Nos. 09-FM-001152 & 09-FM-001337

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

E.J.,
APPELLANT,

v.

D.J.,
APPELLEE.

ON APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA FAMILY COURT – DOMESTIC RELATIONS BRANCH, DRB293608

REPLY BRIEF OF APPELLANT

*[redacted]

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*[redacted]

Dated: April 30, 2010

Counsel for Appellant

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INTRODUCTION

Instead of focusing on the legal errors raised by this appeal, Mr. J both distorts those issues[1] and simply re-argues the facts by attacking Ms. J's credibility and motives while painting Mr. J as the victim of her supposed malevolent alienation of L.J's affections.[2] Not only are the majority of Mr. J's factual characterizations verifiably incorrect,[3] unsupported by the record,[4] or drawn solely from his own testimony, most are also irrelevant to the legal issues raised by Ms. J, which are based on the court's *findings* and the *uncontested* evidence. The purpose of this appeal is not to re-litigate the facts, but rather to correct the trial court's failure to correctly apply the custody statute to the facts *it found.*

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[1] Mr. J repeatedly misstates Ms. J's positions and arguments to make them sound extreme or untenable. For instance, at no time has Ms. J suggested that an abuse offender "should never have contact with his children." Appellee's Br. 20. On the contrary, Ms. J has merely argued only that the children's emotional well-being and physical safety is essential to having a healthy relationship with their father. *See, e.g.,* Appellant's Br. p. 30 n.18.

[2] In fact, Mr. J's repeated implication that Ms. J exaggerates Mr. J's abuse out of ill will or litigation strategy (Appellee's Br. 5, 7-8) is contradicted by Dr. Zu's expert testimony that, in contrast to Mr. J who has "recurring difficulties in being able to forgive and forget" (J.A. 543), Ms. J "may be somewhat more forgiving than the average child custody litigant, more able to let go of resentments and move on with her life, which should be favorable for the children") (J.A. 539).

[3] For example, Mr. J asserts that Ms. J's concerns about his potential neglect of young S.J are unfounded, because "both parents were in the house when these incidents occurred." Appellee's Br. 21. In fact, even Mr. J's citation to Dr. Zu's report contradicts this assertion with respect to one incident. *See* J.A. 534. As for the second incident in 2008, Ms. J was in the house but she and the rest of the family had been explicitly ordered downstairs so that Mr. J could be alone with S. J.A. 360.

[4] *E.g.,* Appellee's Br. 22 (claiming, without citation, that the use of the word "batterer" to describe Mr. J is "more of Ms. J's growing exaggeration which has contributed so much to L.J's alienation").

Those findings embody two key points which are not debatable here. First, Mr. J committed domestic violence. The court adjudicated Mr. J a two-time perpetrator of intrafamily offenses involving intent to injure or frighten Ms. J, as well as a man who "used temper and intimidation to impose his will" and is "more likely to lose his temper than most people." J.A. 3, 5. Second, the court's findings are also clear that *Mr. J* contributed to L's hostility toward him *and* that Ms. J merely acted - at most - from her natural feelings of fear due to Mr. J's abuse. J.A. 384, 427-28, 283-85. A core issue in this appeal is thus that, where an abuser's behavior *contributes* to a child's estrangement, such estrangement cannot become a ground for rebutting the presumption against custody to the abuser under D.C. Code Section 16-914.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO FIND ADDITIONAL INTRAFAMILY OFFENSES.

The trial court committed legal error by failing to make factual and legal findings regarding several additional incidents in which Mr. J committed physical or "intent-to-frighten" offenses. This legal error deprived this Court the ability to review the *legal* question of whether the facts as found constitute intrafamily offenses. The court also erred by failing to find that some of the uncontested facts do constitute intrafamily offenses. The ignored testimony included Mr. J's shaking and throwing Ms. J onto a bed in 1997; two reckless driving incidents in 2001-02 and 2004, one of which he *admitted*; a threatening statement he made to Ms. J while smashing the knife into the cutting board; a mishandling of L when she was a toddler; and a shoving of L.J into her mother and grandmother while he was enraged in 2008. *See* Appellant's Br. 5-10. The court made no explicit findings of fact about any of these incidents but referenced undefined

"incidents where [Mr. J] lost his temper" as "not fall[ing] within the definition of domestic violence in the District of Columbia." J.A. 3 n.2.

