Western New England Law Review

Volume 43 *43*
Issue 1

Article 7

2021

FAMILY LAW—THE REVICTIMIZATION OF SURVIVORS OF DOMESTIC VIOLENCE AND THEIR CHILDREN: THE HEARTBREAKING UNINTENDED CONSEQUENCE OF SEPARATING CHILDREN FROM THEIR ABUSED PARENT

Jeanne M. Kaiser
Western New England University School of Law, jkaiser@law.wne.edu

Caroline M. Foley

WESTERN NEW ENGLAND LAW REVIEW

Volume 43 2021 Issue 1

FAMILY LAW—THE REVICTIMIZATION OF SURVIVORS OF DOMESTIC VIOLENCE AND THEIR CHILDREN: THE HEARTBREAKING UNINTENDED CONSEQUENCE OF SEPARATING CHILDREN FROM THEIR ABUSED PARENT

JEANNE M. KAISER & CAROLINE M. FOLEY*

Massachusetts law governing child custody recognizes the damaging effect that witnessing domestic violence can have on a child. Accordingly, the law requires courts to give special attention to the effects of domestic violence on a child when determining custody. An unintended consequence of this scrutiny is that parents who have been the victims of domestic violence can lose custody, or even their parental rights, for failing to protect children from witnessing their abuse. This result can be prevented by requiring courts to apply the same level of attention to the effects of domestic violence when removing a child from an abused parent as they do when placing a child with an abusive parent.

INTRODUCTION

Massachusetts law has played a leading role in recognizing the particular type of harm children can suffer when they witness domestic abuse. Since 1996, juvenile and family courts have been required to detail the impact that witnessing domestic violence has on children before awarding custody of a child to a perpetrator of such violence.[1] Trial courts

* Jeanne M. Kaiser is a Professor of Legal Research and Writing at Western New England University School of Law. She has also been a member of the appellate panel of the Children and Family Law program of the Committee for Public Counsel Services in Massachusetts for over twenty years. As a member of the panel, Professor Kaiser represents indigent parents and children in appeals of child welfare cases. She also serves as a mentor for new members of the panel. Caroline M. Foley is a candidate for J.D., Western New England University School of Law, 2021, and a member of the Law Review. The author would like to thank Professor Kaiser for her guidance throughout the writing of this piece.

1. *See* Custody of Vaughn, 664 N.E.2d 434, 439–40 (Mass. 1996).

are required to consider the "profound impact" that being a witness to domestic abuse can have on a child, especially during certain developmental stages.[2] Accordingly, courts must provide detailed and specific findings about the effect of domestic abuse on a particular child before making any custody decision that would place the care of a child in the hands of a parent who has been abusive to a domestic partner.[3]

Massachusetts law has paid less attention to another side of the problem of domestic violence. What about the parent who is the victim of physical abuse? A parent who is caught in a cycle of domestic violence might remain in an abusive relationship for a significant amount of time. If she does not leave the relationship, her children may witness repeated domestic abuse and suffer associated psychological harm. Does a mother who remains in an abusive relationship neglect or psychologically abuse her children? Should it affect whether her children remain in her custody?

When the state intervenes in child custody cases, the answer to these questions is sometimes "yes." It is not unusual in cases brought by the Massachusetts Department of Children and Families (DCF) to include allegations of failure to protect a child from witnessing domestic violence. These cases cite the ruling in *Custody of Vaughn* regarding the pernicious effects witnessing domestic violence has on children.[4] In some instances, they determine that a parent who is the victim of physical abuse is unable to protect her children from witnessing that abuse and therefore unfit to parent the child.[5]

They do not, however, necessarily follow *Vaughn*'s directive of providing specific and detailed findings of fact about the effect of the abuse on the particular child before removing the child from a parent's custody or even severing parental rights. The result of this practice can prove more damaging to children than the effect of witnessing the abuse. This result was clearly illustrated to one of the authors of this Article when she represented a five-year-old child seeking on appeal to reverse a judgment of the trial court keeping her separate from her mother. In that case, the primary evidence of the mother's unfitness was that she had a history of being involved in abusive relationships witnessed by her older children, and that therefore her "poor decision making" could subject her five-year-old daughter to harm.[6]

That case illustrates the unfortunate corollary of the recognition of the harmful effects of domestic violence on children. Courts may be too ready to separate children from a parent who has been caught in a cycle

2. *Id.* at 439; *see infra* notes 57–60.

3. *Id.* at 440.

4. *See infra* note 31.

5. *See infra* note 63.

6. Care & Prot. of Umika, 140 N.E.3d 948 (Mass. App. Ct.), *rev. denied*, 143 N.E.3d 1037 (Mass. 2020).

of domestic violence, primarily as a victim. That practice can have the tragic effect of denying a child her constitutional right to be raised by her parents and leave her indefinitely in the care of the state.[7] In such cases, failure to fully consider all aspects of the impact of domestic violence, including the trauma of separation, can revictimize children with a parent who has been caught in the cycle of domestic violence. At the same time, it deprives a parent of their constitutional right to raise a child.[8]

This problem can be cured by requiring trial courts to take the same care before removing a child from a parent who has suffered at the hands of an abuser, as is required before placing a child with a parent who has a history of perpetrating such abuse. The trial court should be required to make findings about the effect of domestic violence on the particular child whose welfare is at issue. In so doing, the court should assess the progress a parent has made in escaping the cycle of domestic violence, while recognizing that progress in such cases is rarely linear and often involves multiple attempts to escape the cycle.[9] The findings should also closely examine to what degree DCF has fulfilled its duty to exercise reasonable efforts to reunify the family.[10] Those efforts should be specifically tailored to assist a parent in extracting themselves from abusive circumstances. Finally, and most importantly, the court should be required to carefully weigh the risk that a parent would expose a child to new incidents of domestic violence against the impact of indefinite impermanence and separation from the parent on the child.[11] These findings are just as important in cases where a parent has been a victim of domestic violence as when the parent has been a perpetrator.

I. *CUSTODY OF VAUGHN*: THE UNINTENDED EFFECT OF SEPARATING $ CHILDREN FROM THEIR ABUSED PARENT $

Vaughn was the first case in the nation to require consideration of the impact of domestic violence on children in the custody context.[12] It prioritized in a new way the negative effects that exposure to domestic violence has on children[13] by holding that a court must make specific findings of fact regarding the impact of the abuse prior to awarding a child's custody to an abuser.[14]

7. *See* Santosky v. Kramer, 455 U.S. 745, 760 (1982) (both parent and child have a constitutionally protected interest in their family relationship).

