

**IN THE
COURT OF APPEALS OF VIRGINIA**

RECORD NO. 0068-11-2

Ms. G, **Plaintiff/Appellant,**

v.

Mr. G, **Defendant/Appellee.**

**BRIEF AMICI CURIAE on behalf of the
Domestic Violence Legal Empowerment and Appeals Project, Justice for Children,
National Coalition Against Domestic Violence, and Leadership Council on Child Abuse
and Interpersonal Violence**

IN SUPPORT OF APPELLANT

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INTEREST OF AMICI CURIAE

Domestic Violence Legal Empowerment and Appeals Project

The Domestic Violence Legal Empowerment and Appeals Project (“DV LEAP”) was founded in 2003 by one of the nation’s leading domestic violence lawyers to further the civil rights of battered women and children by making appellate litigation possible. DV LEAP’s mission is to establish strong legal precedents upholding the rights of victims of abuse, and to hold trial courts accountable to the law by ensuring appropriate appellate review. DV LEAP fills a vacuum in advocacy for victims of abuse by providing *pro bono* appeals, training, and strategic assistance to lawyers and courts. While DV LEAP prioritizes cases from the District of Columbia, DV LEAP also accepts cases of substantial importance from other states. DV LEAP also organizes and spearheads the domestic violence community’s advocacy in Supreme Court domestic violence litigation. DV LEAP has a particular expertise and interest in national and local issues relating to custody and domestic violence and has filed several party and amicus briefs in custody and abuse appeals.

Justice for Children

Justice for Children is a national child advocacy organization with headquarters in Houston, Texas and offices in Washington, D.C. The agency was founded in 1987 by Randy Burton, a former Chief Prosecutor of the Family Offenses Section of the Harris County, Texas District Attorney’s office, and a group of concerned citizens within the community in response to the inadequacies and failure of child protective systems and family courts to protect abused and neglected children. Justice for Children has appeared as amicus curiae in numerous cases throughout the country.

The agency’s mission is to provide legal advocacy for neglected and abused children and to develop and implement collaborative solutions to entrenched problems impeding the quality of

life for these children, as well as to raise consciousness about the failure of governmental agencies to protect victims of child abuse. Justice for Children is a 501(c)(3) organization funded primarily through individual and corporate donations as well as foundation grants. Justice for Children works together with Children's Protective Services and other such agencies for the welfare of these children, and, when appropriate, opposes court or agency action that threatens to compound the abuse already suffered by these helpless victims. When existing agencies fail to help, Justice for Children intervenes as the advocate for the child. Justice for Children's expert opinion is recognized and valued by local and national media, legal and medical professionals, child abuse experts, and various other children's rights organizations.

National Coalition Against Domestic Violence

The mission of the National Coalition Against Domestic Violence ("NCADV") is to end one of the greatest social and public health issues in America: domestic violence. NCADV is a nonprofit organization dedicated to providing advocacy, leadership, and support to battered women and their families. NCADV's work includes coalition-building at the local, state, regional, national, and international levels; support for community-based services that place battered women and their families on the road to recovery; public education and awareness; and efforts to eradicate the social conditions that contribute to domestic violence and other forms of violence against women. NCADV is also instrumental in developing public policy and implementing innovative legislation that addresses domestic violence and other forms of violence against women. Moreover, NCADV serves as a national expert for court cases involving domestic violence and has become a leading national voice on the incidence and ills of custody disputes involving domestic violence or child abuse.

NCADV's network of over two thousand local programs and its membership is comprised of grassroots organizations, community programs, survivors, and individuals

dedicated to ending domestic violence and supporting battered women and their families. NCADV was formally organized in January 1978 when over two hundred advocates from around the nation journeyed to Washington, D.C. to attend the U.S. Commission on Civil Rights hearings on battered women. Thirty-three years later, NCADV remains the only national organization of grassroots shelter and service programs for battered women, and continues to be a leading voice on domestic violence issues in the community, the legislature, the courts, and around the world.

Leadership Council on Child Abuse and Interpersonal Violence

The Leadership Council for Child Abuse and Interpersonal Violence (formerly the Leadership Council on Mental Health, Justice, and the Media, hereinafter “Leadership Council”) was founded in 1998 by professionals concerned with the ethical application of psychological science to human welfare. The Leadership Council is a 501(c)(3) organization, located at 191 Presidential Boulevard, Bala Cynwyd, Pennsylvania. The Leadership Council is a nonprofit scientific and professional organization consisting of internationally recognized researchers and scholars within the scientific and legal communities.

The mission of the Leadership Council is to provide professionals, officers of the court, and policy makers with the latest and most accurate scientific information on issues related to interpersonal violence. As part of its mission, the Leadership Council disseminates high quality scientific and medical research concerning the prevalence and consequences of child abuse and other forms of interpersonal violence in the general population. The Leadership Council has participated in and hosted academic conferences and has provided testimony before Congress and state legislatures. It has also supported peer-reviewed research and hosted academic conferences. Collectively, its board members have published hundreds of articles in peer-reviewed journals on the effects of trauma on children and adults. Advisory board members

include internationally known forensic experts, clinical care providers for trauma victims, editors and reviewers for major journals, and leaders in both the American Psychological Association and the American Psychiatric Association.

Amici are familiar with and have an interest in participating in this appeal and seek to provide this Court with relevant social science information related to the likely impact of these proceedings on victims of trauma.

STATEMENT OF THE CASE

DV LEAP adopts the Statement of the Case provided by Ms. G in her Opening Brief to this Court.

ASSIGNMENTS OF ERROR

DV LEAP adopts the Assignments of Error provided by Ms. G in her Opening Brief to this Court.

STATEMENT OF FACTS

DV LEAP adopts the Statement of Facts provided by Ms. G in her Opening Brief to this Court.

STANDARD OF REVIEW

DV LEAP adopts the Statement of the Case provided by Ms. G in her Opening Brief to this Court.

SUMMARY OF ARGUMENT

Throughout this custody litigation, Ms. G testified extensively to a lengthy history of abuse by Mr. G, including several incidents of physical violence, including marital rape, and nearly constant verbal and psychological abuse, as well as a high degree of obsessive and financially controlling behavior. Mr. G admitted to hitting her four to five times, and several outside professionals corroborated this history and noted some degree of danger or abuse in Ms. G and Mr. G's marital relationship. App. 504 (Tr. 189:20-25 (Dr. N)); *see* App. 210 (7/11/10 Report, at 41). The court-appointed custody evaluator, Dr. N, while responsibly reporting many of these indicia, lacked the expertise to assess this history. Instead, after observing benign interactions between the children and their father, she stated: "For the undersigned, given the specifics of this particular case, the primary determinant issues are and were the parents' practical parenting skills and ability to provide for the well-being of the children." App. 210 (7/11/10 Report, at 41). She also suggested that based on her observations, there were "no signs" that the children were "currently being abused" or reacting in a way that indicated that "his relationships with them are or were problematic." App. 210 (7/11/10 Report, at 41).

The trial court relied almost entirely upon Dr. N's evaluation and dismissed the history of abuse as "in conflict and . . . inconclusive," stating that "there is not any corroborative evidence of it." App. 613 (Tr. 303:20-23). Amici submit that the undisputed record here demonstrates that this finding was "plainly wrong," Va. Code Ann. § 8.01-680 (2010)—in fact, Mr. G's multiply corroborated history of abuse indicates that he presents a danger to both Ms. G and her children. Perhaps because neither of the professionals relied upon by the court in this case, the court-appointed custody evaluator Dr. N and the guardian ad litem ("GAL") Ms. LM, had expertise in domestic violence, both seriously misinterpreted the children's behavior, completely missing the fact that it was actually indicative of a history of abuse. That the children behaved

better in Mr. G's presence is actually indicative of their fear of their father, not his superior parenting.