Mr. J argues that the trial court is not required to make such findings, because only one intrafamily offense is necessary to trigger the presumption against custody to an abuser, and additional offenses "[do] not add or detract from that shifting of the presumptions." Appellee's Br. 12. However, it is settled law in the District of Columbia that, when applying a statute in the context of domestic violence, the trial court must review the "entire mosaic" and not just a single, or the most recent, incident of violence. *See Tyree v. Evans*, 728 A.2d 101, 106 (D.C. 1999) (vacating the trial court's order refusing to extend Appellant's CPO and remanding the case for further proceedings including an examination of additional instances of violence). This court has held that in matters involving children and domestic violence "it is essential that the court avoid an unduly narrow focus" and that "the judge must be appraised of the entire mosaic." *Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. 1991) (vacating the trial court's denial of Appellant's CPO and remanding the case for further proceedings "which should result in the entry of more comprehensive findings of fact and conclusions of law" related to additional intrafamily offenses). Perhaps more fundamentally, when a court fails to fully assess the history and scope of intrafamily offenses, it is unable to accurately assess the harm the perpetrator has inflicted on the family and future risks to the children and adult victim. This assessment of future risk includes whether unsupervised access will "endanger the child or significantly impair the child's emotional development." *See* D.C. Code §16-914(a-1). A court cannot ignore large portions of the trial record and do justice to this standard.

In short, the "entire mosaic" of past abuse is directly relevant to a court's determination of whether, and how, the presumptions against custody to a perpetrator of intrafamily offenses are

rebutted. Thus, Mr. J's claim that a court may close its eyes after finding just a single intrafamily offense for purposes of custody and visitation adjudications is untenable.

Next, Mr. J argues that any evidence of an intrafamily offense prior to September 15, 2005[5] is barred by D.C. Code § 12-301(8)'s three-year statute of limitations. Appellee's Br. 12. This too is incorrect. Neither the Intrafamily Offenses Act nor the custody statute contains a statute of limitations and none applies under either law.[6] In fact, the D.C. Council eliminated the only statute of limitation included in the Intrafamily Offenses Act, which applied solely to dating relationships, in 2008.[7]

Finally, this Court has expressly rejected the argument that old intrafamily offenses can become stale or irrelevant in a custody or visitation determination about children's best interests:

> Chapter 10, § 16-1005 governing hearings in petitions for civil protection orders contains a subsection (c-1) which mirrors § 16-914(a-1). Thus, the legislature twice, and consistently, stressed two propositions: (1) a parent's commission of an intrafamily offense could impact the custody decision and result in a limitation on parental visitation rights; and (2) intrafamily offenses result in both emotional and physical harm to children. *In that regard, and significantly, the plain words of both § 16-914(a-1) and § 16-1005(c-1) do not place a time limit on the consideration of an intrafamily offense,* or distinguish between an intrafamily offense committed prior to or after the issuance of an initial custody and visitation order, or require a finding that a new intrafamily offense has been committed, when considering requests for modification of prior court orders.

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[5] The divorce and custody proceedings were consolidated with the civil protective order case. Ms. J obtained the temporary protection order on September 15, 2008. *See* J.A. 3, 518.

[6] When reviewing a statute, the court must first examine the plain language of the statute and its meaning. *See Cass v. District of Columbia*, 829 A.2d 480, 482 (D.C. 2003).

[7] The prior Section 16-1003(d) stated, "an action for an intrafamily offense under section 16-1001(5)(B) shall not be brought more than 2 years from the date the right to maintain the action occurs." D.C. CODE § 16-1003(d), *repealed by* Intrafamily Offense Act of 2008, D.C. Law 17-368, § 3(b)(2), 56 DCR 1338 (Mar. 25, 2009).

Wilkins v. Ferguson, 928 A.2d 655, 668-69 (D.C. 2007) (emphasis added). Appellee's claim that past intrafamily offenses are precluded from consideration must therefore be rejected.

For all these reasons, the court erred in failing to find additional intrafamily offenses, or at least making factual findings sufficient to allow this Court to review its conclusion that no additional offenses had occurred.

II. THE COURT'S FAILURE TO APPLY SECTION 16-914(A-1) WAS REVERSIBLE ERROR.

D.C. CODE Section 16-914(a-1) requires that:

> if the judicial officer finds by a preponderance of evidence that a contestant for custody has committed an intrafamily offense, any determination that custody or visitation is to be granted to the abusive parent shall be supported by a written statement by the judicial officer specifying factors and findings which support that determination. In determining visitation arrangements, if the judicial officer finds that an intrafamily offense has occurred, the judicial officer shall only award visitation if the judicial officer finds that the child and custodial parent can be adequately protected from harm inflicted by the other party. The party found to have committed an intrafamily offense has the burden of proving that visitation will not endanger the child or significantly impair the child's emotional development.

