

# Nicholson's Four Factors for Judicial Consideration in Cases Involving Domestic Violence and Children



ABA Center on Children and the Law | Futures Without Violence | National Center to Advance Peace for Children, Youth and Families



"That was the premise of the lawsuit... to help child welfare so they understood the dynamics of domestic violence and how removing children is bringing more harm to the children than helping. . ."

—Sharwline Nicholson, Plaintiff Mother, *Nicholson v. Scoppetta*

## *Nicholson v. Scoppetta*

In 2003, the U.S. Court of Appeals for the Second Circuit (344 F.3d 154) held the agency's practice of removing children based on a parent's failure to prevent a child from witnessing domestic violence:

- ✓ amounted to an agency policy or custom,
- ✓ raised serious questions of federal constitutional law, and
- ✓ established that the city could be liable for the agency's actions if those actions violated the mothers' or children's constitutional rights.

The Second Circuit also asked the state court to resolve several questions of state law. In 2004, the New York Court of Appeals (820 N.E.2d 840) answered those certified questions and held that:

- ✓ Witnessing domestic violence alone does not constitute child neglect.
- ✓ Witnessing violence by itself does not create a presumption of injury to justify removing a child from the parent who experienced domestic violence.
- ✓ Removing a child from a parent who experienced domestic violence requires evidence of agency efforts to prevent the need for removal.
- ✓ Removing a child from the parent who experienced domestic violence requires judicial evaluation of the potential harm that will arise from that removal for the child.

## NICHOLSON'S LEGAL FRAMEWORK

The federal and state court holdings in *Nicholson* combined to establish a legal framework for judges throughout the Second Circuit to apply when evaluating child welfare cases that originated from domestic violence.

## NICHOLSON'S SIGNIFICANCE

- A seminal New York state court decision that rose to the federal appellate level based on assertions of constitutional liberty interests in family.
- Established a critical legal framework for evaluating child abuse and neglect allegations in cases arising from exposure to domestic violence with a focus on protecting against children's removal from a parent who has experienced violence/a parent who is a survivor of domestic violence.

## WHERE COURTS STAND TODAY

Twenty years later, how has that framework shaped the field? This review highlights appellate court decisions across the country through *Nicholson's* lens.



## Nicholson's Four-Point Rubric

*Nicholson* requires child welfare agencies to produce four categories of evidence when seeking judicial authorization to separate a child from the care and custody of a domestic violence survivor:

### 1. Imminent Harm

Evidence of emotional injury and actual or imminent harm to the child. Witnessing domestic violence does not support a finding of actual or imminent harm.

### 2. Parental Care

Evidence that the survivor from whom the child was removed failed to exercise a minimum degree of care for their child. Being a victim of domestic violence is not evidence of failure to protect or failure to exercise care for one's child.

### 3. Individualized Agency Support

Evidence that the agency has tried to prevent the child's separation from the parent who is a domestic violence survivor. This evidentiary burden requires more than reasonable efforts to prevent removal and must be based on the specific needs of the parent who is a survivor of domestic violence.

### 4. Harm of Removal

Evidence that the agency has evaluated the potential imminent harm against the harm that the child will experience from being separated from their survivor parent's care.

Under *Nicholson*, each category of evidence is required. If the agency does not meet all four criteria, the evidence does not support separating a child from their survivor parent.

## Introduction to the Tools

The named plaintiffs in the *Nicholson* litigation—Sharwline Nicholson, Sharlene Tillett, and Ekaete Udoh—are all mothers whose children were involuntarily taken from them by the Administration for Children’s Services (ACS) in New York City in the late 1990s. In each of the plaintiffs’ cases, at least one of the grounds for child removal was that the mother had been assaulted by another individual and had “failed to prevent” her child or children from being “exposed” to that incident of violence against her.

### A Uniform Conclusion

When considering the constitutionality of these child removals, the federal district court, federal appellate court, and state appellate court all rejected the idea that children are presumptively safer when taken from a parent who has experienced domestic violence. Each decision recognized the critical importance of the relationship between domestic violence survivors and their children. Each decision also recognized the deeply rooted constitutional rights at issue under the Fourth and Fourteenth Amendments.<sup>1</sup> Finally, the courts also delivered a powerful and uniform message about how the very act of separating a child from their parent produces more harm. For example, the courts noted that separating “children following episodes of domestic violence may actually intensify the trauma of the violence by removing the child’s best coping mechanism, the parent, and encouraging feelings of self-blame.” *Nicholson*, 344 F.3d 154, 174.

That message—about the harm of parent and child separation—was precisely what motivated Sharwline Nicholson and her co-plaintiffs to file their constitutional challenges against ACS in the first place: to make clear that “removing children is bringing more harm to the children than helping.”

### Harm of Removal—A Novel Inquiry

The harm inherent in taking children from their parents and placing them in foster care is not unique to domestic violence cases. When developed in 2004, however, the *Nicholson* legal framework for assessing that harm was unique. In addition to requiring findings of imminent risk, parental unfitness, and agency efforts, as had previously

been required under New York law, the *Nicholson* framework was novel in requiring courts to weigh the “the harm removal might bring” as a factor for consideration before authorizing a child’s removal based on any exposure to domestic violence. *Nicholson*, 820 N.E.2d 840, 852. Although not an explicit part of the legal decisions, this component of the decision was especially significant because it

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came at a time when racial disproportionality was at an all-time high within child welfare caseloads nationally (by 1999 federal data indicates that nearly 40% of all children in foster care were Black). As an extension of this disproportionality, the harms of family separation were more likely to be experienced by families of color, as was the situation in Ms. Nicholson’s case. Having legal checks and balances in place to prevent such removals was thus both a constitutional and civil rights issue.

### *Nicholson* Today

In 2004, these federal and state appellate decisions and the legal framework they launched requiring evaluation of “harm of removal” marked a true watershed moment in domestic violence and child welfare law. Twenty years later, we began this caselaw summaries project with an idea that even though the precedential impact of the cases was limited to states within the Second Circuit (New York, Connecticut, Vermont), the decisions provided an invaluable framework for assessing all child welfare cases arising from domestic violence across the country. What we found was more mixed.

Although some agencies and courts now apply the *Nicholson* framework with regularity, “exposure to domestic violence,” “failure to prevent” and “failure to protect” children from that exposure continue to be cited regularly as a basis for removing children from domestic violence surviving parents in child welfare cases based on “neglect.” In addition to being used as an ongoing basis for child

removal, domestic violence also continues to be cited as a reason for including an abused parent's name in a child abuse and neglect registry, or for delaying reunification between children and the parent who experienced abuse.

In other words, still today, parents who experience domestic violence are expected to prevent their children from witnessing or knowing about that violence when they experienced it. If they fail to do so, they face the risk of losing custody of their children as a penalty for experiencing harm themselves. In any other area of legal practice such a justification—holding victims responsible for harm caused to witnesses who observe the violence against them—would be considered a perverse approach to administering justice. So too, it is a perverse approach for responding to domestic violence cases.

### Trauma, Distorted Reality, and Perverse Effects

Removing a child from a parent who has experienced domestic violence incurs just as much harm today as it did when Sharwline and her co-plaintiffs had their children taken from them more than 20 years ago. Child removals from a domestic violence survivor often involve the break-up of sibling groups, changes in schooling, disconnection from community, relatives, and cultural roots. Most importantly, both survivor parents and their children experience deep trauma from the separation.