Both the court and the professionals relied on how Mr. G presented in the course of the litigation. Lacking these basic understandings of the dynamics of domestic abuse, Mr. G, a well-educated, affluent businessman, was able to persuade the court that he is the better parent, and that his victim, who had worked through the harms he had inflicted on her, and was working on parenting her traumatized children, was inadequate. Amici suggest that the setting aside of the undeniable history of abuse in this case was a "plain error" which infected the entire proceeding and custody decision.

ARGUMENT

I. THE RECORD INDICATES A MULTIPLY CORROBORATED HISTORY OF ABUSE.

Ms. G met Mr. G shortly after she graduated from high school—he was then thirty years old. *See* App. 379 (Tr. 64:14-16); App. 38 (11/30/09 Report, at 15). After dating for four years, they married when she was twenty-two years old, after she became pregnant. App. 379-80 (Tr. 64:11-13, 65:4-8); App. 38 (11/30/09 Report, at 15).

Early on in their relationship, Mr. G told Ms. G that, in her words, "if I ever left him, I would get nothing, I would never see my baby again who wasn't even born, and I would get nothing." App. 399-400 (Tr. 84:22-85:1). This uncontested threat is emblematic of a batterer's need for power and control—and this case is, sadly, the culmination of that threat.

Battering is typically defined as "a pattern of coercive control in a partner relationship, punctuated by one or more acts of intimidating physical violence, sexual assault, or credible threat of physical violence. This pattern of control and intimidation may be predominantly psychological, economic, or sexual in nature or may rely primarily on the use of physical violence." LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING*

THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 3 (2002); *see* NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES ("NCJFCJ"), A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES 9 (2008), <http://www.ncjfcj.org/images/stories/dept/fvd/pdf/judicial%20guide.pdf> [hereinafter, NCJFCJ, A JUDICIAL GUIDE]; Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, JUV & FAM. CT. J., Fall 2003, at 11, 15 (emphasizing coercive control as key component of domestic violence). Mr. G has exhibited such a pattern of coercive control and intimidation, punctuated by acts of physical violence, over Ms. G and their children, and even extreme emotional abuse toward Mr. G's own parents. This section points to the record evidence to demonstrate Mr. G's abusive behavior in the following categories: physical violence, psychological abuse, and financial control.

A. Mr. G Committed Acts Of Physical Violence Against His Wife And Children.

1. Against Ms. G.

As she had in much earlier marital therapy, Ms. G reported in this custody litigation that Mr. G had assaulted her in five discrete incidents of physical violence. She told Dr. N that Mr. G "was repeatedly physically aggressive toward her, usually forcing her onto the floor and subduing her in some fashion, pulling her hair, and/or shaking her; she said these acts of aggression happened five times during their relationship and caused her concern about his overall potential to be violent." App. 43 (11/30/09 Report, at 20). Ms. G also testified about the five specific incidents in some detail:

1. In 1999, Mr. G "grabbed my hair and pulled me back [with g]reat force . . . I mean, he pulled -- he yanked my head backward and somehow my body fell forward." App. 383-85 (Tr. 68:20-70:20).
2. Just after the family moved to Tokyo, in early 2001, Mr. G "said to me, don't hide behind your baby. And he took her out of my arms and he put her in her crib. . . . He chased me into the living room. . . . And he again grabbed me from behind and got

me down on the floor . . . and he had my wrists on either side of my body up around my head. And he was, with his hands, holding me down, leaning over me and screaming at me.” App. 394-96 (Tr. 79:22-81:18).

3. In late 2002, when Ms. G was ten weeks pregnant with E2 and E1 was fifteen months old, “he caught me in the hallway and grabbed my hair . . . I got away from him and a lot of my hair stayed with him . . . but then he caught me in the living room, got me to the floor. And that time, he didn’t stop at restraining me, he kneeled on my chest with his right knee. . . . And I don’t really remember much after that because I was afraid he was going to choke me.” App. 402-04 (Tr. 87:5-89:3).
4. After returning home from grocery shopping in early 2006, “We had -- that was the only attack that occurred in the daytime. . . . I don’t remember what we were talking about and he didn’t start shouting at me, but that time he just turned to me and grabbed me and threw on the floor.” App. 410-12 (Tr. 95:23-97:2).
5. Only two weeks later, Mr. G “finally just reached the point of rage. And he stood up and just started shouting at me to shut up, shut up, shut up. As he crossed the room and he grabbed -- he approached me head-on, grabbed my hair -- . . . on both sides of my head and started shaking my head and was just screaming, shut up.” App. 413-15 (Tr. 98:8-100:19).

Ms. G also testified at length regarding an incident of marital rape. App. 405-09 (Tr. 90:11-94:24).

Ms. G’s testimony about abuse was *multiply corroborated*. First, Dr. N testified that Mr. G had admitted to hitting Ms. G “four to five” times. App. 504 (Tr. 189:20-25 (Dr. N)); *see* App. 210 (7/11/10 Report, at 41). Second, Ms. G’s reports of abuse long pre-dated the litigation and were made while the parties were still living together in Japan: Dr. N noted that Dr. M, Mr. G’s and Ms. G’s marital therapist in Japan, “said Ms. G reported to him that there had been five occasions in the marriage when Mr. G had been physically violent to her. He said that given the dynamics in his office, he had concerns that there may have been additional episodes beyond this.” App. 49 (11/30/09 Report, at 26).

Third, when she first returned to Virginia in 2007, long prior to any mention of divorce litigation by either party, Ms. G sought services for herself and the children from Family Advocacy Clinics, Incorporated, a facility which provides free or low-cost services to family

members affected by domestic violence. App. 194-95 (7/11/10 Report, at 25-26). Ms. G began individual therapy with Dr. W in February 2010, just before the children returned to Japan with their father. App. 195 (7/11/10 Report, at 26). Dr. W reported that Ms. G had confided to her a “number of violent marital events, and especially incidents of marital rape.” App. 195 (7/11/10 Report, at 26). Dr. N noted that Dr. W “perceives her to be evidencing behaviors and attitudes commonly demonstrated by victims of violence.” App. 208 (7/11/10 Report, at 39).

This physical abuse is consistent with Mr. G’s undisputed psychological abuse and extreme controlling behavior (described below), much of which he explicitly admitted. Dr. N testified that a spouse who degrades the other parent in front of other adults has “a higher risk of engaging in other types of abuse,” App. 504 (Tr. 189:5-19), such as more violent abuse—specifically, “[o]nce some of those thresholds are crossed, yes, the barriers for the other things are open,” App. 504 (Tr. 189:18-19).

Dr. N further reported that “Ms. G completed the MOSAIC Threat Assessment Systems evaluation regarding her relationship with Mr. G. Based on the information she provided, it was determined that the potential for violence to escalate significantly ranked at 8 out of a possible 10.” App. 203 (7/11/10 Report, at 34). Amici note that the MOSAIC Threat Assessment System is a scientifically developed, well-regarded instrument used in the field of domestic violence to assess the dangerousness of an abuser. While it is based on information provided by a victim, the MOSAIC assessment evaluation has been shown to have statistically predictive capabilities for stalking/threatening and severe abuse. JANICE ROEHL ET AL., INTIMATE PARTNER VIOLENCE RISK ASSESSMENT VALIDATION STUDY: THE RAVE STUDY PRACTITIONER SUMMARY AND RECOMMENDATIONS: VALIDATION OF TOOLS FOR ASSESSING RISK FROM VIOLENT INTIMATE PARTNERS 13 (2005), <http://www.ncjrs.gov/pdffiles1/nij/grants/209732.pdf>. In fact, when compared with three other risk assessment models often used in the field, the MOSAIC Threat

Assessment Systems evaluation “had the highest accuracy for predicting stalking and threatening.” *Id.* at 15.

When asked at trial whether Ms. G “was a victim of domestic violence,” Dr. N responded, “She was a victim.” App. 505 (Tr. 190:4-8).