D.C. CODE § 16-914 (a-1). Despite finding that Mr. J had committed two intrafamily offenses, each involving intent to injure or frighten Ms. J,[8] the trial court failed to reference or consider this statutory standard in deciding Mr. and Ms. J's respective custody rights.

This Court's previous ruling in *Wilkins* makes clear that the trial court's failure to apply Section 16-914(a-1) requires reversal. Contrary to *Wilkins*, Mr. J argues that the court need not

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[8] Mr. J belittles the adjudicated offenses suggesting they were entirely non-concerning. Appellee's Br. 4 ("Ms. J did not react fearfully. She did not retreat. She did not leave the house . . . Instead, she continued the argument"). In fact, these assertions are not contained in the pages cited, and are directly refuted in the record. Ms. J testified that she "was scared for [her] life" (J.A. 60) and repeatedly referenced her desire to have as little as possible to do with Mr. J because he had almost strangled her. J.A. 428 ("[H]ow do you expect me to treat a person who tried to strangle me? Yes, I'm afraid of him. I don't want to get anywhere around him").

expressly discuss the statutory provision, and that the court's opinion as a whole provides the analysis required under subsection (a-1). *See* Appellee Br. 16. Yet, in *Wilkins*, as in this case, the decision under review was also lengthy and detailed, and contained extensive factual discussion before concluding that the evidence of child sexual abuse was "insufficient" to justify restrictions on Mr. Ferguson's unsupervised access. *Wilkins*, 928 A.2d at 664. Nonetheless, this Court reversed because, among other things, the "order . . . contains no reference to applicable statutory provisions," *i.e.*, subsection (a-1). *Id*. at 670 (the court did not "make the required finding under Section 16-914(a-1)") (citing *In re L.L.*, 653 A.2d 873, 880 (D.C. 1995)); *see also Dumas v. Woods*, 914 A.2d 676, 678 (D.C. 2007) (citing *Johnson v. Washington*, 756 A.2d 411, 418 (D.C. 2001) ("the rules of the court require detailed written findings of fact and separate conclusions of law on all matters" for the appellate court to review whether a trial court abused its discretion); *Ysla v. Lopez*, 684 A.2d 775, 781 (D.C. 1996) ("The articulation of the court's reasoning is important because it aids the appellate court in conducting its review and supplies to the parties information that may persuade them as to the correctness of the trial court's decision. Such express reasoning can also function as a guide to what changes in circumstances would or would not support a modification of the order"). Indeed, the *Wilkins* Court refused to infer that the trial court had implicitly considered or met the subsection (a-1) standard, even as it acknowledged that the trial judge was well aware of "the governing statutory scheme." 928 A.2d at 670 (noting that the court had previously applied the parallel provision in the protection order statute, Section 16-1005(c-1)).

Mr. J next argues that *Wilkins* is distinguishable because in *Wilkins* several mental health experts agreed that visitation should be supervised, whereas here the mental health experts purportedly agreed that "there is no risk of harm." Appellee's Br. 17. However, even if this

characterization of the mental health testimony were accurate,[9] the *Wilkins* decision does not stand for the proposition that where experts are unanimous the court must follow them, regardless of their opinions. Rather, the experts' unanimity in *Wilkins* regarding the appropriateness of visitation supervision was *consistent* with the aim of the statute's protective provisions. The decision by no means suggests that where the experts agree that there is *no risk,* while minimizing or ignoring intrafamily offenses the statute treats as significant, the court need not apply subsection (a-1). In this case, the experts on whom Mr. J relies prioritized maximizing his relationship with the children over possible emotional harm to the children, and did not concern themselves with the statute's definitions or protections. *See generally* Appellant's Br. Sec. III. For example, neither expert followed up on the detailed reports of four-year-old S.J's significant emotional distress after visits with her father. *See* Appellant's Br. 11; J.A. 337-39, 347 (Dr. R.Zi.took Mr. J's word for it that the visits were a "great success").

[9] Mr. J repeatedly invokes the opinions of *four* mental health professionals. However, only two, Drs. Zu and R.Zi., were witnesses at trial and qualified as experts or subjected to cross-examination. *See* J.A. 200, 300-01. Moreover, while some of the experts opined that Mr. J was not dangerous, none went so far as to actually state, as Mr. J claims, that Mr. J poses "no risk." Appellee's Br. 15-18, 25-26. Indeed, Dr. Zu reported that Mr. J may be "mildly above average risk for loss of control over his temper . . . acute frustration or aggravation may provoke outbursts . . . [that he is prone to] blaming other people or unfavorable situations for his difficulties, and he may rationalize his expressions of anger with a denial of hostile intentions . . . [that he is] impatient and easily frustrated when his wishes are not gratified . . ." J.A. 542. He further found that Mr. J is capable of "intense, dramatic, and even immature" outbursts and is "a risk for emotional outbursts and impulsive actions." J.A. 542 (emphasis added). Given these findings, along with Dr. Zu's acknowledgment that Mr. J shook his daughter during an altercation over a toothbrush (J.A. 237) - it would be difficult to credit any opinion that Mr. J presents no risk to his children.