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Holding survivors accountable for the harm they experience is also contradicted by domestic violence realities. Decades of research and lived expertise both before and after the *Nicholson* decisions demonstrate that a parent who experiences domestic violence is rarely able to pack up their children, leave their home, and seek refuge and services to provide a safer space without significant help from both informal and formal systems of support. Successfully finding and using such support also requires overcoming challenges such as addi-

tional threats to safety. Taking children to hold a parent accountable for experiencing violence that they can neither control nor easily escape does not enhance child safety.

Indeed, this approach produces quite the opposite result by discouraging parents from seeking help altogether. Just as the federal appellate court cautioned in 2003, child and parent separation based on domestic violence exposure has a “perverse effect of discouraging abused parents from taking action against their batterer” because they “fear ACS” power to remove their children even more than they feared the individual perpetrating abuse against them. *Nicholson*, 344 F.3d at 174. Twenty years later, the regularity with which agencies and courts continue to punish survivors and their children for experiencing harm by another continues to have a long-term chilling effect on survivors’ trust in seeking help at all, a net negative for ensuring the safety of parents and their children. In an ironic twist, holding them accountable legally for failing to seek protection they could not trust is doubly confounding. This fear of help seeking plays an especially prominent role for families of color who continue to have a higher rate of child welfare involvement across the United States.<sup>2</sup>

### *Nicholson* Recharge

In addition to our disappointment in discovering how often criteria such as “failure to protect” or “failure to prevent” still support child removals, perhaps the most disappointing finding from our case review was the discovery that even in decisions that do apply the *Nicholson* framework, almost no courts evaluated the “harm of removal” factor at all. In other words, the primary goal of the litigation remains a largely hollow promise in judicial decision making.

Rather than focus on the lackluster impact of the *Nicholson* framework’s first 20 years, we chose to transform this project from an emphasis on case-law summaries to an opportunity for providing judges, attorneys and agencies with a *Nicholson* “recharge.” The ABA Center on Children and the Law, Futures Without Violence (FUTURES), the National Center to Advance Peace for Children, Youth, and Families (NCAP) operated by Caminar Latino – Latinos United for Peace and Equity, and



Sharwline Nicholson have partnered over the last two years to create the following three tools which recenter the original goal of the lawsuit and the seminal holdings from the appellate courts:

**Section One:** *Applying the Nicholson Four-Point Rubric:* We have developed a *Nicholson* Rubric and applied it to existing decisions to examine how the four key rules from the case are and are not applied with authenticity. The goal of this section is to help judges and attorneys ensure all child welfare cases that arise from a domestic violence incident are carefully assessed and removals are not authorized under law unless the agency can meet all four parts of the *Nicholson* Rubric.




**Section Two:** *Domestic Violence Explained by Survivors:* Sharwline Nicholson, Ericka Murria, and Selena Hernandez have reviewed language from judicial decisions where domestic violence provided the basis for family separation. These women have done a powerful audit of the findings of fact, analysis, and holdings from a survivor perspective—correcting harmful language, identifying missed examples of protective strategies in the fact summaries, offering lived expertise, and raising the harm of removal concept in key instances. The goal of this section is to learn how to see the case from a survivor perspective and to know that future decisions should be written and reviewed with this perspective in mind.

**Section Three:** *Model Legal Analysis: Using the Nicholson Rubric:* We have written two model decisions for how judges can apply a domestic violence-informed approach in practice. In each instance, we strive to ground the analysis and application of the law in Ms. Nicholson's original call to recognize that when social services providers, attorneys, and judges want to help survivors and their children, forcing an involuntary family separation achieves exactly the opposite result—removing children brings more harm than help and is simply not supported by law, research, or lived experience and domestic violence reality.

## Section 1

# Applying the *Nicholson* Four-Point Rubric

This section provides summaries of seven appellate-level legal decisions from across the country that were issued between 2004-2020 after *Nicholson* was decided. In each of these cases, exposure to domestic violence formed the primary basis for removing a child from the parent who experienced the violence in the home. The cases that are profiled highlight a variety of paths that child welfare cases involving a child witnessing domestic violence take. They reveal the common response of removing the child and punishing survivors despite *Nicholson's* strong legal precedent. At the end of each summary, we have included an evaluation of how the legal decision did and did not apply the four *Nicholson* factors (Imminent Harm, Parental Care, Agency Support, Harm of Removal). Look for the following coding:

-  The court both (1) evaluated the factor and (2) the consideration of that factor is substantially aligned with the intent of *Nicholson*, even though some limitations in analysis may remain (for example, an Imminent Harm determination based solely on whether the child was present in the room during a DV assault).
-  The court evaluated the factor, but the consideration of that factor is not aligned with intent of *Nicholson*.
-  The court did not consider the factor as required to align with *Nicholson*.

### Cases Analyzed

*In re Ravern H.*, 789 N.Y.S.2d 563 (App. Div. 2005).

*New Jersey Div. of Youth and Family Services v. S.S.*, 855 A.2d 8 (N.J. Super. Ct. App. Div. 2004).

*In re Cole L.*, 285 Cal. Rptr. 3d (Ct. App. 2021).

*M.M. v. Department of Children & Families*, 946 So.2d 1287 (Fla. Dist. Ct. App. 2007).

*Doe v. Whelan*, 2012 WL 4056723 (D. Conn.).

*Matter of K.L.T.*, 845 S.E.2d 28 (N.C. 2020).

*In re A.R.A.*, 835 S.E.2d 417 (NC 2019).

## Outcome

Neglect finding overturned on appeal.

## Facts

The mother was holding her infant when her boyfriend chased her and broke her finger by closing it in a doorframe. While the mother tried to escape the apartment with her child, her boyfriend grabbed her by the head, bit her face, and pushed her onto her child. Child welfare authorities removed her two children (18 months and six weeks old) from her care for 12 months.

## Procedural History

The trial court supported this removal and concluded the mother neglected her children by “engaging in domestic violence” that exposed one of her children to harm.

The mother challenged the family court’s fact-finding order and disposition determining that she had neglected one of her children based on exposing the child to domestic violence by her boyfriend.

The appellate court said that “[t]o support a finding of neglect [the] petitioner must prove both parental misconduct and harm or potential harm to [the] child by a preponderance of the evidence.” The court concluded that the petitioner had only established two facts: that the mother was a victim of domestic violence, and that the children were exposed to that violence. It failed to establish that the mother was “responsible for neglect.”

The appellate court held that a mother did not “engage in” an incident of domestic violence in the presence of her children to support a neglect finding in a child protection proceeding resulting in the removal of her two children for 12 months. The appellate court reversed and concluded the mother was not responsible for the harm her children experienced by witnessing domestic violence against her.

### To what degree did the court apply the *Nicholson* framework?



**Imminent harm to the child:** The appellate court found the children were exposed to violence against their mother but that did not constitute imminent harm to them.



**Parental care:** The appellate court found that the agency had failed to establish the mother was responsible for neglect through any form of parental misconduct.



**Agency support:** The court opinion provides no information about agency support provided to prevent removal from the mother’s care.



**Harm of removal for the child:** The court opinion provides no information about the harm of removal for the children when separated from their mother’s care.

## Outcome

Abuse finding overturned.

## Facts

A mother was physically and verbally abused by her husband in the presence of their child. During an argument, her husband placed his hands around her neck while their son played nearby. She left the home with her son and when she returned her husband began verbally abusing her. Her husband grabbed her neck again. She fled to her son's bedroom where her husband choked her and pulled her hair. She called the police and ran from the home with her son in her arms. Her husband chased her and punched her in the head. He tried to flee but was blocked by a police car. He then threatened to kill his wife and told the police that he "usually followed through on his threats."

