

The *Nicholson* Decisions¹: New York's Response to 'Failure to Protect' Allegations

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In early 1999, Sharwline Nicholson was a victim of a brutal assault by the father of her child, who was visiting from out of state. While Ms. Nicholson was in the hospital recovering from her injuries, the police removed her children from their babysitter and placed them in foster care. New York City's child protective services agency, the Administration for Children's Services ("ACS" or "CPS"), charged Ms. Nicholson with child neglect, claiming that she had "engaged in domestic violence" in the presence of her children.

The child protective manager who made the decision to place Ms. Nicholson's children in foster care readily admitted that it is common practice in domestic violence cases to remove children from battered mothers as a coercive measure, because "after a few days of the children being in foster care, the mother will usually agree to [ACS] conditions for their return without the matter ever going to court."² ACS kept Ms. Nicholson's children in foster care for nearly a month, and prosecuted her for seven months. The charges were finally dismissed.

Ms. Nicholson was not the only woman who was being abused by New York's child welfare system. As her story unfolded, so did the stories of many other survivors. Ekaete Udoh's children were removed from her due to domestic violence – even though she had been to court 23 times seeking help in the years prior to the final incident which led to her children being removed. Sharlene Tillet, who was beaten while she was pregnant, was charged with child neglect on the grounds of allowing domestic violence in the presence of her (unborn) child. The theory in all of these cases was that the children were suffering emotional harm from exposure to domestic violence against their mothers and, therefore, the children should be removed from their mothers. In fact, City policy declared, the imminent danger of emotional harm from exposure to domestic violence was so great that the children could even be removed without a court order.

By January 2001, it became abundantly clear that the *Nicholson*, *Udoh*, and *Tillet* cases were not aberrations but rather the result of a burgeoning City policy of removing children from battered mothers and prosecuting the mothers for child neglect—a policy that was based on a misguided interpretation of state law and an indifference to federal constitutional law.

¹ *Nicholson v. Williams*, 203 F.Supp.2d 153 (E.D.N.Y. 2002);
Nicholson v. Scoppetta, 344 F.3d 154 (C.A.2 (N.Y.) 2003);
Nicholson v. Scoppetta, 3 N.Y.3d 357, 820 N.E.2d 840 (N.Y. 2004).

² *Nicholson*, 203 F.Supp.2d at 170.

New York State Law

New York's Family Court Act §1012(f) defines a neglected child as a child under the age of eighteen:

(i) whose physical, mental or emotional condition has been *impaired* or is in imminent danger of becoming impaired *as the result of the failure* of his parent or other person legally responsible for his care *to exercise a minimum degree of care*

[...] (B) in providing the child with proper supervision or guardianship, *by unreasonably inflicting or allowing to be inflicted harm*, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court... [emphasis added]

Thus, assessment of whether a child is neglected under New York law requires, as a threshold matter, an analysis of whether the child suffered physical, mental or emotional harm rising to the level of impairment contemplated by the statute.

By the late 1990's, when the Nicholson, Udoh, and Tillet children were removed, the legal landscape in New York regarding child neglect vis-a-vis domestic violence was muddy, due in some measure to a misguided interpretation and application of a state court appellate decision.³ The City claimed that exposure to domestic violence constituted *per se* emotional harm to a child rising to the level of impairment under the neglect statute. The City claimed further that the potential for emotional harm to a child from witnessing domestic violence was so high, that ACS could do away with the requirement of a court order—that is, the requirement of due process—and simply remove children wherever domestic violence was found. Unfortunately, in a series of decisions containing nothing more than a few sentences, other New York appellate courts appeared to adopt the *per se* standard as well.⁴

At this time, battered mothers in other states were facing the same problems, biases, and punitive practices as faced by battered mothers in New York City. In other jurisdictions, these were called “failure to protect” cases. Battered mothers were charged with failing to protect their children from the potential emotional or physical harm of being exposed to violence. But New York City phrased its neglect charge in a different way: a battered mother is *per se* neglectful because she is “engaging in domestic violence in the presence of her children.” In choosing the language “engaging in domestic violence” to describe a victim’s role in an assault upon her, the City said very clearly what many other jurisdictions were saying obliquely: that the victim was equally responsible for the violence in the home. The City used this approach to justify

³ *In Re Lonell J.*, 242 A.D.2d 58, 673 N.Y.S.2d 116 (1st Dept. 1998)

⁴ Jill M. Zuccardy, *Child Protective Cases Involving Domestic Violence Issues*, 189 PLI/Crim 165 (March, 2002).

removing children from victim-mothers Nicholson, Udoh and Tillet, and hundreds of other mothers similarly situated.

The Federal Court Case

At first representing only Ms. Nicholson, Ms. Udoh, and Ms. Tillet, the public interest law firm of [Lansner & Kubitschek](#) teamed up with New York City's [Sanctuary for Families' Center for Battered Women's Legal Services](#) and filed three separate federal lawsuits against New York City and its child protective services agency. Plaintiffs alleged that they were being deprived of both substantive and procedural due process, and that their children were being removed based on constitutionally inadequate investigations, without probable cause and absent training and supervision. Plaintiff-mothers alleged violation of their First and Fourteenth Amendment rights, with the children suffering additionally from a deprivation of their Fourth Amendment right to be free from unlawful search and seizure.