Rather than prioritize child safety as the statute and this Court require, these experts relied on "alienation" theory to discount and minimize the domestic violence.[10] *See* Appellant's Br. 43-47; *see also infra* Sec. III. This approach is directly contrary to the intent and language of the statute, which prioritizes protection of children's safety and emotional well-being once a finding of an intrafamily offense has been made. *Wilkins*, 928 A.2d at 668-670. Therefore, the court's reliance on the experts' opinions does not make the order consistent with *Wilkins*.[11]

Mr. J's remaining arguments boil down to the claim that Ms. J was less accusatory prior to the litigation, implying that her testimony about specific incidents at trial should be ignored or discounted. Appellee's Br. 21. However, even if this portrayal of the past were accurate, not

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[10] Dr. Zu also minimized Mr. J's violence by claiming it was not "control" violence but rather "situational" violence, which, he implied, is less concerning. J.A. 216-22, 286-88. However, the statute makes no distinction between types of violence – nor should it, given that this claim (that "situational" violence is not dangerous) has no empirical or scientific basis. *Accord*, Brief of Amici Curiae, 16-18; J.A. 160-163 (even "situational" violence can be severe and negatively affect children) (Testimony of Dr. S).

[11] Rather than address the evidence of the emotional harm shared custody would pose to S.J, Mr. J points to Drs. Zu's and R.Zi.'s recommendations for shared custody. Appellee's Br. 20. It is certainly true that both psychologists somewhat inconsistently recommended some version of joint custody while also expressing serious concerns about the impact of this on 4-year-old S. *See* J.A. 331-32 ("the emotional impact on S.J going back and forth between households is going to be tough") (Testimony of Dr. R.Zi.); J.A. 208 (S.J "is so confused that going back and forth between the two is like incredibly – extremely stressful and difficult for her, *more than she can manage*") (Testimony of Dr. Zu) (emphasis added). What is striking is that even these experts agreed that the instability and disruption of a 50-50 arrangement is so destructive as to be "more than [S.J] can manage." *See* J.A. 208; 331-32 Perhaps this is why even Dr. R.Zi.backed off from shared custody at the time of trial, where she recommended only "joint custody" and "liberal access," while expressing concerns with a 5:2 2:5 arrangement for S.J. J.A. 331-32 In any event, fortunately for the District's children, subsection (a-1) puts the children's emotional well-being above fairness to the parents or the distribution of blame, which too often fuel forensic recommendations. *See Wilkins*, 928 A.2d at 667 ("where visits with one parent have 'detrimental effects' or 'would place [the child's] emotional welfare at risk,' the parental right to immediate and ongoing visitation may have to yield, or may need to be closely supervised. This is particularly true where, as here, the trial court has found that a parent committed an intrafamily offense") (quoting *In re D.M.*, 771 A.2d 360, 366 (D.C. 2001) (other citations omitted).

only would Ms. J's and Ms. L's prior tolerance and accommodation of Mr. J's behavior be irrelevant to the truth of their specific testimony describing Mr. J's destructive conduct, their credibility is not the issue on this appeal. Rather, the issue is the court's failure to make findings on these factual questions. *See* Appellant's Br. Sec. I.

III. THE COURT'S REBUTTAL OF THE PRESUMPTION AGAINST JOINT CUSTODY TO A PERPETRATOR OF INTRAFAMILY OFFENSES BASED ON PURPORTED ALIENATION WHICH WAS CAUSED IN PART BY THAT PARENT, VIOLATES SECTION 16-914.

Ms. J argues that the trial court erred in holding that D.C. Code Section 16-914 (a)(2)'s presumption against joint custody to an intrafamily offender was rebutted by evidence of the children's alienation. Insofar as the presumption reflects the D.C. Council's awareness that someone who has already committed intimate violence may be physically and/or emotionally harmful for the children, the children's "alienation" does nothing to alleviate that concern. Moreover, to the extent that the children's alienation is a response, even in part, to Mr. J's own abusive and angry conduct, awarding him increased access on that ground turns the presumption on its head, making his abuse and its negative impact on his children a reason to give him more, rather than less, parenting time. This would fundamentally contradict the meaning and purpose of subsections (a-1) and (a)(2).