8. *Id.*

9. *See infra* Part III, Section B.

10. *See id*.

11. *See infra* Part III, Section C.

12. Philip C. Crosby, Case Comment, Custody of Vaughn*: Emphasizing the Importance of Domestic Violence in Child Custody Cases*, 77 B.U. L. REV. 483, 483 (1997).

13. *Id.*

14. Custody of Vaughn, 664 N.E.2d 434, 440 (Mass. 1996).

In *Vaughn*, the court found that Vaughn's father, Ross, physically and verbally abused Vaughn's mother, Leslie.[15] The testimony in Probate and Family Court revealed that Ross "'would fly into rages' and strike out at Leslie."[16] Vaughn witnessed a lot of the violence.[17] In October 1992, Leslie obtained a restraining order against Ross, which forced him to leave the house.[18] On the following day, Ross filed an action to establish paternity of Vaughn and obtain his custody.[19]

In 1993, the Probate and Family Court awarded Vaughn's primary physical custody to his father.[20] The mother filed a complaint on appeal based on the judge's "lack of comprehensive findings on the issue of the father's physical abuse of her as it relates to his fitness."[21] The Appeals Court reversed the lower court's decision and remanded the case to the Probate and Family Court for consideration of evidence regarding the effect that exposure to domestic violence had on Vaughn.[22] The Appeals Court noted that at trial, an expert psychologist testified that Vaughn suffered from the typical emotional problems experienced by children who witness their mothers' abuse, including depression, sadness, anxiety, and responsibility for the batterer's wellbeing.[23]

The Massachusetts Supreme Judicial Court (SJC) agreed with the Appeals Court that the judge "fail[ed] to make detailed and comprehensive findings of fact on the issues of domestic violence and its effect upon the child as well as upon the father's parenting ability."[24] The Appeals Court also gave weight to the *Gender Bias Study of the Court System of Massachusetts* (*Gender Bias Study*) highlighting that "appellate courts should make it clear that abuse of any family member affects other family members and must be considered in determining the best interests of the child in connection with any order concerning custody."[25]

The court explained the need to address domestic violence in custody cases other than by implication due to its high frequency.[26] The court concluded that "[r]equiring the courts to make explicit findings about the

15. *Id.* at 435.

16. *Id.*

17. R.H. v. B.F., 653 N.E.2d 195, 197 (Mass. App. Ct. 1995), *aff'd sub nom.* Custody of Vaughn, 664 N.E.2d 434 (Mass. 1996).

18. *Vaughn*, 664 N.E.2d. at 436.

19. *Id.*

20. *Id.* at 434.

21. *R.H.*, 653 N.E.2d at 196.

22. *Vaughn*, 664 N.E.2d at 434.

23. *R.H.*, 653 N.E.2d at 200.

24. *Vaughn*, 664 N.E.2d at 438 (alteration in original) (quoting *R.H.*, 653 N.E.2d at 201).

25. *Id.* at 437 (quoting MASS. SUPREME JUDICIAL COURT, GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT (1989), https://www.ncjrs.gov/pdffiles1/Digitization/127983NCJRS.pdf).

26. *Id.* at 439–40.

effect of the violence on the child and the appropriateness of the custody award in light of that effect will serve to keep these matters well in the foreground of the judges' thinking."[27] Ultimately, the court held that a child who is exposed to domestic violence suffers a "distinctly grievous kind of harm,"[28] especially during important developmental stages.[29]

Following *Vaughn*, courts must make specific "*Vaughn* findings" about the extent of domestic violence, its effect on children, and how it impacts the abuser's parenting.[30] *Vaughn* has been expanded to include the analysis of other factors such as history of domestic violence, whether a parent has sought help, negative effects of violence on children, and whether the parent understands the negative effects of children being exposed to violence.[31] Moreover, *Vaughn* findings must be made even if the information presented to the court is dated and disputed.[32]

Comprehensive findings on domestic violence, when making custody determinations, are required in proceedings pursuant to the Massachusetts General Law which governs the removal of children from their parents' custody and termination of parental rights.[33] Consequently, *Vaughn* has not only affected custody proceedings between parents, but also custody proceedings between parents and the state.

An irony exists regarding the application of *Vaughn* in state-involved custody cases. The SJC's focus on the *Gender Bias Study* and the impact of domestic abuse on women makes it clear that the court was concerned about the pervasiveness of domestic violence against women and the deprivation of their human right to be safe.[34] Nonetheless, an unintended

27. *Id.* at 440.

28. *Id.* at 437.

29. *Id.* at 439.

30. *Id.* at 437.

31. *See, e.g.*, Adoption of Will, No. 10-P-416, 2010 Mass. App. Unpub. LEXIS 1236 (2010), *aff'd*, 937 N.E.2d 73 (Mass. App. Ct. 2010); Adoption of Ramon, 672 N.E.2d 574, 578 (Mass. App. Ct. 1996). The Massachusetts legislature has also acknowledged the concerns reflected in *Vaughn* by enacting a statute related to the impact of exposure to domestic violence on children. MASS. GEN. LAWS ch. 208, § 31A (2018) (created a rebuttable presumption that evidence of past or present abuse goes against the best interest of the child when awarding custody).

32. *In re* Lillith, 807 N.E.2d 237, 243 (Mass. App. Ct. 2004).

33. *Id.*

34. *Vaughn*, 664 N.E.2d at 437.

> Quite simply, abuse by a family member inflicted on those who are weaker and less able to defend themselves—almost invariably a child or a woman—is a violation of the most basic human right . . . . [F]orce within the family and in intimate relationships is not less but more of a threat to this basic condition of civilized security, for it destroys the security that all should enjoy in the very place and context which is supposed to be the refuge against the harshness encountered in a world of strangers.

Id.

consequence is that the holding in *Vaughn* has been applied in ways that can punish women for being abused by their partners by endangering their right to custody of their children. Likewise, children can be further victimized by being separated from their abused parent due to the abuser's acts of violence.