The father was charged with terroristic threats and endangering the welfare of a child, simple assault, and criminal coercion. A no-contact order was put in place for the child. The mother chose not to seek a restraining order for herself. A caseworker visited the home and advised the mother to obtain a restraining order and enter a battered women's treatment program. The caseworker contacted the child's pediatrician who reported "no concerns" about the child's case and said the mother "is always appropriate and concerned" about the child and is "very careful with him."

The father made bail and moved in with his mother. The mother had contacted the prosecutor's office to support a reduced bail. Upon release, the father did not return to his family's home or seek contact with the mother or child. When the caseworker learned the mother had supported a reduced bail, however, she sought *ex parte* removal of the child from the mother's care. She visited the home unannounced with a police escort and threatened to place the child in foster care if the mother did not comply with recommended treatment. The mother agreed to voluntarily place her son with her own parents for 15 days. The caseworker then substantiated a neglect finding against the mother and temporary custody was awarded to the child welfare agency.

The child's mother began individual therapy twice



The court acknowledged that inclusion in a child abuse registry . . . could have a devastating effect on the mother's reputation and ability to secure employment, which could prevent her from attaining stability and independence to leave a domestic violence situation.

a week, attended a battered women's program weekly, and obtained a restraining order against her husband as requested by the caseworker. The caseworker later testified that the child was happy and healthy and exhibited no signs of abuse or emotional trauma. The mother's psychologist testified that she recognized she was a battered spouse and returning to her husband would not be in her or her son's best interests. A Child Placement Review Board (CPR Board) recommended to the trial judge that the child continue to be placed outside the mother's care because she did not understand how domestic violence caused emotional harm for a child.

## Procedural History

The trial court concluded the mother's conduct met the definition of abuse under New Jersey law. The mother's name was entered into a state child abuse registry.

The appellate court reversed and found the trial court judge, caseworker, and CPR Board had all assumed emotional harm to the child from witnessing domestic abuse but no evidence sustained those assumptions. The court acknowledged that inclusion in a child abuse registry on this basis could have a devastating effect on the mother's reputation and ability to secure employment, which could prevent her from attaining stability and independence to leave a domestic violence situation. The appellate court ordered the mother's name withdrawn from the registry.



## To what degree did the court apply the *Nicholson* framework?



**Imminent harm to the child**—The child was not subject to imminent harm from witnessing domestic violence between his parents. Evidence of actual harm to a child from witnessing domestic violence is needed to support an abuse and neglect finding, not merely an assumption that the child suffered harm.



**Parental care**—The agency had failed to establish the mother was responsible for abusing her child resulting from her own experience with domestic violence.



**Agency support**—The court concluded that the agency’s engagement with the mother and father—threatening removal into foster care and requiring the mother to engage in services she did not seek—had been extremely coercive and was not supported by the facts of the case.



**Harm of removal for the child**—The court opinion provides no information about the harm of removal for the child when separated from his mother’s care.

## Outcome

Neglect findings reversed.

## Facts

Mother and father had harmed each other during an argument in their home. When the police arrived, they observed bruises and scratches on the mother and father and a broken phone on the floor. The children (3 and 5 years) were asleep in another room. Police contacted the child welfare authorities, who removed the children from their parents' care and custody and placed them with a relative. The agency then filed a dependency petition alleging that the parents' altercation endangered the children's physical health and safety and placed them at risk of serious harm, damage, or danger.

## Procedural History

The trial court sustained the petition. The parents appealed. The appellate court reversed and concluded the children were not at substantial risk of harm.

### To what degree did the court apply the *Nicholson* framework?



Imminent harm to the child—One incident of domestic violence outside the children's presence did not constitute imminent risk of harm.



Parental care—There was no substantial evidence that the parents had failed to care for or protect their children.



Agency support—This factor was not evaluated.



Harm of removal—This factor was not evaluated.

## Outcome

Dependency adjudication reversed.

## Facts

This case involved two instances of violence perpetrated by a father against the mother. In the first, a child was home but did not witness the incident. In the second, the child was not present, and the mother fled the home. The mother contacted the police in both instances. The police arrested the father at home after the second instance. After these incidents, the mother refused to allow the father to contact the child and notified the child's school. The police referred the family to the child welfare authorities, who filed a dependency petition alleging the mother was unwilling to protect the child from the father's domestic violence because she did not seek a restraining order against the father and chose not to participate in recommended therapy sessions.

## Procedural History

The trial court ruled that the child was dependent. The appellate court reversed, holding the evidence did not support the trial court's findings.

### To what degree did the court apply the *Nicholson* framework?



**Imminent harm to the child**—The two violent acts committed by the father outside the presence of the child did not cause harm to the child.



**Parental care**—The mother had successfully prevented the father from contacting the child after the two violent incidents, and the mother's decision not to seek a restraining order did not constitute an imminent risk of harm to the child.



**Agency support**—The agency referred the mother to individual therapy, which she did not attend. There was no further evaluation of the nature of the therapy, why the mother was referred, or whether the agency explored why the mother did not attend. The court explained that agency support of domestic violence survivors must go beyond referrals to therapy. Services must be individually tailored, provided by service providers with expertise in domestic violence and child welfare dynamics, easily accessible and realistic for the survivor to attend. Close monitoring of services must occur to evaluate the survivor's progress and identify and address barriers and challenges. A survivor may decide not to attend services for a variety of reasons that must be explored to understand if adjustments are needed.



**Harm of removal**—This factor was not evaluated.

## Outcome

Emergency removal of three children was upheld as constitutional in a federal civil rights action challenging the legality of a temporary removal of three children from their mother.

## Facts

A mother and her three children brought a federal civil rights action alleging child welfare agency employees violated their constitutional rights to due process and freedom from unreasonable seizures when they removed the children from the mother's care for three days based on her being a domestic violence victim.





Before the removal, the father was arrested for assaulting the mother in the children's presence. A protective order was entered. The incident that led to the children's removal involved an evening when the mother had allowed the father to enter the family home to say goodnight to them despite the protection order. When the mother lied about his presence in the home when questioned by law enforcement they took it as a sign that she would not ensure the father would obey the protection order in the future. The mother had also violated two agency service agreement safety plans in which she agreed that she and the children would not have contact with the father and that she would contact police if he tried to enter the home. As a result, the agency and law enforcement conducted an emergency removal of the children from mother's custody.

## Procedural History

A federal district court in Connecticut found the agency's removal of the mother's children was objectively reasonable. The finding was based on evidence showing the mother violated, and helped the father violate, a protection order prohibiting him from entering the family home by allowing him to be in the home despite concerns about serious domestic violence.

The court found the agency's emergency removal of the children for three days without court authorization or parental consent was justified where the father's presence in the home established probable cause that the children were in immediate danger. The court found plaintiffs' substantive due process right to remain together without coercive state interference was not infringed since the children were removed for only three days before the court issued a temporary custody order placing them with relatives. The court said that a temporary custody transfer does not result in a substantive due process violation because it does "not result in [the] parents' wholesale relinquishment of their right to rear their children."

### To what degree did the court apply the *Nicholson* framework?

-  **Imminent risk of harm**—The court interpreted father's presence in the home, in violation of protection order, and mother's support of his presence, to establish probable cause that the children were in immediate danger of harm from the mother.
-  **Parental care**—The court concluded that because the mother allowed the father to violate a protection order and tuck the children into bed she had demonstrated inadequate parental care.
-  **Agency support**—The court examined agency efforts to provide safety plan requirements for both parents as sufficient agency support.
-  **Harm of removal**—This factor was not explored.



## Outcomes

Termination of parental rights reversed.

## Facts

This case involved a mother of five (two of whom were no longer minors at this time) who was legally blind. The child welfare agency filed neglect petitions in 2016 following three CPS reports concerning extensive physical and sexual abuse by the father toward the children. The father admitted to a social worker that he engaged in sexual behavior with the mother's cognitively-impaired adult daughter. The mother acknowledged that the abuse had happened.