Mr. J's sole legal argument regarding the rebuttal of the presumption seems to be that Ms. J's position is somehow inconsistent with the "civil" and purportedly "rehabilitative" purpose of the statute. Appellee's Br. 22 (citing *Cruz-Foster v. Foster,* 597 A.22d 927 (D.C. 1991) (discussing the Intrafamily Offenses Act). Putting aside the fact that the relevant statute for this proceeding is not the Intrafamily Offenses Act, but the custody statute, the argument misses the mark. Nothing in Ms. J's position asks this Court to enforce a "punitive" use of the custody statute. Rather, Ms. J seeks only to ensure that this Court enforce the *protective* purpose of the

controlling statute – *i.e.*, to ensure that the children's emotional and physical well-being are the first priority in the custody and visitation determination, as required by the statute and this Court in *Wilkins.* Mr. J's suggestion that emphasizing the children's safety, as the two domestic violence presumptions in subsection 16-914 require, is somehow akin to "punishing" Mr. J, seems to reflect the psychologists' perspective that, because it would not allow prioritization of Mr. J's paternal rights, putting the children's interests and needs first was the equivalent of being "punitive." However, the relative ranking of these factors is not a decision for these "experts" but has already been determined by law in the District of Columbia.

Mr. J also endeavors to undercut Ms. J's position on this issue on appeal by mischaracterizing it, as saying "that D.J.'s actions were the sole cause of L.J's alienation." Appellee's Br. 22. On the contrary, Ms. J's argument expressly rests on the assumption that L.J's "alienation" or estrangement results from a confluence of factors including the behaviors and attitudes of both parents, but so long as some proportion of the alienation is potentially due to her father's abusiveness, it is unlawful to treat that alienation as grounds for overcoming the presumption against custody to an abuser. Appellant's Br. 38 *et seq.* ("Mr. J's Behavior Undisputedly *Contributed* to L.J's Estrangement From Him") (emphasis added).

Moreover, it is not true, as Mr. J suggests, that Ms. J's brief "minimizes her own contributions" to L.J's estrangement. Appellee's Br. 23. Rather, Ms. J devotes seven pages of her Opening Brief to discussing Ms. J's contributions to L.J's estrangement, as found by the court and the psychologists. *See* Appellant's Br. 41 *et seq*. These contributions were expressly found by the court and the evaluators to be *unintentional.* The court thus found that L.J was "perhaps, unconsciously . . . picking up on" her mother's "legitimate" fear and wariness of Mr. J. J.A. 427-28 (Ms. J was "not overtly directing or influencing the children as Mr. J has argued"), 384 ("*you*

are unable to see how indirectly you influence them because I agree with you that there are grounds for L.J to be angry with her father . . . she finds some corroboration to those thoughts and beliefs in you, *whether you're aware of it or not*") (Opinion of Court) (emphasis added); *see also* J.A. 290, 559, 336.[12] Ms. J's argument is that, *even given whatever contributions the court found she has made*, those contributions are acknowledged to be unintentional and to stem from her "legitimate" fear and discomfort due to Mr. J's abusive conduct, and therefore, they are natural consequences of Mr. J's abuse. *See* J.A. 428. As such they are not a proper basis for overcoming the presumption against joint custody.

Mr. J does not contest Ms. J's argument that the alienation theory, as invoked by the psychologists,[13] simply re-framed and masked the logical consequences of his behavior. Rather he simply reiterates the psychological critique of Ms. J as "inappropriately" afraid or over-reacting to Mr. J. *See* Appellee's Br. 5, 7-9, 14. Yet it is precisely because alienation theory was

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[12] Despite the court's judicial finding, based on the psychologists' own findings, Mr. J appears determined to stick to his story that Ms. J herself actively tried to alienate the children. Appellee's Br. 20 (claiming inaccurately that Dr. Zu was concerned about "pressures that *E.J. and* L.J would put on S.J to adopt their own estrangement from her father") (emphasis added), 5 (asserting that "Ms. J had . . . enlisted L as the enforcer of that theory [that Mr. J was an abuser]"). Mr. J similarly falsely claims that Ms. J withheld visitation for a month between the TPO and CPO. *Id*. at 4-5. The record actually shows that Ms. J acquired the TPO the day after a visit – and the TPO itself authorized supervised visitation, which he *declined*. J.A. 516, 518. Two weeks later he agreed to the CPO which provided him regular unsupervised visitation. J.A. 518. He visited two days later, on Wednesday October 1, just over two weeks after his last visit. J.A. 182.