II. POST *VAUGHN*: THE LACK OF PARTICULARIZED ASSESSMENT OF A $ CHILD WHO HAS BEEN EXPOSED TO DOMESTIC VIOLENCE AND THE $ VIOLATION OF THEIR CONSTITUTIONALLY PROTECTED RIGHT $

A. *The Law Governing Termination of Parental Rights*

The application of *Vaughn* to care and protection proceedings arises when its ruling is applied to cases evaluating whether to remove children from their families of origin. These cases are enormously consequential. Termination of parental rights (TPR) permanently severs the relationship between a parent and child.[35] In this way, it is different from the custody decision contemplated in *Vaughn.* There, the SJC questioned whether the father should have physical custody of his son despite his history of domestic violence. It did not, however, completely terminate the parent-child relationship.[36]

The decision to terminate parental rights altogether, involves "an exceptionally far-reaching exercise of State power."[37] Indeed, because of the "irrevocable" nature of severing parental rights, the action should only be taken when children's welfare "demands" it.[38] Such cases are of constitutional dimension: the parent-child relationship implicates a fundamental right,[39] parents have the right to raise their children,[40] and families have the right to live together.[41]

Noting the magnitude of these rights, in 1972, the Supreme Court in *Stanley* held that, under the Equal Protection Clause, *all* parents are constitutionally entitled to a fitness hearing before the children are

35. MASS. GEN. LAWS ch. 119, § 26 (2018); MASS. GEN. LAWS ch. 210, § 3 (2018).

36. *See Vaughn*, 664 N.E.2d at 437.

37. Adoption of Katharine, 674 N.E.2d 256, 258 (Mass. App. Ct. 1997).

38. *Id.*

39. Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845 (1977) (holding that "the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition'" (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977))).

40. Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (recognizing parents' liberty interest in "establish[ing] a home and bring[ing] up children").

41. *Smith*, 431 U.S. at 845.

removed from their custody.[42] The Supreme Court ruled on the importance of due process during custody termination proceedings, and determined that states must establish "individual proof" on parent's neglect to deter violation of the Equal Protection Clause.[43] In *Stanley*, the Court held that the Illinois law that presumed that unmarried fathers were "unsuitable and neglectful parents" was a violation of due process because parental unfitness "must be established on basis of individual proof."[44]

Ten years after *Stanley*, the Supreme Court ruled in *Santosky* that a state must prove by *clear and convincing* evidence allegations against the parents before terminating their rights.[45] The Court held that the preponderance of evidence standard does not satisfy the due process clause.[46] The Court ruled that states must prove their allegation against parents by clear and convincing evidence.[47] In the decision, the Court stated that the "fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents."[48] The Court highlighted the importance of states providing parents with "fundamentally fair procedures."[49] *Santosky* held that even after parents are found unfit in a proceeding, they retain constitutionally protected parental rights.[50]

Under Massachusetts law, the constitutional protections surrounding the burden of proof kicks in when DCF seeks permanent custody of a child.[51] The standard of proof in permanent custody cases, or cases in which DCF seeks termination of parental rights, allowing for the child to be adopted, is clear and convincing.[52]

42. Stanley v. Illinois, 405 U.S. 645, 645 (1972).

43. *Id.* at 657.

44. *Id.* at 645.

45. Santosky v. Kramer, 455 U.S. 745, 769–70 (1982).

46. *Id.* at 759.

47. *Id.* at 746.

48. *Id.* at 753.

49. *Id.* at 754.

50. *Id.* at 745.

51. At earlier stages of a custody case, a lesser burden of proof exists. DCF can petition a court for emergency custody of a child in an ex-parte hearing. MASS. GEN. LAWS ch. 119, § 24 (2018). DCF is required to show that the child is either suffering from severe abuse or neglect; in imminent danger of severe abuse or neglect; or that removal is necessary to prevent severe abuse or neglect. *Id.* The standard of proof at this stage is low: DCF is required to show only that there is "reasonable cause" to believe that such circumstances exist. *Id.* However, parents are entitled to a temporary custody hearing within seventy-two hours of the child's removal. At that stage, the standard of proof is preponderance of the evidence. *Id.*

52. Adoption of Carlos, 596 N.E.2d 1383, 1388 (Mass. 1992). There is a difference between placing a child in the permanent custody of DCF (MASS. GEN. LAWS ch. 119, § 26(b) (2018)) and terminating parental rights. MASS. GEN. LAWS ch. 210, § 3 (2018). When DCF is

In accord with these constitutional protections, in Massachusetts courts, DCF bears the burden of proving by clear and convincing evidence that a parent is unfit to further the best interests of a child.[53] Moreover, the court can grant custody to DCF only if it is in the child's best interest.[54] The assessment of parental unfitness and best interests are intertwined.[55]

Parental unfitness in Massachusetts is determined by looking at a "parent's character, temperament, conduct, and capacity to provide for the child in the same context with the child's particular needs."[56] The question is not whether a parent is an ideal parent, or even a good one, but rather whether the parent is "so bad as to place the child at serious risk of peril from abuse, neglect, or other activity harmful to the child."[57] Trial courts must make "specific and detailed findings [of fact] demonstrating that close attention has been [paid to] the evidence" before transferring a child's custody to the state.[58] The findings must show *why* the parents are unfit.[59] The findings must also state the reasons supporting the conclusion.[60] Lastly, there must be a nexus between the state's allegations of parental deficits and "the inability to safely parent."[61]

B. *Intersection of* Vaughn *and Massachusetts Child Protection Law*

The above standards provide a measure of protection to parents who are victims of domestic violence in the Commonwealth of Massachusetts. First, the clear and convincing standard should protect the parents when the primary evidence of unfitness lies with the parent exposing the child to domestic violence. Second, the general requirement of specific and detailed findings requires a court to substantiate parental unfitness and the child's best interest with great particularity. Finally, the requirement to make *Vaughn* findings should mean that the court focuses closely on the

granted "permanent custody," parental rights remain to some degree alive. The parent has the right to request review and redetermination of the custody order every six months. MASS. GEN. LAWS ch. 119, § 26(c) (2018). At that point, if there has been a substantial change of circumstances, custody can be returned to the parent. *In re* Erin, 823 N.E.2d 356, 360–61 (Mass. 2005). In termination of parental rights cases, the parents' rights are completely severed. The child is then free to be adopted by another parent or parents. *Carlos*, 596 N.E.2d at 1389.

53. ch. 119, § 26; *see* Adoption of Ramona, 809 N.E.2d 547, 552 (Mass. App. Ct. 2004).

54. Adoption of Zoltan, 881 N.E.2d 155, 158 (Mass. App. Ct. 2008).

55. *In re* New England Home for Little Wanderers, 328 N.E.2d 854, 860 (Mass. 1975) ("[T]he tests [for unfitness and best interests] are not separate and distinct but cognate and connected.").