Most importantly, *Mr. G never denied striking Ms. G.* When confronted at the custody hearing with Ms. G’s detailed testimony and the corroborating testimony of Drs. N, M, and W, Mr. G’s only “defense” was that his actions were justified because “she’s always slapped me or hit me first.” App. 539 (Tr. 224:5-6). Not only is this no excuse for his physical abuse, even if it were true, it is telling that Mr. G’s claim appears to have surfaced for the first time in custody litigation. Dr. M, the couple’s marital counselor, did not recall Mr. G ever mentioning slapping or hitting by Ms. G, despite the fact that they did discuss Mr. G’s five violent assaults. App. 49 (11/30/09 Report, at 26).

In Mr. G’s only detailed testimony contesting Ms. G’s recitation of his assaults that Dr. N could corroborate, he stated:

I got up, walked across the room to her, put my hands on either side of her head and just held her head and said, just shut up, shut up, shut up. And then all the sudden from her hand I guess the right hand came across with the cup back to my forehead.

App. 541-42 (Tr. 226:25-227:4). This description is notable for two things. First, it *corroborates* the fifth and final incidence of violence testified to by Ms. G—the only difference being that he did not describe himself as screaming. Second, on its face, this does not depict Ms. G assaulting him—rather it depicts her defending herself against his abusive conduct. The record thus contains virtually no specific contradiction of Ms. G’s testimony¹—which was completely consistent with her prior reports to therapists—about Mr. G’s assaults. Amici note

¹ App. 207 (7/11/10 Report, at 38 (“There was no other evidence that she had abused him.”)).

that it is typical for batterers to deny domestic violence, report significantly less violence than reported by their partners, minimize threatening behaviors, characterize violence as self-defense, or lie about violent events in an effort to discredit the victim. BANCROFT & SILVERMAN, *supra*, at 18; NCJFCJ, A JUDICIAL GUIDE, *supra*, at 9 (describing the courtroom demeanor of an abusive parent); Dalton et al., *supra*, at 16.

2. Against the Children.

Batterers' behavior toward their partners is an important predictor of how they are likely to treat their children. BANCROFT & SILVERMAN, *supra*, at 46, 161 (“We find that a batterer’s capacity for cruelty toward his adult victim or toward the children is an important predictor of how safe children will be in his care and of how great his determination may be to gain revenge against the mother”). Here the parallels are substantial:

Ms. G told Dr. N “that [Mr. G] pulled the children’s ears with the express intent of inflicting pain, used a belt to spank E2, humiliated E1, and squeezed the children’s arms ‘hard.’” App. 46 (11/30/09 Report, at 23). Mr. G admitted that Ms. G had frequently said he was disciplining the children “in a physically abusive way.” App. 46 (11/30/09 Report, at 23). According to Dr. N, “[s]everal individuals also said they had observed Mr. G being harsh with and/or inattentive to the children.” App. 51 (11/30/09 Report, at 28). Ms. G testified:

When the children would not immediately respond to correction, he would inflict pain on them. And he often grabs the upper arm. Or when they were babies he used to grab their ear and pull. He would like pull them to time-out corner and hold it tightly while he would be screaming in their face.

App. 454 (Tr. 139:15-20). She testified further—and Mr. G did not contest—that the children would react “with fear” and “would tremble.” App. 455 (Tr. 140:5-6). When the children did not become still and sit in time-out, Ms. G testified that Mr. G “would tie them to a chair instead for time-out . . . [with h]is leather belt.” App. 455 (Tr. 140:7-9, 16-18). Ms. G testified that one time, “he tied it so tightly that E2 was crying and had a red mark afterwards saying that it hurt.”

App. 455-56 (Tr. 140:24-141:1). Ms. G intervened and “did stop it at the point at which he tied them tightly enough to hurt them.” App. 455 (Tr. 140:20-21).

Mr. G’s mistreatment of the children was also corroborated. The children’s maternal grandfather, Mr. B, testified² that he saw Mr. G act abusively toward the children:

[A]ll of a sudden, just the same way he’s demonstrated with adults in his life, that all of a sudden, if they’re not doing something the way he wants or they’re pushing back on him in any way, he can suddenly become outraged. . . . And I can tell by their reactions that they’re afraid. If they don’t move when he wants them to move -- he uses this ear thing. He grabs them by the ear to get their attention or to move them if they’re not moving fast enough or if they’re not paying attention They turn and look out the window because they hear something, he grabs them by the ear and twists it to pull their attention back.

App. 310-11 (B Dep. 30:13-31:2, 31:8-10). Mr. B testified further:

Mr. G will just grab them by the upper arm and just yank them like right out of the chair and send them flying over into the corner And he’ll jerk them right out. And Ms. G or my wife would say, you know, you’re going to pull their arm out of the socket. And, again, they will also be corrected and be told not to interfere.

App. 311-12, 321 (B Dep. 31:12, 31:18-32:1, 51:19-23). Mr. B observed Mr. G twist the children’s ears or grab their arms to the point that they cried. App. 321-22 (B Dep. 51:24-52:1).

Mr. G himself admitted that Ms. G “has frequently accused him of disciplining the children in a physically abusive way,” but claimed that his techniques only came at her request after she failed to control them. App. 46 (11/30/09 Report, at 23). “Ms. G confirmed that this was typically the reason Mr. G used corporal punishment, but she felt his interventions were too harsh.” App. 46 (11/30/09 Report, at 23). Moreover, Ms. G intervened when Mr. G’s discipline included “the element of fear and humiliation beyond just addressing the behavior.” App. 51 (11/30/09 Report, at 23 (Dr. N quoting Ms. G)). Dr. N reported: “Ms. G frequently asserted that Mr. G was physically, emotionally, and verbally abusive toward the children, and that this is one

² The court accepted the deposition of Mr. B and made it part of the record, which “constitute[s] part of the evidence upon which this Court relies on in making its decision.” App. 605 (Tr. 295:3-7).

of the reasons she felt she needed to leave him and take the children.” App. 51 (11/30/09 Report, at 23).

Rather than make the obvious sense of this history, Dr. N focused instead, and almost exclusively, upon her observations of the children with Mr. G, claiming: “There is no current evidence of abuse by him and he appears to have established a positive and effective manner of managing the children’s behavior and relating to them.” App. 208 (7/11/10 Report, at 39). Yet it is well known in the field that it is typical for batterers to perform well under observation, sometimes even appearing gentle, caring, and attentive. BANCROFT & SILVERMAN, *supra*, at 36. Children also often appear relaxed or comfortable with the abusive parent when outsiders are present—“batterers can sometimes exhibit their most charming and humorous behaviors while being observed and thereby elicit a happy, enthusiastic response from children, who may be hungry for that quality of interaction with their father.” *Id.* at 37. Thus, the experts warn that “evaluators should be cautious not to overinterpret children’s positive reactions to their battering fathers under supervision.” *Id.*

Judicial and scholarly experts have emphasized that it is critical that any professional brought into a case involving domestic violence have expertise in the dynamics of coercive control and abuse, precisely in order to avoid such over- or misinterpretation of the dynamics they observe. NCJFCJ, A JUDICIAL GUIDE, *supra*, at 21; NCJFCJ, NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE’S GUIDE 17 (2006), http://www.ncjfcj.org/images/stories/dept/fvd/pdf/navigating_cust.pdf [hereinafter NCJFCJ, NAVIGATING CUSTODY]. Here there is no indication that either the court-appointed custody evaluator or GAL, Ms. M, had in-depth training or meaningful expertise in abuse. They thus focused on observations of the children’s behavior with Mr. G, although this behavior was likely motivated both by fear of Mr. G, and comfort in the presence of a third party. *See* BANCROFT &

SILVERMAN, *supra*, at 37 (“In our experience, it is widely recognized among both clinicians and child protective workers that some children are fairly relaxed and comfortable with an abusive parent as long as there are outsiders present”); NCJFCJ, A JUDICIAL GUIDE, *supra*, at 6; Dalton et al., *supra*, at 25.