[13] Dr. G, whose letter containing a "clinical determination" that L.J was suffering from parental alienation is cited by Mr. J, actually served as Mr. J's personal therapist, and had never spoken to or observed Ms. J or either of the children. *See* Appellant Appendix at iii; J.A. 495. Diagnosis without meeting the "patient" is ethically discouraged by The American Psychological Association's 2002 Ethical Principles of Psychologist and Code of Conduct. American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, 57(12) Am. Psychologist 1060-1073 (2002).

used in this way - to pathologize or marginalize Ms. J's natural responses to abuse - that the court's reliance on it is akin to simply negating the abuse and the statutory protections. *See* Appellant's Br. Sec. III.

The remaining bulk of Mr. J's response seeks only to re-litigate the facts, suggesting, for instance, that the use of the word "batterer" is nothing more than "hyperbole." Appellee's Br. 22. The facts, and labels, are not at issue in this appeal: All of Ms. J's arguments are based on uncontested facts or *prima facie* cases that the court ignored. However, Mr. J's pervasive claim that he is in no sense an abuser or batterer merits a brief response here.

Regarding Mr. J's abuse, the court here explicitly found that Mr. J "used temper and intimidation to impose his will," that he twice, with intent to frighten or injure, committed assaults against Ms. J, and that Ms. J's fear of him is "legitimate."[14] J.A. 3, 5, 8, 428, 493-94; Appellant's Br. 5. The court also noted that his smashing a knife into a cutting board so hard that it broke, during an argument with Ms. J, was further evidence of his explosive "anger" problem. As the court stated, Mr. J is unquestionably a perpetrator of intrafamily offenses. J.A. 3, 8.

Moreover, the entire constellation of Mr. J's behaviors, whether or not all constituting intrafamily offenses or even severe violence, amply describes an abuser as understood in the domestic violence literature.[15] Indeed, while Ms. J has not accused Mr. J of "hitting," Appellee's Br. 22, she clearly stated that:

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[14] As noted in Section I of Ms. J's Opening Brief, there is also additional uncontested and/or *prima facie* evidence of several other instances of Mr. J's explosive and physical rages toward Ms. J, including several involving L.

[15] The implication that someone is not an "abuser" or "batterer" if the specific acts of violence were not severe is a fallacy long challenged by the domestic violence field. *See, e.g.*, Lundy Bancroft & Jay Silverman, *The Batterer as Parent* (Sage 2002) 3 ("our definition [of a batterer] does not require the presence of beatings, but it does require that there at least be actions clearly *(cont'd)*

> when he becomes angry, he clenches his fist, he turns red, and his demeanor can be very frightening. . . . L.J has always been somewhat frightened of him, even during those times when their relationship was far more normal.

J.A. 569 (emphasis added).

Mr. J also repeatedly points to Dr. Zu's report that L.J described her relationship with her father before the divorce as "normal" and "fine."[16] Appellee's Br. 2, 3, 23. However, he omits her far more informative additional description of the relationship, as reported by Dr. Zu:

> [I]n the weeks leading up to the divorce she was aware of the tension between her parents and fearful that there might be a divorce. . . . [S]some anger had arisen because she remembers her father having referred to her mother as "an idiot." . . .
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> Nevertheless, she maintained some wish to see her father at that point. Their relationship began to deteriorate far more seriously *when visits began at their father's house.* At one point . . . L.J remembers her father having gotten

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intended as threats, such as raising fists . . . or *deliberately dangerous driving*.") (emphasis added); *see also* Appellant Appendix at i-ii ("[a]bout 99 percent of abusive episodes are non-injurious and don't result in any kind of outside intervention. . . . even if most of the tactics involve say grabbing or shoving but sufficiently frequently to create an atmosphere of physical intimidation. The cumulative effect is typically a level of fear that is going to appear to be vastly disproportionate to the severity of violence in any given incident and those people who are not expert in this area, evaluative psychologists and what have you, who see levels of fear that are vastly disproportionate to the proximate level of violence in a given episode frequently conclude that victims are exaggerating because they tend . . . to view the domestic violence through the prism of a discrete episode") (Testimony of Dr. S).

In fact, it is notable that the court's and Dr. Zu's characterizations of Mr. J's persona actually mirror the domestic violence literature. *See* Bancroft & Silverman, *supra* at 2 ("[b]atterers tend to be authoritarian yet neglectful parents"); 30 (batterers "often expect their will to be obeyed unquestioningly, taking an intolerant view of any resistance or arguing from their children . . . who need to be able to struggle with their parents as part of the process of identity formation"); 17-18 ("[o]ur clients [batterers] are consistent in holding beliefs that. . . shift blame to their partners' conduct. . . [t]he batterer tends similarly to shift responsibility for the *effects* of his actions. . . *If his abusive behavior drives his children away from him emotionally, he is likely to accuse the mother of 'alienating' the children from him.*") (emphasis added). *Cf.* J.A. 542-543 (Zu Report).