56. Adoption of Mary, 610 N.E.2d 898, 902 (Mass. 1993).

57. Care & Prot. of Bruce, 694 N.E.2d 27, 29 (Mass. App. Ct. 1998).

58. Custody of a Minor, 389 N.E.2d 68, 75 (Mass. 1979).

59. *See* Adoption of Katharine, 674 N.E.2d 256, 260–61 (Mass. App. Ct. 1997).

60. *See* Adoption of Stuart, 656 N.E.2d 916, 922–23 (Mass. App. Ct. 1995).

61. Adoption of Zoltan, 881 N.E.2d 155, 161 (Mass. App. Ct. 2008).

effect of exposure to domestic violence on an individual child.

Nonetheless, a review of cases that apply *Vaughn* in the care and protection arena establishes that its use can border on tautological. The SJC's statement in *Vaughn* that children generally suffer a "profound" impact and a "distinctly grievous kind of harm"[62] when they witness domestic violence is repeatedly cited in cases as proving a child inevitably either has suffered or will suffer harm.[63] Appellate courts have not enforced *Vaughn*'s mandate of specific and detailed findings about the impact of witnessing domestic violence on children[64] Instead, they have allowed courts to rely on a more general connection between child well-being and exposure to domestic violence.

Notably, the Appeals Court has read *Vaughn* not to require any particularized assessment of a child exposed to domestic violence. In *Adoption of Bianca*, the Court of Appeals endorsed the trial court's finding that a father was unfit after he exposed his infant daughter to repeated episodes of domestic violence.[65] The court determined there was no need for expert testimony regarding the effect that exposure to domestic violence would have on a child during her first fourteen months of life.[66] Instead, relying on the oft-repeated statements in *Vaughn*, the court ruled that in cases where a child witnesses domestic abuse there was no need to document psychological damage to the child.[67] Instead, the harm could be presumed because of the natural impact of physical violence in a child's daily life.[68]

Not only can the harm be presumed, but the court can proactively protect a child from exposure to domestic violence before it happens. In

62. Custody of Vaughn, 664 N.E.2d 434, 437 (Mass. 1996).

63. *See, e.g.*, Adoption of Gillian, 826 N.E.2d 742, 748 n.6 (Mass. App. Ct. 2005) (stating domestic violence in a family is "highly relevant" to the determination of parental unfitness); Adoption of Ramon, 672 N.E.2d 574, 577 (Mass. App. Ct. 1996). A large number of cases decided pursuant to the Appeals Court Rule 1:28 cite exposure of children to domestic violence as an important consideration in the determination of parental unfitness. *See, e.g.*, Adoption of Gilberto, 145 N.E.3d 907 (Mass. App. Ct. 2020); *In re* Adoption of Scarlet, 47 N.E.3d 703 (Mass. App. Ct. 2016); *In re* Adoption of Blaine, 45 N.E.3d 611 (Mass. App. Ct. 2016); Adoption of Karyn, 3 N.E.3d 111 (Mass. App. Ct. 2014); *In re* Adoption of Rose, 984 N.E.2d 315 (Mass. App. Ct. 2013); *In re* Adoption of Marta, 965 N.E.2d 900 (Mass. App. Ct. 2012); Care & Prot. of Joan, 938 N.E.2d 906 (Mass. App. Ct. 2010). The frequent use of Rule 1:28 in such cases is troublesome because it can have the effect of hiding a pattern of assuming fault on the part of a parent who exposes a child to her own abuse.

64. *See, e.g.,* Care & Prot. of Umika, No. 19-P-666, 2020 WL 412872 (Mass. App. Ct. 2020), *rev. denied*, 143 N.E.3d 1037 (Mass. 2020).

65. Adoption of Bianca, 75 N.E.3d 1140, 1145 (Mass. App. Ct. 2017).

66. *Id.*

67. *Id.*

68. *Id.* (the court nonetheless found that, in this particular case, there was evidence that the child had suffered psychological damage from witnessing the abuse).

an unpublished decision,[69] the court determined that a father with a long history of abusing his female partners was unfit to parent his son, thus severing their relationship entirely.[70] The court relied on expert testimony from a psychologist that continued exposure to domestic violence could end up harming the child.[71] The court cited *Vaughn* regarding the potentially harmful effects of such exposure[72] and ruled that it was not required to wait until that harm actually occurred.[73] Instead, it terminated the father's parental rights because of the substantial likelihood that the father would become involved in additional abusive relationships that would harm the child.[74]

The Appeals Court's reliance on *Vaughn* also extends to cases in which there is no evidence that the child witnessed the domestic violence between parents who have purportedly separated. In *Adoption of Yale*, the court ruled that the rights of both parents who had "recurring violent disputes" could be terminated to protect the child's future.[75] The lack of proof of a current, abusive relationship also does not stand as a barrier to termination of parental rights partly on the ground that a parent *might* expose the child to domestic violence.[76] In *In re Bancroft,* the trial court did not credit the mother's assertion that her current relationship did not involve abuse, even though there was no evidence otherwise.[77] The Appeals Court determined that the trial court did not improperly shift the burden of proof to the mother because it was "entitled to discredit the mother's uncontroverted testimony" and instead determined there was no credible evidence on the issue.[78] In other cases, courts have determined

69. The Massachusetts Appeals Court frequently uses its Rule 23, formerly known as Rule 1:28, in termination of parental rights cases. The rule permits the court to issue decisions without precedential value that bind only the parties in the case. MASS. APP. CT. R. 23(1). These decisions are addressed primarily to the parties and as such do not fully address the facts or all aspects of the decisional process. Chace v. Curran, 881 N.E.2d 792, 794 n.4 (Mass. App. Ct. 2008). However, electronic research has made these cases more available to attorneys. *Id.* Therefore, the court now permits attorneys to cite these cases in briefs as persuasive authority if they were decided after February 26, 2008. MASS. APP. CT. R. 23(2).

70. Adoption of Will, No. 10-P-416, 2010 WL 4628736, at *4 (Mass. App. Ct. 2010).

71. *Id.* at *4.

72. *Id.* at *3.

73. *Id.* at *4.

74. *Id.*

75. Adoption of Yale*,* No. 12-P-1759, 2013 WL 2184616, at *2 (Mass. App. Ct. 2013).

76. *See In re* Bancroft, No. 13-P-1963, 2014 WL 6089905, at *1 (Mass. App. Ct. 2014).

77. *Id.* at *1.

