that any parent education program mandated or endorsed by the court is attentive to issues of safety. Ideally, parents should not be assigned to the same session, and should not be given information about where or when their partner is attending. If the parent education program is focused on cooperative parenting, it may be advisable to exempt the parent who can offer credible evidence of abuse in his or her relationship since cooperative parenting will not be safe or appropriate in this situation. Further, if completion of the program is made a condition of a divorce being granted, an abusive parent can use his or her failure to complete as a way of subverting the divorce process. If the court is to avoid enabling this abuse, it must be able to discipline the recalcitrant parent, and/or allow the proceedings to move forward on the petition of the other parent.
- Ensuring that custody investigations and evaluations are conducted in a manner that is attentive to safety. The adult parties, for example, should not be interviewed together, and should not be interviewed one after the other unless there is a way to shield them from an encounter in the professional's office. It should be recognized that children may never feel safe disclosing negative information or feelings about a parent; at a minimum, they should be interviewed separately in cases where there are allegations of abuse, even if they are also interviewed, or observed, with one or both parents.
Ensuring that any adult or child who is interviewed with respect to allegations of abuse is first told that the information obtained in the interview cannot be held in confidence, but will be shared with the court, and made available to the party against whom those allegations are made. The risk of retaliatory abuse should be minimized by, for example, letting the interviewee know how and when the information is disclosed, and, where possible, by corroborating the information obtained from the party or child, so that it appears to have been obtained from multiple sources.

Adopting a practice of assigning a single judge to cases in which one or both parties return to court multiple times, particularly over issues relating to custody and visitation. This allows the judge to develop an understanding of the dynamics in the relationship between the parents, and reduces the chances that one parent can manipulate the court system to continue his or her abuse by other means.

C. Crafting Effective Orders: Maximizing Long-Term Safety and Limiting Ongoing Abuse

In any case involving access to children, courts must ultimately give priority to children’s best interests. At the same time, family judges have traditionally been sympathetic to parents’ claims that they have not just an interest but a right to maintain relationships with their children. They have also been protective of their own prerogative and of judicial resources. There are times, then, when it seems that the best interests of children have been subordinated to a court’s reluctance to deprive a parent of contact with a child, or a court’s desire to punish a parent who has sought to evade the court’s jurisdiction or disobeyed its mandate, or a court’s determination to discourage repeat litigation. All of these competing considerations can be triggered by cases involving abuse, and can and have been successfully exploited by abusive partners seeking to manipulate judicial outcomes.

The challenge in these cases is to remain steadfastly focused on the best interests of children who need both an opportunity to heal from past exposure to abuse and an opportunity to live free of either the fear or the reality of abuse, for themselves, their non-abusive parent, or their abusive parent’s new partner or family, going forward.

Recommendations for giving priority to the best interests of children include:

- Not awarding joint legal or physical custody to a parent whose relationship with the other parent has been abusive. Abuse, whether a child is abused directly or abused by exposure to the abuse of the other parent, is de facto poor parenting, as discussed above. Any arrangement that gives the abusive parent shared physical custody will create unacceptable risks for both the children and the abused parent, and provide the abusive parent with too many opportunities to continue a pattern of intimidation and control. Joint legal custody, which will require ongoing negotiation between the parents over major decisions involving the children, is similarly unacceptable, because the abused parent and children will remain hostage to the abusive parent’s agenda.

- Being willing to accept that in severe cases of abuse it may be in the child’s best interest to block all contact between the child and the abusive parent, even allowing the abused parent and the children to move to an undisclosed location, in or out of the state, for their own protection. A parent’s right to a relationship with a child does not trump the child’s right to be free of physical, sexual, or emotional abuse. It is perfectly appropriate to demand that a parent who has exposed a child to violence and abuse, and inevitably injured the child as a result of that exposure, provide solid evidence of changed behavior and attitude before being allowed to resume contact with the child. Successful completion of a batterers’ treatment program will usually be an important aspect of that proof, and full assumption of responsibility for the abuse and its impact should be an essential aspect.

- Making a careful assessment of the abusive parent’s lethality and amenability to treatment before permitting ongoing contact between that parent and the children. A parent’s abuse is not always so threatening that it precludes contact, and there may
be other evidence about the child’s relationship with the abusive parent suggesting that some ongoing contact would be advisable. But the results of the assessment should guide the structure of access arrangements, as well as their frequency and duration. There are factors known to increase the risks of severe or lethal violence:

- a history of violence, especially frequent, severe, and/or with calls to the police by the abuser’s partner or children
- insidious threats and fantasies of serious harm, homicide, or suicide
- availability of weapons (guns or knives)
- drug or alcohol use
- level of obsession with or possessiveness about partner, including stalking/hostage taking
- high degree of depression and rage
- disregard/contempt for authority, such as violation of restraining orders, criminal arrest record
- recent stressor (separation, loss of job, change of custody, death of loved one, etc.)