[16] The wording of Dr. Zu's report implies that these words might not have been L.J's own: The Report reads "L.J's *descriptions suggested* that her relationship with her father was 'fine' and 'normal' prior to August of 2008." J.A. 544 (emphasis added).

> angry at both her mother and grandmother and expressing this anger through the use of his "middle finger." Later . . . she remembers her father having used bad language referring to her grandmother. She noted that her father has seemed, throughout the conflict with her parents, to be the more angry. . . . The real difficulties for her began on a visit in October when her father became angry with her and shook her. At that point she began to feel that she did not want to be with him anymore, that she no longer loved him. . .
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> . . . [The shaking made] her "feel awful." . . . [It] had not really hurt, but it was "scary." . . [S]he had also sustained a bruise on her right shoulder.

J.A. 544-45 (emphasis added). In short, L.J has her own understandable reasons for fear and hostility toward her father.

Finally, regarding legal custody, Mr. J yet again caricatures Ms. J's argument, claiming that she argues that "any intrafamily offense should preclude joint legal custody." Appellee's Br. 26. At no time has Ms. J made such a claim – which would be patently inconsistent with the fact that the presumption against joint custody to a perpetrator of an intrafamily offense *is rebuttable*. Rather, Ms. J argues that the *court's own findings* that the parties "are not able to reach joint decisions regarding the children," J.A. 7, that Mr. J has an explosive and intimidating temper, that he has committed at least two intrafamily offenses, and that Ms. J is "legitimate[ly]" afraid of him, preclude an award of joint legal custody. Appellant's Br. 37. Ordering that the parties co-parent under circumstances such as these simply creates a cycle of endless stress and conflict - for the children as well as the adults. Mr. J offers no response to this point.

IV. THE AMICUS CURIAE BRIEF SHOULD BE CONSIDERED BY THIS COURT BECAUSE IT PROVIDES HIGHLY RELEVANT INFORMATION ABOUT THE KEY ISSUES IN THIS CASE.

Amici's proffered brief discusses the origins of and problems with alienation theory, its legal critiques and rejections in the context of custody litigation, as well as the limited empirical basis or knowledge about the concept of "situational" or "common" couple violence. Amici explain how alienation theory is often misused to trivialize the impact of domestic violence on

adults victims and their children, and to mask consequences of abuse and risks to children, and point out how that occurred here. The majority of Mr. J's arguments against the *amicus* brief were raised in his Opposition to Motion for Leave to File Amicus Curiae Brief and specifically addressed by Amici's Reply. A few points merit an additional response.

First, the bulk of Mr. J's opposition mischaracterizes Amici's substantive arguments. For instance, Amici do not argue that "all claims of domestic violence are true and all claims of child alienation are false." Appellee's Br. 30.[17] Nor do they need to in this case. Given that the trial court already found domestic violence here, Amici seek to inform this court about the pernicious ways that alienation theory is frequently misused to refute valid claims of abuse, or, as here, to overcome the natural and legal implications of that abuse. *See* Amicus Br. 13-14 (urging that courts "carefully scrutinize the facts of the case and distinguish cases where 'children are critical of one parent because they have been inappropriately manipulated by the other . . ., and situations in which children have their own legitimate grounds for criticism or fear of a parent which will likely be the case when that parent has perpetrated domestic violence'"(citation omitted)).

Mr. J similarly hyperbolizes that if this Court adopts Amici's argument, it would essentially prohibit judges from *ever* finding that the presumption against joint custody to a batterer was rebutted. Appellee's Br. 30. Neither this assertion - nor its implication - can be found in Amici's brief.

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[17] Mr. J contradicts himself when he later states that "'Amici acknowledge that there undoubtedly is such a thing as alienating behavior by a parent who denigrates the other parent to the children.'" Appellee's Br. 35, citing Amici Br. 13.