78. *Id.*; *see also* Care & Prot. of Polly*,* 87 N.E.3d 1201, 2017 WL 3400656 (Mass. App. Ct. 2017). In *Care and Protection of Polly*, the trial court found that the mother's ongoing pattern of being involved in abusive relationships rendered her an unfit parent. *Id.* at *2. Although the mother was not in such a relationship at the time of the care and protection proceedings, the court found that "insufficient time" had elapsed to show that she had broken the pattern of abuse. *Id.* An irony in this case is that the children were placed in the custody of their father, who was one of the men who had abused the mother. *Id.* at *4.

harm to the child persists even when the violence was infrequent or occurred years ago.[79]

In short, a reflexive use of the holding in *Vaughn* can result in an assumption that children who witnessed domestic violence are so inevitably and unalterably damaged that leaving them in the custody of their parents is presumptively wrong. Such a presumption has grave constitutional problems.[80] But even putting these problems aside, this assumption is especially troublesome when the parent is the victim of violence, not the perpetrator. It is not unusual for parental rights to be terminated, at least partially, on the ground that a mother has not protected a child from witnessing a man physically abuse her.[81] A real concern arises when a court relies primarily, or solely, on evidence that a parent suffered abuse. In these cases, courts focus on *Vaughn's* assertion that a "grievous kind of harm*"* will result when a child is exposed to domestic violence. Unfortunately, the courts will often fail to take a careful look at the child's specific circumstances as mandated by *Vaughn.*

The problem is aptly illustrated by the recent Massachusetts Appeals Court summary decision in *Care and Protection of Umika.*[82] That case involved a then five-year-old girl who had been in the custody of DCF for over half her life. Her mother had been in a succession of relationships that involved domestic abuse, in which she was primarily the victim. Her older children had witnessed a substantial amount of physical conflict, but there was no evidence that Umika had witnessed any incident of domestic violence. In fact, all but one of the episodes of domestic violence described at the care and protection trial occurred before Umika was even born. Umika was removed from her mother's custody and placed in DCF custody after that single incident. She was a little under two years old at the time.[83]

Umika lived in a succession of foster homes after her removal, always

79. *See, e.g.*, *In re* Lillith, 807 N.E.2d 237, 243–45 (Mass. App. Ct. 2004) (holding that a single act of violence which occurred six years prior to trial warranted remand for specific findings on the impact of domestic violence); *In re* Adoption of Zak, 32 N.E.3d 361 (Mass. App. Ct. 2015) (holding that the trial judge properly considered an incident of abuse towards the mother which occurred five years prior to trial).

80. *See In re* Dep't of Soc. Serv. to Dispense with Consent to Adoption*,* 452 N.E.2d 497, 503 (Mass. 1983) (holding that the statutory presumption of parental unfitness when a child has been in state custody for over one year is unconstitutional because it shifts the burden of proof to the parent).

81. *See infra* Part III, Section B.

82. Care & Prot. of Umika, No. 19-P-666, 2020 WL 412872 (Mass. App. Ct. 2020), *rev. denied*, 143 N.E.3d 1037 (Mass. 2020). One of the authors of this Article served as appellate counsel to Umika (a pseudonym).

83. Some of the information about Umika's case is based on counsel's familiarity with the entire record in this matter. *See supra* text accompanying note 82. The Appeals Court decision, pursuant to Rule 1:28, does not provide a full explication of the facts. *See supra* text accompanying note 69.

apart from her siblings. The mother challenged her continued placement with DCF and, shortly before the trial began, Umika was placed with her maternal grandmother. During the interim, between Umika's removal and the beginning of trial, the mother ended her relationship with her abusive partner. She participated in domestic violence training and entered therapy. At trial, her therapist testified on her behalf about her consistent participation and the progress she had made over time. DCF required the mother to have a psychological evaluation, and the psychologist who performed the evaluation testified as an expert witness at trial. The psychologist testified to the mother's new understanding of domestic abuse dynamics. The psychologist opined that this understanding, plus the two years that had elapsed since she had been in an abusive relationship, made it unlikely that the mother would expose Umika to domestic abuse in the future. The trial court also heard evidence of Umika's continuing bond with her mother. Even though Umika had not been in her mother's custody for over two years, she remained very attached to her. During visits, she would run straight to her mother and cuddle up with her. She sometimes had to be physically separated from her at the end of the visit.

Nonetheless, the trial court remained concerned that if it returned custody of Umika to her mother, she would expose her to domestic violence.[84] The court did not terminate the mother's parental rights, as DCF requested. Instead, it left Umika in DCF custody, leaving her permanently in limbo. The Appeals Court upheld the trial court's decision on the ground that an incident of domestic violence two years prior to the trial was recent enough to justify the trial court's decision that the mother's "poor decision making" could lead to Umika's harm.[85] It further reasoned that, if the mother continued to show progress, she could petition for review at some later date and perhaps be reunited with Umika.[86]

Neither the trial court nor the appellate court considered the fact that there was no evidence that exposure to domestic abuse had ever had an adverse effect on Umika. Indeed, there was no definitive evidence that she had ever actually witnessed domestic violence. More importantly, neither court considered the potentially disastrous effect of indefinitely denying permanency to a child who was almost six years old at the time the appeal was resolved. By the end of the appeal, Umika was no closer to having a permanent home than the day she was removed from her mother's custody.[87]

84. *Umika*, 2020 WL 412872, at *3.

85. *Id.*

86. *Id.* at *4.

87. The Appeals Court did not address Umika's argument on appeal that pursuant to *Custody of Vaughn*, the trial court should have made specific and detailed findings regarding the effect of domestic violence on Umika. The only comment on this issue was contained in a footnote stating that "[t]his argument lacks merit because Umika was developing normally and

The same result would not necessarily have occurred in a different jurisdiction where the fundamental premise of removing children from the custody of a parent for failure to protect them from witnessing abuse is subject to closer questioning. For instance, a New Jersey appellate court determined that particularized evidence was necessary before removing a toddler from her mother's care for failure to protect her from witnessing domestic violence.[88] In that case, the court reversed the trial court's conclusion that the mother abused her child when she did not pursue a restraining order against her husband, and sought to reduce his bail, after he hit her while she was holding the child.[89] Just as in Umika's case, the trial court did not provide findings that the child exhibited signs of harm stemming from the incident.[90] Moreover, like in Umika's case, the judge made no findings based on expert testimony that harm was likely to result from the incident.[91] Finally, in both cases, the trial court made no findings that weighed any potential harm caused by the abuse to the emotional harm caused by removal. [92] Instead, the court held that a trial judge could not simply "take judicial notice . . . that domestic violence [necessarily] begets emotional distress or [some] other psychic injury in child witnesses."[93] If this standard was applied in Umika's case, she would likely be living with her mother right now, instead of remaining indefinitely in DCF custody.