B. Mr. G Psychologically Abused His Wife And Children.

Psychological abuse is defined as “the systematic perpetration of malicious and explicit nonphysical acts against an intimate partner, child, or dependent adult. This can include threatening the physical health of the victim and the victim’s loved ones, controlling the victim’s freedom, and effectively acting to destabilize or isolate the victim.” NCADV, PSYCHOLOGICAL ABUSE, <http://www.ncadv.org/files/PsychologicalAbuse.pdf> (last visited Apr. 22, 2011) (citations omitted); Dalton et al., *supra*, at 15 (noting that psychological abuse includes putdowns, ridicule, constant criticism, and isolation). Mr. G admitted to verbally abusing his wife. He acknowledged to Dr. N “that he had publicly expressed frustration about how she seemed unable to accomplish basic things,” and “[h]e also acknowledged that he yelled at her on occasion in public.” App. 35 (11/30/09 Report, at 12). Dr. W reported to Dr. N that Ms. G described “the trauma she went through with Mr. G in Japan, including being isolated and feeling constantly demeaned by him.” App. 195 (7/11/10 Report, at 26).

As early as 1999, Ms. G described Mr. G’s verbal rage to *his therapist* in New York. App. 391 (Tr. 76:4-13). In Japan, again long before the parties separated, Dr. M observed that Mr. G “had anger management issues, and used his anger and finances to control Ms. G.” App. 49 (11/30/09 Report, at 26). Dr. N testified: “Certainly the marriage therapist who saw them in Tokyo saw Mr. G being verbally aggressive and financially controlling toward her.” App. 505 (Tr. 190:16-19). Dr. N herself concluded that “Mr. G has had anger management difficulties with Ms. G.” App. 67 (11/30/09 Report, at 44). While Dr. N hesitated to conclude whether

abuse occurred, she stated that “it does appear that his anger with and at least prior attempts to control her are of concern from a psychological perspective.” App. 67-68 (11/30/09 Report, at 44-45).

The children’s maternal grandfather testified that Mr. G has an “uncontrollable temper,” and “was really into correcting [Ms. G] frequently.” App. 300, 313 (B Dep. 12:13-21, 33:14). Mr. B personally heard “the berating, the constant berating over everything.” App. 314 (B Dep. 34:9-10). He testified further:

Any plans that she made, they were always wrong, and he corrected them and said, Now I have to get involved. I have to get involved and I have to change this and I have to make it right because you’re doing it wrong. He used words like stupid: You’re stupid. You’re ignorant. I just -- you know, to me that was unacceptable.

App. 315 (B Dep. 35:3-9).

Additionally, Mr. B heard Mr. G demean Ms. G in front of the children: “he would talk about her parenting skills and say no wonder [the children] don’t respect you, no wonder they try to get away with murder around you, things like that. He would call her stupid and ignorant; you don’t know what you’re doing.” App. 315 (B Dep. 35:17-21); *see* App. 312 (B Dep. 32:12-25 (“[H]e would berate her in front of the children, tell her she doesn’t know what she’s talking about, . . . she’s the reason they’re behaving this way, . . . just making . . . negative observations about her parenting skills and . . . basically telling the children that they don’t respect their mother and it’s no wonder.”)).

Mr. B further observed Mr. G’s controlling behavior and quick temper during visits with the family and Mr. G’s parents in 2005 and 2006. He testified that Mr. G’s “anger, his temper was -- I was seeing new levels of temper from him, flying off the handle, trying to control everything that was going on [A]nd if anybody strayed from that, he got very annoyed and

was very critical.” App. 304 (B Dep. 21:15-18). Mr. B even witnessed Mr. G yelling at his own parents, and the effect his conduct had on the rest of the family:

And all of a sudden Mr. G just like turned around in his stool, spun around, and just like yelled at his father: “Will you shut up about that? You’re not going to ever do that. You’re never going to do that, but you keep opening your big mouth. And I’m sick of hearing it.” And he just went off like ridiculous and just snowballed and just screaming at his father. And everybody was like frozen.

App. 305-06 (B Dep. 22:21-23:4). Mr. B testified that Mr. G “[c]orrects his parents on everything. He completely controls how they do, you know, everything.” App. 309 (B Dep. 29:24-25).

Dr. W, who “is well-known in the Richmond area for her work with and on behalf of family who have been exposed to and/or [are] victims of domestic violence,” App. 194 (7/11/10 Report, at 25), reported that “it took multiple sessions to get Ms. G to the point that she could talk about some of the trauma she went through with Mr. G in Japan, including being isolated and feeling constantly demeaned by him. As a result of the abuse, she said Ms. G’s self-esteem was adversely affected.” App. 195 (7/11/10 Report, at 26).

“The battering of a mother is in itself psychologically abusive to her children.” BANCROFT & SILVERMAN, *supra*, at 45. In addition, however, batterers often use similar forms of abuse toward their children and their wives. *Id.* at 46 (“Our clients tend in many ways to replicate their abusive style with the partner in their relationships with the children.”). Mr. G’s verbal abuse toward the children matched his treatment of their mother. Ms. G testified—evidence which Mr. G did not contest—that Mr. G would scream in the children’s faces: “Are you an idiot? And things like, What do you want me to do with you? What can I do with you? What should I do with you?” App. 454-55 (Tr. 139:22-140:1). The children reacted to this treatment from their father with fear. App. 455 (Tr. 140:5-6); *see* App. 46 (11/30/09 Report, at 23).

Regarding his concern for his children's emotional well-being, Mr. G testified that when Mr. G learned that the children were in therapy, after the family returned to Virginia in 2009, "he had it ceased." App. 442 (Tr. 127:22-23). The short- and long-term effects of psychological abuse on children are no less profound than those of more traditionally recognized forms of abuse. *BANCROFT & SILVERMAN, supra*, at 45.

C. Mr. G Used Finances To Control His Family.

"Financial control is frequently part of coercive behavior and can be sufficient in itself to maintain control over the entire family." NCJFCJ, *A JUDICIAL GUIDE, supra*, at 18. From the start of the marriage, when Ms. G was only twenty-two years old and Mr. G was thirty-four, Ms. G was always the primary caregiver, while Mr. G was the wage earner. App. 434 (Tr. 119:3-5 ("Our domestic responsibilities were always very divided.")). Ms. G testified that Mr. G threatened her with his financial power early in their relationship:

He'd already told me in clear words that -- I was already pregnant with E1 and that if I ever left him, I would get nothing, I would never see my baby again who wasn't even born, and I would get nothing. He told me he owned two houses, he had a master's degree, he had a profession, he had a stable career, and that I had nothing, I had debt from college, I had no home, I had no career, and he would get everything and I would get nothing.

App. 399-400 (Tr. 84:22-85:1).

Ms. G testified that Mr. G stepped up his control of the family's money when she returned to Japan with the children in 2008:

Well, the first thing that emerged was the financial arrangement, which had been changed while I was gone from me having an ATM card to his bank account where I could withdraw cash for authorized expenses to him having changed the back account so that I no longer had an ATM card.

So initially he started -- the first few days we were there, he was just leaving money like on the countertop and on our armoire. He would just leave like \$100 . . . , which was to last several days.

App. 427 (Tr. 112:6-18). Ms. G stated that this arrangement continued for a couple of weeks until she told Mr. G that it was not working, and he started transferring money into an account in

Ms. G's name:

He transferred \$500 a week. But unlike the way he normally manages money, he didn't just automatically transfer it. Every day on the week we were to pay the housekeeper, I would have to call and ask if the money was there, if he would transfer it. He would get angry because I was bothering him at work for the money. But every week I would have to call and ask for the money. And he's a person who pays bills punctually and without fail, so this was not just a slip of his mind.

App. 428 (Tr. 113:4-12). Ms. G testified that she had no financial resources and felt trapped.

App. 429 (Tr. 114:20-24 ("At this time I found myself with no financial resource. And what that said to me was I'm trapped. And being trapped meant I'm in danger. I wouldn't be trapped if I was safe. A safe family does not hold people captive financially or otherwise."))).