The removal petition outlined the agency's efforts to work with the family before removing the children. It cited the agency's provision of a hotel room for the mother and children once when the father refused to leave the home, the mother's refusal to seek a domestic violence protection order against the father, and the mother's violation of her safety plan by allowing the father to drive one child to a medical appointment.

After the children were taken into agency custody, the mother entered into a case plan with the agency requiring her to address issues of domestic violence, mental and emotional health, and parenting skills. The record showed the mother complied with her case plan requirements, including completing a 12-session domestic violence support group, separating from and obtaining a divorce from the allegedly abusive father, obtaining a restraining order against the father, and completing various parenting and therapy programs, among other requirements.

## Procedural History

The trial court adjudicated the children neglected and ordered that they remain in agency custody. Between 2016 and 2019, the trial court held seven permanency hearings. During this time, the oldest child aged out of foster care and the court awarded custody of the middle child to his biological father. The permanency plan for the youngest child was first changed to reunification with the mother after the court ended reunification efforts with the father, then to adoption and termination of parental rights.

The trial court terminated both parents' rights. The court found that although the mother complied with the formal requirements of her case plan, a likelihood of neglect still existed based on her history of domestic violence and abusive partners. The mother appealed.

The supreme court reversed, finding the evidence at trial did not support the trial court's conclusion that a likelihood of future neglect existed based on the mother's tendency to become involved in abusive relationships.

### To what degree did the court apply the *Nicholson* framework?



**Imminent risk of harm**—The court concluded the trial court had erred in finding imminent risk based on the mother's past relationships. The supreme court noted that the trial court relied heavily on the mother's online relationship with a former classmate to infer she was likely to repeat her prior neglect of her child by engaging in an unsafe relationship. However, the record lacked any indication that the former classmate posed any risk to the child and the trial court's finding was based on speculation. Mother's online relationship with her former classmate did not support the conclusion that the child would be abused in the future.



**Parental care**—Evidence clearly showed the mother took steps to protect her child by divorcing and ending contact with the father, moving to a new location, focusing on meeting her safety plan requirements, engaging in therapy, and demonstrating appropriate parenting during visits. The trial court improperly determined the mother would be unable to provide the child a safe, permanent home. The evidence showed the mother had eliminated any threat posed by the allegedly abusive father, she confronted her history of domestic violence to the satisfaction of her treatment providers, she showed appropriate parenting during visits with the child, and she secured a suitable home with access to transportation and social supports.



**Agency support**—The agency provided the mother with a case plan, including a 12-session domestic violence support group, and supported mother’s efforts to separate from and obtain a divorce from the father, obtain a restraining order against the father, and complete various parenting and therapy programs, among other requirements.



**Harm of removal**—This factor was not explored.

## Outcome

Termination of parental rights was upheld.

## Facts

Child welfare authorities were engaged with the family previously based on the father's domestic violence and substance use. The father also served time criminally for assaulting the mother and children. After he completed his prison sentence, he returned to the home where the mother lived with their children. According to testimony in the case, one of the children requested that the father return home. This was in violation of his post-release supervision conditions. Shortly after the father's return to the home, the mother voluntarily placed their three children in foster care so the father could live in the home.

## Procedural History

One month after the voluntary placement, the child welfare agency filed a petition alleging that the children were neglected because "respondent-mother and the father had repeatedly failed to comply and cooperate with DSS and the court to assist the parents in keeping the children safe and in avoiding the need for an out-of-home placement." The children were adjudicated neglected, and custody was continued with the agency.

The mother was ordered to complete a parenting education program, demonstrate appropriate parenting skills and an understanding of how substance abuse and domestic violence affect children. She was also ordered to complete an assessment by the Abuse Prevention Council (APC) program for victims and to demonstrate her ability to provide a safe and stable home environment free from domestic violence for a minimum of six months. The father was ordered to comply with similar requirements, complete a substance abuse assessment, and receive an assessment through a batterer's program.

The mother completed most of her requirements and the parents continued to live together. Although the mother was scheduled to complete her APC program, about 12 months after the children had been placed in foster care the court concluded she had not sufficiently sought mental health counseling and substance use services and ordered the permanency plan changed from reunification to adoption.





Additionally, the social worker had not confirmed that the home was safe and stable because both parents had been accused of preventing the social worker on the case from visiting the home to make those assessments.

One month later, the agency filed a petition to terminate the parental rights of the mother and father on the grounds of "neglect, willful failure to make reasonable progress, and willful failure to pay a reasonable portion of the cost of care." At trial, the agency social worker testified that termination would also help facilitate an adoptive placement for the children. She noted that although one of the children was not in a preadoptive placement the goal was to get him to a "point of stability that we can secure a pre-adoptive placement" and that would be more likely if he became available for adoption through termination of parental rights.

The trial court entered an order finding evidence sufficient to support termination of both parents' rights based on neglect and willful failure to make reasonable progress in the case plan. The court further concluded that it was in the children's best interests to have their parents' rights terminated.

The mother appealed the termination of her parental rights. The supreme court upheld the trial court's determination, finding the evidence sufficient to show the mother failed to make reasonable progress toward correcting the conditions that led to the children's removal. The court noted that although she made progress in her case plan by completing the APC program for victims and a separate parenting education program, "clear, cogent, and convincing evidence also demonstrates that she failed to establish an ability to provide a safe and stable home environment for the children." The mother challenged this assessment by arguing there was no evidence the parents had engaged in domestic violence or abusive behavior in the home or during the children's visits. The appellate court dismissed this argument and concluded that by living with the father she had prioritized that relationship over her children's safety.

## To what degree did the court apply the *Nicholson* framework?

-  **Imminent risk of harm**—The court looked to father’s history of domestic violence and assault as sufficient evidence of an imminent risk of harm to the children.
-  **Parental care**—The court looked at mother’s decision to live with the father and then to voluntarily place the children in foster care as evidence that she was not demonstrating sufficient parental care.
-  **Agency support**—The court did not examine agency support but did place substantial weight on the social worker’s testimony that the children would be better served through TPR and that the social worker had not been able to properly assess safety in the home.
-  **Harm of removal**—This factor was not evaluated.





*Elizabeth B. v. New York State Office of Children & Family Servs.,*  
47 N.Y.S.3d 515 (Sup. Ct. App. Div. 2017).

While removals are the focus of this brief, they are just a piece of the problem. Central registry listings resulting from a substantiated abuse or neglect finding hurt children as their mothers struggle to secure a job and face unwarranted societal stigma and mistrust. Even when removal is not the issue, courts should still use the *Nicholson* concepts to carefully analyze the risks of harm for a child and the risks of taking actions against a domestic violence survivor, including by listing them in a central registry. In the following case, the appellate court thoughtfully analyzed the situation from a domestic violence perspective. It provides a good example of heightened review even when *Nicholson* removal factors do not directly apply.

### Holding

Maltreatment finding overturned and registry listing expunged.

### Background

An infant and a 12-year-old child witnessed their father/stepfather hurting their mother on two consecutive days. In the first incident, he punched her arm and leg while driving when the infant was in the backseat. In the second incident, which the older child witnessed, he struck the mother in the back as she held the infant, causing her to fall. She told him to leave the home and he then choked her and threatened that “if [she] ended it that he would end it.”

There was no history of violence before these incidents. Immediately after they occurred, the children’s mother developed a plan to access a car and move to live with relatives. Three days later, she took her two older children to the homes of relatives. She brought the youngest child with her to report the incidents to the police. Her partner was taken into custody and a protective order was put in place.