Second, Mr. J continues to convey a fundamental misunderstanding of the role of amicus briefs - as opposed to party briefs - in appellate cases.[18] Contrary to his claim that this Court should not consider extra-record social science and law review articles,[19] in fact, courts can, and routinely do, properly rely on the non-record evidence offered by *amici curiae*. For example, in *Webster v. Reproductive Health Servs*., 492 U.S. 490 (1989), the Supreme Court repeatedly cited data from the amicus briefs:

> the cost of examinations and tests that could usefully and prudently be performed when a woman is 20-24 weeks pregnant to determine whether the fetus is viable would only marginally, if at all, increase the cost of an abortion. See Brief for American Association of Prolife Obstetricians and Gynecologists et al. as *Amici Curiae* 3 [citations omitted]; cf Brief for American Medical Association et al. as *Amici Curiae* [citations omitted].

Id. 530-31 (O' Connor, J., concurring in part); *see also* U.S. S. Ct. R. 37(1) ("An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.").

This Court too has relied on non-record evidence provided by *amici curiae*. *See Dean v. District of Columbia*, 653 A.2d 307, 326 n.21, 327, 329 (D.C. 1995) (in deciding legal questions appellate courts have discretion to consider "legislative facts" obtained from non-record sources such as a "Brandeis brief," without expert testimony or cross-examination); *Nixon v. United States*, 728 A.2d 582, 589 (D.C.1999) (noting statements of American Psychological Association

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[18] None of the cases Mr. J cites for his assertion that this Court should not "consider any portion of *Amici*'s brief which purports to offer interpretations of literature which is not part of the record" address *amicus* briefs. Further, all of the cited cases are from other jurisdictions and are not binding on this Court.

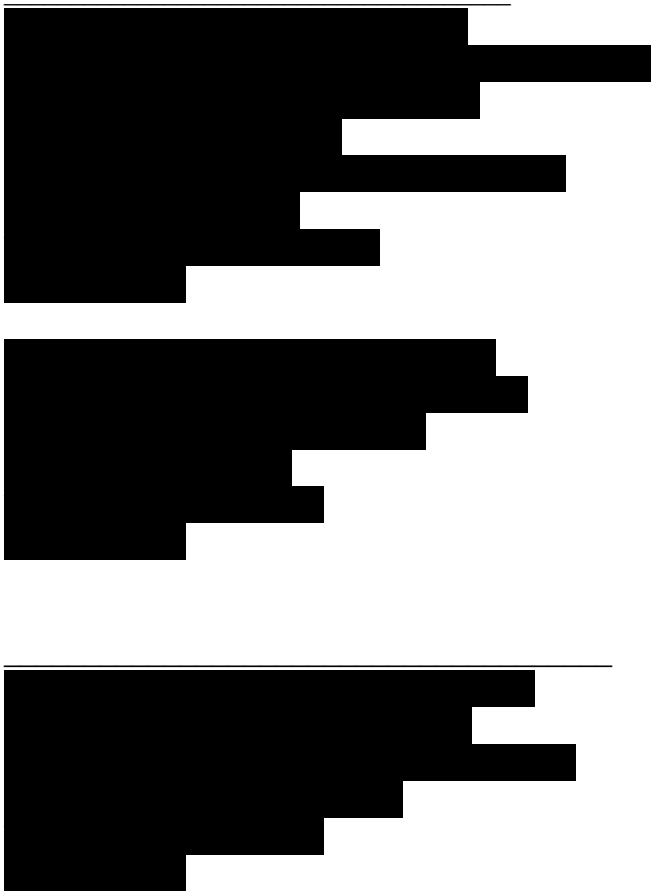
[19] Mr. J also challenges the inclusion of two New York trial court unpublished decisions. Appellee's Br. 31. However, unlike a party brief, the *amicus* brief did not cite these cases as binding precedent on this Court, but simply as additional information for the Court, akin to the other legal and social science information commonly included in *amicus* briefs.

from their amicus briefs in other cases, as evidence of the "general acceptance" of expert testimony about 'battered woman syndrome'"(citation omitted)); *In re Melton,* 597 A.2d 892, 902 (D.C. 1991) (citing U.S. Attorney's amicus brief for proposition that "a psychiatrist could be roundly criticized within . . . the profession for *not* interviewing family members").

In short, none of Mr. J's arguments justify excluding the Amicus brief from this Court's consideration. Should the Court find Amici's arguments unpersuasive, it is free to disregard them – but consider them it should.

CONCLUSION

Appellant respectfully requests that the Court reverse and remand this case to the trial court for further review in accordance with D.C. Code Section 16-914.



Dated: April 30, 2010 *Counsel for Appellant*

CERTIFICATE OF SERVICE

I, [redacted], do hereby certify that I have caused to be delivered by United States Mail, first class and postage prepaid, a true and correct copy of the Reply Brief of Appellant to the following individual(s) at their usual mailing addresses:

[redacted]

[redacted]

Counsel for Appellant

This the 30th day of April, 2010.