Ms. G's father also witnessed Mr. G's financial control of Ms. G. Mr. B testified:

[H]e would look over everything that she did. She had to have receipts . . . and they'd have to sit at the table and he'd have to look at the receipt . . . [and] he'd have his spreadsheets and his little computer and he would sit down and he would criticize, Well, why did you buy so much of this? Why did you need this? Why did you spend money on this? And it was just like -- you know, it could be apples, and he would make an issue about it.

App. 314 (B Dep. 34:12-25). Mr. B testified further that Ms. G "would get upset, frantically search for a receipt." App. 320 (B Dep. 42:19-20). Mr. G confirmed at trial that he demanded a receipt from Ms. G for every purchase she made. App. 551 (Tr. 236:21-25).

As noted above, Dr. M observed during couples counseling that Mr. G "used . . . finances to control Ms. G." App. 49 (11/30/09 Report 26); App. 505 (Tr. 190:16-19 (Dr. N stating, "[c]ertainly the marriage therapist who saw them in Tokyo saw Mr. G being . . . financially controlling toward her")). Most significantly, Dr. M stated that the couple counseling *ended* "after he confronted Mr. G about financial issues in the marriage and Mr. G became angry about this." App. 49 (11/30/09 Report, at 26).

Thus, even without Mr. G's prior admissions to "hitting" his wife, this record contains extensive corroboration of both extensive physical and psychological abuse, targeting both Ms. G and the children. The psychological abuse itself is corroboration of the physical abuse and Mr. G's overall dangerousness. *BANCROFT & SILVERMAN, supra*, at 45 ("Some batterers are capable of extraordinary psychological cruelty toward their children without hitting or sexually abusing them, and our experience indicates (consistent with the research findings) that the implications for children are no less profound than are those of the more traditionally recognized forms of abuse."). Mr. G's behavior presents a pattern of coercive control and intimidation, punctuated by acts of physical violence, over Ms. G and their children—a history of abuse that is multiply corroborated by the record.

II. THE COURT'S FINDING OF NO FAMILY ABUSE IS "PLAINLY WRONG."

The trial court stated:

Factor number nine, *which is a very important factor because it could negate all the other factors in this case . . .* Well, the evidence that I have heard today is in conflict and is inconclusive. If all of this abuse happened as you testified to, ma'am, I'm shocked that *there is not any corroborative evidence* of it. If it did occur then I think Mr. G has done a superb job in covering it up and excusing it. And I don't believe that's what he's done. I don't have evidence that that is a factor in this case. It could have been a pivotal factor in this case, but the evidence is in conflict and is inconclusive in the view of this Court.

App. 613-14 (Tr. 303:14-304:4) (emphasis added). Amici submit that this finding was reversible error because it is "plainly wrong." Va. Code Ann. § 8.01-680.

Virginia's custody statute specifically addresses domestic violence and requires the court to consider "[a]ny history of family abuse." *Id.* § 20-124.3(9). "Family abuse" is defined as "any act involving violence, force, or threat including, but not limited to, any forceful detention, which results in bodily injury or places one in reasonable apprehension of bodily injury and which is committed by a person against such person's family or household member." *Id.* § 16.1-228.

Mr. G's treatment of his family meets this legal standard. Ms. G's multiply corroborated testimony was that Mr. G would pin her down, force her onto the floor, pull her hair, in one instance so hard the hair "stayed with him" when she pulled away, and would physically "subdue" her. *See supra* pt. I.A.1. All of these incidents clearly involve "forceful detention," "bodily injury," and "reasonable apprehension of bodily injury." Va. Code Ann. § 16.1-228. As discussed above, Ms. G's testimony about abuse was corroborated by Mr. G himself, as well as several mental health professionals, including the court-appointed custody evaluator in this case. *See supra* pt. I.A.1. *Mr. G previously admitted that he hit Ms. G 4-5 times. See App. 504 (Tr. 189:20-25 (Dr. N)). Ms. G also reported to her therapist, Dr. W, marital rape. The parties' marital therapist Dr. M, Ms. G's individual therapist Dr. W, and even Dr. N to some extent, all agreed that Ms. G was a victim of abuse. App. 505 (Tr. 190:4-8); App. 49, 65 (11/30/09 Report, at 26, 42); App. 195 (7/11/10 Report, at 26).*

Mr. G's physical manhandling of the children also constituted "forceful detention" causing bodily injury or placing them in "reasonable apprehension" thereof. Va. Code Ann. § 16.1-228. The pulling of the children's ears even when babies, App. 454 (Tr. 139:17-18), "with the express intent of inflicting pain," App. 46 (11/30/09 Report, at 23), yanking and causing them to "fly into the corner," App. 311 (Browne Dep. 31:18-20), use of a belt to spank E2, App. 46 (11/30/09 Report, at 23), and tying them to a chair for time-out, App. 455 (Tr. 140:7-9), are all injurious and instill fear of injury.

It is undisputed that Ms. G and, at times, the children, were afraid of Mr. G. *See App. 396 (Tr. 81:17-18 (Ms. G testifying that she does not remember parts of the incidents in which Mr. G was physically violent with her because "my memory kind of freezes at the point of fear"), 85:9-10 ("I was afraid of the consequence of leaving him."), 404 (Tr. 89:1-3 ("And I don't really remember much after that because I was afraid he was going to choke me.")), 412*

(Tr. 97:20 (“I was making decisions from fear[.]”)), 455 (Tr. 140:5-6 (Ms. G testifying that the children reacted to Mr. G’s discipline “[w]ith fear” and “would tremble”)); App. 305-06 (B Dep. 22:9-23:18 (describing Mr. G’s outburst toward his father, after which “everybody was like frozen”)), 310 (B Dep. 30:13-22 (describing Mr. G’s discipline of his children, “[a]nd I can tell by their reactions that they’re afraid”)), 325 (B Dep. 56:13-14 (testifying that after Ms. G returned to Japan in 2008, “she was afraid and she wanted to come back”)).

Thus, the trial court was right to emphasize the need for “corroboration”—its error was its failure to consider the extensive corroboration, mostly uncontradicted, that was presented. As described above, it is simply not disputed that Mr. G has exhibited a pattern of coercive control and intimidation through psychological abuse and financial control, punctuated by acts of physical violence, against Ms. G and their children. Unfortunately, rather than considering and assessing the evidence, the court succumbed to the temptation to view the case as ““he said/she said,”” an approach which can only benefit the abusive parent. NCJFCJ, A JUDICIAL GUIDE, *supra*, at 11 (“Often that parent has invested effort in convincing the at-risk parent that she will not be believed if she discloses the abusive behavior. The coercive parent’s attempts to influence you in order to discount the other parent’s testimony about the abuse is a method of manipulation aimed at you, as well as the other parent.”). Thus, the court’s finding that there was no family abuse was plainly wrong and should be reversed.

III. THE COURT’S CUSTODY DECISION REWARDS A BATTERER FOR THE EFFECTS OF HIS ABUSE ON HIS FAMILY.

“While most courts today would not consciously grant sole legal or physical custody to a parent who has abused his or her partner, that may be the consequence of an incomplete investigation or an erroneous interpretation of the evidence presented.” Dalton et al., *supra*, at 22. This is precisely what occurred here. This section addresses the ways in which battering impacts a victim’s ability to parent and shapes children’s perceptions of both parents, pointing to

record evidence that shows how Mr. G undermined Ms. G's authority, the extent to which Ms. G's parenting skills improved after she had the opportunity to recover from the traumatic effects of Mr. G's abuse, and how the court's reliance on any alleged preferences of the children was misled.