The Second Circuit considered the same issue in the context of a constitutional challenge to New York's policy of removing children from a parent on the grounds that the parent has been abused by a partner.[94] The Second Circuit deferred on the constitutional question and instead certified the issue to New York's highest state court.[95] However, it noted the district court's concerns with the New York policy.[96] The district court determined that studies were divided on whether witnessing domestic violence was uniformly harmful to children, and that in fact some academic literature argues that such harm is uncertain and rare.[97] The

did not have any identified special needs." *Id.* at *3 n.13. But the fact that Umika did not have diagnosable "special needs" certainly does not mean that she lacks specific needs that any court should consider before making a judgment about her best interests. The SJC rejected Umika's petition of further appellate review. *Umika*, 143 N.E.3d 1037 (Mass. 2020).

88. N.J. Div. of Youth & Family Servs. v. S.S., 855 A.2d 8, 13–14 (N.J. Super. Ct. App. Div. 2004).

89. *Id.* at 17.

90. *Id.* at 14.

91. *Id.*

92. *Id.*

93. *Id.* at 15.

94. Nicholson v. Scoppetta, 344 F.3d 154 (2d Cir. 2003).

95. *Id.* at 175.

96. *Id.*

97. *Id.* at 174 (citing Melissa A. Trepiccione, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child an Acceptable*

district court also noted that the possible effects of witnessing abuse must be weighed against the significant evidence that removing children from a parent is a "significant source of stress and emotional trauma, especially for young children," and that removal can "intensify the trauma of the violence by removing the child's best coping mechanism, the parent, and encouraging feelings of self-blame."[98] The district court recognized that a blanket presumption in favor of removal would fail to capture the nuances of each family situation.[99] The policy of removing children on this basis could backfire because abused parents would be reluctant to report abuse if they feared child protective services would then remove their children.[100]

III. VAUGHN FINDINGS SHOULD BE MADE WHENEVER BASING A CHILD CUSTODY DECISION ON THE FAILURE TO PROTECT FROM $ DOMESTIC VIOLENCE $

Enforcement of *Vaughn*'s requirement of specific and detailed findings regarding the impact of domestic violence on children will help mitigate the problem of improper separation of children from a parent who is the victim of domestic abuse. Moreover, in making such findings, courts should be required to consider three important considerations. First, the court should recognize that breaking free of an abusive relationship is a process and may be difficult to accomplish in a single action. Next, the court should consider whether DCF has satisfied its own obligation to exercise reasonable efforts to provide services that can help a parent break free of abuse. Finally, the court should weigh the risks associated with separation of the child from the parent with the risks associated with being a witness to domestic violence.

A. *Recognizing the Cycle of Domestic Violence*

The trial court's findings about abused parents whose children witness domestic violence should reflect the complexities of the phenomenon. Parents who fail to leave a relationship after even multiple

Solution When Her Child Witnesses Domestic Violence?, 69 FORDHAM L. REV. 1487, 1499–1506 (2001)).

98. *Id.*

99. *Id.*

100. *Id.* When New York's highest court took up the Second Circuit's certified questions, it determined that evidence that a parent allowed a child to witness domestic violence without more was insufficient to satisfy New York's statutory definition of a neglected child. Nicholson v. Scoppetta, 820 N.E.2d 840, 844 (N.Y. 2004). In examining New York's statutory child protection scheme, the court noted the helpfulness of expert testimony in assessing particularized harm to the child, although such evidence is not required. *Id.* at 855. It also stressed that a court should examine the frequency and severity of the abuse, and the escape routes available to a parent who may fear her life is in danger if she leaves an abusive partner. *Id.* at 846.

serious episodes of domestic violence might be assumed to be acting in an obtuse or careless way without concern for the welfare of their children. The reality is that they can be trapped in a system with multiple causes that is difficult to escape.

A parent may have a pattern of leaving an abusive partner, only to return on a number of occasions before ending the relationship.[101] The reasons for that behavior are multifaceted. Generally, victims of domestic violence have internal and external barriers that keep them in a cycle of violence.[102] The external barriers include lack of stable employment, housing, childcare, and lack of trust in law enforcement support.[103] "Established patterns of abuse and control might mean that an abused party has become so isolated from friends, family, and employment that they have nowhere to go if they were to permanently leave."[104] The abusive partner may also control the couple's money and cut off access to funds.[105]

Significantly, victims fear greater injury as the risk of homicide or injury is higher following the first three months after separation.[106] Thus, leaving a partner may be more dangerous than staying in place. Other internal barriers include guilt, shame, low self-esteem, and mental health issues.[107]

Any court assessing a parent's fitness should take into account the struggles faced in abusive circumstances before assuming that leaving an abusive relationship is simply a matter of volition. The court's findings of fact should explicitly assess factors that stand in the way of a parent from removing herself from a relationship infected with domestic violence.[108]

B. *Parenting Abilities of Parents Who Have Experienced Domestic*

101. Commonwealth v. Goetzendanner, 679 N.E.2d 240, 243–44 (Mass. App. Ct. 1997) (describing expert testimony on "battered woman's syndrome").

102. AMANDA GOODSON & LEANA A. BOUFFARD, CRIME VICTIMS INST., BREAKING THE CYCLE OF INTIMATE PARTNER VIOLENCE (2016), http://dev.cjcenter.org/_files/cvi/breaking-cycle.pdf [https://perma.cc/5DHT-SV5W].

103. *Id.*

104. Commonwealth v. Gordon, 29 N.E.3d 856, 867–868 n.13 (Mass. App. Ct. 2015) (citing V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 246 (1996).

105. *Id.*

106. V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 235–46 (1996).

107. *Id.* at 235–36.

108. *See* Nicholson v. Scoppetta, 820 N.E.2d 840, 846–47 (N.Y. 2004) (imposing obligation on courts to consider the frequency and severity of abuse, the resources available to the parent, and the risks accompanying criminal prosecution when determining whether a parent has exercised the "minimum degree of care" required under New York law).