Child welfare authorities began investigating neglect by the children’s mother based on concerns that three days was too long to wait to report the violent incidents and therefore demonstrated “inadequate guardianship.” The agency recommended counseling services. The children’s mother declined counseling services offered by the agency, but she and her oldest child sought counseling from her priest, who had experience assisting families in similar circumstances.

### Court Decision

The child welfare agency substantiated neglect and entered the mother’s name into an abuse and neglect registry. She sought review of that determination and expungement of the registry listing.

The appellate court reversed the agency’s findings and ordered the registry records expunged, concluding the brief delay in reporting the abuse occurred during the most dangerous time in the abusive relationship—when the victim tries to separate from the abuser—and was part of the mother’s “planned strategy to report the abuse in a way that protected her and her children’s safety.”

Regarding potential future harm, the court concluded there was no substantial evidence of imminent risk because reunification between the parents was merely conjecture and the mother had testified that she would require her partner to participate in all court-ordered domestic violence and anger management classes.

None of the harms the children experienced were due to the mother’s actions, and therefore the agency had not established a basis for finding neglect on behalf of the children’s mother. Instead, the mother’s actions demonstrated a consistent interest in keeping her children safe from harm and were reasonable. Specifically, the court explained that when evaluating whether a person experiencing domestic violence has exercised a minimum degree of care for their children requires considering:

- risks of leaving the abuser,
- threats that have been made,
- opportunities for safe relocation,
- severity and frequency of the abuse, and
- options available for support.

Sharwline Nicholson, Ericka Murria, and Selena Hernandez have reviewed two case examples in which domestic violence provided the basis for family separation. They have done a powerful rewrite of the findings of fact, analysis, and holdings from a survivor perspective.

*New Jersey Div. of Youth & Family Servs. v. I.H.C., 2 A.3d 1138 (N.J. Super. Ct. App. Div. 2010).*

## Case Analysis

## Domestic Violence Explained

### Outcome

Evidence was sufficient to support finding of child abuse based on exposure to domestic violence.

### Facts

Three children were removed from their parents and placed in emergency foster care based on two referrals for alleged abuse and neglect and domestic violence.

The removal decision was based on several factors, including:

Exposure to domestic violence is not child abuse. Children and youth are differentially impacted by exposure to violence, as national experts testified in Nicholson. Therefore, each situation needs to be assessed for evidence of imminent harm to children.

The basis on which children were removed doesn't align with the dynamic that the facts suggest, which is that the father was violent and the mother was seeking help. Holding survivors responsible for their partner's pattern and history of violence (1) destroys their trust in "helping systems," (2) makes on-going assessment of harm/impact difficult, and (3) provides the abusive partner additional tactics to use against the survivor—reinforcing the system's blame and judgment of the survivor's parenting, reinforcing a mother's negative perceptions of her own efforts to keep her family safe, etc.

This case raises questions about the caseworker's practice BEFORE the removal. How exactly did they make efforts to help the mother and children to be safe together?

- "What are the child welfare policies on how to greet and create a report with mom? How often was the child welfare worker in contact with mom before the petition was filed for removal? Did the child welfare worker offer to assist the survivor to create a culturally specific/trauma informed safety/exit plan? What options were given to the survivor to keep her children and herself safe?"
- "Why don't they ever interview children of appropriate age before they are taken from their parents and placed in foster care to ask about whether/how they have been harmed, how they feel, where they would feel safe. For the children who have been removed, how has that impacted their lives?"

- a letter the mother had given to her neighbor detailing domestic violence by the father and a fear that he might hurt her and her children;

The letter is evidence that mom was thinking about and planning for safety of her children. In "detailing violence by the father", she created a record that could be used to support future legal actions. This strategy is especially important with abusive partners who have not been arrested, or who present well (which is not the case here).

- the mother’s subsequent denial that she wrote the letter and that domestic violence was occurring;

Mom giving the letter to her neighbor was a protective strategy. Safety/ exit planning often includes a safe person like a neighbor. Mother is thinking outside the box—if she needs help in the middle of the night, her neighbor needs to know and be able to tell others what is happening.

Mom’s later denial of the letter, and of DV, could be a result of broken trust, a sign of escalating danger, and/or a strategy to avoid having her children removed.

- **“Child welfare is intentional about what they present to the judge in a way that they know will work towards their purpose of removing the children from mom.”**
- **“Child welfare is not operating on what is best for the family or the children, more from a business standpoint as opposed to a family standpoint. Can the person interviewing the children be someone outside child welfare? An independent person?”**

- the lack of evidence that the mother had a reliable plan in place to safeguard herself or her children in the event of danger;
- evidence that the mother refused to leave the home and take her children to a safe place;

Had the caseworker coded mom’s actions as protective (or potentially protective) strategies, and supported this mom to implement an exit plan or safety plan, this case might have turned out differently. Too frequently, a DV survivor’s protective strategies are misrepresented as “proof” that a survivor is in denial. Sometimes, it’s safer to stay than to leave.

- **“If a victim feels or believes that they have no options, or opportunities for safety they will stay.”**

- her statement to the caseworker telling her to “take them” if she was being forced to choose between the children and her husband;

Without factoring in the dynamics of DV, this statement can be interpreted—and often is—as a survivor “choosing her partner over her children” when the opposite may be true. If the timing of her leaving isn’t right or can’t be done safely AND she’s not getting any help from the agencies, the statement can be evidence that she’s choosing for the children to be someplace safe and away from the person using violence.

- **“It doesn’t happen this way—she had a plan. No mother says this unless she knows what she’s planning next.”**
- **“(In my own situation) Within one hour, I knew they (child welfare) weren’t there to help me. This mother probably realized immediately that they weren’t there to help.”**

- several past police reports documenting loud arguing in the home;

More information is needed here—when police responded in the past, what actions were taken to assist mom and children to access safety? What kind of follow up did mom receive from the police, advocates, social workers, or child welfare? Did they make things worse or more unsafe for her? For the children?

- a neighbor’s recorded arguments between the parents;
- and the father’s history of domestic violence with his ex-wife and children.

The father’s violence with his ex-wife is HIS pattern of conduct, HIS behavior.

### Procedural history

The family court held the evidence did not prove the children had been abused or neglected. The appellate court overturned this decision and concluded that evidence of “a pattern of conduct can place a child at risk of harm” to support an abuse or neglect finding.

If the person using violence is still in the home and mom has no resources to escape or develop a plan, they cannot both be characterized as freely participating in a “pattern of conduct that places a child at risk of harm.”

### Nicholson Factors

While the court considered three of the four *Nicholson* factors, their analysis and findings were not aligned with *Nicholson* standards.

- **Imminent harm to the child**—Parents’ violent relationship and untreated psychological conditions created a high risk that the children would be harmed. The children had started showing effects of the parents’ coercive and violent relationship - resisting adult authority, disrespecting women, and threatening behavior.
- **Parental care**—Parents failed to exercise a minimum degree of care by not protecting the children from harm. The appellate court found the evidence proved the father exercised coercive control of the mother and represented “a pattern of risk that placed the child at risk of harm” to support an abuse and neglect finding. Further, the parents’ untreated psychological conditions created a high risk that the children would be harmed.

The appellate court found there was evidence that the father exercised coercive control of the mother, which presented a pattern of risk. Survivors often fight back against their abusive partner, verbally or physically. Planning, concrete resources, and real help to keep the survivor and children safe together is the most appropriate intervention. The children’s concerning behaviors appear directly related to their exposure to their father’s violence and coercive control of their mother.

➤ “When a person is being abused, there is no pause button to press to excuse children from the space. What is a recommended “minimum degree of care” during an assault?”