A. Mr. G Undermined Ms. G's Authority.

It is common to see batterers undermining mothers, leading to dynamics in the family that cause the mothers to appear incompetent and ineffective as parents, while the batterers present to outsiders as capable of taking appropriate charge of their children's behavior. BANCROFT & SILVERMAN, *supra*, at 62; Dalton et al., *supra*, at 21; *see* NCJFCJ, NAVIGATING CUSTODY, *supra*, at 14-15. Batterers often attempt to prove to their partners and outsiders that they are the more psychologically healthy parents by pointing out mothers' difficulties with the children as evidence of her incompetence, instability, and need for the batterers' assistance. BANCROFT & SILVERMAN, *supra*, at 62; NCJFCJ, NAVIGATING CUSTODY, *supra*, at 19; Dalton et al., *supra*, at 21. This conduct also serves to strengthen batterers' parenting positions as they pursue custody litigation. BANCROFT & SILVERMAN, *supra*, at 62. And when batterers are no longer present in the home, the children feel suddenly freed, which causes their behavior to erupt. *Id.* at 63. "[T]he batterer is then able to use the effects of his undermining of her authority, combined with the effects of his absence, to make a case in court for why the children need to be in his custody because the mother cannot control them." *Id.* This case appears to be a textbook example of this recognized dynamic in families experiencing domestic violence.

Although the trial court's opinion offers relatively little explanation of its preference for Mr. G over Ms. G as parent, *see* App. 610-14 (Tr. 300:2-304:15), the key focus at trial, and by Dr. N, was Ms. G's supposed difficulty controlling the children. Dr. N testified that upon her

first visit to observe the children at Ms. G's house, E2 was out of control and Ms. G's attempts to redirect him were to no avail. App. 465-66 (Tr. 150:12-23 ("He was taking blocks from his brother. . . . He was running around the house. He was shooting this rubber tip suction cup projectile toward the walls, even though his mother told him not to. This child was literally out of control. He was running across the furniture.")), 151:3-5). E2 told Dr. N that "in her mother's house 'it's like there are 18 screaming monkeys climbing the walls' with regard to the chaos caused by her brothers, and that her mother has little control over her brothers." App. 57 (11/30/09 Report, at 34); App. 476 (Tr. 161:12-13). Dr. N also testified that the children were frequently tardy at school. App. 472 (Tr. 157:23-24), 473 (Tr. 158:2-6 ("Between I think it was September 7th, the first day of school, 2009 and November 25th, 2009, E2 was tardy 20 times, which was 38 percent of his days there. E1 was tardy 10 times, or 19 percent. And E3 I think he was two or three times.")).

Dr. N testified that Ms. G acknowledged becoming overwhelmed at times, "that sometimes she engaged in reactive discipline with the children." App. 481 (Tr. 166:22-25). Ms. G reported to Dr. N, however, that:

[I]n general she felt that many of the children's issues were caused by the way Mr. G had managed them when they were together and certainly more recently that her parenting style had difficulties and her lack of credibility with the children had been shaped by Mr. G treatment of her throughout the marriage.

App. 482 (Tr. 167:2-8). Dr. M, Mr. G and Ms. G's marital therapist in Japan, reported to Dr. N that "Ms. G had a general sense of being chronically tired, they discussed in sessions how she seemed to have difficulty getting things done, and she seemed to have difficulty controlling the children. However, he did not perceive her to be depressed but instead trying to manage a difficult situation." App. 49 (11/30/09 Report, at 26).

These problems are completely consistent with what is known about the impact of battering and emotional abuse on a family. Both the boys' "uncontrollability," and Ms. G's

stress level and exhaustion were attributable to Mr. G's physical, psychological, and verbal abuse. BANCROFT & SILVERMAN, *supra*, at 67. Being abused makes it difficult to be engaged, energetic parents and to keep track of the details related to child care and schooling. *Id.*; Dalton et al., *supra*, at 20. And being abused can engender a timid or indecisive parenting style. BANCROFT & SILVERMAN, *supra*, at 67. Moreover, these parenting difficulties faced by battered mothers are often exacerbated in the immediate aftermath of separation, as "children may target the mother for their anger regarding the parental separation, and they may feel free to behave as they choose now that the batterer's authoritarian presence is gone." *Id.* at 116.

Even more clear on this record is that Mr. G overtly and deliberately undermined Ms. G's parenting with his emotional abuse as well as the physical behaviors. Like many batterers, Mr. G filled the children's heads with his berating and derogatory attitudes toward their mother. Mr. B's testimony made it clear that Mr. G actively undermined Ms. G in front of the children and that they began to adopt his view of her. *See* App. 312 (B Dep. 32:13-25 (Mr. G "would berate her in front of the children, tell her she doesn't know what she's talking about," "she's the reason they're behaving this way," "they know they can get away with murder with you . . . just making observations -- negative observations about her parenting skills and the -- and telling the -- basically telling the children that they don't respect their mother and it's no wonder")). Furthermore, "[h]e would call her stupid and ignorant; you don't know what you're doing. You don't know how to handle money. You're ignorant when it comes to money." App. 315 (B Dep. 35:20-23).

This kind of undermining and attacking of a mother's authority as the mother is a widely recognized aspect of abusive parenting. BANCROFT & SILVERMAN, *supra*, at 57 (describing how exposure to batterers' berating of their mothers teaches children that their mothers are not in command, that they are incompetent or bad mothers). Thus, it is also well recognized that

children of batterers sometimes come to believe that their mothers are stupid, inferior, or worthy of ridicule, and far less powerful than the batterers. *Id.* at 58.

Ms. G was aware that “the primary reasons she had difficulty being an authority figure for the children were because Mr. G actively demeaned and criticized her, including in front of the children.” App. 208 (7/11/10 Report, at 39). She testified at trial about the impact of Mr. G’s battering on her ability to parent: “I think at that time the greatest affect [sic] on my children was that I was making decisions from fear . . . It wasn’t really about just what they wanted or needed. There was a lot of consideration to what behavior would maybe head off more violence, more fighting.” App. 412-13 (Tr. 97:19-98:5). Ms. G admitted that Mr. G’s abuse “hugely impacted” her ability to parent upon leaving Japan with the children in 2009. App. 446 (Tr. 131:13-25 (“Because I had not yet dealt with my own trauma of having been abused and so there were issues that I had personally that were affecting the way I chose to respond to the children and their needs.”)). However, as described below, this changed once Ms. G was free of her abuser and was in productive therapy which helped her work through the impact of the past abuse.

B. MS. G’s Ability To Parent Dramatically Improved Post-Separation.

The literature is clear that following separation, battered mothers’ parenting often improves significantly because they can begin recovery from the traumatic effects of being battered. BANCROFT & SILVERMAN, *supra*, at 43; NCJFCJ, NAVIGATING CUSTODY, *supra*, at 15. Mothers’ parenting is strengthened as they escape from the batterers’ chronic undermining of their parental authority. BANCROFT & SILVERMAN, *supra*, at 43. Thus, Ms. G reported that after five months of therapy with Dr. W, in addition to parenting classes, she was able to address her issues with domestic violence and parenting:

Having resolved a significant portion, not all, but a significant portion of my own traumatic experience, I can place a different kind of attention on what my children need and from a different perspective. So before I was really like a victim trying not to be hurt more. And now I'm parenting from a place of what is our best possible option for all of us.

App. 447 (Tr. 132:1-7).

Everyone noticed a significant improvement in Ms. G's parenting ability following her separation from Mr. G, and once she had an opportunity to heal. Ms. G's father testified that he thought Ms. G initially was being lenient with the children in order to make up for the lack of leniency in Mr. G's relationship with them, but he talked to her about that and thereafter saw her improve her consistency and follow through. App. 321 (B Dep. 51:7-13). "And as --as that improved, so did the behavior; they started to realize that they, you know, they couldn't get away with it." App. 321 (B Dep. 51:10-13). Mr. B testified further that he has continued to observe positive changes in Ms. G: "She's been gaining her strength back. . . . [T]he determined, self-reliant Ms. G has emerged, has re-emerged. . . . I didn't even realize how much she had changed over the years dealing with Mr. G. But now she's -- she's taking action." App. 326 (B Dep. 61:7-12).