On the other hand, there are indicators that suggest amenability to treatment:

- compliance with authority
- capacity to take responsibility for violence
- absence of denial and minimization, rationalization, and excuses
- presence of shame and guilt
- capacity for empathy for the adult and children who are abused or exposed to abuse

Utilizing the full range of available mechanisms for ensuring safety during the transfer of children from one parent to the other, and during visitation, in cases in which an abusive parent will continue to have some contact with his or her children. Access arrangements, graduated according to the assessment of the danger to the child and the abused parent, include:

- therapeutic supervision: the child is seen with the perpetrator only in the office of a therapist, skilled in working with family violence
- supervised access as discussed below
- supervised exchange, using staggered arrival times and other means of assuring no contact between the parents
- unsupervised day-time visits
- unsupervised overnight visits

Supervised access can take place within a secure, court-mandated program or in the community with an appropriate, experienced supervisor present at all times. Supervision of abusive parents should never be provided by close family members. In order for the supervision to be effective, the supervisor must be able to intervene when there are statements or actions that endanger the child psychologically or physically. The supervisor may be able to provide information to the court about the behavior of the parent and child for use in future determinations.

It is best if there are specific criteria for progressing from supervised to unsupervised access. These are, commonly, appropriate behavior during supervised visits, credible reports of successful completion of a batterers’ program or productive participation in counseling targeting the abuse, completion of any other necessary substance abuse treatment program, and other provisions based on the needs of the case. There should also be no unsupervised visits until the child has been treated for the effects of any trauma suffered by exposure to abuse, and the child’s psychological status evaluated by a neutral mental health professional with expertise in the area of family violence and abuse.

Ensuring that any order governing supervised access is specific as to the terms of the supervision, and provides for access to be suspended for any non-compliance with its terms; for any attempt or threat to abduct, hurt, kill, or stalk the abused parent or the children; or for persistent distress on the part of the child about visits or refusal of the child to visit despite interventions.

Framing access orders with sufficient clarity and precision so that they do not require ongoing interpretation. While parents whose relationships are
not characterized by extreme conflict or abuse can be relied upon to “fill in the blanks” in a court’s order, and may well appreciate some flexibility in managing their access arrangements, an abusive parent is likely to exploit every ambiguity to demonstrate his or her ongoing capacity to disrupt and control the life of the former partner, maintaining anxiety and uncertainty about the family’s safety or well-being, and an inability to plan a future free of the abuser’s influence. It is easier to demonstrate noncompliance with an order that is clear, giving the court a solid basis for disciplining the violator or modifying the arrangements.

- Reinforcing the abused parent’s capacity to parent and parental authority. There may be cases in which there is a need for counseling or support services to the children or the abused parent, but the orders for such services should not be punitive in their tone or in their effect. The abused parent may need time to learn how to protect himself or herself and the children more appropriately and to re-establish competence with the children. The court should structure its orders to allow that time.

- Recognizing that behavior on the part of the non-abusive parent that resembles alienation may in fact be the effort, even if imperfect, of a caring parent to protect himself or herself and the children. Fleeing with the children should not prejudice the court against an abused parent in the custody/access decision. Supervision of the contacts between parent and children may relieve the abused parent of the need to take preventive action, and protect the abused parent from further accusations of alienation. It can also provide information about efforts of the perpetrator of abuse to alienate the children from the abused parent.

- Balancing the court’s interest in closure and finality against the potential need for continued court involvement to safeguard the best interests of the children. In the case that does not involve intractable conflict or abuse, the court and the parties share an interest in closure, so that the family can move on with their lives. In cases involving abuse, the non-abusive parent is certainly also hoping for a final resolution that will provide freedom from ongoing abuse, and hoping specifically that the abuser will not use ongoing litigation as a means to continue the abuse. However, if the court’s orders are unsuccessful in securing the safety of the abused parent and/or the children, that parent must be able to return to court to petition for more protection. If the court has initially awarded no access, or only very restricted access, to the abusive parent, then that parent may also deserve a chance to return to court to demonstrate changed behavior and attitudes and petition for more access to the children. The challenge for the court is to distinguish between good and bad faith requests for modification of the initial orders, and perhaps to use the initial orders to educate and discipline the parties by suggesting what will and will not be considered appropriate grounds for subsequent modification. It may be possible, for example, to write into the initial order that any new allegation of stalking, harassment, or the use or threat of physical abuse of a parent or child will be considered sufficient to constitute a material change of circumstances warranting a modification of custodial arrangements.76

**CONCLUSION**

The course of a child’s life may be altered dramatically by a court’s decision in his or her parents’ custody dispute. While many professionals may have a role in contributing, synthesizing, and filtering information, ultimately it is the judge’s responsibility to review all the information carefully, with a view to promoting the healthiest possible upbringing for the child.