The protective strategies that mom used (see above) were mischaracterized and used against her. Whether or not they demonstrate a “minimum degree of care”, they are a basis for agency efforts to build or support additional protective strategies, which appears not have occurred in this case.

If there were documented, impactful psychological conditions, father’s coercive control may have prevented mom from seeking or following through on treatment—which is mental health coercion, part of a pattern of DV.



- **Agency support**—The father failed to engage in domestic violence counseling while the case was pending. He denied his son’s aggressive behaviors and he and the mother denied the children’s developmental delays and refused to seek treatment for them.

When survivors feel trapped, their trust in helpers has been undermined or destroyed, or they do not have access to real help and support, aligning with their partner can be a strategy that provides a degree of safety as they resist the system together.

There is an opportunity here to provide education. Is there evidence that a caseworker or anyone else has provided information in a supportive way on the effects of trauma on children? Were treatment options explained and offered? Did father’s coercive control interfere with mother’s ability to seek treatment for her son, or make them afraid of doing so?

- **Harm of removal**—This factor was not evaluated.

➤ **“Victim blaming the survivor and making her accountable/responsible for the person using violence actions is wrong and creates the most risk of harm for removal of the children.”**

*In re D.M., 392 P.3d 820 (Or. Ct. App. 2017).*

**Case Analysis**

**Domestic Violence Explained**

**Outcome**

Neglect finding upheld.

The father was violent, and mother tried to obtain help. Neglect (and physical abuse) findings for father are appropriate.

**Facts**

During a domestic dispute, the father tackled the mother to the ground and choked her while the child slept in a chair. The father resisted the mother’s pleas to an older child to call the police by kicking the older child’s cell phone from her hands and pushing her away and slapping her in the face.

The language here (“domestic dispute”, “resisted mother’s pleas”) minimizes what happened.

*Rewritten:* “During the father’s violent assault on mother, he tackled and strangled her. When mother asked her oldest child to call the police (a protective strategy), father continued to use violence—this time with the child—to prevent them from getting help. He pushed the child, kicked the cell phone from her hand, and slapped her in the face.” The threat is by the father, to both mom and child.

The mother spoke with two caseworkers and police officers outside the home and took the four-year-old child to a hotel for the night. The older child had previously left the home to stay with a friend.

These are protective strategies. Even before the police responded, mom sent (or allowed) her older child to leave to stay with a friend. She then left the home with her other child and stayed at a hotel.

At the hotel, a caseworker discussed a safety plan with the mother that prohibited contact between her children and the father. The mother refused to sign

Survivors’ immediate reactions in the aftermath of trauma are complicated and are affected by their experiences, their access to natural supports and healers, their coping skills, and others’ responses to their experience. Exhaustion, confusion, numbness, sadness, agitation, dissociation, and many other responses are normal, and can continue

the written safety plan but verbally agreed to comply.

with the stressors of ongoing intervention by CPS. Asking a survivor to sign a safety plan in a moment of crisis or even in the days following a violent assault is not reasonable.

Safety planning should be based in what survivors say they need to be and feel safer, including what others will do to help them. Too frequently, child welfare asks survivors to sign a plan they had no hand in developing, and that doesn't address their unique needs. Caseworkers make the decisions about what survivors need to do, making the plan more a list of agency demands rather than a plan that increases safety and can be implemented.

A survivor not signing such a "plan" that has been developed without them, or that doesn't provide assistance from others, is not an indication that they don't want to be safe, won't try to keep children safe, or are in denial or noncompliant.

- **"Mom probably wanted to rest, sleep and cuddle with kids. Give her a minute to process and figure out what she needs and wants to do."**
- **"A survivor/victim shouldn't be asked to "comply" with anything. This statement is framed as a threat or future statement to be used against the victim at a later date."**

She also agreed to meet at a shelter the next day. While she met with a caseworker and someone from the shelter to finalize the safety plan, she did not keep the child away from the father. She later told the agency she had returned to the family home and the child was staying with grandparents.

More information is needed here, such as why mom went home. The "facts" are written in a way that implies that mom doesn't want to be safe or doesn't care about keeping her children safe. When she returned home, her child stayed with grandparents.

Survivors have certain perceptions or questions about what living in a shelter is like – will it be clean, can I cook for my kids, how will it affect their schooling, and what do I need to give up? Going into shelter with children is not an easy decision to make.

- **"She has the right to say where her kids get to stay."**

However, the agency received reports that the child was seen at the family home when the father was present. It then obtained

The child being seen at the home is not the same as her living there. There may have been a very good reason this occurred – it could even have been protective. Mom, who knows her situation the best, might have determined that allowing the father limited access was the safest thing to do. The demands and assumptions of the agency are not

court authorization to take him into protective custody.

well-informed— most survivors know how to survive, and to keep their children safe.

- **“Safety planning doesn’t consist of threats to the non-violent parent. Was the mother offered a personal protection order or assistance with coordinating parenting time with the father through the family court? Who did the agency receive reports from concerning the child visiting their father? Is it a crime for a child to visit their father? Is someone surveilling the family at this point? Has mom been put on probation or parole for a criminal act that she deserves to be monitored?”**
- **“He’s their father. He had rights. If court ordered them to see father, they would have to go anyway.”**
- **“The person using violence should have been removed from the home. Why do the mom and kids have to become homeless after being assaulted by him?”**

### **Procedural history**

The trial court granted temporary custody of the child to the agency and placed him in foster care. At the jurisdictional hearing, the mother testified about heated arguments with the father and their stormy relationship and her desire to leave the father and take the children to a safe place and create a positive environment for them once she saved enough for a train ticket. The agency caseworker testified that the father blamed himself for the tension and fighting in the home and took responsibility for the recent domestic violence incident. The caseworker said the risk to the child during the domestic violence incident was significant, explaining that “[t]he parents were not in their right state of mind to take considerations of their children’s safety, one child had to leave the home, the four-year-old didn’t have that option.”

Mom had a plan, and needed support and resources to execute it. Dad “blamed himself and took responsibility”—was that manipulation of the system/caseworker? If he was taking responsibility, why did he not leave the home? How did the caseworker create a plan that held the father, and not the mother, accountable for his abuse, and then follow through on that?

The caseworker testified that “the parents were not in their right state of mind” to keep children safe, but mom tried to contact the police in the only way available to her while being violently assaulted, which shows presence of mind.

Victim blaming language permeates this case—mom was assaulted by her partner, she did not “expose her child to DV”. The father directly harmed both the mom and the child.

The trial court took jurisdiction of the child on three bases: (1) the mother placed the child under threat of harm by exposing the child to domestic violence; (2) the

Regarding services, more information is needed. What services was she offered, and what is known about why she chose not to use those services? How would those services have helped to ensure safety? Would other resources (housing, child care, transportation) or supports have helped more?

mother failed to engage in services offered to help her ensure the child's safety; and (3) the father placed the child under threat of harm by exposing the child to domestic violence. The father appealed, challenging these three bases.

The appellate court affirmed. Under Oregon's child dependency statute, "jurisdiction is appropriate when a child's condition or circumstances endanger the welfare of the child." The key inquiry when making this determination is whether there is a reasonable likelihood of harm to the child under the totality of the circumstances. The agency also must prove a nexus exists between the parent's conduct and the harm to the child and that the risk exists at the time of the hearing and is not speculative.

The appellate court found the agency established the parents exposed the child to domestic violence and a current risk of harm to the child existed. It was undisputed the child was in a chaotic and physically threatening environment that involved the father tackling the mother and choking her, striking the older child and knocking her cell phone to the ground and shoving her into the chair where the younger child slept. Even though the child was asleep during his parents' altercation, he was exposed to domestic violence since no one shielded or protected him as it unfolded around him.

