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In New York, battered mothers not presumed neglectful

While Sharwline Nicholson was in the hospital with a broken arm and broken ribs from a beating by her ex-boyfriend, social workers took her two children from their babysitter, placed them in foster care, and charged Nicholson with "engaging in domestic violence" in front of the children. She got her children back, and now the courts have handed her another victory.

In what advocates say is a ground-breaking ruling, the New York Court of Appeals has held that a child welfare agency cannot remove a child from his or her home and charge the child's mother with neglect solely because she was a victim of domestic abuse. (Nicholson v. Scoppetta, 2004 WL 2381177 (N.Y. Oct. 26, 2004).) In the federal class action, mothers and their children claim that a child welfare agency's activities violated their constitutional rights.

"This is the first comprehensive opinion by the highest court in a state on the intersection of domestic violence with child welfare services," said Judith Waksberg of the Legal Aid Society of New York, cocounsel for the class of children.

The ruling answered three certified questions from the Second Circuit in a case that alleges that the New York City Administration for Children's Services (ACS) removed children from their parents' care without probable cause and due process. ACS claims that the removals protected the children, citing studies showing that children may suffer emotional injury from witnessing domestic violence.

"The court clearly said that being a victim of domestic violence does not make you a neglectful mother," said David Lansner of New York City, cocounsel for the class of mothers. "The government has to understand that it can't just blame the mother. It has to intervene proactively to get these batterers out of the home."

Nicholson sued ACS in federal court in April 2000. Senior District Judge Jack Weinstein consolidated her case with those brought by two other mothers and certified a class action in August 2001. He approved two subclasses: battered custodial parents and their children. (Nicholson v. Williams, 205 F.R.D. 92 (E.D.N.Y. 2001).)

Weinstein granted a preliminary injunction in January 2002, holding that the city "may not penalize a mother, not otherwise unfit, who is battered by her partner, by separating her from her children; nor may children be separated from the mother, in effect visiting upon them the sins of their mother's batterer." (In re Nicholson, 181 F. Supp. 2d 182 (E.D.N.Y. 2002); see also Nicholson v. Williams, 203 F. Supp. 2d 153 (E.D.N.Y. 2002).)

The Second Circuit upheld the injunction. Before it would address the constitutional questions, however, the court wanted several issues of state law clarified. (Nicholson v. Scoppetta, 344 F.3d 154 (2d Cir. 2003).)

First, it asked, under New York's child protection laws, can a court find a parent neglectful solely for being the victim of domestic violence and allowing the child to witness the abuse?

Although the state high court answered no, it said the ruling did not mean "that a child can never be 'neglected' when living in a household plagued by domestic violence." In cases where "a preponderance of the evidence establishes that the children were actually or imminently harmed by reason of her failure to exercise even minimal care in providing them with proper oversight," a mother may be charged with neglect.

Second, does emotional injury from witnessing domestic violence rise to the level of "imminent danger" or "risk" to a child, justifying removal from the parent's custody? Not necessarily, said the New York court: "Not every child exposed to domestic violence is at risk of impairment," and "in many instances, removal may do more harm to the child than good."

Writing for the unanimous panel, Chief Judge Judith Kaye emphasized that, whenever possible, a family court should examine these complex issues in a preliminary hearing before the children are removed. Emergency removal without prior judicial approval is acceptable only when the child is in immediate danger.

On a third question—what evidence is needed to justify removal?—Kaye wrote, "When a court orders removal, particularized evidence must exist to justify that determination, including, where appropriate, evidence of efforts made to prevent or eliminate the need for removal and the impact of removal on the child."

"It was a thoughtful and wise decision that represents a huge victory for vulnerable children across New York state," said Richard Wexler, executive director of the Washington, D.C.-based National Coalition for Child Protection Reform, which filed an amicus brief in the case.

"The benefit of the decision outside New York is largely in the area of consciousness-raising," he added. "It serves as a crucial reminder, not just to child welfare workers and judges, but to journalists and the general public, of the urgent need for every removal to pass the 'balance of harms' test. That is, workers need to be certain that they are not doing more harm by removing the child than by leaving the child in the home."

Waksberg praised the court for "refusing to draw bright lines," saying the decision "acknowledges the complexity of domestic violence in the lives of children and the need for a sophisticated understanding of it in making determinations about neglect and children's safety."

—SARA HOFFMAN JURAND