Violence

Courts should also take into account that being a victim of abuse does not necessarily reflect on the ability to be a good parent. Studies have shown that abused women are not better or worse parents than non-abused women.[109] In fact, many women develop strategies to protect their children through their "spirit, endurance, and determination."[110]

Importantly, the evidence shows that it is possible for victims to break free from the cycle of violence and provide a safe environment for their children, especially when they receive appropriate services.[111] Victims who use services like advocacy centers, shelters, and counseling are more likely to remove the internal and external barriers listed above.[112] When they have access to these services, victims are less likely to experience violence in the future; they also perceived improved decision-making, and coping skills.[113] Additionally, victims report having better quality of life and the ability to access other community resources more easily.[114]

Often, relatively short-term services can have a major beneficial impact on women who are victims of abuse. For instance, a study that a trained college student advocates to help 135 victims obtain access to community services found that after only ten weeks, victims who worked with advocates experienced less physical and psychological abuse than victims who did not have access to any services.[115] Another study showed that after six weeks of advocacy support through a law school clinic, participants reported significantly lower levels of physical abuse in comparison to women in the control group.[116] Moreover, studies have also shown that women who were supported in domestic violence shelters reported having more safety strategies and feeling safer.[117] This study interviewed 3,410 women from 215 shelters across eight states when they

109. *See* George W. Holden & Kathy L. Ritchie, *Linking Extreme Marital Discord, Child Rearing, and Child Behavior Problems: Evidence from Battered Women*, 62 CHILD DEV. 311, 324 (1991).

110. Margo Lindauer, *Damned if You Do, Damned if You Don't: Why Multi-Court-Involved Battered Mothers Just Can't Win*, 20 J. GENDER, SOC. POL'Y & LAW 797, 816 (2012).

111. Larry Bennett et al., *Effectiveness of Hotline, Advocacy, Counseling, and Shelter Services for Victims of Domestic Violence*, 19 J. INTERPERSONAL VIOLENCE 815 (2004).

112. *Id.* at 825–27.

113. *Id.* at 826.

114. Cris M. Sullivan & Deborah I. Bybee, *Reducing Violence Using Community-Based Advocacy for Women with Abusive Partners*, 67 J. CONSULTING & CLINICAL PSYCHOL. 43, 49–52 (1999).

115. *Id.* at 49–50.

116. *See* Lisa Goodman & Deborah Epstein, *Refocusing on Women: A New Direction for Policy and Research on Intimate Partner Violence*, 20 J. INTERPERSONAL VIOLENCE 479, 482–85 (2005).

117. ELEANOR LYON ET AL., NAT'L INST. OF JUST., MEETING SURVIVORS' NEEDS: A MULTI-STATE STUDY OF DOMESTIC VIOLENCE SHELTER EXPERIENCES 80–83 (2008).

entered and exited the shelter.[118]

In a study conducted to look specifically into a victim's parenting, participants reported higher parental self-efficacy after three months of support groups.[119] Lastly, the Illinois Department of Human Services evaluated eighty-seven state-funded agencies that supported victims of domestic violence.[120] The study suggested that victims improved their decision-making and sense of self-efficacy when participating in advocacy groups and counseling.[121] The report also highlighted the importance of housing and employment for victims to break free from the cycle of violence.[122]

The services and resources highlighted in these studies have provided support for parents and contributed to their ability to break free from violence. Not only it is possible for victims to break free from the cycle of domestic violence through these support systems, but victims can improve their parenting skills as well. Consequently, the court's findings should relate to what degree parents have been able to take advantage of such services.

In that regard, the findings should also reflect the degree to which DCF has satisfied its obligation to exercise reasonable efforts to keep the family together.[123] DCF is required to "match services with needs" and the trial court must be vigilant in assuring it meets this obligation.[124] To fulfill its obligation, the trial court's findings should outline specifically how DCF linked the parent with the types of services described above: services that help parents cope with the cycle of domestic violence. The court should not be satisfied with boilerplate provisions of services such as referring parents to a domestic violence class. Parents facing the thicket of issues associated with domestic violence need encouragement and support from their DCF social workers, not a list of tasks to complete.[125]

118. *Id.* at 4–5.

119. Einat Peled et al., *The Mothering of Women Abused by Their Partner: An Outcome Evaluation of a Group Intervention*, 20 RES. ON SOC. WORK PRAC. 391, 394–96 (2010).

120. Bennett et al., *supra* note 111, at 819.

121. *Id.* at 826.

122. *Id.* at 827.

123. MASS. GEN. LAWS ch. 119, § 29C (2018). This statute requires DCF to use reasonable efforts to prevent removal of children from their home. Once removal has occurred, DCF has a continuing obligation to use reasonable efforts to reunite the family. The juvenile court must periodically certify that DCF has satisfied these obligations. The requirement is in accord with the Commonwealth's priority of keeping families together. MASS. GEN. LAWS ch. 119, § 1 (2018).

124. Adoption of Lenore, 770 N.E.2d 498, 503 n.3 (Mass. App. Ct. 2002); *see also* Adoption of Ilona, 944 N.E.2d 115, 123 (Mass. 2011).

125. Trial counsel for a parent experiencing domestic violence can be very useful in holding DCF to its obligation to employ reasonable efforts. Trial counsel must bring deficiencies in DCF's performance to the attention of the trial court at the earliest possible stage of the proceedings. *See* Adoption of West, 144 N.E.3d 938, 943 (Mass. App. Ct. 2020);

C. *Variable Effect of Witnessing Domestic Violence on Children*

The court must also determine the effect that witnessing domestic violence has had on the particular children involved. There is no simple formula. Researchers confirm that "no single theory or even combination of theories can explain how children are affected by marital violence."[126] It is important to understand the degree to which a child was harmed as well as different factors unique to the child. Many studies have shown the importance of the child maintaining the bond they have with their non-abusive parent to move forward and minimize the negative effects of exposure to violence.[127] Researchers encourage a "holistic" family systems approach to intervention that considers family safety, support, and evaluates the child in conjunction with her caretaker.[128]

The Office of Child Abuse and Neglect manual divides children's exposure to domestic violence into three categories: hearing a violent event, being an eyewitness, and/or experiencing the aftermath of the violence.[129] The manual further describes that children who are exposed to domestic violence are at risk of neglect, abuse, and higher levels of emotional and cognitive problems.[130] Additionally, with regard to long-term effects, adults who repeatedly witnessed violence as children struggle with depression, low self-esteem, substance abuse, and engage in dangerous behavior.[131]

Despite acknowledging the negative effects, the manual also states that children's reaction to domestic violence vary significantly.[132] The reaction depends upon the child's resiliency, self-esteem, and the presence or absence of a strong relationship with the non-abusive parent.[133] Furthermore, the manual lists factors that can reduce the impact of domestic violence: the frequency and severity of the violence witnessed, coping skills, gender, age, time since exposure, support systems, and

Adoption of Gregory, 747 N.E.2d 120, 124 (Mass. 2001) (holding that parents waive claims that DCF did not comply with the reasonable efforts requirement if they wait until TPR proceedings to bring them).