Dr. N also noticed significant improvements in her observations of Ms. G's parenting. In an Addendum to 7/11/10 Report, she described a visit with the children in Ms. G's home in which Ms. G engaged the children in a rule-making activity. App. 214-15 (Addendum to 7/11/10 Report, at 1-2). Dr. N stated that Ms. G's "interactions with the children were consistently positive and appropriate and the children were well behaved with her. There were a few brief but entirely normal sibling squabbles, but these generally did not require parental intervention." App. 214 (Addendum to 7/11/10 Report, at 1). Dr. N noted that Ms. G appropriately redirected the children when needed, and reported marked improvements:

Overall, this home visit was very positive and consistent with Ms. G's stated intentions that she plans to parent the children differently than she was previously.

I was impressed by her patience, nurturing, and ability to engage three tired children in the rule making task. She also managed the children substantially better than she had before. If she is able to maintain this level of parenting, then she would be an appropriate custodial parent.

App. 215 (Addendum to 7/11/10 Report, at 2).³

The court's opinion offers relatively little explanation of its preference for Mr. G over Ms. G as custodial parent in this case. *See* App. 610-14 (Tr. 300-04). Given that the key focus at trial, and in Dr. N's reports, was Ms. G supposed difficulty controlling the children, it seems unavoidable that this was the dispositive factor. The court's failure to recognize that this dynamic was common in families affected by domestic violence—that is, the batterer's undermining of the mother's authority with the children, the children's reactive acting out along with disrespect for their mother, and the batterer's self-presentation as well in charge of the children's behavior—resulted in a custody decision that rewarded Mr. G, an abuser, for the effects of his abuse on his family. Amici submit that such a decision is both inconsistent with Virginia's statutory concern about domestic violence, bad policy, and destructive to children's best interests, because batterers—especially this one—present obvious physical and emotional risks to children. Dalton et al., *supra*, at 18 (describing an array of potential consequences to children exposed to domestic violence, which “belies the proposition that the behavior of a parent toward his or her partner is irrelevant to our assessment of his or her parenting”).

C. The Court's Reliance On The Children's Alleged Preferences Was Plainly Wrong And Not Supported By The Evidence.

Factor number 8 in the best interests of the child analysis requires the court to consider “[t]he reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference.” Va. Code Ann.

³ Dr. N nonetheless also stated that she was concerned as to whether Ms. G is “going to be able to maintain the strengths and insight she has.” App. 528-29 (Tr. 213: 12-13, 214:15-16).

§ 20-124.3(8). Regarding this factor, the court found: “I only have the testimony of Dr. N, if those are accurate, the children prefer being with the father.” App. 613 (Tr. 303:11-13).

This finding was plainly wrong and without evidence to support it. First, at no time did Dr. N report that E1 ever stated a preference for her father, *see* App. 50, 63 (11/30/09 Report, at 35, 40 (“E1 reported that she did not have a preference for which parent she lived with and would be fine in either situation.”)); App. 208 (7/11/10 Report, at 39 (“None of the children expressed a preference for living with one parent over the other and each said they would be fine with either parent.”)); App. 476 (Tr. 161:18-20 (“She didn’t really have a preference at all.”))—making the court’s finding on this point uncontrovertibly and “plainly” “wrong” as to her.

Moreover, even with respect to the boys, Dr. N’s recommendation to the court plainly states the opposite. App. 208 (7/11/10 Report, at 39). Her initial report and testimony stated that the two younger children, E2 and E3, expressed at times a preference for their father, but also noted that they were too young to understand the implications of their statements and could not provide any reason for their preference. App. 58 (11/30/09 Report, at 35); App. 477, 481 (Tr. 162:3-17, 166:1-4).

Furthermore, in the climate of fear and control instilled by Mr. G, the children’s representations, which they could not explain at all, should have been given no weight whatsoever. Batterers routinely shape their children’s views of both parents. *BANCROFT & SILVERMAN, supra*, at 69. Indeed, Mr. G’s “influence” on his children’s reports to the evaluator could not be more apparent: E3, then five years old, told Dr. N “that once when he was talking with his mother, he told her that he wanted to her to stop causing troubles for his father and said

she was costing his father too much money with the court proceedings.” App. 190 (7/11/10 Report, at 21).⁴

This is emblematic of the ways abusers both drive the children away from their mother, and control their presentation in litigation. “The damage that domestic violence can cause to mother-child relationships may be the most serious cause of distress for children of battered women.” BANCROFT & SILVERMAN, *supra*, at 69-70. Children may draw away from their mothers emotionally due to a tendency over time to absorb the batterers’ disrespect of their mothers. *Id.* at 70. Children may also fear that batterers will retaliate if they ally with their mothers. *Id.*

Thus, it is impossible on this record for the court to have “deem[ed] the child[ren] to be of reasonable intelligence, understanding, age and experience to express such a preference.” Va. Code Ann. § 20-124.3(8). Nor does the court address the “reasonableness” issue at all. For all these reasons, the court’s finding on the children’s preferences, thus, must be reversed, as plainly wrong.

IV. THE COURT’S DECISION WAS CONTRARY TO THE BEST INTERESTS OF THE CHILDREN.

It is a fundamental tenet in the domestic violence field that once one parent has been found to be a batterer, he or she is not a suitable primary custodian. NCJFCJ, FAMILY VIOLENCE: A MODEL STATE CODE, § 402 (recommending a rebuttable presumption against custody to a perpetrator of domestic or family violence, and stating in commentary, “This section was constructed to remedy the failure of many custody statutes to give courts direction related to appropriate consideration of domestic and family violence in contested custody cases . . . [and]

⁴ Also indicative is the report of E2, seven years old at the time, to Dr. N that “his father had told him not to say certain things because those things might get him (Mr. G) in trouble with the court. However, he could not recall what those things were.” App. 189 (7/11/10 Report, at 20).

elevates the safety and well-being of the child and abused parent above all other ‘best interest’ factors”); Dalton et al., *supra*, at 11-33, 27 (stating that “it is perfectly appropriate to demand that a parent who has exposed a child to violence and abuse, and inevitably injured the child as a result of that exposure, provide solid evidence of changed behavior and attitude before being allowed to resume contact with the child,” and urging courts to make “a careful assessment of the abusive parent’s lethality and amenability to treatment before permitting ongoing contact between that parent and the children”).

The reasons for this are many, and are amplified below: First, even batterers who have not previously abused their children present significant risk of physical, emotional and/or sexual abuse to their children. Second, battering needs to be understood as a parenting decision that sheds light on the batterer’s ability to think well about his children’s safety and well-being and therefore is reflective of decisions he is likely to make in the future. Third, the quality of children’s relationship with their nurturing parent is one of the best predictors of their thriving and ability to recover from marital conflict or parental psychopathology—“[c]hildren’s resilience to any type of traumatic event has been linked to the presence of good parent or parentlike figure in their lives, which for children exposed to domestic violence points to the importance in most cases of their relationship with their mother.” BANCROFT & SILVERMAN, *supra*, at 42.

A. Batterers Who Abuse Their Wives Pose Significant Risks To Children.

The risk of abuse to children rises with the severity and frequency of batterers’ violence toward their partners. BANCROFT & SILVERMAN, *supra*, at 43; Dalton et al., *supra*, at 18. Children of batterers are subjected to a greatly elevated risk of physical, sexual and psychological abuse. BANCROFT & SILVERMAN, *supra*, at 42; NCJFCJ, A JUDICIAL GUIDE, *supra*, at 6. The risks increase where victims’ reports of abuse are dismissed by courts as divorce tactics, because this can lead the batterer to feel free to behave with impunity.

BANCROFT & SILVERMAN, *supra*, at 43. With respect to psychological abuse of children, the implications of chronic and harsh criticism are no less profound than those of more traditionally recognized forms of abuse. *Id.* at 45.