- **"Mom didn't have a choice in the actions of assault against her regardless of if her children were present or not. She did not willfully or with any ill intention "expose" her child to the assault and abuse against her."**
- **"How can the caseworker testify to 2 peoples state of mind? One is using violence and the other is actively being abused."**
- **"She wanted a \*\*\* train ticket. What she got was blamed, sent to a hotel, and he verbally took responsibility for ONE incident, but not the ongoing harm and multiple assaults."**

Mother attempted to involve police, and was prevented from doing so by the father's use of physical violence toward the child. The father was responsible for danger he created through his use of violence.

- **"How can you protect anyone else if you are actively being assaulted? If someone is hitting you, strangling you, what imaginary super powers should you possess in order to save the others in the household? Strangulation is extremely lethal. Fighting for your next breath makes it hard to speak, think or move."**



A nexus existed between the exposure to domestic violence and a risk of harm to the child. The caseworker testified that the threat of harm to children is significant whenever they are present during domestic violence. She also testified that the parents were not in a state of mind to consider the child's safety or protect him during their argument.

The parents' altercation supported finding that a current threat of harm existed; the father attacked the mother without considering the emotional or psychological impact on the child, and his violence towards the older child prevented her from restoring safety in the home.

A current threat of harm also existed at the time of the jurisdictional hearing since the mother had failed to keep the child away from the father after the domestic violence incident, she avoided the agency in the weeks between the incident and the jurisdictional hearing, and both parents did not engage in recommended domestic violence services or try to address their issues after the incident.

## Nicholson Factors

While the court considered three of the four *Nicholson* factors, their analysis and findings were not aligned with *Nicholson* standards.

- **Imminent harm to the child**  
—Parents' domestic violence altercation—the father's attack of mother and violence towards older child in younger child's presence—created a current threat of harm to the younger

"Threat of harm is significant whenever (children) are present" is not accurate—this is not borne out by research or the lived experience of survivors. However, in this situation there was actual harm, and it was caused by the person who used violence.

This was not an altercation, it was an assault by one person on another.

➤ **"This statement . . . should be the basis for keeping the children with the mother and removing the threat of danger from the children in ADDITION to offering mom supportive services, family counseling, and a true safety/exit plan with a personal protection order and potential assistance (train ticket) for relocation."**

Many survivors avoid child welfare, knowing that the "help" they provide isn't often helpful. When they do become involved in CPS, survivors should not be mandated to DV services—because they didn't cause the problem, services should be offered, but not required. Instead, talk to the survivor about what they need to be safer, and provide those resources. For the person using violence, mandated services are appropriate, and research shows that consequences for not following through are a critical component for behavioral change.

- **"Everything is used against (survivors)."**
- **"Were there court ordered recommendations? Was the recommendation trauma informed, culturally relevant and survivor-led?"**

child. A current threat of harm also existed at time of the jurisdictional hearing based on the mother's failure to keep the father away from the child.

Mother attempted to protect them all during the incident, and was prevented from doing so. She did not follow the agency's 'safety plan' that she may have had no role in creating. Noncompliance with safety plans is commonly used against survivors, as opposed to best practice which calls for on-going evaluation about why the plan is not working and how it might need to be revised.

➤ **“Child welfare agencies do not develop safety plans. Was the mom “agreeing” or appeasing the agency officer? Did mom feel safe at the time of the conversation? Was mom still in crisis mode?”**

- **Agency support**—Agency developed safety plan with mother, which she verbally agreed to follow but failed to keep child away from father. Both parents did not engage in recommended domestic violence services or try to address their issues after domestic violence incident.

More information is needed—too much context is missing concerning the safety plan for it to be used against mom. How exactly did the agency provide support for either parent to understand why services were being recommended, or what benefit would result from participation?

Building the case against the parents becomes the most important thing, and facts are analyzed in ways that are misleading or inaccurate.

➤ **“They make it sound like it was a conversation, but it hardly ever is—whoever writes it, it’s more like a treatment or case plan. (There’s a) power differential (and) inadequate resources. A safety plan is something that advocates and agencies need to support. Mom may or may not have felt like it was a workable plan, may have gotten beat up again when she got home. The plan may be—WAS—used against her.”**

- **Harm of removal**—This factor was not evaluated.

Many children are hurt or traumatized as a result of removal, particularly from the care of a protective parent, so this factor needs to be consistently applied in any potential removal case.

➤ **“Harm of removal should’ve been factored in the beginning of the assessment and throughout the case.”**



## Commentary

The survivors' perspectives in the *D.M.* case echo themes shared by women in the [Accountability Dialogues](#).<sup>\*</sup> As the answers to the two questions below reflect, listening to survivors' voices is critical to creating a child welfare response that strengthens and supports mothers to protect their children in domestic violence cases.

**You were honest and open. You called the police to ask for help. What word best describes your experience when child protective services became involved?**

• Disrespected

• Angry

• Alone

• Silenced

• Annoyed

• Helpless

• Naïve to the system

• Traumatized

• Angered

• Hurt

• Judged

• Gaslighted

• Voiceless

• No Choices

• Demoralized

• Absolutely worthless

• "I'm so appalled the conversation is still the same after 20+ years."

**What do parents need to prevent intervention and involvement by the child welfare system; and what do families need if they become involved in the child welfare system?**

Increased access to economic supports like affordable housing, childcare, income supports, and quality mental and behavioral health services.

Avoid waiting for a crisis to happen before a family can receive community-based support.

The child welfare system must shift from a punitive system to a humane system that centers child and family well-being.

Caseworkers and investigators should listen to what survivors' need and not to take away what they have.

Prioritize addressing domestic violence, racism, sexism, and other forms of oppression at all levels.

Every parent should be informed of their rights and have knowledge of the child welfare system before an investigation starts.

<sup>\*</sup>The Accountability Dialogues is a three-part series of online discussions with domestic violence survivors of color about the impact the child welfare system has had in their lives and their communities. It allows policymakers and influencers to hear directly from survivors to raise awareness of the urgent need for change and accountability in child welfare. Developed by Futures Without Violence, Ujima, Inc., the National Center on Violence Against Women in the Black Community (Ujima), Latinos United for Peace and Equity (LUPE), and Women Transforming Families: Rising to End Violence, Oppression and the Legacy of Trauma (a project of Ujima).

The following case comparisons model how decisions could be evaluated using a survivor-focused approach in practice.

### Hypothetical Case: *State of ABC v. Emily Parker*

#### Facts:

Emily Parker is a single mother of two children, a son aged 12 and a daughter aged 14. The children were previously removed from Emily's custody twice because of incidents of domestic violence perpetrated against Emily by her former partner.

After another successful reunification with Emily, a caseworker conducted a surprise visit to their home. During the visit, the caseworker noticed Emily and her daughter emotionally upset, and learned that Emily's former partner had hit her while her son was present. The son confirmed the incident and expressed concern, saying that he would "kill him" if it happened again.

The caseworker testified that Emily stated she did not want to press charges against her former partner because she depended on him financially. Subsequently, the children were temporarily removed from Emily's custody and placed with the child welfare agency again. A neglect petition was filed against Emily, alleging that she failed to protect the children from physical, mental, and emotional abuse resulting from the domestic violence.

#### Analysis of *Nicholson* Factors:

**1. Imminent Harm to the Child**—According to *Nicholson*, imminent harm to the child exists when the child welfare agency provides evidence of emotional and actual or imminent harm to the child. Witnessing domestic violence does not inherently constitute grounds for a determination of actual or imminent harm.