126. Melissa A. Trepiccione, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child an Acceptable Solution When Her Child Witnesses Domestic Violence?*, 69 FORDHAM L. REV. 1487, 1506 (2001).

127. *See* Dorota Iwaniec et al., *Research Review: Risk and Resilience in Cases of Emotional Abuse*, 11 CHILD FAM. SOC. WORK 73 (2006).

128. HOWARD DAVIDSON, ABA CTR. ON CHILD. AND THE LAW, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN 5 (1994).

129. H. LIEN BRAGG, U.S. DEP'T OF HEALTH AND HUM. SERVS., CHILD PROTECTION IN FAMILIES EXPERIENCING DOMESTIC VIOLENCE 9 (2003), https://www.childwelfare.gov/pubPDFs/domesticviolence.pdf [https://perma.cc/D2FB-UJZ4].

130. (*Id.* at 10.

131. (*Id.*

132. (*Id.* at 11.

133. (*Id.*

whether there was also child abuse present.[134]

Although some exposed children show more aggressive and fearful behaviors,[135] other children are more resilient to the negative effects and have no greater emotional problems than the children not exposed to domestic violence.[136] In fact, many researchers point to the importance of the child's relationship to the non-abusive parent to minimize the negative effects.[137] One of the research studies indicates that although domestic violence is a "high risk" context for child development, the parent-child relationship is crucial for the child's development of resilience and competence.[138] When a parent is not present, the child is at high risk for not adapting to life after exposure to violence.[139] Another study highlights caregivers and role models as an important factor in predicting how violence will shape a child's adult life.[140]

The more family members in protective roles that are available to the child, the more resilient a child may become.[141] UNICEF indicates the importance of parent-child relationship support in the child's healing process.[142] They state that children need a "sense of routine and normalcy" and the presence of a reliable and caring adult with whom they are close to.[143] Furthermore, they highlight the importance of children seeing that violence at home can end, and that violence is a crime where victims will be protected.[144]

The Office of Child Abuse and Neglect manual states that "[t]he safety of abused children often is linked to the safety of the adult victims. By helping victims of domestic violence secure protection, the well-being of the children also is enhanced."[145] Furthermore, the manual states that

134. *Id.* at 11–12.

135. *See generally* Katherine M. Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 J. CONSULTING CLINICAL PSYCHOL. 339, 339–52 (2003); David A. Wolfe et al., *The Effect of Children's Exposure to Domestic Violence: A Meta-Analysis and Critique*, 6 CLINICAL CHILD FAM. PSYCHOL. REV. 171, 171–87 (2003).

136. AM. PSYCH. ASS'N, DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN 237–67 (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001).

137. *See* Iwaniec, *supra* note 127; Ann S. Masten & J. Douglas Coatsworth, *The Development of Competence in Favorable and Unfavorable Environments: Lessons from Research on Successful Children*, 53 AM. PSYCHOL. 205 (1998).

138. Masten & Coatsworth, *supra* note 137, at 212.

139. *Id.* at 212–13.

140. *See* Iwaniec, *supra* note 127, at 77.

141. Ann S. Masten & Marie-Gabrielle J. Reed, *Resilience in Development*, *in* HANDBOOK OF POSITIVE PSYCHOLOGY 74, 74–88 (C.R. Snyder & Shane J. Lopez eds., 2002).

142. UNICEF, BEHIND CLOSED DOORS: THE IMPACT OF VIOLENCE ON CHILDREN 9 (2006), https://www.unicef.org/media/files/BehindClosedDoors.pdf [https://perma.cc/T99Y-6LSL].

143. *Id.*

144. *Id.*

145. BRAGG, *supra* note 129, at 35.

children should only be removed from parents "when all other means of safety have been considered" or when the victim is unable to protect children and "*unable . . . to accept services*."[146] In short, children need to know that it is possible for the parent to break the cycle of violence and that parent and child will be supported during the process, and not further harmed.

As illustrated above, separating children from parents who are victims of domestic violence can harm children more than benefit their well-being. Furthermore, it sends a message to children that victims are the perpetrator by saying they "failed."[147] It also defines the problem as "women's failures' as mothers rather than in terms of the [partner's] actions."[148]

To minimize further victimization of children, courts must assess the individual circumstances of each child. Most importantly, the court has to look at the intensity and duration of violence the child was exposed to, as well as their connection to their non-abusive parent and available support system. By looking at these factors, the court can determine the long-term effect of the abuse on children and balance whether separation from the non-abusive parent will negatively impact the child more than the exposure to violence.

The child protection system is overwhelmed and does not reflect the range of experiences that children exposed to domestic violence go through.[149] In conclusion, exposure of children to domestic violence should continue to be a factor analyzed in determining a child's best interest, but a one-size-fits-all solution is not the best approach for such a complex and consequential issue.

CONCLUSION

Custody of Vaughn is a watershed moment in Massachusetts law, in which the SJC recognized the special harms children experience when they live in a household contaminated by physical violence. The lesson of *Vaughn* is that courts must take special care when placing a child in the custody of a parent who has abused a domestic partner. *Vaughn* recognizes that while there may be circumstances in which placement with a parent who has been abusive may be warranted, trial judges must

146. *Id.* at 48.

147. JENÉ TOUSSAINT, NAT'L RES. CTR. FOR FAMILY-CENTERED PRAC. & PERMANENCY PLAN., DOMESTIC VIOLENCE AND ITS ROLE IN CHILD WELFARE 2 (2006), http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/information_packets/domestic_violence.pdf [https://perma.cc/9CRL-P95J].

148. Lindauer, *supra* note 110, at 20.

149. JEFFREY L. EDLESON, NAT'L RES. CTR. ON VIOLENCE AGAINST WOMEN, EMERGING RESPONSES TO CHILDREN EXPOSED TO DOMESTIC VIOLENCE 9 (2011), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_ChildrensExposure.pdf [https://perma.cc/TJ7U-XS5E].

thoroughly document the appropriateness of that decision with particularized findings.

There is no reason why the same level of scrutiny should not be applied in cases evaluating the fitness of a parent who has been abused by a partner. Such scrutiny is especially warranted when courts contemplate leaving a child in the custody of the state instead of the custody of a parent. *Vaughn*'s requirement of specific and detailed findings can be implemented to prevent the tragic and unconstitutional separation of children like Umika from a parent who loves them and wants to care for them.