In January 2001, additional plaintiffs having identified themselves, the mothers moved for class certification, seeking relief on behalf of all battered mothers whose children were removed from them, or in danger of being removed from, solely or primarily because the mothers were victims of domestic violence, and on behalf of all the children who were at risk because of the City's policy. Plaintiffs also moved for a preliminary injunction, to stop the City's practice of removing children from their mothers solely or primarily because the mother was a victim of domestic violence, particularly without court order. The motions were combined for an immediate and expedited trial, which began in July 2001.

Forty-four witnesses testified during the two-month trial, including child welfare and domestic violence experts Dr. Evan Stark, Dr. Richard Gelles, Betsy Grove-McAllister, Dr. David Pelcovitz, Linda Spears, Sherry Frohman, and Alisa Del Tufo. In addition to establishing the factual prerequisites for its constitutional claims, plaintiffs emphasized that the City's "cure"—precipitous removal of children—was often worse than the problem it was meant to address. Expert evidence established that children do not *per se* suffer extraordinary harm from witnessing domestic violence, but rather that there is a wide range of possible effects on children from exposure to domestic violence, and an array of factors which influence how an individual child responds, such as age, frequency and content of what the child saw, the child's proximity to the event, the victim's relationship to the child and the presence of a parent to mediate the intensity of the event.

Experts and evidence at trial also highlighted the trauma to children of being removed from their home and placed in foster care, particularly with strangers, and that children in homes where there is domestic violence may be even more vulnerable to the trauma created by removal. For example, expert Dr. Evan Stark noted:

One key to the healthy development of preschool children is a sense of boundaries which separate the child-caretaker relationship from the outside world

and allow the child to experience security in a continuous bond with a caretaking parent who exercises reasonable control over her immediate universe. Since the major characteristic of abusive relationships is the repeated transgression of psychological, physical and social boundaries of the primary caretaker, young children exposed to domestic violence experience their immediate universe as unpredictable and unsafe. This can generate a frightening sense of the world which young children may project outward onto others, producing nightmares for instance, or internalize in the form of low self-esteem. Because of this problem, many experts now recommend a period of complete separation of the batterer from his family, much as in cases of child sexual abuse, as much to confirm the child's sense of security as the mother's. In any case, given this dynamic, removal of a young child from its primary caretaker can be particularly traumatic where domestic violence has occurred and should be used only as a last resort and in the face of evidence that the child faces imminent harm.

Similarly, Dr. David Pelcovitz concluded that “removal heightens a child’s sense of self-blame and that children exposed to domestic violence are at a significantly above-normal risk of suffering separation anxiety disorder if separated from their mother.” Finally, plaintiffs established that separation also may be harmful to children in that it introduces them to the foster care system where they may be, at worst, abused and, at best, suffer a disruption to their contact with community, school and siblings.⁵

At the conclusion of trial, the District Court held that the City’s practices and policies were unconstitutional.⁶ Shortly thereafter, the District Court issued findings of fact and conclusions of law, explaining the court’s reasoning underlying the preliminary injunction.⁷ Harshly criticizing the City’s practices, the court noted that “children’s welfare, the state interest which is so often the great counterweight deployed to justify state interference in family affairs, has virtually disappeared from the equation in the case of [the City’s] practices and policies regarding abused mothers.” The court made specific factual findings with regard to the City’s current policy and practice in child welfare cases involving domestic violence:

- ACS regularly alleges and indicates neglect against battered mothers;
- ACS rarely holds abusers accountable;
- ACS fails to offer adequate services to mothers before separating them or removing their children;
- ACS regularly separates battered mothers and children unnecessarily;
- ACS fails to adequately train its employees regarding domestic violence;
- ACS’ written policies provide insufficient and inappropriate guidance to employees.

⁵ The City does not require that foster homes be screened to determine whether there is a history of reports of domestic violence. Thus, a child may be removed from a home where there is domestic violence and placed with strangers in a foster home where there is domestic violence.

⁶ *Nicholson*, 203 F.Supp.2d at 248.

⁷ *Nicholson*, 203 F Supp.2d at 253.

As a matter of law, the Court held that the City's actions violated the Fourteenth Amendment, by intruding upon the liberty right to familial integrity enjoyed by both mothers and children without substantive and procedural due process. The City's actions also violated the children's Fourth Amendment right to be free from unreasonable seizure, and the Ninth, Thirteenth and Nineteenth Amendment rights of all parties. The court held that a battered mother is entitled to equal protection of the law and that "separating her from her children merely because she has been abused—a characteristic irrelevant to her right to keep her children—treats her unequally from other parents who are not abused."⁸ On January 3, 2002, the District Court issued a preliminary injunction.⁹