Throughout this article we have provided new lenses through which to view contested custody cases. We have distinguished the characteristics of those families affected by intractable conflict from those where abuse has been integral to the family’s dynamics, and described the particular implications of exposure to abuse, and to those who abuse, for children’s growth and development. We have offered both systemic recommendations and case-specific ideas for improving decision-making in the context of abuse.

Our conviction is that a better understanding of the different dynamics and consequences of conflict and of abuse, informed by the most current research findings and a critical analysis of their implications, will improve
High Conflict Divorce

judicial practice. We encourage judges, and all those on whom courts rely for assistance, to examine the facts of each case closely and critically to determine whether it involves conflict or abuse. When the facts initially appear inconclusive, we encourage judges and others to ask the hard questions or press for the further investigation that will clarify the situation, rather than decide the case based upon incomplete information, and the potentially erroneous assumptions and analysis that follow from incomplete information. We hope that judges will embrace this challenge.

AUTHORS' ADDRESSES:

Clare Dalton, LL.M.
George J. and Kathleen Waters Matthews
Distinguished University Professor of Law
Northeastern University School of Law
50 Cargill Hall
400 Huntington Avenue
Boston, MA 02115

Judge Susan B. Carbon
Supervisory Justice
State of New Hampshire Judicial Branch
Grafton County Family Division
26 Green Street
Plymouth, NH 03264

Nancy Olesen, Ph.D.
Psychologist
711 “D” Street
San Rafael, CA 94901

AUTHORS’ NOTE: The authors gratefully acknowledge Katherine E. Garren, NUSL ‘03, for her excellent research assistance.
END NOTES


4. *Id.* at 39.


6. “Commonly, these cases appear numerous times before the court, over prolonged periods of time. The services of arbitrators, assessors, and/or guardians ad litem are requested. Lawyers may submit numerous motions and affidavits, in an effort to capture their client’s version of reality on paper.” *Jaffe, Lemon, & Poisson, supra* note 5, at 14.

7. “[F]requent transitions and more shared access between high-conflict parents were associated with more emotional and behavioral disturbance among children, especially girls.” Johnston, *supra* note 1, at 420.


11. *Id.*


15. Lundy Bancroft & Jay G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, 3 (2002). On the other hand, while not requiring “the presence of beatings,” to identify a batterer, they do require: “actions intended as threats, such as raising fists, cutting phone lines, or deliberately dangerous driving.” Their point is that while psychological abuse is damaging in and of itself, an accompanying fear of violence intensifies the impact of that abuse. *Id.*

16. *Id.* at 6.


19. *Id.* at 334.

20. *Id.*


27. Only three articles appeared on the topic between 1975 and 1980, and even by 1998 a literature search found only 56 articles in peer-reviewed journals. This summary appears in George Holden, *Introduction: The
END NOTES

Development of Research into Another Consequence of Family Violence, CHILDREN EXPOSED TO MARTIAL VIOLENCE at 3-4 (George W. Holden, et al., eds. 1998). By 1998, only four books had been dedicated to the topic; the first published in 1990 and the last in 1998. The four books are: PETER G. JAFFE, DAVID WOLFE, & SUSAN WILSON, CHILDREN OF BATTERED WOMEN (1990); ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN (Eina Peled, et al., eds., 1995); GROUPWORK WITH CHILDREN OF BATTERED WOMEN: A PRACTITIONER’S MANUAL (Eina Peled & Diane Davis, eds., 1995); CHILDREN EXPOSED TO MARTIAL VIOLENCE. The last five years have seen significantly more attention to the subject, and the publication of valuable new resources, including BETSY MCALISTER GROVES, CHILDREN WHO SEE TOO MUCH (2002); LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT (2002); PETER G. JAFFE, NANCY K.D. LEEMON, & SAMANTHA E. POISSON, CHILD CUSTODY & DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY (2003).