Even where the children are not directly abused, they often suffer significant emotional, behavioral, and developmental effects from being exposed to their father's abuse of their mother. Children exposed to domestic violence are more likely to be aggressive with peers (including bullying and insulting) and have more behavioral problems in general. BANCROFT & SILVERMAN, *supra*, at 38. They may internalize various effects, such as feeling burdened by guilt from a belief that their behavior caused past violence toward mother. *Id.* "The level and nature of the *emotional abuse* of a mother by a batterer is an important factor in children's level of distress and is a strong predictor of children's social behavior and adjustment problems." *Id.* (emphasis in original).

These effects "are a reflection on [a batterer's] parenting capacity, 'because battering a child's parent ignores the needs of the child, sets a poor example of conflict resolution, reflects negative attitudes toward women, and emphasizes the use of power to forcefully get one's own needs met at the expense of someone else.'" *Id.* (citation omitted).

B. Batterers Like Mr. G Are Tyrannical Parents.

Batterers tend to be rigid, authoritarian parents who expect their will to be obeyed unquestioningly and who are intolerant of any resistance or arguing from their children. BANCROFT & SILVERMAN, *supra*, at 30. They are similarly resistant to feedback or criticism from family members on the batterers' parenting. *Id.* As set forth in numerous examples above, Mr. G exhibited precisely such a rigid, inflexible parenting style with the children and rejected any feedback from Ms. G or other family members. *See, e.g.*, App. 311-12 (Browne Dep. 31:23-32:1 ("And Selena or my wife would say, you know, you're going to pull their arm out of the

socket. And, again, they will also be corrected and be told not to interfere”)). “This rigidity can contribute to developmental problems for children, who need to be able to struggle with their parents as part of the process of identity formation.” BANCROFT & SILVERMAN, *supra*, at 30.

Batterers are self-centered and expect their children to meet their needs, which often leads to poor emotional boundaries—burdening children with too much information about batterers’ worries about money, health, work, and other adult concerns. *Id.* at 34-35. It is clear Mr. G did exactly this with E3. *See* App. 190 (7/11/10 Report, at 21).⁵

C. **Batterers Teach Destructive Values.**

Children learn from having an abusive parent that physical and/or verbal abuse is justified to gain control over others or resolve conflicts. BANCROFT & SILVERMAN, *supra*, at 49. This lesson is reinforced by court responses—if the parent with the most power wins court conflicts, children may believe that the abuse of power is justifiable and even desirable. *Id.*; NCJFCJ, A JUDICIAL GUIDE, *supra*, at 35 (“When the justice system fails to hold abusive parents accountable, especially when their behavior has been revealed to the court, it reinforces their belief that there are no real consequences for their actions. . . .”); Dalton et al., *supra*, at 20, 22.

Batterers teach domestic violence and rigid beliefs about gender roles. Dalton et al., *supra*, at 18. Research shows a marked increase in boys’ likelihood of battering and using other types of demeaning, psychologically abusive, and aggressive behaviors toward their own partners as adults. BANCROFT & SILVERMAN, *supra*, at 48. Girls raised in abusive homes may form their images of acceptable male behavior from observing batterers, and ultimately blame themselves if they are abused as adults. *Id.*

⁵ Given Mr. G’s extremely mentally unstable history, it is troubling to imagine how he may be behaving in the aftermath of Japan’s national and ongoing trauma.

Batterers have a significant impact on their children's belief systems and values. As a result of the examples set by batterers and often their explicit statements, children may come to believe that hurting people is not wrong, that they can harm others and blame their victims as long as they provoked them, acted stupid, or failed to shut up when told. *Id.* at 49. Learning such destructive values cannot be in any child's best interests.

D. Children Need Their Nonviolent Parent To Heal.

Children exposed to domestic violence are traumatized both by their parents' divorce or separation. *Id.* at 103. In order to heal from these dual sources of trauma, children need an environment that is conducive to emotional recovery. *Id.* One of the most critical elements of such an environment is the quality of the children's relationship with a nurturing parent, usually the caretaking parent. *Id.* at 104. Research indicates that a strong mother-child relationship is a significant contributor to resilience in the children of battered women—assisting the healing of those relationships is thus a critical aspect of children's post-divorce recovery. *Id.*; NCJFCJ, A JUDICIAL GUIDE, *supra*, at 7.

Healing the relationship between Ms. G and her children is particularly critical because she has always been the primary caregiver. *See* App. 433-34 (Tr. 118:25-119:5); *see also* App. 438 (Tr. 123:8-12 (Ms. G testifying that the children “need a parent who can hold them and raise them,” “a parent who will let them express what they're feeling and experiencing,” and she is the person for that role)), 62 (11/30/09 Report, at 39 (Dr. N reporting that Ms. G was primarily a homemaker after her children's births)), 206 (7/11/10 Report, at 37 (same)). Dr. N testified at trial that from the birth of each child until February 2010, Ms. G was a stay-at-home mother who was the main nurturing parent emotionally for the children. App. 507 (Tr. 192:20-25). Dr. N further agreed that it must have been traumatic for the children suddenly to have no physical

contact at all with Ms. G, who had been their primary emotional caregiver. App. 510 (Tr. 195:8-12).

The G children need their mother, especially E1. Dr. N noted in her reports on interviews with Mr. G's friends and neighbors in Tokyo that E1 is seeking out women with whom to discuss female issues. *See* App. 192 (7/11/10 Report, at 23). Ms. Watanabe, the mother of a boy with whom E2 and E3 are friends, "said that E1 has approached her to initiate discussions about 'what will happen to her body when she gets older,' such as 'her breasts getting bigger' and 'blood coming out,' and about which boys she likes." App. 192 (7/11/10 Report, at 23). Similarly, Ms. Oshida, "who said she is a platonic friend of Mr. G's, . . . said she is particularly close to E1 and that E1 has both called her on the phone and talked to her privately in person about female issues." App. 192 (7/11/10 Report, at 23). E1 has asked Ms. Oshida to take her shopping for bras and has also asked what she should do when she begins her period. App. 192 (7/11/10 Report, at 23 ("She noted that at E1's request, they also often have a 'girl day.'")). Both of these women reported to Dr. N that E1 asked them not to tell Mr. G about their discussions. App. 192 (7/11/10 Report, at 23). These are issues that E1, a pre-adolescent girl, should be able to discuss with her mother in person rather than having to seek opportune moments in which she can access privately friends of Mr. G's or parents of the children's friends. E1 clearly needs her mother.

For all of the reasons discussed above, the court's decision was contrary to the best interests of the children and should be reversed.

CONCLUSION

Early on in their relationship, Mr. G told Ms. G that "if I ever left him, I would get nothing, I would never see my baby again who wasn't even born, and I would get nothing." App. 399-400 (Tr. 84:22-85:1). Sadly, Mr. G has now accomplished exactly that. For all of the reasons cited above, the Order entered by the trial court on December 9, 2010 and any related

order should be reversed, with Appellant Ms. G awarded sole physical—and the parties awarded joint legal—custody of E1, E2, and E3. In the alternative, this Court should reverse the decision of the trial court and remand for a new decision in light of the incontrovertible proof of a history of abuse.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 5A:19(f)

I hereby certify that Rule 5A:19(e) of the Rules of this Court have been complied with and that I caused one copy of this Brief Amici Curiae to be mailed to Terrence R. Batzli, Esq. and Charles E. Powers, Esq., Counsel for the Appellee, at Batzli Wood & Stiles, P.C., 3957 Westerre Parkway, Suite 400, Richmond, Virginia 23233 this 26th day of April, 2010; and to Louise A. Moore, Esq., Guardian ad litem, at Crozet House, 100 East Main Street, Richmond, Virginia 23219. Pursuant to Rule 5A:20(h), this Brief Amici Curiae has 12,057 words. Also pursuant to Rule 5A:20(h), counsel for the Appellant does not desire to waive oral argument.

/s/ Carter B. Simpson

Carter B. Simpson, Esq.