While acknowledging the emotional distress that may result from such exposure, the court found that the agency failed to provide concrete evidence indicating actual harm to the children during this incident. The legal threshold for imminent harm, as articulated by *Nichol-*

*son*, required a more direct nexus between the witnessed event and tangible harm to the child. The mere act of the son witnessing domestic violence does not automatically satisfy the criteria for establishing imminent harm.

- 2. Parental Care**—Per *Nicholson*, child welfare agencies must show that the survivor failed to provide a minimum level of care for their child. Being a victim of domestic violence is not evidence of failure to protect or failure to exercise care for one's child. In Emily's case, her decision not to press charges against her abusive boyfriend due to financial dependence likely triggered concerns of the child welfare agency regarding her ability to safeguard her children. Her fear of pursuing legal action seemed to stem from the potential financial repercussions, given her dependency on the person who subjected her to violence. However, not pressing charges or not obtaining an order of protection does not constitute a failure to provide a minimum level of care, and neither do they resolve domestic violence issues.
- 3. Agency Support**—According to *Nicholson*, child welfare agencies must demonstrate efforts to prevent the separation of a child from a parent who is a domestic violence survivor. This requirement goes beyond reasonable attempts and requires tailoring support to the specific needs of the survivor.

In Emily's case, the court acknowledged a lack of agency support in addressing her financial dependence on her boyfriend. The child welfare agency should have taken steps to offer resources such as housing, transportation, financial counseling, and job training to empower Emily toward financial independence.

The agency's failure to provide these resources contributed to the challenges Emily faced, potentially limiting her options to leave an abusive environment. In essence, the agency did not fulfill its obligation to address the specific needs of a domestic violence survivor, as outlined in the *Nicholson* ruling. A more comprehensive approach, addressing both the immediate safety concerns and the financial dependencies, would have better supported Emily in making a decision that prioritizes her and her children's well-being.

- 4. Harm of Removal**—*Nicholson* requires the child welfare agency to provide evidence of a thorough evaluation of imminent harm versus the harm the child might endure through separation from their parent who is a survivor of domestic violence.

Research indicates that such removal can disrupt stability and adversely affect the emotional and mental well-being of children.<sup>3</sup> Research also consistently demonstrates that abrupt separation from a caregiver, particularly in cases involving trauma or violence, could have detrimental effects on a child's emotional and psychological development.<sup>4</sup> These impacts included heightened stress, anxiety, and difficulties in forming secure attachments.

Therefore, a comprehensive evaluation of the immediate safety concerns and also the potential long-term harm caused by removing the two children from Emily's care should have been conducted. In the absence of this evaluation, no removal should have occurred.

## Hypothetical Case: *State of XYZ v. Lisa Thompson*

### Facts

Lisa Thompson is a mother of six children. The child welfare agency investigated the family multiple times over five years, during which domestic violence occurred frequently in the home. The children were present during some incidents of domestic violence.

Lisa took out a protective order against the children's father and was referred to domestic violence counseling. However, there was a pattern of her returning to the father even after his violent behavior. The violence often resulted in emotional distress and fear for the children as they witnessed their father's violence against their mother. In other areas (academics, social relationships, extracurricular activities), they appeared to be functioning well.

The court held that reunification efforts with Lisa would be futile and that she had subjected her children to aggravating circumstances by failing to protect them from domestic violence. The court decided to end reunification efforts and visitation with both parents, ordering the placement of the children in foster care or with other approved caregivers.

### Analysis of *Nicholson* Factors:

- 1. Imminent Risk of Harm**—According to *Nicholson*, witnessing domestic violence does not

automatically indicate actual or imminent harm. In this case, the children witnessed domestic violence between their parents but did not suffer any physical harm themselves. However, ongoing exposure to these types of assaults may place a children's emotional well-being and safety at risk. *Nicholson* acknowledges that witnessing such violence can have emotional repercussions, as it appeared to in this case to some degree. However, there were also indications that the children's overall functioning was not impaired.

- 2. Parental Care**—To comply with *Nicholson*, child welfare agencies have to provide evidence that the parent from whom the child was removed failed to meet a minimum standard of care. Importantly, *Nicholson* underscores that being a victim of domestic violence does not constitute proof of a failure to protect or care for one's child.

In considering Lisa's case, the court held that reunification efforts with her would be futile and that she had subjected her children to aggravating circumstances by failing to protect her children from domestic violence. However, the court failed to identify the abusive father as the parent who failed to meet a minimum standard of care as he perpetrated violence against the



children’s mother.

Further, Lisa’s actions to obtaining a protective order and seek domestic violence counseling showed care for the safety of her children. Without a comprehensive understanding of the underlying challenges Lisa faced that might have caused her to return to the abusive father of her children, the assessment of her parental care was not sufficient. The agency should have helped to address potential obstacles, recognizing that such support was vital for creating a safer environment for Lisa and her children.

- 3. Agency Support**—To comply with *Nicholson*, child welfare agencies must provide evidence of efforts to prevent the separation of a child from a parent who was a domestic violence victim. This requirement goes beyond reasonable attempts and necessitates tailoring support to the specific needs of the survivor. Lisa’s referral to domestic violence counseling indicated an initial recognition by the agency of the need for intervention in the family’s situation.

The caseworker stated that Lisa kept returning to the abusive relationship but did not offer Lisa any additional resources that could help her gain independence for her and her children. Mandating a survivor to domestic violence counseling does not remove specific barriers they may be facing.

An additional critical aspect arose concerning the effectiveness and scope of the agency’s efforts. Notably, the agency failed to provide any resources or referrals for the father, who was identified as the source of violence. To fulfill the evidentiary burden outlined in *Nicholson*, the court must thoroughly assess the agency’s support initiatives, particularly in addressing the behaviors of the person using violence, or DV perpetrator.

- 4. Harm of Removal**—Removing children from the care of their parent who is a victim of DV can disrupt stability and detrimentally affect the emotional and mental well-being of children. Numerous studies consistently demonstrated that abrupt separation from a caregiver, especially in cases involving trauma or violence, could result in heightened stress, anxiety, and challenges in forming secure attachments.<sup>5</sup>

A child welfare agency must furnish evidence showcasing a thorough evaluation of potential imminent harm versus the harm that children might experience from being separated from their parent, particularly a domestic violence survivor—which it failed to do here. Without such an evaluation, a removal is not warranted.

## Endnotes

<sup>1</sup> The federal district court decision found that these removals occurred on a routine basis and government practice unnecessarily and routinely charged parents with neglect and removed their children in instances where the mothers—who had engaged in no violence themselves—had been the victims of domestic violence. The court also concluded that ACS conducted these removals without ensuring that the mother had access to the services she needed, without a court order, and without returning children promptly after being ordered to do so. Finally, the court found that ACS caseworkers and case managers lacked adequate training about domestic violence, and often separated mother and child when less harmful alternatives were available. 203 F. Supp.2d at 228–229.

<sup>2</sup> See Futures Without Violence. “Race, Class, and Gender and Mandated Reporting.” Domestic Violence and Child Abuse Reports: A Complex Matter; Child Trends. State-level Data for Understanding Child Welfare in the United States, April 27, 2023.

<sup>3</sup> Lievano-Karim et. al. *A Balancing Act: How Professionals in the Foster Care System Balanced the Harms of Intimate Partner Violence as Compared to the Harm of Child Removal*, 2023.

<sup>4</sup> Meier & Sankaran. *Breaking Down the Silos that Harmed Children: A Call to Child Welfare, Domestic Violence, and Family Court Professionals*, 2021.

<sup>5</sup> Sankaran, Church, & Mitchell. [A Curse Worse than the Disease? The Impact of Removal on Children and their Families](#), 2019.

# Trauma of Removal Research

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