28 JAFFE, LEEMON, & POISSON, supra note 5, at 50.
29 BETSY MCALISTER GROVES, CHILDREN WHO SEE TOO MUCH 56-57 (2002).
30 JAFFE, LEEMON, & POISSON, supra note 5, at 20.
31 Am. Psychol. Ass’n, supra note 25, at 40-41.
33 B.B. ROBBIE ROSSMAN, DESCARTES ERROR AND POSTTRAUMATIC STRESS DISORDER: COGNITION AND EMOTION IN CHILDREN WHO ARE EXPOSED TO PARENTAL VIOLENCE, in CHILDREN EXPOSED TO MARTIAL VIOLENCE, 223-256 (George Holden, et al., eds., 1998).
34 GROVES, supra note 29, at 37-38. See also Bruce D. Perry, INCUBATED IN TERROR: NEURODEVELOPMENTAL FACTORS IN THE “CYCLE OF VIOLENCE,” in CHILDREN IN A VIOLENT SOCIETY at 124-149 (Joy D. Ososky, ed., 1997).
35 GROVES, supra note 29, at 58. Although this article is written in strictly gender-neutral language, to reflect the reality that women are sometimes the abusive partners in their relationships with non-abusive men, research consistently supports the proposition that control-initiated violence, unlike the violence associated with conflict, is overwhelmingly perpetrated, in heterosexual relationships, by men against women. ELLIS & STUCKLESS, supra note 9, at 46.
36 PETER G. JAFFE, DAVID WOLFE, & SUSAN WILSON, CHILDREN OF BATTERED WOMEN 60 (1990).
38 E. MARK CUMMINGS, CHILDREN EXPOSED TO MARTIAL CONFLICT AND VIOLENCE: CONCEPTUAL AND THEORETICAL DIRECTIONS, in CHILDREN EXPOSED TO MARTIAL VIOLENCE 55-93 (George W. Holden, et al., eds. 1998).
40 BANCROFT & SILVERMAN, supra note 15, at 43.
41 LUNDY BANCROFT & MARGARET MILLER, THE BATTERER AS INCEST PERPETRATOR, IN THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 84 (2002). At the same time, the authors acknowledge the “notable lack of published analysis of this phenomenon,” and report that “[A] recent comprehensive overview of research on domestic violence … did not mention this overlap, and another recent review of risk factors for sexual abuse did not mention battering as a possible perpetrator characteristic.” Id.
42 Id. at 86.
45 BANCROFT & SILVERMAN, supra note 15, at 46. See also Am. Psychol. Ass’n, supra note 25, at 39-41.
46 BANCROFT & SILVERMAN, supra note 15, at 45. See also Am. Psychol. Ass’n, supra note 25, at 39-41.
48 BANCROFT & SILVERMAN, supra note 15, at 64.
49 Id. at 66.
50 GROVES, supra note 29, at 59, 65 and 77.
51 GEORGE W. HOLDEN et al., PARENTING BEHAVIORS AND BELIEFS OF BATTERED WOMEN, in CHILDREN EXPOSED TO MARTIAL VIOLENCE 55-95 (George W. Holden, et al., eds. 1998).
52 BANCROFT & SILVERMAN, supra note 15, at 11.
END NOTES

53 Id. at 34.

54 Id. at 40. See also Judith Herman, Trauma and Recovery 92 (1992).


60 Id. at 37.

61 Fischer, Vidmar, & Ellis, supra note 10, at 2153-2155.

62 Under no circumstances, for example, should a custody investigator interview two parents together if one is alleged to have abused the other. But less obviously, the interviews should not be scheduled so that the two parties are likely to find one another in the waiting room or the parking lot.

63 Jaffe, Lemon, & Poisson, supra note 5, at 32. See also Michele Weldon, I Closed My Eyes: Revelations of a Battered Woman 137-49 (1999). As the author writes: “I spent nearly the equivalent of three college educations … for my children on hearings, motions, pleadings, mediations, complaints, violations, and attempted settlements. And I am still spending. I thought once the divorce was over there would be no more legal battles. I was wrong.” Id. at 138.


67 It is often possible to partner with national or local professional organizations to offer such trainings.


71 In Massachusetts, a man called to schedule his parenting education classes and was told by the staff that he could not enroll for that particular course because his wife was currently enrolled. When the wife left her next parenting class, she found that the tires had been slashed on her car in the parking lot.

72 For a description of the difference between cooperative parenting and parallel parenting, see Geri Fuhrmann & Joseph C. McGill, Parents Apart 12 (1999). As the authors there note: “In families in which domestic violence has occurred, cooperative parenting is not a goal. Only parallel parenting which keeps parents separate affords some degree of safety.” Id.


75 Straus, supra note 66.

76 NCJFCJ Model Code on Domestic and Family Violence, § 404 (1994).