In September 2003, the Second Circuit upheld the District Court's factual finding that the City had a policy and practice of removing children from their non-offending battered mothers (hereinafter "plaintiff mothers"), either with or without court order.¹⁰ Prior to ruling on whether that policy and practice violates the United States Constitution, as found by the District Court, the Second Circuit sought further interpretation of New York law from New York's highest court, the Court of Appeals, by certifying three questions of law:

1. Does the definition of a "neglected child" under N.Y. Family Ct. Act § 1012(f), (h) include instances in which the sole allegation of neglect is that the parent or other person legally responsible for the child's care allows the child to witness domestic abuse against the caretaker?
2. Can the injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a parent or other caretaker constitute "danger" or "risk" to the child's "life or health," as those terms are defined in the N.Y. Family Ct. Act §§ 1022, 1024, 1026-1028?
3. Does the fact that the child witnessed such abuse suffice to demonstrate that "removal is necessary," N.Y. Family Ct. Act §§ 1022, 1024, 1027, or that "removal was in the child's best interests," N.Y. Family Ct. Act §§ 1028, 1052(b)(i)(A), or must the child protective agency offer additional, particularized evidence to justify removal?¹¹

State Court of Appeals Ruling

The New York Court of Appeals issued its decision on October 26, 2004.¹² In a strongly-worded unanimous decision, New York's highest court answered certified question number one with a resounding "no": domestic violence victims who are beaten in the presence of their children are not *per se* neglectful parents.

⁸ *Nicholson*, 203 F.Supp.2d at 248

⁹ *In re Nicholson*, 181 F.Supp.2d 182 (E.D.N.Y. 2002).

¹⁰ *Nicholson v. Scoppetta*, 344 F.3d 154 (C.A.2 (N.Y.) 2003).

¹¹ *Nicholson*, 344 F.3d at 176.

¹² *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 820 N.E.2d 840 (N.Y. 2004).

With regard to question number two, the Court ruled that a practice of removing children from battered mothers without court order violates state law unless the child is in “such urgent circumstance or condition” of imminent danger that there is not time to go to court. The Court categorized the test as “stringent.” The Court noted that while it “cannot say for all future time that the possibility can never exist, in the case of emotional injury—or... the risk of emotional injury—caused by witnessing domestic violence, it must be a rare circumstance in which the time would be so fleeting and the danger so great that emergency removal would be warranted.”

With regard to question number three, the court said that evidence of harm or risk to the individual child is necessary to justify removal. The Court noted that “it may be difficult for an agency to show, absent expert testimony, that there is imminent risk to a child’s emotional state” or that “any impairment of emotional health is clearly attributable” to the victim’s actions or inaction. Finally, the Court held that the trial court must weigh the risk of potential harm of staying in the home against the known harm of removal.

The Settlement

After the state court issued its decision, *Nicholson* returned to the federal court. The injunction was scheduled to expire on December 31, 2004. The federal court, noting that ACS had complied with the injunction and had ceased removing children from battered mothers for more than two years, and that the law was now clear that such removals would violate state law, indicated that it would not extend the injunction further. On December 16, 2004, the plaintiff mothers and children signed a settlement agreement in which the City specifically acknowledged the applicable law and stated its intention to comply with the law. The City also agreed that the plaintiffs were the prevailing parties in the litigation and were entitled to attorney fees.

Implications for Other Jurisdictions

“Failure to protect” cases rest upon a tacit assumption that somehow battered mothers consent to being beaten, assaulted, and injured in the presence of their children. CPS also may presume that a battered mother who does not enter a domestic violence shelter or otherwise relocate is failing to exercise a minimum degree of care. However, relocating is frequently not in the best interests of the child. Even in cases where relocating is in the child’s best interests, there is a critical shortage of domestic violence shelters. Further, many women who try to relocate cannot find permanent housing, and there is “no guarantee that there may be adequate resources available to meet the needs of her children.”¹³

CPS and courts also frequently consider, as a litmus test for neglect, whether a battered mother successfully ended the relationship. As the District Court found, “the process of extrication from a violent relationship often takes time, through a series of separations

¹³ White, *Refusing to Blame the Victim for the Aftermath of Domestic Violence, Nicholson v Williams is a Step in the Right Direction*, 41 Fam. Ct. Rev. 527, 530 (2003).

and 'seeming' reconciliations."¹⁴ A battered mother engaged in the process of extrication cannot be said to have failed to exercise a minimum degree of care.

Moreover, separation does not equal safety. Leaving is not an appropriate safety plan for many mothers because it actually may increase danger to the mothers and children.

As the District Court found, "even if a battered mother wants to free herself from the abusive relationship immediately, this is not always a viable option. The most dangerous time appears to be immediately after she leaves the batterer. His threats will make her aware of this jeopardy."¹⁵ The media is replete with examples of cases in which a battered mother was killed after she left or because she left.

In *Nicholson*, both the federal and state courts wrote excellent decisions analyzing and dispelling many of the myths that inform child protective services intervention in child welfare cases. The best way to use *Nicholson* in other jurisdictions is to use it. Cite to it. Examine the reasoning and adopt it!

¹⁴ *Nicholson*, 203 F. Supp.2d at 194.

¹⁵ *Nicholson*, 203 F. Supp.2d at 194.